



# BRITISH JOURNAL OF AMERICAN LEGAL STUDIES

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# RETELLING ENGLISH SOVEREIGNTY

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## ABSTRACT

*Sovereign immunity is a legal fiction that forecloses the possibility of the government being hailed into court, except by its own permission. The fiction draws on narratives about kingship and realm, state and church, and property and owner that help shield the sovereign from challenges to its authority. This Article argues that sovereign immunity's legal sources relied on relationships between king and church, king and property, and king and constitution to articulate an authority that could not be challenged by its subjects. This Article suggests that, absent other normative stories that support sovereign immunity, the doctrine remains empty of substance other than the legitimating of authority in the face of legal challenges.*

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\* Associate Professor of Law, Savannah Law School. This article is part one of a three-part consideration of Sovereign Immunity in U.S. Courts. Subsequent articles will consider the Constitutional Sovereign and Commercial Constitutional Law. I want to thank Molly Jones for her excellent editorial assistance in bringing this article to a close.

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## I. INTRODUCTION

Sovereign immunity is a fiction. But it is a fiction most jurists accept as true. Despite the acceptance of American jurists, the doctrine's roots contradict early American views regarding the king, hereditary kingship, and sovereignty.<sup>1</sup> In the words of Justice Stevens, it is "the vainest of all legal fictions ... [whose] persistence cannot be denied, but ought not be celebrated."<sup>2</sup> Consider the description by the Supreme Court in *Nevada v. Hall*: "[w]e must of course reject the fiction [sovereign immunity]. It was rejected by the colonists when they declared their independence from the crown. ... But the notion that immunity from suit is an attribute of sovereignty is reflected in our cases."<sup>3</sup> Or again, Justice Stevens suggesting that the doctrine of sovereign immunity continues to flourish despite the perishing of its "*raison d'être*."<sup>4</sup>

To understand sovereign immunity and its fictional origins, one must understand the narratives that surround the fiction. Fictions are intangible and depend on normative presuppositions. One cannot test a legal fiction by feeling its body or by logical deduction. It's a non-truth. But it's a non-truth that we accept as real, as if it were concrete and tangible. For that reason, a legal fiction depends on something outside of its own words to support its meaning.<sup>5</sup> That something is always normative. It can be in the form of stories, histories, or proverbial wisdom, but it always carries normative weight. The narratives that are told in support of fictions become embedded in the legal subconscious and in some ways become sacramental in fulfillment of the fiction.<sup>6</sup> Fictions could possibly manifest an existence outside of law, but never outside of their stories.

<sup>1</sup> *But see* *M'Intosh v. Johnson*, 21 U.S. (8 Wheat.) 543, (1823). While the new republic was anxious to throw off the tyranny of a monarchy, it was also willing to see itself as the successor in interest to the sovereign's propriety in the New World. This embracing of imperialism set the tone for an ironic subtlety. The natural rights rhetoric that so fueled the original thirteen colonies to free themselves of their English Regent also gave excuse to the naked land grab against an inferior people. Or as Chief Justice Marshall would say, "Conquest gives a title which the Courts of the conqueror cannot deny." *Id.* at 588. *See* JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY AND THE LEGAL IMAGINATION* 67-68 (2010).

<sup>2</sup> *United States v. Dalm*, 494 U.S. 596, 622 (1989) (Stevens, J. dissenting).

<sup>3</sup> *Nevada v. Hall*, 440 U.S. 410, 415 (1978).

<sup>4</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 87 (1988).

<sup>5</sup> *See* L.G. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* 14 (1995) ("However, not all stories are equal. Some are better than others. As we examine the stories that judges tell, we find here too that some are good, some are bad. Judges tell us these stories to persuade us that the path of the law should run one way, not another, and we may be persuaded on some occasions but not on others. Furthermore, the ratio of fact to fiction in a story does not correspond to the ratio of truth to falsehood in it.")

<sup>6</sup> *See* Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, (1982) ("In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and

In the United States, jurists have loosely ascribed the origins of the body sovereign to juristic expressions around the king of England. That is, they understand that sovereign immunity is tied into the concept of the king in some special way that warrants further understanding. Courts turn to Blackstone and cite passages relating to the preeminence of the king,<sup>7</sup> the infallibility of the king,<sup>8</sup> the prerogative of the king,<sup>9</sup> the requirement of the king's consent before he may be sued,<sup>10</sup> or the ownership by the crown of all land's

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end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.”)

<sup>7</sup> See e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) citing WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 242 [hereinafter COMMENTARIES] (“And, first, the law scribes to the king the attribute of sovereignty, or pre-eminence”). Blackstone continues this thought “[h]e is said to have imperial dignity; and in charters before the conquest in frequently styled *basilius* and *imperator* the titles respectively assumed by the emperors of the East and the West. His realm is declared to be an empire and his crown *imperial* by many acts of Parliament ... which at the same time declare the king to be the supreme head of the realm, in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man.” 2 *id.* at 242 Thus, though skipped by Justice Kennedy, this is the basis for the prior statement, and its conclusion: “Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. 2 *id.* at 242, cited in *Alden*, 527 U.S. at 715.

<sup>8</sup> See e.g., *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (rejecting the notion of executive perfection, though noting its historical relevance towards uncovering sovereign immunity); see also 2 COMMENTARIES at 238-39 (“Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful...”). Blackstone continues stating that “[t]he king ... is not only incapable of doing wrong, but ever of thinking wrong: he can never mean to do an improper thing: in him is no folly or weakness.” 2 *Id.* at 246.

<sup>9</sup> See e.g., *Myers v. United States*, 272 U.S. 52, 64 (1926) (McReynolds, J., concurring) (“Blackstone affirms that the supreme executive power is vested by our laws in a single person, the king or queen, and that there are certain branches of royal prerogative, which invest thus our sovereign lord, thus all perfect and immortal in his kingly capacity.”); see also 2 COMMENTARIES at 239 (“By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity... It must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer”); 2 *Id.* at 242-43 (“And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion ... ‘A subject, says Pufendorf, so long as he continues a subject, hath no way to *oblige* his prince to give him his due ... For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him.”).

<sup>10</sup> See e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 103 (1996) (Souter, J., dissenting); see also 2 COMMENTARIES at 235 (“Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and

in England.<sup>11</sup> And certain that the fiction only reaches as far as the king, courts ignore the deeper, more probing questions that reach the heart of the fiction. Why is the king infallible? Why must the king consent before being sued? And more probingly, why is there no difference between the king's personal property and his kingly property and how do these attributes inform the king's position towards the realm?<sup>12</sup> Such analysis requires not only an eye towards the mystical but a sort of reverence towards kingly things -- a quality the American courts are not naturally inclined towards. To the extent that American judges have considered the king in realm, they have done so based on antiquarian concepts that all but became irrelevant by the time of American independence; this is Justice Jay's plight in *Chisholm v. Georgia*. Indeed, American courts have never really understood kingly sovereignty.<sup>13</sup>

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idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it; but who, says Finch, shall command the king?"; 2 *id.* at 221 ("[T]he queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll; nor is she liable to any amercement in any court").

<sup>11</sup> See e.g., *Hall*, 440 U.S. at 415 ("The king's immunity rested primarily on the structure of the feudal system"); see also 2 COMMENTARIES at 281 ("When I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects frequently look upon to be their own absolute rights, because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our antient princes.").

<sup>12</sup> I primarily have in mind Justice Stevens' opinions in *United States v. Dalm*, wherein he critiques the majority's willingness to accept the "majestic voices of jurisdiction and sovereign immunity," voices he says hold a "haunting charm over the majority." *United States v. Dalm*, 494 U.S. 596, 616 (1989) (Stevens, J. dissenting). Continuing on, Justice Stevens heroically defends *Bull v. United States*, saying the court then, "reasoned not in obedience to these siren-like voices but rather under the reliable guidance of a bright star in our jurisprudence: the presumption that for every right there should be a remedy. *Id.* at 619 (citing *Marbury v. Madison*, 1 Cranch 137, 162-163 (1803)); see also *Nevada v. Hall*, 440 U.S. 410, 415 (1978) (Stevens, J. dissenting) (stating sovereign immunity "ought not be celebrated..." and "[w]e must of course reject the fiction [sovereign immunity]. It was rejected by the colonists when they declared their independence from the crown... But the notion that immunity from suit is an attribute of sovereignty is reflected in our cases."); *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 87 (1988) (Stevens, J., dissenting) (suggesting that the doctrine of Sovereign immunity continues to flourish despite the perishing of its "*raison d'être*"). Indeed, Stevens sees sovereign immunity as an attribute of the institutions shed in the American Revolution.

I also have in mind, a series of cases I discuss in more detail below that purposefully associate the kingship with principles of sovereignty, like *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793) and *United States v. Lee*, 106 U.S. 196 (1882).

<sup>13</sup> There is a way of reconciling Justice Stevens' opinions, and the opinions in *Chisholm v. Georgia* and *United States v. Lee* despite their incomplete inquiry. That inquiry would ask not what is the true rationale of the sovereign, which would undertake an inquiry similar to

One explanation for the American failure to fully appreciate *kingly things* is the dysfunctional relationship America held with the king in its formative years. Indeed, early American Constitutionalism has an inconsistent identity as both a constitutional and a revolutionary solution to despotism; pertinently both are mutually exclusive of one another.<sup>14</sup> This disharmony is not just a matter of semantics. Rather, the consistent use of inconsistencies recognizes that the American state starts with two diametrically opposed ends. We should not then be surprised that our legal formulations that are so closely tied to these beginnings are equally dysfunctional. On the one hand, we claim sovereign immunity is necessary for government operation, yet at the same time we shrink from its meaning.<sup>15</sup>

This Article specifically addresses how beginnings and sovereignty are intertwined. However, it is not interested in American beginnings except by association and by certain broad conclusions at the end. Rather, its primary focus is English beginnings. Understanding sovereignty in America requires a keen eye towards our original model of sovereignty. Like King Oedipus,<sup>16</sup> who cannot escape his family history, America continues to embrace her British origins, without concretely understanding why.

Part I of this Article briefly sketches American constitutional history surrounding kingly sovereignty. As Part I shows, American courts tended to ascribe qualities to the British sovereign that validated the authority of the state over its citizens. Part II takes the reverse tack and shows how incomplete the American image of the monarchy is, focusing on the kingship's mystical, theological, and dynastic underpinnings.

Part III asks the crucial question that American courts have failed to ask: having taken stock of the king's attributes, how does this "sovereign" relate to his realm? Specifically, it presents three images: king as conqueror/landlord; king as father; and king as trustee. Each of these narratives grounds the doctrine in a story that explains why the authority of the sovereign persists. Leaving those stories behind then, American courts are left with a sovereign whose immunity is only supported by its claim of authority in the face of legitimate legal challenges, spurring commentators to look for other analogies supporting the authority of the state.<sup>17</sup> This Article begins to

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the one I undertake in parts II and III; rather it would ask what is the rationale for the sovereign in 1787 when the U.S. Constitution was ratified. That inquiry is oblivious to historical integrity and instead would allow for the distaste towards kingly things that Stevens wants to find. Said slightly differently, perhaps for purposes of the revolution and government forming, Jay's feudal king is exactly the inflammatory image necessary to underscore American independence. See *infra* text accompanying notes 8-10.

<sup>14</sup> See CHARLES I. MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* 2 (1924) (noting the inconsistency that "Constitutional" and "Revolutionary" rhetoric was used in the formative era).

<sup>15</sup> See e.g., decisions and critiques discussed *supra* notes 6-11.

<sup>16</sup> See generally, Sophocles, *Oedipus the King*.

<sup>17</sup> See e.g., Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, Accident and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 769 (2008) (arguing that sovereign immunity has become a source of authority on its

explore that crucial question of why, in a constitutional republic, the fiction still forecloses the possibility of suit against the “sovereign.”

## II. U.S. SUPREME COURT TREATMENT OF THE KING

In *Chisholm v. Georgia*, the first case to discuss sovereign immunity in the United States, three of the five justices undertook to ascribe some relation of sovereign immunity to the relationship of the king to the people.<sup>18</sup> Chief Justice Jay, in the shortest of these descriptions, juxtaposes the sovereignty of the people of the United States to the sovereigns in Europe that “exist on feudal principles.”<sup>19</sup> Jay characterizes the “sovereign of Europe” as a tyrant. He is the “object of allegiance.” He is above persons in his kingdom. He is the “fountain of honor and authority.” All franchises are granted by his grace alone.<sup>20</sup> Jay’s description of sovereign prerogative explains why the king could not be sued by a subject and why any court judgment was not mandatory upon him but mere advice.<sup>21</sup> Jay’s revolutionary rhetoric reminds the reader that *Chisholm v. Georgia* was decided a mere ten years after the colonists had settled their own contest of sovereignty with the king and suggests a historical context for Jay’s highly critical approach -- a contest that led towards the writing of the Constitution that Jay was now attempting to interpret.

Like Jay, Justice Wilson places the primary emphasis of sovereignty on the feudal qualities of the king. But Wilson also reveals another characteristic of sovereignty -- that of the law giver.<sup>22</sup> “The principle is that all human law must be prescribed by a superior.”<sup>23</sup> That superiority, Wilson informs us, started with William the Conqueror in 1066, and not only operated to create jurisdiction over others, but to exclude himself from the same jurisdiction.<sup>24</sup> Thus Wilson says that “no suit or action can be brought against the king, even in civil matters; because no court can have jurisdiction over him; for all jurisdiction implies superiority of power.”<sup>25</sup> Yet for Wilson, in the United States the people are sovereign, and therefore no sovereign immunity attaches to governments in America like it does in England.

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own, with little legal or legislative assistance); WILLIAM E. NELSON, *ROOTS OF AMERICAN BUREAUCRACY: 1830-1900* (1983) (arguing that the American State is personified through expert salaried members of the American civil service whose authority is directly correlated to the capacity to use authorized force).

<sup>18</sup> *Chisholm v. Georgia* 2 U.S. (Dall.) 419, 471 (1793).

<sup>19</sup> *Id.* (“If then it be true that the sovereignty of the nation in the people of the nation, and the residuary sovereignty of each state in the people of each state, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter are so essential to the latter.”)

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 458 (Wilson, J.).

<sup>23</sup> *Id.* (Wilson, J.).

<sup>24</sup> *Id.* at 461.

<sup>25</sup> *Id.* at 458. (Wilson, J.).

Justice Iredell proceeds differently. Conceding that the United States is the successor in law to England, he looks to what types of cases could be heard against the king.<sup>26</sup> Iredell's description, then, of the common law rights against the sovereign begins with the "Petition of right," which since the time of Edward I was the only right of action against the sovereign of England.<sup>27</sup> Iredell's opinion is as formalistic as it is long. A brief summary of points shall be sufficient. First, giving great deference to Lord Somers,<sup>28</sup> Iredell found that the right of petition against the king did not include a right against the Exchequer in a court of law as the court had no authority over the Treasury. Therefore no right of action exists in the American states that might threaten legislative purses.<sup>29</sup> Second, the Right of petition exists as a grace by the regent.<sup>30</sup> Third, the king as corporation has the authority to subject corporations he establishes to his prerogative.<sup>31</sup> Under these rationales, and since no

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<sup>26</sup> *Chisholm*, 2 U.S. (Dall.) at 437 (Iredell, J.) ("If therefore no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry is perfectly equal) an action of the nature like this before the court could have been maintained against one of the states in the union upon the principles of the common law, which I have shewn [sic] to be alone applicable").

<sup>27</sup> *Id.* But see Louis L. Jaffe, *Suits against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2 (1963) (suggesting that suits against government officials connected to the king proceeded under basis other than "petitions of right"); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 26-28 (2002) (following the Jaffe argument that other actions lie against the king). Indeed, Louis Jaffe suggests that the Petition of Right has been "over generalized into the broad abstraction of sovereign immunity. *Id.* at 3. Jaffe argues this in an attempt to suggest that other actions against palace and government officials weakened sovereign immunity. However, Jaffe seems to have omitted one certainty in his historical argument from England—there is only one sovereign and only one whom sovereign immunity truly applies.

<sup>28</sup> See *Chisholm v. Georgia*, 2 U.S. (Dall.) at 437-45.

<sup>29</sup> See *id.* at 437-39. Iredell comes to this conclusion after reviewing the *Bankers case*, (1691) 87 Eng. Rep. 500. King Charles II accepted loans from several bankers with tallies given from the Exchequer. Interest was paid on the loans until 1683, when it fell in arrears. The barons presented the payment case to the barons of the Exchequer, who granted payment. The attorney general presented the concise question to the court whether such grants were valid under English law. The court held that the king could alienate the revenues of the crown and that the petition to the barons was the proper remedy. The court's more precise holding was that it had no authority to hear this case, but rather the Lord High Treasurer was the proper authority. *Id.*

<sup>30</sup> *Id.* at 442 (quoting Pufendorf "[a] subject say Pufendorf, so long as he continues to be subject hath no way to oblige his prince to give him his due when he refutes it; though no wise prince will ever refuse to stand to a lawful contract. And if the prince gives the subject leave to enter an action against him upon such contract, in his own courts, the action itself proceeds rather upon natural equity than upon the municipal laws. For the end of such action is not to compel the prince to observe the contract, but to persuade him").

<sup>31</sup> *Id.* at 449. Iredell's opinion suggests that because the State of Georgia was not a corporation "under the United States," it could not be subject to the sovereignty of the United States. See also *infra* Part II "*The Gemina Persona*."

law had overturned these principles, Iredell, as the lone dissenter, believed the state of Georgia was protected by sovereign immunity.

Justice Wilson's description of the "sovereign people" seems to explain the differences between the English Sovereign and his immunity and sovereign immunity in North America.<sup>32</sup> Of course, the rationale was used to abrogate sovereign immunity -- not to create it. Interestingly though, the Wilson rationale later is co-opted in support of sovereign immunity in *U.S. v. Lee*.<sup>33</sup> The Court in *Lee* concludes that the people are sovereign and that consent of the legislature as representatives of the people is required for a suit to proceed against the government.<sup>34</sup> Like *Chisholm*, the Court in *Lee* looks back to English tradition to understand why the consent of the sovereign is required for suits to proceed.

As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court.... "The broader reason is that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right at the will of any citizen and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury."<sup>35</sup>

Thus, for Justice Miller, the practical effect of the king serving himself, together with the inconsistency of a sovereign with supreme power, made sovereign immunity a necessity.

By means of summary, the historical perceptions of sovereign immunity by the United States Supreme Court can be isolated into several distinct aspects. First is the concept of the king as infallible.<sup>36</sup> Second, the king is supreme and cannot be forced to submit to any other jurisdiction except to

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<sup>32</sup> *Id.* at 458.

<sup>33</sup> *United States v. Lee*, 106 U.S. 196 (1882).

<sup>34</sup> *Id.* at 204.

<sup>35</sup> *Id.* at 206 (citing *Briggs & Another v. Light Boats*, 11 Allen (Mass) 157 (1865)).

<sup>36</sup> See e.g., *Clinton v. Jones*, 520 U.S. 681, 697 n. 24 (1997) (Stevens, J.) (citing *Nevada v. Hall*, 440 U.S. 410 (1979) for infallibility as basis of king's immunity); *United States v. Dalm*, 494 U.S. 596, 622 (1990) (Stevens, J., dissenting) ("Sovereign immunity has its origin in the ancient myth that the 'king can do no wrong.'"); *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 429 (1981) (Burger, J., dissenting) ("The trend to eliminate or modify sovereign immunity is not an unrelated development; we have moved away from "the king can do no wrong"; *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (Stevens, J.) ("The king's immunity rested on a fiction that the king could do no wrong."); *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (Burger, J.) (ascribing the king's infallibility as a basis for sovereign immunity and extending to officers); *Feres v. United States*, 340 U.S. 135, 139 (1950) (Jackson, J.) ("The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the king could do no wrong was repudiated in America, a legal doctrine derived from it that the crown is immune from any suit to which it has not consented was invoked on behalf of the republic and applied by our courts as vigorously as it had been on behalf of the crown");

that which he consents.<sup>37</sup> Third, the king as law giver is only subject to the laws he consents to as determined by his prerogative.<sup>38</sup> And fourth, subjecting the king to courts would confuse the supreme executive power of the king and therefore be unwise.<sup>39</sup> Part II examines the narratives underlying these supporting theories of the king more completely.

### III. THE GEMINA PERSONA

Act IV of Shakespeare's *Henry V* opens with the king as head of his army, walking in disguise amongst his encamped men, encouraging them for what they fear as a devastating defeat at the hands of his French opponent.<sup>40</sup> Calling himself Harry LaRoy, the king encounters men who exhibit both skepticism and loyalty for the king's proclamations to fight to the death in their battles.<sup>41</sup> Sitting by a campfire, the king speaks with soldiers Williams, Bates, and Court.<sup>42</sup> These conversations forecast a schizophrenic tension within the king himself: on the one hand, the king believes his word to be true, even challenging his detractors to a duel if his word proves disingenuous.<sup>43</sup> On the other hand, the king has the luxury of being two people at once, literally disguising his true identity and showing the reader that should his word fail, his promise to no longer trust the king is utterly devoid of meaning. Thus, literally and figuratively, the king embraces two bodies in *Henry V*.<sup>44</sup>

The king may want his company to trust him completely, but not even the king himself can fully appreciate the uncertainty of his promise to not be ransomed should the English fall.<sup>45</sup> His disguised second person in the form of Harry La Roy bolsters the king's confidence that he indeed will fight to the death by inferring that he will never trust the king's word again if the king is indeed ransomed; while the reader understands that both Harry La

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*see also* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95 (1996) (Stevens J., dissenting); *Will v. Michigan Department of State Police*, 491 U.S. 58, 87 (1989) (Stevens, J., dissenting).

<sup>37</sup> *Alden v. Maine*, 527 U.S. 706, 714 (1999) (Kennedy, J.) ("And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence ... Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him"); *Hall*, 440 U.S. at 415 ("Since the King was at the apex of the feudal pyramid, there was no higher court in which he could be sued. The King's immunity rested primarily on the structure of the feudal system).

<sup>38</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

<sup>39</sup> *United States v. Lee*, 106 U.S. 196, 204 (1882).

<sup>40</sup> William Shakespeare, *The Life of Henry the Fifth* act 4, sc. 1, *reprinted in* *The Riverside Shakespeare* 930, 957-58 (Houghton Mifflin 1974) (1623).

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

<sup>42</sup> *Id.*

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

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

<sup>45</sup> *See* Marilyn L. Williamson, *The Episode with Williams in Henry V*, 9 *STUDIES IN ENGLISH LIT.* 1500-1900275, 277-78 (1969).

Roy and the king would indeed live should a ransom take place.<sup>46</sup> This dualism is pronounced further by the king in the next soliloquy as he ponders the nature of his sovereignty:

King Henry V:; Twin-born, with greatness, subject to the breath, Of every fool, whose sense no more can feel, But his own wringing! What infinite heart's-ease, Must kings neglect, that private men enjoy! And what have kings, that privates have not too, Save ceremony, save general ceremony?<sup>47</sup>

Shakespeare understood that the king's nature was one of duality. That duality was ingrained in the legal, theological and literary traditions of the king and gave rise to the concept of the crown as a corporate sole, expounded in F.W. Maitland's *Crown as Corporation*.<sup>48</sup> But what does this mean? In Sir Frederick Pollock's words, which Maitland begins with, it means: "The greatest of artificial persons, politically speaking is the state. ... In England, we now say that the Crown is corporation: it was certainly not so when the king's peace died with him, and 'everyman that could forthwith robbed another.'"<sup>49</sup> And by artificial persons, Pollock means to tell us that corporations have a "continuous legal existence not necessarily depending on any natural life."<sup>50</sup> In an earlier work, Maitland describes the corporation sole, or that corporate body expressed in one but containing many.<sup>51</sup>

Maitland, Pollock, and Shakespeare describe a mystical aspect of the kingship: that the king is a *gemina persona*, "human by nature and divine by grace."<sup>52</sup> This dualism originally cast in a medieval world and obvious to all with aspirations of understanding kingly things (see i.e. William Shakespeare's *The Tragedy of King Richard the Second*)<sup>53</sup> explained how the king

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<sup>46</sup> See SHAKESPEARE, *supra* note 40, act 4, sc.1.

<sup>47</sup> *Id.* at 958.

<sup>48</sup> F.W. Maitland, *The Crown as Corporation*, 17 L.Q. REV. 131 (1901), reprinted in F.W. MAITLAND, STATE, TRUST AND CORPORATION 32, 32 (David Runciman & Manus Ryan, eds. Cambridge Univ. Press 2003) [hereinafter *Crown as Corporation*].

<sup>49</sup> Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, 113 (MacMillon & Co. Ltd. 1904) (1891).

<sup>50</sup> *Id.* at 111.

<sup>51</sup> F.W. Maitland, *The Corporation Sole*, 16 L.Q. REV. 335 (1901), reprinted in F.W. MAITLAND, STATE, TRUST AND CORPORATION 8, 8 (David Runciman & Manus Ryan, eds. Cambridge Univ. Press 2003) [hereinafter *Corporation Sole*].

<sup>52</sup> Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* 87 (1957).

<sup>53</sup> In an illuminating chapter on the pervasiveness of the king's corporate nature, Kantorowicz draws upon Shakespearean prose as recognizing the king's duality. Of note is a quote from Henry V, discussing the duality of the God-head and man-head nature of the King:

Twin Born with Greatness, subject to the breath of every fool Whose sense no more can feel but his own wringing; What infinite heart's ease must Kings neglect that private men enjoy! What king of god art thou, that suffer'st more of mortal griefs than do thy worshippers.

KANTOROWICZ, *supra* note 52, at 24, (quoting Henry V in SHAKESPEARE, *supra* note 40, at 958. In other examples, Kantorowicz notes that it is the very twin natured kingship that

could die, and at the same time how the crown could yet continue.<sup>54</sup> It explained the divine principles of the king conflated with the mortal and imperfect body of a man. To be sure, the king's two bodies represent a contradiction, but not an unworkable contradiction. Indeed, that contradictory dualism spawned a most important aspect of the sovereign—his eternal nature and divine commission. The result is a king with two bodies—one political and one natural.

Two prominent writers have explored the concept of the king's dual nature: F.W. Maitland in *The Corporation Sole* and *The Crown as Corporation*<sup>55</sup>, and Ernst H. Kantorowicz in *The King's Two Bodies: A Study in Mediaeval Political Theology*.<sup>56</sup> Despite considerable differences, each draws on the same premise: that the dual nature of the king tells us something about his attributes as a sovereign. For Maitland, the exercise is one of understanding contradictions as manifested in space and time. For Kantorowicz, the exercise understands the king's two bodies as defining a mysticism of the sovereign. This tension illuminates the seemingly contradictory nature of the sovereign. On the one hand the sovereign is limited by certain powers by the nature of his position, yet, on the other hand, the king is empowered in a

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forms the “substance and essence” of *The Tragedy of King Richard II*. See KANTOROWICZ, *supra* note 52, at 24-25. Indeed, Kantorowicz carefully suggests that the essence of *Richard II* lies in the irony that if he is a god, he is the “kind of god that suffers more of mortal griefs than do his worshippers” *Id.* Thus, the king in *The Tragedy of Richard II* is framed by the Bishop of Carlisle by what he can do, and what can be done to him:

What subject can give sentence on his King?  
And who sits here that is not Richard's subject?  
And shall the figure of God's majesty,  
His Captain, Steward, deputy-elect,  
Anointed, Crowned, Planted many years,  
Be Judged by subject and inferior breath,  
And he himself not present? O Forefend it, God,  
That in a Christian climate souls refined  
Should show so heinous, Black, obscene deed!

WILLIAM SHAKESPEARE, THE TRAGEDY OF RICHARD II act. 4, sc. 1, *reprinted in* RIVERSIDE SHAKESPEARE, *supra* note 40, at 830.

<sup>54</sup> The duality of roles represents the collision of the temporal with the mystical. See KANTOROWICZ, *supra* note 52, at 101. Indeed, all of Kantorowicz's work is aimed at showing a link between the *sacradotum* and the *regnum* as played out in Medieval culture. *Id.*; see also Maitland, *supra* note 48, at 32-33 (drawing clear reference to the influence of medieval theology on medieval politics). Similar dueling contrasts abound in medieval political practice: City of God versus City of Man; Spiritual Sword versus Temporal Sword, etc. See generally BRIAN TIERNEY, THE CRISIS OF CHURCH & STATE 1050-1300 (1964) (summarizing the intersection of theology and political practice through various conflicts of the state).

<sup>55</sup> See Maitland, *Crown as Corporation*, *supra* note 48; Maitland, *Corporation Sole*, *supra* note 51.

<sup>56</sup> See KANTOROWICZ, *supra* note 52.

way that suggests that the only way to limit his power is to replace him—forcibly.

A. F.W. MAITLAND *THE CORPORATION SOLE AND THE CROWN AS CORPORATION*

Maitland's works on the corporation sole and the kingship intertwine concepts of time, personhood, and property. For Maitland, time becomes an essential characteristic of the kingship's character, crossing over time through the successive lineage of future kings. Landed estates, too, by their fixed nature, crossed over time as well, perpetually existing as it were from one generation to the next. Thus, a continuity of personhood across time, in perpetual possession of his estate, required more than just the existence of one, but rather many whose interests continued without interruption.

In *The Corporation Sole*, Maitland begins with two very basic distinctions. "Persons are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole."<sup>57</sup> Distinguishing the two, Maitland observes that the existence of the corporation's "will" presents a problem when differentiating a corporation aggregate from a corporation sole. "[W]hether the organized group of men has not a will of its own – which is really distinct from the several wills of its members. As it is, however, the corporation sole stops or seems to stop the way."<sup>58</sup> He goes on to suggest that this result forces the law to accept the fictional result, allowing the law to attribute substantive meaning to a purely fictional existence.<sup>59</sup>

Maitland traces the beginning of the use of the term "corporation sole" to the church and to the desire to create separate land tenures (apart from the traditional estates) that prevented donors from later reclaiming the land.<sup>60</sup> By vesting the parson and his successors in land in their aggregate positions rather than in their natural persons, the land could be possessed by the multitude of parsons, though represented by the present parson singularly. Thus, the corporation sole was one joined by many at once, across time, and present in the capacity of the one currently in possession.

Maitland emphasizes the necessity of continuity towards the temporal nature of the corporate form.<sup>61</sup> Drawing on the composition of the corporation as having both a head and a body, the "essence of the corporateness [is]

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<sup>57</sup> Maitland, *supra* note 51, at 8.

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 10 ("It prejudices us in favour of the Fiction Theory. We suppose that we personify offices.").

<sup>60</sup> *Id.* at 10-11 (citing to a sixteenth century legal commentator, Sir Richard Broke, Maitland points out that none of the cases Broke mentions describe the parson as a "corporation," while finding that the estate in the parson goes on). Maitland later describes an earlier conflict by three English judges who considered whether the parson obtained a life estate with a reversionary interest in land to the donor, a fee simple interest, or a life estate without a reversionary interest. *Id.* at 22.

<sup>61</sup> *Id.* at 12.

in the permanent existence of the organized group, the ‘body’ of the members, which remains the same body though its particles change . . . ”<sup>62</sup> Maitland suggests that this problem of continuity presented problems for understanding the priest as holding office as a corporation sole since the parson has no successor until one is appointed.<sup>63</sup> This essence of permanence and the mystical nature of how individuals related to their offices both supported and confounded the idea of a corporation sole. On the one hand, the individual vested with the rights of a corporate sole is in nature “a man: a man who fills an office and can hold land ‘to himself and his successors,’ but a mortal man.” Yet, that mortal man would die, leaving the permanent continuity of the corporation in flux. Maitland points out that this was no problem for Coke or Littleton, who merely put the estate in abeyance until a new parson was appointed.<sup>64</sup>

In *The Crown as Corporation*, Maitland draws on these interactions among personhood, succession, and land tenancy in considering the nature of the king. Maitland begins where he left off in *The Corporation Sole* by attributing its corporate nature to timeless dimension of ecclesial law and policy towards property.<sup>65</sup> But as Maitland caustically says, “unfortunately, the thought occurred to Coke that the king of England ought to be brought into one class with the parson: both were to be artificial persons and both

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<sup>62</sup> Maitland, *supra* note 51, at 13. Maitland breaks with Broke’s assertion that the series of cases and commentators cited were intended to create a corporate sole in the parson. *Id.* at 12. While other commentators cited this case for the proposition that the king granted corporate status in the effect of a corporate sole, Maitland skeptically suggests this reading is generous: “At present, I cannot easily believe that even when the doom of the chantries was not far distant, English Lawyers were agreed that the king could make, and sometimes did make a corporation out of a single man, or out of that man’s official character.” *Id.* at 12. As Maitland says, “I cannot find that into this controversy the term corporation was introduced before the days of Richard Broke.” *Id.* at 13.

<sup>63</sup> *Id.* at 13 (“The man dies and, if there is office or benefice in the case, he will have no successor until time has elapsed and a successor has been appointed.”).

<sup>64</sup> *Id.* Both Littleton and Coke also recognized that the parson could be a corporation sole. Maitland refers to a provision in Sir Edward Coke in his chapter on the English Law of persons identifying a “corporation sole.” See SIR EDWARD COKE, 2a COKE’S REPORTS at 250. The “corporation sole” is a juridical person that is specifically identified by a specific individual. The corporation sole represents the corporate body of the institution, though only one member may be identified. Thus, as Littleton would suggest, a parson is a Body politic identifiable by a specific body of the Parson. See Maitland, *supra* note 51, at 25-26. For the most part, the corporation soles that Coke understood were ecclesial, but there were two others: the King of England and the Chamberlain of the City of London. Regarding the Chamberlain of London, Maitland only finds one example of the civil officer pursuing claims based on his corporate persona. *Id.* at 11-12 (citing 8 Edw. IV, f. 18 (Mich. Pl. 29)). But as to the king, Maitland’s history supports Kantorowicz’s mystical nature of the kingship. See *infra* section b, on *The King’s Two Bodies*.

<sup>65</sup> Maitland, *supra* note 51, at 12.

were to be corporations sole.”<sup>66</sup> Thus, Maitland cautiously ventures two remarks about the king’s “parsonified” nature.<sup>67</sup>

First, Maitland suggests that there is a question of what the head and what the body of the kingship are comprised of, if it is a corporation. He says that while English lawyers may have perceived Henry’s human nature first and foremost,<sup>68</sup> the image of his non-human corporate side—nomatter how mythical—continued to shape the king’s expansive powers. This perception of the nation as a community, pictured as a body with the king as head, found its substance in the teachings of the church.<sup>69</sup> These teachings were only bolstered by Catholic and Roman political theologians who saw the world divided between a spiritual realm and an earthly realm.<sup>70</sup> If the

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<sup>66</sup> Maitland, *supra* note 48, at 32. Maitland ended his essay *The Corporation Sole* with an ominous foreshadowing of what he would say in *The Crown as Corporation*. “The worst of his or its doings we have not yet considered. He or it has persuaded us to think clumsy thoughts or to speak clumsy words about King and Commonwealth.” Maitland, *supra* note 51, at 29.

<sup>67</sup> Maitland, *supra* note 48, at 33 (conceding a mystical quality by saying “that the king is parsonified”).

<sup>68</sup> *Id.* In a striking comment towards the realism character of the common law, Maitland writes that English lawyers were never really adept at the mystical. “They like their persons to be real, and what we have seen of the parochial glebe has shown us that even the church (*ecclesia particularis*) was not for them a person. In all the year books I have seen very little said of him that was not meant to be strictly and literally true of a man, of an Edward or a Henry.” *Id.*

<sup>69</sup> The New Testament abounds with references to the headship and incorporation of the church into the Body of Christ. See e.g., *Colossians* 2:10 (“And you have been given fullness in Christ, who is the head over every power and authority”); *I Corinthians* 11:3 (“Now I want you to realize that the head of every man is Christ, and the head of the woman is man, and the head of Christ is God”); *Ephesians* 1:8-10 (“With all wisdom and understanding, he made known to us the mystery of his will according to his good pleasure, which he purposed in Christ, to be put into effect when the times will have reached their fulfillment—to bring all things in heaven and on earth together under one head, even Christ”); *Ephesians* 4:15 (“Instead, speaking the truth in love, we will in all things grow up into him who is the Head, that is, Christ”); *Romans* 12:4-5 (“Just as each of us has one body with many members, and these members do not all have the same function, so in Christ we who are many form one body, and each member belongs to all the others”).

<sup>70</sup> As early as the fifth century, theologians began articulating that Christ be separate between the earthly and spiritual realms. Pope Gelasius I, following the great schism between the eastern and western churches, wrote to Emperor Anastasius: “Two there are, august Emperor, by which this world is ruled: the consecrated authority of priests and the royal power. Of these, the priests have the greater responsibility in that they will have to give account before God’s judgment seat for those who have been kings of men.” *Letter to Emperor Anastasius, as reprinted in* OLIVER O’DONOVAN & JOAN LOCKWOOD O’DONOVAN, FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 179 (1999). This was further carried through by other Christian writers, including Justinian Corpus. See *Donation of Constantine*, O’DONOVAN & O’DONOVAN, *supra* at 229 (describing the bifurcation of power between Peter’s keys to the kingdom and the earthly power of the Roman Emperor over the Earthly realm); *Novella 6*, in O’DONOVAN & O’DONOVAN, *supra* at 194 (referring to the “greatest of God’s gifts as those of “priesthood and empire,” separate in function and authority). This separation left some theologians and

Bishop of Rome was the head of the church, it made sense that the king held dominion over the earth.<sup>71</sup>

Moreover, the body for which the king is head, Maitland saw in Parliament.

The “commune of the realm” differed rather in size and power than in essence from the commune of a county or the commune of a borough. And as the *comitatus* or *county* took visible form in the *comitatus* or county court, so the realm took visible form in a parliament.<sup>72</sup>

And so the description of knowledge within the realm is not surprising when one considers that Parliament is an ever-present expression of the realm: “Everyone is bound to know at once what is done in Parliament, for Parliament represents the body of the whole realm.”<sup>73</sup> Thus, the Parliament as the realm, with the Lords and Commons together with the king, is said to be a corporation by common law.<sup>74</sup> As an explanation of king and Parliament as government of the people, the analogy is as good as any other.

But the corporate body described above also seemed to hold private rights, owning personal lands and chattels. Maitland reminds us of Henry VIII’s vivid picture of the “body politic” with himself as head.

Where by divers sundry old authentik histories and chronicles it is manifestly declared and expressed that this realm of England is an Empire, and so hath been accepted in the world, governed by One supreme Head and King, having the dignity and royal estate of the Imperial Crown of the same, unto whom a Body Politik, Compact of all sorts and degrees of people and by names of spirituality and temporality been bounden and owen to bear next to God, a natural and humble obedience.<sup>75</sup>

Thus, from Henry’s perspective, “the body spiritual” and the “body politic” come together in the king, and his lineage. Maitland identifies Henry’s break with the Roman Church as the historical background to a newfound conflation of spiritual and political composites of the English crown. Indeed, as Maitland says, under Henry, “were not all Englishmen incorporated in King Henry? Were not his acts and deeds, the acts and deeds of that body politic which was both Realm and Church?”<sup>76</sup>

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legal scholars wondering which authority was preeminent. See e.g., *Pastoral Rule, as reprinted in O’DONOVAN & O’DONOVAN, supra* at 197 (asserting that all men are equal including the ruling head).

<sup>71</sup> See O’DONOVAN & O’DONOVAN, *supra* note 70, at 229.

<sup>72</sup> Maitland, *supra* note 48, at 34.

<sup>73</sup> *Id.* (citing Y.B. 39 Edw. III. F.7).

<sup>74</sup> *Id.* (citing Y.B. 14 Hen. VIII. f. 3. (Mich. Pl. 2)): “the parliament of the Lords and the king and the commons are a corporation.” Note that Blackstone refers to this same formulation, not as corporation but as “Constitution.”). See *infra* notes 243-276 and accompanying text.

<sup>75</sup> *Id.* (citing 25 Hen. VIII c.12).

<sup>76</sup> *Id.* at 34.

This spiritual and material conflation manifested in disputes around lands owned by the king in his person. For example, in 1562, a dispute regarding the king's capacity to lease certain lands came before the court of the duchy of Lancaster.<sup>77</sup> Henry VIII granted a lease for twenty-one years to a certain individual known as W.C. Henry's son, Edward VI, then aged ten, granted a similar lease for twenty-one years to an individual named R.W to take effect immediately on the expiration of the preceding lease.<sup>78</sup> Edward died before the expiration of the term and succeeded by his sister Elizabeth, who then inquired of the court whether she must honor the lease or could avoid it because of Edward's infant capacity (nonage).<sup>79</sup> Unanimously agreeing that the Queen was bound by the lease the Court explained:

For the King has in him two bodies, viz. a body natural, and a body politic. His body natural (if it be considered in itself) is a body mortal, subject to all infirmities that come by nature or accident, to the imbecility of infancy or old age, and to the like defects that happen to the natural bodies of other people. But his body politic is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people, and the management of the public-weal, and this body is utterly void of infancy, and old age, and other natural defects and imbecilities, which the body natural is subject to, and for this cause, what the King does in his body politic, cannot be invalidated or frustrated by any disability in his natural body. And therefore his letters-patent, which give authority or jurisdiction, or which give lands or tenements that he has as King, shall not be avoided by reason of his nonage.<sup>80</sup>

In describing the king's particular natures, the court said:

So that he [the king] has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated into one person and make one body and not divers, that is the body corporate in the body natural *et e contra* the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government, and majesty royal) is magnified and by the said consolidation hath in it the body politic.<sup>81</sup>

This contradiction was too much to ignore. The defendants argued:

The king has two capacities, for he has two bodies, the one whereof is a natural body... the other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation ... and he is incorporated with them and they with him and he is the head and they are the members, and he has the sole government of them.<sup>82</sup>

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<sup>77</sup> Case of the Dutchy of Lancaster (1561), 75 Eng. Rep. 325, 326.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 326. See also Maitland, *supra* note 48 at 35 (discussing Case of the Dutchy of Lancaster).

<sup>81</sup> *Dutchy of Lancaster* (1561), 75 Eng. Rep. 325, 327.

<sup>82</sup> *Id.*

This tension raised the question whether the corporate body of the king was the realm with his subjects (albeit represented by Parliament); or was the succession of interest represented in both the prior kings that held the crown and the future kings to take the throne. Maitland points out a potentially invidious implication.

We are taught that the king is two ‘persons,’ only to be taught that though he has ‘two bodies,’ and ‘two capacities’ he ‘hath but one person.’ Any real and consistent severance of the two personalities would naturally have led to the ‘damnable and damned opinion,’ productive of ‘execrable and detestable consequences,’ that allegiance is due to the corporation sole and not to the man.<sup>83</sup>

However, by tying the king to two bodies, the embodiment of the realm enjoyed the same loyalty as the realm itself. Otherwise, the king could be challenged politically by dissatisfied subjects.<sup>84</sup>

Practically, the fiction had the effect of tying the king’s personal lands and personal monies into the lands of the *kommon weal* and the Exchequer. So when Parliament took over the king’s lands and in exchange give him a set remuneration, a distinct irony surfaced.<sup>85</sup> The legislation made the king’s lands unalienable—both lands held by virtue of being the Crown and those he held as a natural person.<sup>86</sup> So, during the reign of King George III, the Prince Regent was forced to go to Parliament to ask permission to hold lands as a man and not as king, “for he had been denied rights that were not denied to ‘any of His Majesty’s subjects.’”<sup>87</sup>

Eventually, the king’s two bodies’ fictive qualities became offensive towards the realm—the very thing the king was supposed to embody.<sup>88</sup> On the one hand, the king was as frail and as vulnerable to stupidity as any human. But on the other, he was infallible and incapable of stupid decisions. But more importantly, these traits were always continuing in the natural body of the new king.

This contradiction manifested itself in the legal arguments before Kings Bench. Following the 1715 rebellion, an act of Parliament vested all estates

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<sup>83</sup> Maitland, *supra* note 48, at 36 (footnote omitted).

<sup>84</sup> When Charles I was arrested and tried by the Rump House of Commons, the House of Lords and the Common Law Courts refused to participate, believing the actions unlawful against the king. See *infra* notes 154-160 and accompanying text.

<sup>85</sup> George III surrendered the Crown Estates to Parliament on his accession in 1760, in return for an annual grant of revenue known as the Civil List. See E.A. Reitan, *IV. The Civil List in Eighteenth Century British Politics: Parliamentary Supremacy versus the Independence of the Crown*, 9 *HIST. J.* 318, 323 (1966). Similarly, Queen Victoria made certain financial concessions to Parliament during her reign. See William M. Kuhn, *Queen Victoria’s Civil List: What Did She Do with It?*, 36 *HIST. J.* 645, 645 (1993).

<sup>86</sup> As a side note, at the beginning of each monarch’s reign, he renews the corporation formed to hold the lands of the crown on behalf of Parliament. The corporation is known as the Crown Estate. See <http://www.crownestate.co.uk/>.

<sup>87</sup> Maitland, *supra* note 48, at 37 (citing 39 & 40 Geo. III. c. 88).

<sup>88</sup> *Id.* at 37.

of those deemed to be traitors in the king, for the “use of the Publik.”<sup>89</sup> As Maitland tells us, one of those traitors was Lord Derwentwater.<sup>90</sup> This particular traitor owned lands that he leased to certain tenants, who paid a fine on the fee holder’s death.<sup>91</sup> Thus, the tenants believed that since their new lord in fee was the king, and the king never dies, they were not bound to pay the particular fine.<sup>92</sup> Perhaps if the obligation required anything other than the payment of money, the tenants’ argument would have been more successful. But another law was passed by Parliament during the reign of George II that deemed the king’s death the same as if he were a private person.<sup>93</sup>

For Maitland, the eternal nature of the kingship presented legal problems that did not reconcile well to reality. On the one hand, Maitland says, “[w]e are plunged into talk about kings that do not die. . . .”<sup>94</sup> On the other, however, the temporal demise of the crown seems to have had a terminating effect for the government. Thus, “[a]t the delegator’s death[,] the delegation ceased. All litigation not only came to a stop but had to be begun all over again.”<sup>95</sup> Though the fiction is pervasive throughout English law, Maitland seems to wonder out loud whether it was worth the mental exercises when it caused such chaos when proven untrue. Indeed, “[w]hen on the demise of the crown we see all the wheels of the state stopping or even running backwards, it seems an idle jest to say that the king never dies.”<sup>96</sup> Thus, Maitland pointedly perceives, even the public body of the king must be “deemed to die now and then for the benefit of *cestui que trust*.”<sup>97</sup>

Ultimately, Maitland finds the fictions that surround the king—that of his duality, his eternal and divine qualities—created contradictions within the concept of king as corporation.<sup>98</sup> After citing a case that refers to the American state as similar to “corporations,” Maitland concludes that “the American state is, to say the least, very like a corporation: it has private rights, power to sue and the like. This seems to me the result to which English law would naturally have come had not that foolish person led it astray.”<sup>99</sup>

#### B. ERNST H. KANTOROWICZ’S *THE KING’S TWO BODIES*

If Maitland wants to say that the fiction of the king’s two bodies was a foolish folly, Kantorowicz wants to redeem the concept by reading it in the

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<sup>89</sup> Maitland, *supra* note 48, at 38-39 (citing I Geo. I, stat. 2, c.50).

<sup>90</sup> Maitland, *supra* note 48, at 39.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

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

<sup>94</sup> *Id.* at 37.

<sup>95</sup> *Id.* at 37-38. Maitland says further, “We might have thought that the introduction of phrases which gave the king an immortal as well as a mortal body would have transformed this part of the law. But no. The consequences of the old principle had to be picked off one after another by statute.” By way of example, Maitland demonstrates how through Queen Victoria’s reign, the new monarch had to renew all military commissions. *Id.*

<sup>96</sup> Maitland, *supra* note 48, at 38.

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

<sup>98</sup> *Id.* at 45.

<sup>99</sup> *Id.* at 46.

context of the period that the political ideology developed namely one where religious symbolism permeated secular institutions. Indeed, in a time when church and state competed against one another for preeminence in a social sphere, Kantorowicz does not see the king's two bodies as a mistake of history, but rather evidence of a political liturgy that explains the nuanced relationships among states, kings, laws, and subjects.

For Kantorowicz, the mystical is the point. As Maitland would ascribe the description of the "crown as corporation" to either an ignorant folly or an ingenious borrowing from church law, Kantorowicz would suggest it is no accident that the king developed two bodies. He traces the development to thirteenth century church dogma where the "body of Christ" became bifurcated between the true body of Christ and the mystical.

The change may be vaguely connected with the great dispute of the eleventh century about transubstantiation. In response to the doctrines of Berengar of Tours and to the teaching of heretical sectarians, who tended to spiritualize and mystify the sacrament of the altar, the church was compelled to stress most emphatically, not a spiritual or mystical, but a real presence of both the human and the divine Christ in the Eucharist. The consecrated bread was now significantly the *corpus verum* (true body) or *corpus naturale* (natural body) or simply *corpus christi* (body of Christ). ... That is to say, the Pauline term originally designating the Christian church now began to designate the consecrated host; contrariwise, the notion *corpus mysticum*, hitherto used to describe the host, was gradually transferred—after 1150—to the Church as the organized body of Christian society united in the Sacrament of the Altar.<sup>100</sup>

Just as Maitland surveyed legal tracts that gave support to the institution of the crown as corporation, Kantorowicz looks through the theological record to show the parallel development. He starts with Simon of Tournai, who articulates a concept of two bodies of Christ. Simon of Tournai wrote that "[t]wo are the bodies of Christ: the human material body which he assumed from the virgin and the spiritual collegiate body, the ecclesiastical college."<sup>101</sup> Similarly, Kantorowicz points us to Gregory of Bergamo: "One is the body which is the sacrament, another the body of which it is the sacrament ... One body of Christ which is he himself, and another body of which he is the head."<sup>102</sup> In this example, "in the Bodies natural and mystic,

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<sup>100</sup> KANTOROWICZ, *supra* note 52, at 196. In this sense, Kantorowicz suggests "[t]he expression 'mystical body' which originally had a liturgical or sacramental meaning took on a connotation of sociological content." *Id.* That is to say, the *sacradotum* and the *seculrum* had sufficiently merged so that their terminologies became interchangeable. Thus, we could speak of the sacred kingship and the Most Holy Roman Emperor in the same way we could refer to the Church of Rome as the "Empire of Christ."

<sup>101</sup> *Id.* at 198 (citing Henri Lubac, *Corpus Mysticum: The Eucharists and the Middle Ages: Historical Survey* 122 (1945)).

<sup>102</sup> *Id.* at 198 (citing GREGORY OF BERGAMO, *DE VERITATE CORPORIS CHRISTI*, c.18, (ed. H. Hurter), in *SANCTORUM PATRUM OPUSCULA SELECTA* (Innsbruck, 1879)), Vol. xxxix, 75f. For other theological examples of Christ's Two Bodies, see KANTOROWICZ *supra* note 52, at 198-99 (citing Guibert of Nogent, *De Pignoribus Sanctorum*, II PL (discussing the

personal and corporate, individual and collective of Christ,” Kantorowicz claims to have found the precise precedent for “the king’s two bodies.”<sup>103</sup>

Kantorowicz sees the theory of the king’s two bodies first developing through the theologically oriented mystical lens. This narrative of the king’s mystical nature shapes the way his qualities and powers are to be understood. Specifically, his eternal qualities have as much to do with mystical understandings of “time” as they do with the practical understandings of space.

As to time, Kantorowicz suggests that the development of the eternity of the king evolved at approximately the same time as the question of understanding time came to the forefront in philosophical and theological discussions. The crux of this new conflict was between the previously accepted Augustine perception that time is created, and the now revived Aristotelian concept that time was infinite (and therefore not created).<sup>104</sup> To be sure, time was bounded in the church, for without bounded time, there was no creation or end. As Kantorowicz aptly describes, such a view was not the view of the divine being: for the *aeternitas* of God was “timeless.” It was static eternity without motion and without past or future. It was as Augustine called it, “a

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“bipartite body of the Lord (*corpus dominicum bipertitum*)); *Id.* (citing examples of Innocent III’s distinction between the individual body and the collective body); *Id.* (citing William of Auxere’s differentiation of the body Natural (“*corpus naturale* with the *corpus mysticum*”).

<sup>103</sup> KANTOROWICZ, *supra* note 52, at 272.

<sup>104</sup> *Id.* at 274-75. Augustine comes to grips with Time as the creation of God, like himself in Book 11 of the *Confessions*:

at si cuiusquam volatilis sensus vagatur per imagines retro temporum et te, deum omnipotentem et omnificentem et omnitenentem, caeli et terrae artificem, ab opere tanto, antequam id faceres, per innumerabilia saecula cessasse miratur, evigilet atque attendat, quia falsa miratur. nam unde poterant innumerabilia saecula praeterire quae ipse non feceras, cum sis omnium saeculorum auctor et conditor? aut quae tempora fuissent quae abs te condita non essent? aut quomodo praeterirent, si numquam fuissent? cum ergo sis operator omnium temporum, si fuit aliquod tempus antequam faceres caelum et terram, cur dicitur quod ab opere cessabas? idipsum enim tempus tu feceras, nec praeterire potuerunt tempora antequam faceres tempora. si autem ante caelum et terram nullum erat tempus, cur quaeritur quid tunc faciebas? non enim erat tunc, ubi non erat tempus.

St. Augustine, *The Confessions*, 11:13:15.

In contrast, the Aristotelian notion of time being uncreated and to a certain extent co-existent with God, Kantorowicz assigns to the work of the Averroists who supported the “eternity of the world.” Kantorowicz *supra* note 52, at 276. Showing the wide sweeping influence of Aristotle, Kantorowicz points to a passage from Thomas Aquinas, himself an Aristotelian interpreter who suggested at least the possibility that the world had no beginning. See *Summa Theol.*, I QU. 46, art. 2: “Respondeo Deicendum, quod mundum non semper fuisse, sola fide tenetur, et demonstrative probari non potest.”

Now ever standing still,”<sup>105</sup> or, as Dante put it, “the point at which all times are present.”<sup>106</sup>

But such ideas that time was eternal instead of created did lead to a scholastic vision of an “unlimited continuity that was neither *tempus* nor *aeternitas*.”<sup>107</sup> One such manifestation was the revival of the notion of an eon (*aeuum*), a category of endless infinite time, knowing past and future (in contrast to eternity which knows no past or future), but which had a beginning with no end.<sup>108</sup> Three types of time therefore had to be distinguished. First, *aeternitas*, which belonged solely to the realm of God. Second, *tempus*, which likewise was held in the realm of man. Thus, *aeuum*, fell between the two, and belonged to the realm of angelic beings. In a summary statement that details the complicated nature, Kantorowicz tells us that “if God was the immutable beyond and without time, and if man in his *tempus* was the mutable within a mutable and changing finite time, then the angels were the immutable within a changing, though infinite *aeuum*.”<sup>109</sup>

What started with the heretical concept that time was boundless, developed towards a redefining of the meaning of time and thereby the worldly institutions that inhabit time. Thus, though “one did not accept the infinite continuity of a world without end,” he did accept a quasi infinite continuity and “began to act as though it were endless.”<sup>110</sup> Accordingly, one began to “presuppose continuities where continuity had been neither noticed nor visualized before.”<sup>111</sup> Falling in line were conceptions of human creation that could have similar eternal qualities.

Illustrative of a sempiternal institution, medieval scholars could look to two prominent institutions – the Church and the Roman Empire. To be fair,

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<sup>105</sup> KANTOROWICZ, *supra* note 52 at 279. The concept of a “now ever standing still” (*nunc semper stans*) is found in Augustine’s Confessions. See *Confessions*, *supra* note 104, 8 (*nunc semper stans*).

<sup>106</sup> KANTOROWICZ, *supra* note 52, at 279 (citing Dante, *Paradiso*, xvii, 18). Kantorowicz devotes the last chapter of his work to defining the King as man, primarily bound by time as a limiting factor on his sovereignty. See KANTOROWICZ, *id.*, at 451 *et seq.*

<sup>107</sup> *Id.* Kantorowicz assigns this shift in temporal understandings to a confluence of John of Scot’s translation of *Pseudo-Dionysis*, the theological writings of Boethius, and the works produced by the school of Gilbert de la Porrre.

<sup>108</sup> KANTOROWICZ, *supra* note 52, at 279.

<sup>109</sup> *Id.* Kantorowicz points to the Aquinas teaching that “every angel represented a species: the immateriality of the angels did not allow the individuation of the species in matter, in a plurality of material individuals.” In contrast, one must consider the writings of Duns Scotus, who suggested that the ubiety of angels argued against such thoughts. See Alexander Broadie, *Duns Scotus on Ubiety and the Fiery Furnace*, 13 BRIT. J. HIST. PHIL. 3, 18 (2005) (“There were believed to be substances, such as angels, which can be present at a place but not in a quantitative way, that is, not in such a way as to be coextensive or commensurate with it. An angel can be present at a place but only in such a way that the whole of the angel is present at every part of the place. If we wish, we can say that an angel has ubiety, as a way of acknowledging the fact that an angel can be present at a place even if in a non-quantitative manner. But, plainly, such ubiety is *ubietas improprie dicta*.”).

<sup>110</sup> *Id.* at 283.

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

medieval jurists could not conceive of a world without the church.<sup>112</sup> Thus, the Augustinian influenced tenet by William of Ockham, “it cannot be that there be no church – *ecclesia nulla esse no potest*,”<sup>113</sup> became simply the maxim “*Ecclesia nunquam moritur*, the church never dies.”<sup>114</sup> The Roman Empire also shared historical value as a sempiternal institution. For example, the church father Jerome identified Rome as the last of the four world monarchies prophesied in Daniel – an empire that was to continue to the end of the world. Kantorowicz tells us that Jerome’s interpretation was well received, even spawning a new theory that “the fourth monarchy was followed by a fifth – that of Christ, implicating the Roman church as the sempiternal inheritor of Rome.”<sup>115</sup>

But with the problem of sempiternity, also comes a problem of vestment. Rome was conceived on the notion that the Roman people conferred its *imperium* on the ruler. As Kantorowicz points out though, if Rome and the empire were “forever,” then it followed that the Roman *populus* likewise was forever, no matter who may be substituted for the original people of Rome. This concept of the Roman people being the same, though different, runs through texts interpreting Roman law which recognized the “principle of identity despite changes or ‘within changes.’”<sup>116</sup> The result posited a unique and interesting dichotomy: royal heads claiming to be eternal and

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<sup>112</sup> Perhaps the greatest work of fiction from the Middle Ages, *The Canterbury Tales*, posits a social order wherein the parson’s tale “radically redefines the nature of the tale-telling itself.” Lee Patterson, *from The ‘Parson’s Tale’ and the Quitting of the ‘Canterbury Tales,’* 34 *TRADITIO* 371 (1978). He rejects the mythical, extraordinary and outlandish for concrete manifestations of mystical encounterings. As we recall, the host of the journey suggests the tale-telling to shorten their way and “a means of ‘confort’ and ‘myrthe’” on their journey. *Id.* Thus, the parson reminds the tale-tellers that their journey is grounded in reality not myth, though fantastic the story may be. In many ways the parson represents the ever-present reality, reminding the travelers of the church’s presence and that they define the story. *See id.* at 331-80.

<sup>113</sup> *See* WILLIAM OF OCKHAM, *DIALOGUS* 3:1:2. The Concept is Augustinian because it implies a normative worldview in which there perpetually remains the incarnation of the City of God in the Church.

<sup>114</sup> KANTOROWICZ, *supra* note 52, at 292.

<sup>115</sup> *Id.* at 293.

<sup>116</sup> *Id.* at 294. Kantorowicz cites for us the example of the continuity of a law court though judges may have been replaced by others:

For just as the [present] people of Bologna is the same that was a hundred years ago, even though all be dead now who then were quick, so must also the tribunal be the same if three or two judges have died and been replaced by substitutes. Likewise [with regard to a legion] even though all the soldiers may be dead and replaced by others it is still the same legion. Also, with regard to a ship, even if the ship has been partly rebuilt, and even if every single plank may have been replaced, it is nonetheless the same ship.

KANTOROWICZ, *supra* note 52, at 295 (citing *Glos.ord.*, on D.5.1.76 v.). Of course, Maitland also tells us that in England such conclusions were not easily grasped. *See generally* Maitland, *Crown as Corporation*, *supra* note 48; Maitland, *Corporation Sole*, *supra* note 51.

appointed by God holding kingly courts over peoples with sempiternal qualities, but comprised of temporal beings. That is, the persons who form the corporation are not bound by space, but rather they are linear successors of the empire -- all together at the same time, forming the Republic, assenting to Caesar, and observers of the Republic's fall.

What makes the kingship a corporation is a curious realization that the plurality of persons comprising the corporation need not simultaneously exist, but rather could exist in succession. "Normally, the plurality of persons needed to form a collective body was constituted" both "horizontally" (in time) and "vertically" (in succession).<sup>117</sup> But once it was discovered that plurality need not be restricted to "space, but could unfold successively in time, one could discard conceptually the plurality in space altogether."<sup>118</sup> Thus, as Kantorowicz elegantly states:

That is to say, once constructed a corporate person, a kind of *persona mystica*, which was a collective only and exclusively with regard to time, since the plurality of its members was made up only and exclusively by succession; and thus one arrived at a one-man corporation and fictitious person of which the long file of predecessors and the long file of future or potential successors represented, together with the present incumbent, that "plurality of persons" which normally would be made up by a multitude of individuals living simultaneously. That is, one constructed a body corporate whose members were echeloned longitudinally so that its cross-section at any given moment revealed one instead of many members -- a mystical person by perpetual devolution whose mortal and temporary incumbent was of relatively minor importance as compared to the immortal body corporate by succession which he represented.<sup>119</sup>

Having thus outlined how the king was able to break from temporal reality, we shall now consider the specific effects of a king who will not die.

Kantorowicz understands the maxim *rex qui nunquam moritur*, "the King that never dies," as being grounded on three factors: the perpetuity of the dynasty, the corporate character of the Crown, and the immortality of the royal dignity.

By alluding to the dynastic qualities of the kingship, Kantorowicz wants to separate the condition upon which a king might be elected (say endorsed by the Pope) and the condition that a king may be king by virtue of his entitlement. This is precisely the distinction that Kantorowicz draws attention to in showing the examples of Phillip III of France and Edward I of England who come to the throne and begin their reigns without papal sanctification. Kantorowicz says:

Henceforth the king's true legitimation was dynastical, independent of approval or consecration on the part of the church and independent also of election by the people. "The royal power," wrote John of Paris, "is from God and from the people electing the king in his person or in his house,

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<sup>117</sup> KANTOROWICZ, *supra* note 52, at 311.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 312-13.

*in persona vel in domo.*” Once the choice of the dynasty had been made by the people, election was in abeyance: the royal birth itself manifested the prince’s election to kingship, his election by God, and divine providence.<sup>120</sup>

And Kantorowicz demonstrates how this move from anointing a king to anointing *the* King reveals itself in juristic writings of England. In Glanvill, the maxim appears “only God can make an heir.”<sup>121</sup> Two more interesting statements reveal more. First, Archbishop Cranmer, addressing Edward VI’s coronation in 1547 says that kings

be God’s anointed, not in respect of the oil which the bishop useth, but in consideration of their power which is ordained ... and of their persons, which are elected of God and indued with the gifts of his spirit for the better ruling and guiding of this people. The oil if added, is but a ceremony: if it be wanting, that king is yet a perfect monarch notwithstanding, and God’s Anointed as well as if he were inoiled.<sup>122</sup>

More fully described in other parts, Kantorowicz uses the quote above to describe the contradiction that despite the trend away from anointing kings, nevertheless they remained known as “the anointed.”<sup>123</sup>

Second, Lord Coke, C.J. in *Calvin’s Case* infers the continuation of the king, even during the *interregnum*, or time between the death of the king and the coronation of his successor. The facts of *Calvin’s Case*<sup>124</sup> are simple: Robert Calvin, born in Scotland three years after the coronation of James VI of Scotland as James I of England.<sup>125</sup> He obtained land by and through his

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<sup>120</sup> *Id.* at 330 (footnote omitted). Cf. MARK JARRETT, THE CONGRESS OF VIENNA AND ITS LEGACY 28 (2013). The vivid image of Napoleon Bonaparte snatching the crown from Pope Pius VII and crowning himself Emperor of France immediately comes to mind as both suggestive of and contrary to this idea. That is, emperors and kings need not be invested by religious organs to be made regents. On the other hand, kings and emperors must be invested by something other than themselves, presumably God.

<sup>121</sup> R. GLANVILL, THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND 71 (G.D.G. Hall ed. 1965).

<sup>122</sup> Kantorowicz, *supra* note 52, at 318, (citing PERCY E. SCHRAMM, A HISTORY OF THE ENGLISH CORONATION 139 (1937)).

<sup>123</sup> One such example is the anointment/reanointment of King Edward II. Edward II became king during the Campaign against the Scots in 1307 on the death of his father Edward I. He was crowned by the Bishop of Winchester because the Archbishop of Canterbury was unavailable. Thus, Edward II wanted to know from the Pope whether being reanointed king, in England and by the Archbishop of Canterbury would be improper. Pope John XXII’s response was rather direct: because the anointing “left no imprint on the soul” he could repeat his anointing if desired. The interpretation that Kantorowicz recommends is that the anointing of kings there ceased to garner any sacramental value. See KANTOROWICZ, *supra* note 52, at 321.

<sup>124</sup> *Calvin’s Case*, (1606), 7 Coke Reports 1a; 77 Eng. Rep. 377 [hereinafter cited to the English Reports].

<sup>125</sup> 77 Eng. Rep. at 388. The “Union of the Crowns” was personal or dynastic rather than political. This did not occur until the Act of Union, 1707, during the reign of Queen Anne, the last Stuart monarch. DAVID LAWRENCE SMITH, A HISTORY OF THE MODERN BRITISH ISLES, 1603–1707: THE DOUBLE CROWN 29–32 (1998).

guardians (as he was not of legal age). Richard and Nicholas Smith having entered his lands, Calvin's guardians sued for possession. The Smiths' defense was simple: because Calvin was an alien, he could not own land in England.<sup>126</sup>

The entire matter revolved around when the king of England was deemed to accept his kingship and the effects that his coronation had on his subjects. The two defendants, somewhat audaciously, suggested that before the king's coronation, "he was no complete and absolute king," a statement Coke took to mean that logically before a king was crowned, any act of violence against the king could not be treason for lack of a head to commit treason against.<sup>127</sup> In an elaborate opinion, Coke reports that the nature of the kingship was inheritable; that is "the king of England held the kingdom of England 'by birthright inherent' and without any essential ceremony or act to be done *ex post facto*: for coronation is but a royal ornament and solemnization of the royal descent, but no part of the title."<sup>128</sup> Coke seems to make clear that though the king may die, his peace does not die with him.<sup>129</sup>

The second aspect that Kantorowicz wants to emphasize about the perpetual nature of the king is the nature of the Crown as corporation. And by Crown as Corporation, Kantorowicz wants to emphasize the corporal image of "the Crown" representing the object of the monarchy, such as in Baldus de Ubaldis's statement: "With regard to the succession of the son, I do not consider an interval of time; for the *Crown* descends on him in continuity, albeit that the *exterior Crown* demands an imposition of the hand and the solemnity of the offices."<sup>130</sup>

In England, unlike in France, the Crown was understood in practical ways, particularly within the realm of "administration and justice," as opposed to a patriotic symbol. Specifically, the word Crown was used in relation to the royal demesne. For example, in the *Dialogue of the Exchequer* in 1177 a distinction of property rights derived from the king are set by "what

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<sup>126</sup> See *Calvin's Case*, 77 Eng. Rep. at 377. The argument of the defendants is simplified in the text here (1) *Ligeantia*: that Calvin made two allegiances, one to Scotland and one to England (*Id.* at 382-85); (2) *Regna*: though the king binds several nations within himself, he is due the separate allegiance of each nation, and therefore, Calvin could owe only one allegiance (*Id.* at 385-91) (3) *Leges*: the laws of both kingdoms bears this result (*Id.* at 391-96); and (4) *Alienigena*: Calvin is an Alien and not entitled to the protection of the King as against his subjects (*Id.* at 396-406).

<sup>127</sup> See *id.* at 389; see also KANTOROWICZ, *supra* note 52, at 317.

<sup>128</sup> *Calvin's Case*, 77 Eng. Rep. at 389.

<sup>129</sup> Coke alludes to a popular theory by two seminarians at the time that the king was not king until his coronation. The theory suggested that there was a time when the "King's peace died with him." Kantorowicz joins Coke's skepticism for such claims quipping that the two seminarian's argument "must have appeared like some quaint remnant from a distant past, and that the two seminarians appear to us like late descendants of the Englishmen of 1135 or 1272 who were said to indulge in robberies and other disturbances because allegedly on the King's death the king's peace ceased to exist." See KANTOROWICZ, *supra* note 52, at 317.

<sup>130</sup> KANTOROWICZ, *supra* note 52, at 337 (citing Baldus, *Consilia* III, 159, n.2).

pertains to the Crown,” as opposed to those who hold from the king a knight’s fee, not by right of the royal Crown, but by that of some barony.”<sup>131</sup> This distinction is not universal; Kantorowicz gives examples where the nomination King and Crown are used interchangeably in relation to the public sphere; yet, his point is that the word Crown does not get used after Henry II to refer to the king’s private person.

Similarly, the distinctions between Crown and King begin to show themselves in legal proceedings. Showing the same distinction in the writings of Glanvill and Bracton that “the Crown was used for the public sphere and King in the private,” Kantorowicz identifies an interesting phenomenon in the chancery courts. He says:

It was apparently a must to quote both the Crown and royal dignity in cases entangled with ecclesiastical matters, whereas it was a may on other occasions. Nothing, however, could be more wrong than to claim rhetorical tautology on the part of the chancery which issued the writs. For while there could be no doubt that all pleas concerning the competency of either courts Christian or courts secular were *a priori* pleas of the Crown, since they affected the public sphere, the chancery apparently held that those cases affected also the king’s office or dignity as king, his sovereignty or “royalty.”<sup>132</sup>

In a final example of how the “Crown” became distinguished from the man who wore it, Kantorowicz points us to the *Leges Anglorum*, an anonymous tract published in London around 1200. In this illusory writing, in which the author seems to imagine the kingdom in more Arthurian terms, claims that “by right of the Excellency of the Crown, [Britain] ought to be called empire rather than kingdom,” and that the Crown had vast inalienable rights: ‘the universal and total land and the isles pertain to the Crown, including even Norway, because on the basis of the Arthurian legend, “Norway had been confirmed forever to the Crown of Britain.”’<sup>133</sup> The author also reminds his readers of Edward the Confessor’s promise to return all the rights and dignities and lands which his “predecessors ‘have alienated from the Crown of the realm,’ and to recognize it as his duty “to observe and defend all the dignities, rights, and liberties of the Crown of this realm in their wholeness.”<sup>134</sup>

Featured another way, Kantorowicz wants us to associate King as to Crown as tutor is to property of a minor. Thus, the King was the guardian so to speak of the rights of the non-capacity-holding Crown. For example, Kantorowicz points to the numerous charges against Richard II for “acting in prejudice of the people and in disherison of the Crown.”<sup>135</sup> Similarly, Henry III charged that Edward I “disinherited the Crown” by alienating the Isle of Ole’ron, and the magnates charged that Edward II acted in disherison

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

<sup>132</sup> KANTOROWICZ, *supra* note 52, at 344-45.

<sup>133</sup> *Id.* at 345-46.

<sup>134</sup> KANTOROWICZ, *supra* note 52, at 346.

<sup>135</sup> *Id.* at 347.

of the Crown.<sup>136</sup> In contrast Kantorowicz quotes, “Kings are heirs, not of kings, but of the kingdom.”<sup>137</sup> In this sense, the Crown is perpetually a minor, and incapable of being disinherited. This evaluation is seen in the case *King v. Latimer*, where the Court said, “the King presented to the aforementioned church, his aforementioned clerk Robert, as of the right of his Crown which is always so to say, in the age of a minor and against which in this case, no time runs.”<sup>138</sup> The Crown’s minority produced a peculiar result: the King was the guardian of the Crown -- as Kantorowicz says artfully, “for to the perpetual minor, the Crown, there belonged a perpetual adult as guardian, a king who, like the Crown, never died, was never under age, never sick and never senile.”<sup>139</sup>

Finally, the perpetual nature of the king is tied up in the dignity of the king. The notion of a king’s dignity is particularly difficult when kings don’t act in a dignified manner. So to protect the dignity of the Crown from the improprieties of those that wear the Crown, English Jurists located the virtues of the “King” towards the Crown and not the fallible man. But, the ethical or moral activity of the king is only one way to consider his dignity; another is to consider all the vestiments of honor that come with being King.<sup>140</sup> This idea of dignity made its way into ordinary transactions such as land conveyances. For example, Henry IV set aside the lands of the Duchy of Lancaster to be governed and held by the King “as though we would never have achieved the height of royal dignity.”<sup>141</sup>

This idea of dignity though did not really take hold in realist England. So another concept arose that embodied the notions of dignity but also affirmed the separateness from the natural man -- the body politic. The phrase “body politic” comes into the English juristic vernacular thanks again to the Duchy of Lancaster -- or to be more precise, the *Case of the Duchy of Lancaster*, discussed more thoroughly above. For now, highlighting certain uses of the term discussed here will be sufficient. It should be noticed that the judges refer to the king’s duality as comprised of both a body natural and “a body politic” which contains his royal estate and dignity royal.”<sup>142</sup>

Or consider the case of *Hill v. Grange* where the court calls the name of the king “the body politic,” a name of “continuance, which shall always endure as the head and governor of the people as the law presumes, ... and in this the King never dies.”<sup>143</sup> Based on this logic, the court came to the natural conclusion that the King’s death is in law not called death, but demise,

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<sup>136</sup> *Id.* at 346.

<sup>137</sup> *Id.* at 347.

<sup>138</sup> Y.B., 10 Edward II, 1316-17, 46 (cited in KANTOROWICZ, *supra* note 52, at 376 n.212).

<sup>139</sup> KANTOROWICZ *supra*, note 52, at 377.

<sup>140</sup> See *Dutchy of Lancaster* (1561), 75 Eng. Rep. 325, 326. For a discussion of the Dutchy of Lancaster case see *supra* notes 77-82 and text accompanying.

<sup>141</sup> *Dutchy of Lancaster* (1561), 75 Eng. Rep. 325, 326.

<sup>142</sup> *Id.*

<sup>143</sup> *Hill v. Grange* (1556), 73 Eng. Rep. 253.

because thereby he demises the Kingdom to another, and lets another enjoy the functions, so that the dignity always continues... And then when ... the relation is to him as King, he as King never dies; but the King in which name it has relation to him *does ever continue*, and therefore ... the word King shall extend [from Henry VIII] to King Edward VI [that is to the successor] ... From whence we may see that when a thing is referred to a particular King by the name of King, it may extend to his heirs and successors.<sup>144</sup>

Thus, Coke in Calvin's case concludes with sufficient authority that "It is true that the king in genere dieth not, but no question in *individuo* he dieth."<sup>145</sup>

### C. MAGNA CARTA: KINGS, CROWN, CORPORATION

A cursory look at Magna Carta supports the conclusions of both Maitland and Kantorowicz. First, Magna Carta is a corporate document. That is, the document bears the King's seal to represent the dynastic qualities of the kingship. We see this primarily in the way Magna Carta refers to the collective "we" in assigning the rights of the barons. Moreover, the document refers to "our father King Henry" and our brother King Richard, suggesting both a familial and a collegial relationship of the kings through the years. Yes, King Richard can be the Father, Brother and co-holder of the realm with John.

This is best understood in the context of a case arguing the meaning of statutes pertaining to the King; *Hill v. Grange*, a case of trespass against property of the King addresses the plurality of the King in binding documents. The principal issue was whether the King acted in his personal right or by right of the dignity of the Crown. Had he operated under dignity of the Crown, his actions were binding on his successors in interest. The Chief Justice recommended that statutes often bind the fraternity of the King, even when the King's name is mentioned in particular: "And the reason is because the King *is a body politic*, and when an act says 'the King,' or says 'we' it is always spoken in the person of him as King, and in his dignity royal, and therefore it includes *all of those who enjoy his function*."<sup>146</sup>

Second, Magna Carta, properly read, is a document limiting the ability of the King to usurp the rights of the Barons by, amongst other things, using the powers of the Crown. This is most notably seen in the only place where the Crown is specifically mentioned. In Paragraph twenty-four, the document reads: "No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown."<sup>147</sup> Or said simply, those holding offices by virtue of the King, shall not sue in the name of the Crown. This distinction is quite extraordinary. If read on its face, it would mean that the King, though he

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<sup>144</sup> *Id.* at 272-73.

<sup>145</sup> Calvin's Case (1606), 77 Eng. Rep. 377.

<sup>146</sup> *Hill v. Grange* (1556), 73 Eng. Rep. 253 (emphasis added).

<sup>147</sup> *Id.* at 272.

may appoint certain government officials, those officials have no capacity as to the Crown.

Again, *Hill v. Grange* further expounds. The court cites to Magna Carta C. 17 “Common Pleas shall not follow our court” to prove that our great charter did not refer to King John individually, but to the “king as king.”<sup>148</sup> Thus, *Hill v. Grange* provides us a paradox: the Crown authority used by members of the kingly fraternity who, bind themselves both naturally and in their dignity to not abuse the authority of the Crown; as if the dignity would ever seek to abuse its own authority.

Finally, the history and continued reinstitution of Magna Carta suggests a timeless nature to the document itself. As kings behaved in unkingly ways, Magna Carta remained present to remind the Parliament and the King that binding a King had timeless qualities. Thus, both Richard II and Edward II were thought to have “blemished the Crown,”<sup>149</sup> Magna Carta remained as timeless as they were to remind kings of their noble office and to limit their human tendencies, at least in regards to the baron’s property, and the Parliaments authority. At the same time, it implicitly recognizes their dynastic qualities: existing across time, in sempiternity and as a collective body.

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The features of the body sovereign in England are difficult to distinguish apart from the representative of sovereignty in England – namely the king. One way of understanding the body sovereign is to consider its nature as wrapped up in the mystical dual personality of the king.<sup>150</sup> Another is to see the king as a living contradiction.<sup>151</sup> But even Maitland understands that the body of the king holds sovereignty tight. That is to say, the kingship serves as the best foremost example of what a sovereign is, and why sovereignty attaches, no matter how vain those fictions may be. It is the conflict of those fictions, and the gradual displacement of the body sovereign outside the kingship and towards the people that we consider next.

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<sup>148</sup> *Id.* at 273.

<sup>149</sup> In the *Tragedy of King Richard the Second*, Shakespeare dramatizes the decision by nobles to depose the king for his ability to “spend more in peace than they in wars.” See WILLIAM SHAKESPEARE, *THE TRAGEDY OF RICHARD II* act 2, sc. 1. Shakespeare’s prose describes the redemption of a blemished crown:

Redeem from broking pawn, the blemish’d crown  
Wipe off the dust that hides our sceptre’s gilt  
And make high majesty look like itself..

*Id.* Similarly, King Edward II was seen as soiling the crown and has been depicted as a king to be deposed. See e.g., CHARLES MARLOW, *EDWARD II* (1901).

<sup>150</sup> KANTOROWICZ, *supra* note 52, at 198-206.

<sup>151</sup> Maitland, *Crown as Corporation*, *supra* 48, at 35.

#### IV. THE BODY AND THE REALM

At 10:00 in the morning, on January 30, 1648, Charles I gave his last speech while standing on the gallows at Whitehall.<sup>152</sup> The previous ten years, the king engaged in a civil war with Parliament over the authority of the king.<sup>153</sup> Indeed, Charles's reign as king was marked by consistent disputes with Parliament over finances, authority, religious strife, and cultural differences within the kingdom.<sup>154</sup> Following his trial for treason and sentence to death, Charles I stood on the gallows and triumphantly declared: "I stand more for the liberty of my subjects than any that come here to be my pretended judges ... I go from a corruptible, to an incorruptible crown; where no disturbance can be, no disturbance in the world."<sup>155</sup> And after a prayer, with a single blow, the executioner "severed the [king's] head from his body."<sup>156</sup>

Charles's final moments from the Gallows captured an irreconcilable dualism: the destruction of a king's physical body, that left a lingering question for whether the spiritual body remained. First, the act symbolized a shift

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<sup>152</sup> Sean Kelsey, *The Trial of Charles I*, 118 THE ENG. HIST. REV. 583, 614 (2003) (noting the irony that the King's last speech was the only time during his trial and execution that the king proclaimed his innocence, having remained silent and refusing to plead during the court proceedings adjudicating his guilt).

<sup>153</sup> Historians, while divergent over the meaning of the English Civil War, are uniform in the causes of the divide: a struggle between a king set to maintain his royal prerogative and a parliament asserting its authority to reign in a king. See generally, JOHN ADAMSON, THE NOBLE REVOLT: THE OVERTHROW OF CHARLES I 4 (2009) (narrating the English Civil War as a restraint by noblemen upon the kind); MICHAEL BRADDOCK, GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS (2009) (describing the English Civil war as a "crisis in reformation politics – over the nature of the true religion, how to decide what that was, and of the proper relationship between religious and secular authority."); CHARLES SPENCER, KILLERS OF THE KING: THE MEN WHO DARED TO EXECUTE CHARLES I, 2 (2014) (prefacing the narrative of the Civil War and trial of Charles I: "From 1629 to 1640, Charles elected to reign without Parliament in order to hush the exacerbating voices of its more strident members. Instead he relied on money raised through the exploitation of ancient kingly privileges and customs. These were thought by many to be abuses of power and an erosion of the people's civil liberties.").

<sup>154</sup> See SPENCER *supra* note 153, at 32 (noting the connection between the Scottish reformation and the impending English tensions over religion that manifest themselves in the conflict with the king; *Id.* at 78 (noting the tension raised by various parliamentary acts designed to reign in the king's spending and account for treasury revenues).

<sup>155</sup> King Charles I, King Charles His Speech Made Upon the Scaffold at Whitehall-Gate, Immediately before his execution, on Tuesday the 30 of Jan. 1648, with a relation of the manner of his going to execution, (Jan. 30, 1648). Charles I rejected the power of the House of Commons to convict him of treason refusing to answer charges. See Kelsey, *supra* note 152, at 614. Originally charged by the Rump House of Commons, neither the House of Lords nor the Common Law tribunal agreed to the charges because the act was unlawful. See SPENCER *supra* 153, at 47 (noting that the House of Lords, after refusing to go along with the House of Commons, were pad locked out of the proceedings). Yet, the Rump House declared itself capable of legislating alone and formed the court that eventually found Charles I guilty of treason and sentenced him to execution. *Id.*

<sup>156</sup> *Id.*

in the prevailing view of how a sovereign obtained power. Hobbes describes the sources of sovereignty as arising through institution or acquisition.<sup>157</sup> One acquires sovereign reign through either war or increase, while institution affords a sovereign power through the consent of the governed.<sup>158</sup> Indeed, in *Leviathan*, Hobbes sees the authority of consent as preferable as one that guarantees “peace and security.”

But getting to consent to be governed required sorting through the myths of a kingship that accepted the source of the kind’s power was as mystical as his dual nature. In the previous part, we focused primarily on the king’s personhood, his duality, the dynastic consequences of incorporation, and how the king “defeats” natural death by standing in sempiternity. These questions reveal the “myth” of the sovereign’s source of power and authority -- the *nomos* of his being. But the question of the king’s personhood does not answer the central question of how the king relates to his realm. Indeed, the king’s personhood, being as it were a super-human expression of the natural life may indeed answer the “why” one asks when seeing the specific ways that the king relates to his realm. But as with other inquiries the “why” is irrelevant when we don’t understand the “what.”

Ultimately, the question we posed at the beginning regarding sovereignty can be reduced to how the sovereign interacts with his people. One commentator summarized the sovereignty question this way:

One of the distinguishing features of the seventeenth century was its effort to work out a theory of sovereignty. Modern legal positivism never entirely forgot to ask whether laws were just or unjust, but it much prefers to ask whether they are clearly binding and enforceable. What established their power to bind is their origin in an undoubted authority which, simply because it is the lawmaking power, is the supreme power on which all others depend for their validity. Sovereignty is thus its own validation, not necessarily because it is *right* but because it is, by definition the authority from which all others spring. The central question of political science thus becomes the location of such power in a community.<sup>159</sup>

This part proposes two ways of locating that power by looking at the king’s interaction with the realm. The first and most basic way considers the king as fundamental owner of the realm. Indeed, this view highlights the king’s relationship to his people as primarily an economic relationship; accordingly, all members of the king’s realm exist to serve the interests of the king. Thus, in the same way a property owner expects his land to be economically beneficial, so too the king in this relationship relies upon the

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<sup>157</sup> THOMAS HOBBS, *LEVIATHAN* 121 (Richard Tuck, Cambridge Univ. Press 1996) (1651) (“Attaining to this sovereign power, is by two ways. One by Naturall Force, as when a man maketh his children, to submit themselves and their children to his government, as being able to destroy them if they refuse; or by warre subdueth his enemies to his will, giving them their lives on that condition. The other is when men agree amongst themselves to submit to some Man, or Assembly of men, voluntarily, on confidence to be protected y him against all others. This later, may be called a Politicall Common-wealth, or Common-Wealth by institution; and the former, a Common-Wealth by acquisition).

<sup>158</sup> *Id.*

<sup>159</sup> James Daly, Sir Robert Filmer and English Political Thought 29 (1979).

realm. A second view of the kingship is Sir Robert Filmer's view of the king as patriarchal inheritor of regal power. This fatherly king cares for his people as the people reciprocally enrich their king. The third model for viewing the kingship's relationship to the realm, and arguably the one that was most influential to the American framers is that of the Trust. That is, the king indeed holds the realm, but does so for the benefit of the realm itself and exists for the "common weal." Implicit in the trust relationship is the initial grant of authority by the people. Principally, this section will deal with the consideration of this model in the work of Sir John Fortescue, John Locke, and William Blackstone.

All three theoretical frameworks depend on a normative narrative. Each theory discussed in this section weaves a theory of the kingship into a theory of humanity and of political society. Filmer and Locke in rebuttal to each other spend more time defining the way that creation and human existence determine a theory of kingship. Alternatively, Blackstone's and Fortescue's narratives are more strongly tied to a context-specific history of the kingship; Blackstone in particular has something very interesting to say in the context of the revolts and revolutions that tended to define the sovereign. (Can there be a more descriptive way of defining a sovereign's relation to his realm than to highlight when some of his people claim he has breached the limits of his rule?) This work, a polemic, understands the philosophical contrivances of the kingship as built upon narratives and norms as rehearsed by specific authors at specific times. The work's value is its recognition that the normative location of "beginnings" (both as norm and narrative) is an imperative towards understanding sovereignty. Briefly put, this section more than any other tries to make sense of something that is not necessarily coherent: a theological value-set that is challenged by the historical framework, that is shaped by its authors to create a new narrative, and that ultimately works out sovereignty in the terms of that narrative.

#### A. *THE KING AS CONQUERING LANDLORD*

The description of the king as landlord is simple in its ability to locate the power of the king directly to the structure of real property rights in England. Indeed, Arthur Hogue pointed to how certain socage tenures related to the king's sovereignty.<sup>160</sup> The legal mark imprinted on the English countryside (literally) by the Norman kings was characterized by tenures derived

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<sup>160</sup> See ARTHUR HOGUE, *ORIGINS OF THE COMMON LAW* 102 (1966) (Liberty Fund Reprint 1986). Socage tenures are those that derive from no military service, but rather relate to production upon the land of a lord; Socage tenures denoted the holding of land in return for agricultural or economic services. WILLIAM SOMNER & WHITE KENNETT, *A TREATISE OF GAVELKIND* 134-39, 141 (2d ed., London, F. Gyles 1726). Burgage tenures generally speaking "consisted of the land, the house, or both," and were bound by payments of money rather than physical service. See Vanessa Harding, *Space, Property and Propriety in Urban England*, *J. OF INTERDISCIPLINARY HIST.* 549, 550 n.1 (2002); MORLEY DEWOLF HEMION, *BURGAGE TENURE IN MEDIAEVAL ENGLAND* 14 (1914) (contrasting conventional views that Burgage tenure was not distinctive in its own right, "giving a specific description of the

ultimately from the king himself. As Hogue aptly says, in England, the king was “supreme landlord over the realm.”<sup>161</sup> But though the image of king as “supreme landlord” is helpful for understanding the way property rights devolve, it does not explain how the people relate to the king outside of that property relationship.

What it does provide is the image of the conqueror as possessor. Image may indeed be all we have. As the English historian Charles Howard McIlwain has written, the sources following the conquest until the reign of Henry I are “slight, scattered, and rather inconclusive.”<sup>162</sup> Yet the image itself is certainly telling. Certainly, the power that kings had to rule stemmed directly from the first “conqueror” and extended only as kings maintained the power to rule in the Norman’s image. Indeed, from the time of the conquest till the thirteenth century, the assumptions of English law appear similar to the “*coutumes* of northern France,” as opposed to the cultural traditions of the Anglo Saxon predecessors in possession of the English Crown.<sup>163</sup> Even the source of authority being traced to someone called “the conqueror” speaks to the normative view of those who follow in the conqueror’s place. Implicit is the recognition that with a conqueror comes new law, new order, and new loyalty.

That image was one that capitalized on the authority of “king” towards erecting beneficial structures for the collection of taxes and fees. For example, the compilation of the *Domesday Book*, an attempt to systemize the payments of fees to predecessors in title emphasized the connection between land, duty, and king.<sup>164</sup> Indeed, the innovation of the Norman Conquest was to divorce the king from the feudal tenures that so bound the French king. Now the king stood with no other person in his realm above him. Thus, the sheriffs were the king’s officers. The courts were the king’s courts. And accordingly all the people owed their ultimate allegiance to him and him only; their allegiance to their lords was secondary.<sup>165</sup> The conquering king was one way to understand the king’s relation to the people; as conqueror, he was entitled not only to their loyalties but to their treasures as well.

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urban tenure in mediaeval England.”). In 1922, the Law of Property Act transformed all prior tenures to socage. Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16 (Eng.).

<sup>161</sup> HOGUE, *supra* note 160, at 102.

<sup>162</sup> Charles I. McIlwain, *Constitutionalism Ancient and Modern* 70 (1940).

<sup>163</sup> F.W. Maitland, *History of England* in F. W. MAITLAND, *HISTORICAL ESSAYS* 97, 101 (1938). Maitland means the vernacular of law and customs traditionally associated with the English form of law, but which have no source in Anglo Saxon tradition. i.e. trial by jury. *Id.*

<sup>164</sup> *Id.* at 102.

<sup>165</sup> *Id.* Maitland makes this point well emphasizing William’s personal knowledge of the fallacies of the French system, himself being the “rebellious vassal” of the French king. *Id.* This supremacy of the crown, visible in the land tenure, was idealized in prerogatives that gave legislative and judicial powers moments of pause when considering the extent of the king’s power. Edward Jenks, *The Parliament Act and the British Constitution*, 12 COLUM. L. REV. 32, 34 (1912) (the sovereignty or supremacy of the crown in legislative, executive, and judiciary, had until the end of the sixteenth century, manifested itself in just those very kinds of acts which the Petition of Right and Bill of Rights condemn as illegal.”).

But the image that the Norman conquest conveys is not just a pyramidal description of ultimate power. This question returns us to a consideration we breezed by in the last part -- that of the king's corporate character.<sup>166</sup> The corporate model of the kingship included members of the royal dynasty together with his subjects in the realm, along with his predecessors and successors to the Crown. In Norman England, the king was indeed the realm. That image survived through successive generations.

Two cases highlight this view of the king. The first, *Willion v. Berkeley*,<sup>167</sup> is often cited for its compelling language that supports the King's two bodies. In *Willion*, Henry Willion brought suit for trespass and damages against Henry Berkley and Richard Knight, who entered the manor of Weston possessed by Willion and ejected him by "force of arms, viz., swords, staves and knives."<sup>168</sup> Both Berkley and Willion claimed seven acres of land attached to the Weston Manor by rightful claim. During the reign of Henry VII, the property was deeded as a fee tail to William Marquess Berkley, with a remainder in fee tail to Henry VII. The deed also contained a condition that if Henry VII died without male heirs, then the remainder would vest to the next heir of William Marquess Berkley.<sup>169</sup> Edward VI did indeed die without male issue and Berkley claimed the chain of property proceeded as follows: Henry VII – William Marquess Berkley – Henry VII – Henry VIII – Edward VI – Next heir of the Marquess Berkley, namely Henry Berkley.<sup>170</sup>

Willion, on the other hand claimed possession of the land through the grant of a third party, Henry Cook, who claimed rightful ownership of the property by virtue of a second grant by Henry VIII. Succinctly, Willion agreed that property reverted back to Henry VII upon the death of the Marquess, and that title then passed to Henry VIII. However, Willion claimed that Henry VIII then deeded the land in fee simple to Lady Catherine, his first wife, thereby breaking the reversionary right in the King. Thus Willion's chain of title looked so: Henry VII – William Marquess Berkley – Henry VII – Henry VIII – Fee simple to Lady Catherine Latimer – Henry Cock, lessee of Henry Willion.<sup>171</sup>

Importantly, the litigants and the justices did not perceive this case to be simply a question of instruments and heirs. Rather it was a question that touched the metaphysical nature of the king and how the king relates to his realm.<sup>172</sup> Like the conqueror, who related to the realm as possessor, the court

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<sup>166</sup> Indeed, though we answered what aspects of a corporation the king tends to resemble, we ignored purposefully his posture within the corporation. In the last part we only talked about the temporal aspects of the corporate character, that the king is incorporated through time with his brethren monarchs holding the realm as a dynasty. This section looks principally at the second group comprising the king's corporation – his realm.

<sup>167</sup> *Willion v. Berkeley* (1590), 75 Eng. Rep. 338.

<sup>168</sup> *Id.* at 340.

<sup>169</sup> *Id.* at 346.

<sup>170</sup> *Id.* The deed at one point is described in the opinion as containing "both estates-tail precedent." *Id.* at 350.

<sup>171</sup> *Id.* at 346.

<sup>172</sup> See e.g., *id.* at 356 (describing the king's separate mystical body as void of debilities).

saw this issue as touching the very narrative of the king, not just a technical question of reversions.<sup>173</sup> For example, one exception raised by Defendants was that Henry VIII did not have the capacity to deed the property to Catherine.<sup>174</sup> The court then recited the traditional mystical view of the king and his natural body: “[a]nd as to this, it was argued on this side that the King has two capacities, for he has two bodies, the one whereof is a body natural, consisting of natural members as every other man has, and in this he is subject to passions and to death as other men are.”<sup>175</sup> But then, in describing the mystical political body, the court citing Lord Southcote incorporates the realm as bound together by the king: “[t]he other is a body politic, and the members thereof are his subjects, and he and his Subjects together compose the corporation. . . . and he is incorporated with them, and they with him, and he is the head and they are the members, and he has the sole government of them. . . .”<sup>176</sup> The idea expressed in *Willion v. Berkeley* is simply that the king and realm form a body inseparable by the death of the king.<sup>177</sup> As king, the head of the body, he has full capacity to control and govern the members held up in his body.

But *Willion v. Berkeley* suggests more than just the headship of the king over the corporate body of the realm; it also suggests a comity between king and realm.<sup>178</sup> The court describes the reciprocal relationship in relation to an exception taken on the basis of an act presumed only to apply to certain members of the realm. The court in ruling that the statute was a general act and thereby universally applicable, discussed the reciprocal nature of the realm to the king:

For every subject has an interest in the King, and none of his subjects that is within his law is divided from the King, who is his head and sovereign. So that his business and things concerns the whole realm; and forasmuch as the whole realm has an interest in the King and by the same reason in the queen who is his wife, the said act concerns the whole realm. . . .<sup>179</sup>

Ultimately, Willion’s argument failed. The Court distinguishes the rights of Henry VIII as regent from Henry as natural person. Justice Brown says:

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 354.

<sup>175</sup> *Id.* at 356.

<sup>176</sup> *Id.* (citing *Calvin’s Case*, 77 Eng. Rep. 377).

<sup>177</sup> *Willion*, 75 Eng. Rep. at 356. (“And this body (politic) is not subject to passions, as the other is nor to death, for as to this Body the King never dies, and his natural death is not called in our law (as Harper said) the Death of the King, but the demise of the King, not signifying by the word (Demise) that the body politic of the King is dead, but that there is a separation of the two bodies, and that the Body politic is transferred and conveyed over from the Body natural now dead, or now removed from the dignity royal to another body natural. So that it signifies the removal of the body politic of the King of this realm from one Body natural to another.”).

<sup>178</sup> *Id.* at 361.

<sup>179</sup> *Id.*

For the King naturally, properly, and fully cannot purchase by any other name than by the name of King, for the name of King has drowned his surname, and in the name of King, his surname and proper name also are included.... So that the name of the Lord the King contains the King in certain viz, the King which then in, or the King spoken of. And although it is usual at this day to say King Henry 8, or King Edward 3, or King Edward 4 this is but for distinctions sake, to know what King we mean .... For the word King is a name of substance by itself without the name of baptism ... And if land is given to Edward 6 or Henry 8 omitting the word King, they shall take nothing. But contra if a patent is made by King Henry 8 by the words “the King hath granted, omitting Henry ... the gift is good .... So that if land is given to a King by the name of baptism and by the name of King also, ... this shall go in succession as the Crown shall go.<sup>180</sup>

By holding land in his mystical body, the king had an interest in that land through time. Moreover, the mystical elements of the king became incorporated into the things he touched -- his property. But the king’s meta-physical character controlled not only his property but his subjects as well, as discussed in a case one year later – *Hales v. Petit*.<sup>181</sup>

*Hales v. Petit*, was an action for trespass by Margaret Hales, plaintiff against Cyriack Petit. Margaret Hales, with her husband James Hales owned land in fee simple but James Hales “voluntarily and feloniously” drowned himself leaving only widowed Margaret Hales.<sup>182</sup> Upon the death of Mr. Hales, the Archbishop re-leased the lands to Defendant, Cyriack Petit for a new term of years. The ultimate question was whether, by virtue of Hale’s suicide, the land he and his heirs had title to, now escheated to the state. The Court ruled it did.

Hale’s “homicide” is characterized as an offense against God, nature and king.<sup>183</sup> Pertinently to the king, the Court says that Hale’s suicide was an offense,

[a]gainst the King in that hereby he has lost a subject, and (as Brown termed it) he being the Head has lost one of his mystical members. Also he has offended the King in giving such an example to his subjects, and it belongs to the King, who has the Government of the People, to take care that no evil Example be given them, and an evil Example is an offense against Him.<sup>184</sup>

Implicit is the orientation of the court towards viewing the subject, as not just static members of the king’s body, but as productive members that benefit the king in his body politic. So, the court terms the offense not as a moral offense for the sake of being immoral, but rather as a deprivation of a principle part of the king’s realm – one of his persons.

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<sup>180</sup> *Id.* at 374.

<sup>181</sup> *Hales v. Petit* (1560), 75 Eng. Rep. 387.

<sup>182</sup> *Id.* at 390.

<sup>183</sup> *Id.* at 400. As to nature, the crime was failing to self-preserve. *Id.* at 399-400. As to God, it was a violation of the Sixth Commandment “Thou shall not Murder.” *Id.* at 400.

<sup>184</sup> *Id.* at 400.

*Hales v. Petit* and *Willion v. Berkeley* demonstrate how the laws related the king's interest in his "political body." Interestingly, in both cases the treatment of individuals and property held by the "king's body" is symmetrical. Henry of York (Henry VIII) has no more right to deprive himself, or Edward VI for that matter, of property than James Hales can deprive the king of a life. They confirm the image of a conquering king that by virtue of his victory is entitled to the revenues of his body, regardless of the decisions natural persons make. The "beginnings" that are honored are an economic relationship that began in the conquest that entitled the king as king to certain property, as well as the lives of his subjects. They confirm a merger on certain levels of subjects as property.

### B. KING AS FATHER

A similar metaphor to support the divine right of the king to rule appears in the late seventeenth century when Sir Robert Filmer published his *Patriarcha*, a narrative of the kingship as Father, inheritor, and provider of the realm.<sup>185</sup> Historically, *Patriarcha* was composed in 1628 and published posthumously in 1680 as Tory propaganda.<sup>186</sup> Importantly, the events that

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<sup>185</sup> Robert Filmer, *Patriarcha or the natural power of Kings* (1680), available at <http://www.constitution.org/eng/patriarcha.htm>.

<sup>186</sup> See DALY, *supra* note 159, at 9. *Patriarcha* went through several editions starting in 1680. Daly seems to rebuff the influence that Filmer may have had on Tory political philosophy, suggesting that other royalist paths besides Filmer's provided the basic line of discussion. See *id.* at 11. On the other hand, Filmer was deemed a voice to be answered by the Whigs, who "dealt Filmer punishing blows" from his lengthy excursion on the book of Genesis and his general natural theology of the king as father. *Id.* Among those that offered rebuffs to Filmer's thought are Algernon Sidney, who described *Patriarcha* as "grounded on wicked principles equally pernicious to magistrates and people" (see Algernon Sidney, Colonel Sidney's Speech Delivered to the Sheriff on the Scaffold, (Dec. 7, 1683)), and John Locke, whose first part of *Two Treatises of Government* is solely dedicated to rebuffing the thought of Robert Filmer. Sidney also produced a longer, more copious work that spent considerable time debasing the political order of Filmer. See ALGERNON SIDNEY, *DISCOURSES CONCERNING GOVERNMENT*, (1702).

Filmer was not without his supporters. A defense of Filmer was taken up by Edmund Bohun specifically relating to the attacks by Sidney in his Speech on the Scaffold. Specifically, the author performs a line-by-line exegesis of Sidney's speech, trying to demonstrate the speech as a "unseasonable and unbecoming declamation." See Edmund Bohun, *A Defense of Sir Robert Filmer, Against the Mistakes and Misrepresentations of Algernon Sidney Esq. in a Paper Delivered by him to the Sheriffs upon the Scaffold on Tower-Hill, on Friday December the 7<sup>th</sup> 1683 before his execution there 2* (1684) (Hereinafter Defense). One passage from Bohun's writings seem to capture the ideological and religious nature of this tension:

Tho' the season of the year, the infirmities of this age, increased by [Sidney's] close imprisonment of about five months, might be allowed as reasonable causes why he should not speak much at his execution; yet in my poor judgment, they will afford him little excuse either for what he hath or what he hath not delivered in writing, since he was pleased to take that way: For it had been as easy, and much more becoming a Christian, a Subject, and a Martyr, as he seems desirous to be thought, to have told the world whether he were guilty, or not, or of the

Filmer has in mind when he writes *Patriarcha* are not the ones that immediately are associated with Filmer's political rhetoric; instead of the excesses of Charles I, Filmer takes aim at the reigns of Richard II and Edward II, both of which ended in civil war and the death of both kings. Filmer draws parallels between the public response to those earlier kings and the current King Charles I, whose unpopularity was growing.<sup>187</sup> Notably, some of the most momentous conflicts relating to the king and parliament – such as the dissolution of Parliament in 1629 by Charles I,<sup>188</sup> the Long and Short Parliaments

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things laid to his charge, than to Arraign his Judges, to have Exorted the people to Loyalty and Obedience towards their gracious King, and to have prayed for the peace and prosperity of his Prince and his Country, as to complain of the Age, and yet at the same time endeavor to make it worse by an unseasonable and unbecoming declamation.

*Id.*

<sup>187</sup> Charles was given the benefit of the doubt at least early on in his reign. One commentator has noted that most parliamentary objections were aimed at Lord Buckingham and the king's advisors for "misleading" a "helpless monarch." DAVID UNDERDOWN, A FREEBORN PEOPLE: POLITICS AND THE NATION IN SEVENTEENTH CENTURY ENGLAND 39 (1996). Indeed, the theology of the kingship dictated that "the king could do no wrong." As Sir John Eliot said to the House of Commons, " 'no act of the King can make him unworthy of his kingdom;' such an idea would be 'against our religion.'" See PROCEEDINGS IN PARLIAMENT 1626 III, 358 (William B. Bidwell & Maija Jansson, eds, 1991) cited in Underdown, *supra* at 39. However, this perception of a "helpless monarch" would not last as the ultimate trial and regicide of Charles I would show.

<sup>188</sup> In 1629 Charles I dissolved the Parliament session in large measure deeming Parliament's approval unnecessary to collect various taxes for the continuation of wars against Spain, France, and Scotland. In the midst of this dispute the sovereignty of the king arose in the curious form of legal recognition as opposed to regal tradition. See BRADDICK, *supra* note 153, at 34. Charles McIlwain reports that when the Petition of Right, which would require Parliament's approval of taxes before collection, came before the House of Lords, they sought to add a clause "saving the sovereign power of the king." Significantly, the Commons understood that to allow such an addition would be to recognize not only a regal right but a legal right. John Pym said that "All our Petition is for the laws of England, and this power seems to be another distinct Power from the Power of the law: I know how to add Sovereign to his person, but not to his power: And we cannot leave to him a sovereign power..." See CHARLES MCLWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 83 (1979). It would seem that at least by 1628, questions relating to the location of the sovereign were being raised by the House of Commons.

Initially, Charles was hesitant to consent to the Petition of Right, but after consultation, he was informed that it could have no binding force against him. See BRADDOCK, *supra* note 153 at 26. After signing the Petition, he levied taxes, and then dissolved Parliament for eleven years. *Id.*

of 1640,<sup>189</sup> the Ship Money crisis<sup>190</sup> and the accompanying losses in the Bishops Wars with Scotland, the trial and ultimate regicide of Charles I,<sup>191</sup> the assumption by the Lord Protector of the Common Wealth, or the return to the throne of Charles II – were yet to occur. Notably, *Patriarcha*'s ultimate publication came thirty-one years after the regicide of Charles I, and eight years before the abdication of Charles II, known as the Glorious revolution; thus though Filmer was unaware of these events, his reader would certainly recall them parsing Filmer's rhetoric. A primary question these issues spurred was the nature of the king's power and authority, making *Patriarcha* an interesting solution to a king's usurpation of power.<sup>192</sup> Filmer sets out to answer the central question: can liberty be a natural right?<sup>193</sup>

Ultimately, Filmer's theological lens informs his view of human history. The "beginnings" for Filmer are normatively tied to the authenticity and meaning underlying the biblical creation account; the necessity for modeling the timeless structures present in the biblical narrative thus becomes a fulfillment of normative values.<sup>194</sup> So for Filmer, Adam was not just a person given

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<sup>189</sup> Having no Parliamentary session since 1629, Charles I, needed more revenue to continue his wars, specifically against Scotland. Accordingly, he recalled Parliament on April 13, 1640. See BRADDOCK, *supra* note 153 at 37. At that time, many members of Parliament challenged the legality of the prior dissolution and John Pym spoke forcefully for two hours against the acts of the King. *Id.* Three weeks later, on May 5, 1640, Charles again dissolved the Parliament believing the political tension insurmountable. *Id.*

Several months later, on November 3, 1640 Charles convened what is known as the Long Parliament, which did not formally dissolve until May 16, 1660.

<sup>190</sup> "Ship money" was a feudal tax enabling kings to raise money for armies and navies from local barons. For a more detailed discussion of Ship Money, and its implications in the Seventeenth Century, see Stewart Jay, *Servants of Monarchs and Lords: The Advisory Role of Early English Advisors and Judges*, 38 AM. J. LEGAL HIST. 117, 141-43 (1994); see also UNDERDOWN, *supra* note 187, at 43 (suggesting that Ship Money never really became an issue until the Hampden Case in 1637 where, instead of receiving Parliamentary advice, King Charles utilized the advice of his own judges).

<sup>191</sup> See Sarah Barber, *Charles I: Regicide and Republicanism*, HIST. TODAY 29, 31 (1996) ("the tragedy of Charles I: in 1649 the new rulers of England, holding their positions by virtue of conquest over the anointed symbol of divine power on Earth, chose to make the most public and graphic display of the way in which the person of the monarch could be separated from the sovereignty he was meant to express."). This point was made clear by an announcement of the establishment of a new political order in a publication called the *Moderate*: "The Corpse of the King was sent to Windsor, to be buried in St. George's Chappel." As one commentator noted "the point was clear: not only was the king dead, but the kingly office as well." See Amos Tubb, *Printing the Regicide of Charles I* 89 HISTORY, 517 (2004).

<sup>192</sup> See DALY, *supra* note 159, at 4.

<sup>193</sup> *Id.*

<sup>194</sup> Filmer's theology is very much platonic in the systematic tradition of prior political theorists. In contrast, writers such as John Locke and Algernon Sidney would revitalize an Aristotelian way of conceiving the relationship of propriety, right and government in relationship to man. See J.S. Maloy, *The Aristotelianism of Locke's Politics*, J. OF HISTORY OF IDEAS 235, 236 (2009) (noting the long history back to Rousseau recognizing the Aristotelian influence on Locke and Sidney).

“economic power” in the garden, but a person vested with political power over the world as father of the world.<sup>195</sup> According to Filmer, civil power flows by “divine institution.”<sup>196</sup> The divine institution that Filmer refers to is Adam’s election as the first human in creation and the powers that derived from his estate.<sup>197</sup> Thus, Filmer’s model understands kingship as deriving power from beginnings. Succinctly, there is significance in being the first. For Filmer, the description of king as Patriarch or *Pater Patriae* affirms the nature of beginnings inherent in kingship.

And fatherhood carries a mystical quality about who should be king. King’s, though not the natural parents of their citizens, are the mystical parents, holding their children within their reign. Kings are not chosen by human hands but by the mysteries of “first birth.”<sup>198</sup> The picture that Filmer has in mind is the king’s receipt of power directly from God himself:

All such prime heads and fathers have power to consent in the uniting or conferring of their fatherly right of sovereign authority on whom they please; and he that is so elected claims not his power as donative from people, but as being substituted properly by God from whom he receives his Royal Charter of an Universal father, though testified by the ministry of the heads of the people.”<sup>199</sup>

Two ideas are gestating here for Filmer: first, just as the king received from God the Royal Charter, he may pass the royal seat on to his own heir, subject of course to the hand of God, with whom the choice of heir ultimately resides. Second, the “ministry of the heads of people” includes the act of ministering to the king; it confirms the people’s submission to, not authority over the body of the king.

The first idea posed by Filmer—that kings receive their grant directly from God and therefore may grant royal authority to their own heirs—captures the nature of the royal grant. His heirs are considered the “next heirs to those first progenitors who were at first natural parents of the whole people, and in their right succeed to the exercise of supreme jurisdiction. And

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<sup>195</sup> Filmer, *supra* note 185, at 4 (“I see not then how the children of Adam, or of any man else, can be free from subjection to their parents. And this subjection of children being the fountain of all regal authority, by the ordination of God himself.”).

<sup>196</sup> *Id.* at 4 (“It follows that civil power not only in general is by divine institution, but even the assignment of it specifically to the eldest parents, which quite takes away that new and common distinction which refers only power universal and absolute to God, but power respective in regard of the special form of government to the choice of the people.”).

<sup>197</sup> Filmer refers to Adam’s lordship, which descended to the patriarchs as being as “large and ample as any dominion of any monarch.” *Id.* at 4. That dominion included the power to decree a death sentence (see Judah’s pronouncement of a death sentence to Tamar, Gen. 38:24); power to war and command armies (see Abraham’s commanding of an army, Gen. 14:14); power to make peace with other nations (see Abraham declaring peace with Abimelech, Gen. 20:14-18). He summarizes thus: “These acts of judging in capital crimes, of making war, and concluding peace, are the chiefest marks of ‘sovereignty’ that are found in any monarch.” *Id.* at 5.

<sup>198</sup> *Id.* at 6.

<sup>199</sup> *Id.*

such heirs are not only lords of their own children but also of their brethren, and all others that were subject to their fathers.”<sup>200</sup> Indeed, as discussed in Part II, the mystical continuation of the king’s corporation, is reflected in Filmer’s view of primogeniture and the ascent of new kings.<sup>201</sup>

This does not mean that the forceful removal of kings does not occur or is not ordained. Indeed, Filmer has to make sense of the falls of Richard II and Edward II from royal power. What Filmer makes clear is that this removal from power is not because of the people’s will but solely due to the will of God.

If it please God, for the correction of the prince or punishment of the people, to suffer princes to be removed and others to be placed in their rooms, either by the factions of the nobility or rebellion of the people, in all such cases, the judgment of God, who hath power to give and to take away kingdoms, is most just; yet the ministry of men who execute God’s judgments without commission is sinful and damnable. God doth but use and turn men’s unrighteous acts to the performance of His righteous decrees.<sup>202</sup>

Said more directly, kings fall because of the need to discipline the king, or to discipline the people, or both.

Specifically in England’s case, Filmer notes that the kingdom has never truly suffered under a tyrant. “Edward II and Richard II were not insupportable either in their nature or rule.”<sup>203</sup> Rather, it was the wickedness of the people that led to both insurrections; the result was the “miserable wast[ing]” of the kingdom by civil war, which only affirmed the nature of the Britain’s to the world:

These three unnatural wars have dishonoured our nation amongst strangers, so that in the censures of kingdoms the King of Spain is said to be the King of Men, because of his subject’s willing obedience; the King of France, King of Asses, because of their infinite taxes and impositions; but the King of England is said to be the King of devils, because of his subjects’ often insurrections against and depositions of their princes.<sup>204</sup>

But most supporting of Filmer’s point that deposition is brought about because of the need for discipline is the successor reign of Henry. Quoting

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<sup>200</sup> *Id.* at 7-8.

<sup>201</sup> Filmer, *supra* note 185, at 7 (“[A]s long as the first fathers of families lived, the name of the patriarchs did aptly belong unto them; but after a few descents, when the true fatherhood itself was extinct, and only the right of the father descends to the true heir, then the title of prince of king was more significant to express the power of him who succeeds only to the right of that fatherhood which his ancestors did naturally enjoy.”).

<sup>202</sup> *Id.* at 7.

<sup>203</sup> *Id.* at 23. Indeed, Filmer says, “Edward II by many historians is reported to be of a good and virtuous nature, and not unlearned;” his misfortune being a result of “fortune” rather than despotic rule. Likewise, Richard II was deposed by a “tempestuous rage, neither led nor restrained by any rules of reason or state.” *Id.*

<sup>204</sup> *Id.* at 23-24.

the historian Hollinshed, Filmer shows how the deposition of Richard II led to the people's long-suffering at the hands of his replacement:

That he was most unthankfully used by his subjects; for although, through the frailty of his youth he demeaned himself more dissolutely than was agreeable to the royalty of his estate, yet in no king's days were the commons in greater wealth, the nobility more honoured, and the clergy less wronged, who notwithstanding, in the evil-guided strength of their will, took head against him, to their own headlong destruction afterwards, partly during the reign of Henry, his successor, who greatest achievements were against his own people in executing those who conspired with him against King Richard. But more especially in succeeding times when, upon occasion of this disorder, more English blood was spent than was in all the foreign wars together which have been since the Conquest.<sup>205</sup>

Filmer's point is simple; a deviled people deserve a deviled king.<sup>206</sup>

Filmer's second point is social: the ministry of the people contains a distinct economic authority. Adam was not only first father, but also first possessor, first caretaker, first economic provider. Filmer, therefore, sees the "political fatherhood" in a reciprocal relationship to his children. The king extends his care over the many families to "preserve, feed, clothe, instruct, and defend the whole" family. But the king also may extract the "bounties" of his people.<sup>207</sup> Filmer's interpretation of the biblical story of the prophet Samuel's admonition of kingship<sup>208</sup> demonstrates his point:

it is evidently shown that the scope of Samuel was to teach the people a dutiful obedience to their king, even in those things which themselves did esteem mischievous and inconvenient; for by telling them what a king

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<sup>205</sup> Sir Robert Filmer, *Patriarcha* in SIR ROBERT FILMER, *PATRIARCHA AND OTHER WORKS* 95 (Ed. Peter Laslett 1995).

<sup>206</sup> Filmer's notion of cosmic justice—that good peoples get good kings, while bad people get tyrants—was a well-documented theory in the early Middle Ages that explained why people suffer under tyrannical leaders. See e.g., *Policraticus*, in O'DONOVAN & O'DONOVAN, *supra* note 70, at 283 (describing the Bishop of Rome's "welcoming" Attila the Hun, "the Scourge of God").

<sup>207</sup> *Id.* at 8.

<sup>208</sup> I SAMUEL 8:10-18 (NIV):

Samuel told all the words of the LORD to the people who were asking him for a king. He said, "This is what the king who will reign over you will do: He will take your sons and make them serve with his chariots and horses, and they will run in front of his chariots. Some he will assign to be commanders of thousands and commanders of fifties, and others to plow his ground and reap his harvest, and still others to make weapons of war and equipment for his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive groves and give them to his attendants. He will take a tenth of your grain and of your vintage and give it to his officials and attendants. Your menservants and maidservants and the best of your cattle and donkeys he will take for his own use. He will take a tenth of your flocks, and you yourselves will become his slaves. When that day comes, you will cry out for relief from the king you have chosen, and the LORD will not answer you in that day.

would do he, indeed, instructs them what a subject must suffer, yet not so that it is right for kings to do injury, but it is right for them to go unpunished by the people if they do it. So that in this point it is all one whether Samuel describe a king or a tyrant, for patient obedience is due to both; no remedy in the text against tyrants, but in crying and praying unto God in that day. But howsoever in a rigorous construction Samuel's description be applied to a tyrant, yet the words by a benign interpretation may agree with the manners of a just king, and the scope and coherence of the text doth best imply the more moderate or qualified sense of the words.<sup>209</sup>

Filmer supposes that Samuel's discursion on kingship is not about tyrants or good kings; it is rather neutral towards the moral culpability of kings. Rather, the passage is about what the people can expect from their king.

One such expectation towards the kingship is that the people's economic interests are subordinate to those of the king. First, the people can expect a tenth of their "seed, of their vines, and of their sheep" to be taken by the king as a right of tribute. Second, the taking of such things may be by force when necessary to erect the kingdom, "for those who will have a king are bound to allow him royal maintenance by providing revenues for the Crown, since it is both for the honour, profit, and safety, too, of the people to have their king glorious, powerful, and abounding in riches."<sup>210</sup> Thus, Filmer's conception of the kingship includes one that is owed tributes and who may, if necessary, seize the economic engines of his people for the benefit of the people.

Importantly, Filmer finds normative proof that the king as Father is justified as a natural theory. That theory like the Conqueror/Landlord model combines the economic and political capacities of the kingship together. It establishes that there is a mystically ordained king, who passes his line like a father passes the family estate to his eldest son. And though the king should protect his people like a father protects his children, no one has the authority to correct the king when he fails to do so, or when he unjustly usurps the people.

Whether the image that endures is the traditional view of the conqueror, the baronial landlord, or the *pater patriae* the same end is reached by the discussion suggested in this part: the king is the supreme person stationed above the rest; he is entitled to political power, which includes the economic resources of the people. There is no separation into King and Common; both Court and Cottage are conjoined together irrevocably to serve one another; cottage towards maintaining the honors of Kings and Court towards representing the justice of God for the people. The next section considers alternative images of a slightly restrained king.

### C. THE KING AS HOLDER OF THE CORPUS'S TRUST

The formulation that begins to take shape in the seventeenth century actually began formulation in the fifteenth century. Various revolts showed

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<sup>209</sup> *Id.* at 25.

<sup>210</sup> *Id.*

the theory was believable; people started thinking that sovereignty may actually originate in the people, who then grant the power to rule to their leaders, kings etc. The normative analogy that I wish to set forth here is that of a trust between king and public. Specifically three formulations of that trust are discussed. The earliest is John Fortescue's binding of the King to the law in the name of the public good. The second, by John Locke, builds on Fortescue's notion that law binds kings, but offers a remedy to despotic kings. The third, by William Blackstone, mitigates Fortescue and Locke. In all three, narratives of beginnings formulate the theory.

### 1. Sir John Fortescue's *On the Laws and Governance of England*

The earliest formulation of a "trust relationship" is raised by Sir John Fortescue, who believed that the public served to benefit the king economically while the king offered his protection and justice. But these reciprocal actions were not contractual. There was no bargain, per se, that the king reached with his people to assume an elevated station. Rather, they were simply duties attached to the station each assumed within the social strata of the realm.

So, for example, when Fortescue describes the reason for this social order, he looks specifically to the economic duty of the people to not just support the king, but to do so abundantly. For "if a king is poor, he shall by necessity make his expenses and buy all that is necessary to his estate, by credit and borrowing; wherefore his creditors will win upon him the fourth or the fifth penny of all that he spends ... What dishonor this is, and abating of the glory of a king."<sup>211</sup>

Fortescue's concern is as much towards a stable social government as it is towards the "glory of a king." Fortescue's theory of kingship infers that kingship arises in two distinct forms--*dominium regale* and *dominium politicum et regale*; England is represented by the later while France the former.<sup>212</sup> The narrative that Fortescue gives makes a juxtaposition between the biblical pagan King Nimrod and the more civilized and wise king of the Britons, Brutus.<sup>213</sup> The distinction for Fortescue solely revolves around the aim of the government. For Nimrod and his progeny, the king governed solely by his own will, and arose from the might of the conquering prince. The latter, on the other hand began as a cognitive act of the people and their vesting in the person and line of the king a power to rule over them justly.

And in this sense, Fortescue makes clear that "the head does not swallow the body," but rather each exist with their own areas of supremacy.<sup>214</sup> His king who rules by both royal and political means specifically subjects

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<sup>211</sup>SIR JOHN FORTESCUE, ON THE GOVERNANCE OF ENGLAND 92 (Shelly Lockwood, ed. 1996).

<sup>212</sup>*Id.* at 87 ("Although the French King reigns upon his people 'by royal dominion,' yet neither Saint Louis, sometime King there, nor any of his progenitors, ever set any tax or other imposition upon the people of that land without the assent of the three estates.").

<sup>213</sup>*Id.* at 85-86.

<sup>214</sup>KANTOROWICZ, *supra* note 52, at 231.

himself to the laws of the land that he rules over. “For the king of England is not able to change the laws of his kingdom at pleasure.”<sup>215</sup> Unlike the civil law of the continent which holds the pleasure of the prince to be the “force of law,” England has chosen to restrain its king from the power of his own prerogative.<sup>216</sup> Indeed, restraining the king politically is the only means of protecting the realm from the rule of a tyrant.<sup>217</sup>

Were we tempted to stop here in Fortescue’s political theory, then we might begin to equate his theory with Locke’s social contract; indeed, Locke even perceived Fortescue as suggesting that a prince may forfeit his power to the “obedience of his subjects.”<sup>218</sup> But Fortescue wants to make clear that political communities require kings. Quoting from Augustine’s *City of God* and Aristotle’s *Politics*, he describes the difference between a body with and without a head:

Sainte Augustine, in the nineteenth book of the City of God, Chapter 23, said that “a people is a group of men united by consent of law and by community of interest.” But such a people does not deserve to be called a Body whilst it is acephalous, that is, without a head. Because, just as in natural things, what is left over after decapitation is not a body, but what we call a trunk, so in political things, a community without a head is not by any means a body. Hence Aristotle in the first book of the Politics said that “whenever one body is constituted out of many, one will rule, and the others will be ruled.”<sup>219</sup>

For Fortescue, removal of a sovereign is not the answer to a tyrant; rather a more forceful restraining of the king by the laws is the proper answer. Continuing his metaphor of the body and the head, Fortescue says that the law restrains a king like tendons serve as connectors in the human body:

The law, indeed, by which a group of men is made into a people resembles the sinews [tendons] of the physical body, for just as the body is held together by the [tendons], so this body mystical is bound together and preserved as one by the law, which is derived from the word “binding,” and the members and bones of this body, which signify the solid basis of truth by which the community is sustained, preserve their rights through the law, as the body natural does through the [tendons]. And just as the head of the physical body is unable to change its sinews, or to deny its members proper strength and due nourishment of blood, so a King who is head of the body politic is unable to change the laws of that body or to deprive that same people of their own substance uninvited or against their wills.<sup>220</sup>

Fortescue combines a political theory that originates sovereignty in the people with the learned experience of having a king who holds that sover-

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<sup>215</sup> Sir John Fortescue, *On the Laws of England* 18 (Shelly Lockwood, ed. 1996).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 26.

<sup>218</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 207 (Yale Univ. Press 2003) (aligning Fortescue, Bracton, and “the author of the Mirror”).

<sup>219</sup> Fortescue, *Laws*, *supra* note 215, at 20.

<sup>220</sup> *Id.* at 21.

eignty to the exclusion of all others. In certain measure, this is the accomplishment of all the theorists discussed herein, and so Fortescue is not necessarily remarkable in that fashion. He is remarkable for his ability to separate what he perceives to be the “political origins of the kingship” from the mystical qualities that the king inherits when he assumes the throne. Thus, Fortescue is perfectly happy to attribute to the king all the qualities discussed in the first part of this paper (*The Gemina Persona*) if one understands that the starting place for the king’s power begins as an investment by the people and is limited by the expression of the people through law. Foremost, though Fortescue’s principle of trust is built on the presence of a wise king that honors the law – just like Brutus.

## 2. John Locke’s Two Treatises of Government

Locke’s beginnings, like Filmer, start in creation: the very beginnings of the natural world that endow humans with certain qualities, rights, and duties towards each other.<sup>221</sup>

To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man.<sup>222</sup>

That state was the state at creation.

Locke’s narrative of creation is rather matter of fact. “[Adam] was created, or began to exist, by God’s immediate power, without the intervention of parents, or the pre-existence of the same species to beget him, when it please God he should.”<sup>223</sup> Adam was created like the beasts of the field.<sup>224</sup> In creation, he was vested with a general authority over the beasts of the earth, not singularly, but as representative of the grant to all mankind: “it was not to Adam in particular.”<sup>225</sup> Additionally, there is nothing in the biblical text that would recommend that Adam was granted similar authority over mankind.<sup>226</sup> Adam (and Noah) receive on behalf of mankind, the general suppositions of nature, not as any privilege or elevation of position, but

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<sup>221</sup> Locke interprets Filmer’s theory as establishing four primary justifications for Monarchy through Adam: creation, donation, subjection of Eve, and Fatherhood. This work will not attempt to parse each of those themes, but rather try to string together Locke’s affirmative theory of beginnings.

<sup>222</sup> Locke, *supra* note 218, at 101.

<sup>223</sup> *Id.* at 14-15.

<sup>224</sup> *Id.* at 14-15.

<sup>225</sup> *Id.* at 20-21.

<sup>226</sup> *Id.* at 20-22. Locke chastises Filmer’s theory by suggesting that Filmer’s norm of Monarch would entitle kings to dine upon the flesh of their subjects, being in subjection to Monarchs in the same way that beasts are subjected to him. *Id.* at 22 (“methinks Sir Robert should have carried his Monarchical power one step higher, and satisfied the world that Princes might eat their subjects too, since God gave full power to Noah and his heirs to eat ‘every living thing that moveth,’ as he did to Adam to have dominion over them.”).

simply because they were there.<sup>227</sup> Most notably, the role of creator does not pass to Adam from God in the creation; rather God remains the sovereign creator, with Adam simply being the first of his workmanship.<sup>228</sup>

Because Adam gains no preeminence over others by being first, neither do other men have such a claim to privilege. In that way, nature informs mankind that “being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.” Mankind exists as “servants” of “one sovereign master:”

they are his property, whose workmanship they are, made to last during his, not another’s, pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any subordination among us that may authorize us to destroy another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.<sup>229</sup>

From this initial state of creation/nature, man comes together to form political societies.<sup>230</sup> Though he does not tell us precisely how man comes together (i.e. he does not give us a meeting hall or general election theory) he does tell us why: “we are naturally induced to seek communion and fellowship with others;”<sup>231</sup> and to avoid states of war.<sup>232</sup> In doing so, man reorders his interaction with humanity and the natural world “by their own consents,” making themselves into a “political society,” and thereby comes to agreements regarding crime, family, war, and most importantly property, money, and exchange. Thus, “God, having made man such a creature, that in his own judgment it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination, to drive him into society, as well as fitted him with understanding and language to continue and enjoy it.”<sup>233</sup>

That reordering occurs by the common agreement of transgressions that are worthy of punishment (the making of laws) as well as the authority to execute those laws against transgressors (what Locke calls the power of war and peace).<sup>234</sup> Importantly, Locke identifies the three primary functions that our Western tradition has embraced as the powers of government; the determination of norms (legislative); the determination of specific violation of those norms (magisterial); and the enforcement and execution of those norms (executive).<sup>235</sup> Importantly, the reordering occurs when man, in polit-

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<sup>227</sup> *Id.* at 32-33.

<sup>228</sup> *Id.* at 36-37.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 106.

<sup>231</sup> *Id.* at 106.

<sup>232</sup> *Id.* at 109.

<sup>233</sup> *Id.* at 133.

<sup>234</sup> *Id.* at 137.

<sup>235</sup> *Id.* at 137. “And herein, we have the original of the legislative and executive power of civil society, which is to judge by standing laws, how far offenses are to be punished, when

ical community, agrees to “resign to the public” his executory power by instituting one “supreme government.”<sup>236</sup> What defines Locke’s civil society is the availability of men to whom grievances may be made regarding the trespass of individual rights.<sup>237</sup>

In this way (and in this narrative), Locke finds absolute monarchies inconsistent with civil society. The story told above was man’s purposefully removing himself from the law of nature by erecting means of airing grievances to the state. Absolute monarchy from Locke’s perspective retains “both legislative and executive power in” the king alone, leaving “no judge to be found,” no appeals of wrong doings, and likely no relief.<sup>238</sup> In a description of Government that closely resembles the English constitution, Locke sets forth the attributes of the legislative and executive powers, noting that while the legislature is “supreme” the executive must retain “prerogative” to accomplish the necessary functions of the state.<sup>239</sup> In doing so, the executive acts in the “the people’s trust” to act “according to the public good.”<sup>240</sup> Specifically, the public good is definable by the laws that restrain the executive, and protect the people from such vices as undue taxation or takings of their property, declaring unjust wars, and the maintenance of even-handed justice.

Locke’s narrative ends in the same place it begins: with people able to recapture their sovereignty from despotic leaders. Specifically Locke’s remedy for the people was available when the executive abused his executive authority by refusing to call parliaments or by abusing his trust of maintaining the public good.

[B]etween an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth: as there can be none between the legislative and the people should either the executive or the legislative, when they have got the power in their hands, design or go about to enslave or destroy them. The people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven.<sup>241</sup>

Perhaps the events of Charles I’s reign remain quite fresh on Locke’s mind. No doubt, Charles I’s abrupt adjournment of Parliament in 1629, its lengthy recess until 1639, his ongoing war with Parliament, followed by his

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committed within the common wealth; and also to determine by occasional judgments founded on the present circumstances of the fact, how far injuries from without are to be vindicated; and in both these to employ all the force of the members, when there shall be need.”

<sup>236</sup> *Id.* at 138.

<sup>237</sup> *Id.* at 138.

<sup>238</sup> *Id.* at 138-39.

<sup>239</sup> *Id.* at 171.

<sup>240</sup> *Id.* at 172.

<sup>241</sup> *Id.* at 175.

trial, conviction and execution at Whitehall had a lasting effect on all political thought in the British seventeenth century.<sup>242</sup> These events, together with the political turmoil during Charles II's reign, the abdication of the throne by James II, and the subsequent Glorious Revolution and William and Mary suggests that Locke theory of individual sovereignty consenting to be ruled is the only viable "form" of government. Thus, in a political environment where the king dissolves the Parliament, the people are free to oppose the king's rule for turning the government towards a shapeless morass. But Locke's narrative is not confined to one tyrant: it is applicable to all. By hedging his theory away from specifics and towards abstract theories of cosmology, Locke develops a picture of sovereignty more transportable than any of the other theories discussed herein. Unlike Filmer, you don't have to see the sovereign as only fulfilled in a monarchy; but you can.

### 3. William Blackstone

Blackstone is not unaware of the manner in which cosmology and creation informs law and political structures; he says in his introduction to the *Commentaries on the Laws of England*:

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform. And to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answer the end of its formation.<sup>243</sup>

Blackstone sets forth the principle that a natural function of social systems is to make rules for their efficient operation. (And that's what he wants us to know of the laws of England—that they and the branches that enforce their operations are a part of a system).<sup>244</sup> Foremost, Blackstone understands that government must conform to certain natural principles of order, it is the

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<sup>242</sup> RICHARD ASHCRAFT, *LOCKE'S TWO TREATISES OF GOVERNMENT* 286-87 n. 12 (1987). Ashcraft in a note acknowledges the difficulty of assuming that Locke had in mind the regicide of a king in writing his work. He writes: "I emphasize this is only an implication that follows from Locke's argument, and not necessarily Locke's own belief. We do not know what he thought about the execution of Charles I during the period he was writing the *Two Treatises*." *Id.* at 287 n.12.

<sup>243</sup> 2 *COMMENTARIES*, *supra* note 7, at 38; *see also* 2 *id.* at 48.

<sup>244</sup> *See* 2 *id.* at 48 ("[F]or when society is once formed, government results of course, as necessary to preserve and to keep that society in order.").

specific manifestations of law that concerns Blackstone and those manifestations will inform his narrative of law making, law enforcing, and judicial discretion.<sup>245</sup>

Indeed, Blackstone sees the systems of Britain as being better than the other systems of the world since in Britain, the “Constitution” affords the executive “all the advantages of strength and dispatch, that are to be found in an absolute monarch,”<sup>246</sup> while the legislative functions are divided into the spheres of Kings, Aristocrats, and Commons.<sup>247</sup> The Constitution so endowed represents all England from Peasant to Lord; the English Constitution comprises England.<sup>248</sup>

But in Blackstone, the experience of kings is really what defines sovereignty. For example, Blackstone not only tells us that the power to dissolve a parliament rests solely with the king,<sup>249</sup> that Parliaments cannot exist without kings,<sup>250</sup> but that the occasional termination of Parliament benefits society by refreshing Parliament on a regular basis;<sup>251</sup> he also turns our attention to the dangers that exist when Parliaments are allowed to continue indefinitely by showing concretely what happens:

[a]nd this would be extremely dangerous if at any time is should attempt to encroach upon the executive; as was fatally experienced by the unfortunate King Charles the First who having unadvisedly passed an act to continue the parliament then in being till such a time as it should please

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<sup>245</sup> 2 *id.* at 49. (“By the sovereign power . . . is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on.”).

<sup>246</sup> *Id.*

<sup>247</sup> 2 *id.* at 49. “first the king; secondly the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the house of commons, freely chosen by the people from among themselves. In this total body is lodged the sovereignty of Britain for the benefit of British society.

<sup>248</sup> 2 *id.* at 49:

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happy united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principle ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king has not negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

to dissolve itself, as last fell a sacrifice to that inordinate power, which he himself had consented to give them.<sup>252</sup>

Kings are entrusted with great prerogative; but that prerogative can be dangerous when abused.

And indeed, the primary way of understanding this monarchy is as a trust on behalf of the people. The trust that Blackstone specifically refers to consists of three elements: “to govern according to law; to execute judgment in mercy; and to maintain the established religion.”<sup>253</sup> The experience of the monarchy (particularly the fate of James II) affords Blackstone a concrete way of explaining how that trust is upheld or violated, and then remedied within the British Constitution.<sup>254</sup> Constitution is not the idea that the people retain the elements of sovereignty under the terms of a social contract with its leaders. It is rather a purposeful divesting of authority from the people to a body that contains representative, hereditary, and noble elements. Importantly, divesting is irrevocable. If the people once held sovereignty, they gave it up, not to a king, but to a constitution—a constitution that includes, among other things, a king.

The narrative that Blackstone tells thus has two beginnings. The first under King Egbert in the year 800, begins the reign of monarchs and ends in 1688, with the Glorious Revolution and the abdication of government by James II.<sup>255</sup> The Glorious Revolution “was not a defeasance of the right of succession, and a new limitation of the Crown, by the king and both houses of parliament: it was the act of the nation alone, upon an apprehension that there was no king in being.”<sup>256</sup> Blackstone specifically wants to make clear: the abdication by James is not some act by the public that removed a tyrant from power; nor should it be interpreted in itself as a limitation on the power of future monarchs. Instead, it was the conscious decision by James II, in deciding to break the people’s trust, to abdicate the throne.

Blackstone’s reading assumes that this breach was intended by James II as an abdication; for Blackstone, that is the only way to understand James II’s actions. The mystical body existed as close to perfection as a human body could.<sup>257</sup> And yet, Blackstone and the English people had to make sense of this fundamental breach of the English trust—at breach that was arguably

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 233.

<sup>254</sup> *Id.* (“And these reciprocal duties are what I apprehend, were meant by the convention in 1688, when they declared that King James had broken the original contract between king and people”).

<sup>255</sup> *Id.* at 197. Blackstone traces the lineage of royal successors from Egbert to James II.

<sup>256</sup> *Id.* at 213.

<sup>257</sup> See 2 COMMENTARIES, *supra* note 7, at 238 (“Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong. Which antient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful...”).

more egregious than the over-taxation by Charles II or the quartering of soldiers in the city by the same.<sup>258</sup> The only plausible solution was that James II made the conscious decision to no longer be king when he broke the people's trust. It certainly helped Blackstone's case that James peacefully left the city, instead of fighting for his throne.

Next, Blackstone informs us that the abdication of James II resulted not in the termination of his reign, but in the termination of the old Constitution of Britain. Notably, King James II "endeavored to subvert the constitution of the Kingdom," not just the monarchy.<sup>259</sup> Because he broke faith, he also broke "the original contract between King and people; . . . having violated the fundamental laws; and having withdrawn himself out of this Kingdom; has abdicated the government, and that the throne is thereby vacant."<sup>260</sup> And having abdicated the government, "which abdication did not affect only the person of the King himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine."<sup>261</sup> Indeed, Blackstone does not render ancestors to mean necessarily the members of Parliament, but rather "society at large." He explains:

for, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society.<sup>262</sup>

One possibility is that Blackstone perceives the abdication of government by James II as though the entire English system was tossed back towards a state of nature. Such a conclusion is consistent under the English Constitution since only a king can call a Parliament.<sup>263</sup> Upon a king's demise, Parliament terminates.<sup>264</sup> Thus, upon James II's abdication, Parliament was discontinued.<sup>265</sup> With no king in place, and no one able to call a Parliament, the English Constitution was terminated with it. (Note the difference between the mere demise of the king and the abdication by James II. With demise, there is always a successor.<sup>266</sup> However, by breaking the sacred line

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<sup>258</sup> See Robert Zaller, *The Figure of the Tyrant in English Revolutionary Thought*, 1993 JOURNAL OF THE HISTORY OF IDEAS 585, 587 (describing the association of Charles I as the embodiment of the Tyrant image).

<sup>259</sup> 2 COMMENTARIES, *supra* note 7, at 211.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 212.

<sup>263</sup> See *id.* at 192.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*

<sup>266</sup> See 2 COMMENTARIES, *supra* note 7, at 191 ("[T]he grand fundamental maxim upon which the *jus coronae* or right to succession to the throne of these kingdoms depends, I take to be this: 'that the crown is, by common law, and constitutional custom hereditary.' The title descends on 'the death or demise of the last proprietor.'").

of succession, there was no successor that the kingship could fall upon and therefore no person who could call a Parliament).

After James II's abdication, a delegation elected from a Parliamentary convention drafted a Declaration of Rights and presented that declaration to William of Orange and his wife Mary, along with the English Crown. William accepted the monarchy and subsequently reaffirmed the rights stated in the Declaration.<sup>267</sup> Parliament then, when reconvened, adopted the Declaration into law, almost identical in form, as the Bill of Rights.<sup>268</sup>

Blackstone believes that upon the reinstatement of the monarchy in the form of William of Orange and Queen Mary, a new social contract was reached – this time expressly composed as the Declaration of Rights.<sup>269</sup> To be clear, the contract for the most part looks the same as the one that James II abdicated from; indeed the contract itself proclaims that the lords and commons declare their “ancient rights and liberties.”<sup>270</sup> The declaration of rights to William of Orange was no Constitution – it was a marriage proposal. It laid forth the grievances that the commonwealth shared against the prior monarch; set forth the expectations and limitations that the people placed on the monarch; and then prayed that the Prince of Orange “accept the same accordingly.”<sup>271</sup> Thus, upon the ascension of William and Mary to the throne of England, the compact was solemnized, a Parliament was called, and the new Constitution began. Such is the naturalist narrative of the Glorious Revolution.

Blackstone, though has a slightly different one. He would agree with all of the elements of the story: that England is a Constitution; that kings call Parliaments and so on. But his conclusion passively ignores the facets of the story and instead suggests that the Constitution remained whole. Blackstone's sometimes inconsistent portrayal of the normative story that unfolded in the Glorious Revolution is certainly due to his appetite for the English Constitution. He is quite willing to accept the normative story that was recorded instead of concluding that the Constitution was indeed subverted. He says “I, therefore *choose* to consider this great political measure upon the solid footing of authority, than to reason in its favour from its justice, moderation, and expedience: because that might imply a dissenting or revolting from it, in case we should think it to have been unjust, oppressive or inexpedient.”<sup>272</sup> Blackstone has a narrative; but, as he acknowledges the conclusion to that narrative runs on different terms than the narrative would

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<sup>267</sup> See Calvin Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1239 (1987). (providing an excellent and concise summary of the transition of the monarchy).

<sup>268</sup> See *id.* n. 42 (citing 1 W & M 2d Sess., Chapt. 2 (1689)). Massey notes that the Bill of Rights provision is identical to article 10 of the English Declaration of Rights, *reprinted in* L. SCHWOERER, *THE DECLARATION OF RIGHTS 1689*, at 297 (1981). *Id.*

<sup>270</sup> See SCHOEWER, *supra* note 268.

<sup>271</sup> *Id.*

<sup>272</sup> 2 COMMENTARIES, *supra* note 7, at 212.

suggest, partly because he foresees that the narrative itself may be subverted by the conclusion.

What is important for our purposes are two principles: what actually happened and what normatively happened. What happened in actuality was the removal of a king, the reestablishment of a new monarch, and the carrying on of British government. Indeed, the monarchy after William of Orange does not seem to look much different from what went before.<sup>273</sup> But normatively, the theoretical hurdles are enormous. How do you explain the removal of an unpopular king who breaks trust with the social contract, particularly when your social contract affords no means for his removal?<sup>274</sup> Once removed, how do you explain a still standing parliament that has no authority to exist without a king to call it into session?<sup>275</sup> But even Blackstone would have agreed that even if the Glorious Revolution did not subvert the Constitution, it certainly qualified it. His narrative importantly sees the abdication of James II as a climax in the constitutional narrative. After James's abdication, and as a result of Parliament's solicitation of William of Orange, Blackstone can conclude that when the throne is vacant, Parliament may choose a new king.<sup>276</sup>

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The kingship in England relates to the realm according to the story you tell. Those stories have normative values of what the beginning means. And accordingly, those beginnings shape the way writer perceives the sovereign's relationship to the realm. For some the notion of King Conqueror explains why no court can have jurisdiction over him; for Filmer and his followers Fatherhood explains their normative conflation of scripture and reality. Likewise, the Lockean and Blackstonean narratives describe norms qualified by human imperfections. In all three narrative forms, as the normative values begin to align, the story teller weaves his conceptions of the normative values

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<sup>273</sup> See Noah Webster, *An Oration on the Anniversary of the Declaration of Independence* (New Haven 1802) in CHARLES S. HYNEMAN & DONALD S. LUTZ, II *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805* at 1234 (1983) (comparing King George III to Charles I and James II); WILLIAM WHITING, *AN ADDRESS TO THE INHABITANTS OF BERKSHIRE COUNTY, MASS. (1778)* ("decrying the charter of Connecticut as dead being composed under the tyrant Charles I: "But dust to dust, earth to earth, ashes to ashes, without either hope or fear of its resurrection; let us dismiss this frightful corpse of a charter").

<sup>274</sup> See 2 *COMMENTARIES supra* note 7, at 148 (restating the apprehension that "James II" abdicated his throne; *id.* at 213. *But see id.* at 212 (acknowledging that the old line ended with James II, and that James II "did endeavor to subvert the Constitution.")).

<sup>275</sup> Note that Blackstone calls the gathering of Lords and Commons that issue the Declaration of Rights a "Parliament of Necessity." See *id.* at 148. Thus Blackstone sees a distinction between Parliaments called by the king and the 1688-1689 version.

<sup>276</sup> See *id.* at 192 (noting that the inheritance of the Crown is limitable by Parliament).

into history, making them appear to be timeless truths, when instead they are more likely new found alterations that explain the story being told.<sup>277</sup>

## V. CONCLUSION

In 1381, triggered in the county of Essex, a peasant's revolt was underway, spreading quickly across large parts of the country. The origins, lay with an ever-growing tension within the English socio-political structure, but as one scholar has noted:

demographic change as a result of the black death; the labour laws; a change in the town –countryside relation, together with high social mobility and an increase in trades and services; the growing rural land market; the proletarianization of the lower clergy; the loss of confidence in lordship and law; and the effect of the hundred years war, especially with regard to the government's need for money

compounded any brewing political dissensions in the area.<sup>278</sup>

Interestingly, a curious event within the revolts occurs in Essex in June 17, 1381. Then, Geoffrey Lyster led the taking of the City of Norwich, assumed residence in the castle, and held court sessions styling himself "King of the Commoners."<sup>279</sup> Lyster's rebellion, and the self-designation with the sacred name of King, suggests a dissatisfaction with the current sovereign – at least the acts of the sovereign's agents in Essex and Norwich. Indeed, Richard II may have been king over the Lords, but he did not represent the interests of the Commons.

I end this article, moving backwards so to speak, considering Lyster's revolt mainly because it was an anecdote without consequence.<sup>280</sup> No meaningful change in the English social or political structure occurs because of Lyster; no one hears Lyster's self-proclamation of sovereignty in 1381 and thinks "maybe we too should be sovereign." One reason for the revolt's historical irrelevancy may be the absence of a normative narrative to sustain it. Importantly, Lyster tells no story of beginnings or normative entitlement, comparable to Richard II's narratives of conqueror, landlord or father. Absent a supportive narrative, Lyster's claims lack credibility: can we really

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<sup>277</sup> Though Blackstone would certainly agree that the Glorious Revolution brought forth a "new era" where the bounds of prerogative and liberty were "better defined," he is hesitant to call the events a subversion of the Constitution. The republicans, he tells us, "held that this misconduct of King James amounted to an endeavor to subvert the Constitution; and not to an actual subversion or total dissolution, of the government according to the principles of Mr. Locke." Therefore, Blackstone's conclusion is that the abdication of James II is no different than if he were to have died: "the constitution was kept entire." See 2 COMMENTARIES *supra* note 7, at 213-14.

<sup>278</sup> Herbert Eiden, *Joint Action Against Bad Lordship: The Peasant's Revolt in Essex and Norfolk*, 83 HISTORY, 5,7 (1998); for a general discussion of the Peasants Revolt of 1381, see C. OMAN, THE GREAT REVOLT OF 1381 (1906) & R.H. HILTON, BOND MEN MADE FREE: MEDIEVAL PEASANT MOVEMENTS AND THE ENGLISH RISING OF 1381 (1973).

<sup>279</sup> Eiden, *supra* note 278, at 20.

<sup>280</sup> *Id.* at 8.

believe that a poor man Lyster can be sovereign?<sup>281</sup> In that way, Lyster's revolt and the Peasants uprising of the 1380s appear merely as an opportunistic but illegitimate grab for power. Perhaps. Or it could be that Lyster and the Peasant's revolt represent a step towards combining the economic and social hardships to which they responded with a normative framework that was to develop more fully much later. What the seventeenth century develops that was missing in the fourteenth is a base of normative narratives that offer meaning to the "power grabs" that occur during the reign of Charles I, under circumstances that would have resonance with those complaints made by peasants in 1381.<sup>282</sup>

The question that Lyster's rebellion, and the polemical discussions regarding beginnings and the attachment of sovereignty raise for American jurists and scholars is the central dilemma concerning what exactly our own narrative is. Justice Stevens recognizes that the power of court decisions built on narratives of sovereignty exist in a fragile state.<sup>283</sup> And though those fictions may uncover some underlying resentment towards "sovereign things" in the American narrative, it still does not explain or give good account for the existence of sovereign immunity today. Indeed, by its own terms, it cannot. The conclusion to this article at this point is unsatisfactory. It leaves us with the recognition that our narrative and our norms do not correspond to one another. And thus, American sovereignty may be just as Justice Stevens says, an institution without its "*raison d'être*."<sup>284</sup>

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<sup>281</sup> For that matter, his followers looked even less capable of supporting a King. See R.H. Hilton, *Bond Men*, in Hilton *supra* note 278, at 182 (suggesting that chancery records suggest a vast majority of the participants in the uprising were extremely impoverished).

<sup>282</sup> See generally Amos Tubb, *Printing the Regicide of Charles I*, 89 HISTORY 296 (2004) (describing the polemics that surfaced supporting the condemnation of King Charles); see also Robert Zaller, *The Figure of the Tyrant in English Revolutionary Thought*, 1993 J. OF THE HISTORY OF IDEAS 585, 587 (describing the association of Charles I as the embodiment of the Tyrant image).

<sup>283</sup> Justice Stevens acknowledged after his retirement the importance that myths and fictions play in the American Constitutional system. He wrote: "Historical myths, like glittering generalities, have played a more important role in Supreme Court adjudication than we often recognize. Sometimes the Court's failure to mention relevant facts helped to perpetuate preexisting myths, sometimes the Court itself is responsible for myths, and sometimes myths have a longer life expectancy than the truth." Justice John Paul Stevens, *Glittering Generalities and Historical Myths*, 51 UNIV. OF LOUISVILLE L. REV. 419, 421 (2013).

<sup>284</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 87 (1988).

# A GOVERNMENT OF LAWS NOT OF PRECEDENTS

1776-1876:

## THE GOOGLE CHALLENGE TO COMMON LAW MYTH<sup>1</sup>

James R. Maxeiner\*\*

### ABSTRACT

*The United States, it is said, is a common law country. The genius of American common law, according to American jurists, is its flexibility in adapting to change and in developing new causes of action. Courts make law even as they apply it. This permits them better to do justice and effectuate public policy in individual cases, say American jurists.*

*Not all Americans are convinced of the virtues of this American common law method. Many in the public protest, we want judges that apply and do not make law. American jurists discount these protests as criticisms of naïve laymen. They see calls for legal certainty through statutes as unwise and unattainable. But not all American jurists agree.*

*Some American jurists believe that times have changed. The golden era of common law is past, they say. It passed in the early 20<sup>th</sup> century. Today Americans live in an “age of statutes”; courts apply statutory texts and not common law precedents. Some American jurists conclude that the United States needs a new common law for an age of statutes. Others believe that the United States should have a textual approach that deals with statutes.*

*The near religious reverence that Americans have for their legal institutions inhibits reform. What most Americans do not know, however, is that the United States has always lived with statutes. Contemporary American common law methods, and not statutes, are the intruder of the 20<sup>th</sup> century. Statutes and statutory methods are the normal way that modern states govern their people*

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\* Common law myth in this article refers only to the United States and not to England or elsewhere. “Google” is a teaser for digitization generally. See I.C. *infra*.

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Apology: Although in this article I call attention to legal history, I do not intend it to be a work of legal history. In working on a book tentatively titled *Failures of American Lawmaking in International Perspective*, I realized that even if I show that present American statutory methods do not work well and that foreign statutory methods do, some readers will respond by saying: so what? America is exceptional: America has always eschewed statutes and preferred judge-made law. The point of this article is to disestablish common law myth rather than to establish any particular competing history. It is an invitation to others to do legal history. Others have preceded me with works of legal history that make the same challenge.

*and conduct their legal systems. For the first century of the Republic Americans expected to adopt modern methods.*

*Until only a few years ago, the literature of earlier American ages of statutes was lost to view. The digitization of American legal history by Google and others now makes that history available to all. It suggests a record that challenges the myth that contemporary common law methods have always dominated American legal history.*

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## I. INTRODUCTION

In 1876, as part of the national celebration of the Centennial of the independence of the United States of America, Americans commemorated a century of American law. They celebrated progress wrought through statutes, i.e., through written laws. In other words, they commemorated a government of laws. They saw what one would call today American exceptionalism in “written constitutions and codification.” They feted freedom from the “atrocities” of common law. They looked forward to a world where legislation would improve society and bring law home to all Americans.

How strange that sounds to contemporary ears! Statutes—American progress? Common law—American atrocity? No. It cannot be. All true American lawyers know that common law is their legal system’s genius. It is America’s heritage—it is America’s destiny. Contemporary American common law judges ingeniously make law as they decide cases. That’s how law progresses. Only naïve laypersons believe that law is a system of rules in a rulebook, or so advocates of contemporary common law profess.

Guess what? The Centennial Writers were right. One now can read the long-overlooked proof. Google and other digitizers provide it. For more than a century Americans sought to create a system of written laws organized in *rule books*, i.e., to establish a government of laws and put law on a firm foundation *for the people*. Only a decade ago, American lawyers, judges and law professors might have dismissed the Centennial Writers’ commendation of statutes and their corresponding condemnation of common law as delusional. No longer. In the last ten years, 19<sup>th</sup> century American law has been digitized. Where before, it lay unread in musty pamphlets and crumbling sheepskin bindings hidden away in dusty stacks in the darkened lower reaches of a few research libraries, today it is on everyone’s desktop. Where before, even if one could borrow the rare books, for want of indexing, one would not know which books to borrow or which pages to read. Today, however, word searches take one directly to veins of gold in hundreds of publications which before one had to sift through laboriously to find a few nuggets.

So why does it matter? If the Centennial Writers were right, professors of contemporary American common law are wrong. Giving precedents’ primacy in legal reasoning and lauding judges making law as they apply it—is NOT part of America’s legal makeup. If professors of contemporary common law are to persist in their praise of contemporary common law methods, then they ought not be allowed to rely on sentiment, but they ought to be required to show efficacy and justice. This article challenges the contemporary common law myth that the first century of the Republic was an age of American common law when common law dominated to the near exclusion of statutes in providing rules by which Americans lived. It questions conventional wisdom that judges through their decisions were principally responsible for adjusting the country’s law to the tremendous changes that took place in the course of those hundred years.

Contemporary common law myth accounts for contemporary American fixation on the Supreme Court of the United States, on judicial process and on appellate opinions as the source of law. It accounts for American lawyers’ indifference to state and federal legislatures, to their processes of making laws and

to whether people can comply with conflicting commands. It accounts for why in the American legal system legal reasoning starts from cases instead of from statutory texts, which renders statutes of little use to the public. In short, contemporary common law myth denies the United States of America a modern government of laws and has left it with a primitive rule of lawyers.

Digitization challenges contemporary Americans to consider:

- Did Americans in the first century of the Republic look for *a government of written laws*? Might they have seen statutes as the natural and expected building blocks of their nation?
- Did Americans in the first century of the Republic look for a *law of rules*, where in abiding by the law people fit facts into an existing system of laws and did not expect judges to create new law?
- Did Americans in the first century of the Republic expect that *rules would be systematized* by legislatures, in codes, so that people could apply laws to themselves without judicial intervention?

That these issues were much discussed in the first century of the Republic is sufficient to disestablish contemporary common law myth that statutes and their systematization are somehow un-American. If in the 19<sup>th</sup> century Americans looked for a modern legal system, then surely they should in the 21<sup>st</sup>. They should put behind them the sentimentality of the 20<sup>th</sup> century that pined for a common law for an age of statutes<sup>1</sup> or sought to fit common law courts into a civil court system.<sup>2</sup> Americans should look for a civil system for an age of statutes, i.e., a government of laws.<sup>3</sup>

The balance of this article consists of six further parts:

Part II, *Celebrating Law in America 1776-1876*, describes the legal commemoration of the Centennial of American Independence and the assertions there made by writers that I term the “Centennial Writers.” It sets out the gist of contemporary common law myth. It shows how digitization—the Google of this article’s title—challenges Americans to compare the myths of today with the facts underlying the themes of the Centennial Writers.

Part III, *Founding a Government of Laws*, reports *legislative work* of the Founders. It discusses the enigmatic role of English law in American legal history. It shows how digitization undoes contemporary common law myth that the Founders were looking for a common law state and gave statutes little thought.

Part IV, *Building a Government of Laws*, shows the myriad ways in which Americans in the first century of the Republic looked to written law to facilitate governing, including constitutions, constitutional conventions, statutes, civics, and self-governance. It shows how digitization challenges Americans today to question the contemporary common law

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<sup>1</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

<sup>2</sup> See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

<sup>3</sup> See James R. Maxeiner, *Scalia & Garner’s Reading Law: A Civil Law for the Age of Statutes?*, 6 *J. Civil L. Studies* 1 (2013).

myth of dominance of precedents over statutes supposedly superseded only later in a 20<sup>th</sup> century “age of statutes.”

Part V, *Progress in American Jurisprudence: Systematizing*, demonstrates that in the first century of the Republic Americans sought and taught systematizing, *i.e.*, compiling statutes, revising law and codifying it. Digitization challenges the contemporary common law myth that systematizing was exceptional and was not, as it has been elsewhere in the world, a normal incident of building a modern government of laws.

Part VI, *Epilogue*, identifies the demise of systematizing and the rise of American legal institutions that created and today perpetuate contemporary common law myth that true Americans don’t deal with statutes.

Part VII, *Conclusion*

## II. CELEBRATING PROGRESS IN LAW IN AMERICA 1776-1876



1876: *The Torch of Liberty* at the Philadelphia Centennial Exhibition<sup>4</sup>

In 1876, a century after Americans met in Philadelphia to declare independence, they returned to celebrate the anniversary with “a competitive display of industrial resources, constructions, fabric, and works of use and beauty, distributed through a hundred departments of classified variety.”<sup>5</sup> Americans invited the world to participate. France sent the Torch of Liberty that a decade later would adorn the Statue of Liberty in New York Harbor that today greets the world.

<sup>4</sup> FRANK LESLIE’S HISTORICAL REGISTER OF THE UNITED STATES CENTENNIAL EXPOSITION, 1876 at 239 (1877).

<sup>5</sup> *History and the Centennial*, 8 POPULAR SCIENCE MONTHLY 630 (March 1876).

A. THE CENTENNIAL OF WRITTEN LAW

For the legal profession, participation in the Centennial Exposition of 1876 was problematic. What would be their “works of use and beauty?” Long-serving federal judge and later chancellor of the State University of Iowa Law School, James H. Love, wryly related to the Iowa bar:

If we could exhibit at the Centennial, the burning of a witch or a heretic, at the stake; or the putting of a prisoner to the question on the rack; or the disemboweling of a traitor while yet alive; ... the progress and amelioration of the law would be made manifest to all men. If we had any means of making a visible exhibition of what the common law, which forms the basis of our jurisprudence was even a century ago, in contrast with what it is to-day, we might venture to challenge a comparison of progress with any calling, art or profession which is displaying the evidences of its progress at the great exposition.<sup>6</sup>

Love presented an indictment of common law consisting of about a dozen “atrocities.” He added, “if time allowed, I could give a thousand illustrations and proofs to maintain it as a ‘true bill.’”

Although the legal profession provided no exhibit at the Centennial Exposition, it did contribute to commemorative volumes published by two of the nation’s leading journals, *The North American Review* and *Harper’s New Monthly Magazine*.<sup>7</sup> Each volume reported on American progress in the century just past. *The North American Review*, then under the editorship of Henry Adams, was the premier intellectual journal of the day.<sup>8</sup> Adams’ review, presented a special issue that included an essay on “Law in America, 1776-1876.”<sup>9</sup> Harper’s *New Monthly Magazine*, was a part of one of the most successful publishing enterprises of the day, Harper & Brothers. It offered a series of articles which Harper’s then combined in a centennial volume, *The First Century of the Republic: A Review of American Progress*. The Centennial volume included a new essay on “American Jurisprudence.”<sup>10</sup>

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<sup>6</sup> James H. Love, *Address of the Hon. J. M. Love, Delivered at the Third Annual Meeting of the Iowa State Bar Association*, in PROCEEDINGS OF THE THIRD ANNUAL MEETING OF THE IOWA STATE BAR ASSOCIATION HELD AT DES MOINES, MAY 11 AND 12, 1876, 7, at 17, reprinted in 10 WESTERN JURIST 399, 409 (1876).

<sup>7</sup> For information on the publications, see John B. Mason, *The North American Review*, 289-300, in AMERICAN LITERARY MAGAZINES: THE EIGHTEEN AND NINETEENTH CENTURIES (Edward E. Chielens, ed., 1986); and Barbara M. Perkins, *Harper’s Monthly Magazine*, in *id.* at 166-71. Harper’s also published *Harper’s Weekly: A Journal of Civilization*. Today, it is the second oldest continuously published journal in America.

<sup>8</sup> See *North American Review*, N.Y. TIMES, April 18, 1876, at 2.

<sup>9</sup> G.T. Bispham, *Law in America, 1776-1876*, 122 N. AM. REV. 154 (1876) [hereinafter *Law in America, 1776-1876*, 122 N. AM. REV.]. The author George Tucker Bispham, was later dean of the University of Pennsylvania Law School. He was author of a leading textbook on equity.

<sup>10</sup> THE FIRST CENTURY OF THE REPUBLIC: A REVIEW OF AMERICAN PROGRESS (Harper and Brothers, 1876) [hereinafter, THE FIRST CENTURY OF THE REPUBLIC]. The editors had planned, published and advertised the series from the start “as a valuable addition to the history of our country.” *Id.* at 8-9. The law essay was written by Benjamin Vaughn Abbott, was a member of

The editors recorded their goals for their commemorations:

Henry Adams of the *North American Review* wrote to one potential contributor of his hope that the law article would influence public opinion and that “the ultimate aim of the article should be to settle the question whether on the whole the movement of American Law has been such as ought to satisfy our wishes and reasonable expectations, or has fallen short of them, and whether we are justified in feeling confidence in its future healthy progress.”<sup>11</sup>

Harper’s, in *The First Century of the Republic’s* foreword (“Publishers’ Advertisement”), stated goals that, if anything, were more ambitious for its *Review of American Progress*. The volume was “an indispensable supplement” to the Philadelphia exposition’s display of “the material symbols of progress.” It connected with the “formative idea” in the subjects of inquiry to show “the beginnings of great enterprises, tracing them through consecutive stages their development, and associating with them the individual thought and labor by which they have been brought to perfection.” The papers, when first published, were recognized, not as magazine articles “of merely temporary importance,” but as “a valuable contribution to the permanent history” of the United States. Taken together they suggested a comparison of progress in the United States with that of other countries “such as to awaken a feeling of just pride in every American citizen.”<sup>12</sup>

#### 1. Celebrating Modern Statutes Displacing English Law

The two volumes are similar. Both displayed a century of American progress in many fields. Their two essays on law are likewise similar. Both measured progress in law in terms of displacing feudal English law with modern American statutes. Both included in their selections of English law that Americans had cut out, the heart of the ancient English common law: property law, criminal law, and procedure.<sup>13</sup> In property law, for example, both essays celebrated that Americans had reversed English common law rules that gave husbands control of their wives’ lands, personal property, services, contracts and crimes. Both cited statutes as the source of the change. *The North American Review* contrasted American “fondness” for “positive legislation” with English

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the 1870s commission that revised federal laws. He edited dozens of volumes of case reports and digests.

<sup>11</sup> Letter of August 28, 1875 from Henry Adams to Thomas M. Cooley, Benton Historical Library, Cooley Collection, Box 1, Folder August to September. Judge Cooley, one of the century’s most renowned jurists, apparently declined the invitation. Did Adams then ask his friend, Oliver Wendell Holmes, Jr. to write the entry? We don’t know. Holmes’s biographer Marke DeWolf Howe wrote at length of the two men’s friendship at that time, read all the primary sources that he could find, but made no mention of such an offer. MARKE DEWOLF HOWE, OLIVER WENDELL HOLMES; VOL. 2. THE PROVING YEARS 1870-1882, at 142-48 (1963).

<sup>12</sup> THE FIRST CENTURY OF THE REPUBLIC at 437.

<sup>13</sup> They both consider a variety of topics. Among those that both consider are imprisonment for debt and expansion of admiralty jurisdiction to navigable inland waters.

“indisposition to statutory reform” to explain why American law of women’s property had been “many steps in advance of the English system.”<sup>14</sup>

In criminal law neither essay dwelt on the cruelties that Judge Love derided. They accented the positive.<sup>15</sup> *The North American Review* rejoiced: “the seeds of reform in criminal law, sown at an early date, have borne most luxuriant harvests.” It noted “in criminal jurisprudence the American mind has always been far in advance of the English.”<sup>16</sup> Harper’s *The First Century of the Republic* noted how many acts once counted crimes were no longer so and how the “criminal law was severe in those days as compared with ours.”<sup>17</sup>

Both essays judged English common law civil procedure similarly. *The North American Review* charitably critiqued: “however perfect in theory, [it is] liable to abuse or disarrangement in practice.”<sup>18</sup> Harper’s *The First Century of the Republic* was more pointed: “as actually pursued [legal proceedings] were often the means of doing injustice in the name of the law.”<sup>19</sup> The latter noted that more than half of the states had replaced common law procedure with the David Dudley Field’s reform Code of Procedure of New York. *The North American Review* was not so sure “whether the results of this simplification of procedure have been altogether desirable.”<sup>20</sup>

## 2. Celebrating American Progress: “*written constitutions and codification*”

Such improvements were for *The North American Review* “but passing illustrations of the originality of American thought in jurisprudence.” They were instances where “[t]he American mind, practical as well as liberal, brought

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<sup>14</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 155-56; THE FIRST CENTURY OF THE REPUBLIC at 448-49. Cf. 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES AND AT COMMON LAW AND IN EQUITY 1-4 (1875). For a statement of medieval common law and subsequent modifications of married women’s property rights, see ANDREA DIANNE BESSAC MAXEINER, DOWER AND JOINTURE: A LEGAL AND STATISTICAL ANALYSIS OF THE PROPERTY RIGHTS OF MARRIED WOMEN IN LATE MEDIEVAL ENGLAND (Ph. D. thesis, The Catholic University of America, 1990). Before Americans adopted Married Women’s Property Acts starting in the 1840s, they had already overturned much of common law property law. *Law of Real Property*, 1 AM. JURIST 58, 98 (1829) (“not only ... a complete revolution, but a substantial improvement, has been made in this country in the law of real property”).

<sup>15</sup> In another essay *The First Century of the Republic* catalogued the gruesome “barbarities of the past.” *Humanitarian Progress*, in THE FIRST CENTURY OF THE REPUBLIC at 454, 460-61. Neither essay does more than hint at the reason given then (and now) for abolishing common law offenses: there should be no public offense “unless the legislative power of the country has positively and plainly so declared it.” THOMAS W. POWELL, ANALYSIS OF AMERICAN LAW 544 (2<sup>d</sup> ed., 1878).

<sup>16</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 173.

<sup>17</sup> THE FIRST CENTURY OF THE REPUBLIC at 437.

<sup>18</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 185.

<sup>19</sup> THE FIRST CENTURY OF THE REPUBLIC, at 450-51. See generally DAVID DUDLEY FIELD, JR., LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD. REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST 1891 WITH SOME CHANGES AND NOTES (1891).

<sup>20</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 185-86.

down [an idea] from the region of speculation and applied it, through the machinery of *statute law*, to the direct and practical amelioration of mankind.”<sup>21</sup> That is what made American law exceptional. *The North American Review* elaborated: “The *great* fact in the progress of American jurisprudence which deserves special notice and reflection is its tendency towards *organic statute law* and towards the *systematizing of law*; in other words, towards *written constitutions* and *codification*.”<sup>22</sup> Similarly Harper’s *The First Century of the Republic* wrote: “the art of administering government according to the directions of a written constitution may fairly be named among the products of American thought and effort during our century.”<sup>23</sup>

Both essays saw American progress similarly: written constitutions of the people implemented by written codes and statutes of their legislatures. These differences from English common law, not affinity with it, are what defined American progress. Both essays distinguished American constitutions from earlier charters. *The North American Review* characterized American constitutions not as “*concession[s]* from a sovereign,” but as expressions “of a free people, who are perfectly at liberty to form their own governmental institutions.”<sup>24</sup> More fully Harper’s *The First Century of the Republic* explained:

Now a ‘constitution,’ as we in America understand the term, is something far deeper and more fundamental than any of the state papers of past centuries. Our idea is that there is no hereditary right, but that all the powers of government, all the authority which society can rightly exercise toward individuals, are originally vested in the masses of the people; that the people meet together (by their delegates) to organize a government, and freely decide what officers they will have to act for them in making and administering laws, and what the powers of these officers shall be. These written directions of the people, declaring what their officers may do and what they may not, form the constitution. The idea, in its practical development, is American.<sup>25</sup>

Legislatively enacted statutes are the corollary to the peoples’ constitutions. In accord *The North American Review* wrote: “Akin to the disposition to crystallize organic law in the form of written constitutions is the disposition to codify municipal law, which has always displayed itself in the legal history of all of the States of the Union.”<sup>26</sup> Similarly Harper’s *The First Century of the Republic* wrote: “[t]he readiness of American Legislatures to codify or revise the laws is a noticeable feature.”<sup>27</sup>

*The North American Review* concluded that codification, to a greater or lesser extent must become “indispensable to any nation which draws its laws from varied sources ... and which designs or attempts to make the progress of those laws keep pace with the growing wants of the times without developing

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<sup>21</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 174 [emphasis added].

<sup>22</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 174 [emphasis in original].

<sup>23</sup> THE FIRST CENTURY OF THE REPUBLIC at 437.

<sup>24</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 176, 177 [emphasis in original].

<sup>25</sup> THE FIRST CENTURY OF THE REPUBLIC at 437.

<sup>26</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 176.

<sup>27</sup> THE FIRST CENTURY OF THE REPUBLIC at 451.

into a mass of unmanageable contradictory rules.” The practical administration of law, the essay argued, depends on its simplicity, and “this end can only be attained ... by resorting to the expedient of codification.”<sup>28</sup> *The First Century of the Republic* agreed with qualifications: “Codes are useful; but immediately relieving the lawyer of his library has not been their strong point.”<sup>29</sup>

### 3. Taking the Centennial Writers Seriously

In 1876 *The North American Review*, Harper’s and a third journal, *The Nation*, were a “national forum where positive and concrete proposals for institutional reform could be aired and debated.”<sup>30</sup> So what did reviewers think of these two volumes?

*Popular Science Monthly* called the essays of the *North American Review* “able, calm and philosophic.”<sup>31</sup> The *Journal of Jurisprudence* in Edinburgh, Scotland gave over nine of its pages to excerpt the law essay that it found “thoughtful and philosophical.”<sup>32</sup> It closed its excerpts quoting: “The great fact in the progress of American jurisprudence which deserves special notice and reflection is its tendency towards *organic statute law* and towards the *systematizing of law*; in other words, towards *written constitutions* and *codification*.”<sup>33</sup> *The North American Review*’s competitor, *The Nation*, on the other hand, looking at the same remarks, thought the law contribution “not so satisfactory as the others. It contains too much philosophy of a vague sort and too little law.”<sup>34</sup> In its review of the Harper’s volume the *New York Times* was catty: “As magazine papers they served their purpose moderately well, but the wisdom of collecting them into a volume may be questioned.”<sup>35</sup> It had no comment on the law paper. Two months later, however, the *Times* reported that Harper’s had released the essays in book form because “they had been so well received.”<sup>36</sup> Vaughan, author of the “American Jurisprudence” essay, only four years later, reported that “the paper, as published, gave rise to calls for others in the same vein, resulting in the preparation of numerous popular articles upon law topics,

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<sup>28</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 179.

<sup>29</sup> THE FIRST CENTURY OF THE REPUBLIC at 436.

<sup>30</sup> STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920, at 44 (1982). Skowronek credits these and other journals, as creating “a national intellectual community for the first time.” The three others were *Atlantic Monthly*, *Century* (in 1876 published as *Scribner’s Monthly*) and *The Forum* (in 1876 not yet published).

<sup>31</sup> *Retrospects of Our Past Hundred Years*, 8 POPULAR SCIENCE MONTHLY 630, at 631 (March 1876). It summarized the law essay without criticism.

<sup>32</sup> *Law in America 1776-1876*, 20 J. JURISPRUDENCE 293 (T. & T. Clark, Law Book-sellers, Edinburgh, 1876).

<sup>33</sup> *Id.* at 302.

<sup>34</sup> *The North American Review for January*, THE NATION, No. 555, 118, 119 (Feb. 17, 1876).

<sup>35</sup> *New Publications, The First Century of the Republic: A Review of American Progress*. *New York: Harper & Brothers*, 1876, N.Y. TIMES, Oct. 9, 1876, at 3.

<sup>36</sup> *Harper & Brothers*, N.Y. TIMES, Dec. 15, 1876, at 5.

which appeared in the *New-York Times* [!] and *Tribune*, *The Christian Union* and *Congregationalist*, and other periodicals.”<sup>37</sup>

Whether the Centennial Writers were right, particularly in their conclusions, might reasonably be questioned, but that their point of view is to be taken seriously, cannot. Henry Adams, editor of the *Review*, great-grandson of John Adams, former student of law in Berlin, friend of Oliver Wendell Holmes and then professor in Harvard College writing one of America’s first books in legal history, surely would not have tolerated slipshod work. In this article I address how these two leading journals in celebration of the first century of the American republic could indict common law and laud code law. Today an untenured American law professor who espoused such heresy would be drummed out of the academy. Before explaining how the Centennial Writers could believe as they did, this article examines what I mean by contemporary common law myth and juxtapose it with the understanding of the Centennial Writers (in B.) and identify the sources that challenge it (in C.)

#### B. CONTEMPORARY AMERICAN COMMON LAW

“[T]his system of making law by judicial opinion... is what every American law student, every newborn American lawyer, first sees when he opens his eyes. And the impression remains for life. His image of the great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.”

Antonin Scalia (1997)<sup>38</sup>

The Centennial Writers saw a different world than that described by Justice Scalia. They saw law as a system of determinant written rules organized and adopted by democratically legitimate legislatures for impartial application in individual cases. Although this was an exceptional idea in 1776, and was still remarkable in 1876, today it is conventional legal thought nearly everywhere.<sup>39</sup> It is the essence of a “government of laws,” or what Americans today more commonly call a “rule of law.” U.S. Supreme Court Justice Antonin Scalia aptly captures the idea when he writes of “the rule of law as a law of rules.”<sup>40</sup>

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<sup>37</sup> BENJAMIN VAUGHAN ABBOTT, *JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND* iv (1880).

<sup>38</sup> Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 9 (1997).

<sup>39</sup> Cf., H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

<sup>40</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

American law schools *today*, however, do NOT teach that law is a system of rules. Instead, they teach what Justice Scalia describes: a contemporary common law that puts “synthesizing” law, i.e., finding and making new “law” ahead of applying existing rules to determine rights.<sup>41</sup> They have taught such law for a century. “The common law is not a body of rules,” contracts law icon Arthur L. Corbin told his law professor colleagues in 1912, “it is a method. It is the creation of law by the inductive process.”<sup>42</sup> In such a common law, the judge is the central figure. Judges’ decisions are the touchstone for legal argument even when statutes are applied.<sup>43</sup> Rather than rules, their system and their application, law schools give process and judicial lawmaking primacy.

The genius of contemporary American common law, American law professors claim, is its flexibility in adapting to change and in developing new causes of action. Courts make law even as they apply it. Judges gain when they can wait to state the rule until the “point of decision.”<sup>44</sup> A youthful Oliver Wendell Holmes, Jr. asserted that “It is the merit of the common law that it

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<sup>41</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 5 (2012).

<sup>42</sup> Arthur L. Corbin, *What is the Common Law?*, 3 AM. L. SCHOOL REV. 73, 75 (1912). *Cf.*, PAUL SAMUEL REINSCH, *THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 8-9 (1899), *reprinted in* 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 370-71 (1907) (“When the courts [today] come to analyze the nature of the law actually brought over by the colonists, they find it a method of reasoning, ‘a system of legal logic, rather than a code of rules;’ the rule, ‘live honestly, hurt nobody, and render to every man his due.’ Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word.”). Corbin adjusted his teaching accordingly; “Learning the details of contract law, per se, is a worthy objective ... but this is clearly the secondary objective.” *Supra*. A century later there is a casebook that teaches Corbin’s lesson. TRACEY E. GEORGE & RUSSELL KOROBKIN, *K: A COMMON LAW APPROACH TO CONTRACTS* xix (2012).

<sup>43</sup> Although agreement with all points made in this paragraph is not universal, this and the following paragraph capture the conventional wisdom that American law professors teach their students today. *See* FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 103-17 (2009); ANNE M. BURR & HOWARD BROMBERG, *U.S. LEGAL PRACTICE SKILLS FOR INTERNATIONAL LAW STUDENTS* 6-7, 44, 79-87 (2014); BONITA K. ROBERTS & LINDA L. SCHLUETER, *LEGAL RESEARCH GUIDE: PATTERNS AND PRACTICE* 2-3 (5<sup>th</sup> ed. 2006); AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 2-9 (5<sup>th</sup> ed. 2012); William J. Brennan, Jr., *Introduction* in NEW YORK UNIVERSITY SCHOOL OF LAW, *FUNDAMENTALS OF AMERICAN LAW* 1, 3 (1996).

<sup>44</sup> Richard A. Cappalli, *At the Point of Decision: The Common Law’s Advantage over the Civil Law*, 12 TEMPLE INT’L & COMP. L. REV. 87 (1998). *See also* RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 8 (3d ed. 1997) (textbook used by the National Institute of Trial Advocacy) (“The heart of the common-law tradition is adjudication of specific cases. Case-by-case development allows experimentation because each rule is reevaluated in subsequent cases to determine if the rule did or does produce a fair result. If the rule operates unfairly, it can be modified.... The genius of the common law is that it proceeds empirically and gradually, testing the ground at every step, and refusing, or at any rate evincing an extreme reluctance, to embrace broad theoretical principles.”).

decides the case first and determines the principle afterwards.”<sup>45</sup> A middle-aged and already iconic Massachusetts Justice Holmes told an audience of aspiring lawyers that “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>46</sup> Holmes “prediction theory” led to “legal realism,” which remains the dominant American approach to law.<sup>47</sup>

What could be wrong with such genius? To begin, judge-made law is law for lawyers; it is not law for people. Lawyers might be able to synthesize a rule out of a mass of precedents; the public cannot. People need to be able to apply law without seeking a judicial decision. What might be called judge-made law in other judicial systems is subsidiary to statute law; written rules provide the public with the guidance the rule of law requires. To continue, judge-made law is not democratic. No matter how judges are selected, they are not ordinarily employed to make law. To conclude, most law is made and most applications of law take place outside of courts.

American law professors concede that “most laypeople probably think of law as a system of rules; much like the traffic code writ large.”<sup>48</sup> But this “popular conception,” they write, is “highly misleading.” Such a “rulebook picture of law is a particularly inapt rendering” of the American “common law system.”<sup>49</sup> Not rules, but cases “are the primary grist for the legal reasoning mill.”<sup>50</sup> Case law, also known as judge made law, is the American preference: legislation is the exception.<sup>51</sup> American law professors belittle the public’s longing for legal determinacy<sup>52</sup> and judges that only apply law but to not make it.<sup>53</sup>

Anglo-American jurists from English legal philosopher Jeremy Bentham to U.S. Supreme Court Justice Antonin Scalia have criticized “judge-made law.” Bentham famously flailed it as “dog-law:” “When your dog does anything you want to break him of, you wait till he does it, and then beat him for it.”<sup>54</sup> Justice Scalia denounces judge-made law as undemocratic: “we elect those who will

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<sup>45</sup> Oliver Wendell Holmes, Jr., *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

<sup>46</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 460-61 (1897).

<sup>47</sup> See Anthony D’Amato, *A New (and Better) Interpretation of Holmes’s Prediction Theory of Law* 3, 14 (2008), NORTHWESTERN UNIVERSITY SCHOOL OF LAW FACULTY WORKING PAPERS, Paper 163 (suggesting that legal realism “was a disastrous setback for American law”).<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/163>.

On Holmes’s address generally, see David Luban, *Essay: The Bad Man and the Good Lawyer: A Centennial Essay on Holmes’s The Path of the Law*, 72 N.Y.U.L. Rev. 1547 (1997).

<sup>48</sup> STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 11 (3<sup>d</sup> ed. 2007).

<sup>49</sup> FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 103 (2009).

<sup>50</sup> BURTON, *supra* note 48, at 11.

<sup>51</sup> See JANE C. GINSBURG, INTRODUCTION TO LAW AND LEGAL REASONING 71 (rev. ed., 2004).

<sup>52</sup> See James R. Maxeiner, *Some Realism About Legal Certainty in the Globalization of the Rule of Law*, 31 HOUSTON J. OF INT’L L. 28, 33-34 (2008).

<sup>53</sup> See James R. Maxeiner, *Imagining Judges that Apply Law: How They Might Do It*, 114 PENN STATE L. REV. 472, 473 (2009).

<sup>54</sup> JEREMY BENTHAM, TRUTH VERSUS ASHHURST; OR, LAW AS IT IS, CONTRASTED WITH WHAT IT IS SAID TO BE 11 (1835, 1<sup>st</sup> ed. 1823, written 1792), in 5 *The Works of Jeremy Bentham* 231 (John Bowring, ed., 1843).

write our laws—and expect courts to observe what is written.”<sup>55</sup> They have powerful criticisms for which there are no good answers.<sup>56</sup> Perhaps the most persuasive indictment of judge-made law is that by itself it fails to produce rules that people can follow.

Most applications of law are by individuals who apply law to themselves: they follow the law in ordering their daily lives, *e.g.*, they stop at red lights. A smaller, but still large number of applications are by individuals charged with applying law to others: *e.g.*, government officers issue driver’s licenses. Even less numerous are applications by individuals charged with compelling others to follow the law: *e.g.*, police officers who stop speeding motorists. Least numerous of all are where judges decide rights and disputes. To defend contemporary common law indeterminacy Americans resort to claims of American legal history that have become myths: *dominance* of common law in the 19<sup>th</sup> century legal system over statutes and *primacy of precedents* in legal reasoning. Both impede law reform; the latter imperils contemporary American law as well. Primacy of judicial precedents imperils good government and a just society. Primacy of judicial precedents undermines application of law, by its subjects, by its officers and by its law enforcers. It even undermines application of law by judges.

I seek in this article to debunk common law myths of dominance and priority over statutes. I suggest a greater role for statutes than is usually allowed in American understanding of the past, but I am not creating an alternative universe, either in the past or in the present, of statutory law. Legal method—making, finding and applying law to facts—is a joint enterprise. The best solution will include both “judge-made law” and statutes.

### C. THE “GOOGLE CHALLENGE” I.E. DIGITIZATION

Digitization offers access to test the claims of the Centennial Writers. Their world is now open to us. Before, it was largely closed. Their publications were found scattered in only a handful of research libraries and, for want of indexing, difficult to access even when found.

The typical American law school library of the 20<sup>th</sup> century reflected the case-law orientation of the 20<sup>th</sup> century legal system. Its collection consisted mostly of case reports, case digests, case citators, and law school law reviews. All of these as we know them today got their start in the 1880s and 1890s. They reflected a world that had already changed from the world that the Centennial Writers knew. In the 20<sup>th</sup> century, much legal literature for the law before 1876 could be found in only a handful of research libraries. Even in its own day, that literature was often difficult to acquire.

In 2004 the *Google Library Book Project* began; one of its goal is to digitize and make available all books published before 1926.<sup>57</sup> About the same

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<sup>55</sup> SCALIA & GARNER *supra* note 41, at 22 (2012).

<sup>56</sup> See Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765 (2004); GORDON TULLOCK, *THE CASE AGAINST THE COMMON LAW* (1997).

<sup>57</sup> The first wave of legal digitization began earlier, on April 2, 1973, when the Lexis system was first offered. It did not change and may have even reinforced the case law orientation of

time, Gale Research introduced its *Making of Modern Law* database, which makes available digital copies of many English language legal treatises, including pamphlets, published between 1800 and 1926. W.H. Hein similarly first offered its *Hein Online* database, which includes, nearly all 19<sup>th</sup> century Anglo-American legal periodicals and many statutory collections. Other organizations have contributed to the digitization of American law. Hathi-Trust, Cornell's *Making of America*, and the Internet Archive are others that I have used frequently. One that I have just started to use is that of the Bavarian State Library's Digital Library - Munich Digitization Center; MDZ, available at <https://www.bsb-muenchen.de/en/catalogues-databases/digital-collections/>. Digitization is now moving from books and journals to newspapers and manuscripts.

What digitization offers is more than even the best of research law libraries could offer: convenient desktop access to most legal materials, including large classes of materials that one might not ever have thought to access. Digitization goes beyond just providing access to physical texts: through word searching it takes researchers directly to relevant passages within physical books. Particularly in the first century of the Republic, relevant information is found in volumes and articles the titles of which often do not even suggest that they might be of interest. Whole new classes of legal literature that had been practically forgotten are now available, while known classes have become accessible and usable as never before.

1. *Pamphlets*. A “new” class consists of a mountain of pamphlets of independent “discourses” and “orations.” Throughout the 19<sup>th</sup> century, when jurists talked with each other, the means of communication was often a twenty-to-fifty page pamphlet. Law journals were few, infrequent, and did not publish long comments. So authors self-published or, commonly, the sponsor of an address published the talk. Journals, law and public, took note of these addresses. Opposing parties answered with their views.<sup>58</sup>

2. *Legislative materials*. Although constitutions and statutes have been available with difficulty, with exceptions, the materials that went into making those constitutions and statutes, *i.e.*, governors addresses, committee reports and debates, have been hard to locate, and when attainable, not easily used. Digitization and word searching changes all of that.

3. *Early legal periodicals*. Hein Online now makes practically all early American legal periodicals available and word searchable. These journals took

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American law libraries. It was slow to extend coverage back in time and stayed largely with case reports and law school law reviews.

<sup>58</sup> Before digitization Professor Michael H. Hoeflich brought this literature to public attention. See, e.g., Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989). In the case of legal education reprint publishers guided by scholars such as Professor Hoeflich and Professor Steve Sheppard provided important primary sources even before digitization. See, e.g., MICHAEL H. HOEFLICH, GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18<sup>TH</sup> AND 19<sup>TH</sup> CENTURIES (1988); MICHAEL H. HOEFLICH, SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING (2008); STEVE SHEPPARD, THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES (2 vols., 1999).

a variety of forms ranging from academic journals to chatty legal newspapers. For the latter in particular, word searching is a god-send for access.

4. *Non-legal periodicals.* Although the first U.S. law journal appeared in 1806, only in the 1830s did law journals appear with some regularity. Particularly in first half-century of the New Republic, but continuing for decades after, authors often published legal works in general interest journals such as *The North American Review*, *The Southern Review*, *The Democratic Review*, *Hunt's Merchants' Magazine* and *The American Quarterly Review*.

5. *Earliest legal materials (to about 1826).* Some of the earliest legal materials appear in unlikely places, e.g., the appendices or notes to other works. So, for example, one of the most interesting of comments on the commerce clause of the U.S. constitution is appended to an 1804 work on the *History of Land Titles in Massachusetts*. Prefaces to the initial volumes of case reports are often informative. Some of the early reports of U.S. Supreme Court decisions included substantive appendices. To a limited extent, this appending approach continued through the end of the century. Full notes--not mere footnotes--to editions of Blackstone by St. George Tucker (1803) and by William G. Hammond (1890) are particularly valuable commentaries on American law.

6. *Popular works.* Not to be forgotten are the many thousands of popular works that appeared and addressed legal issues principally or incidentally. Once it would not have been practical to search them. Now it is.

Most of the materials cited here from before 1926 are available full text from one or more of the digitizers. Because of limitations in digitizing, sometimes several searches, or visits to several sites, may be necessary to find any given item. Except as noted otherwise, I believe that most of the pre-1926 works I cite here are available at one of the half-dozen digitizers noted above.

### III. FOUNDING A GOVERNMENT OF LAWS

The founders of the United States believed that they were creating a new order of the ages. Contemporary common law myth denies, however, that they did. The myth imagines:

The leaders of the American Revolution, such as John Adams and Thomas Jefferson talked grandly about breaking with the European past and starting "a new order of the world." But when the Constitutional Convention met in a steamy summer in Philadelphia in 1787, it was with the assumption that English common law would continue unchanged in the United States.<sup>59</sup>

This statement is fiction. On July 1, 1787, just as the Convention came close to falling apart over the issue of small state representation in Congress, in Virginia, twenty-three state statutes that Jefferson had drafted and that Madi-

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<sup>59</sup> NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 354 (1997). Cf. William D. Bader, *Mediations on the Original: James Madison, Framers with Common Law Intentions—Ramifications in the Contemporary Supreme Court*, 20 VT. L. REV. 5 (1995). See JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 15 (2003).

son, the Convention's orchestrator-in-chief, had sponsored in the Virginia legislature, went into force.<sup>60</sup> These statutes changed received English criminal law and procedure, property law and civil procedure. One new statute subjected lawyers to licensing, regulation and examination.<sup>61</sup> Another directed courts to order lawyers "to help and speed poor persons in their suits ... without any reward for their counsels, help and businesses in the same."<sup>62</sup> So much for common law continuing unchanged as the delegates met.

Statutes had a leading role in the Founders' vision of a New Republic. What role, if any, English law, whether statutory or common law, would have in the independent United States of America is a more difficult issue. This Part III considers first the Founders' vision of statutes, and second, the enigmatic role of English law in America.

#### A. THE FOUNDERS' VISION: A GOVERNMENT OF LAWS FOR A NEW NATION

You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. ... When before the present epoch, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?

John Adams, *Thoughts on Government* (1776)

When I left Congress in 76, it was in the persuasion that our whole code must be reviewed, adapted to our republican form of government, and, now that we had no negatives of Councils, Governors & Kings to restrain us from doing right, that it should be corrected in all its parts, with a single eye to reason, & the good of those for whose government it was framed.

Thomas Jefferson, *Autobiography*<sup>63</sup>

In the world of Adams and Jefferson, law was about legislating and government was about governing. Written laws were supposed to state principles beforehand and to authorize governors and governed alike to judge according to those principles. Democratically selected legislatures were to be supreme and not judges. States were governments of laws and not of men.

Lost in the clouds of common law myth is American leadership in statute law in the 18<sup>th</sup> century Enlightenment. Americans have long taken pride in their leadership in the world of written constitutions—that of Massachusetts of 1780 is the oldest still in force—but few know that America, for a time, was a leader in written statutes as well.

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<sup>60</sup> THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779, INCLUDING THE REVISAL OF THE LAWS, 1776-1786) 332 (Julian P. Boyd, ed., 1950).

<sup>61</sup> Bill No. 97 "A Bill for Licensing Counsel, Attorneys at Law, and Proctors," *Id.* at 587.

<sup>62</sup> Bill No. 112 "A Bill Providing a Means to Help and Speed Poor Persons in Their Suits," *Id.* at 629.

<sup>63</sup> THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON'S LIFE 67 (Paul Leicester Ford, ed. 1914; *New Introduction* by Michael Zuckerman, 2005).

One doesn't need digitization to dismantle the myth that the nation's founders were captives of the hoary English common law who didn't believe in written law or even might be seen as having advocated contemporary common law myth. Of English law—statute law as well as common law—they made selective interim use, and dispatched much to the dustbin of history. For American statutes they labored. Against judge-made law, they cautioned, but they relied on right-minded judges to refrain from making law in the guise of interpretation. Their aspirations ran to written law of legislation and not to unwritten common law.<sup>64</sup> In this part I address written law and ten of the founder lawyers: two created the Declaration of Independence, Jefferson and Adams; two secured adoption of the Constitution: Madison and Hamilton; and six constituted the first Supreme Court of the United States.

### 1. Declaring Independence to Write Laws for the Public Good

The Declaration of Independence of 1776 was about legislation and legislatures. Its first charge against King George was that “He has refused his Assent to Laws, the most wholesome and necessary for the public good.” That and the next seven charges related to legislation and legislatures. Thirteen of the twenty-seven charges in all dealt with some manifestation of legislation. Of common law there was no mention. Four charges did deal with administration of justice, including judiciary powers, appointment of judges and trials.<sup>65</sup>

More than any other two people, John Adams and Thomas Jefferson brought the Declaration of Independence into being. They acted to make the republican ideals of the Declaration reality in law. For Adams, it was a frame of government; for Jefferson it was the nuts and bolts of government itself.

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<sup>64</sup> Cf. Charles Abernathy, *The Lost European Aspirations of U.S. Constitutional Law*, in 24 FEBRUAR 1803: DIE ERFINDUNG DER VERFASSUNGSGERICHTSBARKEIT UND IHRER FOLGEN 37 (Werner Kemp, ed. 2003) ; Vanderlinden, *supra* note \*\*, at 8-9. For a tempered view that denies contemporary common law myth, yet ascribes a greater role to common law tradition, see JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* (2003) (mostly directed to constitutional law, but at page 14 referring to Jefferson's Revisal as a “decision simply to draft model statutes for reform, not to try to introduce a wholly new order.”)

<sup>65</sup> Professor Stoner again provides a tempered more common law view of the Declaration of Independence: “the choice of independence—or its defense to the world—mandated that appeal be made to the law of nature rather than the law of England, but when abstract terms such as ‘absolute Despotism’ were given concrete meaning, it was by reference, in the largely unread catalogue of grievances, to numerous rights and privileges at common law ....” *Id.* at 13-14.

## 2 The Written Laws of the Founders: Adams, Jefferson & Madison

### *a. Adams' Government of Laws: Massachusetts' Frame of Government*

In fall 1779, Adams drafted the *Constitution or Frame of Government* of the Commonwealth of Massachusetts, which is still law today, and which is still reasonably well known. There he popularized the phrase of a “government of laws, not of men” that into the twentieth century described what Americans today call the rule of law. There he provided for a framework for statute law and for governing.<sup>66</sup>

### *b. Jefferson's Code: Virginia's Revisal of Laws*

From fall 1776 through spring 1779, Jefferson wrote the laws for a New Republican government for Virginia. He provided legislation for reformation of the laws of the nation's then most populous state. James Madison described Jefferson's reformation as “a mine of legislative wealth, and a model of statutory composition.”<sup>67</sup> One modern scholar sees in Jefferson's legislation, “a rare and comprehensive view of how a founder envisioned an actual republican society.”<sup>68</sup>

Jefferson's lawmaking from 1776 to 1779 is unparalleled in American history. No American legislator before or since has accomplished so much of such importance in such a short period of time. In three weeks in June 1776 he drafted the Declaration of Independence. Then he already had in mind as much building a government of laws as declaring rights and independence. In May in Philadelphia for congress, he wrote a friend back home that the government to be established was “the whole object of the present controversy.”<sup>69</sup> In the three years that followed he drafted the laws for a republican government.

No work had more substance for Jefferson than building a government of laws. He wrote in his autobiography, “I knew that our legislation under the regal government had many vicious points which urgently required reformation, and I thought I could be of more use in forwarding that work. I therefore retired from my seat in Congress on the 2d. day of Sep., resigned it, and took my place in the legislature of my state.”<sup>70</sup> When a messenger reached him in Virginia with a Congressional commission to join Benjamin Franklin on the critical mission to France, Jefferson took three days to think it over—keeping the messenger waiting—and finally declined the appointment.

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<sup>66</sup> See James R. Maxeiner, *Building a Government of Laws: Adams and Jefferson 1776-1779*, in *LEGAL DOCTRINES OF THE RULE OF LAW AND OF THE LEGAL STATE* (James Hickey & James Silkenat, eds., IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE vol. 38, 2014).

<sup>67</sup> James Madison to Samuel Harrison Smith, November 4, 1826, in *THE WRITINGS OF JAMES MADISON*, VOL. 1819-1836 at 256, 257-258 (Gaillard Hunt, 1910).

<sup>68</sup> RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC* 62 (1987).

<sup>69</sup> Jefferson to Thomas Nelson, May 16, 1776, in 1 *THE PAPERS OF THOMAS JEFFERSON* (VOL. 1, 1760 TO 1776) 292 (Julian P. Boyd, ed., 1950).

<sup>70</sup> *THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON'S LIFE* 57 (Paul Leicester Ford, ed. 1914; *New Introduction* by Michael Zuckerman, 2005).

From October 1776, when Jefferson joined the state legislature, until June 1779, when he became governor, Jefferson did little else than work on legislation. His work took two forms: (1) drafting bills on particular subjects, *e.g.*, civil justice, property law, the established church, importation of slaves, and naturalization; and (2) systematic review and reform of Virginia law.<sup>71</sup> The latter is known as the “Revisal.” The Revisal was literally two bundles of 126 bills that the Virginia House Committee on Revision under Jefferson’s leadership prepared from October 1776 to June 1779.<sup>72</sup> The bills of the Revisal alone were printed in ninety oversized folio pages in tiny type (over three hundred pages in a standard type face in a large octavo book).<sup>73</sup> Other legislation he wrote or sponsored was of comparable extent. He was, as the editor of his papers said, “a veritable legislative drafting bureau.”<sup>74</sup>

Jefferson worked to build a new society. He designed legislation that struck at the very roots of the common law: the land law, inheritance and criminal law. According to one biographer, Jefferson intended to “completely overthrow the English legal system that had chained Virginia for 170 years.”<sup>75</sup> Jefferson’s legislation abolished primogeniture and completely changed rules of descent. He proposed a new penal law “to proportion crimes and punishments in cases [previously] capital.” It failed of passage by a single vote. Jefferson drafted legislation that would end forever the idea that the common law made Christian doctrine a part of law. His legislation disestablished the Anglican Church in Virginia. His bill establishing religious liberty is the best-known of all his legislation. Jefferson sought to organize and rationalize common law institutions. His legislation restated and reorganized court institutions and procedures both civil and criminal to make, writes one historian, a “mantel of procedural safeguards for all.”<sup>76</sup> Jefferson’s legislation reorganized government in all its branches. It provided for a state militia and navy, a board of war, a board of trade and a board of auditors. It districted the legislature and provided for elections and appointments. It created a public land office to administer claims to the western lands.

Professors of contemporary common law myth take heart that Jefferson declined the suggestion of one committee member that the committee tackle all law including all common law. If one knows the extent of the tasks that Jefferson and his committee of three did take on, and how limited were their resources, one should accept his explanation that it simply was not practical: “an arduous undertaking, of vast research, or great consideration & judgment: and

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<sup>71</sup> THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779, INCLUDING THE REVISAL OF THE LAWS, 1776-1786) 306 (Julian P. Boyd, ed., 1950).

<sup>72</sup> *Id.* at 306-307.

<sup>73</sup> REPORT OF THE COMMITTEE OF ADVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA IN MDCCLXXVI (1784) (available best at Google books). The following paragraphs do not cite to individual bills from the Revisal. They are found in the Committee’s Report and in Boyd’s analysis of the Revisal, in 2 THE PAPERS OF THOMAS JEFFERSON (VOLUME 2, 1777 TO 18 JUNE 1779), *supra* note 71.

<sup>74</sup> THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1779), *supra* note 71, at 306.

<sup>75</sup> WILLIAM STERNE RANDALL, THOMAS JEFFERSON: A LIFE 285 (1993).

<sup>76</sup> LERNER, *supra* note 68, at 64.

when reduced to a text ... would become a subject of question & Chicanery until settled by repeated adjudication.”<sup>77</sup>

Although Jefferson’s Revisal did not banish common law altogether, it did not promote 18<sup>th</sup> century common law methods as a path to the New Republic. It gave no hint of approval of judicial legislation that characterizes contemporary common law methods. To the contrary, Jefferson’s Revisal promoted legislative methods; it *was* legislation. Jefferson could hardly have proceeded in any other way. Only statutes can root out old laws, rationally refashion remaining institutions, create new institutions, and provide direction to governors in how to govern. Jefferson sought to use legislation to do all these things. His success was limited by his own methods. In a democratic republic Jefferson could not decree a new society and new laws. He had to get assent of the democratically-elected legislature.

*c. Madison’s Adoption of: Jefferson’s Revisal 1784-1787*

The English invasion of Virginia in 1779 delayed the Virginia legislature’s consideration of Jefferson’s Revisal. By the time the English were expelled and the legislature able to take up the work, Jefferson was on a mission to Europe. James Madison took Jefferson’s place as legislator leading the Revisal. In the two years just before Madison brought the country together for a constitutional convention and helped draft a constitution, he presented Jefferson’s anti-common law legislation to the Virginia legislature. He introduced 118 of the Revisal’s 126 bills and achieved adoption of fifty-eight.<sup>78</sup>

3. The Written Laws of the Constitution

The Founders designed a government of written laws. That made America exceptional in 1787. Contemporary common law myth claims the Constitution for common law tradition but its “true family affinity,” writes Professor Charles Abernathy, “is that of the written law of the great codes of France and Germany that followed in the nineteenth century.”<sup>79</sup> The Founders were much influenced by Continental legal thought, by Montesquieu, Locke and Beccaria and classical Roman ideas.<sup>80</sup> That meant written laws.<sup>81</sup> The Constitution is about making and applying written laws.

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<sup>77</sup> AUTOBIOGRAPHY, *supra* note 63, at 67-68.

<sup>78</sup> THE PAPERS OF THOMAS JEFFERSON (VOL. 2, 1777 TO 18 JUNE 1777), *supra* note 71, at 322-323.

<sup>79</sup> Abernathy, *supra* note 64, at 37.

<sup>80</sup> See, e.g., DAVID J. BEDERMAN, THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM (2008); Matthew P. Bergman, *Montesquieu’s Theory of Government and the Framing of the American Constitution*, 18 PEPPERDINE L. REV. 1 (1990); JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 332 (2014); M.N.S. SELLERS, AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES CONSTITUTION (1994).

<sup>81</sup> That idea is well conveyed by the title of the book by Montesquieu that influenced America’s founders. Published originally in French as *De l’esprit des loix*, and then as *De l’esprit des lois*, the French title has been variously rendered in English, first as *The Spirit of Laws*, and later sometimes as *The Spirit of the Laws*. The German rendition leaves no doubt: *The Spirit of the Statutes (Der Geist der Gesetze)*.

The first provision after the Preamble, Article 1, section 1, grants Congress “legislative power.” Article 1, section 8 lists specific powers and concludes with a general grant “To make all laws which shall be necessary and proper for carrying into execution the forgoing powers.”

Article II vests the “executive power” in the President. Article II, section 3, provides that the president “shall take care that the laws be faithfully executed.”

Article III, section 1 vests the “judicial power” in “one Supreme court.” Article III, section 2, provides that that power extends to an assortment of controversies, but first to cases “arising under” written law, *i.e.*, this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority.”

Article VI provides for the supremacy of written laws and binds all judges to that written law: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby ...”

If judge-made law is in the Constitution, it must be found in the interstices. The Constitution provides the mechanism for Congress to make statutes subject to the approval of the President. It makes no allowance for the Supreme Court to invalidate statutes that Congress makes and the President approves.<sup>82</sup> It speaks of “judicial power,” but does not include in that power giving Supreme Court decisions the force of law or even giving the Court power to make rules for the conduct of its business. Nor does it include in that power other issues that might be seen as judicial, *i.e.*, determination of whether there are courts inferior to the Supreme Court or where trials are to take place when the crimes do not occur within a State. Instead Article III assigns those issues to Congress.

The 1787 Constitution does not mention “common law”,<sup>83</sup> but it does abolish the common law punishment for treason. It uses English law terminology for legislation when it refers to concepts such as “ex post facto” law and “bill of attainder.” The Constitution does address uniformity and coordination of state laws. Article I, section 8 grants Congress the power “To establish a uniform rule of naturalization, and uniform Laws on the Subject of Bankruptcies throughout the United States.” Article I, sections 9 and 10, prohibits states from taking certain actions and subjects other actions to Congressional authorization. Article IV, section 1 requires states to give “full faith and credit” to the public acts of other states and gives Congress authority “by general laws [to] prescribe ... the effect thereof.” It provides for interstate extradition. Article IV, section 2 infamously provides for extradition of fugitive slaves (“Person[s] held to service or labour”).

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<sup>82</sup> The Supreme Court itself claimed that power in the controversial decision of *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>83</sup> The term appears only in the Seventh Amendment.

#### 4. Written Laws in the Federalist Papers 1787-1788

Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

*Federalist No. 62* (1788)<sup>84</sup>

*The Federalist Papers* confirm the commitment of James Madison, Alexander Hamilton and John Jay to written law. They address issues of statute law and statute lawmaking. These include quality of legislation, uniformity of laws throughout the nation, and worries that constitutional review of statutes might lead to judicial superiority over legislatures. So *Federalist No. 62, The Senate*, by Madison, saw in the Senate (as contrasted to the House) a body with “due acquaintance with the objects and principles of legislation.” It would protect the people against “so many monuments of deficient wisdom” that were “are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes.” It would provide “a knowledge of the [legislative] means by which that object [of the happiness of the people] can be best attained.” It would secure that laws are not “made for the FEW, not for the MANY.” [Emphasis in the original.]

*Federalist No. 53, The House of Representatives (continued)* (by Madison)<sup>85</sup> worried that “The laws are so far from being uniform, that they vary in every State.” It foresaw that “The most laborious task will be the proper inauguration of the government and the primeval formation of a federal code.” Yet Madison was optimistic that “Improvements on the first draughts will every year become both easier and fewer ... And the increased intercourse among those of different States will contribute ... to a general assimilation of their manners and laws.” He underestimated subsequent difficulties in harmonizing law, when he wrote in *Federalist No. 56, The Total Number of the House of Representatives (continued)*<sup>86</sup> of creating a federal tax code: “In every State there have been made, and must continue to be made, regulations on this subject which will, in many cases, leave little more to be done by the federal legislature, than to review the different laws, and reduce them in one general act.”

*Federalist No. 78, The Judiciary Department*, (by Hamilton)<sup>87</sup> answered the “perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.” It argued that: “The interpretation of the laws is the proper and peculiar province of the courts.” That did not mean, however, “a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior

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<sup>84</sup> Publius [James Madison], *The Senate*, FEDERALIST NO. 62, INDEPENDENT JOURNAL, Feb. 27, 1788, <http://www.constitution.org/fed/federa62.htm>.

<sup>85</sup> Publius [James Madison], *The House of Representatives (continued)*, FEDERALIST NO. 53, INDEPENDENT JOURNAL, Feb. 9, 1788. <http://www.constitution.org/fed/federa53.htm>.

<sup>86</sup> Publius [James Madison], *The Total Number of the House of Representatives (continued)*, FEDERALIST NO. 56, INDEPENDENT JOURNAL, Feb. 16, 1788, <http://www.constitution.org/fed/federa56.htm>.

<sup>87</sup> Publius [Alexander Hamilton], *The Judiciary Department*, FEDERALIST NO. 78, INDEPENDENT JOURNAL, June 14, 1788, <http://www.constitution.org/fed/federa78.htm>.

to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.” Judges must always be faithful to law: “a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” Judges were to apply and not make law: “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”

## 5. Written Laws and the First Supreme Court

The first Supreme Court of the United States was not a judicial legislature. Probably its most enduring act was not a judicial decision, but a 1793 letter to President Washington declining to give an advisory opinion.<sup>88</sup> This is the origin of the case or controversy requirement. The first Court decided only a handful of cases. None foreshadowed modern-day judicial supremacy. Moreover, the methods by which it worked were not conducive to judicial lawmaking, *i.e.*, the justices delivered their opinions seriatim from the bench and not as a single opinion of the Court.<sup>89</sup> There was, as yet, no system of publication of written opinions. The justices of the first Supreme Court were as much legislators or governors as they were judges.

*Chief Justice John Jay* (1789-1795) was the third author of the Federalist papers. His best-known affirmative act while on the Supreme Court was extra-judicial: negotiation of the controversial “Jay Treaty” with Great Britain. In 1795 he resigned his position as Chief Justice to become Governor of the State of New York. His speeches as governor demonstrate his respect for a government of laws.<sup>90</sup> Governor Jay looked for clear lines of authority: “The more the principles of government are investigated, the more it becomes apparent that those powers and those only, should be annexed to each office and department,

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<sup>88</sup> STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 179* (1997) (reprinting the letter in full).

<sup>89</sup> Professor Gerber attributes the generally low estimation of Justice William Cushing to his speaking last as senior associate justice. SCOTT DOUGLAS GERBER, *Deconstructing William Cushing*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 97, 107 (1998).

<sup>90</sup> John Jay, in *THE SPEECHES OF THE DIFFERENT GOVERNORS, TO THE LEGISLATURE OF THE STATE OF NEW YORK* 47-67 (1825). In his first address, the *Speech of January 6, 1796*, he promised to respect the “constituted authorities” under national and state constitutions, *id.* 47; to “give efficacy” to national laws and measures, *id.* at 48; to amend “laws and regulations, [which] however carefully devised, frequently prove defective in practice,” *id.* at 48; and, to resolve opposite opinions in constitutional construction by a “declaratory act,” *id.* at 48-49.

which properly belong to them.”<sup>91</sup> Legislatures made laws for the people; judges carried them out.<sup>92</sup>

*Associate Justice John Rutledge* (1789-1792) was South Carolina’s first chief executive after independence. He made his mark as Chairman of the Committee of Detail of the Constitutional Convention of 1787, where he had much to do with enumerating Congress’s legislative powers, including the necessary and proper clause.<sup>93</sup> On the Court he decided no cases as Associate Justice. He attended only one of three terms before he resigned to become Chief Justice of South Carolina. In 1795 he served as interim Chief Justice. His judicial philosophy as shown on the bench in South Carolina is said to “leave legal innovation to legislators, in the belief that fixed and known laws were important to liberty.”<sup>94</sup>

*Associate Justice James Wilson* (1789-1798) was one of only six men to sign both the Declaration of Independence and the Constitution. He is considered to have been second only to James Madison as principal drafter of the Constitution. While he was on the Court, in March 1791 the Pennsylvania House of Representatives engaged him “to prepare bills, containing such alterations, additions and improvements as the code of law, and the principles and forms of the constitution then lately adopted might require.”<sup>95</sup> Wilson accepted the challenge. He proposed that he would work to make law “a plain rule for action” and through a commentary reduce the common law into “a just and regular system”. He intended to write laws “level to the understanding of all.”<sup>96</sup> Had Wilson brought the work to completion, it would have rivaled Jefferson’s revisal. But Wilson, even more than Jefferson was strapped for funds. When the legislature failed to provide support, he dropped the project. Hugh Henry Brackenridge, Justice of the Pennsylvania Supreme Court, wrote “It was considered a great loss by intelligent men that the design should be abandoned; and it continued to be thought of as what ought to be accomplished.”<sup>97</sup>

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<sup>91</sup> *Id.* at 49.

<sup>92</sup> *Id.* (“One great object of which a people, free, enlightened and governed by laws of their own making, will never lose sight, is, that those laws be always so judiciously applied and faithfully executed, as to secure to them the peaceable and uninterrupted enjoyment of their rights.”).

<sup>93</sup> James Haw, *John Rutledge: Distinction and Declension*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 70, 89 (Scott Douglas Gerber, ed., 1998).

Three of the other four members of the Committee on Detail went on to substantial roles in the federal government, James Wilson as Associate Justice, Oliver Ellsworth as Chief Justice, and Edmund Randolph as Secretary of State and Attorney General.

<sup>94</sup> *Id.*

<sup>95</sup> 1 *THE WORKS OF HONORABLE JAMES WILSON, L.L.D.* Preface (Bird Wilson, ed., 1804), reprinted in 1 *COLLECTED WORKS OF JAMES WILSON* 417 (Kermit L. Hall & Mark David Hall, eds., 2007). On Wilson’s role in drafting the Constitution, see William Ewald, *James Wilson and the Drafting of the Constitution*, 10 *J. CONST. L.* 901 (2008).

<sup>96</sup> 1 *WILSON*, *supra* note 95, at 419-21.

<sup>97</sup> Hugh Henry Brackenridge, *Some View of the Endeavors to Improve the Law by the Legislature*, in *HUGH HENRY BRACKENRIDGE, LAW MISCELLANIES: CONTAINING AN INTRODUCTION TO THE STUDY OF LAW, SHEWING THE VARIATIONS OF THE LAW OF PENNSYLVANIA FROM THE LAW OF ENGLAND, AND WHAT ACTS OF ASSEMBLY MIGHT REQUIRE TO*

*Associate Justice William Cushing* (1789-1795). Justice Cushing, of the six, is perhaps the one most remembered for work as a judge. He had served as a judge in Massachusetts since 1772 and as Chief Justice of Massachusetts since 1780. In that capacity he found slavery to be unconstitutional. His reputation as Supreme Court justice is lackluster. Professor Gerber, in reconstructing the justice, attributes to him “Inventing Textualism.”<sup>98</sup>

*Associate Justice John Blair, Jr.* (1789-1799) is described as “A Safe and Conscientious Judge.” He was apparently a quiet supporter of Madison and Jefferson’s Revisal Committee of George Wythe and Edmund Pendleton.<sup>99</sup>

*Associate Justice James Iredell* (1790-1799) who died prematurely at forty-eight, is remembered as reviser of laws in the model of Jefferson. In 1776 he served on the North Carolina Commission established to recommend which statutes should continue in force as “consistent with the genius of a free people.”<sup>100</sup> He then drafted North Carolina’s first court bill. In 1787 the State Assembly appointed him to revise and compile the legislative acts of the state and former colony. He completed the work in 1791 after joining the Court. It is known as “Iredell’s Revisal” and long was the basis for North Carolina law.<sup>101</sup>

#### B. THE ENIGMA OF THE RECEPTION OF ENGLISH LAW IN AMERICA IN THE FIRST CENTURY OF THE REPUBLIC

Proponents of contemporary common law myth claim a faux mantel of history to perpetuate priority for judge-made law in contemporary America. They belittle the role of statutory law, they inflate the extent of the reception of English law, and they mischaracterize what America did receive. Not America generally, but individual American colonies and states, received not all of English law, but some British statutes and some English common law. The legal method that they received was not contemporary creation of law, but a more modest “discovery” of law. American scholars have known for sixty years that “The legal philosophy dominant when [the American] government was established did not contemplate judicial legislation in any form.”<sup>102</sup>

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BE REPEALED OR MODIFIED ...27, 28 (1814). See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM* 28, 37 (1981).

<sup>98</sup> SCOTT DOUGLAS GERBER, *Deconstructing William Cushing*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 97, 106-113 (1998).

<sup>99</sup> Wythe Holt, *John Blair: “A Safe and Conscientious Judge,”* in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 155 (1998). In 1780, the year after Jefferson and his team of Wythe and Pendleton submitted the Revisal, Blair joined the latter two as the third judge of the Court of Chancery. *Id.* at 158. He supported both of them—silently—in the Virginia convention that ratified the Constitution. *Id.* at 162.

<sup>100</sup> JAMES IREDELL & WILLIAM H. BATTLE, *Preface*, in 1 *THE REVISED STATUTES OF THE STATE OF NORTH CAROLINA* v, x-xi (1837); Willis P. Whichard, *James Iredell: Revolutionist, Constitutionalist, Jurist* in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL* 198, 203 (1998). See generally WILLIS P. WHICHARD, *JUSTICE JAMES IREDELL* (2000).

<sup>101</sup> See IREDELL & BATTLE, *supra* note 100, at xii.

<sup>102</sup> FRED V. CAHILL, JR., *JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY* v (1952). See also 21 and 151.

In the first century of the Republic, reception of English law was enigmatic, because it had been enigmatic in Colonial America. In 1774 loyalist John Dickinson, repeating a grievance from New York, complained that law in the American colonies was in a state of “confusion” and “controversy;” no one knew when English law applied. He argued that “passing an act for settling the extent of the English laws” was “absolutely necessary for the public security.”<sup>103</sup>

### 1. English Law and the Colonies

In contemporary common law myth the 17<sup>th</sup> century colonists practically brought “the common law” over in the cargo holds of their ships. A plaque placed in 1959 by the Virginia Bar at Jamestown states: “Here the common law of England was established on this continent with the arrival of the first settlers on May 13, 1607.” Ironically, in 1607 when the settlers who named their settlement Jamestown were at sea on their way to America, the settlement’s namesake, King James I, was telling the British Parliament that it should replace common law with statute law: “leave not the Law to the pleasure of the Judge, but let your Lawes be looked into: for I desire not the abolishing of the Lawes, but onely the clearing and the sweeping off the rust of them, and that by Parliament our Lawes might be cleared and made knowen to all the Subjects. Yea rather it were lesse hurt, that all the approved Cases were set downe and allowed by Parliament for standing Lawes in all time to come.”<sup>104</sup>

Today’s scholars see the common law carryover differently than contemporary common law myth. Professor William E. Nelson concludes, “England’s common law was not the initial foundation of [the] legal systems.” Instead “the English legal heritage ... constituted a set of background norms to which [colonies] turned when convenient.”<sup>105</sup> Professor James R. Stoner sees as “a serious

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<sup>103</sup> [JOHN DICKINSON], LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 90-91 (Philadelphia 1774). Dickinson wrote for Pennsylvania, but he took (with attribution) most of his criticism from New York’s WILLIAM SMITH, THE HISTORY OF THE PROVINCE OF NEW YORK, FROM THE FIRST DISCOVERY TO THE YEAR M.CDD.XXXII 243 (London 1767).

<sup>104</sup> King James I, *Speech [sic] to Parliament of 31 March 1607*, KING JAMES VI AND I: SELECTED WRITINGS (Neil Rhodes et al., eds.) 307, 310-11 (2004). *Accord*, King James I, *Speech [sic] to Parliament, March 1609*, *id.* at 325, 332-333, and partly quoted in SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, MADE TO THE LEGISLATURE, APPEAR TO BE IN FORCE, IN PENNSYLVANIA, WITH SOME OTHERS xv (1817) (“I would wish both these statutes and reports, as well in the parliament as common law, to be once maturely reviewed, and reconciled”).

<sup>105</sup> WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA, VOL. 1, THE CHESAPEAKE AND NEW ENGLAND, 1607-1660 (2008). *See also* William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1968) (reviewing the three “standard” theories of reception). Max Radin observed that legally common law could only be subsidiary and not obligatory, since common law was the king’s law which, with the exception of the writ of error, did not run across the seas. Max Radin, *The Rivalry of Common-Law and Civil Law Ideas in the American Colonies*, in 2 LAW: A CENTURY OF PROGRESS 404, 407-11 (1937).

error” the assumption “that the Americans of the Revolutionary era simply accepted the dominant understanding of common law in contemporary Britain ....”<sup>106</sup> Just five years after the bar posted the plaque in Jamestown, in a comprehensive study of British statutes in America, Elizabeth Gaspar Brown, warned against the “utter folly” of presuming an identity of law between law as practiced in individual colonies and in England.<sup>107</sup>

It could hardly have been otherwise. English laws, legal institutions and legal methods were so complex as to make it practically impossible for even the most sophisticated colonials to know, let alone import and recreate them.<sup>108</sup> The first modern systematization of English common law—Blackstone’s *Commentaries on the Laws of England*—came too late to enable a colonial reception; it was not published until the very eve of the Revolution, in England in 1765-1769, and in the United States, not until 1771 to 1772. While a masterful improvement, it is not short. It consumes four thick oversized volumes. It was intended only as an introduction!<sup>109</sup> Contemporary Hugh Henry Brackenridge, Justice of the Supreme Court of Pennsylvania, observed “Even in the country of its origin the common law is not a *national*, or a *uniform* system.” He thought that “as a part therefore of English jurisprudence the common law is intricate, and too much embarrassed with exceptions and distinctions to be a subject of ready comprehension to the public mind.”<sup>110</sup> Brown, in her path-breaking work on British statutes in America, concluded that, “However much the colonists may have wished that they possessed the full body of the common law of England, they did not.”<sup>111</sup>

Common law even in early modern England did not enjoy the near total dominance that contemporary common law myth supposes. Written law, i.e., statutes, always had a role. Already in the early modern era statutes made major inroads on common law in England. A “deluge of parliamentary legislation”<sup>112</sup> in the mid-eighteenth century led the Lord Chancellor to complain that “our statute books are increased to such an enormous size, that they confound every man who is obliged to look into them.”<sup>113</sup>

Reception of English law varied throughout the colonies. Law in one colony cannot rightly be assumed to have been law in another.<sup>114</sup> The new world

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<sup>106</sup> JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 13 (2003).

<sup>107</sup> ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836, at 20 (1964).

<sup>108</sup> Cf., PAUL SAMUEL REINSCH, THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 7 (1899), reprinted in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367, 369 (1907).

<sup>109</sup> “*Sullivan’s Lectures*,” 3 BOSTON ANTHOLOGY & MONTHLY REV. 438, 439 (1806).

<sup>110</sup> HUGH H. BRACKENRIDGE, CONSIDERATIONS ON THE JURISPRUDENCE OF THE STATE OF PENNSYLVANIA, NO. 1, at 6 (1808). I have not found this digitized.

<sup>111</sup> Brown, *supra* note 107, at 20-21. Owing to the unwritten constitution of the United Kingdom, statutes were British, for they generally applied in Scotland, but common law was “English,” for it applied only in England and Wales.

<sup>112</sup> DAVID LEMMINGS, LAW AND GOVERNMENT IN ENGLAND DURING THE LONG EIGHTEENTH CENTURY: FROM CONSENT TO COMMAND 3 (2011).

<sup>113</sup> Quoted in *id.* at 9 and in 18 THE SCOT’S MAGAZINE 476 (1756).

<sup>114</sup> See BROWN, *supra* note 107, at 20.

was a land of “many legalities.”<sup>115</sup> Each colony must be investigated separately.<sup>116</sup> Their differing origins, as settlements of previously uninhabited territories or as lands obtained by cession, and their differing constitutional statuses, led to debate about differing legislative authority.<sup>117</sup> Even if the Jamestown settlers had common law in their cargo holds, their counterparts in Massachusetts carried over a more civil cargo. Literally on board their ship before landing, the Pilgrims pledged in the *Mayflower Compact*, not fidelity to an undefined common law, but to the creation of statutes for governing:

[We] Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.

They followed through on their pledge. The preamble of the *Lawes and Libertyes of Massachusetts* of 1647 colorfully explains why: “a Commonwealth without lawes is like a Ship without rigging and steeradge.”<sup>118</sup> Colonial magistrates provided a book of laws to “satisfie your longing expectation, and frequent complaints for want of such a volume to be published in print: wherin (upon every occasion) you might readily see the rule which you ought to walke by.”<sup>119</sup>

That there might have been an indigenous and dominating American common law in the colonial era does not seem plausible. The rudimentary nature of courts and law practice, the lack of lawyers, as well as the lack of law reporting made even limited adoption of new law wherever sourced difficult. Before the Revolution, there were no published books of American precedents. Books of English decisions, on which an American common law would have built, were hard to come by and imported.<sup>120</sup> There were, however, statutes in large numbers to guide the governors and the governed alike. Digitization permits perusal of the many volumes of indigenous colonial statutes. In some colonies there were already revisals of statutes.<sup>121</sup> A case might be made that colonial Americans lived already in an “age of statutes.”<sup>122</sup>

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<sup>115</sup> See, e.g., THE MANY LEGALITIES OF EARLY AMERICA (Christopher L. Tomlins & Bruce H. Mann, eds., 2001); William E. Nelson, *The Common Law in Colonial America, Vol. I, The Chesapeake and New England 1607-1660* (2008), *Vol. II, The Middle Colonies and the Carolinas, 1660-1730* (2012).

<sup>116</sup> BROWN, *supra* note 107, at 20.

<sup>117</sup> *Id.* at 1-15.

<sup>118</sup> THE LAWES AND LIBERTYES OF MASSACHUSETTS (1647). See EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP (3<sup>d</sup> ed., 2007) 156-160.

<sup>119</sup> *Id.*

<sup>120</sup> Cf. BROWN, *supra* note 107, at 19-20; Vanderlinden, *supra* note \*\*, at 6, 11.

<sup>121</sup> For an extensive guide to pre-statehood law in the several states, see PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA, 2 vols., (Michael Chiorazzi & Marguerite Most, eds., 2005).

<sup>122</sup> See Erwin C. Surrency, *Revision of Colonial Laws*, 9 AM. J. LEGAL HIST. 189 (1965).

## 2. English Law in the First Century of the Republic

In 1826, a half century into the New Republic, satirist and later Secretary of the Navy James Kirke Paulding in a popular satire quipped: “That it is the common law is certain. But nobody can tell exactly what is the common law.”<sup>123</sup> Eleven years later in 1837, in what was soon the most popular one volume student’s introduction to American law of the 19<sup>th</sup> century, Professor Timothy Walker made the same point: “The only certainty, therefore, is that we have something which we call common law, scattered at random over a vast surface. But precisely what it is, or how far it extends, is hidden in the breast of our judges, and can only be ascertained by experiment. I need hardly to observe, that this uncertainty is a vast evil.”<sup>124</sup>

The uncertainty was self-inflicted. English law, including English common law, had no force in the new states except as the states themselves adopted it.<sup>125</sup> When in 1776 the American colonies became “free and independent states” with full power “to do all the other acts and things which independent states may of right do,”<sup>126</sup> among those powers was the power to legislate for themselves without royal interference. And legislate they did. But it was thought expedient to carryover some English statutes and to adopt some of English common law.<sup>127</sup>

When a legislature enacts a specific foreign statute, or continues one in force, with or without modification, lawgiving is not problematic. For a formerly occupied state to carry on law of the erstwhile occupier is common. Legal systems are complicated and are not easily created. So German states on which Napoleon imposed his codes, for one example, continued his codes in force after

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<sup>123</sup> JAMES KIRKE PAULDING, *The Perfection of Reason*, in *THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM* 144, 166 (1826) (2<sup>d</sup> ed. 1835; 3<sup>d</sup> ed. 1839).

<sup>124</sup> TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW, DESIGNED AS A FIRST BOOK FOR STUDENTS* 56 (1837) (11<sup>th</sup> and last edition, 1905). The final sentence Walker deleted already in the second edition. The rest of the quotation was retained through to the last edition in 1905. See also PAUL SAMUEL REINSCH, *THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 8-9 (1899), reprinted in *1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 367, 370-371 (1907) (“... on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word.”).

<sup>125</sup> ST. GEORGE TUCKER, *Note E, Of the Unwritten, or Common Law of England, and Its Introduction Into, and Authority Within the United American States*, in *1 BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 378 (St. 1803). In their introduction to the 1996 reprint of St George Tucker’s edition of Blackstone, Paul Finkelman and David Cobin explain that Tucker “placed much greater emphasis on legislation than Blackstone had.” *Id.* at x-xi.

<sup>126</sup> DECLARATION OF INDEPENDENCE.

<sup>127</sup> BROWN, *supra* note 107, at 23-24.

French troops departed, some for nearly a century.<sup>128</sup> Korea, for another example, continued Japanese law in force long after Japanese troops were expelled in 1945.<sup>129</sup> Although some American states adopted by legislation specific British statutes, others did so by less precise means. Some legislatures just continued in force existing law. Others adopted English law specifically, but wholesale, by reference and without enumeration. Others did the same, but placed limits on which laws applied, of time (*e.g.*, of a certain date or event) or nature (*e.g.*, “general nature,” “applicable” or “suitable” to America conditions).<sup>130</sup> All of these general measures left it to whoever applied the law—subject, governor or courts—to decide in particular cases whether English or British law applied.<sup>131</sup>

The *raison d'être* of the first volume of American reports of cases, Ephraim Kirby's reports for Connecticut, a state where there was no reception statute, was the identification of which British statutes applied in the state.<sup>132</sup> Kirby acknowledged that his reports would not have been feasible had the Connecticut legislature in 1785 not required superior courts to give written reasons for their decisions when pleadings closed in issues at law.<sup>133</sup> Jesse Root, Connecticut's only other reporter in the eighteenth century, likewise thought reports would help show which “laws of England and the civil law ... have been incorporated into our own system, and adapted to our own situations and circumstances.”<sup>134</sup>

Such piecemeal adjudicatory determination was inadequate for the public. Some states simply repealed all British statutes. In other states, where British

<sup>128</sup> See, *e.g.*, *Abolition of the Code Napoleon in the Rhenish Provinces*, 1 JURIST: Q.J. JURIS. & LEGISL. 246 (1827).

<sup>129</sup> See JAMES R. MAXEINER WITH GYOHOO LEE & ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE 276-81 (2011).

<sup>130</sup> BROWN, *supra* note 107, at 25-26 lists these in tabular form for the first years of the New Republic and then details them all through her book.

<sup>131</sup> Cf., SAMUEL ROBERTS, A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT, MADE TO THE LEGISLATURE, APPEAR TO BE IN FORCE, IN PENNSYLVANIA, WITH SOME OTHERS xvi (1817) (noting that the judges' report was not determinative in later legal proceedings whether a particular English statute was in force in Pennsylvania).

<sup>132</sup> EPHRAIM KIRBY, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1875 TO MAY 1879 WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS iii (2<sup>d</sup> ed. 1898) (1<sup>st</sup> ed., 1789) (“Our courts were still in a state of embarrassment, sensible that the common law of England, “though a highly improved system,” was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications, every attempt of the judges, to run the line of distinction, between what was applicable and what not, proved abortive: For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory.— Hence arose a confusion in the determination of our courts; — the rules of property became uncertain, and litigation proportionately increased.”) See Alan V. Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297, 302-305 (1972). Briceland also describes the difficulties Kirby had financing, producing and distributing the book.

<sup>133</sup> *Id.* at iii-iv.

<sup>134</sup> 1 JESSE ROOT, REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT AND SUPREME COURT OF ERRORS... PREFACED WITH OBSERVATIONS UPON THE GOVERNMENT OF LAWS OF CONNECTICUT ... xiv (1798).

statutes were too numerous to repeal *in toto* or to adopt specifically, jurists, sometimes with legislative sanction, and sometimes without, compiled volumes of British statutes that they considered applicable to American conditions.<sup>135</sup> The purpose of these volumes was the same as that of compilations of the states' own statutes. So, wrote the author of a Georgia volume: "Now [the laws] are placed within the power of every man, and all may know the *statute* law of Georgia who chose to read it."<sup>136</sup>

Identifying English common law presented greater hurdles still. In 1837 Justice Story, in a report to the state legislature listed five prerequisites for applying a rule of English common law in Massachusetts: (1) was it was in force at the time of emigration; (2) had it since then remained unmodified by English statutes; (3) was it "applicable to the situation of the colony," (4) had it been "recognized and acted upon"; and (5) "with this additional qualification, that it ha[d] not been altered, repealed, or modified by any of our subsequent legislation now in force."<sup>137</sup> With such strenuous requirements one might assume that little English common law was applicable in Massachusetts.<sup>138</sup> Without an

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<sup>135</sup> Georgia: WILLIAM SCHLEY, *A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA* (1826);

Kentucky: *Appendix. A Collection of All the Acts of Parliament an Acts of Virginia, of a General Nature, Which Remain in Force in the State of Kentucky, in 2 THE STATUTE LAW OF KENTUCKY; WITH NOTES, PRÆLECTIONS, AND OBSERVATIONS ON THE PUBLIC ACTS 493* (William Littell, Compiler, 1798);

Maryland: WILLIAM KILTY, *A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND, AND WHICH BY EXPERIENCE HAVE BEEN FOUND APPLICABLE TO THEIR LOCAL AND OTHER CIRCUMSTANCES ....* (1811); JULIAN J. ALEXANDER, *A COLLECTION OF THE BRITISH STATUTES IN FORCE IN MARYLAND ACCORDING TO THE REPORT THEREOF MADE TO THE GENERAL ASSEMBLY BY THE LATE CHANCELLOR KILTY: WITH NOTES AND REFERENCES* (1870) (2<sup>d</sup> revised ed. In two vols. by Ward Baldwin Coe, 1912);

North Carolina: FRANÇOIS-XAVIER MARTIN (ED.), *A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA* (1792)(It was said to be "utterly unworthy of the talents of the distinguished compiler, omitting many important statutes, always in force, and inserting many others, which never were, and never could have been in force ...." IREDELL & BATTLE, *supra* 100, at xii);

Pennsylvania: *THE REPORT OF THE JUDGES OF THE SUPREME COURT OF THE PENNSYLVANIA OF THE ENGLISH STATUTES, WHICH ARE IN FORCE IN THE COMMONWEALTH OR PENNSYLVANIA; AND OF THOSE OF THE SAID STATUTES WHICH, IN THEIR OPINION, OUGHT TO BE INCORPORATED INTO THE STATUTE LAWS OF THE SAID COMMONWEALTH REPORTED ON THE 19<sup>TH</sup> AND 20<sup>TH</sup> OF DECEMBER 1808* (1808); SAMUEL ROBERTS, *A DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH ... APPEAL TO BE IN FORCE, IN PENNSYLVANIA* (1817) (2<sup>d</sup> ed. by Robert E. Wright, 1847). *See also*, HUGH HENRY BRACKENRIDGE, *Note: Introductory to the Report of the Judges on the British Statutes in Force, &c.* [By an act of Assembly of April 7, 1807] in *LAW MISCELLANIES ....* 39 (1814).

<sup>136</sup> WILLIAM SCHLEY, *A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA; ... xvii-xviii* (1826) ("hence the ignorance of many in regard to this branch of our laws, which was as much out the reach of the people, as were the laws of.").

<sup>137</sup> *REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF 7* (1837).

<sup>138</sup> Professor Stoner quoting this passage observes: "To the modern reader, this sounds so qualified as to sever all relation, but Story is merely writing with his customary precision."

exhaustive examination of early court records and printed records, it's difficult to reach definitive conclusions. Suggestive that there was not much is the absence of English common law volumes counterpart to the collections of applicable British statutes.<sup>139</sup> On the other hand, the absence may simply be indicative of uncertainty.<sup>140</sup> In any case, by 1841 the *United States Magazine and Law Review* had had enough. It regretted any carryover of English law: the Founders "should have declared their independence not only of the government, but of the laws of the mother-country."<sup>141</sup>

Whatever was the extent of carryover of English 18<sup>th</sup> century common substantive law, that carryover does not validate contemporary common law myth of lawmaking judges. At the beginning of the New Republic, common law, whether English or American, if there was such, was understood to be a pre-existing body of rules that judges *discovered* and did not *create*. Judges declared law; they did not make it, so the judges said. Judges found law in long-existing customs, in statutes and in statute-like common law writs. They "pretended" that common law consisted of statutes "worn out by time, their records having been lost."<sup>142</sup> The reports of their decisions were merely evidence of the law and not the law.<sup>143</sup> What Professor Stoner calls "The Great Transformation" to today's world of judges as lawmakers did not come until the second century of

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JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 14 (2003).

<sup>139</sup> According to Cook, "Regrettably, no one has attempted to compile a list of received common law rules." CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 12 (1981). Thanks to digitization, I found one nominal exception: CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY, TO WHICH IS PREFIXED A BRIEF SUMMARY OF THE LAWS OF THE UNITED STATES (1822).

<sup>140</sup> See SCHLEY, *supra* note 136, at xvii-xviii (1826) Schley lamented that he could not provide the same service for common law: "But the common law is still in some measure unattainable by the people, being as it is, a collection of immemorial customs which are not written like the statute law, but handed down from one generation to another, by the decisions of the court of justice, which are said to be the evidence of the common law, and preserved in the various books of reports and elementary treatises, written by men who have made this subject their particular study. This branch of law then, from its nature, is not susceptible of being placed in a *tangible* form and handed to the people like the statute law; and therefore the General Assembly by giving us the following statutes, have done all they have power to do, unless, indeed, they should be disposed to new model our whole system of jurisprudence, and present us with a new code, *a la mode du code Napoleon*." [Emphasis in original].

<sup>141</sup> *Edward Livingston and His Code, Second Article*, 9 U.S. MAG. & DEMOCRATIC REV. 211, 212 (1841). The article continued: "In consenting to adopt the Common Law as the rule of their civil existence, they brought upon themselves a vast and complicated system, which every year would render more cumbersome and intricate, and demonstrate its utter want of congeniality with the institutions they were about to establish, and the popular spirit and manners destined to grow up under their influence." *Id.*

<sup>142</sup> See WALKER, *supra* note 124, at 53.

<sup>143</sup> See generally, *id.* at 53; WILLIAM G. HAMMOND, *Not Delegated to Pronounce a New Law but to Maintain and Expound the Old One*, (note 30) in 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ... EDITED FOR AMERICAN LAWYERS 213-226 (William G. Hammond, ed., 1890); EUGENE WAMBAUGH, THE STUDY OF CASES 75-80 (2<sup>d</sup> ed., 1894); see also STONER, *supra* note 138, at 3 and 11.

the Republic. Stoner dates it to the publication in 1881 of Oliver Wendell Holmes book, *The Common Law*.<sup>144</sup>

Development of contemporary common law could hardly have come much sooner. The prerequisites were lacking. Common law pleading and the lack of modern common law bibliographic tools stood in the way. The system of common-law pleading used in England, and when copied in America, discouraged lawyers from urging judges to make law. Pleadings had to make a single issue of law or of fact determinative of the court's decision. If they sought to make new law through interpretation and failed, they lost the case.<sup>145</sup> Wise pleaders would seek to make new law only when absolutely necessary and then still describe the decision sought as applying old law. Moreover, much "new law" that courts made worked not to reform substantive law and justice, but to expand their own jurisdiction.<sup>146</sup>

#### IV. BUILDING A GOVERNMENT OF LAWS

A government of laws rests on institutions. In the first century of the Republic Americans looked to written laws—constitutions and statutes—to build those institutions. They adopted statutes to guide society. They taught their children and each other about those statutes. They used those statutes—without judicial intervention—to apply law.

##### A. A CENTURY OF WRITTEN CONSTITUTIONS

Before there was the Declaration of Independence there was what Professor Gordon S. Wood calls "the real declaration of independence": the resolution of the Second Continental Congress of May 10 and 15, 1776 authorizing and encouraging the states—then still colonies—to create new governments and state constitutions.<sup>147</sup> The Founders were serious about creating a government of laws.

By 1780 all but two states (Connecticut and Rhode Island) had followed the recommendation of the Continental Congress and had adopted written constitutions. Americans did not stop adopting constitutions then. In 1782 they

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<sup>144</sup> STONER, *supra* note 138, at 25-29. *See also*, Vanderlinden, *supra* note \*\*, at 17-18.

<sup>145</sup> *Cf.*, THEODORE F.T. PLUCKNETT, *STATUTES & THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* 3-4 (1922) (observing of 14<sup>th</sup> century pleading, "there were circumstances under which a clever pleader would offer up ... puzzling points, for the simple reason that he had no better matter to advance. Judges, however, were men of plain common sense, and not infrequently put an abrupt end to such attempts to 'embarrass the court,' whereupon the ingenious pleader would immediately offer to take issue on some simple matter of fact.").

<sup>146</sup> *See, e.g.*, 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 43, 103, 107 (1768) (accepting as irrefutable plea that contract was made in England in order to give common law court over jurisdiction of civil law court). *See* Louisa Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE L. J.* 1, 5-9 (1990).

<sup>147</sup> GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 132 (1969).

adopted the Articles of Confederation and, when those Articles proved inadequate, in 1787 they convened to create the Constitution of the United States. When new states joined the Union, they adopted their own constitutions. When state constitutions fell behind the times, states amended or replaced them. In 1876, coincident with the centennial of independence, the United States Senate ordered publication of the states' constitutions to that date. The collection required two over-sized volumes of more than 2100 pages.<sup>148</sup> By 1887, the centennial of the drafting of the U.S. Constitution, by one count, the United States had adopted one hundred four state constitutions (including Connecticut and Rhode Island) and two hundred and fourteen partial amendments.<sup>149</sup> Americans in the first century of the Republic were serious about building governments of laws.

Conventional wisdom today, in the shadow of contemporary common law myth, holds that constitutional changes are a bad thing.<sup>150</sup> But in the nineteenth century amendments were thought to be essential for improvement.<sup>151</sup> Legal educator and judge George Sharswood may have had that in mind when in 1860 on the eve of the Civil War he wrote: "How sublime a spectacle it is to behold a great nation ... engaged peacefully and calmly in considering, and determining by the light of reason and experience those deeply interesting and exciting questions which in other countries and other ages not far remote were settled on the battle-field or in more terrific scenes of domestic revolution."<sup>152</sup>

In the decade of the 1860s, the United States adopted what has sometimes been called "the second constitution," *i.e.*, the Civil War amendments, the 13<sup>th</sup>,

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<sup>148</sup> THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, 2 vols., (Ben Perley Poore, compiler, 1877). Poore's collection was updated by THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA COMPILED AND EDITED UNDER THE ACT OF CONGRESS OF JUNE 30, 1906 BY FRANCIS NEWTON THORPE (7 vols. 1909). These volumes are searchable on a number of Internet sites.

<sup>149</sup> Henry Hitchcock, *American State Constitutions: A Study of Their Growth* 13-14 (1887).

<sup>150</sup> See Lawrence M. Friedman, *State Constitutions in Historical Perspective*, in STATE CONSTITUTIONS IN A FEDERAL SYSTEM, 496 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 33, 35 (1988). Conventional wisdom may be changing: leading jurists, including Supreme Court justices, have called for constitutional amendments in light of lawmaking failures. See, e.g., PHILIP K. HOWARD, *RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* 179-183 (2014) (proposing a "Bill of Responsibilities" consisting of five amendments); JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014); THOMAS E. BRENNAN, *THE ARTICLE V AMENDATORY CONSTITUTIONAL CONVENTION: KEEPING THE REPUBLIC IN THE TWENTY-FIRST CENTURY* (2014).

<sup>151</sup> JOHN ALEXANDER JAMESON, *THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS AND MODE OF PROCEEDING* § 81, 80 (3<sup>d</sup> ed., 1873). The first edition appeared in 1867; the 4<sup>th</sup> and last, in the centennial year of the U.S. Constitution, 1887. I cite the third edition as the one just before the 1876 Centennial. See Roman J. Hoyos, *A Province of Jurisprudence?: Invention of a Law of Constitutional Conventions*, in *LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE* 81 (Angels Fernandez and Markus D. Dubber, eds., 2012).

<sup>152</sup> SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, Vol. 4, 443 n. 4, 646 (George Sharswood ed., 1860).

14<sup>th</sup> and 15<sup>th</sup> amendments.<sup>153</sup> They (finally) abolished the scourge of slavery from the country. But the United States had to settle these issues on the battlefield.

At century's end, in 1897 James Schouler, newly elected president of the American Historical Association and law treatise writer, in his inaugural address, proposed "A New Federal Convention" to change the Constitution. Schouler contrasted the absence of "constructive statesmanship" in the federal constitution with amendments of state constitutions where one could see "American ingenuity still at work." He proposed that the convention consider, among other issues, "improved modes of federal legislation."<sup>154</sup>

In the 19<sup>th</sup> century Americans used constitutional conventions to change their framework laws. Constitutional conventions were so common—192 by 1876—that John Alexander Jameson wrote a 684-page treatise on their "history, powers and modes of proceeding." His book appeared in four editions from 1867 to 1887.<sup>155</sup> At a time of general legislative stinginess, the people or their representatives repeatedly brought expensive conventions into being.

There was a less-expensive alternative: unwritten constitutions—a mix of judge-made law and interpreted statutes—as was the case in England. Yet in the United States, all constitutions save two in early Connecticut and Rhode Island have been written. Why? According to Jameson for the same reasons that one might prefer statute law to common law. "Precisely the same distinction exists between written and unwritten Constitutions":

An unwritten Constitution is made up largely of customs and judicial decisions, the former more or less evanescent and intangible ...; and the latter composing a vast body of isolated cases having no connecting bond but the slender thread of principle running through them, a thread often broken, sometimes recurrent, and never to be estimated as a whole but by tracing it through its entire course in the thousand volumes of law reports.<sup>156</sup>

"Not so with written Constitutions," he continued. Such constitutions are "statutes merely." Like well-written statutes, they can reduce the ground for interpretation; they cannot and should not eliminate all interpretation. "The field thus provided for construction," Jameson wrote, "though infinitely narrower than in unwritten Constitutions, is still ample, for a Constitution can only deal in generalities, whereas its application to particular cases is precisely that which must daily be determined."<sup>157</sup>

In discussing the difference between applying a written constitution and applying an unwritten one, Jameson made a perceptive point that pertains

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<sup>153</sup> See, e.g., GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* (2007); JAMES R. STONER, JR., *COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 1* (2003).

<sup>154</sup> James Schouler, *A New Federal Convention*, *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION* 19, 24, 28 (1898), also separately printed and so available on Google, and reprinted in JAMES SCHOULER, *IDEALS OF THE REPUBLIC* 289 (1908).

<sup>155</sup> The count is from the fourth edition of JAMESON, *supra* note 151 at 655.

<sup>156</sup> JAMESON, *supra* note 1151, at 76.

<sup>157</sup> *Id.*

equally to the difference between applying statute and case law. Applying unwritten law adds an extra and difficult step: “the duty of those who construe a written Constitution is merely, first, to ascertain the meaning of the general clause of it covering the case; and, secondly, to determine its application to the particular facts in question.” In interpreting an unwritten constitution, “this inquiry must be prefaced by another still more difficult [task] ...; it first inquires what the terms of the law are and then proceeds to determine their meaning and application.”<sup>158</sup> That extra step undercuts self-application of law.

Jameson saw written constitutions as inhibiting judge-made law: “If judicial legislation is an evil, written Constitutions are clearly barriers in the way of its progress.” But “how far are they advantageous on the whole?”<sup>159</sup> He agreed with Jefferson that an important benefit is that “they fix... for the people the principles of their political creed.”<sup>160</sup> He saw the major drawback in inflexibility of amendment. Constitutions required efficient mechanisms for amendment, which are neither too restrictive nor too lax.<sup>161</sup>

### B. A CENTURY OF CONSTITUTIONAL CONVENTIONS

State constitutions are just one place to look for American views of statute law and common law. The debates that gave rise to them are goldmines for exploring American legal culture.<sup>162</sup> People cared about their constitutions. In Pennsylvania they cared so much that they published the proceedings of the convention begun in 1837 in fourteen volumes in English *and* in an additional fourteen volumes in German translation!<sup>163</sup> Use of written or unwritten law arose in such disparate issues affecting legal methods as incorporation by reference of foreign law,<sup>164</sup> constitutional mandates for codification of state laws,<sup>165</sup>

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<sup>158</sup> *Id.* at 77.

<sup>159</sup> *Id.* at 78.

<sup>160</sup> *Id.* at 78 (quoting Letter to Dr. Priestly, 4 *Works* at 441).

<sup>161</sup> *Id.* at 80-81.

<sup>162</sup> *Cf.*, WILLIAMJAMES HULL HOFFER, *TO ENLARGE THE MACHINERY OF GOVERNMENT: CONGRESSIONAL DEBATES AND THE GROWTH OF THE AMERICAN STATE, 1858-1891* x (2007) (“one finds a treasure trove of thinking about the nature and function of government embedded in the debates on particular pieces of legislation.”). See James R. Maxeiner, *Bane of American Forfeiture Law: Banished at Last?*, 62 *CORNELL L. REV.* 768 (1977) (using Congressional debates over the Civil War confiscation acts to gain insights into contemporary forfeiture law).

<sup>163</sup> *PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION COMMENCED AND HELD AT HARRISBURG ON THE SECOND DAY OF MAY, 1837* (John Agg, compiler, 14 vols. 1837-1839), hereafter *PENNSYLVANIA 1837-1839 PROCEEDINGS, published in German as VERHANDLUNGEN UND DEBATTEN DER CONVENTION DER REPUBLIK PENNSYLVANIEN UM VERBESSERUNGEN ZU DER CONSTITUTION VORZUSCHLAGEN, ANFANGEN UND GEHALTEN ZU HARRISBURG, AM ZWEITEN MAI, 1837* (14 vols., 1837-1839).

<sup>164</sup> Thoroughly researched with respect to English statutes in the pre-digital age is ELIZABETH GASPARD BROWN, *BRITISH STATUTES IN AMERICAN LAW 1776-1836* (1964). Several Constitutions incorporate by reference English common law and statutes up to a particular time. Louisiana constitutions have prohibited adoption of foreign law. See text at 220-21, *infra*.

<sup>165</sup> See text at 232-34, *infra*.

length of legislative terms,<sup>166</sup> judicial life tenure,<sup>167</sup> election of judges,<sup>168</sup> and Supreme Court judges' circuit riding.<sup>169</sup>

Into these debates scholars today can dig from their desktops to uncover buried gold. The California Convention of 1849 is a particularly rewarding dig because contemporaries throughout the nation saw California government as a national achievement accomplished by the tens of thousands of Americans from around the country who settled California in only two years. Looking back in 1881 legal educator William G. Hammond recalled: "That wonderful state was the first to grow up to full maturity almost in a night and to create a judiciary, a bar, and the entire organization of the state government, of men suddenly brought together from all parts of the continent."<sup>170</sup>

Reading the 1849 California debates one finds nuggets. One is whether the California constitution should incorporate, in deviation from the English common law rule, the then new rule of modern American statutes of separate property for married women. Conditions in California made the issue ripe for challenge since existing law was not the English common law of coverture (no separate property) but the Mexican civil law (of separate marital property rights).

One proponent of separate property promoted it as one of "many excellent provisions in the civil law" that had been the "law of the land" under which

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<sup>166</sup> See text at 232-34, *infra*.

<sup>167</sup> E.g., 10 PENNSYLVANIA 1837-1839 PROCEEDINGS, *supra* note 163, at 195-204 (remarks of Mr. Read) (arguing that life tenure had not worked well, gave judges "despotic power," allowed them to "change the law according to their own caprice," at 201; permitted them to "unblushingly avow their determination to *make law*" and disregard "the plainly expressed intention of the *legislature*, at 202; and leading to "a glaring usurpation of legislative power," at 203).

<sup>168</sup> *Id.* at 159, 162 (Remarks of Mr. Biddle) (arguing that election of judges would threaten "that uniform and consistent symmetry, which should exist in a system of laws, and which is so essential in the administration of justice.").

<sup>169</sup> E.g., REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN. 1850, at 640 (1850) (remarks of Mr. Goodwin) (arguing against the asserted benefits of judges of the Supreme Court holding local circuit courts to obtain popular sentiment: "The application and construction of the laws and the construction of statutes are neither of them to be determined or aided by popular sentiment and popular impulses, as has been in fact suggested. The interpretation of statutes is to be ascertained from the statutes themselves, and those rules of construction which reason and good sense have established; and the rules of the common law are to be determined by the investigation of its principles and reasons, in reports and other books of authority, and the exercise of sound judgment in their application to facts as they are presented, and circumstances as they arise in the progress of things. The judges are not to make the law, but to determine what it is, and apply it to the case presented.").

<sup>170</sup> WM. G. HAMMOND, AMERICAN LAW SCHOOLS IN THE PAST AND IN THE FUTURE 5 (1881). Hammond elaborated: "Its law and practice were constructed from materials gathered in every state of the union." *Id.* It modeled its Constitution on the New York Constitution of 1846 and the Iowa Constitution of 1844. CARDINAL GOODWIN, THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA 1846-1850, at 230-46 (1914). California considered adoption of Civil Law, but chose "American common law." *Report on Civil and Common Law*, 1 REPORTS OF CASES ... IN THE SUPREME COURT OF THE STATE OF CALIFORNIA 588 (1851). In 1872 California adopted Field's five codes.

“native Californians” had “always lived.”<sup>171</sup> Another recommended it as a practical way to get women to immigrate to California: “It is the very best provision to get us wives that we can introduce into the Constitution.”<sup>172</sup> Still another attacked the English common law rule as having its origin “in a barbarous age;” in the “nice distinctions of the common law,” “the principle so much glorified” was “that the husband shall be a despot, and the wife shall have no right but such as he chooses to award her.”<sup>173</sup>

Advocates of English common law coverture countered: “we tread upon dangerous ground when we make an invasion upon that system which has prevailed among ourselves and our ancestors for hundreds and hundreds of years.”<sup>174</sup> They made a nationalist argument: “The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority.”<sup>175</sup>

Still others defended the substance of the English common law rule itself: “there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife. ... Nature did what the common law has done—put [wife] under protection of man.”<sup>176</sup>

Opponents made the methodological argument that it would be better to try the new rule as a statute that the legislature could revise or repeal if experiences were adverse.<sup>177</sup> Proponents of separate property used the debate over separate property to make their own methodological arguments against adopting English common law of any kind. One said: “Sir, I want no such system; the inhabitants of this country want no such system; the Americans of this country want no such thing. They want a code of simple laws which they can understand; no common law, full of exploded principles with nothing to recommend it but some dog latin, or the opinions of some lawyer who lived a hundred years ago.”<sup>178</sup>

In short, said this proponent of statute law: “They want something the people can comprehend.” He explained that: “the law is the will of the people properly expressed, and that the people have a right to understand their own will and derive the advantage of it, without going to a lawyer to have it expounded.”<sup>179</sup>

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<sup>171</sup> J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849 at 258 (1850) (remarks of Mr. Tefft).

<sup>172</sup> *Id.* at 259 (remarks of Mr. Halleck).

<sup>173</sup> *Id.* at 264 (remarks of Mr. Jones).

<sup>174</sup> *Id.* at 257 (remarks of Mr. Lippitt).

<sup>175</sup> *Id.* at 260-61 (remarks of Mr. Lippitt).

<sup>176</sup> *Id.* at 259 (remarks of Mr. Botts).

<sup>177</sup> *Id.* at 258 (remarks of Mr. Lippitt).

<sup>178</sup> *Id.* at 264 (remarks of Mr. Jones).

<sup>179</sup> *Id.* The speaker continued: “Where is this common law that we must all revert to? Has the gentleman from Monterey got it? Can he produce it? Did he ever see it? Where are the ten men in the United States that perfectly understand, appreciate, and know this common law? I should like to find them. When that law is brought into this House—when these thousand musty

One delegate, reared in common law religion, reacted in shock: “for the first time in my life, to hear the common law reviled; yes sir, that which has been the admiration of all ages ... has been in this House, this night, spoken of with contempt and derision.”<sup>180</sup>

The Convention voted with the proponents of statute law and against a substitute proposal that would have retained common law coverture.<sup>181</sup>

The married women’s property rights issue was not the only instance when the Convention weighed use of written versus unwritten law. It considered whether it had authority to appoint a commission of three persons to form a code of laws to be submitted to the legislature at its first session. In the end, it tabled the motion, but in consequence directed that the legislature meet every year and not every other year as the motion’s proponent favored.<sup>182</sup>

### C. A CENTURY OF STATUTES

A government of laws is a government of written laws, *i.e.*, statutes. Statutes are inevitable in modern government. Statutes are how modern societies democratically decide what they shall do. Statutes are how democracies inform people and guide their officials. Statutes are the people’s directions for modernization: they throw out the old and bring in the new. In the first century of the Republic statutes drove out English law; statutes gave the American people new and better rules.

#### 1. Necessity of Statutes

Were there only a constitution establishing a government, but no statutes to structure the government and to guide governing, there would be a government of men. Precedents cannot create institutions. Precedents can sometimes determine who was right in the past, where there is general agreement on what is right, but not what is better policy for the future. Precedents assume existing institutions; they cannot create new ones. Precedents assume consensus; they cannot legitimate commands where consensus is absent.

Written statutes are a corollary to written constitutions.<sup>183</sup> American legislatures lost no time adopting statutes. Virginia led in the New Republic thanks to Jefferson, but was not alone. Legislatures passed statutes on just about any

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volumes of jurisprudence are brought in here and we are told this is the law of the mass—I want gentlemen to tell me how to understand it. I am no opponent of the common law, nor am I advocate of the civil law. Sir, I am an advocate of all such law as the people can understand.”  
*Id.*

<sup>180</sup> *Id.* at 268 (remarks of Mr. Botts).

<sup>181</sup> *Id.* at 269.

<sup>182</sup> *Id.* at 76-82, 301-04, 322.

<sup>183</sup> *Cf.* TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW, DESIGNED AS A FIRST BOOK FOR STUDENTS (1<sup>st</sup> ed., 1837 (“our constitutional law has been codified to the admiration of the world, while that of England still remains unwritten, a heavy mass of doubtful precedents. ... Again, the criminal law both of the United States, and of our own state [Ohio], has been likewise codified.”). The last, 11<sup>th</sup> edition, appeared in 1905.

imaginable subject. By the 1840s, according to one civics text, “Almost every transaction of life is regulated by laws.”<sup>184</sup>

Written laws can be difficult of adoption. That is well recognized. Written laws are difficult of drafting. That is not so well recognized. The public assumes that it is easy to write good laws. Many lawyers, judges and academics share that false assumption. Many scholars outside law assume it is. They can dismiss a decision not to write new law on political grounds when, in fact, technical reasons or lack of manpower may stand in the way.

Legislation is more demanding than litigation. It is harder to make good laws than it is to decide individual cases, for in lawmaking one is deciding classes of cases for the future. Lawyers work with one case at a time. In counseling, they advise how they see the law in one or a handful of fact situations. In litigating, they argue for one view that they see as benefiting their client. Judges focus on one set of facts and the laws that might apply to it.

Good laws, on the other hand, make provision for not one case, but for all cases, even though lawmakers know that they cannot anticipate all cases. Good laws capture in a few understandable words what people are to do. Good laws are consistent internally and consistent with other laws. John Austin saw that this, “the technical part of legislation, is incomparably more difficult than what may be styled the ethical.”<sup>185</sup>

The “American Jurisprudence” essay of *The First Century of the Republic* cheerfully characterized organized American legislation as four tones sounding together to make the “common chord” of the “ear of 1876”: (1) divine authority underlying human law, (2) willingness to obey the present existing law, (3) confidence in ability to improve the forms and modes of law as growth warranted, and (4) a resolute purpose to make that improvement in due season.<sup>186</sup> The “Law in America: 1776-1876” essay of *The North American Review* affirmatively concluded that three headings captured how American law in the past century had progressed to become “(1) more simple, (2) more humane and (3) more adaptive.”<sup>187</sup>

*The First Century of the Republic* didn’t give details. Even in a single jurisdiction that would be impossible in a brief and accurate epitome. “In our country such difficulty is increased by the consideration that the law in all its details differs exceedingly in different States. ... Hence in matters of law it is not possible to give concise, simple answers, which shall be accurate, to even the simplest questions.”<sup>188</sup>

Each state had (and has) its own books of statutes and, eventually, its own books of reports. In 1876, *The First Century of The Republic* estimated, that just the volumes in then current use, including statutes, reports, treatises and

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<sup>184</sup> SAMUEL G. GOODRICH, *THE YOUNG AMERICAN: OR BOOK OF GOVERNMENT AND LAW; SHOWING THEIR HISTORY, NATURE, AND NECESSITY. FOR THE USE OF SCHOOLS.* 35 (8<sup>th</sup> ed., 1847).

<sup>185</sup> John Austin, *Codification and Law Reform*, in 2 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 1092, 1099 (5<sup>th</sup> ed., Robert Campbell, ed., 1885).

<sup>186</sup> *THE FIRST CENTURY OF THE REPUBLIC* at 434.

<sup>187</sup> *Law in America: 1776-1876*, 122 *NORTH AM. REV.* at 191.

<sup>188</sup> *Id.*

journals, counted more than three thousand volumes. That count took no account of the multitude of legislative materials appearing separately in small pamphlets and addressed again and again in successive revisions and reenactments.

The outpouring of legislative materials in America to 1876 already was enormous. In 1906 the State Library of Massachusetts published a “Hand-List” of statute law in which it made “the effort to record every legislative session and every volume containing session laws or revisions and compilations of law.” It disclaimed completeness. It chose to publish a “Hand-List” and not a catalogue, since the latter was foreclosed by time and cost. The *Hand-List* included only a few non-official materials, *e.g.*, contemporaneous or historic discussions of statutes. Yet, so limited, the list is more than six hundred pages long and includes more than 10,000 entries.<sup>189</sup>

Behind each entry is a statute—or more commonly several or even many statutes—to which a legislature devoted hours, days, weeks, months or even years of attention. One page of a statute, even a hastily drafted one, is likely to have required more human attention than one page of case report. Yet common law myth acknowledges only the latter and ignores the former.

## 2. Progress with Statutes

What did all these statutes address? In the first century of the Republic new statutes had two principal tasks: changing existing rules, often originating in England, and creating new rules to deal with a modern world.<sup>190</sup>

### *a. Replacing English Law with American Statutes*

It should be no surprise that Jefferson sought to get rid of English law.<sup>191</sup> American legislatures followed Virginia’s lead and by statutes overturned the heart of English common law: property law, criminal law and procedure. Here is a partial list:

- Statutes, not precedents, ended English common law tenures and created modern ones.
- Statutes, not precedents, abolished English common law coverture and created married women’s property rights.

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<sup>189</sup> STATE LIBRARY OF MASSACHUSETTS, HAND-LIST OF LEGISLATIVE SESSIONS AND SESSION LAWS, STATUTORY REVISIONS, COMPILATIONS, CODES, ETC., AND CONSTITUTIONAL CONVENTIONS (1912).

<sup>190</sup> Along similar lines, but asserting a dominant though not exclusive role for unwritten law, see E.W. [presumably Emory Washburn], *We Need a Criminal Code*, 7 AM. L. REV. 264 (1872) (“In a community like ours, whose chief characteristic may be said to be progress, new demands are constantly requiring to be supplied by new laws or modifications of old ones, where changes are steadily wrought in the body of the system, sometimes by legislation, and at others, far more frequently, by that all-pervading sentiment whose power courts recognize as one of the chief sources of a people’s unwritten law.”).

<sup>191</sup> Virginia by Act of December 27, 1792 ended application of British statutes that the revisal had not included in its text. HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, OLIVER WENDELL HOMES DEVISE HISTORY VOLUME II, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815, 562 (1981).

- Statutes, not precedents, ended English descents and created modern ones.
- Statutes, not precedents, ended English criminal law and created criminal codes.
- Statutes, not precedents, ended English criminal procedure and created counsel-based criminal trials.
- Statutes, not precedents, ended common law pleading and created code pleading.

In other words, Americans could look at their statutes with pride, as one Ohioan did: “if our legislation has been excessively variable and fluctuating ... it has at least the merit of doing away many of the abuses which have come down to us with the common law, by introducing simplicity in the place of technicality.”<sup>192</sup>

*b. New Rules for a Modern World*

Getting rid of old law alone was not enough to create the new American order that rapid changes in life the 19<sup>th</sup> century demanded. The first century of the Republic required new laws. Early in the 19<sup>th</sup> century America began making new laws needed for a modern economy of national travel, fast communication, mass production, national markets and national corporations, in which people could make their own choices. The Centennial Writers saw that. Common law myth, already in the early 20<sup>th</sup> century, held that Americans should thank judges for the “vast body of jurisprudence ... built up to meet these new and unexpected conditions of society.”<sup>193</sup> Modern American law was, according to the myth, “the work of the judges and the lawyers, aided or interfered with only occasionally by statutory provisions.”<sup>194</sup> Yesterday’s myth is today’s conventional wisdom. One text writes, “Antebellum judges dethroned the English common law by Americanizing it.”<sup>195</sup> A noted monograph takes as its point of departure: “Especially during the period before the Civil War the common law performed as great a role as legislation in underwriting and channeling economic development.”<sup>196</sup>

That was not the view of the Centennial Writers.<sup>197</sup> It was not the view of a leading common law proponent a century ago. In 1908, Harvard Law School,

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<sup>192</sup> *Ohio Legislation*, 11 AM. JURIST & L. MAG. 91, 100 (1834).

<sup>193</sup> William B. Hornblower, *A Century of Judge-Made Law, Address Before the School of Law of Columbia University, June 16, 1907*, 7 COLUMBIA L. REV. 453 (1907).

<sup>194</sup> *Id.* For an extreme statement from the 20<sup>th</sup> century, see J.A. Corey, *Book Review*, 9 CANADIAN J. ECONOMICS & POL. SCI. 265, 266 (1953) (there was “only an infinitesimal amount of law-making by legislatures until after the middle of the nineteenth century”).

<sup>195</sup> KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 109 (1989). In the posthumous second edition of Hall’s work (2008), successor author Peter Karsten deletes the quoted sentence and writes instead “To a certain extent, American jurists in the first century of the ‘new nation’ altered or ‘Americanized’ some English common law.”

<sup>196</sup> MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 1 (1977).

<sup>197</sup> See *THE FIRST CENTURY OF THE REPUBLIC* at 451-52 (a “Brief Retrospect” listing many areas where America had achieved “systems of laws.”).

basking in the teaching triumph of the case method, was the epicenter of emerging American common law myth. Yet Cambridge icon Professor Charles Warren in discussing “The New Law: 1830-1860” in his semi-official history of Harvard Law School, even as he paid homage to the role of common law, gave first credit and greater attention to “the simplification of the law by codes and statutory [*sic*] revisions, *for the benefit of laymen as well as lawyers.*”<sup>198</sup>

In twenty of twenty-five pages in his *New Law* chapter, Warren catalogued changes in fifteen areas of law: mill act and watercourse law, the law of torts, telegraph law, gas corporation law, street railway law, grain elevator law, insurance law, patent law, copyright law, trademark law, insolvency and bankruptcy law, labor law, married women, criminal law, and the law of evidence. In each of these entries, judges appear as handmaidens to statutes, if they appear at all. Expanding on Warren’s list and considering the reports of the Centennial writers, the following seem to be true:

- Statutes, not precedents, created the post office and provided for carrying the mails.
- Statutes, not precedents, created corporations.
- Statutes, not precedents, created common schools, and provided for educating children.
- Statutes, not precedents, governed distribution of public lands.
- Statutes, not precedents, created state land-grant colleges.
- Statutes, not precedents, regulated trade in alcohol and explosives, sometimes controversially (“license laws”).
- Statutes, not precedents, guarded the public health, *e.g.*, authorized quarantines.
- Statutes, not precedents, regulated navigation and merchant seamen.
- Statutes, not precedents, created taxes and provided for tax collection.
- Statutes, not precedents, created new government offices.
- Statutes, not precedents, created election laws.
- Statutes, not precedents, created protections for civil rights.
- Statutes, not precedents, governed immigration.
- Statutes, not precedents, infamously constrained internal emigration (fugitive slave laws).
- Statutes, more than precedents, regulated and protected the public in steamboat and railroad traffic.
- Statutes, more than precedents, regulated and protected the public in markets.

America could and did legislate. The first century of the Republic and its *Golden Age of American Law*<sup>199</sup> was itself an “Age of Statutes.”

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<sup>198</sup> *Id.* at 234 [emphasis added].

<sup>199</sup> *Cf.*, CHARLES M. HAAR (ED.), *THE GOLDEN AGE OF AMERICAN LAW [1820-1860]* (1965).

#### D. A CENTURY OF COMMON SCHOOLS

Contemporary common law myth holds that following the American Revolution “The content and method of the common law were absorbed into American social culture and have never been displaced.”<sup>200</sup> Modern legal historians claim that “It was as clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social or political, was largely to be determined by judges.”<sup>201</sup> Digitization challenges the idea that the American people preferred common law rules and judge-made law over statutes.

As already discussed, digitization demonstrates that the people through their legislatures discarded the content of common law, *i.e.*, property law, criminal law and procedure. Digitization discloses no public demand for common law. Where would one look to find common law incorporated in the social culture? One should not look in pre-digital law libraries with their endless rows of unread case reports and dry treatises. One might better look in ephemeral popular works of the 19<sup>th</sup> century retained in only a few public or university libraries, but now largely available through digitization. If common law and judge-made law really were absorbed into American social culture in our first century, one would expect to find them in the works through which Americans’ ancestors passed on their governmental culture to the next generation: civics texts, patriotic addresses, popular political works and the like. One doesn’t. Those works, by and large, passed on a culture of a government of laws not of precedents.

##### 1. Common Schools

American public schools—first called common schools—are largely an innovation of the first fifty years of the 19<sup>th</sup> century. Beginning already in colonial times in Massachusetts, they gradually spread throughout the land. Jefferson made the establishment of public schools a central part of his Revisal. Slave states were slower than were free states in making public education available. Civics had a central role in the newly-established common schools. The American Revolution was about self-governing. Since the Revolution Americans have taken interest in providing for the education of the people in the workings of their government. James Wilson reports that already the first assembly of Pennsylvania adopted an act “for teaching the laws in the schools.”<sup>202</sup>

##### 2. Civics Texts for Common Schools

American civics texts date to the introduction of universal public education

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<sup>200</sup> Graham Hughes, *Common Law Systems*, in NEW YORK UNIVERSITY SCHOOL OF LAW, FUNDAMENTALS OF AMERICAN LAW 9, 12 (Alan Morrison, ed. 1996).

<sup>201</sup> HORWITZ, *supra* note 196, at 2 (quoting Mark De Wolf Howe, *The Creative Period in the Law of Massachusetts*, 69 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 237 (1947-1950)).

<sup>202</sup> 1 WILSON, *supra* note 95, at 420.

in the first half of the nineteenth century.<sup>203</sup> They were central to achieving the mission of the newly forming common schools, *i.e.*, public schools: to educate youth as private citizens who would in public life take responsibility for government and administer its laws.<sup>204</sup> When in 1819 New York promoted public schools, the state's Superintendent of Common Schools recommended that the "course of study in every well organized common school, ought to embrace ... "the history of our own country, its constitution and form of government, the crimes and punishment which form our criminal code, and such parts of our civil jurisprudence as every man in his own daily intercourse with the world, is concerned to know."<sup>205</sup> In laying out his plans, he lamented that there was yet no proper book for this. He expressed hope that soon a "suitable" one would be available. It took more than a decade for his hope to be fulfilled, but by the 1830s there were a dozen or more candidates for common schools to choose from.<sup>206</sup> In the 1840s yet another dozen or so came on the market.<sup>207</sup> Some of these and new similar books provided America's civics texts to 1876.

These books do not teach common law content or judge-made law.<sup>208</sup> These books do teach a government of laws, not of men. They instruct in legislation not litigation. Their laws are statutes not precedents. One of the first of the then new books, Arthur J. Stansbury's *Elementary Catechism on the Constitution of the United States for the Use of Schools* (1828) boasts: "Let every youthful American exult that he has no master but the law."<sup>209</sup> *The Young American* (first edition, 1842), written by S.G. Goodrich, author of the popular Peter Parley children's books series, uses illustrations to show the progress from the customs of "The Savage State" to the written laws and civil government of "The Civilized State." The book explains the alluring illustrations:

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<sup>203</sup> Of his proposals for new legislation in his Revisal, Jefferson was especially proud of his bills for "the more general diffusion of knowledge." Jefferson wanted to establish universal public schooling. His bill for public education was an American model for a generation.

<sup>204</sup> INSTRUCTIONS FOR THE BETTER GOVERNMENT AND ORGANIZATION OF COMMON SCHOOLS, PREPARED AND PUBLISHED PURSUANT TO A PROVISION IN THE ACT FOR THE SUPPORT OF COMMON SCHOOLS, PASSED APRIL 12, 1819, at 3, 6 (Gideon Hawley, Superintendent of Common Schools, 1819).

<sup>205</sup> *Id.* at 4.

<sup>206</sup> Authors included: Arthur J. Stansbury (1828), Alexander Maitland (1829), Andrew Yates (1830), William Sullivan (1831), Samuel C. Atkinson (1832), William Alexander Duer (1833), Edward D. Mansfield (1834), Joseph Story (1834), Francis Fellowes (attributed, 1835), John Phelps (1835), Andrew W. Young (*Introduction to the Science of Government*, 1835), Alfred Conkling (1836), and Marcius Willson (1839). Young's book had more than twenty editions.

<sup>207</sup> Following in the 1840s came new books by James Bayard (1840), Joseph Story (1840), A. Potter (1841), S.G. Goodrich (3<sup>d</sup> ed. 1843), Charles Mason (1843), Andrew W. Young (*First Lessons in Civil Government*, 10<sup>th</sup> ed. 1843), Thomas H. Burrows (1846), J.B. Shurtleff (1846), Daniel Parker (1848), and Joseph Bartlett Burleigh (1849).

<sup>208</sup> Because these have little entered the legal discussion, I detail them more than other primary sources of this article.

<sup>209</sup> J. STANSBURY, ELEMENTARY CATECHISM ON THE CONSTITUTION OF THE UNITED STATES FOR THE USE OF SCHOOLS 18 (1828).

Among savages, there are no written or printed laws. The people have certain customs and if disputes arise, they are settled according to these. ...

[Barbarous states] are still without books in general use, without education among the people at large, without printed laws....

[In Civilized States] laws are enacted to secure to each individual the acquisition of his labor, skill and exertion.<sup>210</sup>

A consistent theme of the civics texts is that governments and written laws are essential features of society. Goodrich's text is explicit already in its subtitle: *Book of Government and Law: Showing Their History, Nature and Necessity*. The other books are no less explicit in their texts. William Sullivan's *Political Class Book* (1830) teaches that "[a]n extensive and varied society ... *could not go on* without established laws, and a faithful observance of them."<sup>211</sup> Andrew White Young's *Introduction to the Science of Government* (first edition, 1835), the book most frequently issued, teaches that "government and laws are necessary to social beings," and warns that "[w]ithout laws, there would be no security to person or property; the evil passions of men would prompt them to commit all manner of wrongs against each other, and render society, (if society can be said to exist without law,) a scene of violence and confusion."<sup>212</sup>

Government is by statutes. That was textbook learning. Goodrich's text explains:

The system or form of government of the United States, is prescribed in a written constitution, sanctioned by the people. The statutes are the laws enacted by congress, agreeably to this constitution. The administration consists of the president of the United States, his secretaries, &c.<sup>213</sup>

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<sup>210</sup> GOODRICH, *supra* note 184, at 14, 15, 22. This is the edition available on Google Books and appears to be the last. The first edition is from 1842.

<sup>211</sup> WILLIAM SULLIVAN, *POLITICAL CLASS BOOK: INTENDED TO INSTRUCT THE HIGHER CLASSES IN SCHOOLS IN THE ORIGIN, NATURE, AND USE OF POLITICAL POWER. WITH AN APPENDIX UPON STUDIES FOR PRACTICAL MEN; WITH NOTICES OF BOOKS SUITED TO THEIR USE* BY GEORGE B. EMERSON 19 (1830).

<sup>212</sup> ANDREW W. YOUNG, *INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND CIVIL JURISPRUDENCE; COMPREHENDING A GENERAL VIEW OF THE GOVERNMENT OF THE UNITED STATES AND OF THE GOVERNMENT OF THE STATE OF NEW YORK: TOGETHER WITH THE MOST IMPORTANT PROVISIONS IN THE CONSTITUTIONS OF THE SEVERAL STATES ADAPTED TO PURPOSES OF INSTRUCTION IN FAMILIES AND SCHOOLS* 18, 20 (2<sup>d</sup> ed. 1836). This is the version available on Google Books. The first edition's title from 1835 shows even better that it was teaching a world of written law. Its title: *INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND STATUTORY LAW*. The book went through at least twenty-five editions.

Young may have conquered the market. He subsequently brought out a book for younger students (age 10) and books for older students. The latter included one on comparative government and several books on political history for older students. One book was marketed nearly twenty-five years after his death in 1877. *THE GOVERNMENT CLASS BOOK: A MANUAL OF INSTRUCTION IN THE PRINCIPLES OF CONSTITUTIONAL GOVERNMENT AND LAW* (1901 ed. by Salter S. Clark).

<sup>213</sup> GOODRICH, *supra* note 184, at 22.

Other texts likewise teach that a government of laws is a rule of laws that guides ruled and rulers alike. So J.B. Shurtleff's *The Governmental Instructor* (first edition 1845) instructs "[i]n order to aid the chief ruler in ruling in accordance with the wishes of the people, most nations, in modern times, have adopted a *Constitution* and *Code of Laws*, which they have bound themselves to obey, and by which the ruler has bound himself to govern."<sup>214</sup>

A law is a legislatively adopted statute. Later editions of Young's text put it this way: "Law, as the word is generally used, has reference to the government of men as members of the body politic; and signifies an established rule, prescribed by a competent authority in the state, commanding what its citizens are to do, and prohibiting, what they are not to do."<sup>215</sup> John Phelps' *The Legal Classic* (1835) teaches: "Law is the work and the will of the legislature in their derivative and subordinate capacity."<sup>216</sup> Charles Mason's *Elementary Treatise* (first edition 1842) similarly says: "The office of the legislative department is to pass laws."<sup>217</sup> The people, through their representatives, make laws. The people must be able to understand laws, not only to follow them but to evaluate them. So Young's text explains the purpose of the book in its preface: "The power to make and administer the laws, is delegated to the representative and agent of the people; the people should therefore be competent to judge when, and how far, this power is constitutionally and beneficially exercised."<sup>218</sup> The texts worked to fulfill the goals expressed already in the Superintendent's 1819 report: "where the people are entrusted with the government of themselves, a knowledge of the constitution and form of government, under which they live, is necessary to enable them to govern with wisdom and to appreciate the blessings of their free and happy condition."<sup>219</sup>

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<sup>214</sup> J.B. SHURTLEFF, *THE GOVERNMENTAL INSTRUCTOR, OR A BRIEF AND COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE UNITED STATES, AND OF THE STATE GOVERNMENTS, IN EASY LESSONS, DESIGNED FOR SCHOOLS* (4<sup>th</sup> ed., 1846) [emphasis in original]. This is an edition available on Google Books. The first edition is from 1846; the last is from 1871. There was even an edition for German-language schools: *DER KLEINE STAATSMANN, ODER, EINE KURZE UND UMFASSENDE UEBERSICHT DER REGIERUNG DER VEREINIGTEN STAATEN UND DER STAATEN-REGIERUNGEN: AUF EINE LEICHT UND FASSLICHE ART DARGESTELLT ZUM GEBRAUCH FÜR SCHULEN* (New York, 1845).

<sup>215</sup> ANDREW W. YOUNG, *INTRODUCTION TO THE SCIENCE OF GOVERNMENT, AND COMPEND OF THE CONSTITUTIONAL AND CIVIL JURISPRUDENCE OF THE UNITED STATES WITH A BRIEF TREATISE ON POLITICAL ECONOMY. DESIGNED FOR THE USE OF FAMILIES AND SCHOOLS*, § 22, at 20 (19<sup>th</sup> ed., 1850).

<sup>216</sup> JOHN PHELPS, *THE LEGAL CLASSIC, OR, YOUNG AMERICAN'S FIRST BOOK OF RIGHTS AND DUTIES: DESIGNED FOR SCHOOLS AND PRIVATE STUDENTS* 27 (1835). This edition is available in Gale, *Making of Modern Law* series online in subscription or in print-on-demand.

<sup>217</sup> CHARLES MASON, *AN ELEMENTARY TREATISE ON THE STRUCTURE AND OPERATIONS OF THE NATIONAL AND STATE GOVERNMENTS OF THE UNITED STATES. DESIGNED FOR THE USE OF SCHOOLS AND ACADEMIES AND FOR GENERAL READERS* 27 (1842) This is an edition available on Google Books. There was a second edition in 1843.

<sup>218</sup> YOUNG, *INTRODUCTION*, 2<sup>d</sup> ed. 1835, *supra* note 212, at iii.

<sup>219</sup> *INSTRUCTIONS*, *supra* note 204, at 6. Fifteen years later a successor reported: "On our common schools we must rely to prepare the great body of the people for maintaining inviolate

It is the duty of citizens to learn the laws and the duty of the legislature to write laws that citizens can observe. So Sullivan's text teaches youth: "Our first duty then, is, to use the gift of reason in learning the laws which are prescribed to us."<sup>220</sup> Young's text comforts youth that they can do it: "[man's] reason enables him to understand the meaning of laws, and to discover what laws are necessary to regulate human action."<sup>221</sup> Mason's book stresses the importance of the legislature providing comprehensible rules: "As laws are established to be the rules of action, they ought to be expressed in the most clear and intelligible form."<sup>222</sup> Alfred Conkling's *The Young Citizen's Manual* (first edition 1836) lauds the New York legislature for having done so in the criminal code of the 1829 Revised Statutes: "One of the great excellencies of this branch of our written laws, consists in the brevity and precision of language in which it is expressed."<sup>223</sup>

Statutes are nothing to fear. Long before American lawyers spoke of "statutorification" textbook writers identified the phenomenon, its cause and its solution. Goodrich tackled the issue head on. The phenomenon was "the law is seen to be everywhere, upon the land and the sea in town and country."<sup>224</sup> The cause of our numerous laws is "[w]hensoever any evil arises, or any great good is desired, the law-makers seek to avert the one and secure the other by legislation, if it is within their proper reach."<sup>225</sup> The solution is, not to deny statutes, but to deal with them: adopt just statutes, systematize them and enforce them. It explained:

In a civilized society, the laws are numerous, and as each law is an abridgment of some portion of absolute liberty, would be taken away. But still, it appears that all liberty, essential to happiness, is compatible with a complete system of laws; and in fact where the laws are just, and most completely carried into effect, there is the greatest amount of practical liberty.<sup>226</sup>

The texts teach separation of powers. Stansbury's book states the division. "[Legislators] make the laws, while judges only explain and apply them."<sup>227</sup> Mason's text explains why we need judges and cannot depend on self-application alone: "To the judicial power it belongs to expound and enforce the laws.

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the rights of freemen." ANNUAL REPORT OF THE SUPERINTENDENT OF COMMON SCHOOLS, ASSEMBLY DOCUMENT NO. 8, JANUARY 7, 1835, at 34.

<sup>220</sup> SULLIVAN, *supra* note 211 at 17.

<sup>221</sup> YOUNG, INTRODUCTION, 2<sup>d</sup> ed. 1835, *supra* note 212, at 19.

<sup>222</sup> MASON, *supra* note 217, at 27.

<sup>223</sup> BEING A DIGEST OF THE LAWS OF THE STATE OF NEW YORK AND OF THE UNITED STATES, RELATING TO CRIMES AND THEIR PUNISHMENTS, AND OF SUCH OTHER PARTS OF THE LAWS OF THE STATE OF NEW YORK RELATING TO THE ORDINARY BUSINESS OF SOCIAL LIFE AS ARE MOST NECESSARY TO BE GENERALLY KNOWN; WITH EXPLANATORY REMARKS. TO WHICH IS PREFIXED, AN ESSAY ON THE PRINCIPLES OF CIVIL GOVERNMENT. DESIGNED FOR THE INSTRUCTION OF YOUNG PERSONS IN GENERAL AND ESPECIALLY FOR THE USE OF SCHOOLS 28 (2<sup>d</sup> ed. 1843). This edition is available on Google Books. The first edition was published in 1836.

<sup>224</sup> GOODRICH, *supra* note 184, at 12.

<sup>225</sup> *Id.* at 35.

<sup>226</sup> *Id.* at 31-32.

<sup>227</sup> STANSBURY, *supra* note 209, at 62.

... Laws would be very inadequate to the purpose for which they are designed, were there not some tribunal competent to decide authoritatively upon their meaning and application, and clothed with power to enforce and effectuate its decisions.”<sup>228</sup>

The texts leave little room for judges to make laws. None teaches it. Shetleff’s book warns: “If the *judicial* power absorbs or encroaches upon the executive or legislative, or if the *legislative* encroaches upon the executive or judicial, the result is as fatal to liberty as if the executive absorbed the judicial and legislative.” Why? Because “All the legislative or law-making power granted by the constitution of the United States, is vested in a congress.”<sup>229</sup> The elected representatives of the people make laws.

The civics texts saw that America was exceptional. But the young nation wasn’t exceptional because paternal common law judges guarded what they held to be citizens’ rights. It was exceptional because the people governed according to law. Stansbury’s text tells youth the story that they could see unfold in their later lives:

In the first place, consider how happy and how highly favored is our country, in having a system of government so wisely calculated to secure the life, liberty, and happiness of all its citizens. Had you lived or travelled in other parts of the world, you would be much more sensible of this, than you can possibly be without such an opportunity of comparing our lot with that of others. But, as your reading increases, particularly in history and in travels, you will be able to form a more just estimate of what you enjoy. When you read of the oppression which has been, and still is exercised, I do not say in Africa and Asia, whose inhabitants are but partially civilized—but even in the most enlightened countries of Europe; under absolute monarchs, a proud and rapacious nobility—a worldly, selfish, and ambitious priesthood—a vast and rapacious standing army, and a host of greedy officers of government; and then turn your eyes on your own happy home, a land where none of these evils has any place—where the people first make the laws and then obey them—where they can be oppressed by none, but where every man’s person’s property, and privileges are surrounded by the law, and sacred from every thing but justice and the public good; how can you be sufficiently grateful to a beneficent Providence, which has thus endowed our country with blessings equally rich and rare?<sup>230</sup>

Common schools taught liberty in laws of Americans’ making.<sup>231</sup>

So what did common schools teach of common law—the supposed fabric of their society? If the civic texts they used are any indication, they taught very little. The texts devote pages to legislation. None devotes pages, even sentences,

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<sup>228</sup> MASON, *supra* note 217, at 27.

<sup>229</sup> SHETLEFF, *supra* note 214, at 44.

<sup>230</sup> STANSBURY, *supra* note 209, at 76.

<sup>231</sup> *See, e.g.*, CONKLING *supra* note 223, at 19 (“strictly speaking, it was not civil liberty that they achieved. It was *National Independence*, and it was nothing more. It was the faculty of self-government—the privilege of framing a government for themselves and of making their own laws, instead of receiving laws from the king and parliament of Great Britain. It was a change from colonial dependence to a state of independency.”).

to common law method of making law while applying it. There are only a few thin threads of the common law in the nation's fabric. Most of the texts give common law no more than a dozen or two mentions. These mentions are of two sorts. The one is to show how Americans have overcome common law through written law. Even Justice Story's text, which is the one book to address common law in detail and with favor, relates how Congress abolished the common law of treason with its "savage and malignant refinements in cruelty."<sup>232</sup> Another type of mention is to show how Americans must rely on common law to define certain terms used in the Constitution or in other written laws, *e.g.*, impeachment,<sup>233</sup> murder.<sup>234</sup> In other words, common law provides a kind of vocabulary. Occasionally, it fills in gaps, for example, when New York repealed the age of consent for marriage.<sup>235</sup> Most texts make no more than passing mention of the carryover of common law to the American colonies. English common law is only an interim measure. Only three of the ante-bellum texts identified address common law as a topic in any sense to which a class might devote time; only one—that by Justice Story—provides the foundation for a class session. And that class would be largely historical.

Sullivan's text asks the question: "What is the Common Law?"<sup>236</sup> It answers with a paragraph of text, explains common law's basis in English custom, its use to define terms and identifies as its principal role to prescribe "the rules of proceeding in a great majority of all the cases, civil and criminal, which are tried in our courts."<sup>237</sup> This text, by a lawyer, is the only one to even mention the concept of precedent: it does that in a single sentence.<sup>238</sup> Sullivan's text is neither an endorsement of past common law nor of its then present direction of procedure, nor any basis for creating a new common law, substantive or procedural.<sup>239</sup>

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<sup>232</sup> JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES WITH AN APPENDIX AND GLOSSARY. THE SCHOOL LIBRARY PUBLISHED UNDER THE SANCTION OF THE BOARD OF EDUCATION OF THE STATE OF MASSACHUSETTS § 211, 124 ("The offender is to be drawn to the gallows on a hurdle; hanged by the neck, and cut down alive; his entrails taken out, and burned while he is yet alive; his head cut off; and his body quartered. Congress are intrusted with the power to fix the punishment, and have, with great wisdom and humanity, abolished these horrible accompaniments and confined the punishment simply to death by hanging.").

<sup>233</sup> *E.g.*, WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES: DESIGNED AS A TEXT BOOK FOR LECTURES, AS A CLASS BOOK FOR ACADEMIES AND COMMON SCHOOLS, AND AS MANUAL FOR POPULAR USE 89 (1833).

<sup>234</sup> *E.g.*, SULLIVAN, *supra* note 211, at 31.

<sup>235</sup> *E.g.*, CONKLING, *supra* note 223, at 111.

<sup>236</sup> SULLIVAN, *supra* note 211, at ix.

<sup>237</sup> *Id.* at 30-31.

<sup>238</sup> *Id.* at 37 (explaining why citizens should be interested in exercise of the judiciary power, it notes that "the principle on which the case is decided, may form a precedent affecting his interests materially.").

<sup>239</sup> See WILLIAM SULLIVAN, AN ADDRESS TO THE MEMBERS OF THE BAR OF SUFFOLK, MASS. AT THEIR STATED MEETING OF THE FIRST TUESDAY OF MARCH, 1824 (1825) (63 page address on history of the profession and legal methods by author of the text.).

The second of the three is one of Young's later civics texts, a longer and denser text than his *Introduction*. Designed for senior students and adults *The Citizen's Manual* adds materials on foreign governments, international law, practical substantive law, and parliamentary procedure. It reports on sixteen areas of substantive laws under the title "Common and Statutory Laws."<sup>240</sup> The sections on substantive law convey what the law generally is, by statute first, and by common law gap-fillers, second. Sometimes they show how Americans have reversed the common law (*e.g.*, allowing aliens to acquire real estate). The common law that Young's text describes is a gap-filler destined to disappear. As if to emphasize the demise of common law and the growth of statute law, the text adds more than twenty-five pages on parliamentary rules.<sup>241</sup>

Justice Story's book, alone, explains English common law at length, its partial adoption in the colonies, and the potential for American judge-made law. In this regard, the 1840 version of the book,<sup>242</sup> which appeared after his 1837 Massachusetts Code Report, is more extensive than that of the 1834 version of the textbook, which appeared before the Code Report.<sup>243</sup> In an historical chapter on colonial governments it answers the question how "the common law of England came to be the fundamental law of all the Colonies?" Story's text answers by explaining the differences among the Colonies, both in their legal status, and in how each chose to accept "only such portions of it, as were adapted to its own wants, and were applicable to its own situation." The text praises the common law as "[t]hus limited and defined by the colonists themselves, in its application, the common law became the guardian of their civil and political rights."<sup>244</sup> But it makes no claims for a common law of the future such

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<sup>240</sup> ANDREW W. YOUNG, *THE CITIZEN'S MANUAL OF GOVERNMENT AND LAW. COMPRISING THE ELEMENTARY PRINCIPLES OF CIVIL GOVERNMENT; A PRACTICAL VIEW OF THE STATE GOVERNMENT, AND OF THE GOVERNMENT OF THE UNITED STATES; A DIGEST OF COMMON AND STATUTORY LAW, AND OF THE LAW OF NATIONS; AND A SUMMARY OF PARLIAMENTARY RULES FOR THE PRACTICE OF DELIBERATIVE ASSEMBLIES; WITH SUPPLEMENTARY NOTES ON THE GOVERNMENT OF THE STATE OF OHIO, AND THE CONSTITUTION OF THE STATE* 173-230 (1853). There is a revised edition of 1859. Subjects addressed are rights of persons, domestic relations, minors, rights of property, wills and testaments, deeds and mortgages, incorporeal hereditaments, leases, contracts in general, contracts of sales, fraudulent sales, principal and agent, partnership, bailment, promissory notes, and bills of exchange. The text explains that this part of the book gives "an abstract of the laws which more particularly define the right, and prescribe the duties, of citizens in the social and domestic relations." These laws are "first, *statute laws*, [and] secondly, the *common law*." Common law is not new law created by judges; it "consists of rules that have become binding by long usage and general custom" and is the "same as that of England. *Id.* at 173-174.

<sup>241</sup> *Id.* at 254-282.

<sup>242</sup> JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES WITH AN APPENDIX AND GLOSSARY. THE SCHOOL LIBRARY PUBLISHED UNDER THE SANCTION OF THE BOARD OF EDUCATION OF THE STATE OF MASSACHUSETTS, Vol. XIII* (1840). The book was reprinted, but not revised.

<sup>243</sup> JOSEPH STORY, *THE CONSTITUTIONAL CLASS BOOK: BEING A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES: DESIGNED FOR THE USE OF THE HIGHER CLASSES IN COMMON SCHOOLS* (1834).

<sup>244</sup> *Id.* at 20-22.

as present day proponents do. The text does not assert, as claimed today by English and American judges alike, that “common law provides the tools and flexibility to allow the law to continue to serve the needs of a diverse society in world of rapid change and technological development.”<sup>245</sup> Instead, like the other civics texts, it records how constitutions and statutes corrected defects of the common law. Just as do the other texts, it gives chapters to legislation and on the judicial department; it has not one word on precedents.<sup>246</sup>

### *E. A CENTURY OF CIVICS FOR CITIZENS*

If common law substance and common law method had been absorbed into American “social culture,” as contemporary common law adherents claim, a quick digital check should disclose the common law receiving ubiquitous praise in adult literature. I find no such acceptance. Patriotic addresses and adult civics texts that I have seen track civics texts for common schools: glory, laud and honor for legislation and little note of common law substance or method. Other popular adult literature that does address common law sometimes satirizes it.

#### 1. Patriotic Celebrations and Commemorations

Americans have celebrated the 4<sup>th</sup> of July 1776 since the 4<sup>th</sup> of July 1777.<sup>247</sup> Long before the Public Broadcasting Service began its series “Capitol Fourth” on the Washington Mall,<sup>248</sup> Americans gathered to fete the Nation’s Birthday. The Centennial Celebration of 1876 and the Bicentennial Celebration of 1976 were only the biggest of the parties. In the first century Americans got together in public places and had notables give orations. Many of these addresses—particularly those given in New England—were published.<sup>249</sup> Add to the 4<sup>th</sup> of July

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<sup>245</sup> COMMON LAW, COMMON VALUES, COMMON RIGHTS, ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS viii (American Bar Association, 2000).

<sup>246</sup> More than do the other texts, Story’s identifies the institution of the jury with the common law. See, e.g., STORY, *supra* note 243, at 25.

<sup>247</sup> See Hannah Keyser, *The First Fourth of July Celebration* (in 1777) <http://mentalfloss.com/article/57633/first-fourth-july-celebration-1777> (excerpting the July 18, 1777 issue of the *Virginia Gazette*. The 4<sup>th</sup> was an official holiday first in Massachusetts in 1781.). *But see* LEN TRAVERS, *CELEBRATING THE FOURTH: INDEPENDENCE DAY AND THE RITES OF NATIONALISM IN THE EARLY REPUBLIC* 6 (1997) (“because these orations were consistently delivered by lawyers, clergymen, college professors, and politicians . . . I question their validity as representative of popular belief.”).

<sup>248</sup> John. J. O’Connor, *TV Weekend*, NEW YORK TIMES, July 3, 1981 reports the program. It may have begun sooner.

<sup>249</sup> See University of Missouri, Fourth of July Orations Collection, 1791-1925, <http://library.missouri.edu/specialcollections/bookcol/rare/fourth/> (458 pamphlets). The Internet Archive, <https://archive.org> permits a search on “Fourth of July Orations” which returns about 500. See also TRUMPETS OF GLORY: FOURTH OF JULY ORATIONS, 1786-1861 (Henry A. Hawken, ed., 1976) (reprinting about twenty); INDEPENDENCE DAY ORATIONS AND POEMS, JULY 4, 1876, NEW YORK TRIBUNE, EXTRA NO. 33 (1876) (printing the five semi-official national orations for the Centennial).

orations addresses for similar commemorations and patriotic addresses multiply. Many have been digitized. If common law content and common law methods are, or were, part of the fabric of the nation, one would think that their threads would be found when the nation gathered to celebrate its nationhood.<sup>250</sup>

*a. Fourth of July Orations*

I haven't read them all—there are at least 500 published addresses for the Fourth of July alone—but reading and searching, I am yet to find tributes to common law content or to common law methods.<sup>251</sup> What I do find are commendations of the heroism of the founders. I find that only some orations address law or government. I suspect that there is a common emphasis—the United States created a government of and for the people—but I haven't conducted a study. Contemporary common law enthusiasts should go and make such a study. They should read as many of these pamphlets as the can. Light skeptics of these claims can look at a single volume that might stand for all the celebratory addresses.

*b. Eulogies of Adams and Jefferson*

On July 4, 1826, the fiftieth anniversary of American Independence, the two men most responsible for drafting and adopting the Declaration of Independence, John Adams and Thomas Jefferson, both died. The coincidence was taken as a marvelous sign from heaven blessing the American enterprise. Across the country there were many joint eulogies. Nineteen of these were collected and issued in a single volume the same year as *A Selection of Eulogies Pronounced in the Honor of Those Illustrious Patriots and Statesmen, John Adams and Thomas Jefferson*. The volume is available on Google Books. What does it suggest?

The book has only two mentions of “common law.” The first is that of the young Caleb Cushing, who later would be Attorney General of the United States, commissioner charged with revising the federal statutes, and President Grant's nominee to be Chief Justice of the United States. Cushing in his eulogy remembered that Adams and Jefferson were both educated to the bar. But they were not educated in law as they would have been in England, “to the barbarous technicalities of the common law,” but in the American way “where the study is more a study of principles.”<sup>252</sup>

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<sup>250</sup> And that is just as true, if not more true, if one accepts Travers' assertion, *supra* note 247, at 7, that many a celebration was intended as much “to do battle with opponents” as “to minimize the conflicts and to assert the idealized (but dubious) unity of the American people.”

<sup>251</sup> Even the common law jury seems to make only a few cameo appearances. A Google search of jury in books with title including July 4 published 1776 to 1876 identified only ten orations that even mentioned the jury. See, e.g., ISAAC STORY AN ORATION ON THE ANNIVERSARY OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA, PRONOUNCED AT WORCESTER, JULY 4, 1801, at 11 (1801), which mentioned the jury in passing but focused, at 24, on measuring political doctrines against the Constitution and laws.

<sup>252</sup> Caleb Cushing, *Eulogy, Pronounced at Newburyport, Massachusetts, July 15, 1826, in A SELECTION OF EULOGIES PRONOUNCED IN THE HONOR OF THOSE ILLUSTRIOUS PATRIOTS AND STATESMEN, JOHN ADAMS AND THOMAS JEFFERSON* 19, 29-30 (1826).

The second and last mention of “common law” was by William Wirt, then the Attorney General of the United States and to this day the longest-serving Attorney General ever. Wirt referred to the common law as the mundane part of Jefferson’s law studies: “The study of the law he pursued under George Wythe; a man of Roman stamp, in Rome’s best age. ... Here, too, following the giant step of his master, he travelled the whole round of the civil and common law.”<sup>253</sup>

Most of the nineteen eulogists remembered Adams and Jefferson for the government and the legislation that they created. John Tyler, then governor of Virginia and later President of the United States, rejoiced of Jefferson: “The statute book of this state, almost all that is wise in policy or sanctified by justice, bears the impress of his genius ....” Tyler recalled that Jefferson’s laws abolished the common law of entails and descents.<sup>254</sup> Daniel Webster, then representative in Congress, orator par excellence, and the nation’s most celebrated Supreme Court advocate, recounted the careers of Adams and Jefferson and noted Jefferson’s “important service of revising the laws of Virginia ....”<sup>255</sup> Less well-known eulogist Sheldon Smith might have spoken for the nation when he said of Adams and Jefferson: “They formed a system of government, and a code of laws, such as the wisdom of man had never before devised.”<sup>256</sup> Attorney General Wirt let Jefferson speak for himself; on the last page of the book he quoted the inscription Jefferson directed for his gravestone: “Here was buried: Thomas Jefferson, Author of the Declaration of Independence, Of the Statutes of Virginia, for Religious Freedom, And Father of the University of Virginia.”<sup>257</sup>

## 2. Civics for Adults

The spirit that led to instruction of youth in civics, and that celebrated the government of the people in commemorative addresses, found realization too in the idea of a legally-educated people. A government of laws is not a law for lawyers: it is a law for people. Every citizen should know something of the law. So in 1834 Justice Story addressed the American Institute of Instruction, a professional group for educators, “I do not hesitate to affirm, not only that a knowledge of the true principles of government is important and useful to Americans, but that it is absolutely indispensable, to carry on the government of their choice, and to transmit it to their posterity.”<sup>258</sup>

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<sup>253</sup> William Wirt, *Eulogy Pronounced at the City of Washington, October 19, 1826*, in SELECTION OF EULOGIES, *supra* note 252, at 379, 396.

<sup>254</sup> John Tyler, *Eulogy, Pronounced at Richmond, Virginia, July 11, 1826*, in SELECTION OF EULOGIES, *supra* note 252, at 5, 8.

<sup>255</sup> Daniel Webster, *Eulogy, Pronounced at Boston, Massachusetts, August 2, 1826*, in SELECTION OF EULOGIES, *supra* note 252, at 193, 223.

<sup>256</sup> Sheldon Smith, *Eulogy, Pronounced at Buffalo, New-York, July, 22d 1826*, in SELECTION OF EULOGIES, *supra* note 252, at 91, 94.

<sup>257</sup> Wirt, *supra* note 253, at 426.

<sup>258</sup> JOSEPH STORY, [The Science of Government as a Branch of Popular Instruction] A LECTURE DELIVERED BEFORE THE AMERICAN INSTITUTE OF INSTRUCTION, AT THEIR ANNIVERSARY, IN AUGUST, 1834, AT BOSTON (1835), reprinted in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614 (William W. Story, ed., 1852).

The civics books discussed above were generally denominated for “use of schools.” What was meant was for use of common schools for children of perhaps eight to fourteen years of age. But some were marketed to more sophisticated students. These might be older students or students in academies or colleges. At the same time, authors wrote introductory works for law students in self-study, law office study or law school study. These were works for adults to educate themselves. These works presented a picture of a whole legal system, and not just of any one corner.<sup>259</sup> The most distinguished of these—designed to reach all areas of knowledge—was the 13-volume *Encyclopædia Americana* which first appeared between 1829 and 1834. Justice Story provided the principal entries on American law.

Justice Story carried out his convictions in other ways. He turned his scholarly learning into popular instruction. His three-volume *Commentaries on the Constitution of the United States* of 1833 he abridged the same year into a one-volume text for “the use of colleges and high schools.” The next year he further boiled it down to *The constitutional class book: being a brief exposition of the Constitution of the United States: designed for the use of the higher classes in common schools*. Finally, in 1840 he brought out *A Familiar Exposition of the Constitution of the United States with an Appendix and Glossary*. Never revised, it has been repeatedly reprinted and now is available in several heirloom editions.

When states systematized their laws, discussed below in Part IV, and brought them out in one-to-three volumes of compiled or revised statutes, they did so for the benefit of the people at large and not for the legal profession alone. The creators of these works said as much in the introductory matter of their books. Some went further. To make them usable to the public they provided “practical forms ... with appropriate directions,”<sup>260</sup> “notes ... pointing out the principal alterations made by them in the common and statute law,”<sup>261</sup> and even collections for the general public of what the world now calls Frequently Asked Questions (FAQs).<sup>262</sup>

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<sup>259</sup> That distinguishes them from subject- or task-focused books. The former might be, for example, books on education; the latter might be the everyman-his-own-lawyer books.

<sup>260</sup> MANUAL OF THE REVISED STATUTES OF THE STATE OF NEW-YORK; OR, A COMPLETE SERIES OF ALL THE PRACTICAL FORMS, OR PRECEDENTS, REQUIRED BY THE REVISED STATUTES WITH APPROPRIATE DIRECTIONS, EXPLANATIONS AND REFERENCES, TO CASES ADJUDGED IN THE COURTS OF SAID STATE, AND IN THE SUPREME COURT OF THE UNITED STATES IN FIVE PARTS. PREPARED AND COMPILED BY A COUNSELLOR AT LAW (1831).

<sup>261</sup> JOHN CANFIELD SPENCER, NOTES ON THE REVISED STATES OF THE STATE OF NEW-YORK POINTING OUT THE PRINCIPAL ALTERATIONS MADE BY THEM IN THE COMMON AND STATUTE LAW (1830); JOHN CANFIELD SPENCER, ABSTRACT OF THE MOST IMPORTANT ALTERATIONS, OF GENERAL INTEREST, INTRODUCED BY THE REVISED STATUTES; THE PRINCIPAL PART OF WHICH ORIGINALLY APPEARED IN THE ONTARIO MESSENGER (1830).

<sup>262</sup> WILLIAM B. WEDGEWOOD, THE REVISED STATUTES OF THE STATE OF NEW YORK REDUCED TO QUESTIONS AND ANSWERS FOR THE USE OF SCHOOLS AND FAMILIES (1843). Wedgwood brought out a series of these books for other states besides New York.

### 3. Common Law and Literature

Common law did not figure prominently in adult civics texts. It did, however, make recurrent appearances in satire in the literature of the first century of the Republic. The most famous of these is Charles Dickens' *Bleak House* published in twenty monthly installments in 1852 and 1853. Professors of contemporary common law myth might dismiss that satire as criticism of the English Court of Chancery. But a quarter century before there was the English *Bleak House*, there was the purely American satire of James Kirke Paulding, *The Perfection of Reason*.

Paulding was a popular author already in 1826 he published *The Perfection of Reason* as one of three stories in his *The Merry Tales of Three Wise Men from Gotham*.<sup>263</sup> The hero in *The Perfection of Reason* was the son of a lover of the common law (*i.e.*, of the "perfection of reason"). The hero lost a lawsuit to recover for a lame horse to his adversary's common law defense of *caveat emptor* (let the buyer beware). Yet when our hero tried to rely on *caveat emptor* to defend in his sale of a ship, the court rejected the defense. Ships were governed by maritime law, where the common law of *caveat emptor* did not apply!

Before digitization there was already substantial interest among scholars about the relationship between letters and law in the early American Republic.<sup>264</sup> Digitization portends substantial increase in knowledge of the people and their law as revealed in literature.

#### F. A CENTURY OF SELF-GOVERNING

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America

1787: Preamble to the United States Constitution

The rule being prescribed, [a statute] becomes the guide of all those functionaries who are called to administer it, and of all those citizens and subjects upon whom it is to operate.

Joseph Story, *Encyclopedia Americana* (1834)<sup>265</sup>

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<sup>263</sup> JAMES KIRKE PAULDING, *The Perfection of Reason*, in *THE MERRY TALES OF THE THREE WISE MEN OF GOTHAM* 144, 166 (1826) (2<sup>d</sup> ed. 1835; 3<sup>d</sup> ed. 1839).

<sup>264</sup> See, e.g., CHARLES HANSFORD ADAMS, "THE GUARDIAN OF THE LAW": AUTHORITY AND IDENTITY IN JAMES FENIMORE COOPER (1990); ROBERT A. FERGUSON, *LAW & LETTERS IN AMERICAN CULTURE* (1984); BENJAMIN LEASE, *THAT WILD FELLOW JOHN NEAL AND THE AMERICAN LITERARY REVOLUTION* (1972); *LITERARY CRITICISM OF LAW* (Guyora Bindeer & Robert Weisberg, eds., 2000); M. FREDERICK LOCHES, ROBERT WALSH: HIS STORY (1941); C. THOMAS TANSALLE, ROYALL TYLER (1967); MADELINE SAPIENZ, *MODER CHIVALRY IN EARLY AMERICAN LAW: H.H. BRACKENRIDGE'S LEGAL THOUGHT* (1992).

<sup>265</sup> Joseph Story *et al.*, [Appendix] *Law, Legislation, Codes*, 7 *ENCYCLOPÆDIA AMERICANA* 576, 581 (1834).

Contemporary common law myth assumes that the United States in the first century of the Republic was a “night-watchman” state where people were largely free of being governed. Only later, supposedly, sometime in the 20<sup>th</sup> century, did Americans create an “administrative state.” Recent scholarship challenges that assumption. It shows Americans governing and administering in the 19<sup>th</sup> century.<sup>266</sup> That governing and administering rested on written laws.

For statutes to govern, Professor Charles Warren rightly wrote, they must be accessible “*for the benefit of laymen as well as lawyers.*”<sup>267</sup> There he saw one of the great benefits of codes and revisions: laymen can read and apply the law themselves without lawyers. People in their occupations and their professions can themselves implement law. People in their daily lives can follow the rules that are imposed on them. Proponents of common law myth claim that the public does not read laws and is not interested in statutes. Codes and revisions are of little use to them more than a listing of court decisions. An 1827 Committee Report to the South Carolina legislature by Thomas Grimké countered that argument. “Not, that the people will read a portion every day, or will even have them in their houses; but that, whenever in the course of public or private business, the people are required to read or hear the law for their guidance, it may be simple clear and concise.” Thus, the report continued, “the sovereign authority, above all in a republic, [is duty bound] to prepare the laws in the best possible manner for the use of the people whenever they are called upon to act upon them.” Someone charged with applying the law, the Report continued, could find his duties nowhere “concisely and clearly stated. ... But in a Code, he would read in a few pages all that concerned him.”<sup>268</sup>

Digitization supports Grimké’s prognosis: it shows even before Grimké’s report the beginnings of an occupational literature of collected statutes that continued to develop long afterwards. By occupational I mean books intended to permit educated laymen to learn and apply the law applicable in their occupations ordinarily without legal consultation. These books give or refer readers to rules that laymen are to apply and assume no further professional involvement. Readers of these books may include lawyers who advise participants in the oc-

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<sup>266</sup> See, e.g., BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH CENTURY AMERICA* (2009); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (1996). See also, OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY, MASSACHUSETTS 1774-1861* (Rev’d ed. 1969); William J. Novak, *Making the Modern American Legislative State*, in *LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING 20* (Jeffrey A. Jenkins & Eric M. Patashnik, eds., 2012).

<sup>267</sup> 1 CHARLES WARREN, *Chapter XXXV: New Law 1830-1860*, in *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 234 (1908); CHARLES WARREN, *Chapter XVII: Progress of the Law 1830-1860*, in *HISTORY OF THE AMERICAN BAR* 446 (1911).

<sup>268</sup> REPORT, SOUTH CAROLINA [of the “Committee appointed 20<sup>th</sup> of December last, to report on the practicability and expediency of a Code of the Statute and Common Law of this State] 9 (1827).

cupational field. Such books cannot easily persist where judicial precedents predominate, for laymen cannot be expected to possess, find, understand, identify as authoritative or apply precedents.

Already in the first twenty-five years of the 19<sup>th</sup> century such professional literature began to appear in a variety of fields in numbers of publications and copies printed that may have exceeded case reports in those years. Among the first were guides to military and education law, which often governments distributed free to users. The War Department provided, for “the use of the army,” a compilation of all the laws related thereto, including penal laws and laws related to organization and administration. State superintendents of schools provided laws and regulations for the conduct of the new common schools. These were statutes for the people and not for the legal profession.<sup>269</sup> They continued to come up to the Centennial and beyond. Here is a sampling of such books focused on those which appeared first in the particular types referenced and which have been digitized. Included in the list are comments from some of the authors relevant to the need of the people for such books and for their systematizing:

- Military,<sup>270</sup>

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<sup>269</sup> ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 74 (1990).

<sup>270</sup> *E.g.*, ADJUTANT-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *LAWS FOR REGULATING AND GOVERNING THE MILITIA OF THE COMMONWEALTH OF MASSACHUSETTS* (1803); ISAAC MALTBY, *A TREATISE ON COURTS MARTIAL AND MILITARY LAW: CONTAINING AN EXPLANATION OF THE PRINCIPLES WHICH GOVERN COURTS MARTIAL AND COURTS OF INQUIRY, UNDER THE AUTHORITY OF AN INDIVIDUAL STATE, AND OF THE UNITED STATES, IN WAR AND PEACE: THE POWERS AND DUTIES OF INDIVIDUALS IN THE ARMY, NAVY, AND MILITIA, AND THE PUNISHMENTS TO WHICH THEY MAY BE LIABLE, RESPECTIVELY, FOR VIOLATIONS OF DUTY: THE NECESSARY FORMS FOR CALLING, ASSEMBLING, AND ORGANIZING COURTS MARTIAL, AND ALL OTHER PROCEEDINGS OF SAID COURTS* iii-iv (1813) (treatise and appendix of rules and regulations) (“This treatise was originally undertaken, in compliance with the solicitations of military gentlemen; and solely with a view to the militia. ... The militia man is indeed deeply interested in *all* its details, being liable to the same pains and penalties, and to the same rules and regulations, by the articles of war, as the individual of the regular army. Besides this personal interest, which every militia officer has at stake, in these discussions, there is also a public interest involved. ... If officers will give themselves the necessary information, those disagreeable delays, so frequently witnessed at court-martial, will be avoided. ... The author is not without hope, therefore, that the work as now presented, will be found interesting and useful, not only to the militia, but to the army and navy of the United States.”); ADJUTANT GENERAL’S OFFICE (of Virginia), *MILITARY LAWS* (1820); TRUEMAN CROSS, *MILITARY LAWS OF THE UNITED STATES; TO WHICH IS PREFIXED THE CONSTITUTION OF THE UNITED STATES* (1825) (unnumbered iv: “for the use of the army, a compilation of the acts of congress relating thereto. ... The propriety of rendering all the *penal* laws accessible to those on whom they are to operate, is sufficiently obvious—and it is believed to be an object of some moment, that the law relating to organization and administration, though repealed or modified, should be placed within the reach of the army.”).

## *A Government of Laws Not of Precedents*

- laws of war,<sup>271</sup>
- postal service,<sup>272</sup>
- schools,<sup>273</sup>
- universities,<sup>274</sup>
- tax and revenue laws,<sup>275</sup>
- bankruptcy,<sup>276</sup>
- mechanics' liens<sup>277</sup>
- farming,<sup>278</sup>
- land offices,<sup>279</sup>

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<sup>271</sup> General Orders No. 100, promulgated by Lincoln, was not a handbook, but the laws themselves for the guidance of the armies. See JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* (2012). Its author was Francis Lieber, the creator of the *Encyclopædia Americana*. See Paul Finkelman, *Review [of Witt], Francis Lieber and the Modern Law of War*, 80 U. CHI. L. REV. 2071 (2013).

<sup>272</sup> *E.g.*, POST-OFFICE LAW, WITH INSTRUCTIONS, FORMS AND TABLES OF DISTANCES, PUBLISHED FOR THE REGULATION OF THE POST OFFICE (1800); POST-OFFICE LAW, INSTRUCTIONS AND FORMS, PUBLISHED FOR THE REGULATION OF THE POST-OFFICE (1825).

<sup>273</sup> *E.g.*, INSTRUCTIONS FOR THE BETTER GOVERNMENT AND ORGANIZATION OF COMMON SCHOOLS, PREPARED AND PUBLISHED PURSUANT TO A PROVISION IN THE ACT FOR THE SUPPORT OF COMMON SCHOOLS, PASSED APRIL 12, 1819 (Gideon Hawley, Superintendent of Common Schools, 1819); THE SCHOOL OFFICERS' GUIDE, FOR THE STATE OF OHIO; CONTAINING THE LAWS ON THE SUBJECT OF COMMON SCHOOLS, THE SCHOOL FUND, &C, TOGETHER WITH INSTRUCTIONS FOR THE INFORMATION AND GOVERNMENT OF SCHOOL OFFICERS (1842).

<sup>274</sup> *E.g.*, LAWS OF THE STATE UNIVERSITY: ACTS OF CONGRESS AND LAWS OF THE MISSOURI LEGISLATURE RELATING TO THE UNIVERSITY OF MISSOURI AND AGRICULTURAL AND MECHANICAL COLLEGE, AND SCHOOL OF MINES AND METALLURGY TOGETHER WITH THE BY-LAWS OF THE BOARD OF CURATORS: WITH AN APPENDIX (1872).

<sup>275</sup> *E.g.*, L. ADDINGTON, A DIGEST OF THE REVENUE LAWS OF THE UNITED STATES: WHEREIN ARE ARRANGED, UNDER DISTINCT HEADS, THE DUTIES OF COLLECTORS, NAVAL OFFICERS, SURVEYORS, MERCHANTS, MASTERS, AND ALL OTHER PERSONS CONNECTED WITH THE IMPOSTS (1804); ALEXANDER SIDNEY COXE, THE SYSTEM OF THE LAWS OF THE UNITED STATES IN RELATION TO DIRECT TAXES AND INTERNAL DUTIES INACTED IN THE YEAR 1813, CONTAINING THOSE LAWS AT LARGE WITH SOME EXPLANATIONS; AND A COPIOUS INDEX (1813).

<sup>276</sup> *E.g.*, THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND (1801) (reprinting U.S. and English statutes, providing a guide to proceedings).

<sup>277</sup> *E.g.*, PETER ARRELL BROWN, A SUMMARY OF THE LAW OF PENNSYLVANIA SECURING TO MECHANICS AND OTHERS: PAYMENT FOR THEIR LABOUR AND MATERIALS IN ERECTING ANY HOUSE OR OTHER BUILDING CONTAINING THE SEVERAL ACTS OF ASSEMBLY ON THE SUBJECT; AND THE DECISIONS THAT HAVE TAKEN PLACE UNDER THEM (1814) (statute printed followed by questions and answers explaining it).

<sup>278</sup> *E.g.*, JOHN M'DOUGAL, THE FARMER'S ASSISTANT, OR, EVERY MAN HIS OWN LAWYER (1813) (collection of forms, not statutes).

<sup>279</sup> *E.g.*, JOHN KILTY, THE LAND-HOLDER'S ASSISTANT, AND LAND-OFFICE GUIDE; BEING AN EXPOSITION OF ORIGINAL TITLES, AS DERIVED FROM THE PROPRIETARY GOVERNMENT, AND

- military pensions,<sup>280</sup>
- poor,<sup>281</sup>
- canals,<sup>282</sup>
- commerce,<sup>283</sup>
- maritime,<sup>284</sup>

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MORE RECENTLY FROM THE STATE OF MARYLAND: DESIGNED TO EXPLAIN THE MANNER IN WHICH SUCH TITLES HAVE BEEN, AND MAY BE, ACQUIRED AND COMPLETED v (1808) (the preface includes four pages of fine type on creation and use of the book, *e.g.*, “I have believed that it would not fail to engage the perusal of that respectable description of citizens for whose use it is professedly designed.”).

<sup>280</sup> *E.g.*, THE PENSION LAWS, OF THE UNITED STATES, INCLUDING SUNDRY RESOLUTIONS OF CONGRESS, FROM 1776 TO 1833: EXECUTED AT THE WAR DEPARTMENT... COMPILED BY ROBERT MAYO, M.D. iv (1833) (“the Secretary of War has thought proper to charge an humble individual in the Pension Office, with the task of compiling this system of laws .... To dignify the Pension laws of our country, with a place in the nomenclature of systems, may seem ridiculous to those who view these laws in a detached sense, or in the order of their dates only. But he who will take a survey of the prominent enactments, connected with the minute details growing out of each as they are developed, though they were commenced and progressed under the dictates of justice and gratitude, without any view to system building, will nevertheless discover and admire therein, that beautiful symmetry and order of parts, which constitute system in any branch of science or law, natural or civil.”).

<sup>281</sup> *E.g.*, JONATHAN LEAVITT, A SUMMARY OF THE LAWS OF MASSACHUSETTS, RELATIVE TO THE SETTLEMENT, SUPPORT, EMPLOYMENT AND REMOVAL OF PAUPERS (1810).

<sup>282</sup> *E.g.*, A COLLECTION OF THE LAWS RELATIVE TO THE CHESAPEAKE AND DELAWARE CANAL: PASSED BY THE LEGISLATURES OF THE STATES OF MARYLAND, DELAWARE, AND PENNSYLVANIA, SUBSEQUENT TO THE YEAR 1798: PUBLISHED JUNE 1, 1823 (1823).

<sup>283</sup> *E.g.*, J. C. GILLELAND, THE COUNTING-HOUSE ASSISTANT, OR, A BRIEF DIGEST OF AMERICAN MERCANTILE LAW: EMBRACING THE LAW OF CONTRACT (1818) (statement of rules for self-application to avoid lawsuits); JOSHUA MONTEFIORE, THE AMERICAN TRADER’S COMPENDIUM: CONTAINING THE LAWS, CUSTOMS, AND REGULATIONS OF THE UNITED STATES, RELATIVE TO COMMERCE: INCLUDING THE MOST USEFUL PRECEDENTS ADAPTED TO GENERAL BUSINESS (1811) (alphabetical listing of concepts with some forms).

<sup>284</sup> *E.g.*, JOSEPH BLUNT, THE MERCHANT’S AND SHIPMASTER’S ASSISTANT; CONTAINING INFORMATION USEFUL TO THE AMERICAN MERCHANTS, OWNERS, AND MASTERS OF SHIPS iii (1832) (“a work of this nature has long been imperiously required by the shipmaster, the merchant, the lawyer, and the statesman. ... [It includes] As much of the common law, relative to bills of exchange, factorage, and freight, as is necessary to guide a person in the ordinary course of business, is next presented. ... A digest is then given of the laws of Congress .... The commercial statutes of the different states follow the acts of Congress. .... Without regarding the different legislative jurisdiction to which he is subjected at different times, a master naturally acts as if the same law was in force throughout the United States, and becomes liable to penalties, which a little acquaintance with the statutes would have enabled him to avoid. In enacting laws relative to commerce, the state legislatures have evidently seldom, if ever, consulted the provisions on the same subject in the sister states; and in this independent method of legislation, a system discordant in its provisions, overburdened with details, and incongruous in itself, has grown up with the increase of our trade, to the vexation and dismay of the owners and masters of ships.”); *id.* (1<sup>st</sup> ed, 1822; 9<sup>th</sup> ed. 1857); German edition, BESTIMMUNGEN ÜBER HANDEL UND SCHIFFFAHRT DER VEREINIGTEN STAATEN VON NORD-AMERIKA ... NACH J.

- slavery laws for abolitionists,<sup>285</sup>
- slavery laws for slave owners,<sup>286</sup>
- roads and highways,<sup>287</sup>
- railroads,<sup>288</sup> and,

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BLUNT'S AMERIKANISCHEM WERKE (Carl F. Loosey, transl., 1855) (published in Vienna, but by an Austrian in New York City).

<sup>285</sup> *E.g.*, NEW YORK MANUMISSION SOCIETY, SELECTIONS FROM THE REVISED STATUTES OF THE STATE OF NEW YORK: CONTAINING ALL THE LAWS OF THE STATE RELATIVE TO SLAVES, AND THE LAW RELATIVE TO THE OFFENCE OF KIDNAPPING; WHICH SEVERAL LAWS COMMENCED AND TOOK EFFECT JANUARY 1, 1830, TOGETHER WITH EXTRACTS FROM THE LAWS OF THE UNITED STATES, RESPECTING SLAVES (1830); GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA v-vi (1827) (Preface: "Having been under the necessity of bringing together the laws of so large a number of independent states, it must be obvious that considerable difficulty existed in assigning to each part its proper place and giving to each its due effect, and, at the same time, preserving the appearance of symmetry in the whole." ... "Of the *actual* condition of slaves this sketch does not profess to treat. In representative republics, however, like the United States, where the popular voice so greatly influences all political concerns,—where the members of the legislative departments are dependent for their places upon *annual* elections,—the laws may be safely regarded as constituting a faithful exposition of the sentiments of the people, and as furnishing, therefor, strong evidence of the practical enjoyments and privations of those whom they are designed to govern.") (2<sup>d</sup> ed., 1858).

<sup>286</sup> *E.g.*, JACOB D. WHEELER, A PRACTICAL TREATISE ON THE LAW OF SLAVERY. BEING A COMPILATION OF ALL THE DECISIONS MADE ON THAT SUBJECT, IN THE SEVERAL COURTS OF THE UNITED STATES, AND STATE COURTS. WITH COPIOUS NOTES AND REFERENCES TO THE STATUTES AND OTHER AUTHORITIES, SYSTEMATICALLY ARRANGED (1837).

<sup>287</sup> *E.g.*, WILLIAM DUANE, A VIEW OF THE LAW OF ROADS, HIGHWAYS, BRIDGES AND FERRIES IN PENNSYLVANIA (1848) (professional manual with procedures and extracting statutes); A COUNSELOR AT LAW, PLANK ROAD MANUAL, INCLUDING THE GENERAL LAW OF PLANK ROADS AND TURNPIKES OF THE STATE OF NEW YORK, WITH THE REFERENCES TO THE REVISED STATUTES, ALSO AN APPENDIX, CONTAINING A SHORT ESSAY ON THE CONSTRUCTION OF PLANK ROADS, AND ALL THE NECESSARY FORMS AND PRECEDENTS TO BE USED UNDER THE ACTS (1848).

<sup>288</sup> *E.g.*, MOSES M. STRONG (ATTORNEY OF THE COMPANY), A COMPILATION OF THE SEVERAL ACTS OF THE LEGISLATURE OF WISCONSIN AFFECTING THE LA CROSSE & MILWAUKEE R.R. COMPANY: TOGETHER WITH THE BY-LAWS OF THE COMPANY: ALSO, SOME GENERAL LAWS OF THE STATE IN RELATION TO RAIL ROAD (1856); BONNEY, CHARLES CARROLL. RULES OF LAW FOR THE CARRIAGE AND DELIVERY OF PERSONS AND PROPERTY BY RAILWAY: WITH THE LEADING RAILWAY STATUTES AND DECISIONS OF ILLINOIS, INDIANA, MICHIGAN, OHIO, PENNSYLVANIA, NEW YORK AND THE UNITED STATES: PREPARED FOR RAILWAY COMPANIES AND THE LEGAL PROFESSION (1864) ("This book is designed for the guidance of railway companies, their agents, employes [*sic*] and patrons, in the receipt, transportation and delivery of persons and property; and for the convenience of the profession in advising thereof. ... In other words, I have endeavored to make a book in which the rights, duties and liabilities of passengers, consignors, engineers, consignees and other persons concerned in or affected by the usual course of railway business, may readily be found distinctly presented, and plainly expressed. The statutes are rarely found complete, outside of the State in which they belong; and the decisions condensed and reported, are scattered through so large a number of volumes, as to be unavailable for everyday use." i. "I cannot resist the conviction, that a familiarity with the subject-matter of this treatise, by the non-professional persons for whose use it is, in part, designed, would prevent

- as is noted below, the Centennial Guards that provided security at the Centennial exposition.<sup>289</sup>

At their best, they instruct the user in how to carry out the tasks with which they are charged. They find their forerunners in manuals for justices of the peace of the first half-century of the Republic.<sup>290</sup> Well-conceived and executed such books give the statutes that they support true effectiveness. People can carry out the laws themselves.

Occupational literature has limits that restrain wide-spread distribution: it needs to be authoritative. That means any one book is practically limited to one jurisdiction, or to a group of closely related jurisdictions where it is possible to spell out variations. Useful occupational literature depends on the user being able to rely on the book. That means the law the book reports needs to be comprehensible and stable and not undermined by courts.

## V. PROGRESS IN SYSTEMATIZING LAWS FOR THE PEOPLE

Government of the people, by the people, for the people.  
Abraham Lincoln (1863)<sup>291</sup>

In 1788, a dozen years after the beginning of the Republic's first century, James Madison foretold in *Federalist No. 62*: "It will be of little avail *to the people*, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood."<sup>292</sup>In 1861, fifteen years before the end of the Republic's first century, President Abraham Lincoln in his first state of the union message called on Congress to make the statute laws "as plain and intelligible" and as "small compass" as possible. "Well done," a revisal would "greatly facilitate" the administration of the laws and "would be a lasting benefit *to the people*, by placing

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many of the losses and accidents which now occur."); EDMUND F. WEBB (COMPILER), *THE RAILROAD LAWS OF MAINE : CONTAINING ALL PUBLIC AND PRIVATE ACTS AND RESOLVES, RELATING TO RAILROADS IN SAID STATE, WITH REFERENCES TO DECISIONS OF SUPREME JUDICIAL COURT: ALSO A DIGEST OF THE DECISIONS OF THE COURTS OF SAID STATE, ON THE SUBJECT OF RAILROADS: AND COPIES OF ALL MORTGAGES, DEEDS OF TRUST, LEASES, AND CONTRACTS, MADE BY SAID RAILROADS* (1875) ("The object of this volume is to present the entire body of the railroad law of this State in a convenient and accessible form. ... Railroad laws have so multiplied as to embarrass those having occasion to trace them through so many volumes. It is hoped this compilation may abridge their labors." Unnumbered Preface.).

<sup>289</sup> See note 490 *infra*.

<sup>290</sup> The classic English work is Michael Dalton's *Countray Justice* of 1619, which continued to appear for nearly two centuries.

<sup>291</sup> ABRAHAM LINCOLN, *GETTYSBURG ADDRESS* (1863).

<sup>292</sup> [James Madison], *The Senate, Federalist No. 62*, *INDEPENDENT JOURNAL*, February 27, 1788. [Emphasis added.]

before them in a more accessible and intelligible form the laws which so deeply concern their interests and their duties.”<sup>293</sup>

The Centennial Writers were asked to write about progress in American law. Progress meant systematizing. For the first century of the Republic and for another decade thereafter, Americans systematized their laws. Today, that Americans have what I call “collated laws,” *i.e.*, a more organized form of compiled laws, is not due to lack of popular desire for systematized laws, but to failures of the political system to carry out their out wishes and deliver a government of laws. No one ever voted for common law.

#### A. THE NECESSITY OF SYSTEMATIZING

Systematizing of laws may be likened to building a library of books. For rules to guide, for books to be useful, rules and books, and their contents, must be accessible. When one has only a few laws or only a few books, one can skim through them all to find the rules or information that one needs. When one has more than a few laws, or more than a few books, one organizes the laws or the books to enable finding what one needs. Systematizing is a normal development of written laws. Even such a short set of laws as the biblical Ten Commandments is systematized: the commandments begin with affirmative duties to God, continue with affirmative duties to parents, and conclude with prohibitions of acts harmful to one’s fellow men. Systematizing is necessary to a government of laws. In a government of laws, law must be accessible to people. Without system, laws become unknowable, inconsistent and incoherent. Tyrants, not laws, govern. In the 19<sup>th</sup> century proponents of systemization likened its absence to the reign of the Roman Emperor Caligula, who “published” laws in such ways that no one could read them.<sup>294</sup>

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<sup>293</sup> Abraham Lincoln, *Annual Message to Congress, December 3, 1861*, in 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 35 (1953). [Emphasis added.] An English journal, in an article reprinted in Canada, already in August 1860, reported a movement to revise federal statutes and that the U.S. Senate had agreed to a resolution “for the appointment of a commissioner to revise the public statutes; to simplify their language; to correct their incongruities; to supply their deficiencies; to arrange them in order; to reduce them to one connected text; and to report them thus improved to Congress for its final action, to the end that the public statutes, which all are presumed to know, may be in such form as to be more within the apprehension of all.” *Codification of Law in America*, 4 SOLICITORS’ J. AND REP. 833 (1860), reprinted in 6 UPPER CANADA L.J. (OLD SERIES) 222 (1860). Lincoln the systematizer has recently been hailed as the codifier of the laws of war. See WITT, *supra* note 271.

<sup>294</sup> See, e.g., J. Louis Tellkamp, *On Codification, or the Systematizing of the Law*, 26 AM. JURIST & L. MAG. 113 (1841), 283, 288 (1842), reprinted in J.L. TELLKAMPF, *ESSAYS ON LAW REFORM, ETC.* 3, 44 (1st ed., London, 1859) (2d ed., Berlin, 1875) (“To hang up the laws on a high pillar, as ... the tyrant did, so that no citizen could read them; or, which amounts to the same thing, to bury them under all the materials of learned books, customs, scattered statutes, and collections of decisions or conflicting judgments and opinions, so that a knowledge of jurisprudence can be attained by only a few of the people; such a state of things can in no wise be justified.”). See also, *On the Promulgation of the Laws*, 6 AM. L.J. 152k, 152m [sic] (1817); John Adair, *Legislature of Kentucky* [Governor’s Message, Oct. 16, 1821], 21 NILES’ WEEKLY REG. 185, 189-190 Nov. 17, 1821) (“In free states where the people either make the laws, or

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Three reasons for systematizing stand out: *governing* rationally through knowable laws, *unifying* laws in governed areas and *reforming* laws. The relative importance of each of these reasons has varied from place-to-place and time-to-time. In many instances, perhaps in most and contrary to intuition, law reform is not the major reason for systematizing, but is only incidental to rationalization or unification.<sup>295</sup>

Principal arguments made for systematizing have been similar over time and place.<sup>296</sup> Systematized law is law knowable by the people; it is law they can abide by. Where a legal answer cannot be known beforehand, systematized law

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choose those who do, the principle of the government is corrupted whenever the people cease to understand those laws.”); Joseph Desha, [*Governor’s Message*], JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY 14, 15 (“Unintelligible laws are no better than unpublished laws, known only to the tyrant who makes them.”) (Dec. 26, 1827); BENJAMIN JAMES, A DIGEST OF THE LAWS OF SOUTH-CAROLINA, ...; A COMPENDIOUS SYSTEM OF THE GENERAL PRINCIPLES AND DOCTRINES OF THE COMMON LAW, ... THE WHOLE BEING DESIGNED, CHIEFLY, FOR THE INSTRUCTION AND USE OF THE PRIVATE CITIZEN AND INFERIOR MAGISTRATE x (1822); James Brown Ray, [*Governor’s Address, December 4, 1827*], JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE TWELFTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD ... ON MONDAY THE THIRD DAY OF DECEMBER, 1827, 9, 26 (1827); Maynard Davis Richardson, *Codification*, in THE REMAINS OF MAYNARD DAVIS RICHARDSON 93, 96 (1833); WILLIAM SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA; ... xvii-xviii (1826) (“hence the ignorance of many in regard to this branch of our laws, which was as much out the reach of the people, as were the laws of Caligula.”); Leland Stanford, *Annual Message of the Governor, January 7<sup>th</sup>, 1863*, JOURNAL OF THE SENATE OF THE STATE OF CALIFORNIA DURING THE FOURTEENTH SESSION OF THE LEGISLATURE OF THE STATE OF CALIFORNIA: 1863, 27, 44-45 [page 52 of the JOURNAL OF THE ASSEMBLY] (“no person, not versed in law, can with any certainty of correctness, turn to the pages of our statute book to ascertain what the law is”); E.W. [presumably Emory Washburn], *We Need a Criminal Code*, 7 AM. L. REV. 264, 266 (1872).

The metaphor originates in SUETONIUS, THE LIVES OF THE TWELVE CAESARS, paragraph 41 (A.D. 121), and was used in England and Germany as well. See, e.g., *On the Promulgation of the Laws*, 1 J. JURISPRUDENCE 241, 242 (1821). Tellkampf, followed Hegel closely and, like Hegel, referred (incorrectly) to the tyrant Dionysius instead of Caligula. See T.M. KNOX, HEGEL’S PHILOSOPHY OF RIGHT TRANSLATED WITH NOTES 358 n. 64 (1952). See also [James Madison], *The Senate, Federalist No. 62*, INDEPENDENT JOURNAL, February 27, 1788 (“Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed? Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and unformed mass of the people.”).

<sup>295</sup> E.g., *Report of the Committee*, THE CODE OF THE STATE OF GEORGIA PREPARED BY R.H. CLARK, T.R.R. COBB AND D. IRWIN v, viii (1861).

<sup>296</sup> See, e.g., in reverse chronological order, HUGH COLLINS, WHY EUROPE NEEDS A CIVIL CODE 2-3 (2013); DAVID DUDLEY FIELD, *Codification*, 20 AM. L. REV. 1 (1886) reprinted in 3 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 238 (Titus Munson Coan, ed., 1890); DAVID DUDLEY FIELD, *Reasons for the Adoption of the Codes, Substance of an address before the Judiciary Committee of the Lower House of the Legislature, at Albany, on the 19<sup>th</sup> of February, 1873, on the Codes*, in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 361 (A.P. Sprague, ed., 1884); [Joseph Story et al.], [*Appendix*] *Law, Legislation, Codes*, 7 ENCYCLOPÆDIA AMERICANA 576, 581, 586-592 (1834).

can give transparency to how decisions will be made. Systematized law can control and direct those who govern. Systematized law, as unified law, brings together people in one legal order. Systematized law, as reformed law, as consistent law, promotes equal justice under law.

Principal arguments against systematizing laws, likewise, have remained steady. Systematized laws, it is said, are inflexible and adjust less well to changes in society over time. Because written law focuses on language and system, if it is the exclusive source of law, it is said to tie the hands of decision makers in individual cases and to make it harder for them to reach just or pragmatic solutions.<sup>297</sup> Systematized law, as unified law, denies legal diversity.

Arguments against systematizing laws often go beyond theory to focus on practicalities. Systematizing laws costs too much. It is too difficult. Its benefits are too few. Some arguments are political: lack of trust in the systematizers or in the systematization or disapproval of changes in law systematized. The practical response of proponents of systematizing is to point to experiences of places that have systematized: who has ever had codes and reverted to no codes?

The persistence in the United States of these arguments against systematizing is remarkable. Today they are recited with the same conviction of truth as they were two hundred years ago. Yet, in the meantime, the world has developed modern legal methods.<sup>298</sup> The world has seen the successes of French and German code-based methods and has imitated them. It has seen the failures of American contemporary common law methods. Yet the United States remains without codes.<sup>299</sup> Is there another staple of modern society that the world has which the United States lacks?

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Systematizing requires an inventory of applicable laws that are available for consultation. In American parlance, laws passed individually over years by legislatures are “compiled” in a single volume, usually, of still applicable statutes. Often they are arranged in chronological or alphabetical order. Compiling is a first step in systematizing laws but not the last.<sup>300</sup> Laws exist to govern daily life. When compiling statutes, inconsistencies become apparent; likewise it becomes obvious that some statutes have become obsolete. A government of

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<sup>297</sup> Field asserted that “Every argument against a code is, in my judgment, full of sophistry. The only one I shall stop to consider, is that the judges should be left to make the law as they go along.” DAVID DUDLEY FIELD, *LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD*, REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST, 1891, WITH SOME CHANGES AND NOTES 20 (1891).

<sup>298</sup> See James R. Maxeiner, *Scalia & Garner’s Reading Law: A Civil Law for the Age of Statutes?*, 6 J. CIVIL L. STUDIES 1 (2013).

<sup>299</sup> See James R. Maxeiner, *The Cost of No Codes*, 31 MISSISSIPPI COLLEGE L. REV. 363 (2013), also in *THE SCOPE AND STRUCTURE OF CIVIL CODES* (J. César Rivera, ed., IUS GENTIUM vol. 32, 2014). See generally WOLFGANG FIKENTSCHER, *DIE METHODEN DES RECHTS IN VERGLEICHENDER DARSTELLUNG* (5 vols., 1975-1977).

<sup>300</sup> In 1838 the *American Jurist* explained that even a compilation is a “great good”: “The first step is thus taken towards the formation of a written code of laws, in which the whole body of common and statute law shall be amalgamated into one homogenous mass.” *Revised Statutes of North Carolina* [Review], 19 AM. JURIST & L. MAG. 484, 485 (1838).

laws deals with inconsistencies and obsolescences. No man can follow contrary commands. No man should be required to follow laws that have lost their reason for being. In American parlance, systematizing to make laws consistent and current is to “revise” laws.

Revised laws do not fulfill fully the promise of systematization. To apply law well, one should be able to find and interpret easily the particular laws that govern. One should need to consult as few laws as is commensurate with the complexity of the matter at hand. Historically a common way to make law accessible in this sense has been through “codifying” laws into a limited number of codes. Codes in this sense are systematic statements of particular areas of law. They thus can state laws in ways that facilitate the learning and the applying of the legal rules that they contain. Codifying, more than revising, changes existing law, in form or substance or both.

In American parlance “code” is often used in a different sense that does not include systematizing, at least systematizing beyond compiling. “Code” may refer only to a mere compilation. Similarly, “code” may be a shorthand for the complete body of a state’s standing laws.

At other times, “codes” in American usage are systematized bodies of laws aspiring to, if not ever reaching, the systematization of French or German codes. “Revised laws” may be functionally equivalent to codes in this modest sense<sup>301</sup>. What sets these American codes apart from their Continental counterparts is not so much the lesser level of systematization, as it is the different treatment by the courts. Continental courts start legal reasoning from codes and give codes priority over other sources of law. American courts may ignore codes and defer to other sources of law.<sup>302</sup>

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The enormity of the work of systematizing well done is hard to appreciate even for legislators, lawyers and judges, not to speak of laymen, historians or law teachers.<sup>303</sup> Legislators when they commission a code seem to expect to get it back, said one advocate of systematizing, “by return mail”.<sup>304</sup> Lawyers in practice work with one case at a time. In counseling they advise how they see the

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<sup>301</sup> For discussions of the distinctions, see *THE FIRST CENTURY OF THE REPUBLIC* at 451; ERWIN C. SURRENCY, *A HISTORY OF AMERICAN LAW PUBLISHING* 85 (1990). The former draws a sharp line between codes and revised statutes.

<sup>302</sup> As a result, proponents of codes have long seen fit to insert “fundamental rules for ... interpretation and application.” *REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS, OR ANY PART THEREOF. MADE TO HIS EXCELLENCY THE GOVERNOR, JANUARY, 1837*, at 24-25 (1873).

<sup>303</sup> *Cf.*, *Revised Code of Pennsylvania* 19 AM. Q. REV. [Robert Walsh], 399, 403, 409 (1836) (“The amount and complexity of their labours in this respect are not to be judged by the bulk of their production. Not a trace of two-thirds of the actual expense of time and study, which are necessary to the rejection of what maybe supposed to be redundancies, as to the adoption of new provisions, appears upon the face of the reported bills.”)

<sup>304</sup> JOHN WORTH EDMONDS, *AN ADDRESS ON THE CONSTITUTION AND CODE OF PROCEDURE AND THE MODIFICATIONS OF THE LAW EFFECTED THEREBY* 46 (1848).

law in one or a handful of fact situations. In litigating they argue for one view that they see as benefiting their client. Judges focus on one set of facts and the laws that might apply to it. Law teachers in America assume the role of lawyers.

Good lawmakers, on the other hand, provide for all possible cases, even though they well know that they cannot anticipate all possible cases. Good lawmakers capture in a few understandable words what they want people to do, even when they themselves may not know what they want people to do in some cases. Good lawmakers make their laws consistent internally and with other laws. Positivist legal philosopher John Austin famously said that this “the technical part of legislation, is incomparably more difficult than what may be styled the ethical.”<sup>305</sup>

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American professors of contemporary common law myth denigrate systematizing as part of a chimerical quest for what they see as unattainable legal certainty.<sup>306</sup> Contemporary American legal historians discount benefits of systematizing for the legal system as a whole, for public policy, for justice and for law-abiding. For example, Professor Lawrence Friedman writes: “it is hard to see how society can be changed by reforms which only rearrange law on paper.”<sup>307</sup> Professor Kermit Hall saw codifiers as “unconcerned about the effects of codification on the poorer classes, stressing instead the lack of uniformity and certainty in U.S. law, especially in matters affecting commercial relations.”<sup>308</sup> Hall and others trivialize codifying. If they note it at all, they dismiss it as “a critical response to the judicial creation of an American common law.”<sup>309</sup>

Critical legal studies Professor Robert W. Gordon suggests that the idea that the “unruly mess” of the mid 19<sup>th</sup> century could through rule reform be remedied was “a kind of collectively maintained fantasy of what society would like if everyone played by the rules.” According to Gordon, this “fantasy” ex-

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<sup>305</sup> John Austin, *Codification and Law Reform*, in 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 1092, 1099 (5<sup>th</sup> ed., Robert Campbell, ed., 1885).

<sup>306</sup> See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VALPARAISO L. REV. 517 (2006). *But see*, James R. Maxeiner, *Legal Certainty and Legal Methods: A European Alternative to American Legal Indeterminacy?*, 15 TULANEJ. INT’L & COMP. L. 541 (2007).

<sup>307</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 354 (1973) (“Behind the work of the law reformers was a sort of theory: that the legal system is best, and works best, and does the most for society, which conforms to the ideal of legal rationality—the system which is most clearly, orderly, systematic (in its formal parts), which has the most structural beauty, which most appeals to the modern, well-educated jurist. The theory was rarely made explicit, and of course never tested. It was in all probability false . . .”) The third edition, 2004, at 304-305, is similar.

<sup>308</sup> KERMIT L. HALL THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 126 (1989).

<sup>309</sup> KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 139 (2<sup>d</sup> ed., 2009) (giving codifying one page out of 465). *See also* G. EDWARD WHITE, AMERICAN LEGAL HISTORY: A VERY SHORT INTRODUCTION (2014) (not even a footnote in 149 pages).

plains why the proponents of codes in the 1870s and 1880s “should have invested most of their public energy in what may seem to us a relatively sterile and peripheral activity: the improvement of legal science.”<sup>310</sup> So today the United States remains a land without a science of law (in the sense of what the Germans call *Rechtswissenschaft*).

Such thinking explains the practical disappearance of statutes and their systematizing from American legal consciousness. That which the Centennial Writers saw as the way “to the direct and practical amelioration of mankind,”<sup>311</sup> lawyers on the eve of the sesquicentennial in 1926 suppressed as an un-American attempt “to supplant the parent Common Law” and “to forsake our English heritage and follow the lead of Imperial Rome.”<sup>312</sup> Bicentennial writers—in the middle of the “Age of Statutes”—celebrated *Common Faith and Common Law* and took no note of statutes or codes.<sup>313</sup> Millennial American and English writers jointly celebrated *Common Law, Common Values, Common Rights*, with no mention of statutes of the century just past, such as the American Civil Rights Act of 1964 or the U.K. Human Rights Act 1998.<sup>314</sup>

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<sup>310</sup> Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 53-55 (Gerard W. Gawalt, ed., 1984).

<sup>311</sup> *Law in America: 1776-1876*, 122 N. AM. REV. at 174.

<sup>312</sup> J. Carroll Hayes, *The Visit to England of the American Bar Association*, in *THE AMERICAN BAR ASSOCIATION LONDON MEETING 1924: IMPRESSIONS OF ITS SOCIAL, OFFICIAL, PROFESSIONAL AND JURIDICAL ASPECTS AS RELATED BY PARTICIPANTS IN CONTEST FOR MOST ENLIGHTENING REVIEW OF TRIP* (1925) 9, 15 (reporting the consensus of the bar at the meeting).

<sup>313</sup> *POLITICAL SEPARATION AND LEGAL COMMUNITY: COMMON FAITH AND COMMON LAW* (Harry W. Jones, ed., 1976).

<sup>314</sup> *COMMON LAW, COMMON VALUES, COMMON RIGHTS, ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS* (2000). In this book, British indifference to statutes is remarkable; almost no one writing in the book observed the Regulations and Directives of the European Union which envelop every Member State’s law including that of the United Kingdom.

B. A CENTURY OF SYSTEMATIZING LAWS<sup>315</sup>

The laws are not made for the lawyers but for the people.  
*American Law Journal* (1813)<sup>316</sup>

In the first century of the Republic all American states and the federal government systematized their laws. All compiled their laws; all did so before they published official reports of the decisions of their courts. All published some form of revision or codification. There is no room for the idea that statutes and their systematization were ever foreign to America or for the thought that case law, that is, judge-made common law, was the one and only true law.

1. The Necessity of Systematizing

Systematizing was—and is—necessary to a well-functioning modern state; in importance it may be second only to the written constitution itself.<sup>317</sup> Americans can congratulate themselves on the alacrity with which they undertook—

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<sup>315</sup> Until recently American law professors had to look to outsiders, either American historians or foreign jurists, for scholarship on pre-1890 systematizing. *See, e.g.*, CHRISTINA BÖRNER, KODIFIKATION DES COMMON LAW. DER CIVIL CODE VON DAVID DUDLEY FIELD (Dr. jur. diss., Faculty of Law, University of Zurich, 2001) (a related English language essay of the author is Christina Börner, *The Institutional Backgrounds for the Field Civil Code in New York (1865) and California (1872)*, 1 GLOBAL JURIST ADVANCES Issue No. 3 (2002)); CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (Ph. D. diss., Dept. of History, University of Maryland College Park, published Greenwood 1981); CHARLES T. CULLEN, ST. GEORGE TUCKER AND LAW IN VIRGINIA 1772-1804 (Ph. D. diss., Corcoran Dept. of History, University of Virginia, 1971, published Garland, 1987); WILLIAM D. DRISCOLL, BENJAMIN F. BUTLER: LAWYER AND REGENCY POLITICIAN (Ph. D. diss., Dept. of History, Fordham University 1965, published Garland 1987); MICHAEL JOSEPH HOBER, THE FORM OF THE LAW: DAVID DUDLEY FIELD AND THE CODIFICATION MOVEMENT IN NEW YORK, 1839-1888 (Ph.D. diss., Dept. of History, University of Chicago, 1975); PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY (Ph. D. diss., Dept. of History, University of Illinois, Champaign, 1961, published Garland, 1986); MAURICE EUGEN LANG, CODIFICATION IN THE BRITISH EMPIRE AND AMERICA (Dr. jur., University of Leiden 1924, published Amsterdam, 1924); DONALD JOSEPH SENESE, LEGAL THOUGHT IN SOUTH CAROLINA, 1800-1860 (Ph. D. diss., Dept. of History, University of South Carolina, 1970); STEPHAN SOBOTKA, DAVID DUDLEY FIELD UND DIE KODIFIKATIONSBESTREBUNGEN IM STAAT NEW YORK IM 19. JAHRHUNDERT, -- UNTER BESONDERER BERÜCKSICHTIGUNG DES "CIVIL CODE" (Dr. jur. diss., Faculty of Law, University of Cologne, 1973); DAUN ROELL VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (Ph.D. diss., Dept. of History, Johns Hopkins University, 1974). These works are mostly not yet digitized. One which is, is Gunther A. Weiss, *The Enchantment of Codification in the Common Law World*, 25 YALE J. INT'L L. 435 (2000).

<sup>316</sup> Introductory remarks to John Treadwell, Enoch Perkins & Thomas Day, Report of a Committee, *Of the Laws of Connecticut* (1808), in 4 AM. L.J. 222 (1813).

<sup>317</sup> *See, e.g.*, *Revision of the Laws in Massachusetts*, 13 AM. JURIST & LAW MAG. 344, 378 (1835) ("The formation of a code is a magnificent enterprise, worthy of a State; success in which is one of the most glorious events in the annals of any community.... If well accomplished, it is, next to the formation of a frame of government, pre-eminently the most

against substantial difficulties—the seemingly mundane task of compiling. Jefferson, before he could focus on reform of substantive law, collected statutes. James Wilson, who had the same task, explained to the Pennsylvania Assembly, “How can I make a digest of the laws, without having all the laws upon each head in my view?”<sup>318</sup>

In the early Republic even the task of compiling required a Herculean effort.<sup>319</sup> In the 1790s James Wilson in Pennsylvania and John F. Grimké in South Carolina each reported dealing with over 1700 statutes in their respective states.<sup>320</sup> They had no clerical staffs and no means of reproduction of laws other than manual copying.<sup>321</sup> Communications were slow and mail services lacking. Finding all laws to be compiled could be practically impossible. Had Jefferson not been the avid book collector that he was, had he not had access to his own personal library and the personal libraries of others, he could not well have drafted his revisal.

Nevertheless, by 1800 all of the original thirteen states and the federal government had compiled their laws: Connecticut (1784); Delaware (1797); federal government (1797); Georgia (1800); Maryland (1799); Massachusetts (1788); New Hampshire (1789); New Jersey (1800); New York (1789); North Carolina (1791); Pennsylvania (1793-1797); Rhode Island (1798); South Carolina (1790); and Virginia (1794).<sup>322</sup> In 1837, at the 50<sup>th</sup> anniversary of the United States Constitution, the *American Jurist & Law Magazine* presented a 25-page

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important and social achievement.”). Cf. George P. Fletcher, *Three Nearly Sacred Books in Western Law*, 54 ARK. L. REV. 1 (2001) (comparing the French and German Civil Codes with the United States Constitution).

<sup>318</sup> 1 THE WORKS OF HONORABLE JAMES WILSON, L.L.D. Preface (Bird Wilson, ed., 1804), reprinted in 1 COLLECTED WORKS OF JAMES WILSON 418 (Kermit L. Hall and Mark David Hall, eds., 2007).

<sup>319</sup> The task was no less in England. See, RICHARD WHALLEY BRIDGMAN, REFLECTIONS ON THE STUDY OF THE LAW 43 (1804) (“the code of statute laws has swollen to a mass so burthensome as to become insupportable even by an *Atlas* or *Hercules*, and to call for the aid of a second *Justinian* to digest, simplify, and reduce them.” [emphasis in original]).

<sup>320</sup> THOMAS FAUCHERAND GRIMKÉ, *Preface*, THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA, FROM ITS FIRST ESTABLISHMENT AS A BRITISH PROVINCE DOWN TO THE YEAR 1790, INCLUSIVE . . . (1790).

<sup>321</sup> Difficulties of copying dealt a body blow to Edward Livingston’s proposed penal code. It was destroyed in a fire the night before he was to deliver it to the printer. JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 335 (2014). The sheer technical demands of handwriting continued until the invention of the typewriter introduced to America at the Philadelphia Centennial Exposition. Cf., REPORT OF THE CODE COMMISSIONERS OF THE STATE OF CALIFORNIA, NOVEMBER 15<sup>TH</sup>, 1873, at 3 (“The work of copying four Codes, consisting of fourteen thousand one hundred and sixty-five sections, or about twenty thousand one hundred and seventy-six folios, required much time and occupied two Secretaries constantly nine months.”) [I could not locate a digitized copy of this Report.].

<sup>322</sup> CHECK-LIST OF STATUTES OF STATES OF THE UNITED STATES OF AMERICA, INCLUDING REVISIONS, COMPILATIONS, DIGESTS, CODES AND INDEXES (Grace E. Macdonald, compiler, 1937). See also STATE LIBRARY OF MASSACHUSETTS, HAND-LIST OF LEGISLATIVE SESSIONS AND SESSION LAWS, STATUTORY REVISIONS, COMPILATIONS, CODES, ETC., AND CONSTITUTIONAL CONVENTIONS (1912).

detailed list of the most recently published revisions, digests and collections of the 25 states and the Federal government including short critical notices. This it did, not so much to satisfy academic interests, but more to facilitate lawyers answering legal questions: “the labor of the inquirer is greatly diminished, by having recourse, in the first instance, to some general collection, behind which it is unnecessary to extend his examination.”<sup>323</sup> It found “worthy of remark” that nearly fifty years of legislation of the Federal government had never been revised under the authority of the government.<sup>324</sup> It criticized some works, *e.g.*, Delaware (without “systematic arrangement”)<sup>325</sup> and Maryland (“not revised or digested, but merely arranged and published in the order of their enactment”),<sup>326</sup> and praised others, *e.g.* Georgia (“carefully and skillfully made”)<sup>327</sup> and Louisiana (“the theory of obligations, ... comprising, in a condensed form, one of the most satisfactory digests of the general principles on that subject”).<sup>328</sup>

By the Centennial in 1876 there were thirty-seven states. New states, as they joined the Union (and some even before as territories), adopted, compiled, revised and codified laws. New states did not write on blank slates. They, too, faced challenges in compiling. Where original states sometimes could not find the laws that they had passed, new states sometimes could not tell which laws were their laws and where they applied. In the first century of the Republic, American political boundaries changed dozens of times. New states had legal inheritances of laws from as many as six or more different states, territories and even countries.<sup>329</sup>

The Centennial Writers expected that systematizing would advance beyond compiling. *The North American Review* wrote “The practical administration of law depends ... upon its simplicity .... No nation, in modern times, can afford to go on accumulating vast masses of authoritative decisions and statutes, without occasionally stopping to digest decisions and to revise written laws.”<sup>330</sup> “[Practical administration] can only be attained ... by resorting to the expedient of codification.”<sup>331</sup> Harper’s *First Century of the Republic* reported that by 1876 nearly every one of the by then 37 states—including rebelling states—had

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<sup>323</sup> *A Notice of the Most Recent Revisions, Digests, and Collections of the Statute Laws of the United States and of the Several States*, 18 AM. JURIST & L. MAG. 227 (1837) (emphasis in original).

<sup>324</sup> *Id.* at 228.

<sup>325</sup> *Id.* at 232.

<sup>326</sup> *Id.* at 241.

<sup>327</sup> *Id.* at 233.

<sup>328</sup> *Id.* at 235.

<sup>329</sup> *Cf.*, *e.g.*, George H. Hand, *Preface*, THE REVISED CODES OF THE TERRITORY OF DAKOTA A.D. 1877 iii (1877) (“During their existence as territories, the boundaries and extent of these divisions have been subject to frequent and marked changes, and new names have appeared and old ones have disappeared or become permanent in statutes formed out of a part, rendering, until recently, the political geography of the territories more like the figures in the kaleidoscope.”).

<sup>330</sup> *Law in America: 1776-1876*, 122 N. AM. REV. at 179.

<sup>331</sup> *Id.*

revised or codified its laws since 1860.<sup>332</sup> It was, as one contemporary wrote, “a necessity, and from the earliest dawnings of law has been so considered.”<sup>333</sup>

Revising and codifying are more challenging than compiling. One systematizer can speak for many. In 1835 Mississippi’s reviser in reporting to the legislature on his progress in prepare a Revised Code, explained his delay: “The consolidation of numerous statutes into one uniform law, embracing the whole subject of them, requires great care and deliberation. The foundations of the law are to be examined, prior legislation is to be revised and weighted, and the legitimate consequences of the principles embodied, logically deduced. However easy all this may appear to a cursory observer, yet certain I am, that whoever shall attempt the labor, will find an ample field for mental exertion.”<sup>334</sup> He fulfilled his commission, but the legislature did not adopt his work.<sup>335</sup>

In the Republic’s first century work toward revising and codifying was nearly everywhere—at least at some time,—and nearly every moment—at least somewhere. Often leaders in revising and codifying were leaders in the legal system generally. The amount of energy they and the public put into compiling, revising and codifying was enormous and is unrecognized today.

Compilations were non-controversial. Revisions and codifications, on the other hand, were controversial and, at best, partially successful. The records of compilations are fat bound volumes. Records of revisions and codifications often are ephemeral: draft laws, committee reports, legislative debates, public discourses, pamphlets, journals, and newspapers. But those works exist in quantity: a *Bibliography of Codification and Statutory Revision*<sup>336</sup> from 1901 is 57 pages long, lists over a thousand entries drawn from only six libraries in New York State. Hard to find in libraries, today most of these entries are on digital desktops.

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<sup>332</sup> THE FIRST CENTURY OF THE REPUBLIC at 451 (excluding possibly Pennsylvania and Tennessee). See also Chapter XXXV. *Revised Statutes*, in WILLIAM B. WEDGWOOD, THE GOVERNMENT AND LAWS OF THE UNITED STATES: A COMPLETE AND COMPREHENSIVE VIEW OF THE RISE, PROGRESS, AND PRESENT ORGANIZATION OF THE STATE AND NATIONAL GOVERNMENT 112 (1866) (stating that every state by 1866 had published “Revised Statutes of the State”). One can confirm the assertion by consulting either of the lists in note 322, *supra*. From the lists, one cannot well tell systematizing revisions from mere compilations.

<sup>333</sup> P.N. Bowman, *Interstate Revision and Codification*, 3 SO. L. REV. (New Series) 573, 575 (1877).

<sup>334</sup> Letter of P. Rutilius R. Pray, dated January 15<sup>th</sup>, 1835, to the Honorable P. Briscoe, President of the Senate, in JOURNAL OF THE SENATE OF THE STATE OF MISSISSIPPI AT A CALLED SESSION THEREOF, HELD IN THE TOWN OF JACKSON [commencing January 19, 1835] 84, 85 (1835).

<sup>335</sup> A. HUTCHINSON, CODE OF MISSISSIPPI; BEING AN ANALYTICAL COMPILATION OF THE PUBLIC AND GENERAL STATUTES OF THE TERRITORY AND STATE, . . . FROM 1798 TO 1848 . . . at 67. See R. RUTILIUS R. PRAY, NOTES TO THE REVISED STATUTES OF THE STATE OF MISSISSIPPI (1836).

<sup>336</sup> It is appended to a 75 page report on *Statute Law in New York, From 1609 to 1901* which itself is a *Supplement* to [New York (State) Legislature], REPORT OF THE JOINT COMMITTEE OF THE LEGISLATURE OF 1900 ON STATUTORY REVISION COMMISSION BILLS, which itself is available on Google Books as an attachment to the REPORT OF THE SPECIAL COMMITTEE OF THE ASSEMBLY OF THE LEGISLATURE OF 1901 ON STATUTORY REVISION COMMISSION BILLS 1901.

It is unhelpful to characterize systematization as a social, political or religious movement. It has no particular proponents and no particular beneficiaries. It has no particular place in time. It is, as the Centennial Writers and their contemporaries saw, more a natural phenomenon of modern government, such as democracy. If it is to be counted a movement, then it is a movement like public education. Public education is an apt analogy: proponents of the one were often proponents of the other.<sup>337</sup> Their shared goal was and is an educated public.

## 2. The Ubiquity of Systematizing

Systematizing spread across the North American continent with the people who settled it. It was ubiquitous. In every state some measure of systematizing occurred. Systematizing was part of the law. Systematizing was something leaders in law did. Systematizing was something the people expected. To merely say that it was ubiquitous—in the face of a century of denial—is not enough to challenge contemporary common law myth. I beg the reader’s patience to show some of the many manifestations of systematization in the first century of the Republic, first to the Civil War, and then at the “Centennial Moment”:

*Jefferson’s Revisal of Virginia Laws.* As noted above, the first century of the Republic began with Jefferson rushing home to Virginia to initiate his Revisal of Virginia laws. Throughout the original thirteen states, jurists compiled their states’ laws. Virginia was the leader in revising. Bill-by-bill its legislature considered Jefferson’s handwork.<sup>338</sup> Jefferson credited Madison for overcoming the opposition of “endless quibbles, chicaneries, perversions, vexations of lawyers and demi-lawyers.”<sup>339</sup> When Madison went off to the Constitutional Convention in Philadelphia, others in Virginia picked up where he left off.<sup>340</sup> As for the importance of the work for the people, one publisher of the revised Virginia laws opined: “it is plain that every family in the commonwealth, should, if possible, possess a copy of it.”<sup>341</sup> But Virginia was not alone in taking up revision; it was just the first and most successful. South Carolina,<sup>342</sup> North Carolina (with

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<sup>337</sup> Examples are Thomas Jefferson in Virginia and Horace Mann and Joseph Story in Massachusetts.

<sup>338</sup> See JULIAN P. BOYD (ED.), PAPERS OF THOMAS JEFFERSON, vols. 1 to 3 (1950) (giving bill-by-bill descriptions).

<sup>339</sup> THE AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, TOGETHER WITH A SUMMARY OF THE CHIEF EVENTS IN JEFFERSON’S LIFE 71 (Paul Leicester Ford, ed. 1914; New Introduction by Michael Zuckerman, 2005).

<sup>340</sup> ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 80 (1990). The successor *Revised Code of 1792* was characterized by another author as “merely a compilation.” Henry E. Ross, *History of Virginia Codification*, 11 VA. L. REG. 91 (1905).

<sup>341</sup> *Preface*, A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE, AS ARE NOW IN FORCE v (Samuel Pleasants, Jun. & Henry Pace, 1803). This preface gives particular attention to practical conditions of cost and portability: “In riding ten, or fifteen miles to a county court-house, a gentleman does not always think it worth while to take a portmanteau along with him.” *Id.* at ii-iii.

<sup>342</sup> 1 JOSEPH BREVARD, AN ALPHABETICAL DIGEST OF THE PUBLIC STATUTE LAW OF SOUTH-CAROLINA xvii (1814).

later Associate Justice Iredell) and Pennsylvania (with Associate Justice Wilson) also made starts in the 18<sup>th</sup> century.

*Toulmin's Southwest Digests.* The influence of Virginia and of Jefferson extended to Kentucky, the new state formed out of Virginia, and to Mississippi and Alabama to the south. Jefferson helped Harry Toulmin, an immigrant Englishman, become President of the Transylvania Seminary.<sup>343</sup> From there Toulmin became second Secretary of State of Kentucky (1796-1804). While Secretary of State he compiled Kentucky's laws<sup>344</sup> and wrote a multi-volume treatise on criminal law intended to be prefatory to a criminal code.<sup>345</sup> In 1804 Jefferson appointed Toulmin federal judge for the Territory of Mississippi (1804-1819). While Territorial Judge Toulmin compiled the Territory's laws.<sup>346</sup> When the State of Alabama was created in the old Mississippi territory, Toulmin compiled its laws.<sup>347</sup>

*Louisiana Purchase.* In 1803 the United States doubled its size when it purchased the Louisiana territory that had been variously under the civil law systems of France and Spain. The Territory of Orleans, the later state of Louisiana, was separated from the rest already in 1804. In 1808 that territory adopted the civil law-based *Digest of the Civil Laws in Force in the Territory of Orleans*. In 1812 the Constitution of the new state of Louisiana included an anti-reception clause designed to prevent the kind of adoption by reference of English law that some other states had accomplished.<sup>348</sup> Notwithstanding popular perceptions, Louisiana was never under the Code Napoleon.<sup>349</sup> Louisiana has, however drawn on French codes in adopting its own laws and has defended its civil law

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<sup>343</sup> On Toulmin, see Paul M. Pruitt Jr., *Harry Toulmin: A Frontier Justinian*, in PAUL M. PRUITT, JR. TAMING ALABAMA: LAWYERS AND REFORMERS, 1804-1929 (2010).

<sup>344</sup> HARRY TOULMIN, SECRETARY TO THE COMMONWEALTH OF KENTUCKY, COLLECTION OF ALL THE PUBLIC AND PERMANENT ACTS OF THE GENERAL ASSEMBLY OF KENTUCKY WHICH ARE NOW IN FORCE, ARRANGED AND DIGESTED ACCORDING TO THEIR SUBJECT; TOGETHER WITH ACTS OF VIRGINIA xv (1802) ("The very confused and undigested state in which the acts of the Legislature of Kentucky have hitherto remained, rendered an arranged collection of them highly necessary both to professional gentlemen and to the public at large."). Toulmin included *A Summary of the Criminal Law of Kentucky as Applicable to Freeman*, at xxviii.

<sup>345</sup> HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF KENTUCKY (2 vols., 1804).

<sup>346</sup> THE STATUTES OF THE MISSISSIPPI TERRITORY, REVISED AND DIGESTED BY THE AUTHORITY OF THE GENERAL ASSEMBLY (Harry Toulmin, compiler, 1807).

<sup>347</sup> DIGEST OF THE LAWS OF THE STATE OF ALABAMA: CONTAINING THE STATUTES AND RESOLUTIONS IN FORCE AT THE END OF THE GENERAL ASSEMBLY IN JANUARY, 1823 (Harry Toulmin, compiler, 1823).

<sup>348</sup> LA. CONST. 1812 art. IV, sect. 11 ("the legislature shall never adopt any system or code of laws, by general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.").

<sup>349</sup> The territory was transferred four months before the French Code Civil came into force. In any event, however, Louisiana was transferred back to France from Spain for only a few weeks in 1803. It had for decades prior been under Spanish rule and laws.

inheritance against common law intrusions.<sup>350</sup> Louisiana law has introduced French law to Americans.<sup>351</sup>

On the frontier the object of legislation was clearer than the means. In 1822 at the first meeting of the Legislative Council of the Territory of Florida, the newly chosen President apologized for his lack of “practical experience of the forms of legislation.” The Governor told the Council: “The uncertainty as to the laws actually in force in Florida, renders it your duty to give to the territory the basis of such a code, as can be clearly and certainly understood by the great body of the people.” The Governor was none too clear about where that would come from. Notwithstanding “serious objections to the common law,” he advised that “common law be adopted as the basis of our code.” His more general counsel: “combine whatever is excellent in both systems, and avoid whatever is objectionable in either, as a distinct code.”<sup>352</sup> Clear from that message is, whether substantive rules be common law or civil law origin, they should be rules of written law.

*Livingston’s Laws.* Through Edward Livingston, a New Yorker and younger brother of Robert Livingston, is the way most Americans in the first century of the Republic learned of Louisiana law. Louisiana engaged Livingston (with others) to revise the 1808 digest as a civil code, to draft a code of procedure and to prepare a criminal code.<sup>353</sup> Livingston is known outside Louisiana better for the criminal law work, which was not adopted, than for the civil law work, which was.<sup>354</sup> The criminal law proposals were reprinted, some in part, beginning already in 1824 in England, France, Germany and Quebec.

In 1828 Congress printed Livingston’s proposed *System of Penal Law* for the House of Representatives as Livingston had revised it as Congressman for

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<sup>350</sup> See, e.g., SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* (1993) (with a bibliography of relevant materials); RICHARD HOLCOMBE KILBOURNE, JR., *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839* (1987) (discussing, *inter alia*, the debate over sources for the 1808 digest); Augustin Parise, *Private Law in Louisiana: An Account of Civil Codes, Heritage, and Law Reform*, in *THE SCOPE AND STRUCTURE OF CIVIL CODES* (Julio César Rivers, ed., IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE Vol. 32) 429 (2013).

<sup>351</sup> See E. Evariste Moise, *Two Answers to Mr. Carter’s Pamphlet*, 29 ALB. L.J. 267 (1884); *Jurisprudence of Louisiana*, 4 AM. QUARTERLY REV. 53 (Robert Walsh, ed., 1828).

<sup>352</sup> *Florida*, 23 NILES’ WEEKLY REGISTER 23-24 (Sept. 14, 1822) (including the July 22, 1822 message of Governor William P. Duval).

<sup>353</sup> LOUISIANA LEGAL ARCHIVES, [two volumes in one] VOLUME 1, A REPUBLICATION OF THE *PROJET* OF THE CIVIL CODE OF LOUISIANA OF 1825, VOLUME 2, A REPUBLICATION OF THE *PROJET* OF THE CODE OF PRACTICE OF LOUISIANA 1825 (1937); EDWARD LIVINGSTON, *SYSTEM OF PENAL LAW, PREPARED FOR THE STATE OF LOUISIANA; COMPRISING CODES OF OFFENCES AND PUNISHMENTS, OF PROCEDURE, OF PRISON DISCIPLINE AND EVIDENCE APPLICABLE AS WELL TO CIVIL AS TO CRIMINAL CASES. AND A BOOK, CONTAINING DEFINITIONS OF ALL THE TECHNICAL WORDS USED IN THIS SYSTEM* (1824).

<sup>354</sup> See, e.g., *The Livingston Code*, in JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 332 (2014). From the first century of the Republic, see, e.g., *Edward Livingston and His Code*, 9 U.S. MAG. & DEMOCRATIC REV. 3, 211 (2 parts, 1841); CHARLES HAVENS HUNT, *LIFE OF EDWARD LIVINGSTON WITH AN INTRODUCTION BY GEORGE BANCROFT* (1864).

the United States.<sup>355</sup> In 1832 a Congressional committee included Livingston's proposal as the criminal law component of a complete code for the District of Columbia.<sup>356</sup> Livingston's work gave encouragement to later codifiers.<sup>357</sup> In 1856 Henry Maine called him "the first legal genius of modern times" and said that it was his "code, and not the Common law of England, which the newest American States are taking for the substratum of their laws."<sup>358</sup>

Digitization promises to disclose influences not previously known. One colorful example that I found is in Indiana. In 1827 the new state's young (age 33) governor, proposed that he would write a code based on the "Napoleon or Livingston codes" so as "to enable the people generally to form a tolerable correct idea of that system which controls their actions." It would help in "shaking off this disreputable stigma" of control by British laws. He implored the bar not to suppose "that this attempt to promulgate the laws of the land, will be aimed at their useful profession, or condemn its practicality, until they see the book."<sup>359</sup> One wonders how serious he was when one learns what came of his proposal.

Three years later, in 1830, when the Senate had not received the promised code from the Governor and itself was considering revision, it formally inquired how far he "had progressed in the codification of the laws of the State."<sup>360</sup> The Governor responded that he had been doing it on his own time and that it could not form any part of the revision the Senate was contemplating.<sup>361</sup> There then

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<sup>355</sup> EDWARD LIVINGSTON, *A SYSTEM OF PENAL LAW FOR THE UNITED STATE OF AMERICA, CONSISTING OF A CODE OF CRIMES AND PUNISHMENTS; A CODE OF PROCEDURE IN CRIMINAL CASES; A CODE OF PRISON DISCIPLINE; AND A BOOK OF DEFINITIONS*, PRINTED BY ORDER OF THE HOUSE OF REPRESENTATIVES (1828).

<sup>356</sup> Edward Livingston, *System of Penal Law for the District of Columbia*, in *A SYSTEM OF CIVIL AND CRIMINAL LAW FOR THE DISTRICT OF COLUMBIA AND FOR THE ORGANIZATION OF THE COURTS THEREIN*, REPORTED BY THE JOINT COMMITTEE APPOINTED FOR THE PURPOSE IN OBEDIENCE TO A RESOLUTION OF THE FIRST SESSION OF THE TWENTY-SECOND CONGRESS, DOCUMENT NO. 85, in VOLUME II. CONTAINING DOCUMENT NO. 85, OF PUBLIC DOCUMENTS PRINTED BY ORDER OF THE SENATE OF THE UNITED STATES, SECOND SESSION OF THE TWENTY-SECOND CONGRESS ... BEGUN DECEMBER 3, 1832 ... IN TWO VOLUMES, at pp. 291-685 (1833).

<sup>357</sup> *E.g.*, *The Statute Laws of Tennessee*, 8 AM. JURIST 298, 314 (1832) ("It must be gratifying to Mr. Livingston to see ... his labors have been duly appreciated, and have been signally useful in softening the rigor of the criminal law in one, at least, of the neighbor states, and in improving the style of their composition.").

<sup>358</sup> H.J.S. Maine, *Roman Law and Legal Education*, 1856 CAMBRIDGE ESSAYS 1, 17 (1856), reprinted in HENRY SUMNER MAINE, *VILLAGE-COMMUNITIES IN THE EAST AND WEST* 330, 360 (3<sup>rd</sup> and enlarged ed., 1880). For a contemporary account of Livingston's life, see CHARLES HAWES HUNT, *LIFE OF LIVINGSTON WITH AN INTRODUCTION BY GEORGE BANCROFT* (1864).

<sup>359</sup> James Brown Ray, [*Governor's Address, December 4, 1827*], *JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE TWELFTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD ... ON MONDAY THE THIRD DAY OF DECEMBER, 1827*, 9, 25-26 (1827), also in *MESSAGES AND PAPERS RELATING TO THE ADMINISTRATION OF JAMES BROWN RAY: GOVERNOR OF INDIANA 1825-1831* (Dorothy Riker & Gayle Thornbrough, eds., 1954).

<sup>360</sup> *JOURNAL OF THE SENATE OF THE STATE OF INDIANA: BEING THE FIFTEENTH SESSION OF THE GENERAL ASSEMBLY; BEGUN AND HELD ... ON MONDAY THE SIXTH OF DECEMBER, 1830*, 61 (1830 [*sic*]).

<sup>361</sup> Letter of Dec. 10, 1830, *id.* at 63-64.

followed a two month long dispute between the Governor and the Senate over ownership and possession of what was apparently the only copy of the Louisiana Civil Code in the State of Indiana. Also involved were the Secretary of State, the State Auditor, the State Treasurer, the State Librarian and the State Librarian's predecessor in office. The heart of the dispute the Governor identified as "an evident determination to wrest it from my hands, on the part of those who cannot endure the idea of having a code of laws for Indiana."<sup>362</sup> The book ended up in the State Library and Indiana ended up without a Livingston-like code.<sup>363</sup>

*Napoleon's Five Codes.* In the first decade of the 19<sup>th</sup> century France systematized its law: it adopted Napoleon's five codes, *i.e.*, the *Code Civil* (the "Napoleonic Code," the most famous of the five, first in 1804), as well as codes of Commerce, Civil Procedure, Criminal Procedure and Criminal Law. Americans took note. In 1814, notwithstanding negative perceptions of France under Napoleon, and "the powerful coalition ... arrayed against her," New York attorney John Rodman, in his translation of the Commercial Code, reported that it was "generally admitted that the new system of jurisprudence adopted in France was entitled to the highest commendation, as a production of wisdom and learning."<sup>364</sup> He offered the Commercial Code as an aid to "throw off the shackles of antiquated [common law] rules and precedents, unfounded in reason and truth, and diligently endeavor to ingraft into our system of jurisprudence those pure principles of equity and justice ...."<sup>365</sup> Throughout the 19<sup>th</sup> century Americans pointed to Napoleon's codes as examples of the success of written law. Digitization facilitates new examinations of the influence of the French codes in America. In England they inspired Jeremy Bentham the most famous publicist of codes ever.

*Bentham—Legislator of the World.*<sup>366</sup> Bentham never visited America, but he made his influence felt in the new world. In 1811 he wrote to President Madison, himself famous for legislation, and offered his services to codify American

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<sup>362</sup> Letter of Jan. 10, 1830, *id.* at 500.

<sup>363</sup> The story is told in the pages of the *Journal*, *supra* note 360, at 49-50, 63-64, 169, 249-250, 277-278, 500-509, 518-519, 546-553, Appendix (d).

<sup>364</sup> JOHN RODMAN, THE COMMERCIAL CODE OF FRANCE, WITH THE MOTIVES, OR DISCOURSES OF THE COUNSELLORS OF STATE, DELIVERED BEFORE THE LEGISLATIVE BODY, ILLUSTRATIVE OF THE PRINCIPLES AND PROVISIONS OF THE CODE iii-iv (1814). Rodman's was already the *second* American translation of the French Commercial Code of 1807. Robert Walsh had already included in the second volume of his journal, *The American Review of History and Politics*, translations of both the Commercial and the Criminal Codes. *Commercial Code of the French Empire. Translated for the American Review, with Explanatory Notes*, 2 AM. REV. HIST. & POLITICS—APPENDIX 91 (Oct. 1811); *Penal Code of the French Empire*, 2 AM. REV. HIST. & POLITICS—APPENDIX 1 (July 1811). Rodman, to increase the reform value of his translation, added what we call today in American English, the legislative history, *i.e.*, the *Motives*. He lamented that he had been unable to get enough subscribers to support publication of his translation of the larger Civil Code. RODMAN, *supra* at iv-v.

<sup>365</sup> *Id.* at xiii.

<sup>366</sup> *See generally* JEREMY BENTHAM, 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW, AND EDUCATION" (Philip Schofield & Jonathan Harris, eds., 1998); JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION: INCLUDING CORRESPONDENCE

law. He made the same offer to other leaders, including to the Czar of Russia. Madison let the letter sit for five years—the two countries were at war—before he respectfully declined. Bentham then wrote to the governors of states and got some modest interest. Bentham’s influence was with leaders rather than with the public, and even there it was uneven, for Benthamism was as much about utilitarianism as about codifying. He is said to have had the greatest influence on Edward Livingston,<sup>367</sup> but he also befriended a wide range of notables including John Quincy Adams and influenced other code proponents including David Dudley Field.<sup>368</sup> At the end of the Republic’s first century *The Nation* wrote that “The various attempts made, with more or less success, in this country no less than in England, to codify the law are also distinct results of the teachings of Bentham and Austin.”<sup>369</sup> Today digitization permits scholars further to plumb the depths of Benthamism in American law systematization.

*Grimké & Cooper—Systematizing in South Carolina.* In an 1828 article on *Codification in the United States of America*, an English journal, after reporting on Bentham’s communications, turned to the then ongoing work to codify law in South Carolina. The governor had proposed appointment of special committee to take up the matter and the legislature unanimously approved. At first limited to statute law, the legislature amended the resolution to include common law. To confine the measure to consolidation of statutes, according to one criticism, “might benefit the bar, but would leave the citizens in their present state of ignorance of ‘the HYDRA, the COMMON LAW,’ nurtured by the profession ....”<sup>370</sup> Noted jurist Thomas S. Grimké (who would later be eclipsed by his famous abolitionist sisters)<sup>371</sup> led a drive for a code and chaired the committee.<sup>372</sup> One supporter of the project following its demise identified the “seri-

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WITH THE RUSSIAN EMPEROR, AND DIVERS CONSTITUTE AUTHORITIES IN THE AMERICAN UNITED STATES (1817).

<sup>367</sup> C.W. Everett, *Bentham in the United States of America*, in JEREMY BENTHAM AND THE LAW: A SYMPOSIUM (George W. Keeton & Georg Schwarzenberger, eds.) 185, 193 (1948).

<sup>368</sup> PETER J. KING, UTILITARIAN JURISPRUDENCE IN AMERICA: THE INFLUENCE OF BENTHAM AND AUSTIN ON AMERICAN LEGAL THOUGHT IN THE NINETEENTH CENTURY (Ph. D. diss., Dept. of History, University of Illinois, Champaign, 1961, published Garland, 1986). King devotes one chapter to three befriended politicians (Aaron Burr, John Quincy Adams, and Albert Gallatin), another to three intellectuals (Thomas Cooper, David Hoffman, and Richard Hildreth), and a third to three code proponents (Livingston, David Dudley Field and Richard Vale).

<sup>369</sup> *Modern English Law* [Review], 22 THE NATION 273, 274 (1876), reprinted in 3 CENTRAL L.J. 728 (1876). The same review commented on English attempts to codify: “Other causes, no doubt, have contributed to the failure of English reformers to produce a code, but the nature of the House of Commons is the most obvious cause of their want of success.” *Id.* at 274.

<sup>370</sup> *Codification of the Laws of the United States of America*, 2 JURIST Q.J. JURIS. & LEGIS. 47, 50 (1828).

<sup>371</sup> See MARK PERRY, LIFT UP THY VOICE: THE GRIMKÉ FAMILY’S JOURNEY FROM SLAVEHOLDERS TO CIVIL RIGHTS LEADERS (2001).

<sup>372</sup> See THOMAS S. GRIMKÉ, ORATION, ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING THE WHOLE BODY OF THE LAW TO THE SIMPLICITY AND ORDER OF A CODE, DELIVERED IN THE CITY-HALL BEFORE THE SOUTH-CAROLINA BAR ASSOCIATION (18[27]; Thomas S. Grimké), REPORT. SOUTH CAROLINA [of the Committee appointed 20<sup>th</sup> of December last, to report on the

ous difficulties” the “friends of codification encounter[ed]”: “indifference to action, a dread of consequences, the prejudices of education, all are against them. The laws of Carolina, inconsistent and unintelligible as they are, were the laws of our forefathers.”<sup>373</sup> That no code came of the effort has been attributed in a modern study to lawyer opponents who feared that codification “might destroy the stability of law and threaten the very existence and fabric of society.”<sup>374</sup>

Systematizing was not, however, at an end in South Carolina. Thomas Cooper, a Jefferson protégé whom the third president described as “one of the ablest men in America and that in several branches of science”, after resigning as President of what became the University of South Carolina, took up the legislature’s commission to,<sup>375</sup> as he described it, “to make a collection of our laws that shall form the basis of any future revision, condensation, or digest.”<sup>376</sup> It was a fitting memorial in retirement for a man who decades before published the first American edition of the *Institutes of Justinian*.<sup>377</sup>

*Sampson’s New York Discourse*.<sup>378</sup> The same 1828 English article on *Codification in the United States of America*, after addressing South Carolina, passed on to consider William Sampson, an Irish-American lawyer. In 1823 Sampson, challenged common law in an address in New York. The journal reported Sampson’s “considerable influence” in moving Americans away from common law and toward codification.<sup>379</sup> His influence was later called “electrifying” and seen as leading to the *New York Revised Statutes* of 1829.<sup>380</sup> That

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practicability and expediency of a Code of the Statute and Common Law of this State by Thomas S. Grimké) (1827).

<sup>373</sup> W.W. STARKE, SPEECH ... ON CODIFYING THE LAWS DELIVERED IN THE HOUSE OF REPRESENTATIVES IN DECEMBER 1828 at 5 (1830).

<sup>374</sup> DONALD JOSEPH SENESE, LEGAL THOUGHT IN SOUTH CAROLINA, 1800-1860 at 412 (Ph. D. diss., Dept. of History, University of South Carolina, 1970).

<sup>375</sup> DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783-1839, at 198, 371-373 (2<sup>nd</sup> ed. 1961).

<sup>376</sup> 1 THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA; EDITED, UNDER AUTHORITY OF THE LEGISLATURE (in five volumes) iii (1836) (according to MALONE, *supra* note 375, at 407, it was the “final work of Cooper’s life and the chief monument to his legal learning.”).

<sup>377</sup> THOMAS COOPER, INSTITUTES OF JUSTINIAN WITH NOTES (1812) (2<sup>d</sup> ed. 1841) (3<sup>d</sup> ed. 1852).

<sup>378</sup> SAMPSON’S DISCOURSE, AND CORRESPONDENCE WITH VARIOUS LEARNED JURISTS, UPON THE HISTORY OF THE LAW, WITH THE ADDITION OF SEVERAL ESSAYS, TRACTS, AND DOCUMENTS, RELATING TO THE SUBJECT. COMPILED AND PUBLISHED BY PISHEY THOMPSON (1826). This is a collection of many comments on Sampson’s discourse and gives an idea that he did get attention for his ideas.

<sup>379</sup> *Codification of the Laws of the United States of America*, 2 JURIST Q.J. JURIS. & LEGIS. 47, 54 (1828) (reporting his writings “have had considerable influence in the United States, and have been greatly instrumental in drawing the attention of the profession, and the public of that country, to the necessity and practicability of amending the law by a mature and decided revision of its principles and present state, especially the common law.”);

<sup>380</sup> CHARLES P. DALY, THE COMMON LAW: ITS ORIGIN, SOURCES, NATURE, AND DEVELOPMENT AND WHAT THE STATE OF NEW YORK HAS DONE TO IMPROVE UPON IT 54 (1894) (“it electrified the public mind. ... and led within a decade thereafter to the enactment of the Revised Statutes. What it urged was felt to be necessary,—a thorough revision and reconstruction of the entire system then existing in this State”). *Accord*, James Dunwoody Brownson De Bow, *Louisiana*,

legislation catapulted New York into a leadership among all states that it held so long as systematizing remained a live issue.

New York may have been destined to become the nation's leader in revising and codifying. It was, and is, after all, the "Empire State". New York City was, and is, the nation's commercial capital; it was first political capital under the Constitution. For the first century of the Republic, with very little let-up, even in war, statutes were a topic of public debate. If there had been no other activity in the United States, that in New York would disprove contemporary common law myth that common law dominated to the near exclusion of statutes.

New York began dealing with statutes already in the colonial era.<sup>381</sup> It was quicker to compile laws after the Revolution than most states, and sooner to regularize the practice. Already in 1792, 1801 and 1813 it published compilations. A fourth, initiated in 1825, led to the *Revised Statutes of 1829* that provided the legal framework for New York through to the end of the 19<sup>th</sup> century.

*Butler's & Duer's New York Revised Statutes.* The *New York Revised Statutes of 1829* were a code in the modest American sense in all but name. The 1825 Act that authorized them appointed three eminent jurists, Chancellor James Kent, Erastus Root and Benjamin F. Butler, to do the work. When Kent declined to serve the governor appointed another prominent jurist, John Duer. Butler and Duer set out to do more than compile statutes: they proposed a complete revision of New York laws. Unexpectedly, the legislature agreed.<sup>382</sup> The result four years later was the *New York Revised Statutes of 1829*.

The *New York Revised Statutes* find no place in contemporary common law myth. Although ignored in the academy, their history is told in contemporary reports and in secondary works.<sup>383</sup> They were a product of a rational give-

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1 COMMERCIAL REV. 386, 417 note † (1846), reprinted 1 J.D.B. DE BOW, THE INDUSTRIAL RESOURCES, ETC., OF THE SOUTHERN AND SOUTHWESTERN STATES 417, 433 note † (1846). Just before Sampson gave his address, Henry Sedgwick published THE ENGLISH PRACTICE: A STATEMENT SHOWING SOME OF THE EVILS AND ABSURDITIES OF THE PRACTICE OF THE ENGLISH COMMON LAW, AS ADOPTED IN SEVERAL OF THE UNITED STATES, AND PARTICULARLY IN THE STATE OF NEW YORK ... BY A LOVER OF IMPROVEMENT (New York: 1822). Three years later David Dudley Field joined Sedgwick's firm, first as clerk and then as associate.

<sup>381</sup> The British government is reported to have encouraged the colonies to create collections of their statutes for use by the public and government officials. See Erwin C. Surrency, *Revision of Colonial Laws*, 9 AM. J. LEGAL HIST. 189 (1965).

<sup>382</sup> Root, who wanted to follow the old approach, was replaced by Henry Wheaton, Supreme Court Reporter, who himself was later replaced by John C. Spencer. Spencer was later Secretary of War and sponsor of an early translation of Alexis de Tocqueville's *Democracy in America*.

<sup>383</sup> See ERNEST HENRY BREUER, THE NEW YORK REVISED STATUTES – 1829. ITS SEVERAL EDITIONS, REPORTS OF THE REVISERS, COMMENTARIES AND RELATED PUBLICATIONS UP TO THE CONSOLIDATED LAWS OF 1909 (Typescript, University of the State of New York, New York State Law Library, 1961); Robert Ludlow Fowler, *Observations on the Particular Jurisprudence of New York, 1821-1846*, 25 ALBANY L.J. 166 (1882); John W. Edmonds, *Introduction, Extracts from the Original Reports of the Revisers* [of 1827], in 5 STATUTES AT LARGE OF THE STATE OF NEW YORK, COMPRISING THE REVISED STATUTES, AS THEY EXISTED ON THE 1<sup>ST</sup> DAY OF JULY 1862, at 235-49 (1863).

and-take between drafters and legislators.<sup>384</sup> Their authorization followed according to the proposal debated in 1825. In 1826 the revisers reported on their progress. In 1827 the revisers delivered six volumes of printed reports of their proposals published.<sup>385</sup> After months of consideration in legislative session, the legislature adopted the *Revised Statutes* in 1828 and they were published in 1829 in three large volumes.

The *New York Revised Statutes* were seen abroad “as a practical specimen of the procedure and principles of American codification.”<sup>386</sup> At home, they served as inspiration and model in other states. For example, nearly thirty years later, Judge Thomas Cooley compiled Michigan laws “after the manner of the Revised Statutes of New York.”<sup>387</sup> Closer to home in distance and in time were their apparent influences on Pennsylvania and Massachusetts in the 1830s and 1840s.

*Revised Code of Pennsylvania* of 1836. In 1830 the Pennsylvania legislature provided for appointment of a commission to “render the statute laws of Pennsylvania more simple, plain and perfect.” The Commissioners worked six years to general approval. The legislature spent almost an entire session on just thirteen of the bills that the “Commissioners to revise the Civil Code” presented.<sup>388</sup> Lamented was that the work was not complete and was limited to statute law.<sup>389</sup> Still, Harvard’s Professor Charles Warren early in the 20<sup>th</sup> century wrote that what was done, was done “so thoroughly as practically to construct a Civil Code.”<sup>390</sup>

*Massachusetts Revised Statutes* of 1836. If New York was leader, Massachusetts was a close follower for nearly thirty years—and sometimes itself

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<sup>384</sup> For a sharp contemporary criticism of the proposal, see *Review “Revision of the Laws,”* 2 ATLANTIC MAGAZINE 458-466 (1825).

<sup>385</sup> Although published in print runs of 750, complete sets of these volumes are “very scarce.” Breuer, *supra* note 383, at 5-6, reports only two sets. The only digitization of which I am aware is *Extracts from the Original Reports of the Revisers*, in 5 STATUTES AT LARGE OF THE STATE OF NEW YORK, COMPRISING THE REVISED STATUTES, AS THEY EXISTED ON THE 1<sup>ST</sup> DAY OF JULY, 1862, 251-435 (John W. Edmonds, ed., 1863). I own a copy of volume 4 from the library of T. Sedgwick & D.D. Field.

<sup>386</sup> *Codification of the Laws of the United States of America*, 2 JURIST Q.J. JURIS. & LEGIS. 47, 59 (1828).

<sup>387</sup> 1 THE COMPILED LAWS OF THE STATE OF MICHIGAN, COMPILED AND ARRANGED BY THOMAS M. COOLEY iv (1857).

<sup>388</sup> *Advertisement* in 2 BENJAMIN PARK & OVID F. JOHNSON, A DIGEST OF THE REVISED CODE AND ACTS, FORMING WITH PURDON’S DIGEST OF 1830, A COMPLETE DIGEST OF THE LAWS OF PENNSYLVANIA TO THE PRESENT TIME, TWO VOLUMES IN ONE (1837).

<sup>389</sup> GEORGE SHARSWOOD, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW 260-61 (1870). For positive and extensive contemporary accounts, see *Revised Code of Pennsylvania*, 13 AM. Q. REV. 30 (Robert Walsh, ed., 1833), and *Revised Code of Pennsylvania*, 19 AM. Q. REV. 399 (Robert Walsh, ed., 1836).

<sup>390</sup> 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 259 (1908).

leader.<sup>391</sup> February 24, 1832 the Massachusetts legislature authorized the governor to appoint three Commissioners “to revise, collate and arrange ... all general statutes of the Commonwealth.”<sup>392</sup> The Commissioners started from the example of the *New York Revised Statutes* and hoped to effect “a general conformity among the codes of the different States of the Union.”<sup>393</sup> Although styled “Revised Statutes,” the *American Jurist and Law Magazine* considered the revision to be a code. The journal in discussing the project addressed what a good code would look like. It noted that the issue of codification no longer had the “direful import” it once had, since the two sides had come considerably closer. By 1835 the “advocates of each form of the law, admit[ed] that there must be some of both forms; they only disagree[d] as to the proportional amount.”<sup>394</sup> The *American Jurist* applauded the Commissioners’ suggestion that their final report should be “sent to all town officers, that the public judgment upon its merits might be early matured, and such errors as might be detected be set right.”<sup>395</sup> A little over a year later, the *American Jurist* returned to review the adopted and published *Revised Statutes of the Commonwealth of Massachusetts*. It pronounced the close of “this great and important undertaking” and “the improved state to which, by means of it, our statutory law has been advanced.”<sup>396</sup> The *Revised Statutes of Massachusetts* were noted abroad—as was the “extraordinary amount of labor” given to them: three years to prepare the final report, fifty one days of a special joint committee and special session of the whole legislature.<sup>397</sup>

*Justice Story’s 1836 Massachusetts Code Commission.* Massachusetts did not stop its systematizing with its own *Revised Statutes*. In the very year of their publication—1836—the governor proposed, the legislature authorized, a blue ribbon panel headed by Justice Joseph Story was appointed, and the panel re-

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<sup>391</sup> The July 1859 issue of the *American Law Register* illustrates the competition nicely. First, it gives three pages to note publication of the 1389 page STATE OF MASSACHUSETTS-REPORT OF THE COMMISSIONERS ON THE REVISION OF THE STATUTES (“We are seldom called upon to pass upon labors of greater magnitude than those now before us.”) and follows those pages immediately with three pages noting publication of STATE OF NEW YORK—FIRST REPORT OF THE COMMISSIONERS OF THE CODE (designed “to reduce into a systematic code such of the laws of that State as were not comprised in the codes of civil and procedure already completed”). *Notices of New Books*, 7 AM. L. REG. 568, 571 (1859) (respectively).

<sup>392</sup> *Revision of the Laws in Massachusetts*, 13 AM. JURIST & LAW MAG. 344, 347 (1835).

<sup>393</sup> *Id.* at 351, 355-56.

<sup>394</sup> *Id.* at 341.

<sup>395</sup> *Id.* at 352 [emphasis in original].

<sup>396</sup> *Revised Statutes of Massachusetts*, 15 AM. JURIST & LAW MAG. 294, 294-295 (1836). The journal added an endorsement for legislation: “How far the changes introduced are judicious, is a question to be settled, in the main, by time and experience; and the felicity of legislation is so great, that a statutory evil can be remedied, the moment the pressure is felt.” *Id.* at 318.

<sup>397</sup> *Law Commission, Report of the Commissioners for Revising and Consolidating the Laws*, in JOURNAL OF THE LEGISLATIVE COUNCIL OF THE PROVINCE OF NEW BRUNSWICK, FROM 7<sup>TH</sup> JANUARY TO 7<sup>TH</sup> APRIL 1852 at 356, 359 (1852) and in 1 THE REVISED STATUTES OF NEW BRUNSWICK vii, xiii (1854). The Report noted that Maine paralleled Massachusetts in systematizing its statutes.

ported upon the “practicability and expediency of reducing to a written and systematic code the Common Law of Massachusetts or any part thereof.”<sup>398</sup> The Commissioners reported favorably: much, but not all common law, they counseled, was suitable for codification. Proponents of codification took Story’s Report as an endorsement of codification and at least twice reprinted it years later.<sup>399</sup>

Story was a lifelong practitioner of systematization.<sup>400</sup> In an oft-reprinted address to the Suffolk County Bar Association, he alerted the bar to “the fearful calamity which threatens us of being buried alive ... in the labyrinths of the law,” for which he knew “of but one adequate remedy, and that is, by a gradual Digest, under legislative authority,” through which “we may pave the way to a general code, which will present in its authoritative text the most material rules to guide the lawyer, the statesman, and the private citizen.” He held up the “modern code of France” as “perhaps the most finished and methodical treatise of law that the world ever saw.” He called on “the future jurists of our country and England, to accomplish for the common law what has been so successfully demonstrated ... in the jurisprudence of other nations.”<sup>401</sup>

Story was a “codifier.”<sup>402</sup> Yet, while promoting codifying, he affirmed a role for “the forming hand of the judiciary.”<sup>403</sup> It is suggestive of the strength

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<sup>398</sup> REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT ON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF (1837).

<sup>399</sup> LAW REFORM TRACTS NO. 3. CODIFICATION OF THE COMMON LAW. REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE, THE COMMON LAW OF MASSACHUSETTS, PUBLISHED UNDER THE SUPERINTENDENCE OF A LAW-REFORM ASSOCIATION (1852); CODIFICATION OF THE COMMON LAW, LETTER OF JEREMY BENTHAM, AND REPORT OF JUDGES STORY, METCALF AND OTHERS (David Dudley Field, ed., 1882).

<sup>400</sup> When still a relative youth, he published the first collection of precedents of pleadings (an important part of applying law in common law pleading). As a junior legislator, he oversaw printing of one of the first compilations of Massachusetts laws. THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, 3 VOLS IN 1 at [unnumbered vi] (1807). As young Supreme Court Justice he oversaw the most frequently cited collection of federal laws (so SURRENCY, *supra* note 340, at 105), THE PUBLIC AND GENERAL STATUTES PASSED BY THE CONGRESS OF THE UNITED STATES OF AMERICA FROM 1789 TO 1827 INCLUSIVE ... PUBLISHED UNDER THE INSPECTION OF JOSEPH STORY ..., (3 vols., 1828). He began his treatise publishing career with American editions of English law treatises, and ended up in the 1830s publishing the first editions of his systematic commentaries on various branches of law.

<sup>401</sup> It was first printed as the first article in the first volume of the *American Jurist and Law Magazine*. An Address delivered before the Members of the Suffolk Bar, at their anniversary, on the fourth of September, 1821, at Boston, 1 AM. JUR. AND LAW MAG. 1, 31-32 (1829). It was reprinted, not only in several editions of Story’s collected works, but also abroad, in Scotland, as A DISCOURSE ON THE PAST HISTORY, PRESENT STATE, AND FUTURE PROSPECTS OF THE LAW (1835) as LAW SERIES NO. II: THE CABINET LIBRARY OF SCARCE AND CELEBRATED TRACTS, and in England in an article titled *Improvement and Study of the American Laws*, 11 LEGAL OBSERVER OR J. JURISPRUDENCE 510 (Supplement for April, 1836).

<sup>402</sup> HALL, *supra* note 195, at 126 (1989).

<sup>403</sup> Story, *supra* note 401, 1 AM. JURIST at 31.

of contemporary common law myth that some of the most careful of American scholars of legal history might turn ‘Story the codifier’ into ‘Story the common law champion’<sup>404</sup> who accepted codification only with “serious reservations”<sup>405</sup> and sometimes was even “hostile” to it.<sup>406</sup> Why should it be so important to call into question Story’s advocacy of codifying? Professors of contemporary common law myth may think that code-based systems leave no room for judicial innovation, but code-system jurists do not. There is room for both civil and common law methods in one system.<sup>407</sup>

Perhaps hostility to codifying is there somewhere in Story’s work, but I have not seen it. Shouldn’t digitisation show it, not just in his writings, but in how his contemporaries understood them? Moral philosopher Jasper Adams resided at Harvard nearly contemporaneously with Story’s writing of the Massachusetts Code Commission Report. Adams included in his moral philosophy chapters supporting codification, with no hostility evident. In his preface he thanked Justice Story for consulting with him “as often as it suited me” and acknowledged that “several of my chapters have derived the greatest advantages from the consultations which were thus encouraged.”<sup>408</sup> Story’s own son, William Wetmore Story, wrote of his father’s work on the Code Commission: “The Report goes on to state the objections which have been urged against codification and triumphantly answers them.”<sup>409</sup> Out in the old west, one of Story’s best students, Timothy Walker, took up the cause of codifying.

*The old West: Story’s “worthy Son in Law” Timothy Walker & the young Salmon P. Chase.* Timothy Walker, perhaps more than any other student of Story’s, was the Justice’s “worthy Son in Law;”<sup>410</sup> Walker was also the leading advocate of codification in the old West in the antebellum era.<sup>411</sup> He left for Ohio already in his first year at Harvard in 1830. In Cincinnati he became friends and collaborated with later Supreme Court Chief Justice Salmon P.

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<sup>404</sup> See JAMES R. STONER, JR., COMMON LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 14 (2003).

<sup>405</sup> R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 274 (1986).

<sup>406</sup> G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, OLIVER WENDELL HOLMES DEVISE HISTORY, VOLS. III-IV, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 150-151 (1988). Cf., Arthur Rolston, *An Uncommon Common Law: Codification and the Development of California Law, 1849-1874*, 2 CAL. LEGAL HIST. 143, 146-147 (2007) (reading the report to conclude that codifying the common law was “neither possible nor expedient” in general but allowing for limited codification).

<sup>407</sup> See Maxeiner, *Scalia & Garner’s Reading Law*, *supra* note 3.

<sup>408</sup> JASPER ADAMS, ELEMENTS OF MORAL PHILOSOPHY xii (1837).

<sup>409</sup> 2 WILLIAM W. STORY, LIFE AND LETTERS OF JOSEPH STORY, EDITED BY HIS SON, WILLIAM W. STORY 247 (1851). The paragraph continued: “It then proceeds to recount its advantages with great clearness and force, and recommends that the labors of codification should be specially devoted to these three branches of law.” *Id.*

<sup>410</sup> WALTER THEODORE HITCHCOCK, TIMOTHY WALKER, ANTEBELLUM LAWYER, Introduction (1990).

<sup>411</sup> Hall speaks of the two together as the leaders of a second block of codifiers. HALL, *supra* note 402.

Chase. In 1833 and 1834 Chase published a multi-volume innovative compilation of the laws of Ohio. Chase designed it with professional practice in mind, to deal with the “perplexity” caused by “the huge mass of law which the legislation of forty-three years had accumulated.”<sup>412</sup> In 1835 Walker addressed the Cincinnati Legislative Club on codification.<sup>413</sup> In 1837 he published the first edition of his pro-codification and highly successful, *Introduction to American Law* discussed below in the next section.<sup>414</sup> Walker’s codifying work was cut short when he was run down by a drunken driver and died of his injuries.<sup>415</sup>

As result of Story’s Code Commission Report, Massachusetts appointed a commission to codify criminal law. It completed its work in 1841; finally in 1844 the legislature rejected the project.<sup>416</sup> Despite that rejection, ten years later the legislature returned to systematizing. In 1854 it resolved that the governor should appoint three Commissioners, “on the basis, plan and general form and method of the Revised Statutes,” for “consolidating and arranging the general statutes of the commonwealth.” The Commissioners completed their “revision” in fall 1858 and presented it in print form in 1859, when the legislature considered in about eighty days of hearings of a joint special committee during the

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<sup>412</sup> 1 THE STATUTES OF OHIO EDITED BY SALMON P. CHASE 5 (1833). Charles Warren described Chase’s work as “exceptionally able.” HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 259 (1908).

<sup>413</sup> Timothy Walker, *Codification—Its Practicability and Expediency—Being a Report Made to the Cincinnati Legislative Club, in 1835*, WESTERN L.J. 433 (1844).

<sup>414</sup> A recent review of legal literature in Ohio can be taken as a marker of the power of contemporary common law myth. Notwithstanding Walker’s national renown, a two volume work on Ohio legal history gives Walker’s work few words and then largely reports his work’s deprecation by others and demise after more than 75 years. John F. Winkler, *The Legal Literature of Ohio*, in 2 THE HISTORY OF OHIO LAW 501, 510-512, 522 (M.L. Benedict and J.F. Winkler, eds., 2004). This history of Ohio law gives case reporters more notice. Digitization—not available in 2004—shows alternative views in Ohio besides Walker. One critic in 1855, in an unlikely place, a report on schools in Cincinnati, called condemned common law and called for codification: “The slow progress of our Universities and Colleges, has been averted to, but the perfection—not of human reason, but of the power to stand still in this go-ahead age, is to be found in our adherence to the common law. . . . The codification of laws has always been spoken of as a desideratum, but no steps have ever been taken by those who have adopted the English common law system, to accomplish this object, notwithstanding the universal acknowledgment of its expediency.” JOHN P. FOOTE, THE SCHOOLS OF CINCINNATI AND ITS VICINITY 23-24 (1855) (reprinted 1970). Foote’s criticism of American law is unvarnished. He had particular scorn for law administered to the Indian natives. “We have invented one kind of law, which is peculiar to our nation . . . . It is neither based on the law of nations, the law of God, or the law of humanity. . . . It is not even Lynch law.” *Id.* at 25.

<sup>415</sup> Gordon A. Christenson, *A Tale of Two Lawyers in Antebellum Cincinnati: Timothy Walker’s Last Conversation with Salmon P. Chase*, 71 U. CIN. L. REV. 457 (2002).

<sup>416</sup> The governor initially proposed a Commission to codify the common law. The legislative committee concurred, but the whole legislature demurred, and authorized instead, a Commission to consider the issue. The story is told in CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 173-181 (1981).

recess of the legislature, and then in a special session of the legislature in the last four months of the year.<sup>417</sup>

*Constitutional Commitments to Codification Countrywide.* In 1846 New York held a constitutional convention to draft a new constitution for the state. Proponents of codification secured inclusion in the Constitution of a mandate that the legislature appoint two commissions to codify the substantive and procedural laws. One, the “Code Commission,” was “to reduce into a written and systematic code the whole body of the law of the state.”<sup>418</sup> The other, the “Practice Commission,” was to “revise, reform, simplify and abridge the rules of pleadings, forms and proceedings of the courts of record of this State.”<sup>419</sup> David Dudley Field eventually led both commissions. A Belgian contemporary saw the constitutional direction as a way to overcome historic “Anglo-Saxon” opposition to codification and written law.<sup>420</sup> In Illinois the Committee on Law Reform at the 1847 Constitutional Convention proposed a similar provision that would, in today’s terms, sunset common law and English statutes after 1870.<sup>421</sup> The Illinois Convention did not adopt it.

The New York Constitution of 1846 was not the first state constitution to mandate systematizing. Already the Indiana Constitution of 1816 mandated codification of part of the law, *i.e.*, criminal law: “It shall be the duty of the General Assembly, as soon as circumstances will permit, to form a penal code, founded on principles of reformation, and not of vindictive justice.”<sup>422</sup> The Alabama Constitution of 1819 copied the Indiana language exactly.<sup>423</sup> In another separate section the Alabama Constitution directed that within five years, and every ten years thereafter “the body of our laws, civil and criminal, shall be revised, digested, and arranged under proper heads, and promulgated.”<sup>424</sup> The Missouri Constitution of 1820 included similar language limited, however to “all the statute laws.”<sup>425</sup>

The New York Constitution of 1846 was also not the last state constitution to mandate systematizing. The Kentucky Constitution of 1850, the Maryland Constitution of 1851, the Indiana Constitution of 1851 and the short-lived Reconstruction Arkansas Constitution of 1868 all had provisions substantively

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<sup>417</sup> *Preface*, in THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS: REVISED BY COMMISSIONERS APPOINTED UNDER A RESOLVE OF FEBRUARY 16, 1855, AMENDED BY THE LEGISLATURE, AND PASSED DECEMBER 29, 1859, iii, iv (1860).

<sup>418</sup> N.Y. CONST. of 1846, art. 1, sect. 17.

<sup>419</sup> N.Y. CONST. of 1846, art. 6, sect. 24.

<sup>420</sup> LUCIEN JOTTRAND, LA NOUVELLE CONSTITUTION DE NEW-YORK POUR 1847. AVEC UN COMMENTAIRE 7 (1847). *Cf.*, ROBERT BAIRD, THE CHRISTIAN RETROSPECT AND REGISTER: A SUMMARY OF THE SCIENTIFIC, MORAL AND RELIGIOUS PROGRESS OF THE FIRST HALF OF THE NINETEENTH CENTURY 176-177 (1851).

<sup>421</sup> JOURNAL OF THE CONVENTION, ASSEMBLED AT SPRINGFIELD, JUNE 7, 1847 ... FOR THE PURPOSE OF ALTERING, AMENDING, OR REVISING THE CONSTITUTION OF THE STATE OF ILLINOIS 309 (1847).

<sup>422</sup> IND. CONST. of 1816, art. IX, sect. 4.

<sup>423</sup> ALA. CONST. of 1819, art. 6, sect. 19.

<sup>424</sup> ALA. CONST. of 1819, art. 6, sect. 20.

<sup>425</sup> MO. CONST. of 1820, art. III, sect. 35. Maine, which entered with Missouri as part of the Missouri Compromise, inherited the Perpetual Statutes of Massachusetts.

similar to those of the New York Constitution.<sup>426</sup> The Ohio Constitution of 1851 had a similar provision limited to civil process.<sup>427</sup> The author of notes to the Maryland Constitution described the seventeenth section as embracing “some of the most useful provisions that are to be found in the whole Constitution.”<sup>428</sup> The debates in Kentucky show the influence of other states and of popular opinion. “This is the day of reform. Our sister states have set us a glorious example of legal reform: our constituents expect it, they demand it, at our hand.”<sup>429</sup> Opponents focused, not on principle, but on practicality. One conceded for that most members of the body “agree that the object aimed at is desirable, provided it can be attained without too much expense and labor.”<sup>430</sup> Other opponents argued that they did not believe the legislature was technically competent to codify.<sup>431</sup>

*Criminal Codes Countrywide.* Constitutional mandates specific to criminal law are reminders that already in the first century of the Republic the American penchant for codifying seen by the Centennial Writers manifested itself, not only in system-wide revisions, but in specific areas of law.<sup>432</sup> In my readings, no area of substantive law appeared as often as criminal law. The reason for focus on criminal law is obvious: two basic principles of criminal law are “no crime without statute” (*nullum crimen sine lege*) and “no punishment without statute” (*nulla poena sine lege*). Nowhere is the need for written law to guide and control the governors, as well as to guide and protect the governed more firmly felt than in criminal law.<sup>433</sup>

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<sup>426</sup> KY. CONST. of 1850, art. VIII, sect. 22; MD. CONST. of 1851, III, sect. 17; IND. CONST. of 1851, art. VII, sect. 20; ARK CONST. of 1868, art. XV, Sect. Eleven

<sup>427</sup> OHIO CONST. of 1851, art. XIV.

<sup>428</sup> EDWARD OTIS HINKLEY, *THE CONSTITUTION OF THE STATE OF MARYLAND ... WITH MARGINAL NOTES AND AN APPENDIX* 78 (1851) (“This State has long been suffering for want of a proper Codification of its laws.”). William Price had five years before agitated in the state for codification as the only solution: “What other remedy can be suggested for the hugeness and discordance of the mass of materials from which the most ordinary rule of Law must be drawn and which existing in an hundred different phases, can only be applied in one, but which one is to govern his case, no man can tell.” [WILLIAM PRICE], *PARAGRAPHS ON THE SUBJECT OF JUDICIAL REFORM IN MARYLAND: SHEWING THE EVILS OF THE PRESENT SYSTEM, AND POINTING OUT THE ONLY REMEDY FOR THEIR CURE* 66 (1846). Price hoped for a code that “in all its general features, should be the same over the entire Union ....” *Id.*

<sup>429</sup> *REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY* 905 (1849) (remarks of Mr. Gholson). Referenced in the debates were, *inter alia*, Justinian, Bacon and Brougham in England, Livingston and Louisiana, and New York.

<sup>430</sup> *Id.* at 903 (remarks of Mr. Triplett).

<sup>431</sup> *1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION* 319-320, 32 (1851) 1 (remarks, respectively of Mr. Merrick and Mr. Harbine).

<sup>432</sup> Such a sectorial approach is the approach of contemporary systemization proponents such as the Uniform Laws Commission and of the American Law Institute.

<sup>433</sup> Success has been elusive. *See, e.g.*, ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789-1939*, at 5 (2011) (“Ultimately, the picture that emerges from this study is that of a criminal justice system that was far more a government of men than one of laws in the first 150 years after ratification of the Constitution.”) For a study of the principle in American law,

Digitization gives access to the many specifically criminal law codification projects of the first century of the Republic.<sup>434</sup> Although not all systematization projects were successful, statutory rather than common law crimes have been the American norm since the 19<sup>th</sup> century. Already in 1812 the United States Supreme Court rejected a federal common law of crimes.<sup>435</sup> In 1834 one Ohioan proudly wrote: The leading characteristic of our *criminal law*, is, that it is all of statutory provision. ... We acknowledge no part of the common law in regard to crimes. Our criminal code is probably the most humane and the most simple, that has been tried in modern times.<sup>436</sup>

One would expect that a statutory criminal law is an explicit rejection of contemporary common law myth. Yet some professors of that myth today teach, and their students today believe, that criminal law is a common law subject.<sup>437</sup>

*David Dudley Field's New York and World Codes.* If the first century of the Republic were bereft of all systematizing except Jefferson's Revisal at the beginning of the century and Field's codes at the end, contemporary common

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see STANISŁAW POMORSKI AMERICAN COMMON LAW AND THE PRINCIPLE *NULLUM CRIMEN SINE LEGE* (2<sup>d</sup>, revised and enlarged ed. [first in English], 1975).

<sup>434</sup> To name only a few examples through the decades of the first century of the Republic: HARRY TOULMIN & JAMES BLAIR, A REVIEW OF THE CRIMINAL LAW OF KENTUCKY (2 vols., 1804); REPORT, MADE BY JARED INGERSOLL, ESQ., ATTORNEY GENERAL OF PENNSYLVANIA, IN COMPLIANCE WITH A RESOLUTIONS OF THE LEGISLATURE, PASSED THE THIRD OF MARCH, 1812, RELATIVE TO THE PENAL CODE 5 (1813) (endeavoring "to systematize and arrange all the acts for the punishment of crimes that are to be found in the statute book"); CODE OF CRIMINAL LAW PREPARED FOR THE LEGISLATURE OF NEW JERSEY, BY VIRTUE OF A RESOLUTION OF THE COUNCIL AND GENERAL ASSEMBLY ADOPTED FEBRUARY 27, 1833 [Lucius Q.C. Elmer], iii (1834) ("an effort has been made to present a systematic digest of the criminal law, and to introduce some improvements") [this is a personal copy; I have not located a digitized version]; PRELIMINARY REPORT OF THE COMMISSIONERS OF CRIMINAL LAW [Willard Phillips, Preliminary Report of the Commissioners for reducing so much of the Common Law as relates to crimes and punishments, and the incidents thereof, to a written and systematic code], MASS. SENATE NO. 21 (February 1839); PLAN OF A PENAL STATUTE, PROPOSED FOR ADOPTION TO THE LEGISLATURE OF KENTUCKY [S.S. Nicholas] vii (1850) ("How are our citizens [to know what the law has forbidden, and what it has enjoined] unless the legislature affords them the means for its acquisition? ... It is a mere mockery to refer us to the unwritten law of England."); H.S. SANFORD, THE DIFFERENT SYSTEMS OF PENAL CODES IN EUROPE; ALSO, A REPORT OF THE ADMINISTRATIVE CHANGES IN FRANCE, SINCE THE REVOLUTION OF 1848, 33<sup>D</sup> CONGRESS, 1<sup>ST</sup> SESS., SENATE, EX. DOC. NO.68 (1854); E.W. [presumably Emory Washburn], *We Need a Criminal Code*, 7 AM. L. REV. 264 (1872).

<sup>435</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (February 13, 1812). The Court held that "Although this question is brought up now for the first time to be decided by his Court, we consider it as having been long since settled in public opinion." Although cast in jurisdictional terms, it can reasonably be understood, in part, as a manifestation of the popular demand for written law that stood behind constitutional mandates of criminal law codification. See generally, Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267 (1968).

<sup>436</sup> *Ohio Legislation*, 11 AM. JURIST & L. MAG. 91, 93 (1834) [emphasis in original].

<sup>437</sup> See Kevin C. McMunigal, *A Statutory Approach to Criminal Law*, 48 ST. LOUIS U.L.J. 1285 (2004) (relating the survival of that belief).

law myth would still be untenable. Both Jefferson and Field legislated as did no other Americans. Both legislated for what was at each respective time the most populous state in the Union. Both overturned common law and substituted modern statutory law. Both had stature outside the United States. Field was *the* American codifier.<sup>438</sup> With first-hand youthful exposure to European legal systems behind him, in the late 1830s he began a fifty-year long personal campaign to rationalize and systematize American law in all its branches. To relate even ten percent of his work would consume this entire article. On his death in 1894 he was praised as “the most conspicuous legal figure of the world for the last half century.”<sup>439</sup>

Field’s first major success in law reform came in 1842 when the Committee on the Judiciary of the New York State Assembly reported his bill: “An Act To improve the administration of justice.” Field was not a member of the legislature, so he accompanied his proposal with a fifty-page (printed) letter on law reform.<sup>440</sup> Field supported adoption of the provisions of the Constitution mandating process and substantive law codification and creation, respectively, of Process and Code Commissions.

Although not originally appointed to either commission, he succeeded to a vacancy on the Process Commission and soon became its leader. In 1848 the Commission reported a Code of Civil Procedure (first reported 1848,<sup>441</sup> reported complete 1850) and in 1850 a Code of Criminal Procedure (first reported 1849,<sup>442</sup> reported complete 1850). The former the legislature passed immediately; the latter it did not adopt until three decades later. In 1857, after both Commissions expired without the Code Commission ever having taken action, Field secured that commission’s reestablishment and his appointment to it. He self-funded its work. Between 1858 and 1865 Field’s Code Commission drafted three codes, a Political Code (reported complete 1860), a Civil Code (first reported 1862, reported complete 1865), a Penal Code (first reported 1864, reported complete, 1865). The legislature did not take them up at the time, but

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<sup>438</sup> ARTHUR T. VANDERBILT, *MEN AND MEASURES IN THE LAW* 86 (1949) (“Field almost became the American Justinian.”).

<sup>439</sup> Irving Browne, *David Dudley Field*, 6 GREEN BAG 245 (1894). For a brief biography, see James R. Maxeiner, *Field, David Dudley, Jr.* [biography] in 7 AMERICAN NATIONAL BIOGRAPHY 878 (1999).

<sup>440</sup> *A Letter from D.D. Field Esq. of New-York, on Law Reform, in Appendix, To the Report of the Committee on the Judiciary, in Relation to the More Simple and Speedy Administration of Justice, in An Act To Improve the Administration of Justice, in State of New-York*, Doc. No. 81, *In Assembly, March 2, 1842, Report in Part of the Committee on the Judiciary, in Relation to the Administration of Justice*, in 5 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, SIXTY-FOURTH SESSION [*sic*, 65<sup>th</sup>] at 19 (1842). Professor John Head states concisely Field’s problem through five decades: “his enthusiasm far outstripped his authority.” John Head, *Codes, Cultures, Chaos, and Champions: Common Features of Legal Codification Experiences in China, Europe, and North America*, 13 DUKE J. COMP. & INT’L L. 1, 86 (2003).

<sup>441</sup> *Sub nomine* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF PROCEDURE (1848).

<sup>442</sup> *Sub nomine* FOURTH REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING: CODE OF CRIMINAL PROCEDURE (1849).

turned to them more than a dozen years later after the Centennial. That is addressed below in Part VI. *Epilogue and Conclusion*.

After the Civil War Field began working independently on a Code of International Law. He floated the idea already in 1867.<sup>443</sup> He published “draft outlines” in 1872,<sup>444</sup> an enlarged edition in 1876,<sup>445</sup> and in French in 1881.<sup>446</sup> From 1873 to 1875 he spent two years in Europe as first President of the Association for the Reform and Codification of the Law of Nations, which he had helped found. Except for those two years, in the decade after the Civil War, Field was active in high profile disputes, *i.e.*, constitutional litigation,<sup>447</sup> the 1876 election controversy,<sup>448</sup> and commercial litigation.<sup>449</sup> Those high profile disputes later cost him support in seeking adoption of his codes.

For Field codification was a matter of course. “[W]hether a code is desirable,” he wrote, “is simply a question between written and unwritten law.” That that question ever could have been debatable, was “one of the most remarkable facts in the history of jurisprudence.” Of course rules are written. “If the law is a thing to obeyed, it is a thing to be known; and, if it is to be known, there can be no better, not to say no other, method of making it known than of writing and publishing it.” Written laws are on a plane with written constitutions. “If a written constitution is desirable, so are written laws.”<sup>450</sup> Codification chooses the legislature over the judiciary as the principal source of law: “[t]he true function of the legislature is to make the law, the true function of the judges is to expound it.”<sup>451</sup>

Field’s five codes for New York paralleled Napoleon’s five codes for France: Field and Napoleon each had codes of civil law and civil procedure and codes of criminal law and criminal procedure. They differed in only one of the five codes: Field had a political code where Napoleon had a code of commerce. Not only did Field follow the division into four fields of the French prototype,

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<sup>443</sup> DAVID DUDLEY FIELD, AN INTERNATIONAL CODE, ADDRESS ON THIS SUBJECT, BEFORE THE SOCIAL SCIENCE ASSOCIATION, AT MANCHESTER, OCTOBER 5, 1866. In this address he did not discuss the wartime codification of Lincoln and Lieber of the laws of war. See note 271 *supra*.

<sup>444</sup> DAVID DUDLEY FIELD, DRAFT: OUTLINES OF AN INTERNATIONAL CODE (1872).

<sup>445</sup> DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE (1876).

<sup>446</sup> DAVID DUDLEY FIELD, PROJET D’UN CODE INTERNATIONAL (Alberic Rolin, trans., 1881).

<sup>447</sup> *Ex parte* Milligan, 71 U.S. 2 (1866); *Cummings v. Missouri*, 71 U.S. 277 (1867); and *Ex parte* McCardle, 74 U.S. 506 (1869). He returned to the Court in the Centennial year to argue *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>448</sup> DAVID DUDLEY FIELD, THE VOTE THAT MADE THE PRESIDENT (1877).

<sup>449</sup> On behalf of the reviled railroad magnates Jay Gould and James Fisk in the Erie railroad and the infamous “Boss” Tweed of the infamous Tammany Hall machine. See HOBER, *Chapter VI: The Un-making of a Reputation, 1866-1879*, *supra* note 315, at 318; Renée Lettow Lerner, *Thomas Nast’s Crusading Cartoons*, 2011 GREEN BAG ALMANAC 59, 66-77.

<sup>450</sup> FINAL REPORT OF THE CODE COMMISSION, FEBRUARY 13, 1865, *reprinted in* 1 SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 317, 321 (A.P. Sprague, ed., 1884).

<sup>451</sup> REPORT OF THE SPECIAL COMMITTEE APPOINTED TO CONSIDER AND REPORT WHETHER THE PRESENT DELAY AND UNCERTAINTY IN JUDICIAL ADMINISTRATION CAN BE LESSENERED, AND IF SO, AND BY WHAT MEANS? (1885) *reprinted in* ANNUAL REPORT OF THE 8<sup>TH</sup> ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 323, 348 (1885).

in style he followed it too. Professor Lawrence Friedman describes Field's code of civil procedure of 1848 as "a colossal affront to the common-law tradition." It was, Friedman observes, "couched in brief, gnomic, Napoleonic sections, tightly worded and skeletal; there was no trace of the elaborate redundancy, the voluptuous heaping on of synonyms, so characteristic of Anglo-American statutes. In short it constituted a code in the French sense, not a statute. It was a lattice of reasoned principles, scientifically arranged, not a think thumb stuck into the dikes of common law."<sup>452</sup>

The code that is known as the "Field Code" was Field's Code of Civil Procedure. It was the most successful of them all.<sup>453</sup> Already before the Civil War eight states and territories, all in the West, had adopted it.<sup>454</sup> In 1873 Field boasted that by then 23 states and territories (plus the consular courts in Japan!) had introduced some or all of it.<sup>455</sup> Eleven years later *The New York Mail* took pride that the "State of New York has given laws to the world to an extent and degree unknown since the Roman Codes followed Roman conquests." It reported that as of 1884 twenty-three other states and territories as well as four provinces in India (!) had adopted the Code of Civil Procedure; seventeen other states (and India) had adopted the Code of Criminal Procedure (adopted by New York only in 1881); two other states or territories had adopted the criminal code (adopted by New York), two states or territories had adopted the Civil Code (still not enacted in New York although twice passed the legislature), and one state the Political Code (still not considered by New York). By the end of the 19<sup>th</sup> century most states had modeled their civil procedure laws on Field's Code. Four states had adopted his other codes: California, Montana, and North and South Dakota. New York never did adopt his Civil Code and disfigured his Code of Civil Procedure beyond recognition.

*Field's Process Codes in California.* In 1848 the United States annexed California. As a consequence of discovery of gold, American immigrants flooded California. In 1849, still under military government, the unorganized territory held a constitutional convention in the summer and adopted by popular vote the proposed Constitution in the fall. California became a state September 9, 1850.

The Constitutional Convention considered what California's future laws would be. The Convention considered but decided against mandating code commissions along the lines of the New York Constitution of 1846. When the legislature met for the first time in January 1850, eighty lawyers petitioned it to adopt American common law; seventeen lawyers submitted a counter-petition calling for the legislature to retain civil law in California and to adopt a code based on Louisiana law. In February the legislature's Judiciary Committee reported in favor of common law.<sup>456</sup> The legislature that year adopted a reception

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<sup>452</sup> LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 293 (3<sup>d</sup> ed. 2007).

<sup>453</sup> It was reviewed at length abroad in 12 L. REV. & QUARTERLY J. OF BRIT. & FOREIGN JURIS. 366-398 (1850).

<sup>454</sup> *Id.* at 295.

<sup>455</sup> FIELD, *Reasons for the Adoption of the Codes*, *supra* note 296, at 365.

<sup>456</sup> *Report on Civil and Common Law* (February 27, 1850), *printed at* 1 CAL. 588 (1850).

statute. It also, however, adopted laws governing civil and criminal procedure largely based on Field's original drafts of his code.

Meanwhile, Field's younger brother, former law firm partner and later U.S. Supreme Court Associate Justice, Stephen J. Field in late December 1849, arrived in California seeking his fortune. In November 1850 the younger Field was elected to the state legislature. He reworked his brother's codes as reported complete in New York in 1851 and brought about their adoption in California.

### 3. Summary of Systematizing in the First Century of the Republic

From the foregoing pages, it should be clear that the Centennial Writers were right: "The *great* fact in the progress of American jurisprudence which deserves special notice and reflection is its tendency towards *organic statute law* and towards the *systematizing of law*; in other words, towards *written constitutions* and *codification*."<sup>457</sup> Legal methods were not assumed in the first century of the public, but were under construction. The Centennial Writers did not claim success for systematizing.<sup>458</sup> They hoped for future success. *The First Century of the Republic* begged for understanding: "These achievements of Jurisprudence, when compared with the works of her sisters in other fields of labor, appear moderate, plain, and plodding, rather than rapid, brilliant or extensive. But then, for many, many centuries, Jurisprudence has had no gift of new powers. ... All we can say for her in the century now closing is that, with her antique tools, 'she had done what she could.'"<sup>459</sup>

Systematizing in the first century of the Republic was a story of high hopes and disappointing delivery. Everywhere people worked on systematizing. Complete success was nowhere, while disappointment was just about everywhere. Sometimes work was rejected out-of-hand. More often, what was done was less than what the systematizers had hoped would be done. Systematizers had to settle: not all laws, but only some laws; not a codification of statutes and common law, but only a revision of statutes. Usually, what they did do was greeted with appreciation, but not always.<sup>460</sup>

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<sup>457</sup> *Law in America, 1776-1876*, 122 N. AM. REV. at 174 [emphasis in original].

<sup>458</sup> For a critical comparative view of American skills with legislation at the time, see *German Legislation*, 10 AM. L. REV. 270 (1875).

<sup>459</sup> THE FIRST CENTURY OF THE REPUBLIC at 452, 453. The quotation is from Mark 14:8. Its author, Abbott was such a disappointed systematizer. The Revised Statutes of the United States on which he had worked he called "a simple consolidation." *Id.* at 451.

<sup>460</sup> The 1831 revision in Tennessee, apparently, was one such failure. The preface acknowledged the criticism and appealed for understanding. James Whiteside, *Preface*, in 1 STATUTE LAWS OF THE STATE OF TENNESSEE OF A PUBLIC AND GENERAL NATURE; REVISED AND DIGESTED BY JOHN HAYWOOD AND ROBERT L. COBBS (1831) ("The fault is the materials out of which the work is made; and indeed, nothing short of an entire remodeling of the Statute Law of the State, will divest any work of the kind from the same objections, to which the present one may be considered obnoxious.") One reviewer gave it no sympathy. *The Statute Laws of Tennessee*, 8 AM. JURIST 298, 305 (1832). ("As matters lie, at present, our legislators are in the condition of an ignoramus to whom the management of an apothecary's shop with mislabeled bottles has been committed. Confusion, terror, and death are scattered all about." *Id.* at 305. "The digesters ... were to touch the confused statute book with the wand of harmony, and out

Perhaps reasons for lack of success of systematizing may be found in what was not much discussed in the first century of the Republic: nationalizing and institutionalizing systematizing. Both topics came to the top of discussion in the years just after the Centennial. As far as nationalizing goes, the assumption was that codes in one state would be copied in another. To an extent this occurred, but less often than was expected. As far as institutionalizing goes, the most substantial manifestation were constitutional mandates to revise laws on a continuing basis.

### C. A CENTURY OF SYSTEMATIZING IN LEGAL EDUCATION

If common law methods had the hold on America that contemporary common law myth imagines, American lawyers today would study law in law offices: their learning would, in today's language, be wholly experiential. In 1776 there was no teaching of law in classrooms. Aspiring lawyers taught themselves law, most often while working as copy clerks in law offices.<sup>461</sup>

Formal legal education in classrooms and outside of law offices got off to a rocky start in the New Republic. It took three different tacks: chairs of law within colleges, proprietary law schools, and law schools affiliated with colleges. The first two, created in the first years of the Republic, largely disappeared by about 1835. The latter, the university professional schools of today, were created only as the former disappeared, did not achieve stability until the 1850s, and did not achieve their present dominance until the second century of the Republic. In 1876 most lawyers were still law office trained.

By the Centennial year, however, university law schools had established themselves. In the decade after the Civil War more university law schools were founded (about thirty) than were founded in the eight decades before. Something monumental had happened. Before the Civil War law school studies were seen as "ornamental appendages to the office instruction," but by 1876 they were becoming indispensable.<sup>462</sup> Legal education was moving from the law office into the law school classroom. Still in the future was the peculiar American development of classroom study displacing law office study altogether. The fundamental issue of legal education at the Centennial was how legal education should be divided between law schools and law offices.<sup>463</sup>

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of a chaos they were to produce order. Instead of which confusion has been worsened." *Id.* at 315.) On systematizing in Tennessee, see Samuel E. Williams, *A History of Codification in Tennessee (two parts)*, 10 TENN. L. REV. 61, 165 (1932).

<sup>461</sup> Lest there be any misunderstanding in this day of office printers, copy clerks copied legal documents longhand. Among the first office "type-writers" were those displayed at the 1876 Philadelphia Exposition. See Robert Messenger, *The World of Typewriters 1714-2014*, [http://oztypewriter.blogspot.com/2012/11/on-this-day-in-typewriter-history\\_10.html](http://oztypewriter.blogspot.com/2012/11/on-this-day-in-typewriter-history_10.html).

<sup>462</sup> WM. G. HAMMOND, *AMERICAN LAW SCHOOLS IN THE PAST AND IN THE FUTURE*, at 9 and 4 respectively (1881).

<sup>463</sup> See THEODORE W. DWIGHT, *EDUCATION IN LAW SCHOOLS IN THE CITY OF NEW YORK COMPARED WITH THAT OBTAINED IN LAW OFFICES. A LECTURE DELIVERED TO THE STUDENTS OF COLUMBIA COLLEGE LAW SCHOOL, ON MONDAY EVENING FEBRUARY 7, 1875* (1876).

In the first century of the Republic, legal education established itself by working to provide that which the profession could not provide: systematization of law. Teachers of law in the first century were few in number, but most were leaders in systematizing. It is an irony of American legal history that in the second century of the Republic, when the bar no longer had use for copy clerks and gave up its role in professional instruction, the academy assumed that instructional role and largely abandoned its scientific role in systematization.<sup>464</sup>

No matter which venue—college, proprietary law school, or professional law school—the leading teachers of American law in the first century of the Republic systematized. They taught rules for law applying and not skills for law synthesizing. They taught law as a science: not as a natural science (as Harvard's Langdell later would claim), but as a systematizing science. The great advantage of law school learning was systematic study. Legal educators understood that systematic law is more easily learned than the alternative of unsystematic law.<sup>465</sup> They characterized law office study as drudgework that interfered with real learning.<sup>466</sup>

### 1. College Chairs

A statute started classroom legal education in America. Jefferson's Revisal authorized a professorship of law at the College of William & Mary. As governor of Virginia Jefferson saw the chair into being and the appointment to it of his Revisal's co-author, George Wythe.<sup>467</sup>

Although Wythe and his successor, St. George Tucker, enjoyed some success at William & Mary in attracting students, similar attempts at other colleges failed. In some, Harvard and Yale, plans were discussed, but did not come to fruition until much later. In others, Pennsylvania College, Columbia, and Maryland, professors were named and began work—James Wilson at Pennsylvania, James Kent twice at Columbia, David Hoffman at Maryland—only to suspend lectures for want of students.

What the colleges' professors left behind were important works of systemization. For Wythe, it was Jefferson's Revisal. For the others, the legacies were

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<sup>464</sup> See JAMES R. MAXEINER, EDUCATING LAWYERS NOW AND THEN: AN ESSAY COMPARING THE 2007 AND 1914 CARNEGIE FOUNDATION REPORTS ON LEGAL EDUCATION AND A REPRINT OF THE 1914 REPORT THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS BY JOSEF REDLICH (2007); same without Redlich Report, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. LEGAL INFO. 1 (2007),

<sup>465</sup> See, e.g., JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS vi, viii (1832) ("was originally made for instruction of *Students at Law*" ... "to render the doctrines of Pleading *more intelligible and more easy of attainment*" [emphases in original]). See also, Vanderlinden, *supra* note \*\*, at 13.

<sup>466</sup> See, e.g., JOSIAH QUINCY, PRESIDENT, AN ADDRESS DELIVERED AT THE DEDICATION OF DANE LAW COLLEGE IN HARVARD UNIVERSITY, OCTOBER 23, 1832 (1832).

<sup>467</sup> ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 116 (CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING BULLETIN No. 15, 1921).

systematizing texts: Wilson's *Lectures on Law*, Kent's *Commentaries on American Law*, Tucker's edition of *Blackstone's Commentaries*, and Hoffman's *Course of Legal Studies*. These addressed both statutory law and common law.

## 2. Proprietary Law Schools

Contemporaneous with the college appointments, practitioners established independent proprietary law schools to conduct law training more closely tied to practice. Where college teaching anticipated supplemental law office study, proprietary law schools did not. One, the school in Litchfield Connecticut (1780-1833), was a great success. Most others failed; some eked out an existence with a small number of students. They were creatures of the lawyers who created and conducted them. When the lawyers died or retired, their schools came to an end.<sup>468</sup> One might suppose that the proprietors of these law schools would have focused on practice skills and have ignored systematizing.<sup>469</sup> Yet that does not seem to have generally been the case. Many proprietors practiced systematizing:

*Zephaniah Swift*, proprietor of the law school in Windham Connecticut, prepared the first compilation of federal laws (The Folwell edition of 1797), wrote the first all-encompassing treatise of an American state's law, *A System of the Laws of the State of Connecticut* (6 vols. 1795) as well as the first American treatise on the law of evidence.<sup>470</sup>

*Henry St. George Tucker*, proprietor of the Winchester Law School in Virginia, wrote a Blackstone-based students' text for his state, *Commentaries on the Laws of Virginia* (1831).

*Theron Metcalf*, after conducting the short-lived law school at Dedham Massachusetts (1828-1829), became co-reviser with famous educator Horace Mann of the Massachusetts Revised Statutes. In 1837 he was one of five Commissioners of the Massachusetts Code Commission of 1837 chaired by Justice Story.<sup>471</sup>

*Peter van Schaak* was one of the revisers of the colonial laws of New York<sup>472</sup> before conducting a long-lived law school at Kinderhook New York.

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<sup>468</sup> See CRAIG EVAN KLAFTER, *REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT* 133-177 (1993) (listing proprietary schools and giving statistics).

<sup>469</sup> One short-lived proprietary school did rely principally on moot courts. CREED TAYLOR, *JOURNAL OF THE LAW-SCHOOL AND OF THE MOOT-COURT ATTACHED TO IT: AT NEEDHAM, IN VIRGINIA v* (1822) ("The *law-school* was established, not with a view to lectures by the patron, but for the purpose of aiding and assisting the student in the art and science of pleading.").

<sup>470</sup> ZEPHANIAH SWIFT, *A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES* (1810).

<sup>471</sup> REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCE OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE THE COMMON LAW OF MASSACHUSETTS OR ANY PART THEREOF, MADE TO HIS EXCELLENCY THE GOVERNOR, JANUARY, 1837, at 48 (House No. 8, 1837).

<sup>472</sup> PETER VAN SCHAACK (ed.), *LAWS OF NEW-YORK, FROM THE YEAR 1691 TO 1773, INCLUSIVE: PUBLISHED ACCORDING TO AN ACT OF THE GENERAL ASSEMBLY* (2 vols., 1774).

*Tapping Reeve and James Gould*, proprietors of the highly successful Litchfield Law School, published three texts intended to organize the law of husband and wife, descents and pleading.<sup>473</sup> Although they taught the common law, *The American Quarterly Journal* in a survey of American education institutions reported that Litchfield's proprietors taught rules and the principles on which they rested.<sup>474</sup> Reeves, in his *Treatise on the Law of Descents in the Several United States of America* (1825), set out the statutory law of all of the then fifteen states.<sup>475</sup> American legal historian Craig Evan Klafter concludes that proprietors taught common law critically with a view to replacing it through statutes.<sup>476</sup>

### 3. College Professional Schools

College related professional law schools grew out of the older models. In 1816 Harvard finally appointed a professor of law, Isaac Parker. In 1824 Yale took over a proprietary school. The risk of failure was high. In 1831, were nine "law schools," counting all three types of approach, which by a partial count showed six faculty and 127 students.<sup>477</sup> Among notable failures were those of New York University in 1838 and the College of New Jersey (the later Princeton) in the 1840s. Harvard and Yale had both to be "re-founded." Not until the 1850s did university law schools begin to achieve stability. In 1863 there were eighteen law schools, some attached to colleges and others independent.<sup>478</sup>

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<sup>473</sup> TAPPING REEVE, *THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, OF MASTERS AND SERVANT* Preface (1816) ("to bring into one connected view" ... "beneficial to the learner") (3<sup>d</sup> ed. 1867); TAPPING REEVE, *A TREATISE ON THE LAW OF DESCENTS IN THE SEVERAL UNITED STATES OF AMERICA* (1826); JAMES GOULD, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* vi, viii (1832).

<sup>474</sup> See *Education and Literary Institutions*, 5 [AMERICAN] QUARTERLY REGISTER 273 (1833). "The lectures, which are delivered every day, and which usually occupy an hour and a half, embrace every principle and rule falling under the several divisions of the different titles. The examinations, which are held every Saturday, upon the lectures of the preceding week, consist of a thorough investigation of the principles of each rule, and not merely of such questions as can be answered from memory without any exercise of judgment."

<sup>475</sup> REEVE, *supra* note 473, at ii. He lamented that "When we became a nation, we found ourselves divided into a number of distinct sovereignties; each possessing the power to enact laws affecting the property within its own jurisdiction, with the federal government, binding all the states together with political bands, had not the remotest concern. ... Thus what has probably fallen to the lot of no other civilized country, this nation may be justly said to have no general law of descents."

<sup>476</sup> KLAFTER, *supra* note 468. See also, ELLEN HOLMES PEARSON, *REMAKING CUSTOM: LAW AND IDENTITY IN THE EARLY AMERICAN REPUBLIC 175-176* (2011).

<sup>477</sup> *United States, Professional Schools* 18 THE EDINBURGH ENCYCLOPÆDIA, ... CONDUCTED BY DAVID BREWSTER ... THE FIRST AMERICAN EDITION, CORRECTED AND IMPROVED BY THE ADDITION OF NUMEROUS ARTICLES RELATIVE TO THE INSTITUTIONS OF THE AMERICAN CONTINENT 229, 860 (1832) ("They are all of recent origin, and are here presented rather to give a ground to conjecture what will in future be the method of conducting legal studies than to show what is the course now pursued.").

<sup>478</sup> George-A. Matile, *Les Écoles de Droit aux États-Unis*, 9 *Revue HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER* 539, 543-44 (1863), translated in 1 SHEPPARD 319, 321 (Steve Sheppard, ed., 1999).

Among the most important of legal educators of the 1830s to the early 1850s were Justice Story at Harvard (died 1845)<sup>479</sup> and his student (his “worthy Son in Law”), Timothy Walker at Cincinnati (died 1856).<sup>480</sup> Both were famous for their involvement in systematizing. They were succeeded in the late 1850s by Theodore Dwight at Columbia.

In the 1850s Theodore Dwight, first at Hamilton College and then, from 1858, invigorated law schools with the “Dwight” method of instruction. Dwight departed from a straight lecture format and used an interactive lecture or recitation format. Dwight later in the 1880s would oppose codifying. In 1870 Christopher C. Langdell introduced the case method of instruction. It did not reach beyond Harvard until well into the second century of the Republic.

#### D. THE CENTENNIAL MOMENT

The Centennial Writers had good reasons to look forward to codes in a second century of the Republic. They witnessed—one participated in—a fifteen years of codification around the world. At home, Lincoln’s proposed revision of Federal laws of 1861 came to fruition with the publication in 1874 of the first edition of the *Revised Statutes of the United States*. Benjamin Vaughan Abbott, Harper’s Centennial Writer, had been one of Commissioners of the *Revised Statutes*.

In 1862 Field’s New York Commission had published the first draft of a New York Civil Code. In Georgia, the pre-war Code of *all laws of every type* went into effect.<sup>481</sup> In 1864 the New York Commission, published the first draft of a Penal Code, and in 1865 the final draft. In the latter’s forward, Field thanked Abbott for his help. Also in 1865 the Commission published the final draft New York Civil Code. In 1867 the Dakota Territory adopted all five Field codes.<sup>482</sup> In 1872 California, followed.<sup>483</sup> In the 1870s New York—not to Field’s pleasure—revised much of Field’s 1848 Civil Procedure Code in a Code of Remedies.<sup>484</sup> Most other states, as the Centennial Writers noted, revised or

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<sup>479</sup> See text at 116-119 *supra*.

<sup>480</sup> See text at 119 *supra*.

<sup>481</sup> THE CODE OF THE STATE OF GEORGIA PREPARED BY R.H. CLARK, T.R.R. COBB & D. IRWIN iii (1861) (the legislature commissioned a code that would bring together all law “whether derived from the common Law, the Constitutions, the Statutes of the State, the decisions of the Supreme Court, or the Statutes of England, of force in this State”).

<sup>482</sup> See William B. Fisch, *The Dakota Civil Code: Notes for an Uncelebrated Centennial*, 43 N.D.L. REV. 485 (1967) & 45 N.D.L. REV. 9 (1968).

<sup>483</sup> On codifying in California there is recent scholarship. See Rolston, *Uncommon Common Law: Codification and the Development of California Law, 1849-1874*, 2 CAL. LEGAL HIST. 143 (2007); Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994). Field’s brother, Stephen J. Field, led the effort there. Another Western state, Montana, on admission in 1889, did the same. See Andrew P. Morriss *et al.*, *Montana Field Code Debate*, 61 MONT. L. REV. 370 (2000); Andrew P. Morriss, Decius S. Wade’s *The Common Law*, 59 MONT. L. REV. 225 (1998).

<sup>484</sup> See MONTGOMERY H. THROOP, THE CODE OF REMEDIAL JUSTICE; SHALL IT BE REPEALED OR COMPLETED? A COMMUNICATION TO THE JUDICIARY COMMITTEES OF THE LEGISLATURE OF THE

codified laws in the fifteen years before the Centennial. Iowa, under the leadership of legal educator William Gardiner Hammond, was among the leaders. And, important for Americans for future legal metaphors, the National League of Professional Baseball Clubs adopted a Constitution and Playing Rules.<sup>485</sup> The Centennial Celebration itself even had its own rules.<sup>486</sup>

Abroad, in both “civil” and “common” law worlds, there was palpable enthusiasm for codes. In Germany and in Italy civil wars in the 1860s were followed by adoption of unifying national codes.<sup>487</sup> In Latin America, the largest countries, Mexico, Argentina, Brazil and Columbia, all adopted codes. Even in the British Empire codifying was in the air. Beginning in the 1830s Britain imposed codes on India.<sup>488</sup> In 1857 the Legislative Assembly of the Province of Canada, commissioned a codification in English of the civil law of Lower Canada, *i.e.*, New York’s next-door neighbor Québec, which was duly made and took effect in 1866.<sup>489</sup>

Britain itself debated not whether to systematize, but how and when. In 1863 the Lord Chancellor called for revision of the laws to get “a harmonious

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STATE OF NEW YORK BY ... ONE OF THE COMMISSIONERS TO REVISE THE STATUTES 4-5 (1877) (discussion of revision work undertaken 1870 to 1876).

<sup>485</sup> CONSTITUTION AND PLAYING RULES OF THE NATIONAL LEAGUE OF PROFESSIONAL BASE BALL CLUBS (1876). See HEARING ON THE NOMINATION OF JOHN ROBERTS TO BE CHIEF JUSTICE OF THE SUPREME COURT BEFORE THE SENATE JUDICIARY COMMITTEE, 109<sup>TH</sup> CONG., 1<sup>ST</sup> SESS. 56 (Sept. 12, 2005) (testimony of John Roberts: “I will remember that it’s my job to call balls and strikes and not to pitch or bat.”).

<sup>486</sup> Although it had no law exhibit, it did have its own “Bureau of Protection” complete with police force (the “Centennial Guard,” at first, of over 1000 officers) and its own magistrate’s court. For a picture, see FRANK LESLIE’S HISTORICAL REGISTER OF THE UNITED STATES CENTENNIAL EXPOSITION, 1876 at 296 (1877). The Director-General didn’t wait for his court to develop precedents to govern the Guard but promulgated rules. He reported: “The rules and regulations for the government of the Centennial Guard were issued in a manual of convenient size, and each member was supplied with a copy, and required to familiarize himself with its contents before he was permitted to enter on his duties. The manual contained information and instructions in detail, and specifically on the following subjects, *viz.*: the organization of the Guard, discipline, duties of officers and patrolmen, rank and command, promotions, punishments, resignations and discharges, reports, arrests, laws of arrest, prisoners, fires, pay, property, responsibility for uniforms and accouterments, drill, roll-call, orders and communications, lost children and lost property, tobacco, liquor, etc.” *Department of Protection* [Report] in 2 UNITED STATES CENTENNIAL COMMISSION, INTERNATIONAL EXHIBITION, 1876, REPORT OF THE DIRECTOR-GENERAL, INCLUDING THE REPORTS OF BUREAUS OF ADMINISTRATION 679, 680 (1879).

<sup>487</sup> Franz von Holtendorff, *Imperial Federalism in Germany*, 5 INT’L REV. 82, 88 (1878).

<sup>488</sup> For a recent recounting, see ELIZABETH KOLSKY, COLONIAL JUSTICE IN BRITISH INDIA Chapter 2 (2010).

<sup>489</sup> See THE CIVIL CODE OF LOWER CANADA ... BY THOMAS McCORD, ADVOCATE, SECRETARY TO THE CODIFICATION COMMISSION v-x (1867), reviewed in 2 AM L. REV. 331 (1868); BRIAN J. YOUNG, THE POLITICS OF CODIFICATION: THE LOWER CANADA CIVIL CODE OF 1866 (1994). At the same time, a code of civil procedure was adopted.

whole, instead of having, as at present, a chaos of inconsistent and contradictory enactments.”<sup>490</sup> Code proponents were “unwilling that the work of codification should be postponed.”<sup>491</sup> One writer in an English law review in 1869, noting conditions in New York, commented: “At the present day, the subject of Codification has passed out of the domain of theory and has become a practical question.”<sup>492</sup> In 1873 the *London Quarterly Review*, in reviewing Sheldon Amos’ 1873 book, *An English Code*, commented: “Codification has engaged the attention of the minds of great statesmen in every civilized country.” The review catalogued more than a dozen places, including “several states of the North American Union,” that had made “laudable, if not perfectly successful, attempts.” In reviewing Amos’ book on “difficulties” of an English code, and “modes of overcoming them,” it found “every reason to believe that ere long” England would join other civilized nations and accomplish something systematic in the way of codifying its law.<sup>493</sup>

The community of nations began work on a code of the law of nations. As noted above, Field took up public international law into his portfolio of codes.<sup>494</sup> Soon he worked on creating an international body to promote codifying of international law. In June 1873 invitations were sent out from America and in October the founding meeting of the Association for the Reform and Codification of the Law of Nations was held in Brussels.<sup>495</sup> In the Centennial Year James B. Angell, President of the University of Michigan, in an address in Detroit in May, observed that “The question of framing a code of international law is one which is now earnestly engaging the attention of many distinguished publicists. ... Most of the arguments *pro* and *contra* are as applicable to the codification of international as of municipal law.”<sup>496</sup> Field, practically on the actual date of the Centennial, published a second edition of his *Draft Outlines of a Code of International Law*. In September the international organization held a meeting in the Centennial Celebration’s main conference hall; Field himself addressed the meeting.<sup>497</sup>

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<sup>490</sup> *The State of English Law: Codification* [reviewing Speech of the Lord Chancellor on the Revision of the Law], 83 WESTMINSTER REV.—AM. ED. 210, 219 (1865) (excerpting the speech at pp. 23-27).

<sup>491</sup> *Id.*

<sup>492</sup> T.L. Murray, *The Codes of New York*, 27 LAW. MAG. AND LAW REV. 312 (1869). On proposals to codify English law see, *inter alia*, SHELDON AMOS, AN ENGLISH CODE; ITS DIFFICULTIES, AND THE MODE OF OVERCOMING THEM (1873) (positive for codification, but Chapter V views New York codes as a negative example);

<sup>493</sup> *Review: An English Code; Its Difficulties, and the Mode of Overcoming Them*, by Sheldon Amos, 40 THE LONDON QUARTERLY REV. 499 (1873).

<sup>494</sup> That there might be a similar code for resolving conflicts of laws in private transactions was seen as of no less importance. *A Code of Private International Law*, 2 AM. L. REV. 599 (1868).

<sup>495</sup> JAMES B. MILES, ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS: A BRIEF SKETCH OF ITS FORMATION, BY [ITS] GENERAL SECRETARY, BOSTON, U.S.A., PREPARED FOR THE CONFERENCE AT THE HAGUE, SEPT. 1<sup>ST</sup>, 1875, at 11 (1875).

<sup>496</sup> THE PROGRESS OF INTERNATIONAL LAW READ AT DETROIT, MAY 13, 1876, at 8 (1876).

<sup>497</sup> *International Law. A General Court of Nations. The International Code Committee as Philadelphia—Papers by Elihu Burritt, Ex-Gov. Washburn, A.P. Sprague, and David Dudley Field—Careful Discussion of Important Matters*, N.Y. TIMES (Sept. 30, 1876).

## VI. EPILOGUE

At the Centennial of Independence there was little of Blackstone's common law left in the United States.<sup>498</sup> America's legislators by statute had overturned the bulk of it: property law, civil procedure, and criminal law and procedure.<sup>499</sup> Ironically, contract law and tort law, which had had lesser basis in Blackstone's common law,<sup>500</sup> had become (and remain) the bastions of substantive judge-made law. In 1876, not just the Centennial Writers, but many Americans expected that codes would soon displace judge-made law altogether.<sup>501</sup>

They were disappointed.

### A. THE CAMPAIGNS OF ALBANY AND SARATOGA SPRINGS

According to Professor Friedman, codification was crushed in one of "the set pieces of American legal history." That set piece, according to Friedman, "has its hero, Field; its villain is James C. Carter of New York ... Codification was wrong, Carter felt, because it removed the center of gravity from the courts [to] the legislature—the code enacting body ...."<sup>502</sup> For Friedman, the defeat of codification was a personal "snub" to Field and not of importance for the legal system. "One child labor act or one homestead act can have more potential impact than volumes of codes."<sup>503</sup>

#### 1. Albany—23 Times

So what does this set piece look like? It's hyperbole, but if it's a set piece, let's make it dramatic. Much as the Declaration of Independence marked the beginning of a thirteen-year struggle for an American Constitution—a framework for democratic government of laws and not men—the Centennial of the Declaration marked the beginning of a thirteen-year struggle for the laws of that government. Only in the later struggle the lawyers in New York City won and the American people lost.

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<sup>498</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1765).

<sup>499</sup> *Accord*, John F. Dillon, *A Century of American Law*, in PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE ALABAMA STATE BAR ASSOCIATION ... DEC. 14<sup>TH</sup> AND 15<sup>TH</sup>, 1887 (1888), reprinted in PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, THIRTEENTH ANNUAL MEETING, ... ALSO, REPORTS FOR THE YEAR 1889, at 249 (1890).

<sup>500</sup> Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, Address delivered before the Congress of Arts and Science at St. Louis, September 20, 1904, in the *Division of Jurisprudence*, 18 HARV. L. REV. 271, 272 (1905); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT, LAW AND IDEOLOGY IN AMERICA, 1886-1937, 46 (tort law), 102-103 (contract law) (1998).

<sup>501</sup> E.g., the *Albany Law Journal* wrote: "It would be sheer blindness not to perceive the fact that the jurisprudence of the whole world is rapidly and irresistibly tending toward codification." *Book Notices*, 13 ALBANY L.J. 151 (February 28, 1876). Codification was, Professor Reimann notes, "on the verge of success." Mathias Reimann, *Transatlantic Models: Influence between German and American Law*, 41 SEUL L.J. 229, 242-243 (2000).

<sup>502</sup> LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 302 (3<sup>d</sup> ed. 2004), 351 (1<sup>st</sup> ed. 1973).

<sup>503</sup> *Id.* at 305 (3<sup>d</sup> ed.), at 354 (1<sup>st</sup> ed.).

In the 1870s and 1880s Field and his friends repeatedly took three of his four un-adopted codes (the Civil Code, the Penal Code, and the Code of Criminal Procedure) to the New York Legislature. Over-and-over again the people's representatives approved them; over-and-over again the lawyers of New York City overruled the people's representatives. In 1879, the legislature approved all three codes. The governor vetoed all three. In 1880, the legislature again approved the Code of Criminal Procedure. The governor again vetoed it. In 1881, however, it began to look as if all three codes were on their way to becoming law. The legislature again approved the Penal Code and the Code of Criminal Procedure. Only this time, the governor did too.

Alarmed by developments in Albany, March 15, 1881 the Association of the Bar of the City of New York established a Special Committee "To Urge the Rejection of the Proposed Civil Code." Before the special committee could "perfect its organization" the Assembly, *i.e.*, the lower house of the legislature, passed the Civil Code by an overwhelming vote of 83 to three. The Special Committee sprang into action and arranged for an April 21 hearing before the Senate committee considering the bill. The Civil Code died in committee: the legislature adjourned in July without taking action.<sup>504</sup>

So the struggle continued like that for nearly a decade. Field's supporters took the Civil Code to the legislature and the City Bar opposed it. The Special Committee was reappointed and delivered its annual report. Ten annual reports there were in all. In 1882 the City Bar had to rely again on a gubernatorial veto to stop the Civil Code.<sup>505</sup> James C. Carter, who joined the Special Committee that year, took the role of lead advocate; Theodore W. Dwight joined then and in 1883 became chair.<sup>506</sup> Each side let loose plagues of pamphlets as each year the Code made its appearance in legislative committee and sometimes on the floor.<sup>507</sup> The two sides battled for victory. The City Bar's pamphlets railed against codes and not for better codes.

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<sup>504</sup> ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" APPOINTED MARCH 15<sup>TH</sup>, 1881. PRESENTED OCTOBER 21<sup>ST</sup>, 1881, at 5-7 (1881). The special committee reported that "the proposed Code is intended to exterminate the Common Law as a system of jurisprudence." *Id.* at 8.

<sup>505</sup> The Special Committee printed the governor's veto message in its report. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" REAPPOINTED NOVEMBER 1, 1881. PRESENTED OCTOBER 10<sup>TH</sup>, 1882, at 8-9 (1882). The reappointed special committee increased in size from six to sixteen and added two of the principal antagonists: James C. Carter and Theodore W. Dwight.

<sup>506</sup> It was an interesting pairing, as at the time Dwight was Dean of Columbia Law School. Carter had secured Langdell's appointment as Dean at Harvard and was a principal benefactor of that school. Langdell's case method disciples would at decade's end bring about the ouster of Dwight from Columbia.

<sup>507</sup> The special committee was authorized to print its reports in substantial numbers (*e.g.*, 2500 copies). The Reports now are scarce; I have never seen one offered for sale. But most have been digitized. Several of the pamphlets they gave rise to do appear on the used book market.

In 1887 the Assembly again passed the Civil Code. This time the governor had committed to approve the Code. Carter testified before the Judiciary Committee and there, as in 1881, the Code again died. In testifying against the Civil Code, Carter made his attack personal against Field. More significant he conceded that his arguments against the Civil Code were inapplicable to public law. He claimed a common law advantage only for private law.<sup>508</sup> That distinction has long been lost sight of.

In 1888 the Senate passed the Civil Code, but the Assembly voted it down.<sup>509</sup> The *New York Times* reported that this was the twenty-third time that adoption had eluded the Civil Code. The article commented:

it remains for some other legislature to give to the people of the State the benefit of a codification of the common law of the State. The lawyers had their say for and against the code to-day, and few laymen were presumptuous [*sic*] enough to discuss the question. Most of them voted as their lawyer leaders indicated, without any conception of the code, and few of them seemed to even know what a code is.<sup>510</sup>

Professor Friedman says of Field's Code: "New York would have none of it."<sup>511</sup> It was not New York that would have none of it: it was the Association of the Bar of the City of New York that would have none of it. Years later the Association crowed about its great accomplishment "in saving the people of the State."<sup>512</sup>

## 2. Saratoga and Other Battles Around the Country

After the governor vetoed the Civil Code in 1882, Field took the fight for codes national: to the newly-founded American Bar Association ("ABA", founded 1878), to other newly-founded bar associations and to newly important law schools. For a time, it looked like Field might triumph nationally. In 1886 the American Bar Association adopted Field's resolution that "The law itself should be reduced, so far as its substantive principles are settled, to the form of a statute."<sup>513</sup>

All across the country lawyers took up the subject of codification. In 1887 the President of the Tennessee Bar Association reported that thanks to the "very

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<sup>508</sup> JAMES C. CARTER, ARGUMENT OF JAMES C. CARTER IN OPPOSITION TO THE BILL TO ESTABLISH A CIVIL CODE: BEFORE THE SENATE JUDICIARY COMMITTEE, ALBANY, MARCH 23, 1887, at 26. But a Louisiana lawyer noted it already in Carter's earlier writings. E. Evariste Moise, *Two Answers to Mr. Carter's Pamphlet*, 29 ALB. L.J. 267 (1884).

<sup>509</sup> ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, EIGHTH ANNUAL REPORT OF THE SPECIAL COMMITTEE "TO URGE THE REJECTION OF THE PROPOSED CIVIL CODE;" REAPPOINTED DECEMBER 11<sup>TH</sup>, 1888. ADOPTED DECEMBER 11<sup>TH</sup>, 1888, at 7 (1889).

<sup>510</sup> *Politics in the Senate ... The Field Code Defeated*, N.Y. TIMES, May 2, 1888, at 5.

<sup>511</sup> FRIEDMAN, *supra* note 502.

<sup>512</sup> EDWARD W. SHELDON, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, HISTORICAL SKETCH 1870-1920, PREPARED FOR THE SEMI-CENTENNIAL CELEBRATION, FEBRUARY 17<sup>TH</sup>, 1920, at 49.

<sup>513</sup> REPORT OF THE NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 72, 74 (1886).

careful consideration” that the ABA had given codification at its annual meetings, the topic had been subject to “very numerous” discussions around the country and that legal literature was “replete” with the discussion. He told of his personal experience with this “perplexing” topic: “it is a matter that will not down at our bidding. It is a question that has been learnedly discussed in able and eloquent addresses at every State Bar Association to which I have had access.”<sup>514</sup> I have not counted all the states where codes were considered at a state bar meeting, but I have found many. I would be surprised if more than one or two state bar associations did not at a meeting in the 1880s or 1890s at least once take up codification.

Field, as he had before the Civil War, took the campaign to the academy. He personally addressed the Law Academy of Philadelphia in April 1886;<sup>515</sup> a supporter gave the Yale Law School commencement address in June 1884.<sup>516</sup> Field probably counted as sympathizers two contemporary leaders in legal education, Simeon Baldwin, Dean at Yale, and William Gardiner Hammond Dean, Dean at Washington University in St. Louis in the Midwest. But Harvard, Columbia and Hastings in California seem to have lined up against him. Field’s number 1 opponent, James C. Carter, who spearheaded the City Bar’s opposition, was closely tied to Harvard Law School and its Dean Christopher Columbus Langdell.<sup>517</sup> Theodore Dwight, Dean at Columbia and no friend of Langdell’s new teaching method, was himself Chairman of the City Bar’s opposition committee. In the far West, John Norton Pomeroy, the first Dean at Hastings College of Law, who had been an early supporter of Field’s Codes in California, was so widely cited in posthumous opposition, that his earlier support is forgotten.<sup>518</sup>

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<sup>514</sup> W.C. Folkes, *President’s Address*, PROCEEDINGS OF THE FIFTH ANNUAL MEETING OF THE BAR ASSOCIATION OF TENNESSEE, HELD AT MEMPHIS, THURSDAY, JULY 1, AND FRIDAY, JULY 2, 1887, at 90, 92. One early 20<sup>th</sup> century retrospect remarked: “It may seem difficult to imagine any phase of codification that has not been discussed and exhausted at the meetings of our bar associations and kindred learned bodies since David Dudley Field joined issue with James Coolidge Carter.” Nathan Isaacs, *The Aftermath of Codification*, 43 ABA REP. 524 (1920).

<sup>515</sup> DAVID DUDLEY FIELD, CODIFICATION: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA ... APRIL 15, 1886 (1886).

<sup>516</sup> GEORGE HOADLY, CODIFICATION IN THE UNITED STATES: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SIXTIETH ANNIVERSARY OF THE YALE LAW SCHOOL, ON JUNE 24<sup>TH</sup>, 1884 (1884).

<sup>517</sup> Carter had been instrumental in the selection in 1870 of Langdell as Dean, was a founder and the first President of the Harvard Law Alumni Association and endowed a chair at the Harvard Law School.

<sup>518</sup> Lewis Grossman, *supra* note 483. Compare JOHN NORTON POMEROY, THE HASTINGS LAW DEPARTMENT OF THE UNIVERSITY OF CALIFORNIA, INAUGURAL ADDRESS, AUGUST 8, 1878 (1878) with JOHN NORTON POMEROY, THE “CIVIL CODE” IN CALIFORNIA ... REPRINTED FROM THE WEST COAST REPORTER (1885). Joel Bishop, a prolific treatise writer whom one might have supposed would have been neutral or inclined toward codes, came out in defense of common law methods. JOEL PRENTISS BISHOP, COMMON LAW AND CODIFICATION; OR, THE COMMON LAW AS A SYSTEM OF REASONING,— HOW AND WHY ESSENTIAL TO GOOD GOVERNMENT; WHAT ITS PERILS, AND HOW AVERTED. AN ADDRESS DELIVERED BEFORE THE SOUR CAROLINA BAR ASSOCIATION, AT COLUMBIA, DECEMBER 8, 1887.

Meanwhile, Field continued to promote an international code. In 1890 President Benjamin Harrison presented a draft code to Congress that had been proposed at an international congress.<sup>519</sup> For a moment in the fall of 1886, it looked like codes might triumph so well as to exclude common law. A scant six weeks after the ABA approved of Field's Resolution, one of the Centennial Writers, Bispham, came to the defense of common law. He made the "progressive capacity of the unwritten law," the theme of his introductory lecture at the Law Department of the University of Pennsylvania. He worried that statute law might practically displace judge-made law altogether.<sup>520</sup>

But victories with bar associations did not translate into adoption of the Civil Code in New York or in other major states. In 1888 Field was elected President of the American Bar Association. In 1889, he presided over the ABA's first annual meeting away from Saratoga Springs. In a centennial year of the Constitution, he closed his address as President calling on his colleagues one last time: "you must ... give speedy justice to your fellow-citizens, more speedy than you have yet given, and you must give them a chance to know their laws."<sup>521</sup> It was a swan song and not a call to action. Two years later in August 1891, nearing the end of his long life, he published a retrospect on *Law Reform in the United States and Its Influence Abroad*.<sup>522</sup>

Field died Friday the 13<sup>th</sup> of April 1894.<sup>523</sup> That was the end of American campaigns for codes. Never again would America seriously contemplate a civil code such as France then already had had for ninety years, or such as Japan and Germany would adopt only two years later. Like the gravestone Jefferson, Field's gravestone in the family plot at the cemetery in Stockbridge Massachusetts remembers his life's work for written law:

- He devoted his life to reform the law
- To codify the common law
- To simplify legal procedure
- To substitute arbitration for war
- To bring justice within the reach of all men

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<sup>519</sup> See, e.g., MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING A REPORT OF THE INTERNATIONAL CONFERENCE TOUCHING A UNIFORM CODE OF INTERNATIONAL LAW, 51<sup>ST</sup> CONG., 1<sup>ST</sup> SESS., SENATE, EX. DOC. NO. 283 (1890); PAPERS ON THE REASONABLENESS OF INTERNATIONAL ARBITRATION, ITS RECENT PROGRESS, AND THE CODIFICATION OF THE LAW OF NATIONS (Henry Richard, ed., London, 1887).

<sup>520</sup> OF UNWRITTEN LAW. AN INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA, OCTOBER 1<sup>ST</sup>, 1886, 7-8 (1886). For emphasis in his talk Bispham reported the original version: "all law should be reduced as far as possible, to the form of the statute."

<sup>521</sup> *Address of David Dudley Field, of New York, President of the Association*, REPORT OF THE 12<sup>TH</sup> ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 149, 234 (1889).

<sup>522</sup> DAVID DUDLEY FIELD, *LAW REFORM IN THE UNITED STATES AND ITS INFLUENCE ABROAD* REPRINTED FROM THE AMERICAN LAW REVIEW OF AUGUST, 1891, WITH SOME CHANGES AND NOTES (1891).

<sup>523</sup> He was buried in Stockbridge, Massachusetts. Coincidentally, the day before, William Gardiner Hammond, a like-minded voice in the academy in the Midwest, died.

## B. THE GILDED AGE AND THE AMERICAN LEGAL SYSTEM OF TODAY

When Field died, contemporary observers saw the American campaign for codification as going dormant.<sup>524</sup> But codifying soon slipped from dormancy into oblivion and is forgotten today. Field's world is gone. The day when one talked about building a government of laws is gone. The "modern" world of contemporary common law myth has displaced it. That world of American common law was not legislated; it arose by default of legislation and code methods of application. The Gilded Age changed the face of American law. It ushered in today's legal system and contemporary common law myth. America did not suddenly in 1900 find itself in an age of statutes. If anything, in 1900 it gave up on statutes.<sup>525</sup> From the Centennial in 1876 to the century's end in 1900, in "The Gilded Age," the contours of the American legal system of the 20<sup>th</sup> and 21<sup>st</sup> centuries took shape.<sup>526</sup> Institutional changes worked against revisiting codifying. Some of these were:

### 1. From State to National Law

A national economy demanded national law. In 1887 Congress adopted the Interstate Commerce Commission Act. In 1890 it produced the Sherman Anti-Trust Act. In 1892 what is now the Uniform Laws Commission went to work to create uniform state statutes for specific areas of law (e.g., sales, marriage.)

### 2. The Bench: From Applying Law to Making It<sup>527</sup>

At the turn of the 20<sup>th</sup> century judges asserted not only judicial supremacy over constitutional validity of statutes,<sup>528</sup> but over statutes' meanings as well.<sup>529</sup> In 1912 Congressman Robert La Follette, practical leader of the Progressive movement, charged that by "presuming to read their own views into statutes

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<sup>524</sup> See, e.g., RICHARD FLOYD CLARKE, *THE SCIENCE OF LAW AND LAWMAKING: BEING AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORM AND SUBSTANCE AND A DISCUSSION OF THE QUESTION OF CODIFICATION* (1898).

<sup>525</sup> See, e.g., William B. Hornblower, *A Century of Judge-Made Law, Address Before the School of Law of Columbia University, June 16, 1907*, 7 COLUMBIA L. REV. 453 (1907). And Hornblower was among those responsible for statutory revision!

<sup>526</sup> I intend to address some or all of these in my planned book tentatively titled *Failures of American Lawmaking in International Perspective*.

<sup>527</sup> 2 THE WORKS OF JAMES WILSON 502 (Robert Green McCloskey ed., 1967) (1804) ("[E]very prudent and cautious judge... will remember, that his duty and his business is, not to make the law, but to interpret and apply it.").

<sup>528</sup> See, Lawrence M. Friedman, *Introduction*, in COMMON LAW, COMMON VALUES, *supra* note 245, at 11, 15; CHRISTIAN WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW. FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* (1986).

<sup>529</sup> FRED A. CAHILL, JR., *JUDICIAL LEGISLATION. A STUDY IN AMERICAN LEGAL THEORY* 20 (1952). Much as Bispham, having promoted written law was concerned about keeping unwritten law, Eugene Wambaugh, having promoted case law, worried about keeping written law. EUGENE WAMBAUGH, *THE PRESENT SCOPE OF GOVERNMENT* (1897).

without regard to the plain intention of the legislators, [judges] have become in reality the supreme law-making and law-giving institution of our government.”<sup>530</sup>

It is no coincidence that at the same time as judges claimed superiority over statutes they gave up the theory that they only declared common law. Soon legal scholars put forward the claim of judges making law. Other developments of the time worked to promote lawmaking judges: supreme court judges were relieved of circuit-riding responsibilities, intermediate appellate courts were created and trial judges were given books of form jury instructions.

### 3. The Bar: from Legislation to Litigation

State-wide bar associations newly founded in the last quarter of the 19<sup>th</sup> century were established in an earlier tradition of public service rather than in professional interest.<sup>531</sup> At its founding the American Bar Association gave legislation and its uniformity as among its reasons for being.<sup>532</sup> That initial orientation of reform was soon challenged and changed.<sup>533</sup> In 1892 the President of the Mississippi Bar Association in his annual address, objected: “It has been said that lawyers should only deal with the administration of the laws, and that as a class we have no concern with making them. But to this doctrine I cannot subscribe.”<sup>534</sup> By 1918, the transformation seems complete. Ernst Freund, then America’s premier proponent of legislation, lamented the lack of interest in legislative problems: “The business of the legal profession is litigation and not legislation.”<sup>535</sup>

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<sup>530</sup> Robert M. LaFollette, *Introduction*, GILBERT EMSTEIN ROE, *OUR JUDICIAL OLIGARCHY* v (1912). LaFollette continued: “They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation.” *Id.* See Horace A. Lurton, *A Government of Law or a Government of Men?*, 193 N. AM. REV. 3, 23 (1911) (“In this indisputable function of interpreting and construing applicable constitutional or statutory law to the case in hand there lurks, however, an immeasurable power, which is all the more dangerous to the public welfare because under its cover it is possible of a bad or ignorant judge to defeat the legislative purpose.”) Lurton was then a sitting justice of the United States Supreme Court.

<sup>531</sup> See generally, Simeon E. Baldwin, *The Founding of the American Bar Association*, 3 A.B.A.J. 658 (1917).

<sup>532</sup> Article I of its Constitution of 1878 provided that one of the Association’s three objects was to promote “the uniformity of legislation throughout the Union AMERICAN BAR ASSOCIATION, CALL FOR A CONFERENCE, PROCEEDINGS OF CONFERENCE, FIRST MEETING OF THE ASSOCIATION; OFFICERS, MEMBERS, ETC. (1878) at 16 (as proposed), at 30 (as adopted). Article III required that the President open each annual meeting with an address on the “most noteworthy changes in statute law ... during the preceding year.” *Id.* at 18, 32. The former was diluted in the new 1919 Constitution; the latter was dropped already in 1913.

<sup>533</sup> Adolph Augustus Berle, *Modern Legal Profession, Legal Profession and Legal Education*, 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344, 345 (1933).

<sup>534</sup> Hon. L. Brame, *President’s Address*, in PROCEEDINGS OF THE MISSISSIPPI BAR ASSOCIATION AT ITS SEVENTH ANNUAL MEETING HELD JANUARY 7<sup>TH</sup>, 1892, 7, 9 (1892).

<sup>535</sup> Ernst Freund, *Prolegomena to a Science of Legislation*, 13 ILL. L. REV. 264, 272 (1918).

#### 4. The Academy: From Systematizing to Synthesizing

The triumph of Harvard Law School and its case method of instruction sealed the end of the ideal of government of written laws. The case method, introduced in 1870, but not widespread beyond Harvard until 1890, made excerpts of reported court cases the basis of classroom instruction. It was the antithesis of codifying. It had no place for legislation or systematizing statutes, but instructed students how to synthesize a legal rule out of a succession of legal opinions. It fostered prejudice against statutes and codes.<sup>536</sup> It focused on resolution of private law disputes to the exclusion of public law. It let professors teach a mythical national common law and allowed them to ignore the chaos of competing jurisdictions that was and is the reality of American law.

Harvard introduced a number of innovations in legal education that undermined lawmaking in America. Harvard created the modern law school that is neither scholarly nor practical, but is an incubator for common law myth. In 1871 it published the first casebooks for instruction; these included only edited case reports. In 1873 it hired the first law professor who had no experience whatever in the active profession. In 1883 it physically took the law school out of the university when it became the first university law school to build its own building. In 1886 Field opponent Carter helped found and became the first president of the first law school alumni association. He endowed a chair as well. In 1887 Harvard founded the first student-edited law review. The *Harvard Law Review* attained and maintained the position of leading law review notwithstanding its insularity. It had little of the reformist verve and insight of such journals as the *American Jurist* of the 1830s or of contemporary magazines such as the *American Law Review* or the *Albany Law Journal*. Harvard graduate Oliver Wendell Holmes dismissed law school law reviews as the “work of boys”,<sup>537</sup> and yet had a leading role in placing those “boys” as judicial clerks. Today their successors practically monopolize law teaching; they are former apprentices to judges and not to legislators or scholars.

#### 5. Case Reports: from Commentary to Commodity<sup>538</sup>

At the Centennial moment case reporting was struggling to meet the needs of judges making law and the requirements of the bar to use judge-made law.

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<sup>536</sup> *E.g.*, SAMUEL WILLISTON. THE UNIFORM PARTNERSHIP ACT WITH SOME OTHER REMARKS ON OTHER UNIFORM COMMERCIAL LAWS, AN ADDRESS BEFORE THE LAW ASSOCIATION OF PHILADELPHIA DECEMBER 18, 1914, at 1-2 (1915), *reprinted in* 63 U. PA. L. REV. 196(1915) (“Codification has an ugly sound to most American lawyers. We have been trained to believe that no code can be expressed with sufficient exactness, or can be sufficiently elastic to fulfill adequately the functions of our common law.”) *See* Max Radin, *Modern Legal Education, Legal Profession and Legal Education*, 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 334, 338 (1933).

<sup>537</sup> As cited by Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 631 (1996).

<sup>538</sup> *Cf.*, James T. Mitchell, *Historical Address*, in ADDRESS DELIVERED MARCH 13, 1902 AND PAPERS PREPARED OR REPUBLISHED TO COMMEMORATE THE CENTENNIAL CELEBRATION OF THE LAW ASSOCIATION OF PHILADELPHIA, PENNSYLVANIA, 1802-1902, at 13, 15 (1906) (describing law books at century’s end as “mere merchandise”).

Reporters had long abandoned the format of the first reports: books of commentary that reported cases selectively for their importance of developing law, that included arguments of counsel and that sometimes added extensive notes of the reporter's authorship. "Modern case law" demanded books of authority, not books of wisdom. Case reports should be current, inexpensive, and in coverage comprehensive. Books should exist for each jurisdiction. The cases that they reported should be textually accurate, easily found through indices and digests, and of determinable and current validity. An 1873 Report of the Association of the Bar of the City of New York found "radical changes" necessary.<sup>539</sup> Yet by century's end those changes had been made thanks mostly to West Publishing Company and a few others.

In October of the Centennial year West offered its first publication to the profession. In 1886, when the ABA met to debate statutes in Saratoga, its National Reporter system of reporting and organizing cases had gone live. By century's end, it and other publishers efficiently supplied the profession not only with the books of authority, but with the indices, digests and citators to make use of them.<sup>540</sup> West, in its own words, provided the profession with "Law Books by the Million."<sup>541</sup> Legal writing turned from systematizing analysis to collecting authorities.<sup>542</sup> Treatises swelled to incorporate a case from every jurisdiction. The table of cases in such books could be 25% or more of their length.

## 6. Legislation: from Codes to Collations

In the decade after the Centennial American jurists began to discuss improving methods of legislation. Looking to foreign models, they suggested in-

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<sup>539</sup> REPORT OF THE COMMITTEE ON LAW REPORTING OF THE ASSOCIATION OF THE CITY OF NEW YORK 5 (1873). For a contemporary account of similar issues in England, see W.T.S. DANIEL, THE HISTORY AND ORIGIN OF THE LAW REPORTS TOGETHER WITH A COMPILATION OF VARIOUS DOCUMENTS SHOWING THE PROGRESS AND RESULT OF PROCEEDINGS TAKEN FOR THEIR ESTABLISHMENT (1884).

<sup>540</sup> Ironically, the "father of the American digest" was none other than Benjamin V. Abbott, the Centennial Writer for *The First Century of the Republic*. ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 119 (1990).

<sup>541</sup> WEST PUBLISHING COMPANY, LAW BOOKS BY THE MILLION: AN ACCOUNT OF THE LARGEST LAW-BOOK HOUSE IN THE WORLD—THE HOME ESTABLISHMENT OF THE NATIONAL REPORTER SYSTEM AND THE AMERICAN DIGEST SYSTEM 1901, reprinted in 14 GREEN BAG 2D 311, bound as an insert in Google Books to 24 N.J.L.J. (1901).

<sup>542</sup> See generally, SAMUEL FREEMAN MILLER, THE USE AND VALUE OF AUTHORITIES IN THE ARGUMENT OF CASES BEFORE THE COURTS AND IN THE DECISION OF CASES BY THE COURTS, AN INTRODUCTORY ADDRESS BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA, MONDAY, OCTOBER 1, 1888, 121 Pa. xix (1889), reprinted as *Appendix B*, CHARLES NOBLE GREGORY, SAMUEL FREEMAN MILLER: JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 123 (1907).

roducing a permanent legislative institution that would be charged with maintaining the quality of legislation.<sup>543</sup> These discussions foreshadowed the development of the legislative research bureaus and the offices of legislative counsel. But before these bodies could be created, “codifying” was turned into reporting statutes the way reporters reported cases: an exercise in organization and not a scientific work of systematizing. No longer was codifying something for leading jurists. Codifying became collating and creating card catalogs.<sup>544</sup> It was not much of an advance on the first collation of rules in alphabetic order. Indeed, that is what “codifying” has become: the United States “Code” is “systematized” from A for Agriculture of Title 7 to W for War & National Defense of Title 50.

## 7. Legal Culture: From Cosmopolitanism to Nationalism

The ABA Convention, held September 26 to 28, 1904 was sandwiched between the International Congress of Arts and Science held the week of September 19, which included sections on Jurisprudence and on History and Law, and the Universal Congress of Lawyers and Jurists, held September 28 to 30 under

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<sup>543</sup> See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON A PLAN FOR IMPROVING THE METHODS OF LEGISLATION OF THIS STATE, BY A COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1885). The committee consisted of Simon Sterne, Chairman, James M. Varnum, Theron G. Strong, and George H. Yeaman. Id. at 19. See also Simeon E. Baldwin, *Byrce on American Legislation*, 14 NEW ENGLANDER AND YALE REV. 39 (1889); CHARLES REEMELIN, TREATISE ON POLITICS AS A SCIENCE 55 (1875); HENRY WADE ROGERS, THE LAW-MAKING POWER. A PAPER READ BEFORE THE KANSAS BAR ASSOCIATION, JANUARY 24, 1894 (1894), reprinted in 3 NORTHWESTERN L. REV. 39 (1894); SIMON STERNE, OUR METHODS OF LEGISLATION AND THEIR DEFECTS. A PAPER READ BEFORE THE NEW YORK MUNICIPAL SOCIETY ON THE EVENING OF JANUARY 6, 1879 (1879); Simon Sterne, *The English Methods of Legislation Compared with the American*, Read Before the Penn Monthly Association, March 13<sup>th</sup>, 1879, 10 PENN MONTHLY 336 (May 1879); Simon Sterne, *The Prevention of Defective and Slipshod Legislation*, REPORTS OF THE 7<sup>TH</sup> ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 275 (1884); Simon Sterne, *Defective and Corrupt Legislation: The Cause and the Remedy* in the popular (*Questions of the Day*, volume no. XXII, 1885); FRANCIS WAYLAND, ON CERTAIN DEFECTS IN OUR METHODS OF MAKING LAWS, OPENING ADDRESS [OF THE PRESIDENT] BEFORE THE AMERICAN SOCIAL SCIENCE ASSOCIATION, AT ITS ANNUAL MEETING, SARATOGA SPRINGS, SEPT. 5<sup>TH</sup>, 1881 (1881).

<sup>544</sup> See REPORT OF THE SPECIAL COMMITTEE OF THE ASSEMBLY OF THE LEGISLATURE OF 1900 ON STATUTORY REVISION COMMISSION BILLS 1901 COMMITTEE (Adolph J. Rodenbeck, James T. Rogers and James E. Smith): PLAN FOR COLLATING THE STATUTES PREPARATORY TO THE WORK OF CONSOLIDATION AND REVISION: CONTAINING THE REPORT OF THE CHAIRMAN ON A GENERAL PLAN FOR THE CONSOLIDATION AND CLASSIFICATION OF THE STATUTES AND A DETAILED PLAN FOR MAKING A CARD RECORD OF THE HISTORY AND SUBSTANCE OF THE STATUTES OF THE STATE: PREPARED UNDER THE DIRECTION OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK : CREATED BY CHAPTER 664 OF THE LAWS OF 1904 : PASSED MAY 9, 1904. The report includes a color picture of such a card catalogue.

the joint sponsorship of the Exposition and of the ABA.<sup>545</sup> Such cosmopolitanism in American law would soon disappear along with codifying.<sup>546</sup> When the ABA met in London in 1924, on the eve of the nation's sesquicentennial, the consensus was that to adopt a code was an un-American attempt "to supplant the parent Common Law" and "to forsake our English heritage and follow the lead of Imperial Rome."<sup>547</sup>

## VII. CONCLUSION

Systematized written laws are the norm worldwide.<sup>548</sup> They are the world's best practices. Systematizing is not unusual: it is ordinary, albeit difficult. Professors of contemporary common law myth avert their eyes from that inconvenient truth. They would have Americans believe that whatever may be the role of written laws abroad, in the United States unwritten judge-made law is and always has been the American way. Whatever advantage codes may bring to other countries' legal systems, somehow those advantages don't apply in the United States. Digitization challenges those claims. What was natural progress of law abroad was likewise progress that the Centennial Writers observed in their day and hoped for in the future. They expected that their country, that led in writing constitutions establishing government, would follow in writing laws for governing.

In the first century of the Republic and through to the end of the 19<sup>th</sup> century Americans were no less interested in systematizing their laws than were their counterparts abroad. Today, when Americans plead for understandable laws and judges that apply but do not make laws, they are begging for good laws and good legal methods which every believer in a rule of law should wish for.

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<sup>545</sup> OFFICIAL REPORT OF THE UNIVERSAL CONGRESS OF LAWYERS AND JURISTS HELD AT ST. LOUIS, MISSOURI, U.S.A. SEPTEMBER 28, 29, AND 30, 1904 (1905).

<sup>546</sup> See RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930* 14 (1987) ("Given this background of minimal interaction between the American and English legal systems, the emphasis after 1870 on the similarity, if not identity, of the American legal system to its English predecessor, which blossomed into an article of faith on both sides of the Atlantic, becomes a remarkable phenomenon. The reasons for this unlikely transformation were rooted in the broader currents of historical change in addition to narrower legal concerns.").

<sup>547</sup> J. Carroll Hayes, *The Visit to England of the American Bar Association, in THE AMERICAN BAR ASSOCIATION LONDON MEETING 1924: IMPRESSIONS OF ITS SOCIAL, OFFICIAL, PROFESSIONAL AND JURIDICAL ASPECTS AS RELATED BY PARTICIPANTS IN CONTEST FOR MOST ENLIGHTENING REVIEW OF TRIP* (1925) 9, at 15.

<sup>548</sup> See, e.g., *THE SCOPE AND STRUCTURE OF CIVIL CODES* [Selected Papers from the 2<sup>nd</sup> International Academy of Comparative Law Thematic Conference] (J. César Rivera, ed., *IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE* Vol. 32, 2014); *CODIFICATION IN INTERNATIONAL PERSPECTIVE* (Wen-Yeu Wang, ed., *IUS COMPARATUM: GLOBAL STUDIES IN COMPARATIVE LAW*, Vol. 1, 2014); *CODIFICATION IN EAST ASIA* (Wen-Yeu Wang, ed., *IUS COMPARATUM: GLOBAL STUDIES IN COMPARATIVE LAW*, Vol. 2, 2014).

Contemporary common law myth opposes a modern American legal system. It is a myth focused on dispute resolution. It is a myth ill-suited to governing. Digitization denies the myth the claim of historical dominance of precedents. Digitization exposes the contemporary American legal system to the real claims of history: the failure of American lawmaking in international comparison. Codes have worked abroad for two centuries. Americans can look abroad and see how civil law methods avoid the chaos that their forefathers rejected but that they now accept as normal. It is time to change. Oliver Wendell Holmes, Jr. said that it is revolting to have no better reason for a legal practice than blind imitation of the past.<sup>549</sup> It is infuriating to imitate a past that never existed.

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<sup>549</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).



# WHY LAWYERS FEAR LOVE: MOHANDAS GANDHI'S SIGNIFICANCE TO THE MINDFULNESS IN LAW MOVEMENT

Nehal A. Patel \*

## ABSTRACT

*Although mindfulness has gained the attention of the legal community, there are only a handful of scholarly law articles on mindfulness. The literature effectively documents the Mindfulness in Law movement, but there has been minimal effort to situate the movement into the broader history of non-Western ideas in the legal academy and profession. Similarly, there has been little recent scholarship offering a critique of the American legal system through the insights of mindfulness. In this Article, I attempt to fill these gaps by situating the Mindfulness in Law movement into the history of modern education's western-dominated world-view. With this approach, I hope to unearth some of the deep challenges facing a mindful revolution in law that are yet to be widely discussed. In Part I, I introduce the current mindfulness movement in American society. In Part II, I summarize the current Mindfulness in Law movement and the treatment of "Eastern" thought in modern education. I also describe the three levels of change discussed in academic literature: individual, interpersonal, and structural change. In Part III, I discuss how Mohandas Gandhi exemplifies all three levels of change. In Part IV, I offer critical appreciation of the Mindfulness in Law movement by highlighting Gandhi's insights on structural reform. I conclude that a mindful application of Gandhi's thought suggests that satyagraha be incorporated into a constitutional framework, thus making legally protected speech out of forms of public-state dialogue that are traditionally 'extra-legal' and used disproportionately by marginalized populations.*

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*“As regards lawyers, the position is worse still. Have they overcome their infatuation for law-courts? ...Have the lawyers realized that justice should not be costly?... Lawyers have not yet overcome the allurements of fat fees and, in consequence, the cost of justice continues to be counted in terms of gold and guineas... justice cannot be sold.” --M.K. Gandhi<sup>1</sup>*

## I. INTRODUCTION

Mindfulness seems to be everywhere in American society. The February 3<sup>rd</sup>, 2014, issue of “Time” magazine, one of the most widely read periodicals in the United States, showcased a meditating woman on the cover with the title “The Mindful Revolution.”<sup>2</sup> This front page story contained descriptions of the impact of mindfulness in both the scientific community and in practical application, from managing job stress to reducing anxiety among students.<sup>3</sup> The article described various mindfulness practices, such as chewing meditation and aimless wandering, which many Americans are seeking to manage daily life.<sup>4</sup>

Moreover, United States Congressman Tim Ryan recently wrote a book titled “A Mindful Nation” and has made several television appearances to

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<sup>1</sup> Mohandas Gandhi, Collected Works of Mahatma Gandhi, GANDHISERVE FOUNDATION, <http://www.gandhiserve.org/e/cwmg/cwmg.htm>, Vol. 25, 482, [hereinafter CWMG].

<sup>2</sup> Kate Pickert, *The Mindful Revolution*, TIME MAGAZINE, Feb. 3, 2014, at 40-46.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

promote mindfulness.<sup>5</sup> After experiencing an extremely fast and stressful life in American politics, Congressman Ryan sought help from mindfulness meditation to handle the strains of his career. In this process, he had a transformative experience that changed his outlook on his life and American society. Congressman Ryan summarized the great potential of mindfulness in his book and detailed his vision of the way mindfulness can transform people's health, people's lives, the American educational system, and ultimately American society.<sup>6</sup> In addition, other prominent figures such as American economist Jeffrey Sachs have called for a shift to a "mindful society,"<sup>7</sup> and mindfulness advocates also have applied mindfulness practices in schools and even police departments.<sup>8</sup>

Between 2000 and 2010, there were over 1,000 peer-reviewed academic articles published on mindfulness and related subjects, largely in psychology, health, and neuroscience journals,<sup>9</sup> and there is a growing body of scientific literature that supports the overwhelming benefits of mindfulness practices to the mind and body.<sup>10</sup> However, scientific disciplines are not the only ones that have joined the mindful revolution; law schools now have incorporated mindfulness into legal education. Several law schools, notably University of Miami School of Law and Berkeley's Boalt Hall School of Law, have begun mindfulness programs as part of the law school curriculum. The rising popularity of mindfulness meditation is bringing more and more law students into such programs and is increasing the demand to have such programs at other law schools. Meditation instructors (many of them already lawyers) also have developed private practices to teach mindfulness to practicing lawyers.<sup>11</sup>

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<sup>5</sup> For e.g., see [http://www.huffingtonpost.com/2014/03/11/tim-ryan\\_n\\_4943143.html](http://www.huffingtonpost.com/2014/03/11/tim-ryan_n_4943143.html).

<sup>6</sup> Tim Ryan, *A Mindful Nation: How a Simple Practice Can Help Us Reduce Stress, Improve Performance, and Recapture the American Spirit* (2012). See also [http://www.huffingtonpost.com/2014/03/11/tim-ryan\\_n\\_4943143.html](http://www.huffingtonpost.com/2014/03/11/tim-ryan_n_4943143.html).

<sup>7</sup> JEFFREY SACHS, *THE PRICE OF CIVILIZATION: REAWAKENING AMERICAN VIRTUE AND PROSPERITY* 161-84 (Random House 2011).

<sup>8</sup> See Russell Long & Gail Mallimson, *Room To Breathe*, Documentary, at <http://www.roomtobreathefilm.com/about-the-film/credits/index.html>; See also Center for Contemplative Mind and Society (Contemplative Practices in Higher Education Workshops at <http://www.contemplativemind.org/>); Lieutenant Richard Goerling at <http://www.copsalive.com/from-buddha-to-the-blue-line/>; Capt. Cheri Maples of Madison, WI, [http://usatoday30.usatoday.com/news/health/2003-08-19-stress-retreat\\_x.htm](http://usatoday30.usatoday.com/news/health/2003-08-19-stress-retreat_x.htm) (last visited April 12, 2015).

<sup>9</sup> Beth Azar, *Positive psychology advances, with growing pains*, 42 *MONITOR ON PSYC.* 32, 32-36 (2011), available at <http://www.apa.org/monitor/2011/04/positive-psychology.aspx> (last visited Sept. 2, 2014).

<sup>10</sup> See *infra*, Part II, notes 17 to 95.

<sup>11</sup> Leonard L. Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61(4) *J. LEGAL EDUCATION*, 634, 637 (2012) See also Scott Rogers, *Mindfulness In Law*, (Sept. 7, 2014), available at [http://www.mindfulnessinlawclass.com/resources/MIL\\_Rogers\\_Langer\\_Excerpts\\_140829.pdf](http://www.mindfulnessinlawclass.com/resources/MIL_Rogers_Langer_Excerpts_140829.pdf), at 7 (discussing 70 Hale & Dorr attorneys participating in an MBSR program); See also Jan L. Jacobowitz, *Benefits of Mindfulness for Litigators*, 39(2) *LITIGATION*; 27-29 (2013).

Although mindfulness has gained the attention of the legal community, scholarly articles on mindfulness in law only have begun to proliferate. These articles document the mindfulness movement effectively; however, there has been minimal effort to situate the movement into the broader history of non-Western ideas in the legal academy and profession. Similarly, there has been little recent scholarship offering a structural critique of the American legal system through the insights of mindfulness. In this Article, I attempt to fill these gaps by situating the mindful revolution in law into the history of modern education's western-dominated world-view. With this approach, I hope to unearth some of the deep challenges facing a mindful revolution in law that are yet to be widely discussed.

In Part II, I present the current mindful revolution in three parts. In Section A, I briefly review the recent scientific scholarship on mindfulness. In Section B, I review how 'Mindfulness in Law' advocates have applied mindfulness practices in law schools and the legal profession. I also summarize the treatment of "Eastern" thought in modern education. Prior scholarship already contains critical analyses of how the modern education system privileges a peculiar form of western atomism that is unresponsive to alternative conceptions of the world.<sup>12</sup> In light of these critiques, I focus on the use of Buddhist thought in western legal scholarship and practice.

In Section C, I present an analysis of the Mindfulness in Law movement at three levels: the individual, interpersonal, and structural. First, on the level of the individual, I highlight the great potential of Mindfulness in Law to benefit individual law students and lawyers. I argue that the overwhelming evidence that mindfulness meditation reduces stress and anxiety make it imperative that lawyers learn mindfulness practices to manage the high stress

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<sup>12</sup> Manuel Neira, *The University as an Instrument of Cultural Colonisation* in *DISSENT AND DISORDER: ESSAYS IN SOCIAL THEORY* 115-20 (Bhikhu Parekh ed.1971). See BHIKHU PAREKH, *GANDHI'S POLITICAL PHILOSOPHY: A CRITICAL EXAMINATION*,3 (1989); Reinhard Bernbeck, *Structural Violence in Archaeology*. 4(3) *ARCHAEOLOGIES* 390 (2008). See generally James Joseph Scheurich, *Toward a White Discourse on White Racism*, 22 (8) *EDUCATIONAL RESEARCHER* 5 (1993); Richard E. Nisbett et al., *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 *PSYCHOLOGICAL REV.* 291, 291-310 (2001); Shelton A. Gunaratne. *Emerging Global Divides in Media and Communication Theory: European Universalism versus Non-Western Reactions*. 19 *ASIAN J. COMMUNICATION* 366 (2009); S. Ishii., *Proposing a Buddhist Consciousness-Only Epistemological Model for Intrapersonal Communication Research*. *J. INTERCULTURAL COMMUNICATION RESEARCH* 63 (2004).; Min Sun Kim., *Cultural Bias In Communication Science: Challenges of Overcoming Ethnocentric Paradigms in Asia*, *ASIAN J. COMMUNICATION* 412 (2009); Yoshitaka Miike, *Non-Western Theory in Western Research? An Asiacentric Agenda for Asian Communication Studies*, *REV. OF COMMUNICATION* 4- (2006); Yoshitaka Miike, *An Asiacentric Reflection on Eurocentric Bias in Communication Theory*, *COMMUNICATION MONOGRAPHS*, 272-78 (2007); Tu Wieming, *Global Community as Lived Reality: Exploring Spiritual Resources for Social Development*, in *SOCIAL POLICY AND SOCIAL PROGRESS: A Review Published by the United Nations*, First Issue – Special Issue on the Social Summit Copenhagen, 6-12 March 1995, 39 (1996); Tu Wieming., *The Context of Dialogue: Globalization and Diversity* in *CROSSING THE DIVIDE: DIALOGUE AMONG CIVILIZATIONS* (2001).

of a legal career. Second, on the interpersonal level, I review how Mindfulness in Law practitioners have applied mindfulness to alter the way lawyers practice law. Mindfulness practices have been used effectively in family law and in the criminal justice system, where the restorative lawyering movement has made inroads into the plea bargaining and corrections processes.<sup>13</sup> By introducing concepts such as healing and forgiveness, restorative lawyering has gone beyond the benefit of mindfulness to individuals; it has brought the benefits of mindfulness *to social interaction and legal process*. Third, the Mindfulness in Law movement largely has been speechless about how to create *systemic* change. If part of the function of being mindful is to create a compassionate legal system, then Mindfulness in Law must move beyond lawyers benefitting themselves through meditation and beyond the healing and forgiveness that comes *after* a victim has been harmed. To keep lawyers from becoming more efficient workers for an unsympathetic legal system, the mindful revolution must develop a structural critique that contains the intention of *preventing* the very conditions that make law students and lawyers flock to meditation courses in the first place. Furthermore, although restorative lawyering can be a refuge for perpetrators and victims, post-crime healing does not address the wider environment that contributes to the suffering of both the perpetrator and victim. Therefore, the mindful revolution must address the broader sources of suffering that are institutional and systemic to American society.

In Part III, I present the life and writings of Mohandas (Mahatma) Gandhi as a model for seamlessly integrating the three levels of mindfulness. Although he is not a major figure in the mindful revolution, Gandhi was a lawyer who significantly impacted the movement toward a more compassionate legal system. After completing law school in London, Gandhi practiced law in South Africa for two decades.<sup>14</sup> His experience with the Anglo legal system qualified him to present his own view of modern law that contained the three levels of mindfulness. First, with the help of meditative practices, Gandhi not only managed stress but also created his own philosophy of law with the intention of changing people's hearts. Second, he described his view of law practice, which was an early form of restorative lawyering intended to foster nonviolent relationships and heal those who suffered. Third, and perhaps most importantly, he sought to change the function and purpose of the legal system through a philosophy of nonviolent resistance, which contributed to the overthrow of the imperial legal structure ruling India.

At all three of these levels, Gandhi emphasized love and nonviolence, which are core values synonymous with the mindful revolution's focus on compassion and healing. Therefore, Gandhi's life and writings present a

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<sup>13</sup> See Deborah Cantrell, *The Role of Equipoise in Family Law*, 14, J.L. & FAM. STUD. 63, 65 (2012); Howard J. Zehr, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE*, (3<sup>d</sup> ed., 2005). See also Sujatha Baliga, *Law's Middle Way: Mindfulness and Restorative Justice at Berkeley Law*, at 13 minute mark, available at <https://www.youtube.com/watch?v=3epEK9wBNv0> (discussing the founder of Restorative Justice Howard Zehr's book "Changing Lenses") (last visited April 12, 2015).

<sup>14</sup> CHARLES DiSALVO, M.K. GANDHI: ATTORNEY AT LAW, xii (2013). See generally RAMACHADRA GUHA, GANDHI BEFORE INDIA, 82-101(2013).

comprehensive view of mindful law that would give the mindful revolution the systemic critique it currently lacks. Specifically, Gandhi's thought acknowledges nonviolent resistance as a method of having meaningful dialogue with government. If some forms of nonviolent resistance are given limited legal protection, then forms of speech largely used by oppressed populations would have status more equal to other forms of public dialogue with government such as lobbying, litigation, and electoral politics. Consequently, mindful law scholars could use Gandhi's thought to begin a discourse on how some acts of nonviolent resistance can be incorporated into the legal system's current framework, alongside the other forms of public dialogue with government that often are used more effectively by privileged groups.

## II. MINDFULNESS & LAW: THE NEW SYNTHESIS

### A. SCIENTIFIC STUDIES ON MINDFULNESS: AUTHORITATIVE VALIDATION (FOR THE WEST)

Over the last fifty years, mindfulness meditation has gone from being a mysterious foreign practice in American society to a legitimate and thoroughly researched area of psychology, neuroscience, and medicine.<sup>15</sup> Mindfulness training programs often produce positive results in only a handful of sessions,<sup>16</sup> and the benefits of mindfulness on pain<sup>17</sup> and stress reduction have been well documented in research on mindfulness-based stress reduction (MBSR).<sup>18</sup> Mindfulness practices have been associated with decreases in stress and anxiety in college undergraduates,<sup>19</sup> cancer patients,<sup>20</sup> health care

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<sup>15</sup> For a comprehensive review of scientific research on mindfulness, see Shian-Ling Keng et al., *Effects of Mindfulness on Psychological Health: A Review of Empirical Studies*, 31 CLIN. PSYCHOL. REV. 1041 (2011). For a thorough summary of mindfulness-based stress reduction, see *id.* at 1045; see also Alberto Chiesa and Alessandro Serretti, *A Systematic Review of Neurobiological and Clinical Features of Mindfulness Meditations*, 40 PSYCHOL. MEDICINE 1239 (2010).

<sup>16</sup> Keng, *supra* note 15, at 1045-8 (Tables 1-4).

<sup>17</sup> KELLY MAGONIGAL, *THE MINDFULNESS SOLUTION TO PAIN: STEP BY STEP TECHNIQUES FOR CHRONIC PAIN MANAGEMENT*.

<sup>18</sup> Jon Kabat-Zinn, J. *Wherever You Go There You Are: Mindfulness Meditation in Everyday Life*. (1994); Jon Kabat-Zinn, *Mindfulness-Based Interventions in Context: Past, Present, and Future*, 10 CLIN. PSYCHOL.: SCIENCE AND PRACTICE, 144, 144-156 (2003).

<sup>19</sup> John A. Astin, *Stress Reduction Through Mindfulness Meditation*, 66 PSYCHOTHERAPY & PSYCHOSOMATICS 97-106 (1997); Shamini Jain et al. *A Randomized Controlled Trial of Mindfulness Meditation Versus Relaxation Training: Effects on Distress, Positive States of Mind, Rumination, and Distraction* 33 ANNALS OF BEHAVIORAL MEDICINE 11 (2007); Doug Oman et al., *Meditation Lowers Stress and Supports Forgiveness Among College Students: A Randomized Controlled Trial*. 56(5) J. AMERICAN COLLEGE HEALTH 569-78 (2008).

<sup>20</sup> Michael Speca et al., *A Randomized, Wait-List Controlled Clinical Trial: The Effect of a Mindfulness Meditation-Based Stress Reduction Program on Mood and Symptoms of Stress in Cancer Outpatients*. 62 PSYCHOSOMATIC MEDICINE, 613-22 (2007); Richard Bränström et al., *A Randomized Study of the Effects of Mindfulness Training on Psychological Well-*

professionals (who experienced less ‘burnout’),<sup>21</sup> and a more general population of adults.<sup>22</sup> Mindfulness training also has been linked to decreases in depression,<sup>23</sup> exhaustion,<sup>24</sup> negative feelings about the self,<sup>25</sup> and neural expressions of sadness.<sup>26</sup> Other negative behaviors and mental states also are significantly reduced from MBSR,<sup>27</sup> such as neuroticism,<sup>28</sup> absent-mindedness,<sup>29</sup> rumination,<sup>30</sup> difficulty regulating emotions,<sup>31</sup> cognitive reactivity,<sup>32</sup>

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*Being and Symptoms of Stress in Patients Treated for Cancer at 6-Month Follow-Up.*, 19 INT’L J. BEHAVIORAL MED, 539 (2012).

<sup>21</sup> Shauna L. Shapiro et al., *Mindfulness-Based Stress Reduction For Health Care Professionals: Results From A Randomized Trial* 12 INT’L J. STRESS MANAGEMENT 164 (2005).

<sup>22</sup> Ivan Nyklíček & Karlijn F. Kuijpers, *Effects of Mindfulness-Based Stress Reduction Intervention on Psychological Well-Being and Quality of Life: Is Increased Mindfulness Indeed the Mechanism?* 35 ANNALS OF BEHAVIORAL MEDICINE, 331 (2008); Stefan G. Hofmann et al., *The Effect of Mindfulness-Based Therapy on Anxiety and Depression: A Meta-Analytic Review*, 78 J. CONSULTING & CLIN. PSYCHOL. 169, 169 (2010).

<sup>23</sup> Kirk Warren Brown & Richard M. Ryan, *The Benefits of Being Present: Mindfulness and Its Role in Psychological Well-Being*, 84 J. PERSONALITY & SOCIAL PSYCHOLOGY 822 (2003); Morgan Cash & Koa Whittingham, *What Facets of Mindfulness Contribute to Psychological Well-Being and Depressive, Anxious, and Stress-Related Symptomatology?*, 1 MINDFULNESS 177 (2010); See also J. David Creswell et al., *Neural Correlates of Dispositional Mindfulness During Affect Labeling*. 69 PSYCHOSOMATIC MEDICINE 560 (2007).

<sup>24</sup> Nyklíček & Kuijpers, *supra* note 22, at 331.

<sup>25</sup> Paul A. Frewen et al., *Letting Go: Mindfulness and Negative Automatic Thinking*, 326 COGNITIVE THERAPY & RESEARCH 770 (2008).

<sup>26</sup> Norman A. S. Farb et al., *Minding One’s Emotions: Mindfulness Training Alters the Neural Expression of Sadness*, 10 EMOTION 25–33 (2010).

<sup>27</sup> Ruth A. Baer et al., *Using Self-report Assessment Methods to Explore Facets of Mindfulness*, 13 (1) ASSESSMENT 27.

<sup>28</sup> Mathias Dekeyser et al., *Mindfulness Skills and Interpersonal Behaviour*. 44 (5) PERSONALITY & INDIVIDUAL DIFFERENCES 1235 (2008); Tamara L. Giluk, *Mindfulness, Big Five Personality, and Affect: A Meta-analysis*. 47(8) PERSONALITY & INDIVIDUAL DIFFERENCES 805 (2008).

<sup>29</sup> Felix Herndon, *Testing Mindfulness with Perceptual and Cognitive Factors: External vs. Internal Encoding and the Cognitive Failures Questionnaire*. 44(1) PERSONALITY AND INDIVIDUAL DIFFERENCES 32-41 (2008).

<sup>30</sup> Filip Raes & Mark G. Williams, *The Relationship Between Mindfulness and Uncontrollability of Ruminative Thinking*. 1(4) MINDFULNESS, 199 (2010); Wiveka Ramel et al., *The Effects of Mindfulness Meditation on Cognitive Processes and Affect in Patients with Past Depression*, 28(4) COGNITIVE THERAPY & RES. 43 (2010).

<sup>31</sup> Baer, *supra* note 27, at 27-45.

<sup>32</sup> Filip Raes et al., *Mindfulness and Reduced Cognitive Reactivity to Sad Mood: Evidence from a Correlational Study and a Non-Randomized Waiting List Controlled Study*, 47(7) BEHAV. RES. & THERAPY 623 (2009).

social anxiety,<sup>33</sup> avoiding experiences,<sup>34</sup> inability to identify or explain one's own emotions (alexithymia),<sup>35</sup> and the intensity of psychotic delusions.<sup>36</sup>

In addition, a new field called mindfulness-based cognitive therapy (MBCT) focuses on teaching patients to see their symptoms as experiences rather than facts.<sup>37</sup> MBCT has been shown to decrease the rate of relapse in depression patients,<sup>38</sup> decrease number of symptoms of depression,<sup>39</sup> increase the amount of time between relapses,<sup>40</sup> reduce social phobias,<sup>41</sup> and lessen increases in anxiety among bipolar patients.<sup>42</sup> Furthermore, some therapists use a new technique called Dialectical Behavior Therapy (DBT) with patients who either are suicidal, likely to injure themselves, or suffer from Borderline

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<sup>33</sup> Brown & Ryan, *supra* note 24, at 822; Dekeyser et al., *supra* note 29, at 1235; Michael K. Rasmussen & Aileen M Pidgeon, *The Direct and Indirect Benefits of Dispositional Mindfulness on Self-Esteem and Social Anxiety*, 24(2) ANXIETY, STRESS & COPING 227 (2011).

<sup>34</sup> Ruth A. Baer et al., *Assessment of Mindfulness by Self-report the Kentucky Inventory of Mindfulness Skills*, 11(3) ASSESSMENT 191 (2004).

<sup>35</sup> *Id.* at 191.

<sup>36</sup> Paul Chadwick et al., *Responding Mindfully to Unpleasant Thoughts and Images: Reliability and Validity of the Southampton Mindfulness Questionnaire (SMQ)*, 47(4) BRIT. J. CLINICAL PSYCHOL. 451-455 (2008); *See also* Keng, *supra* note 15, at 1043.

<sup>37</sup> Barnhofer, Crane & Didonna, 2009 (cited by Keng et al., 31 CLINICAL PSYCHOL. REV. 1041, 1045 (2011)).

<sup>38</sup> John D. Teasdale et al., *Prevention of Relapse/Recurrence in Major Depression by Mindfulness-Based Cognitive Therapy*, 68(4) J. CONSULTING & CLINICAL PSYCHOL. 615, (2000) (for patients with 3 or more prior relapses); Willem Kuyken et al., *Mindfulness-Based Cognitive Therapy to Prevent Relapse in Recurrent Depression*, 76(6) J. CONSULTING & CLINICAL PSYCHOL. 966, (2008).; Karen A. Godfrin & Cornelis van Heeringen, *The Effects of Mindfulness-Based Cognitive Therapy on Recurrence of Depressive Episodes, Mental Health and Quality of Life: A Randomized Controlled Study*, 48(8) BEHAV. RES. & THERAPY 738-746 (2010).

<sup>39</sup> Thorsten Barnhofer et al., *Mindfulness-Based Cognitive Therapy as a Treatment for Chronic Depression: A Preliminary Study*, 47(5) BEHAV. RES. & THERAPY 366 (2009); Silvia R. Hepburn et al., *Mindfulness-Based Cognitive Therapy May Reduce Thought Suppression in Previously Suicidal Participants: Findings from a Preliminary Study*, 48(2) BRIT. J. CLINICAL PSYCHOL. 209 (2009); J. Mark G. Williams et al., *Mindfulness-Based Cognitive Therapy (MBCT) in Bipolar Disorder: Preliminary Evaluation of Immediate Effects on Between-Episode Functioning*, 107(1) J. AFFECTIVE DISORDERS 275 (2009); Nancy J. Thompson et al., *Distance Delivery of Mindfulness-Based Cognitive Therapy for Depression: Project UPLIFT*, 19(3) EPILEPSY & BEHAV. 247 (2010).

<sup>40</sup> Guido Bondolfi et al., *Depression Relapse Prophylaxis with Mindfulness-Based Cognitive Therapy: Replication and Extension in the Swiss Health Care System*, 122(3) J. AFFECTIVE DISORDERS 224, (2010).

<sup>41</sup> Jacob Piet et al., *A Randomized Pilot Study of Mindfulness-Based Cognitive Therapy and Group Cognitive-Behavioral Therapy for Young Adults with Social Phobia*, 51(5) SCANDINAVIAN J. PSYCHOL. 403 (2010).

<sup>42</sup> Williams et al., *supra* note 39, at 275-79.

Personality Disorder.<sup>43</sup> Among these patients, mindfulness training has significantly reduced anger,<sup>44</sup> aggression,<sup>45</sup> drug use,<sup>46</sup> self-harm,<sup>47</sup> depression,<sup>48</sup> suicidal behavior,<sup>49</sup> and inpatient treatment.<sup>50</sup> Furthermore, Acceptance and Commitment Therapy (ACT) is a therapy that utilizes mindfulness to help

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<sup>43</sup> MARSHA M. LINEHAN, COGNITIVE-BEHAVIORAL TREATMENT OF BORDERLINE PERSONALITY DISORDER (1993) (Cited by Keng et al, *supra* note 15, at 1047.).

<sup>44</sup> Marsha M. Linehan et al., *Interpersonal Outcome of Cognitive Behavioral Treatment for Chronically Suicidal Borderline Patients*, 151(12) AM. J. PSYCHIATRY 1771 (1994); Ralph M. Turner, *Naturalistic Evaluation of Dialectical Behavior Therapy-Oriented Treatment for Borderline Personality Disorder*, 7(4) COGNITIVE & BEHAV. PRAC. 413 (2000); Cedar R. Koons et al., *Efficacy of Dialectical Behavior Therapy in Women Veterans with Borderline Personality Disorder*, 32(2) BEHAV. THERAPY 371 (2001).

<sup>45</sup> Thomas R. Lynch et al., *Treatment of Older Adults with Co-Morbid Personality Disorder and Depression: A Dialectical Behavior Therapy Approach*, 22(2) INT'L J. GERIATRIC PSYCHIATRY 131 (2007).

<sup>46</sup> Marsha M. Linehan et al., *Dialectical Behavior Therapy for Patients with Borderline Personality Disorder and Drug-Dependence*, 8(4) AM. J. ADDICTION, 279-292(1999); Marsha M. Linehan et al., *Dialectical Behavior Therapy Versus Comprehensive Validation Therapy Plus 12-Step for the Treatment of Opioid Dependent Women Meeting Criteria for Borderline Personality Disorder*, 67(1) DRUG & ALCOHOL DEPENDENCE 13 (2002).

<sup>47</sup> Roel Verheul et al., *Dialectical Behaviour Therapy for Women with Borderline Personality Disorder 12-Month, Randomised Clinical Trial in the Netherlands*, 182(2) BRIT. J. PSYCHIATRY 135 (2003); Marsha M. Linehan et al., *Two-Year Randomized Controlled Trial and Follow-Up of Dialectical Behavior Therapy vs Therapy by Experts for Suicidal Behaviors and Borderline Personality Disorder*, 63(7) ARCHIVES GEN. PSYCHIATRY 757 (2006).

<sup>48</sup> Thomas R. Lynch et al., *Dialectical Behavior Therapy for Depressed Older Adults: A Randomized Pilot Study*, 11(1) AM. J. GERIATRIC PSYCHIATRY 33 (2003).

<sup>49</sup> Marsha M. Linehan et al., *Naturalistic Follow-Up of a Behavioral Treatment for Chronically Parasuicidal Borderline Patients*, 50(12) ARCHIVES GEN. PSYCHIATRY 971 (1993).

<sup>50</sup> *Id.* at 971-74.

people constructively accept negative emotions rather than avoiding and rejecting them.<sup>51</sup> ACT has significantly reduced depression,<sup>52</sup> dysfunctional attitudes,<sup>53</sup> hospitalization rates,<sup>54</sup> math and test anxiety,<sup>55</sup> nicotine addiction and cigarette use,<sup>56</sup> and opiate use.<sup>57</sup>

Mindfulness not only decreases negative states but also increases the ability to let go of negative emotions,<sup>58</sup> improves coping skills,<sup>59</sup> improves innovation,<sup>60</sup> increases happiness,<sup>61</sup> and increases well-being and positive mental states.<sup>62</sup> For example, MBSR training significantly increases life satisfaction,<sup>63</sup> agreeableness,<sup>64</sup> conscientiousness,<sup>65</sup> vitality,<sup>66</sup> self-esteem,<sup>67</sup>

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<sup>51</sup> STEVEN C. HAYES ET AL., *ACCEPTANCE AND COMMITMENT THERAPY: AN EXPERIENTIAL APPROACH TO BEHAVIOR CHANGE* (2d ed. 1999).

<sup>52</sup> Robert D. Zettle & Steven C. Hayes, *Dysfunctional Control by Client Verbal Behavior: The Context of Reason-Giving*, 4 ANALYSIS VERBAL BEHAV. 30 (1986); Robert D. Zettle & Jeanetta C. Rains, *Group Cognitive and Contextual Therapies in Treatment of Depression*, 45(3) J. CLINICAL PSYCHOL. 436-445 (1989); Raimo Lappalainen et al., *The Impact of CBT and ACT Models Using Psychology Trainee Therapists A Preliminary Controlled Effectiveness Trial*, 31(4) BEHAV. MODIFICATION 488 (2007).

<sup>53</sup> Lappalainen et al., *supra* note 53, at 488-511.

<sup>54</sup> Patricia Bach & Steven C. Hayes, *The Use of Acceptance and Commitment Therapy to Prevent the Rehospitalization of Psychotic Patients: A Randomized Controlled Trial*, 70 J. CONSULTING & CLINICAL PSYCHOL. 1129 (2002).

<sup>55</sup> Robert D. Zettle, *Acceptance and Commitment Therapy (ACT) vs. Systematic Desensitization in Treatment of Mathematics Anxiety*, 53(2) PSYCHOLOGICAL RECORD 3 (2012).

<sup>56</sup> Elizabeth V. Gifford et al., *Acceptance-Based Treatment for Smoking Cessation*, 35(4) BEHAV. THERAPY 689 (2004).

<sup>57</sup> Steven C. Hayes et al., *A Preliminary Trial of Twelve-Step Facilitation and Acceptance and Commitment Therapy with Poly Substance-Abusing Methadone-Maintained Opiate Addicts*, 35 BEHAV. THERAPY 667 (2004).

<sup>58</sup> Frewen et al., *supra* note 25, at 773.

<sup>59</sup> Lynch et al., *supra* note 48, at 33-45.

<sup>60</sup> Frank W. Bond & David Bunce, *Mediators of Change in Emotion-Focused and Problem-Focused Worksite Stress Management Interventions*, 5(1) J. OCCUPATIONAL HEALTH PSYCHOL. 156 (2000).

<sup>61</sup> Ruodan Shao & Daniel P. Skarlicki, *The Role of Mindfulness in Predicting Individual Performance*, 41(4) CAN. J. BEHAV. SCIENCE 195, 195 (2009) (citing Jacob and Brinkerhoff (1999)).

<sup>62</sup> James Carmody & Ruth A. Baer, *Relationships Between Mindfulness Practice and Levels of Mindfulness, Medical And Psychological Symptoms and Well-Being in a Mindfulness-Based Stress Reduction Program*, 31 J. BEHAV. MED. 23, 23 (2008).

<sup>63</sup> Brown & Ryan, *supra* note 23, at 822.

<sup>64</sup> Brian L. Thompson & Jennifer Waltz, *Everyday Mindfulness and Mindfulness Meditation: Overlapping Constructs or Not?*, 43(7) PERSONALITY & INDIVIDUAL DIFFERENCES 1875 (2007).

<sup>65</sup> Giluk, *supra* note 28, at 805; *Id.* at 1875-85.

<sup>66</sup> Brown & Ryan, *supra* note 24, at 822.

<sup>67</sup> Brown & Ryan, *supra* note 24, at 822; Rasmussen & Pidgeon, *supra* note 33, at 227-233.

sense of autonomy,<sup>68</sup> competence,<sup>69</sup> optimism,<sup>70</sup> and pleasant affect.<sup>71</sup> After one 8-week MBSR training course, subjects even had significantly higher immune function measured by increases in influenza antibodies.<sup>72</sup> Furthermore, Kuyken et al. (2008) found that MBCT significantly increased patient quality of life scores,<sup>73</sup> and Forman et al. (2007) found that mindfulness-based practices in ACT are significantly related to increased life satisfaction.<sup>74</sup>

In short, mindfulness changes the brain – and for the better. Meditation has been associated with increased theta-wave brain activity (an indicator of rest or sleep),<sup>75</sup> as well as continued alpha-wave brain activity (associated with wakefulness) while maintaining restful metabolic rate.<sup>76</sup> Davidson et al. (2003) also found increased left-sided anterior activation, which is associated with positive affect.<sup>77</sup> In addition, mindfulness practices have been linked to the ability of the prefrontal cortex to inhibit the amygdala, which suggests that mindfulness meditation helps the individual to control emotional reactions and outbursts.<sup>78</sup> Moreover, mindfulness eating practices are related to people maintaining a balanced diet.<sup>79</sup> Mindfulness practices even have led to significant decreases in binge eating among those with eating disorders,<sup>80</sup> suggesting that even instinctual cues from the brain can be controlled through mindfulness.

Perhaps the most profound significance of mindfulness for law is the fact that mindfulness significantly increases empathy.<sup>81</sup> Recent research has

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

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*; See also Keng et al, *supra* note 17.

<sup>72</sup> Richard J. Davidson et al., *Alterations in Brain and Immune Function Produced by Mindfulness Meditation*, 65 PSYCHOSOMETRIC MED. 564 (2003).

<sup>73</sup> Kuyken et al, *supra* note 39, at 966.

<sup>74</sup> Evan M. Forman et al., *A Randomized Controlled Effectiveness Trial of Acceptance and Commitment Therapy and Cognitive Therapy for Anxiety and Depression*, 31 BEHAV. MODIFICATION 772 (2007).

<sup>75</sup> Akira Kasamatsu & Tomio Hirai, *An Electroencephalographic Study on the Zen Meditation (Zazen)*, 20(4) PSYCHIATRY & CLINICAL NEUROSCIENCES 315, (1966).

<sup>76</sup> B. K. Anand et al., *Some Aspects of Electroencephalographic Studies in Yogis*, 13(3) ELECTROENCEPHALOGRAPHY & CLINICAL NEUROPHYSIOLOGY 452 (1961); B. K. Bagchi & M. A. Wenger, *Electrophysiological Correlates of Some Yogi Exercises*, 7 ELECTROENCEPHALOGRAPHY & CLINICAL NEUROPHYSIOLOGY 132 (1957); Robert Keith Wallace, *Physiological Effects of Transcendental Meditation*, 167(3926) SCI, 1751 (1970).

<sup>77</sup> Davidson et al, *supra* note 73, at 564–570.

<sup>78</sup> John David Creswell et al., *Neural Correlates of Dispositional Mindfulness During Affect Labeling*, 69 PSYCHOSOMATIC MED. 560 (2007).

<sup>79</sup> SUSAN ALBERS, *EATING MINDFULLY: HOW TO END MINDLESS EATING AND ENJOY A BALANCED RELATIONSHIP WITH FOOD* (2012).

<sup>80</sup> Christy F. Telch et al., *Dialectical Behavior Therapy for Binge Eating Disorder*, 69 J. CONSULTING & CLINICAL PSYCHOL. 1061 (2001).

<sup>81</sup> Dekeyser et al, *supra* note 28, at 1235–45; Shauna L. Shapiro et al., *Effects of Mindfulness-Based Stress Reduction on Medical and Premedical Students*, 21(6) J. BEHAV. MED. 581, 581 (1998).

connected mindfulness meditation to significant increases in attention toward others, in particular, having compassionate regard for the suffering of others.<sup>82</sup> Condon et al. (2013) recently found that meditation significantly increased compassionate responses to suffering.<sup>83</sup> Condon et al. compared a non-meditating group to a group that participated in an 8-week mediation training.<sup>84</sup> After the 8 week course, each subject was asked to return to the lab “under the guise of completing tests of cognitive ability.”<sup>85</sup> However, the researchers collected the actual data when subjects were asked to sit outside the lab in a waiting area with three chairs. Two female confederates sat in two of the chairs, leaving the third chair unoccupied for the subject. After the subject sat in the chair for 1 minute, a third female confederate acted as the sufferer by entering from “around the corner with crutches and a walking boot.”<sup>86</sup> The sufferer winced while walking, stopped in front of the chairs, “then looked at her cell phone, audibly sighed in discomfort, and leaned back against a wall.”<sup>87</sup> If two minutes passed and the subject did not offer his seat, the subject was coded as not offering help. The results showed that subjects who participated in the meditation training were significantly more likely to offer their seat (i.e., manifest a compassionate response) when compared to the non-meditating control group.<sup>88</sup>

Condon et al. and several other meditation researchers are bridging the gap between the individual-focused health benefits of meditation and the interpersonal consequences of meditative practice. For example, Fredrickson et al. (2014) connected improved immune system function and gene expression to loving-kindness meditation.<sup>89</sup> Frederickson and fellow scholars also found that loving-kindness meditation improves cardiovascular health<sup>90</sup> and

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<sup>82</sup> David DeSteno, *The Morality of Meditation*, N. Y. TIMES, July 5, 2013, [http://www.nytimes.com/2013/07/07/opinion/sunday/the-morality-of-meditation.html?\\_r=0](http://www.nytimes.com/2013/07/07/opinion/sunday/the-morality-of-meditation.html?_r=0), last visited Feb. 23, 2013.

<sup>83</sup> Paul Condon et al., *Meditation Increases Compassionate Responses to Suffering*, 20 PSYCHOLOGICAL SCIENCE 1 (2013).

<sup>84</sup> One group of meditators were trained in mindfulness mediation, while another group were trained in compassion mediation. Differences were insignificant between the two groups. *Id.* at 3.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 3.

<sup>89</sup> Barbara L. Fredrickson et al., *A Functional Genomic Perspective on Human Well-Being*, Proceedings of the National Academy of Sciences of the United States of America, available at <http://www.pnas.org/content/110/33/13684>, last visited July 24, 2014.

<sup>90</sup> Bethany E. Kok et al., *How Positive Emotions Build Physical Health: Perceived Positive Social Connections Account for the Upward Spiral Between Positive Emotions and Vagal Tone*, 24 PSYCHOL. SCI. 1123 (2013).

increases life satisfaction,<sup>91</sup> positive emotions,<sup>92</sup> and positive social relationships.<sup>93</sup> Today, there are many scientists and clinicians who are explaining the deep links between mindfulness and compassion.<sup>94</sup> Neurobiologist Dan Siegel recently discussed the results of meditation in the context of meaningful bonds, empathy, and love.<sup>95</sup> Similarly, clinical psychologist Jack Kornfield fundamentally links meditation and loving-kindness throughout his widely acclaimed writings.<sup>96</sup>

### B. MINDFUL LAWYERING: LAWYERS & MEDITATION

Mindfulness in Law initiatives have begun to appear at law schools alongside the recent scientific explosion supporting the power of meditation.<sup>97</sup> The University of Miami School of Law has a Mindfulness in Law program that has served as a model for other law schools.<sup>98</sup> Director Scott Rogers has developed an entire curriculum for integrating mindfulness into law school. In an article titled “The Mindful Law School,” Rogers described a mindfulness-based approach to legal education. Part of Rogers’ approach includes Jurisight, a program that introduces mindfulness concepts and practices by blending the terms of neuroscience and law to make the science and

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<sup>91</sup> Barbara L. Fredrickson et al., *Open Hearts Build Lives: Positive Emotions, Induced Through Loving-Kindness Meditation, Build Consequential Personal Resources*, 95 J. PERSONALITY & SOCIAL PSYCHOL. 1045 (2008).

<sup>92</sup> Kok et al., *supra* note 90.

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

<sup>94</sup> See MARK W. MUESSE, PRACTICING MINDFULNESS: AN INTRODUCTION TO MEDITATION (2011).

<sup>95</sup> DAN SIEGEL, THE MINDFUL BRAIN: REFLECTION AND ATTUNEMENT IN THE CULTIVATION OF WELL-BEING 15-19 (2007); see generally DAN SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION (2010); See also <http://www.rewireme.com/explorations/the-neuroscience-of-well-being-mindfulness-love/#sthash.xSifL5Bm.dpuf> last visited July 24, 2014.

<sup>96</sup> See generally JACK KORNFIELD, SEEKING THE HEART OF WISDOM: THE PATH OF INSIGHT MEDITATION (2001); JACK KORNFIELD, THE WISE HEART: A GUIDE TO THE UNIVERSAL TEACHINGS OF BUDDHIST PSYCHOLOGY, (2009).

<sup>97</sup> Riskin, *supra* note 11, at 638. See also Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 1-67 (2002); Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493 (2009); For more examples of meditation and law-related fields, see also Nicole E. Ruedy & Maurice E. Schweitzer, *In the Moment: The Effect of Mindfulness on Ethical Decision Making*, 95 J. BUS. ETHICS 73 (2010).

<sup>98</sup> See Miami Law: Mindfulness in Law Program, <http://www.miamimindfulness.org/> (last visited July 21, 2014) and University of Miami Faculty: Scott Rogers, <http://www.law.miami.edu/faculty-administration/scott-rogers.php?op=1> (last visited July 21, 2014); Becky Beaupre Gillespie, *Mindfulness in Legal Practice is Going Mainstream*, ABA JOURNAL (Feb 1, 2013 3:10 AM), [http://www.abajournal.com/magazine/article/mindfulness\\_in\\_legal\\_practice\\_is\\_going\\_mainstream/](http://www.abajournal.com/magazine/article/mindfulness_in_legal_practice_is_going_mainstream/) (last visited July 21, 2014); Karen Sloan, *How to Learn the Law Without Losing Your Mind*, THE NAT’L L. J. (Sept. 17, 2012), <http://www.ctlawtribune.com/id=1202571280345> (last visited July 21, 2014).

practice of mindfulness enjoyable and approachable to law students.<sup>99</sup> The Program consists of courses integrated into the law school curriculum, such as “Mindful Ethics” that combines mindfulness with professional responsibility.<sup>100</sup> The program also teaches mindful eating practices to handle the fast-paced fast-food lifestyle rampant in the profession, and contains regular presentations on the mental and physical benefits of mindfulness.<sup>101</sup> There also are ‘Mindful Spaces’ where students can enjoy organic green tea, learn a 15-minute yoga routine that does not require change of clothing, and go on 15-minute walks with faculty.<sup>102</sup> The program website also is adorned with mindfulness exercise instructions and a mindful student spotlight.<sup>103</sup> To Rogers, the program’s goal is to use mindfulness to enhance the well-being of the individuals in contact with the system of legal education and lawyering. In Roger’s own words, “a system that operates with awareness and compassion as its core elements is likely to inspire a development that engages the intellect, eases suffering, and broadens the horizon of what is possible.”<sup>104</sup>

Similarly, Boalt School of Law at the University of California-Berkeley has a new Berkeley Initiative for Mindfulness in Law. The Initiative has regular sessions of meditation and Qi Gong, along with a continuous list of visiting speakers covering a wide range of topics, from neuroscientific evidence of the effectiveness of mindfulness for lawyers to the role of mindfulness in social justice activism.<sup>105</sup> Also, Georgetown University School of Law began a program called Lawyers in Balance and invited Congressman Tim Ryan to speak at a mindfulness event.<sup>106</sup> In addition, City University of New York (CUNY) School of Law has a Contemplative Urban Lawyering Pro-

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<sup>99</sup> Scott Rogers, *The Mindful Law School: An Integrative Approach to Transforming Legal Education*, 28 TOURO L. REV. 1193 (2012); For an expanded discussion on the legal profession, see Rogers, *supra* note 11, at 7. See also Jacobowitz, *supra* note 11, at 27-29.

<sup>100</sup> Scott Rogers, *Mindfulness in Law Program Overview*, YouTube (Mar. 6 2012) [https://www.youtube.com/watch?v=N\\_W20c59SNA#t=50](https://www.youtube.com/watch?v=N_W20c59SNA#t=50) (last visited July 21, 2014).

<sup>101</sup> Rogers, *supra* note 99 at 1202-3.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* For an expanded discussion of University of Miami’s Program and offerings, see SCOTT L. ROGERS, MINDFULNESS FOR LAW STUDENTS: APPLYING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL (2009); SCOTT L. ROGERS, THE SIX-MINUTE SOLUTION: A MINDFULNESS PRIMER FOR LAWYERS (2009); JAN L. JACOBOWITZ & SCOTT L. ROGERS, MINDFULNESS AND PROFESSIONAL RESPONSIBILITY A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM (2012).

<sup>104</sup> Rogers, *supra* note 99, at 1205.

<sup>105</sup> See <http://www.law.berkeley.edu/mindfulness.htm> (last visited July 21, 2014) (photo of Professor Charles Halpern leading Qi Gong session outside the law school; see also Charles Halpern, *Effective and Sustainable Law Practice: The Meditative Perspective*, Syllabus available at <http://www.law.berkeley.edu/17497.htm>, last visited Sept. 7, 2014).

<sup>106</sup> See <http://www.law.georgetown.edu/campus-life/health-wellness/lawyers-in-balance/>, last visited July 22, 2014; <http://www.law.georgetown.edu/news/press-releases/rep-tim-ryan-at-georgetown-law.cfm>, last visited July 22, 2014.

gram and a corresponding social justice course, both incorporating mindfulness.<sup>107</sup> Furthermore, University of Akron School of Law is beginning a program in mindfulness-based stress reduction (MBSR).<sup>108</sup> Vanderbilt Law School also has recently created a Supportive Practices Group that incorporates mindfulness practices,<sup>109</sup> and Yale Law School has a Meditation and the Law program.<sup>110</sup> In addition, mindfulness is incorporated into an Emotional Intelligence course at University of Missouri, into dispute resolution<sup>111</sup> courses at Northwestern and University of Florida law schools,<sup>112</sup> and into various classroom exercises at Arizona Summit School of Law.<sup>113</sup> In total, anywhere from twelve to twenty U.S. law schools offer mindfulness courses or are integrating mindfulness into the curriculum in areas such as negotiations.<sup>114</sup>

These programs also are receiving attention from the legal profession for their contributions to the legal community.<sup>115</sup> In a conference at Miami's federal district courthouse in 2012, Judge Alan Gold uttered the words, "I am calling for an all-out revolution"<sup>116</sup> and wondered how lawyers in his courtroom would respond if he sounded a Tibetan Bell rather than a gavel.<sup>117</sup> Apparently, around the country there are many people who have responded to Judge Gold's call.<sup>118</sup> At least twelve Bar Associations now have programs

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<sup>107</sup> Riskin, *supra* note 11, at 637.

<sup>108</sup> Richard Weiner, *Mindfulness Makes Its Way into Law Schools*, Akron Legal News, Oct. 17, 2012, <http://www.akronlegalnews.com/editorial/5071>.

<sup>109</sup> Riskin, *supra* note 11, at 637.

<sup>110</sup> Steven W. Keeva, *Practicing From the Inside Out*, 7 HARV. NEGOT. L. REV. 97 (2002); Douglas A. Codiga, *Reflections on the Potential Growth of Mindfulness Mediation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002); *See also* <http://www.law.yale.edu/admissions/18137.htm>, last visited July 26, 2014.

<sup>111</sup> For a discussion on the role of mindfulness in dispute resolution, *see* Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory That Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433 (2010) For a discussion of the issue of mindfulness enhancing mediator neutrality, *see* Evan M. Rock, *Mindfulness Meditation, The Cultivation of Awareness, Mediator of Neutrality, and the Possibility of Justice*, 6 CARDOZO J. OF CONFLICT RESOLN. 347 (2005).

<sup>112</sup> Riskin, *supra* note 11, at 637.

<sup>113</sup> *See* <http://www.azsummitlaw.edu/finding-happiness-law> and the work of Mary Delores Guerra to include mindfulness into curriculum. Rogers, *supra* note 99, at 1192.

<sup>114</sup> Weiner, *supra* note 108.

<sup>115</sup> *Id.*; *see also* Jacobowitz, *supra* note 12, at 27-29; STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (10th ed. 2011).

<sup>116</sup> Jan L. Jacobowitz, *Benefits of Mindfulness for Litigators*, 39(2) LITIGATION 27 (2013).

<sup>117</sup> *Id.*

<sup>118</sup> For example, Arizona Judge Roland J. Steinle began meditating several years ago and noticed an improvement in his own calmness and a reduction in stress. *See* <http://www.sedonameditation.com/documents/DesertLivingSep08.pdf> (quoting Steinle on his meditative practices). Now, he has begun to speak about meditation for legal professionals. *See generally* <https://azatty.wordpress.com/2011/06/16/meditative-convention-start/>, <http://themindfuljudge.com/events/index.html>.

related to mindfulness.<sup>119</sup> Some areas even have private organizations<sup>120</sup> or permanent groups dedicated to mindfulness for lawyers,<sup>121</sup> such as the D.C. Area Contemplative Law Group and the Mindfulness in Law Joint Task Force between the South Florida Chapter of the Federal Bar Association and the Dade County Bar Association.<sup>122</sup> Meditation groups for lawyers also have been created in Northern California, Denver, New York City and Portland, Oregon.<sup>123</sup> In addition, many mindfulness-related workshops are sponsored by the American Bar Association, the American Association of Law Schools, individual law schools or other parts of universities, law firms or corporate legal departments, government agencies, non-governmental organizations, and courts.<sup>124</sup>

Furthermore, as part of his mindfulness and law advocacy, Professor Leonard L. Riskin has made substantial contributions to the development of mindful dispute resolution.<sup>125</sup> He has applied mindfulness to the mediation and alternative dispute resolution literature in order to view law as a healing profession and to increase lawyer awareness of both internal and external tensions that exacerbate conflict.<sup>126</sup> In this capacity, mindful dispute resolution can reduce escalation of conflict and aid in constructive long-term settlement of conflict.

Similarly, the therapeutic jurisprudence movement has been extended to incorporate mindfulness.<sup>127</sup> “Its founders, law professors David Wexler and Bruce Winick, maintain an extensive set of resources”<sup>128</sup> at their website.<sup>129</sup> Mindfulness also has been used as a tool to enhance collaborative

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<sup>119</sup> Weiner, *supra* note 109.

<sup>120</sup> See Judi Cohen, *Effective Mindfulness for Lawyers in the Organization Warrior One*, <http://www.warriorone.com>.

<sup>121</sup> Leonard L. Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61(4) J. OF LEGAL EDUC. 637 (2012). Riskin also says that mindfulness & law programs also are appearing “in Australia, Austria, Canada, Denmark, Israel, and Greece.” *Id.*

<sup>122</sup> Weiner, *supra* note 108.

<sup>123</sup> Riskin, *supra* note 11, at 637.

<sup>124</sup> *Id.*

<sup>125</sup> Leonard L. Riskin, *Awareness and Ethics in Dispute Resolution and Law: Why Mindfulness Tends to Foster Ethical Behavior*, 50 S. TEX. L. REV. 493 (2009); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Leonard L. Riskin, *The Place of Mindfulness in Healing and the Law*, in SHIFTING THE FIELD OF LAW & JUSTICE 99 (Linda Hager et al., eds., 2007); Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 447 (Marjorie Silver, ed., 2007).

<sup>126</sup> *Id.* See also Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. OF LEGAL EDUC. 79 (2004).

<sup>127</sup> Anthony V. Alfieri, *Educating Lawyers for Community*, WIS. L. REV. 115, 118-121 (2012) (citing work on King at fn. 22).

<sup>128</sup> Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement”*, N. Y. L. Sch. Clinical Res. Inst. Res. Paper Series 05/06-12, 2, available at <http://ssrn.com/abstract=875449>.

<sup>129</sup> See [www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org).

divorces in family law practice.<sup>130</sup> Additionally, mindfulness has been connected to enhancing mediator neutrality<sup>131</sup> and reducing the role of anger in mediations,<sup>132</sup> which could promote the ideals of fairness and reasoned discussion in law.

Mindfulness techniques also are being used to enhance trial advocacy. As Trial Advocacy teacher Professor David M. Zlotnick states, “Without question, analytic types are attracted to the field and law school exaggerates the tendency to process everything intellectually.”<sup>133</sup> By incorporating mindfulness practices into trial advocacy training, instructors such as Zlotnick can complement the strong intellect many students bring to law school, with greater emotional insight, empathy, calmness, and clarity with jurors.

To connect the work of Riskin, Wexler, Winick, Zlotnick and others, Susan Daicoff<sup>134</sup> has described the Mindfulness-in-Law movement as part of a “comprehensive law movement” whose other components include “collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.”<sup>135</sup> She highlights the Center for Restorative Justice at the University of Minnesota, which is directed by Professor Mark Umbreit, a leader in the Restorative Justice movement.<sup>136</sup> Under this broader collaborative law umbrella, Umbreit and others are bringing a holistic focus to law that broadens lawyers to multiple dimensions of conflict and the human condition.

The Mindfulness in Law movement and many other parts of the collaborative law movement rely on “Eastern” thought – especially Buddhist philosophy -- to create alternative conceptions of law and the human condition. In the next section, I discuss the relationship between Buddhist and western thought, especially as it applies to law practice.

### 1. Buddhist Thought and Western Law: A Case of East-West Dialogue.

Connected to the Mindfulness in Law movement is a less-discussed “East-West” dialogue between modern law practice and the insights of Buddhist lawyers.<sup>137</sup> A major concern of Buddhist lawyers involves reconciling the tension they experience between their values and modern law practice. In Buddhist thought, mindfulness is part of a process through which one

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<sup>130</sup> See Cantrell, *supra* note 13, at 65.

<sup>131</sup> Rock, *supra* note 111.

<sup>132</sup> Don Ellinghausen Jr., *Venting or Vipassana? Mindfulness Meditation’s Potential for Reducing Anger’s Role in Mediation*, 8(63) CARDOZO J. CONFLICT RESOL. (2006).

<sup>133</sup> David M. Zlotnick, *Integrating Mindfulness Theory and Practice into Trial Advocacy*, 61(4) J. LEGAL EDUC. 654, 658 (2012).

<sup>134</sup> Daicoff, *supra* note 128, at 57.

<sup>135</sup> *Id.* at 1-2.

<sup>136</sup> *Id.* at 2. See also <http://2ssw.che.umn.edu/rjp/People/Umbreit.htm>.

<sup>137</sup> This “East-West” dialogue has a history in scientific fields as well, such as psychology. See B. Alan Wallace and Shauna L. Shapiro, *Mental Balance and Well-Being: Building Bridges Between Buddhism and Western Psychology*, AM. PSYCHOL. 690 (2006).

recognizes the interdependence of all beings, and this recognition has profound consequences on one's view of guilt. In an adversarial system in which one party is the accused, applying an interdependent understanding of guilt can be challenging. As one Buddhist lawyer explained:

There is no case in which one person is solely guilty, liable, or responsible. Any case whatsoever, or any karmic act whatsoever, involves a hidden series of karmic acts... Every individual case is like the tip of an iceberg. In a criminal case, we cannot solve the problem simply by saying "guilty" or "not guilty".<sup>138</sup>

Because the connectedness of all beings is central to Buddhist thought, a Buddhist lawyer must practice law as if a lawyer were "one with the community... urging mutual understanding, respect, and a common solution."<sup>139</sup> To achieve this understanding, Buddhist teachings offer the Eightfold Path, a set of practices leading to the realization of interconnected being (Enlightenment).<sup>140</sup> Right Mindfulness (or Right Attention) is one of the components of the Eightfold Path,<sup>141</sup> but in current American legal discourse, mindfulness has been surgically removed from the rest of the Eightfold Path as a singular and primary preoccupation. This can seem like a problem to some Buddhist lawyers who often raise the issue of compassion in law,<sup>142</sup> especially since compassion contains an interpersonal quality of loving-kindness that mindfulness – together with the rest of the Eightfold Path – is meant to cultivate.<sup>143</sup>

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<sup>138</sup> Kinji Kanazawa, *Being a Buddhist and a Lawyer*, 66(4) *FORDHAM L. REV.* 1171, 1174.

<sup>139</sup> *Id.* at 1175. Although many in the legal community may find these to be noble goals, it in some ways is even more difficult to impart this Buddhist view into law than a Judeo-Christian view. As Kanazawa stated, "I cannot connect easily legal concepts, such as covenants and contracts, with Buddhism, as may be done more easily in the Judeo-Christian tradition." *Id.* Similarly, Blatt commented that the Abrahamic faiths "more readily generate a role for lawyers." William S. Blatt, *What's Special About Meditation? Contemplative Practice for American Lawyers*, 7 *HARV. NEGOT. L. REV.* 125, 139 (2002).

<sup>140</sup> ROBERT THURMAN, *THE JEWEL TREE OF TIBET: THE ENLIGHTENMENT ENGINE OF TIBETAN BUDDHISM* 114 (2005); ("enlightenment is realizing our inexorable interconnected-ness"); EKNATH EASWARAN, *THE DHAMMAPADA* 31 (1985); HUSTON SMITH, *THE WORLD'S RELIGIONS* 103-112 (1991) (109-111 for Right Mindfulness). See also HUSTON SMITH & PHILIP NOVAK, *BUDDHISM: A CONCISE INTRODUCTION*, 143-44 (2003); BANSI PANDIT, *THE HINDU MIND* 85 (2d ed. 1996); LAMA SURYA DAS, *AWAKENING THE BUDDHA WITHIN* 296 (1997).

<sup>141</sup> Easwaran, *supra* note 140, at 31-3; Smith, *supra* note 140; See also Smith & Novak, *supra* note 140; Pandit, *supra* note 140; Surya Das, *supra* note 140.

<sup>142</sup> Deborah J. Cantrell, *Can Compassionate Practice Also Be Good Legal Practice?: Answers from the Lives of Buddhist Lawyers*, 12(1) *RUTGERS J. L. & RELIGION* 2, 73-5 (2010); See also Deborah J. Cantrell, *Inviting the Bell: A Preliminary Exploration of Buddhist Lawyers in the United States*, U. of Colo. L. Sch. Leg. stud. res. paper series, Working Paper Number 10-12 (Mar. 11, 2010), <http://ssrn.com/abstract=1568953>.

<sup>143</sup> Easwaran, *supra* note 140; Smith, *supra* note 140; See also Smith & Novak, *supra* note 140; Pandit, *supra* note 140, at 81-6; Surya Das, *supra* note 140. Other parts of the Eightfold Path that often are left out of American mindfulness discourse but relevant to law practice are Right View, Action, Effort, and Livelihood.

For some Buddhist lawyers, there are times when their values are difficult to reconcile with their law practice. One Buddhist criminal lawyer explained that sometimes he must discredit police officers in order to zealously represent his client, even though his role as an advocate may foster negative feelings in the officers. He explained, “you have real countervailing duties. I don’t think there’s a way to reconcile everything we’re asked to do as Buddhists with everything we’re asked to do as lawyers.”<sup>144</sup>

The Mindfulness in Law movement faces a similar predicament. The path from mindful practice to a mindful legal *system* is steep, and along the way, there are points where both the structure and culture of the legal system is at loggerheads with mindful practice. Unfortunately, reconciling these tensions requires reforms that few scholars have been willing to discuss, in part because this conversation involves facing aspects of the dominant world-view underlying modern American legal thought.

In contrast to law scholars, many scholars in other disciplines have engaged in this necessary conversation. For instance, scholars from communications and philosophy have criticized the western-dominated world-view that animates modern law and education. In communications scholarship, recent scientific research has revealed a deep bias in the ways that modern discourse identifies proper ‘logic’ and ‘analytical reasoning.’<sup>145</sup> Furthermore, philosopher Charles Mills has suggested that aspects of western thought have fundamentally racist theoretical bases.<sup>146</sup> Specifically, Mills has confronted a major canon of western social theory - the social contract - and has argued that the historical basis of the social contract rests in a ‘racial contract.’ In this racial contract, people of color are subjugated to ‘humanoid’ status in the interest of white men’s protection of their property rights.<sup>147</sup> In this analysis, Mills has challenged the legitimacy of contract theory, one of the foundations of western legal doctrine.

The academic mindfulness scholarship rarely engages the critical academic discourse on western dominance, and to do so would require mindfulness commentators to discuss the deep canyon that historically has separated western education from the rest of the world’s thought. To highlight the dominant western world-view of American culture more broadly, Samuel Huntington even described American society as a settler’s society, rejecting the notion that American society is an ‘immigrant society.’<sup>148</sup> In a settler’s

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<sup>144</sup> Cantrell, *supra* note 142, at 46.

<sup>145</sup> Nisbett et al., *supra* note 12, at 291-310; Gunaratne, *supra* note 12, at 366-383; Ishii (2004) *supra* note 12, at 63-65; Kim, *supra* note 12, at 412-21; Miike (2006), *supra* note 12, at 4-31; Miike (2007), *supra* note 12, at 272-278; Wieming (1995), *supra* note 12; Wieming (2001), *supra* note 12.

<sup>146</sup> See generally CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

<sup>147</sup> *Id.*; Scheurich, *supra* note 12; see generally CAROLE PATEMAN & CHARLES W. MILLS, *CONTRACT AND DOMINATION* (2007).

<sup>148</sup> Samuel Huntington, *Who Are We?* (quoted in JOHN A. POWELL, *RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY* (2012) )

society, new groups must conform to the dictates of the dominant group.<sup>149</sup> In the American case, the atomistic world-view of early settlers became a dominant conception of man that forced alternative conceptions to conform to its contours or risk marginalization. As a result, the atomism so deeply embedded in American individualism can make social transformation to interdependent individualism potentially hostile rather than peaceful.

Furthermore, the doctrine of universal interdependence of all beings and the value of compassion contain emotional insights that contradict the dominant juxtapositions of emotion and reason in the west.<sup>150</sup> Especially in early Euro-American history,<sup>151</sup> emotional insight distracted from the power of reason and therefore had to be amputated from conscious thought processes and intellectual inquiries.<sup>152</sup> Law has not been immune to this tendency; for centuries, the notion of law's "logic" leading to "rational" conclusions pervaded and still pervades legal discourse.<sup>153</sup> Therefore, from one view, legal thought contains a deep pervasive bias against – and perhaps aggressive hostility toward – emotional insight, even though compassion, empathy, and interdependence are based in part on emotional intelligence.<sup>154</sup> Tragically, when scholars and students engage in the style of reasoning that is privileged in much of modern legal education, they lose the opportunity to engage what is perhaps the most positive, intense, and influential emotional experience in human life: the experience of love.

By developing the type of emotional intelligence that fosters love, law scholars can eliminate some of legal reasoning's blind spots, but to mention love as a basis for legal reasoning is anathema to education in a modern law school classroom. Within the dominant framework of legal education, love in law can seem absurd, ridiculous, or at best, irrelevant. Because they are forced to accept this dominant framework, law students are socialized to accept the foundation of a modern western culture and history in which mindfulness is foreign. This presents a unique challenge to the Mindfulness in Law movement, but without the insights of mindfulness proponents, legal education will continue to be bereft of the insights that could create solutions

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<sup>149</sup> *Id.* See also John A. Powell, *John A. Powell on Social Justice, Mindfulness and The Law: Reflections on the Self*, YouTube, <https://www.youtube.com/watch?v=Yq2LppGBaEI> at 25:00-28:00 (last viewed July 22, 2014).

<sup>150</sup> ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* 245-252 (2008).

<sup>151</sup> The function of this juxtaposition has been viewed as a form of gender dominance and is made visible in the labelling of women as 'emotional.' Historically, this labelling rendered women incapable of exercising the power of reason that was seen as the domain of men. GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917* 18-25 (2008).

<sup>152</sup> *Id.*

<sup>153</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 104-123 (1987); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 207-219 (1988).

<sup>154</sup> DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 96-110 (2006); DANIEL GOLEMAN, *SOCIAL INTELLIGENCE* 82-116 (2007).

for many modern problems. The Mindfulness in Law movement has the potential to combine students' intellectual acumen with emotional intelligence, but to recognize its full potential, mindfulness scholars must grapple with the western privilege that has been entrenched in American legal thought since the colonial period. In an age in which modern law and legal systems are part of a global order, "it is about time we recognized [the] deep-seated ethnocentric and cultural biases"<sup>155</sup> of western legal philosophy.<sup>156</sup>

C. *THREE LEVELS OF CHANGE: INDIVIDUAL, INTERPERSONAL, & STRUCTURAL*

Mindfulness has potential to improve individual well-being, interpersonal interactions, and social structure. However, in practice, mindfulness primarily has penetrated the level of individual well-being in American society and has not transformed American culture from atomistic self-interest to other-regarding interdependence. The highly self-regarding quality of American individualism can be seen in a recent advertisement attracting university students to mindfulness meditation.<sup>157</sup> It reads:

[S]tudent survey results from the Winter 2014 sessions:

88% reported that mindfulness helped improve their academic performance

77% reported that mindfulness helped improve their focus and concentration

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<sup>155</sup> BHIKHU PAREKH, *GANDHI'S POLITICAL PHILOSOPHY: A CRITICAL EXAMINATION* 3 (1989).  
<sup>156</sup> *Id.*

<sup>157</sup> Note: The ad is on the website for the Academic Advising Center at the University of Michigan, and I teach in the University of Michigan system. There are many other examples that illustrate modern marketing of mindfulness; therefore, I use this ad as a reflection of modern mindfulness promotion rather than being an ad unique to my University in any way. I assume any American organization must employ dominant American cultural frames to promote its services and attract clientele. Mindfulness promotion, too, must entail culturally sensitive strategies to appeal to broad populations. Therefore, I present this ad as an illustration of American perceptions of mindfulness rather than perceptions peculiar to my University. For more examples of atomistic portrayals of mindfulness in American society, *see generally* <http://korumindfulness.org/> last visited April 12, 2015 (highlighting the individualized mental and physical health benefits to university students). *See also* Yale Law School Admissions website, *supra* note 111, at <http://www.law.yale.edu/admissions/18137.htm>, last viewed April 12, 2015 ("The law school offers guided meditation sessions each week. Whether you choose to take part in these mid-day recharges, or if you prefer to get your dose of mindfulness at home, starting or ending your day with a few minutes of a quiet brain will put you at ease when you are cold-called in class. When you are centered with meditation, whatever stresses the legal academy throws at you seem like berries, not boulders.").

59% reported that they studied more effectively.<sup>158</sup>

To promote mindfulness, the ad emphasizes individual benefit as the sole reason to incorporate mindfulness into education. The message to the reader is ‘I will do better in school, I will focus better, and I will study more effectively.’ This message certainly makes it clear that mindfulness can help individuals achieve “success” by modern definitions; however, when viewed within the context of the entire Eightfold Path, mindfulness is far from this atomistic characterization. In the context of progressing toward Enlightenment, mindfulness is an aid for becoming aware of one’s connection to others and for developing the empathy that fosters social harmony.<sup>159</sup> Although ‘improved concentration’ can foster inner peace, the ad itself is purely “self-regarding”<sup>160</sup>; none of the “other-regarding”<sup>161</sup> qualities of mindfulness such as developing compassion or loving-kindness appear in the ad. Like the promotion of yoga in American society, the promotion of mindfulness seems constitutive of a larger culture in which benefits to oneself are more important than developing any “other-regarding” qualities. Apparently, to promote mindfulness to university students, an ad touting ‘what mindfulness can do for you’ is more effective and appealing than an ad that says mindfulness can “develop your empathy,” “improve your compassion,” or “make your loving-kindness more effective.” In other words, within the dominant frames of American individualism, the ‘other-regarding’ qualities of mindfulness seem insignificant when compared to the “self-regarding” benefits of mindfulness.

From one view, the dominant atomistic frames of American society constrain mindfulness advocates’ ability to emphasize the “other-regarding” potential of mindfulness. As a result, promotions of mindfulness in American society emphasize individual-level benefits (i.e., ‘how mindfulness can benefit me’), as opposed to emphasizing how mindfulness can provide benefits at the interpersonal level (i.e., by improving relationships through kindness) and structural level (i.e., by reforming institutions through the use of compassion). Furthermore, if one considers the structural and cultural pervasiveness of economic self-interest in American society, then the dominant economic values could create pressure on organizations to portray mindfulness in ways that promote the greatest immediate profit and growth. Within American society’s atomistic individualism and profit-growth model, mindfulness organizations face structural pressures to “get people in the door” and must appeal to consumer self-regard first in order to maximize interest in their product. Consequently, due to cultural and economic pressures,

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<sup>158</sup> From the University of Michigan Newman Academic Advising Center at <http://www.mindfulnessumich.com/>. Advertised on the University of Michigan CTools Course Management Site at <https://ctools.umich.edu/gateway/>, last visited July 21, 2014.

<sup>159</sup> LAMA SURYA DAS, *AWAKENING THE BUDDHA WITHIN* 292, 297 (1997).

<sup>160</sup> Dasgupta uses the term “other-regarding” to describe Gandhi’s mentality in contrast to “self-regarding” behavior. AJIT K. DASGUPTA, *GANDHI’S ECONOMIC THOUGHT* 32 (1996); see also VENKATRAMAN SUBRAY HEDGE, *GANDHI’S PHILOSOPHY OF LAW* 29-32 (Revision of author’s thesis, 1983).

<sup>161</sup> See DASGUPTA, *supra* note 160.

'other-regarding' qualities of mindfulness that could promote structural change can become secondary considerations, even for the most well-intentioned mindfulness advocates.

There are alternatives to the atomistic, hyper-individualistic, "self-regarding" portrayal of the pursuit of happiness in American culture and the pursuit of "success" in American education. However, the current discourse on mindfulness does little to ask questions that force us to probe deeper into American individuality: for instance, should the ultra-competitive model that pits students against each other for grades be questioned? For advocates who want to increase compassion and loving-kindness with mindfulness, it is no consolation to see students flock to meditation because they want "a better edge" on the competition. Similarly, to John A. Powell,<sup>162</sup> it is no consolation to see mindfulness used on soldiers, either. In a presentation at Berkeley's Boalt Hall School of Law, Powell lamented at the fact that mindfulness was being used by the military to better train combat troops to be "able to kill people, only better!"<sup>163</sup> If combat troops are trained to "be more focused" without questioning the imperative to kill, then modern society has succeeded in its evisceration of mindfulness from its sisters: compassion and loving-kindness.<sup>164</sup>

Although many Mindfulness-in-Law proponents have discussed the challenges that mindfulness faces from the dominant atomistic modern lifestyle, there has been little resolution regarding what lawyers should do about the challenge. In a self-reflective Article, Riskin described two negotiations he once had in the developing world – one with a carriage driver and one with a female textile seller - for which he has felt tremendous guilt over 20 years. He experiences this guilt largely because of his exercise of strong self-interest in situations he now feels may not have warranted such a response.<sup>165</sup>

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<sup>162</sup> Powell uses lower-case in his name.

<sup>163</sup> Powell, *supra* note 149, at 44:15 (expressing concern over the limited use of mindfulness with soldiers only 'as a technique'), and at 1:00:00 (discussing the meaning of yoga as union).

<sup>164</sup> For examples of the connection between mindfulness and love, compassion, and kindness, see Rick Hanson, *Buddha's Brain: The Practical Neuroscience of Happiness, Love, and Wisdom* (2009); Rick Hanson, *Just One Thing: Developing a Buddha Brain One Simple Practice at a Time* (2011); Rick Hanson, *Hardwiring Happiness: The New Brain Science of Contentment, Calm, and Confidence* (2013); (see also Hanson, *Love the World*, at [http://www.huffingtonpost.com/rick-hanson-phd/love-the-world\\_b\\_1161781.html](http://www.huffingtonpost.com/rick-hanson-phd/love-the-world_b_1161781.html), last visited July 22, 2014).

<sup>165</sup> Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 *HARV. NEGOT. L. REV.* 1, 3-4 (2013). Riskin refers to the healthy and compassionate part of himself as "Gandhi" (at 40-58) and ends the Article with an eloquent poem from poet Juan Ramon Jimenez about the individual self as beyond the atomistic self:

I am not I.  
I am this one  
Walking beside me whom I do not see,  
Whom at times I manage to visit,  
And whom at other times I forget:

Riskin's refreshing transparency opens readers to the question of how loving-kindness and adversarial negotiation could coexist in a modern environment that aggressively celebrates and promotes self-interest.<sup>166</sup> Although interpersonal tension could be resolved with loving-kindness, no single individual's compassion in the moment of bargaining with an impoverished seller is going to alter the structural conditions in which the interaction takes place.

For this reason, many lawyers who apply mindfulness to interpersonal conflict have alluded to the need for a structural level of change. For instance, Harris et al. invoked the teachings of Buddhist monk Thich Nhat Hanh to explain how mindfulness can aid transformative justice in Oakland.<sup>167</sup> They presented a way of conceptualizing mindful lawyering that focuses on long-term cooperation rather than competitive struggle. In Harris et al.'s conception, "the practice of mindfulness means... find[ing] new ways to work with former opponents, and [using] the relationships created within the Coalition to support still-greater efforts."<sup>168</sup> By applying mindfulness to relationships, Harris et al. have helped to move mindfulness discourse beyond individual benefit and into the level of interpersonal benefit. However, as Harris et al. strive to improve interactions, they also have recognized the structural qualities of the American political and legal systems that impede 'other-regarding' exchanges. Harris et al. sympathetically explained the plight of social justice advocates by saying "Community lawyers know well the feeling of Pyrrhic victory when fighting for subordinated communities and interests in a legal and political system that purports to be neutral, yet frequently consolidates the power of winners against losers."<sup>169</sup> Here, Harris et al. acknowledged that the efforts of social justice lawyers are challenged by structural "conditions that gave rise to highly adversarial relationships".<sup>170</sup> In short, social justice lawyers have used mindfulness as a powerful

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The one who remains silent when I talk,  
The one who forgives, sweet, when I hate,  
The one who takes a walk where I am not,  
The one who will remain standing when I die

JUAN RAMON JIMENEZ, I AM NOT I, IN *THE WINGED ENERGY OF DELIGHT* 97 (Robert Bly 2005), reprinted in ARTHUR ZAJONC, *MEDITATION AS CONTEMPLATIVE INQUIRY: WHEN KNOWING BECOMES LOVE* 31 (Lindisfarne Books 2009), (cited by Riskin, *supra* note 165, at 59).

<sup>166</sup> JAMES M. HENSLIN, *ESSENTIALS OF SOCIOLOGY: A DOWN-TO-EARTH APPROACH* 46 (6<sup>th</sup> Ed. 2006) (for data showing American value preferences for individualism and worldly success). Riskin also discussed Adam Smith's conception of the two selves governed by "the passions" and the "impartial spectator". See Riskin, *supra* note 165, at 7. This aspect of Smith's writing could serve as potential bridge between modern legal 'impartiality' and mindful detachment.

<sup>167</sup> Angela Harris, Margaretta Lin & Jeff Selbin, *Symposium: Race, Economic Justice, and Community Lawyering in the New Century: From "The Art of War" to "Being Peace": Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CALIF. L. REV. 2073, 2125.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 2128.

<sup>170</sup> *Id.* at 2125.

tool for changing the tenor of social conflict, largely by using it on the interpersonal level; however, the structural conditions that exacerbate conflict will continue to breed more conflicts unless they are confronted.

To integrate mindful law practice at the individual, interpersonal, and structural levels, Harris et al. provided a three-level template.<sup>171</sup> On the individual level, the meditating lawyer benefits from decreases in stress, anxiety, and burn-out, as previously summarized. At the interpersonal level, Harris et al. have used compassionate tactics when opponents appear to be mean-spirited or corrupt. Harris et al. referenced Gandhi while making this point, stating “Gandhi said that we must “be the change you wish to see in the world.””<sup>172</sup> At the structural level, Harris et al. emphasized the connection between mindfulness and social change. They explained how justice cannot be achieved simply by overthrowing officials and replacing their oppressive behavior with equally discriminatory practices. In their own words:

In my view, changing the identities of the people who hold power does not mean that community justice is automatically achieved. I do not want to support unprincipled tyrants no matter what their class, race, or politics.<sup>173</sup>

Here, Harris et al. expressed concern over simply replacing people in power with people of different races, ethnicities, or genders, since community justice means little if those who attain power continue the corrupt habits of their predecessors. Gandhi expressed the same sentiment in his own rebuke to Indian freedom fighters who chose violence and corrupt tactics, saying that they “want English rule without the Englishman. You want the tiger’s nature, but not the tiger... This is not the Swaraj [self-rule] that I want.”<sup>174</sup> In other words, simply replacing rulers with individuals of different racial or ethnic identities does not alter structural injustices; if it alters anything, it merely may change which populations are oppressed within that structure.

Therefore, transformative justice must accomplish more than the mere regime changes of past revolutions. Instead, it must nurture a new form of power based on cooperation rather than competition, and mindful lawyering could play a role in this social change. As Harris et al. explain, “mindful lawyering is a practice that connects the traditional Buddhist goal of individual inner enlightenment with the political program of facilitating the development and exercise of cooperative power.”<sup>175</sup> Similarly, the Sarvodaya

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<sup>171</sup> The three levels I present in this Article broadly focus on systemic change in the rule of law and legal systems in American society but parallels Harris et al.’s more specific template for law practice. In the context of law practice, Harris et al. call their 3 levels the “Lawyer-Self” & “Lawyer-Client,” “Lawyer-Community,” and “Lawyer-Movement.” See Harris et al., *supra* note 167, at 2126-8, 2128-9, & 2129-31.

<sup>172</sup> Harris et al., *supra* note 167, at 2124-25.

<sup>173</sup> *Id.*

<sup>174</sup> MOHANDAS GHANDI, HIND SWARAJ AND OTHER WRITINGS, (Anthony Parel ed. 1997).

<sup>175</sup> Harris et al., *supra* note 173, at 2130. Harris et al. further add “Yet in other seemingly hopeless eras, extraordinary events have occurred. Examining the work of leaders such as

movement in Sri Lanka is rooted in the Buddhist tradition and uses an engaged mindfulness approach to social change.<sup>176</sup> Not coincidentally, the name of the movement – Sarvodaya – was Gandhi’s preferred term for “the welfare of all.”<sup>177</sup> Gandhi’s preoccupation with “the welfare of all” both in and outside of his law practice makes a deeper engagement with his life a useful exercise for the mindful lawyer. Like many social justice lawyers today, Gandhi’s personal decision to live among those whom he sought to help presents an opportunity to connect the three levels of change.

Before becoming a leader of the Freedom Movement in India, Gandhi practiced law in South Africa for decades and developed his view of the proper role of law and lawyering.<sup>178</sup> In the face of extreme discrimination, Gandhi developed a mindful conception of law as an outgrowth of love. This has led some scholars to conclude “that the traditional assumption that political power is inevitably based on force is wrong.”<sup>179</sup> Scholar Jonathan Schell observed that “for Gandhi, there were two kinds of power: power obtained by the fear of punishment, and power obtained by acts of love, which he called Satyagraha.”<sup>180</sup> Schell referred to power from fear as “coercive power” and power from love as “cooperative power.”<sup>181</sup> Schell endorsed the view that cooperative power can become the globally dominant form of power.<sup>182</sup>

Similarly, Gandhi saw a role for law and lawyers in this global transition to cooperative power, and this view informed his negotiations with British officials. Professor Rhonda Magee described Gandhi’s view of the power of love as it applied to his legal philosophy, and stated:

Gandhi’s study of the law and his concern for justice were never bound to conventional legal codes, which in fact permitted the abuse of colored people. Instead, he found his way through experience and reflection to a moral insight that transcended the legal conventions of the country in which he was travelling. . . . Gandhi lived his whole life guided by the moral insights directly accessible to him and only secondarily by the statutes of nation states. The light of conscience reaches beyond social convention to a realm of spiritual realities ruled over by love.<sup>183</sup>

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Gandhi and Martin Luther King, and events such as the fall of apartheid South Africa and the toppling of the Berlin Wall...” *Id.* at 2125.

<sup>176</sup> See GEORGE D. BOND, BUDDHISM AT WORK: COMMUNITY DEVELOPMENT, SOCIAL EMPOWERMENT, AND THE SARVODAYA MOVEMENT 9-17 (2004).

<sup>177</sup> CWMG, vol.8-9, Mohandas K. Gandhi, Sarvodaya (1908) (trans. Valji Govindji Desai 1951).

<sup>178</sup> DiSalvo, *supra* note 14.

<sup>179</sup> Harris et al., *supra* note 168, at 2129-30. (Quoting Jonathon Schell).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 2130.

<sup>183</sup> ARTHUR ZAJONC, MEDITATION AS CONTEMPLATIVE INQUIRY: WHEN KNOWING BECOMES LOVE 187 (2009) (quoted in Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535, 587 (2011): “Examining the transformation of young Mohandas Gandhi from a lawyer in the early stages of a conventional career to international human

In Gandhi's conception, creating a world "ruled over by love" would require a synthesis of the individual, interpersonal, and structural levels. Attorney Douglas Codiga described this synthesis with a story in which a friend asked Gandhi "if his aim in settling in a poor rural village in India to serve the villagers as best he could was purely humanitarian."<sup>184</sup> Gandhi replied, "I am here to serve no one else but myself, to find my own self-realization through the service of these village folk."<sup>185</sup> Both the friend's question and Gandhi's reply address the intention of our actions, and Codiga explained the importance of Gandhi's reply for lawyers:

The questioner voices the conventional suspicion of humanitarian generosity, and implies that Gandhi is really serving his own needs by behaving altruistically. Gandhi replies from an unconventional point of view. As Aitken notes, "[f]or the questioner, humanitarianism seems unrealistic, and in effect, Gandhi acknowledges this, agreeing in order to make a deeper point." Gandhi's deeper point is that the villagers clearly are serving him, and that he is finding his own self-realization through his work with the villagers... Gandhi's response is instructive for lawyers who are interested in taking up mindfulness meditation but who may misapprehend it as simply a tool for stress reduction or improved listening and negotiation skills. While mindfulness meditation may provide these and possibly other pragmatic benefits, it also offers something more: the chance to cultivate self-realization through serving clients and practicing the law. The deeper appeal of mindfulness meditation to lawyers is its potential to connect the day-to-day work of lawyering with insights that provide lasting meaning into perennial questions about human existence. Like Gandhi serving the villagers, these insights come not from metaphysical speculation but through mindful legal work grounded in regular meditation practice. For mindfulness meditation to be more widely embraced throughout the profession, this dual potential--pragmatic benefits plus deeper insights--must be clearly understood and appreciated.<sup>186</sup>

Scholars such as Codiga already have recognized the multi-level potential for mindfulness to positively influence American society. However, in American legal scholarship, Gandhi often appears in one of two ways: either as an exemplar for the individual and interpersonal benefits of mindful lawyering or as an example of a nonviolent civil disobedient. As a result, the

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rights leader, Zajonc describes the epistemological and ethical roles of contemplative reflection: While Gandhi had surely been intellectually aware of racism, his personal experience on the train, coupled with his selfless concern for all who suffered likewise, led to both insight and action that activated his long life of social activism.").

<sup>184</sup> Codiga, *supra* note 110, at 121-122.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* Codiga quotes John Leubsdorf, *Gandhi's Legal Ethics*, 51 RUTGERS L. REV. 923, 925 (1999) ("noting Gandhi's "devotion to alternative dispute resolution" and quoting Gandhi who wrote that "a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby--not even money, certainly not my soul."). Gandhi later urged the implementation of Arbitration Boards, which were to dispense "pure, simple, home-made justice," as part of a political boycott of the British-imposed Indian court system. *See id.* Leubsdorf, at 930."). *See* Codiga, *supra* note 111, at \*111, fn 9.

connections between his personal, interpersonal, and structural views have been given less attention, and therefore, the manner in which his personal and interpersonal practices influenced his structural resistance largely is unexplored in law scholarship. Unfortunately, in the Mindfulness in Law discourse, much of Gandhi's thought on nonviolent resistance has been ignored, but its relevance to mindful law potentially is profound. In Part III, I further discuss Gandhi in light of the three levels of analysis: 1-his personal meditative practice and philosophy of law, 2-his approach to lawyering and legal interactions, and 3-structural change in legal institutions. By discussing these three levels, I present Gandhi as one of the twentieth century's mindful lawyers, and the architect of a comprehensive view of mindful law for the current Mindfulness in Law movement.

### III. MOHANDAS GANDHI: SYNTHESIS OF PERSONAL PEACE, RESTORATIVE LAWYERING, & SYSTEMIC CHANGE

#### A. PERSONAL PEACE: GANDHI'S LAW OF LOVE

To understand why Gandhi viewed law as an expression of love, it is important to first understand the basis of his social ontology. To Gandhi, society was not comprised of atomistic selves who first and foremost pursued self-interest. Instead, Gandhi largely accepted the ontology present in many of the world's meditative traditions, most notably within many branches of Indian philosophy.<sup>187</sup> Gandhi meditated regularly, and one of the most notable texts that influenced Gandhi's meditations was the Upanishads, in which the self of the individual is indistinguishable from the self of any other being.<sup>188</sup> In other words, the atomistic self is an aberration, a being that exists only within the collective subjective experience of those who live in an atomistic society. Therefore, to Gandhi, the western notion of the individual dislodged the self from its fundamental connectedness to the universe, and this dislocation of the self was at the heart of the colonizers' apparent disregard for its subjects and the environment.<sup>189</sup> To Gandhi, the indignity suffered by colonial subjects and the degradation of the environment during colonial rule meant that the dominant political and economic order lacked recognition of the deep interdependence that sustained collective life.<sup>190</sup> Beyond the atomistic self and within the truest essence of the human being was recognition of a universal unity, which he blissfully experienced as love.<sup>191</sup>

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<sup>187</sup> See Nehal A. Patel & Lauren Vella, *A Mindful Environmental Jurisprudence?: Speculations on the Application of Gandhi's Thought to MCWC v. Nestle*, 30 PACE ENVTL. L. REV. 1116, 1137-1152 (2013). See also Easwaran, *supra* note 140, 118-9 (discussing Gandhi's own meditation).

<sup>188</sup> EKNATH EASWARAN, *GANDHI THE MAN* 72, 118-9 (1997) (discussing Gandhi's own meditation). See generally EKNATH EASWARAN, *THE UPANISHADS* (1987).

<sup>189</sup> See Parel & Vella, *supra* note 187; see also, Parel ed., *supra* note 174.

<sup>190</sup> See Parel & Vella, *supra* note 188; see also Parel, ed., *supra* note 174.

<sup>191</sup> Parel & Vella, *supra* note 187.

Gandhi often spoke of Truth and Love together or interchangeably.<sup>192</sup> As a result, in his thought, justice began with compassion,<sup>193</sup> because the fundamental composition of every human being was identical (*aham brahmasmi*).<sup>194</sup> For Gandhi, the ‘Law of Love’ was a recognition of the oneness of humanity, and by extension, *ahimsa* (nonviolence) was the only rational way to treat oneself; in other words, when one views the other as himself, the law of nonviolence becomes a way of life.<sup>195</sup> As a result, “even the hoodlums are part of us and, therefore, they must be handled gently and sympathetically.”<sup>196</sup> This approach not only is necessary with those who commit crime, but also with those who oppose us: “non-violence teaches us to love our so-called enemies.”<sup>197</sup> Therefore, within Gandhi’s thought, whether one examines an issue in criminal or civil law, adversaries must be understood first and foremost with love.

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<sup>192</sup> “For me truth and love are interchangeable terms. You may not know that the Gujarati for passive resistance is truth-force. I have variously defined it as truth-force, love-force or soul-force. But truly there is nothing in words. What one has to do is to live a life of love in the midst of the hate we see everywhere.” CWMG, Vol. 15: 21 May, 1915 - 31 August, 1917, at 436; “My faith in Truth and Love is as vivid as in the fact that I am writing this to you. To me they are convertible terms. Truth and Love conquer all.” CWMG, Vol. 15: 21 May, 1915 - 31 August, 1917, at 442; “Never, never give up truth and love. Treat all enemies and friends with love.” CWMG, Vol.16, at 378. For more illustrations of Gandhi’s connection of Truth and justice to love and nonviolence, see the following: “[India] chose then with the greatest deliberation the way of truth and peace and symbolized it in her acceptance of the charkha and non-co-operation with all that was evil.” CWMG, Vol. 33 at 238; “The way of peace is the way of truth. Truthfulness is even more important than peacefulness. Indeed, lying is the mother of violence. A truthful man cannot long remain violent.” CWMG, Vol. 35, at 245-6; “India’s swaraj can be won through the students if they are truthful in their conduct. There is no need to prove that swaraj is to be achieved only through the way of truth and non-violence,” CWMG, Vol. 42: 2 May, 1928 - 9 Sept., 1928, at 103; “Truth and non-violence represents a universal principle.” CWMG, Vol. 46: 12 May, 1929 - 31 August, 1929, at 455; “the way of truth and non-violence tells us that we should ...do only what is just.” CWMG, Vol. 58: 16 Nov., 1932 - 14 Jan., 1933, at 63; “Dharma here does not signify mere observance of externals. It signifies the way of truth and non-violence. The scriptures have given us two immortal maxims. One of these is: “Ahimsa is the supreme Law of dharma.” The other is: “There is no other Law or dharma than truth.” These two maxims provide us the key to all lawful artha and kama.” CWMG, Vol. 79: 16 July, 1940 - 27 Dec., 1940, at 5; “use your journalistic gifts so as to serve the country by the way of truth and non-violence.” CWMG, Vol. 84 at 178; “Let us not commit another wrong to undo the first. That cannot be the way of truth or of non-violence.” CWMG, Vol. 85: 2 Oct., 1944 - 3 Mar., 1945, at 166.

<sup>193</sup> AJIT ATRI, GANDHI’S VIEW OF LEGAL JUSTICE 177 (2007) (“Pure compassion, a sarvodaya worker says, is pure justice.”). Also, “I want you to destroy this evil of untouchability by arousing in you compassion and love, or, if you would have it so, a sense of brotherhood.” CWMG, Vol. 30: 27 Dec., 1924 - 21 Mar. 1925, at 239 -240.

<sup>194</sup> BANSI PANDIT, THE HINDU MIND 271 (1998).

<sup>195</sup> ATRI, *supra* note 193, at 177 (2007) (quoting Mohandas K. Gandhi, 11 YOUNG INDIA, 126 (18-4-1929)).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

The Law of Love was associated with both Gandhi and Tolstoy, who spent a year writing letters to each other before Tolstoy's death.<sup>198</sup> To both Gandhi and Tolstoy, the Law of Love represented the ideal to which all social institutions must strive, and its basis is in a social ontology that views people through an interdependent individualism that preserves each person's dignity as part and parcel of the whole world. In law, this notion of loving the other as a form of loving oneself already is present in the work of some mindfulness scholars. For example, Professor John A. Powell described the notion of 'the other' as originating in the fallacy that there is an atomistic 'self.'<sup>199</sup> Powell described Gandhi as an embodiment of the heart of mindfulness<sup>200</sup> and discussed Gandhi's emphasis on the connection between collective and individual good.<sup>201</sup> For Gandhi, this connection started with an awareness of the self as a part of others. As Kaufman stated, "When we put our ordinary activities through the crucible of self-awareness, we embark on a spiritual path."<sup>202</sup> Within his own spiritual path, Gandhi preferred the power of love as the force through which law should be exercised.

The foundation of love in Gandhi's thinking can be seen in his Theory of Trusteeship, in which he viewed all wealth as held in trust for the well-being of all. In his own words,

You may say that trusteeship is a legal fiction. But if people meditate over it constantly and try to act up to it, then life on earth would be governed far more by love than it is at present. Absolute trusteeship is an abstraction like Euclid's definition of a point, and is equally unattainable.<sup>203</sup>

For Gandhi, love was an ideal for which to strive, even if love was not lived to perfection. Nonviolence (*ahimsa*) was the central practice for developing a loving mindset and the supreme law to be applied to all aspects of life. As Gandhi stated, "When non-violence is accepted as the law of life, it must pervade the whole being and not [be] applied to isolated acts."<sup>204</sup> Violence, even when justifiable, was against the law of the universe:

The only thing lawful is non-violence. Violence can never be lawful in the sense meant here, i.e., not according to man-made law but according to

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<sup>198</sup> See Thomas Weber, *Tolstoy and Gandhi's Law of Love*, SGI QUARTERLY (Jan. 2010) <http://www.sgiquarterly.org/feature2010jan-9.html>. This article is excerpted from THOMAS WEBER, *GANDHI AS DISCIPLE AND MENTOR* (2004).

<sup>199</sup> John A. Powell, *John A. Powell on Social Justice, Mindfulness and The Law: Reflections on the Self*, YOUTUBE, <https://www.youtube.com/watch?v=Yq2LppGBaEI> at 30:00-40:00 (last viewed July 22, 2014).

<sup>200</sup> *Id.* at 43:00.

<sup>201</sup> *Id.* at 45:15.

<sup>202</sup> GEORGE W. KAUFMAN, *THE LAWYERS GUIDE TO BALANCING LIFE & WORK* 179 (ABA Book Publishing, 2d ed. 2006) (cited by Rhonda V. Magee, *supra* note 183, at 124, fn. 24).

<sup>203</sup> Mahatma Gandhi, Interview with Nirmal Kumar Bose, in 65 CWMG, *supra* note 1, at 316, 318 (cited by Shyamkrishna Balganes, *Gandhi and Copyright Pragmatism*, 101 CALIF. L. REV. 1705 (2013)).

<sup>204</sup> CWMG, Vol. 69: 16 May, 1936 - 19 Oct., 1936, at 341.

the law made by Nature for man”.<sup>205</sup> “... Non-violence is the law of the human race and is infinitely greater than and superior to brute force.”<sup>206</sup>

Here, Gandhi explained the law of love in the sense of natural law, and therefore, in Gandhi’s view, the discoverers of nonviolent insights found the universe’s underlying truths as a scientist makes discoveries:

Non-violence is the law of our species as violence is the law of the brute. The spirit lies dormant in the brute and he knows no law but that of physical might. The dignity of man requires obedience to a higher law-to the strength of the spirit... The *rishis* who discovered the law of non-violence in the midst of violence were greater geniuses than Newton.<sup>207</sup>

To make the world consistent with this underlying law of the universe that gives peace to the human heart, Gandhi found it necessary to answer anger with love and violence with non-violence. Gandhi described the power to respond to anger with love through his method of *Satyagraha* (nonviolent resistance):

that is the law of love. That is Satyagraha. Violence is concession to human weakness, Satyagraha is an obligation. Even from the practical standpoint it is easy enough to see that violence can do no good and only do infinite harm.<sup>208</sup>

In his description of *satyagraha*, Gandhi highlighted the oneness of Truth and Love:

Truth (*satya*) implies love, and firmness (*agraha*) engenders and therefore serves as a synonym for force. I thus began to call the Indian movement ‘*satyagraha*’, that is to say, the Force which is born of Truth and Love or non-violence.<sup>209</sup>

According to Gandhi, “For a nonviolent person, the whole world is one family.”<sup>210</sup> As a result, “This doctrine of *Satyagraha* is not new; it is merely an extension of the rule of domestic life to the political. Family disputes and differences are generally settled according to the law of Love... It is the Law of Love which, silently but surely, governs the family for the most part throughout the civilized world.”<sup>211</sup> In Gandhi’s thought, part of the function

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<sup>205</sup> CWMG, Vol.92: 9 August, 1946 - 6 Nov., 1946, at 348.

<sup>206</sup> CWMG, Vol. 69: 16 May, 1936 - 19 Oct., 1936, at 340.

<sup>207</sup> CWMG, Vol. 21: 1 July, 1920 - 21 Nov., 1920, at 134.

<sup>208</sup> CWMG, Vol. 17: 1 May, 1919 - 28 Sept., 1919, at 35.

<sup>209</sup> CWMG, Vol. 34: 11 Feb., 1926 - 1 Apr., 1926, at 93.

<sup>210</sup> MOHANDAS K. GANDHI, *QUINTESSENCE OF GANDHI IN HIS OWN WORDS* 48 (Shakti Baktra compiler, 1984).

<sup>211</sup> V.R. KRISHNA IYER, *JURISPRUDENCE AND JURISCONSCIENCE A LA GANDHI* 6-7 (1976). As Iyer explained, Gandhi also discussed the need to juxtapose truth and suffering when they sit on different sides of a situation. If one must follow Truth, then one must accept that there will be suffering (both voluntary & involuntary) among the adherents. Iyer’s comments also lead to the question of why lawyers are so reluctant to talk about love as a potential socio-legal force, and how secular law can embrace love as meaningfully relevant to conflict resolution. Inclusion of love could have profound consequences on legal discourse, but in

of law is to enhance love within and between people, as one might imagine the function of a family:

Nations cannot be one in reality, nor can their activities be conducive to the common good of the whole humanity, unless there is this definition and acceptance to the law of the family in national and international affairs, in other words, on the political platform. Nations can be called civilized, only to the extent that they obey this law.<sup>212</sup>

Former Justice of the Supreme Court of India, Krishna Iyer, explained Gandhi as having “injected a revolutionary spirituality into mindless legality.”<sup>213</sup> To Gandhi, because of law’s foundation in love, lawyers were important administrators of love in the political sphere and in conflict resolution. In the next section, I describe Gandhi’s view of law practice as an early form of restorative lawyering in which he applied loving-kindness to interpersonal conflict.

#### B. GANDHI’S RESTORATIVE LAWYERING: INTERPERSONAL RESOLUTION THROUGH LOVING-KINDNESS

Despite lawyers’ potential to advance the Law of Love, Gandhi found much wanting in the legal profession. “[T]he profession teaches immorality,” Gandhi explained, “it is exposed to temptation from which few are saved.”<sup>214</sup> In Gandhi’s view, the legal profession “is one of the avenues of becoming wealthy and their [lawyers’] interest exists in multiplying disputes.”<sup>215</sup> As a result, lawyers “are glad when men have dispute”<sup>216</sup> rather than dismayed, because through multiplying disputes, lawyers are able to collect “more fees than common labourers”.<sup>217</sup> In Gandhi’s view, people are more liberated when they avoid lawyers and courts: “If people were to settle their own quarrels, a third party would not be able to exercise any authority over them.”<sup>218</sup>

Gandhi criticized his own profession because of its inability to use law to further justice. As an alternative, he offered his description of *Ramarajya*, or his ideal legal state. *Ramarajya* is a reference to the popular legend of

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the west, constructions of love as a social force often arise in ‘religious’ (Christian) discourses that historically have had tensions with secular discourse. This division, perhaps, has contributed to making the discussion of love in western legal discourse difficult. See generally HEDGE, *supra* note 160; ATRI, *supra* note 193; Parel (ed.), *supra* note 174, at 69 and ‘law’ in index.

<sup>212</sup> KRISHNA IYER, *supra* note 211.

<sup>213</sup> *Id.*, at 5.

<sup>214</sup> CWMG, Vol. 10: 5 August, 1909 - 9 Apr., 1910, at 275. Also quoted in Atri, *supra* note 194, at 235.

<sup>215</sup> CWMG, Vol. 10: 5 August, 1909 - 9 Apr., 1910, at 275. Also quoted in Atri, *supra* note 194, at 235-6.

<sup>216</sup> *Id.*

<sup>217</sup> CWMG, Vol. 10: 5 August, 1909 - 9 Apr., 1910, at 276.

<sup>218</sup> CWMG, Vol. 10: 5 August, 1909 - 9 Apr., 1910, at 276. Also quoted in Atri, *supra* note 194, at 236.

Rama, which illustrates the qualities of an ideal leader. Gandhi connected the legal profession to the fulfilment of *Ramarajya*, and argued that lawyers played a substantial role in creating justice in the ideal state:

Have the lawyers realized that justice should not be costly? ...Lawyers have not yet overcome the allurements of fat fees and, in consequence, the cost of justice continues to be counted in terms of gold and guineas... How, then, shall we establish *Ramarajya*? In *Ramarajya*, justice cannot be sold.<sup>219</sup>

To make law more about justice and less about wealth – and to control the skyrocketing costs of litigation in modern law practice - Gandhi called for a greater equalization of income between white-collar workers and manual laborers. To Gandhi, there was no reason for lawyers to earn more than the common laborer if the point of living was to serve others. His belief partly rested on the grounds that, relative to the distribution of wealth in his time, a greater economic equality would be more effective for meeting the welfare of all: “If all labored to their bread and no more, then there would be enough food and enough leisure for all<sup>220</sup>... All the Bhangis [low-level workers], doctors, lawyers, teachers, merchants, and others would get the same wages for an honest day’s work.”<sup>221</sup>

Gandhi described a pre-British India in which occupations were less stratified, and justice and freedom were more attainable for the rural masses:

This nation had courts, lawyers and doctors, but they were all within bounds. Everybody knew that these professions were not particularly superior; moreover, these vakils [advocates/lawyers] and vaidas [healers/doctors] did not rob people; they were considered people’s dependents, not their masters. Justice was tolerably fair. The ordinary rule was to avoid courts.<sup>222</sup>

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<sup>219</sup> CWMG, Vol. 25: 27 Oct., 1921 - 22 Jan., 1922, at 482.

<sup>220</sup> CWMG, Vol. 67: 25 Apr., 1935- 22 Sept., 1935, at 207. Also quoted in Atri, *supra* note 194, at 237. “I believe that one of the chief reasons for our moral fall is that doctors, lawyers, teachers and others acquire their knowledge mainly for getting money and, in fact, use it for that purpose.” Vol. 28: 22 May, 1924 – 15 Aug., 1924, at 82-83. “We are talking with crooked notions of varna. When varna was really practiced, we had enough leisure for spiritual training. Even now, you go to distant villages and see what spiritual culture villagers have as compared to the town-dwellers. These know no self-control. But you have spotted the mischief of the age.” CWMG, Vol. 40 2 Sept., 1927 1 Dec., 1927, at 484.

<sup>221</sup> CWMG, Vol. 94: 17, Feb., 1947 - 29 Apr., 1947, at 31. Also quoted in Atri, *supra* note 194, at 237.

<sup>222</sup> CWMG, Vol. 10: 5 August, 1909 - 9 Apr., 1910, at 280. Gandhi continued, “There were no touts to lure people into them. This evil, too, was noticeable only in and around capitals. The common people lived independently and followed their agricultural occupation. They enjoyed true Home Rule... where this cursed modern civilization has not reached.” *Id.* For a description of vakils and touts, see WILLIAM FISCHER AGNEW, THE INDIAN PENAL CODE: AND OTHER ACTS OF THE GOVERNOR-GENERAL RELATING TO OFFENCES, WITH NOTES 698 (1898), (for tout definition), available at [http://books.google.com/books?id=9u8SAAAAYAAJ&dq=In+indian+courts+what+is+a+%22tout%22&source=gbs\\_navlinks\\_s](http://books.google.com/books?id=9u8SAAAAYAAJ&dq=In+indian+courts+what+is+a+%22tout%22&source=gbs_navlinks_s).

Although Gandhi rebuked the legal profession for its obsession with wealth and foment of conflict, Gandhi recognized the need for the law and lawyers, and he believed “it was not impossible to practise law without compromising truth.”<sup>223</sup> As he explained,

The first thing which you must always bear in mind, if you would spiritualize the practice of law, is not to make your profession subservient to the interests of your purse, as is unfortunately but too often the case at present, but to use your profession for the services of your country...<sup>224</sup> ...A true lawyer is one who places truth and services in the first place and the emoluments of the profession in the next place only.<sup>225</sup>

Gandhi stressed the social functions of service, but his view also furthered individual development. The Sanskrit maxim *tat tvam asi* (thou art that) implies that the individual’s essence is the essence of other individuals. Consequently, to Gandhi, an enlightened society would privilege that course of action that was good for both the individual and the whole:

I believe in the essential unity of man and for that matter all that lives. Therefore I believe that if one man gains spiritually the whole world gains with him and, if one man fails, the whole world fails to that extent.<sup>226</sup>

Therefore, healing others and furthering one’s own self-realization were the same practice. In the context of law practice, implementing the maxim of *tat tvam asi* into legal disputes led to both the healing of harmed parties and the lawyer’s self-realization.

To heal harmed parties, Gandhi wanted lawyers to prevent and undue the harm caused in strained relationships, and to mend the fences between parties whose relationships may otherwise be destroyed. As a young attorney in South Africa, Gandhi handled a case that left a permanent impression on him in this regard. Gandhi recognized that his client, Dada Abdullah, a prominent businessman, had a strong case against defendant Tyeb Sheth. However, Gandhi stated, “I also saw that the litigation, if it were persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city [community]”.<sup>227</sup> Gandhi also concluded that legal fees would escalate if the case was tried in court, and he contacted the defendant to consider arbitration to reduce cost. Gandhi recalled, “I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise.”<sup>228</sup> Gandhi’s client won in arbitration, “But that did not satisfy me. If my client were to seek immediate

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<sup>223</sup> CWMG, Vol. 44: 16 Jan., 1929 - 3 Feb., 1929, at 363.

<sup>224</sup> CWMG, Vol. 40: 2 Sept., 1927 - 1 Dec., 1927, at 433.

<sup>225</sup> CWMG, Vol. 74: 9 Sept., 1938 - 29 Jan., 1939, at 197. Also quoted in ATRI, *supra* note 194, at 237.

<sup>226</sup> Thomas Weber, *Gandhi’s Moral Economics: The Sins of Wealth Without Work and Commerce Without Morality*, in THE CAMBRIDGE COMPANION TO GANDHI 150 (Judith M. Brown & Anthony Pare eds, 2011). For Gandhi, it was not possible for an individual to gain spiritually while those around him suffered. *Id.*

<sup>227</sup> CWMG, Vol.44: 16 Jan. 1929 -3 Feb., 1929, at 190.

<sup>228</sup> *Id.*

execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount”.<sup>229</sup> As a result, Gandhi asked his client, Mr. Abdullah, to allow Mr. Sheth to pay installments to avoid bankruptcy, and although it was even more difficult to achieve this agreement than it was to secure the agreement to arbitrate, “both were happy over the result, and both rose in the public estimation.”<sup>230</sup>

Gandhi managed the conflict by considering the needs of both parties and healing the relationship, and he achieved great results. In his Autobiography, Gandhi explained this event as the moment when he found the true purpose of law:

My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.<sup>231</sup>

Along similar lines, Howard J. Zehr, a founder of restorative justice, called on criminal lawyers to recognize the needs of the offender, which includes aspects of the healing process such as accepting responsibility, self-forgiveness, and closure.<sup>232</sup> Contemporary restorative lawyering has been effective at illustrating the power of a healing approach<sup>233</sup> and also has shown its promise for managing interpersonal conflict. For example, by applying mindfulness and loving-kindness meditation to interpersonal forgiveness, restorative lawyering has been used effectively between perpetrators and victims in criminal justice cases and also between divorcing spouses in family law cases.<sup>234</sup>

Restorative lawyering leaders are well aware of this great potential for mindfulness at the interpersonal level. For example, Sujatha Baliga, a leading figure in the Restorative Lawyering movement, often has explained real examples through which lawyers have helped to heal harmed parties and relationships.<sup>235</sup> However, Baliga also sees a disconnect between contemporary

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> CWMG, Vol.44: 16 Jan. 1929 -3 Feb., 1929, at 190-191.

<sup>232</sup> HOWARD J. ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (3d ed. 2005) *See also* Sujatha Baliga, *supra* note 13, at 13 minute mark, available at <https://www.youtube.com/watch?v=3epEK9wBNv0> (discussing the founder of Restorative Justice Howard Zehr's book “Changing Lenses”).

<sup>233</sup> Zehr, *supra* note 13. *See also* Baliga, *supra* note 13; *see* Cantrell, *supra* note 13, at 65; *see generally* JENNY PHILLIPS, DHAMMA BROTHERS, documentary, <http://www.dhammadbrothers.com/>.

<sup>234</sup> Zehr, *supra* note 14. *See also* Baliga, *supra* note 14. *See* Cantrell, *supra* note 14, at 65.

<sup>235</sup> Baliga, *supra* note 14.

western mindfulness and the original context in which mindfulness was culturally constructed,<sup>236</sup> and this disconnect can limit the meaning and effectiveness of mindfulness for transforming society.

The same disconnect can be seen in western models of yoga, in which yoga often is viewed as an exercise for purely health benefits rather than for its purpose as a tool for finding union with the world. Much of western yoga is focused on *Asanas* (poses/postures), only one 'limb' of the eight limbs of yoga (*Ashtangas*).<sup>237</sup> In contrast, for centuries and perhaps millennia outside the west, these eight limbs have been honed collectively to bring the practitioner to enlightenment.<sup>238</sup> The eight limbs of yoga include *Yamas* (ethical precepts), *Niyamas* (individual observances), *Asanas* (poses/postures), *Pranayama* (mindful breathing), *Pratyahara* (withdrawal of the senses), *Dharana* (concentration), *Dhyana* (meditative absorption), and *Samadhi* (unitive consciousness).<sup>239</sup> It must be noted that the *yamas* and *niyamas* are self-disciplines that require restraint; the *Yamas* include *asteya* (non-stealing), *aparigraha* (non-possessiveness), *brahmacharya* (continence), *ahimsa* (nonviolence), and *satya* (truth); the *Niyamas* are *saucha* (cleanliness), *santosh* (contentment), *tapas* (austerity), *swadhyaya* (self-study), and *Ishvar-Pranidhana* (offering oneself to contemplation of ultimate reality).<sup>240</sup> The *yamas* and *niyamas* prepare the mind for the latter stages of yoga and lay the groundwork for a more blissful and harmonious way of living.

However, in a society dominated by the economic imperative to grow wealth, and in which the culturally dominant image of success is monetary,<sup>241</sup> it is all too convenient to disassociate the *Asanas* from the eight limbs of Yoga, just as mindfulness has been dissociated from the Eightfold Path. In American society -- where the person who has renounced possessions is not the symbol of success -- mindfulness could become a cultural object that

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<sup>236</sup> *Id.* at 0:00-10:00 minute mark.

<sup>237</sup> One perhaps may include aspects of *Pranayama* and *Pratyahara* into popular American understanding of yoga, but in any event, I am of the impression that *asanas* largely dominate the American imagination of yoga, and in any case, the popular American conception is narrow relative to the place of *asanas* in many of yoga's earlier conceptions.

<sup>238</sup> BARBARA STOLER MILLER, *YOGA: DISCIPLINE OF FREEDOM*, 51-52 (1995); MICHELE MARIE DESMARAIS, *CHANGING MINDS: MIND, CONSCIOUSNESS AND IDENTITY IN PATANJALI'S YOGA-SUTRA AND COGNITIVE NEUROSCIENCE*, 155 (2008); B.K.S. IYENGAR, *LIGHT ON LIFE: THE YOGA JOURNEY TO WHOLENESS, INNER PEACE, AND ULTIMATE FREEDOM*, 15, 252-63 (2005) *YOGA: THE IYENGAR WAY*, MIRA SILVA & SHYAM MEHTA, 166 (2005). See generally, ALISTAIR SHEARER, *EFFORTLESS BEING: THE YOGA SUTRAS OF PATANJALI* (1982).

<sup>239</sup> *Id.*

<sup>240</sup> DESMARAIS, *supra* note 240, at 155, 158-166; see also Miller, *supra* note 240, at 52-6; IYENGAR, *SUPRA* NOTE 240, AT 10-11, 176, 250-8. Like the other *yamas* and *niyamas*, *Ishvar-Pranidhana* can be translated in many ways. Here, I translated this metaphysical idea to emphasize the expected behavior of a practitioner of yoga, for whom contemplation of the underlying fundamental self is a central virtue.

<sup>241</sup> Robert Merton, *Social Structure and Anomie*, 3 AM. SOCIOLOGICAL REV. 672 (1938). See also JOHN HAGAN, *CRIME AND DISREPUTE*, 32-33 (1994).

merely serves as a tool to acquire more worldly success.<sup>242</sup> This use of mindfulness runs the risk of merely making lawyers better “hamsters in the wheel,” where the profit imperative dominating the modern large law firm and its clients remains totally unquestioned, and the ideal of the highly paid Big Law lawyer remains the high-prestige marker of “success” in law.<sup>243</sup> In modern economies that have yoga and meditation but lack the *yamas, ni-yamas*, and the Eightfold Path’s Right Livelihood, mindfulness could become a method to make lawyers less burned-out in order to process more cases without questioning their long work hours.<sup>244</sup> Rather than challenging the imperatives of dominant organizations, mindfulness could become another subjugated tool to feed insatiable hunger for power and wealth.<sup>245</sup>

Like Baliga, scholars and community lawyers such as Angela Harris, Margaretta Lin, and Jeff Selbin recognize the daunting challenges that face the Mindfulness in Law movement if it is to be effective beyond the individual level.<sup>246</sup> For instance, Lin explained the challenge in applying mindfulness to one’s choice of *tactics* as a social justice activist:

We work in environments where we carry the suffering of other people on our shoulders, and we are up against systems and people who appear corrupt, unprincipled, and disdainful of our clients. We feel, at times, that we are in pitched battles in a war for power. We see developers and city officials as our enemies who we need to vanquish. We make strategic choices in order to win the battle and justify those choices because we are trained that way, because they are effective, and because we have a duty to protect our clients from further suffering. As a result, our tactics too easily can become adversarial or spiritually and emotionally violent.<sup>247</sup>

There is danger in becoming spiritually or emotionally violent, yet as Lin explains, resistance to systems may be necessary to address oppression

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<sup>242</sup> As mindfulness advertisements and promotions illustrate, mindfulness can be marketed as a tool to make you work more effectively, and therefore, make you more “successful” in a worldly sense or in the minds of other similarly-socialized persons. See Yale Law School Admissions website, *supra* note 111, at <http://www.law.yale.edu/admissions/18137.htm>, last viewed April 12, 2015; see also <http://www.mindfulnessumich.com/> and <http://korumindfulness.org/>, *supra* note 160, last viewed April 12, 2015.

<sup>243</sup> Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 2(1) LAW & SOCIAL INQUIRY, 155-216 (1977); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005). See also Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand.L. Rev. 954 (1999).

<sup>244</sup> Perhaps lawyers also would not question the accumulation of needless wealth and possessions. These concerns are similar to the concern of mindfulness helping combat soldiers avoid PTSD without questioning the imperative to kill. See Powell, *supra* note 150, at 43:00-47:00.

<sup>245</sup> Some studies suggest that the pure profit model of success could be toxic to the happiness of lawyers. See Dianne Molvig, *What Makes Lawyers Happy*, WISCONSIN LAWYER, July/August 2014, at 24-31; Schiltz, *supra* note 243.

<sup>246</sup> See Angela Harris, *Reflections on Mindfulness, Social Justice and Diversity*, <http://www.miamimindfulness.org/resources/videos.html>; Harris et al, *supra* note 167.

<sup>247</sup> Harris, *supra* note 149, at 2123.

and exploitation. Gandhi reconciled this tension by nonviolently resisting in thought, word, and deed, even if the other party refused to acknowledge his dignity. As a result, Gandhi was an example of a nonviolent lawyer unwilling to acquiesce to dysfunctional systems or sacrifice love at the altar of violence. In his own words: “Never, never give up truth and love. Treat all enemies and friends with love.”<sup>248</sup> For Gandhi, the Law of Love became a modus operandi – even in the midst of violent opponents – once he dissolved the separate self into a higher consciousness (*samadhi*).

Similarly, Powell reiterated how self-realization connects mindfulness to social justice. Powell described how the Buddha left home to pursue enlightenment (*nirvana*) because he saw *others* suffer, not because he himself suffered.<sup>249</sup> In Powell’s conception, the Buddha’s “other-regarding”<sup>250</sup> motivation to cease suffering illustrates the way that a mindful person realizes the interdependent well-being of the world. Buddha’s “mindfulness-in-action” calls upon lawyers to promote social justice through structural change, because suffering is endemic within oppressive, unjust, or exploitative systems.

Interestingly, a century ago, Gandhi began to implement this sensibility into his life as a lawyer. Like current Mindfulness in Law practitioners, Gandhi practiced meditation to cultivate peace within himself and compassion during interpersonal negotiations. Similarly, the Mindfulness in Law movement certainly has advanced the notion that violent thoughts, speech, or acts have no place in genuine conflict resolution. In this respect, the Mindfulness in Law movement has made great strides in recent years and in some places may even start to become more mainstream. However, this mainstreaming may be due in part to the removal of mindfulness from its original cultural context and its subsequent dissociation from its ethical and ontological basis.<sup>251</sup> This can be disturbing to people who wish to keep mindfulness connected to restorative lawyering, and also for people who are sensitive to “Eastern” thought’s marginalization in the modern western world.<sup>252</sup>

More significantly, for all of the accomplishments of the mindfulness and restorative lawyering movements at the individual and interpersonal lev-

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<sup>248</sup> CWMG, Vol.16, 1 Sept., 1917 - 23 Apr., 1918, at 378. “Let us not commit another wrong to undo the first. That cannot be the way of truth or of non-violence.” CWMG, Vol.85: 2 Oct., 1944 - 3 Mar., 1945, at 166.

<sup>249</sup> Powell, *supra* note 149, at 43:00-47:00.

<sup>250</sup> For use of the term “other-regarding,” see DASGUPTA, *supra* note 160, at 32; HEDGE, *supra* note 160, at 29-32. See also Patel & Vella, *supra* note 187.

<sup>251</sup> As mentioned at *supra* note 237, Baliga also expressed such a concern. Baliga, *supra* note 13, at 0:00-10:00 minute mark.

<sup>252</sup> Syed Nizar Alam, *Colonization of Reason*, 24 JAHANGIRNAGAR REVIEW, 199 (2013); See also Raghuvver Singh, *Traditional Wisdom and Modern Science as Paradigms of Political Discourse*, in POLITICAL DISCOURSE: EXPLORATIONS IN INDIAN AND WESTERN POLITICAL THOUGHT 221-237 (Bhikhu Parekh & Thomas Pantham ed., 1987). See generally EDWARD W. SAID, *Representing the Colonised*, in REFLECTIONS ON EXILE AND OTHER ESSAYS, (2001); EDUARDO VIVEIROS DE CASTRO, CANNIBAL METAPHYSICS (2014).

els, the need for systemic critique remains. The Mindfulness in Law movement contains little if any discussion of applying mindful thought to systems, and Gandhi's discussion of lovingly confronting systemic issues has not been discussed extensively in the current mindfulness movement. To face the structural impediments to creating a mindful legal system, the mindfulness movement would have to engage Gandhi's discussion of love as a way to handle structural injustice. To ameliorate law's current limits and embrace Gandhi's message to follow one's conscience, doesn't a mindful law scholar have to acknowledge the reasons why oppressed populations practice loving non-cooperation?

C. GANDHI'S SYSTEMIC CRITIQUE: NONVIOLENT RESISTANCE.

Perhaps Gandhi's most recognizable contribution to modern conflict resolution is his Theory of *Satyagraha*, or nonviolent resistance.<sup>253</sup> Because commentators often interpreted 'passive resistance' as implying weakness, Gandhi sought an alternative term to describe his non-cooperation campaigns.<sup>254</sup> Gandhi sought input from others to invent a new term, and his nephew suggested '*sadagraha*,' meaning 'to unwaveringly cling to a good cause.'<sup>255</sup> Gandhi edited the term to create '*satyagraha*,' or 'to firmly cling to Truth.'<sup>256</sup>

For Gandhi, law was not the ultimate rule for deciding one's proper conduct. Rather, it was the human conscience that was best suited to determine proper action.<sup>257</sup> When law conflicted with one's conscience, a person held a duty to follow the higher law of the conscience. In his own words, "there is a higher court than courts of justice, and that is the court of conscience. It supersedes all other courts."<sup>258</sup> Because of his commitment to the conscience, Gandhi saw law as subservient to a 'greater court' that resided inside the human heart and emanated from its fundamental goodness. As a

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<sup>253</sup> VINIT HAKSAR, RIGHTS, COMMUNITIES, AND DISOBEDIENCE, vii-xxix (2d Ed. 2001), ANTHONY J. PAREL, GANDHI, FREEDOM, AND SELF-RULE 8-11 (2000) Paul F. Power, *Mahatma Gandhi and Civil Disobedience*, in THE MEANINGS OF GANDHI, 165-180 (Paul F. Power, ed., 1971).

<sup>254</sup> M.K. GANDHI, NONVIOLENT RESISTANCE 381 (Dover Publications, 2001). *See generally* HOMER A. JACK ED., THE GANDHI READER: A SOURCEBOOK OF HIS LIFE AND WRITINGS, (1956).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Nehal A. Patel and Ksenia Petlakh, *Gandhi's Nightmare: Bhopal and the Need for a Mindful Jurisprudence*, 30 HARV. J. RACIAL & ETHNIC JUST. 151, 179-180 nn. 201 & 210 (2014).

<sup>258</sup> Vol. 25: 27 Oct., 1921 - 22 Jan., 1922, at 270. "In matters of conscience the Law of Majority has no place." Vol. 21: 1 July, 1920 - 21 Nov., 1920, at 114. "Indeed whilst on the one hand civil disobedience authorizes disobedience of unjust laws or immoral laws of a state which one seeks to overthrow, it requires meek and willing submission to the penalty of disobedience and, therefore, cheerful acceptance of the jail discipline and its attendant hardships." Vol. 25: 27 Oct., 1921 - 22 Jan., 1922, at 356.

result, Gandhi felt compelled to resist laws when his conscience demanded, and he did so *even while he was still practicing law*.<sup>259</sup>

Gandhi is an example of a lawyer willing to work beyond law's conventional limitations. As a lawyer himself (and in some ways, despite being one), Gandhi concluded that lawyers who recognize the need for structural change need a different relationship with law, as an activist instead of a pure practitioner. Even as he practiced law, he was willing to step out of the traditional role of the lawyer when the courts were resistant to change and when the conscience demanded him to do so. Through his willingness to step outside of the confines of typical law practice,<sup>260</sup> Gandhi inspired scores of other elite lawyers in India, such as future Prime Minister Jawarhalal Nehru, to practice *satyagraha* as both a supplement to and substitute for legal practice. With this courage, he helped to begin a movement that travelled worldwide, rooted in the idea that the power of love could restore the dignity of the oppressed and the oppressor. In the Indian Independence Movement, U.S. Civil Rights Movement, Velvet Revolution, Farm Workers Movement, and other nonviolent social justice movements, major legal changes may not have been accomplished if those movements relied solely on lawyers who were working within the standard limits of law practice and were disaggregated from their ethical selves.<sup>261</sup>

One of the major obstacles in legal reform is this separation of the lawyer from herself.<sup>262</sup> Much of modern legal education and law practice socializes a lawyer to leave her ethical sensibilities at home, put on a 'lawyer hat' at work, and then accept any result that arises in courts and legislatures, regardless of how much her conscience tells her to resist the outcome. The inability to aggregate the parts of oneself into a whole person and dignify the voice of one's conscience is in part the source of the limitations of lawyers, law practice, legal systems, and legal thought. Legal institutions often are a source of resistance to social justice in part because lawyers face pressure to separate their conscience from their labor.<sup>263</sup>

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<sup>259</sup> DiSALVO, *supra* note 14, at xii.

<sup>260</sup> (and thereby keep the lawyer in him from being disaggregated from his humanity).

<sup>261</sup> Harris et al, *supra* note 167, at 2094. See generally Patel & Vella, *supra* note 187, at 1116; HAKSAR, *supra* note 253 at vii-xxix; PAREL, *supra* note 253; Power, *supra* note 253; THOMAS WEBER, ON THE SALT MARCH: THE HISTORIOGRAPHY OF GANDHI'S MARCH TO DANDI, (1997).

<sup>262</sup> For an extended discussion of legal rationality and modern bureaucracy, see generally, MAX WEBER, GENERAL ECONOMIC HISTORY (Glencoe, IL: The Free Press 1950); MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY (1958). H.H. Gerth & C. W. Mills eds., 1958); MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY. (New York: The Citadel Press; 1962); MAX WEBER, MAX WEBER: ON CHARISMA AND INSTITUTION BUILDING. (S.N. Eisenstadt ed., 1968).

<sup>263</sup> Harris et al. also recognized the tension between social justice and law, stating, "Lawyering for social justice can seem like an oxymoron. In this view, law is designed to maintain the power and privilege of economic and social elites, and civil and human rights have only been obtained through the efforts of mass movements and challenges to law and legal rhetoric. In this perspective, lawyers are inherently limited in their ability to advance genuine social justice, serving only to undercut the activism and organizing that is needed

Gandhi broke through this separation by integrating his conscience into his law practice.<sup>264</sup> With a willingness to sacrifice their own privilege, he and scores of other Indian lawyers showed that lawyers can contribute to systemic change. To these lawyers, mindful lawyering implicitly applied not only to direct interactions with opponents but also to face injustices embedded in the legal system. To confront structural injustice, Gandhi chose methods of systemic resistance that honored the dignity of individuals within those systems. In his own words:

salvation lay not through violence but through non-violence. Non-violence in its dynamic condition means conscious suffering. It does not mean meek submission to the will of the evildoer, but it means the putting of one's soul against the will of the tyrant.<sup>265</sup> ...My whole soul has risen against the existing system of Government, because I believe that there is no real freedom for India under the British connection if Englishmen cannot give up the fetish of their predestined superiority... in spite of all the good intentions of individual English administrators.<sup>266</sup>

For Gandhi, it was imperative to keep love as the foundation of his philosophy of law, law practice, and his search for systemic change in the legal system. Gandhi's disciple, Vinoba Bhave, summarized the three-fold change in a style characteristic of Gandhi: "Firstly, I want to change people's hearts. Secondly, I want to create a change in their lives. Thirdly, I want to change the social structure."<sup>267</sup> In terms of the application of mindfulness to law, this three-fold approach would entail a change in the philosophy of law ('change in people's hearts'), manner of law practice ('a change in their lives'), and system-wide change in the function and purpose of the legal system ('change in the social structure').

The Mindfulness in Law movement has made strides in impacting the hearts and potentially the lives of many lawyers. However, the change in social structure of which Bhave spoke requires mindfulness to, as Baliga implied, remain culturally connected to other parts of the Eightfold Path that keep the function of mindfulness on transcending the self. Scholar Joanna Macy once provided an example of the broader significance of mindfulness when she quoted a teacher's explanation of the concept: "Right Mindfulness – that means stay open and alert to the needs of the village.... Look to see

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for fundamental and lasting change to occur." Harris et al, *supra* note 168, at 2132. For a deeper discussion of alienation and labor, see generally KARL MARX, THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE (New York: International Publishers; 1926); KARL MARX, & FREDERICK ENGELS, THE COMMUNIST MANIFESTO (Moscow: Progress Publishers, 1969 [1848]).

<sup>264</sup> For a discussion of Gandhi's method for discerning between various competing moral claims, see Farah Godrej, *Nonviolence and Gandhi's Truth: A Method for Moral and Political Arbitration*, 68 REV. OF POLITICS 287 (2006).

<sup>265</sup> CWMG, Vol. 21 : 1 July, 1920 - 21 Nov., 1920, at 135.

<sup>266</sup> CWMG, Vol. 23: 6 Apr. 1921 - 21 July, 1921, at 318.

<sup>267</sup> GEORGE D. BOND, BUDDHISM AT WORK: COMMUNITY DEVELOPMENT, SOCIAL EMPOWERMENT, AND THE SARVODAYA MOVEMENT 9 (2004).

what is needed – latrines, water, road... .”<sup>268</sup> In contrast, the popular American construction of mindfulness is limited because it often is applied narrowly to the individual’s ability to observe the present moment for the sake of his own health and achievement. Part of the problem with such an atomistic conception is its class implications; in the words of Harris et al., “[m]indfulness practice can seem like a ridiculous luxury in the face of the suffering that community lawyers witness daily.”<sup>269</sup> For the privileged in the United States, mindfulness is disemboweled from its origins in Enlightenment philosophy, and as a result, many American practitioners remain oblivious to and disconnected from structural contributions to suffering. On its current course, mindfulness might become a health fad for an atomistic privileged class and a tool to justify the lack of resources for legal aid (i.e., “the clinics don’t need funding; the clients just need to meditate to improve their condition”).<sup>270</sup> In other words, mindfulness could be subsumed into pre-existing justifications for the status quo.

Without a consciousness of structural conditions, the mindfulness movement would underestimate the daunting institutional resistance that it faces in American society. For its brief time in American legal discourse, the Mindfulness in Law movement has been silent about how to reform overwhelmingly corrupt, dysfunctional, and violent social structures. However, the needed reforms are simple when viewed via the lives of people who have practiced *satyagraha*. In fact, the power of love and nonviolence has a living tradition in American society, especially through the lives of thousands of non-cooperation practitioners during the Civil Rights movement. For example, Martin Luther King, Jr.’s view of the application of love is an essential example of American nonviolent resistance.<sup>271</sup> One of King’s preferred

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<sup>268</sup> *Id.* at 16 (citing JOANNA MACY, DHARMA AND DEVELOPMENT: RELIGION AS RESOURCE IN THE SARVODAYA SELF-HELP MOVEMENT, 37 (1983)).

<sup>269</sup> Harris et al, *supra* note 167, at 2128.

<sup>270</sup> This type of argument could be extended to other social issues such as public school funding (i.e., “the children don’t need more school funding, they just need to meditate to improve their performance”).

<sup>271</sup> Anthony E. Cook, *Toward a Normative Framework of a Love-Based Community*, in LAW AND RELIGION: A CRITICAL ANTHOLOGY 373, 373–82 (Stephen M. Feldman ed., 2000); See generally ROBERT K. VISCHER, MARTIN LUTHER KING, JR., AND THE MORALITY OF LEGAL PRACTICE, (2013); Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431 (1994); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959 (2000); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Deborah J. Cantrell, *What’s Love Got To Do With It?: Contemporary Lessons on Lawyerly Advocacy from the Preacher Martin Luther King, Jr.*, 22 ST. THOMAS L. REV. 296 (2010); Deborah J. Cantrell, *Lawyers, Loyalty, and Social Change*, 89 DENVER U. L. REV. 964-5, 973 (2012); Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599 (2008); Alfieri, *supra* note 127, at 120 n.22 (generally at 117-121).

terms, “agape,”<sup>272</sup> is from the Greek meaning “brotherhood” and encompassed “the gift of nonviolence, which is indeed a gift of love.”<sup>273</sup> As Professor Rhonda Magee explained, when one contemplates the power of love, “Martin Luther King’s definition of justice comes to mind: Love correcting everything that stands against love.”<sup>274</sup> Up to this point, the Mindfulness in Law movement has been successful in developing techniques to help individual lawyers and interpersonal conflict. However, the view that somehow meditation automatically will fix systemic problems needs engagement with those such as King and Gandhi who already have applied mindful living to systemic change.

This engagement especially is important because of the ways that the various parts of a lawyers’ life can conflict. Riskin once discussed the multiple “Parts” of the “Self” in which various parts of an individual can be in conflict and prefer contradictory choices.<sup>275</sup> Even for a lawyer with the intention of providing service to the disempowered, there are “Parts” that pull against such open-hearted action, even despite feeling genuine compassion. Structurally, lawyers are connected to the systems that sometimes enable the oppression that lawyers often observe.<sup>276</sup> This connection can function as subtle entanglements that make lawyers acquiesce to the dysfunctional patterns within systems.<sup>277</sup> Especially at elite schools, a legal education is in part a socialization process<sup>278</sup> into a privileged profession that distances its members from the truly disadvantaged.<sup>279</sup> In contrast, after decades of practicing law, Gandhi renounced the material privilege of a legal career and lived among India’s masses - and minimized his own material life to approximately \$2 USD of total assets.<sup>280</sup> For lawyers, “the law” is a part of their

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<sup>272</sup> ROBERT K. VISCHER, MARTIN LUTHER KING, JR., AND THE MORALITY OF LEGAL PRACTICE 81-150 (2013).

<sup>273</sup> MARTIN LUTHER KING, A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 62 (James Melvin Washington ed. (1991).

<sup>274</sup> 2 The Papers of Martin Luther King Jr. 6 (1992) (cited in Magee, *supra* note 183, at 53 n.290).

<sup>275</sup> Riskin, *supra* note 98, at 1-67.

<sup>276</sup> See generally Harris et al, *supra* note 168.

<sup>277</sup> The ‘Parts’ of ourselves that are entangled in oppressive systems can be instrumental in people’s decisions and behavior. EKNATH EASWARAN, THE UPANISHADS, 1 (1987) (citing the *Brihadaranyaka Upanishad*, IV.5). Therefore, to address structural change, mindfulness advocates cannot focus simply on our everyday choices ‘in the moment.’ Mindful living would have to include reflections on our own deep embeddedness in oppressive systems and the ‘Parts’ of ourselves that have ‘deep, driving’ self-interested desires to remain a part of these systems.

<sup>278</sup> See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 54-75 (David Kairys ed., 1982).

<sup>279</sup> See generally WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY (2012).

<sup>280</sup> LOUIS FISCHER, GANDHI: HIS LIFE AND MESSAGE FOR THE WORLD (1954), at back cover (showing a photograph of Gandhi’s possessions at the time of his death). Gandhi famously is known for living with virtually no personal assets. The \$2 USD amount I provided is my estimate of the likely value of Gandhi’s assets at the time of his death.

social being, and to seriously discuss structural reform, law scholars would have to be willing to confront the legal profession's attachments to the legal system's status quo. Especially for today's lawyers, years of investment in the system through law school study and hundreds of thousands of dollars of law school debt can create a strong attachment that makes critique difficult. Later in a lawyer's career, attachment can come from a comfortable income, health insurance, and retirement plans that legal employment can offer. After years of hard work, it is understandable if many lawyers are tempted to benefit from the comforts of their profession. However, if mindfulness extends to structural reform, then law scholars would have to ask if reaping all the benefits of a legal career is the mindful response when a lawyer's conscience senses a deep disconnect between law and justice.

In the contemporary Mindfulness in Law scholarship, there is minimal discussion of how the legal profession is connected to systems of privilege and power. These systems resist reforms that would address the suffering of disempowered populations; in contrast, Gandhi was a lawyer who detached from law's privileges (*Anasaktiyoga* being his preferred term)<sup>281</sup> and found a way to practice with principles that challenged the norms of his profession. His method of law practice itself would have been a unique contribution to developing the personal and interpersonal dimensions of the legal profession, but Gandhi also sought structural change and ultimately left law practice entirely. Although it may seem paradoxical to some, Gandhi actually gained freedom by renouncing his privilege, and he used his new-found freedom to act purely by his own conscience rather than remaining silent in the face of injustices. Although he made his life choices in a unique colonial context, Gandhi's exit from the legal profession should give mindful law scholars a moment to reflect. Law scholars share a common discourse that focuses on issues such as legal process, legal doctrine, and jurisprudence. Although these preoccupations are important in legal thought, they are not a source of creative insight from the perspective of those who experience structural injustice. To reform the existing legal *system*, the Mindfulness in Law movement would have to use the empathy developed from meditation to understand the plight of oppressed populations more intimately and to make law practice a more effective method of structural change.

In theory, aggrieved groups have many channels to open dialogue with the legal system, including engagement with executive branch agencies, lobbying the legislature, litigation, and electoral politics. However, for many oppressed populations, none of these methods have been as effective for engaging the legal system as nonviolent resistance. To Gandhi, *satyagraha* was a method to engage in a dialogue with the legal system, especially when the other methods to speak to the system had failed. The exercise of nonviolent civil disobedience often indicates a failure of the legal system to respond to

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<sup>281</sup> CWMG, *supra* note 2, Vol. 46: 12 May, 1929 - 31 Aug., 1929, at 164. SURENDRA VERMA, METAPHYSICAL FOUNDATION OF MAHATMA GANDHI'S THOUGHT 90-94 (1970). See also B.N. Ghosh, GANDHIAN POLITICAL ECONOMY: PRINCIPLES, PRACTICE AND POLICY (2007); B.N. GHOSH, BEYOND GANDHIAN ECONOMICS: TOWARDS A CREATIVE DECONSTRUCTION 26-27(2012).

pleas for justice, and therefore, Gandhi framed *satyagraha* as a chance to redeem the legal system. In fact, dialogue always is the final preferred means of conflict resolution in Gandhi's thought. If direct appeals to the hearts of government officials failed, then Gandhi encouraged the people to repeat their demand for dialogue through *satyagraha*. In Gandhi's thought, *satyagraha* is the antidote to the legal system's inaction and the engine of dialogue for marginalized groups when their legal system is unresponsive to their welfare.

Former Indian Supreme Court Justice Krishna Iyer once explicitly presented a challenge to the legal community, saying "the presiding idea is that law is to be socially just or suffer civil disobedience."<sup>282</sup> Given the recent protests over police killings in Fullerton, MO, and Staten Island, perhaps it is time for the American legal system to recognize *satyagraha* as an aggrieved group's way of reaching out to the state for dialogue. Because Gandhi's desire for dialogue should be protected in a free society, mindful lawyers could seek systemic reform by contemplating a constitutional right to *satyagraha* for groups under structural duress. Without such a legal reform, government will continue to favor methods of communication that privileged groups easily can exercise – such as influencing enforcement agencies, lobbying, litigation, or elections – at the exclusion of nonviolent resistance, which is a preferred and sometimes necessary method for the underprivileged. Recognition of *satyagraha* as a legal method of communicating with government will give incentive for protestors to communicate nonviolently and create a more inclusive society by acknowledging the methods of dialogue that oppressed groups often must exercise.

The Mindfulness in Law movement has made admirable impacts on the individual and interpersonal levels, but the movement is yet to begin a discussion of how to create reform in the legal system at the structural level. A meaningful step toward such change can be a discussion of how the legal system can be reformed to incorporate into its framework the traditionally 'extra-legal' methods of discourse of oppressed populations. Wouldn't mindfulness, compassion, and loving-kindness demand such a discussion of structural reform?

#### IV. CONCLUSION: WARY OPTIMISM FOR MINDFULNESS IN LAW

Gandhi's meditative practices, approach to legal practice, and nonviolent resistance kept him from being a non-critical servant of a larger unsympathetic legal system. At all three levels of analysis, Gandhi challenged the machine-like qualities of modern legal regimes, and his thought on the *struc-*

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<sup>282</sup> V.R. KRISHNA IYER, *supra* note 211, at 4. Justice Iyer even applied this challenge to social scientists, saying "social scientists must, in the right spirit, research into the vast potentiality of this gift of hope to the sublime rule of law." *Id.* at 4. For thoughtful discussions of civil disobedience and legal or constitutional rights, see generally HAKSAR, *supra* note 253; KIMBERLEE BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE (2012) (discussing Necessity and other legal theories as potential legal defenses for civil disobedience).

tural level of law can help bring the highest expression of love and compassion into contemporary law. This Article is an attempt to add the important systemic issues about legal thought and legal systems into a mindful law discourse that currently is limited to meditation and restorative interpersonal healing. I conclude that all three levels – individual mindfulness, social interaction, and systemic critique -- must be addressed simultaneously because they complement each other in their emphasis on legal reform.

Meditation is scientifically shown to boost memory,<sup>283</sup> creativity,<sup>284</sup> and standardized intelligence test scores,<sup>285</sup> but without its original connection to loving-kindness, its meaning and effectiveness is stunted. The Mindfulness in Law movement faces an impasse: to be a “flash in the pan”<sup>286</sup> that gets absorbed into law school’s anxiety-ridden individualism, or to be harnessed to transform the legal profession from self-regarding materialism to other-regarding compassion.<sup>287</sup> As Professor Beth Mertz stated, “the demand on law students to frame the world through legal doctrine develops in lawyers a ‘doctrinal filter’ that tacitly coerces law students to adopt a new, more distanced attitude toward morality and emotion.”<sup>288</sup> This quiet coercion, hidden under the guise of “reason,” can be a destructive part of legal training that limits students’ abilities to imagine emotionally-intelligent alternatives. Current legal education often situates conflict into abstractions for which a conceptual solution is necessary, rather than training students to be aware of the moment and act according to what seems needed for genuine resolution in that particular instance. In contrast to standard legal training, Gandhi

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<sup>283</sup> Shao & Skarlicki, *supra* note 61, at 196 (citing Pagano & Frumkin (1977)); Jared T. Ramsburg and Robert J. Youmans, *Meditation in the Higher-Education Classroom: Meditation Training Improves Student Knowledge Retention during Lectures*, 5 MINDFULNESS 431 (2014).

<sup>284</sup> See generally ELLEN J. LANGER, MINDFULNESS (1989); ELLEN J. LANGER, THE POWER OF MINDFUL LEARNING (1997).

<sup>285</sup> See Michael D. Mrazek et al., *Mindfulness Training Improves Working Memory Capacity and GRE Performance While Reducing Mind Wandering*, PSYCHOLOGICAL SCIENCE (2012). See also *Brief Mindfulness Training May Boost Test Scores, Working Memory*, Mar. 26, 2013, at

<http://www.psychologicalscience.org/index.php/news/releases/brief-mindfulness-training-may-boost-test-scores-working-memory.html> ). See generally LANGER (1989), *supra* note 284; LANGER (1997), *supra* note 284; Ramsburg and Youmans, *supra* note 283; DeSteno, *supra* note 82.

<sup>286</sup> Codiga, *supra* note 110, at 109 (quoting Riskin, *The Contemplative Lawyer*, *supra* note 97, at 45).

<sup>287</sup> This issue has broader social significance beyond law and represents a deeper existential American dilemma. For an example of a critique of consumption that has relevance to living mindfully, see GEORGE RITZER, EXPLORATIONS IN THE SOCIOLOGY OF CONSUMPTION: FAST FOOD, CREDIT CARDS, AND CASINOS 203-221 (2001); Roy Porter, *Consumption: Disease of the Consumer Society?*, in CONSUMPTION AND THE WORLD OF GOODS 58-84 (John Brewer & Roy Porter eds., 1993); THOMAS PRINCEN ET AL., EDs., CONFRONTING CONSUMPTION 1-22 (2002).

<sup>288</sup> Magee, *supra* note 184, at 53, n. 290 (citing ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO THINK LIKE A LAWYER (Oxford University Press 2007, at 124).

often had to explain to people that he was not interested in creating abstract scholarly treatises to explain his solutions; rather, his goal was to focus on what the immediate moment presented to him and live his principles, saying humbly,

To write a treatise on the science of ahimsa is beyond my powers. I am not built for academic writings. Action is my domain, and what I understand, according to my lights, to be my duty, and what comes my way, I do. All my action is actuated by the spirit of service. Let anyone who can systematize ahimsa into a science do so, if indeed it lends itself to such treatment.<sup>289</sup>

If the deeper existential insights of mindfulness become separated from its practice, the Mindfulness in Law movement may, in the words of Riskin, end up being merely “a few flashes in a few pans.”<sup>290</sup>

Although many Mindfulness in Law scholars have engaged “Eastern” thought, there has been virtually no mention of the Buddhist Sarvodaya movement and minimal engagement with one of the most infamous Asian lawyers of the 20<sup>th</sup> century: Mohandas Gandhi. Both his knowledge of and exploits with the law helped him create an original theory of law’s embeddedness in political and social systems, and yet, American law scholars have almost entirely ignored Gandhi’s contribution to social and legal theory.<sup>291</sup> The ‘interdependent individualism’ of Gandhi and engaged Buddhism presents a way for mindfulness to transcend the limitations of modern atomistic being. However, there still is a historic marginalization of “Eastern” worldviews in the legal academy that trivializes the challenges to western constructions of knowledge and legitimacy.

More generally, American discourse conveniently excises mindfulness from its existential elements and origins.<sup>292</sup> Given this exorcism, it should come to no surprise that *asanas* and mindfulness, respectively, are the limb (*anga*) of yoga and the part of the Eightfold Path that have been popularized in American society. The popularity of *asanas* and mindfulness could very well be due to their subjugation to existing atomistic imperatives in American society. For instance, as a cultural object, yoga in American society already has been dissociated from its historical connections to specific ethical practices and moral considerations. This should serve as a moment of caution for Mindfulness in Law advocates to note the ways in which the ethical discourse surrounding mindfulness can become diluted, and how mindful-

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<sup>289</sup> CWMG, Vol. 90: 25 Feb., 1946 - 19 May, 1946, at 1.

<sup>290</sup> Riskin, *The Contemplative Lawyer*, *supra* note 97, at 45; Codiga, *supra* note 110, at 109.

<sup>291</sup> A recent exception is Yxta Maya Murray’s *A Jurisprudence of Non-violence*, which invokes the lives of Gandhi and King to advance a non-violent legal theory. Yxta Maya Murray, *A Jurisprudence of Non-violence*, 9 CONN. PUB. INT. L.J. 65 (2009).

<sup>292</sup> For scientific study on the connection between meditation and spiritual experience, see Jeffrey M. Greeson et al., *Changes in Spirituality Partly Explain Health-Related Quality of Life Outcomes after Mindfulness-Based Stress Reduction*, 34(6) J. BEHAVIORAL MEDICINE, 508-18 (2011); Kabat-Zinn, *Mindfulness-Based Interventions*, *supra* note 18, at 144-56

ness could be severed from its deeper purposes as it is absorbed by the dominant American political, economic, institutional, and cultural systems. Advocates could claim that mindfulness will transform society ‘from the inside-out,’<sup>293</sup> but in terms of its existence as a cultural object, mindfulness can be coopted and trivialized as well.

This trivialization is palpable even in mindfulness advocates’ attempts to appeal to mainstream America. The apparent popularity of meditation and yoga among women could indicate that meditation and yoga sit uncomfortably with American cultural standards of manliness. In American society, justifications for practicing mindfulness sometimes conform to hyper-masculine imagery to keep meditation from seeming ‘soft.’<sup>294</sup> For example, in “A Mindful Nation,” Congressman Ryan described a scientist’s enthusiasm for the benefits of mindfulness by saying that the scientist “wants everything proven with hard-nosed research.”<sup>295</sup> Moreover, although Ryan used a wide range of examples to appeal to a diverse population, some examples involved the use of “Eastern” practices to improve performance in male-dominated activities. For instance, Ryan discussed his use of yoga “to deal with multiple football injuries”<sup>296</sup> and illustrated the importance of mindfulness during combat for “operational effectiveness,” decreasing “pre-deployment stress,” and “reducing battlefield errors.”<sup>297</sup> Ryan’s efforts to advocate for mindfulness are commendable, especially for including examples that connect mindfulness and masculinity which might appeal to a broader male audience. However, the pressure on mindfulness advocates like Ryan to avoid love and compassion when referring to traditionally male activities presents a formidable challenge to efforts to mindfully address structural problems. In addition, attempts to draw the American male population to mindfulness without questioning the cultural frames that connect masculinity and aggression stands in stark contrast to Powell’s previously mentioned concerns about the use of mindfulness to more effectively carry out acts of violence.

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<sup>293</sup> This refers to and includes the notion that mindful lawyers can transform the legal system by beginning with their inner transformation, producing a subsequent change in their law practice, and creating systemic change by making mindfulness practices more popular in the profession. In this line of thinking, as lawyers change law practice and legal systems ‘from the bottom-up,’ new mindful reinterpretations of legal doctrine also could change legal theory and jurisprudence.

<sup>294</sup> In other words, mindfulness advocates sometimes must avoid seeming as if they are presenting a way for American men to look unmanly or ‘impotent’. From one historical view, losing manliness and becoming feminized is a male fear in American society. *See generally*, Bederman, *supra* note 151. Perhaps the pronounced acceptance of yoga among American women compared to men underscores this cultural fear against being ‘feminized’ by ‘exotic Eastern’ practices. For an especially graphic example of the feminization and trivialization of nonviolent power, see Maxim magazine’s drawing of a hyper-masculinized weightlifter pile-driving an image resembling the elderly Mohandas Gandhi, MAXIM MAGAZINE, Feb. 2003. *See also* SHILPA S. DAVE, INDIAN ACCENTS: BROWN VOICE AND RACIAL PERFORMANCE IN AMERICAN TELEVISION AND FILM 60, 170, 188 (2013).

<sup>295</sup> Ryan, *supra* note 6, at 50.

<sup>296</sup> *Id.* at 18.

<sup>297</sup> *Id.* at 122-3.

Along similar lines, mindfulness still faces the barriers presented by the historical division between the “East” and “West.” As mindfulness pioneer, Jon Kabat-Zinn, once had to explain, “It’s not just some silly quaint thing they used to do in Asia because they had nothing better to do. It’s a way to stay healthy.”<sup>298</sup> Even those who have advocated most for mindfulness mediation like Ryan and Kabat-Zinn must contend with contemporary American cultural categories that trivialize Asia’s intellectual traditions by prizing physically-focused “health” over the often feminized and exoticized insights of nonviolence, compassion, and love. Because of the tensions between American constructions of manliness and the traditional feminization of the “the East,” the strength of meditation to cultivate love and compassion could get lost.

The historic ties of mindfulness to “Eastern” philosophy make it ripe for marginalization, and even if it survives the dominant structure’s assaults to trivialize it, mindfulness could become a warped shell of its former self.<sup>299</sup> Despite American society’s diverse population, western education almost entirely dominates what a modern educated American must know and read to be considered erudite. During the colonial period, Gandhi contended with this western conception of learnedness while he completed his legal education, and his thought reflects the struggle to address the inherent privilege of western world-views in modern social and legal thought. Today, some scholars such as Codiga are illustrating the compatibility of mindfulness practices with secular life and society,<sup>300</sup> but overall, scholars minimally have addressed the barriers caused by historical “East/West” divisions in thought and education. This historical boundary will have to be crossed to create a genuine appreciation of the social ontology that mindfulness can bring to American legal theory and education.

If mindfulness ever is used to achieve the cultural transformation that it can offer and avoid making lawyers merely more efficient worker bees, then mindfulness practices should not be disemboweled from the body of philosophy from which they originated. To see how law scholars can retain a connection to the origins of mindfulness, there is no need to reinvent the wheel; Gandhi’s conceptions of law already are mindful inventions that retain their connection to a broader “other-regarding” philosophy, one which even includes the *yamas*, *niyamas*, and parts of the Eightfold Path such as Right Livelihood. Therefore, Gandhi already has invented the wheel for an enlightened legal theory, but law scholars have to take the *yamas*, *niyamas*, and Right Livelihood seriously and acknowledge the significance of Gandhi’s

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<sup>298</sup> Patrick Hruby, *Washington Was Making Rep. Tim Ryan sick ... Until He Found Mindfulness: Ohio Democrat Touts Emotional, Cognitive Health Benefits of Meditative Practice*, WASH. TIMES, Wed., July 11, 2012.

<sup>299</sup> See generally EDWARD W. SAID, *ORIENTALISM* (2003); SAID, *Representing the Colonised*, *supra* note 252; Ronald Inden, *Orientalist Constructions of India*, 20, *MOD. ASIAN STUD.* 401, 442 (1986); Gunaratne, *supra* note 12, at 366-383; Kim, *supra* note 13, at 412-421; Miike, *supra* note 13, at 4-31; Miike, *An Asiatic Reflection on Eurocentric Bias in Communication Theory*, *supra* note 13, at 272-278; MILLS, *supra* note 146; Scheurich, *supra* note 13, at 5-10; Pateman and Mills, *supra* note 148.

<sup>300</sup> Codiga, *supra* note 110.

detachment from worldly possessions (*Anasakti*). Using his life as his message, Gandhi humbly challenged law scholars to question the legal profession's prestige and income hierarchy and direct the profession's energies toward remedying structural injustices.

Furthermore, for mindfulness discourse and social justice discourse to reach an understanding with the broader legal community, the issue of love in law must be reconciled. Ironically, the notion that love plays a role in healing people and relationships is self-evident to many of the world's masses and yet seems bewildering to academics and lawyers. Insights about love chronically are absent from academic writing in law and policy. As a result, to many non-lawyers, the law often seems deeply divorced from social reality<sup>301</sup> and seems to exist in a realm of its own, with its own logic, sensibilities, and timelines.<sup>302</sup> As a result, for the layperson, law's relevance to real human relationships can seem suspect.<sup>303</sup> It is no surprise that laypersons sometimes view legal systems as self-serving factory-like entities that produce case "outcomes" rather than resolutions. In contrast, Gandhi's application of love to law was intended to bring law closer to the relevant relationships in a conflict rather than privileging the abstract "relevant" legal concept that often is only relevant to lawyers themselves.

Lawyers seem oblivious to the potential of love because the dominant cultural frames in which lawyers are socialized simply lack the tools to foster love's application, and law schools do not provide those tools. Instead, future lawyers are socialized to box out such considerations and often trivialize them in order to preserve the centuries-old bias toward a narrow conception of the superior power of "logic" and "reason" over "emotion" and "love".<sup>304</sup> This dichotomy already is rejected by many psychologists as false.<sup>305</sup> As is now increasingly recognized, emotion, logic, and even gut feeling are mutually involved in human thought processes.<sup>306</sup> An attempt to create a basis for love in legal reasoning is therefore realistic, sensible, and timely. There is no reason for the modern lawyer to fear love or for logic and love to be mutually exclusive. Logic and love coexist.<sup>307</sup>

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<sup>301</sup> See generally PATRICIA EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW* (1998).

<sup>302</sup> *Id.*

<sup>303</sup> See generally PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* (1991); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

<sup>304</sup> DAMASIO, *supra* note 150, at 245-252; Goleman (2006), *supra* note 154, at 96-110; Goleman (2007), *supra* note 154; MACKINNON, *supra* note 153, at 104-123; PATEMAN, *supra* note 153, at 207-219; Bederman, *supra* note 151, at 18-25, 125-151.

<sup>305</sup> DAMASIO, *supra* note 150, at 245-252; Goleman (2006), *supra* note 154, at 96-110; Goleman (2007), *supra* note 154; D. J. ARKUSH, (2008). *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*. *BYU L. REV.* 1275 (2008).

<sup>306</sup> *Id.* Adam HadHazy, *Think Twice: How the Gut's Second Brain Influences Mood and Well-Being*. *SCIENTIFIC AMERICAN* (Feb.12 2010), <http://www.scientificamerican.com/article/gut-second-brain>.

<sup>307</sup> For an example of contemplative practices that can connect logic and love, see generally ZAJONC, *supra* note 165. For a broader example of how the terms 'logic' and 'love' are used

Finally, there is a gap between lawyers' meditation practice and restorative lawyering on the one hand, and on the other hand, discussion of structural reform through a legal framework that formally recognizes a limited right to loving non-cooperation. To address structural issues, mindful law scholars would have to reflect on Gandhi's inclusion of *satyagraha* into his philosophy of law. His life challenges law scholars to ask where the current limits of the law may be for accomplishing social change, and to discuss the possibility of a constitutional relationship between fundamental rights and nonviolent resistance in some contexts. Given western formalism's "philosophical dead-ends" and the emptiness of post-modern challenges to formalism, law especially has been void of deep self-reflective critique.<sup>308</sup> As philosopher Louis Wolker stated, "any thought that has constrained itself to law has already lost its soul."<sup>309</sup> If current legal theory categorically saps the soul, then mindful law scholars are left to ponder upon how much existing law can absorb the spirit of mindfulness, and how law and mindfulness can co-exist at any structural level. Can a legal system promote compassion without formal recognition of non-violent resistance in limited circumstances? Is it mindful for law scholars to advocate for social justice without proposing a legal right to *satyagraha* in certain situations? Do law scholars fear love because love would force the profession to face the suffering of oppressed populations and bring to light the profession's inability to mitigate that suffering?

My mindful reader, why do you think lawyers fear love?

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in areas such as education and parenting in American society, *see* <http://www.loveandlogic.com/>.

<sup>308</sup> David M. Zlotnick, *The Buddha's Parable and Legal Rhetoric*, 58 WASH. & LEE L. REV., 957, 973 n.85, 1016 n.297 (2001).

<sup>309</sup> LOUIS E. WOLCHER, *BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY* x (2005).



# IN THE HOLOCAUST'S SHADOW: CAN GERMAN AND AMERICAN CONSTITUTIONAL JURISPRUDENCE PROVIDE A "NEW GUARANTEE" OF HUMAN DIGNITY?

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## ABSTRACT

*In response to the Holocaust, political philosopher Hannah Arendt wrote that human dignity needs "a new guarantee." In the Holocaust's Shadow, Can German and American Jurisprudence Provide a "New Guarantee" of Human Dignity? examines human dignity in the constitutional jurisprudence of America and Germany through the lens of the Holocaust. During the Holocaust, the Nazis' goal before the Final Solution was to degrade the Jews and other victims so that the German population considered these groups "socially dead," not entitled to honor and respect. Nazi treatment of its victims and propaganda to the German citizenry was aimed at dehumanizing the Jews, making the Germans see them as vermin—completely lacking in the attributes that warrant treatment with dignity. As one concentration camp survivor wrote, "In the world of the Holocaust, Jews had no dignity. Jews were human powder, human dust. They were shot as dogs and cats were never shot. They were treated worse than animals." The Nazis proved highly successful at this deliberate degradation. This article explores whether Germany and the United States, in their constitutional jurisprudence, can fulfill Arendt's aspiration of providing human dignity a "new guarantee."*

*In Germany, the Holocaust shapes the nature of human dignity, giving it a particular meaning and vitality. In American jurisprudence, on the other hand, human dignity is widely studied by academics, but the Supreme Court's reliance on the value is spotty and human dignity's meaning varies considerably depending on the case and underlying issues.*

*Germany's concept of human dignity as the fundamental value underlying its Basic Law corresponds directly to the Holocaust in several ways. The particular meaning the German Court typically gives the value, the consistency of the Court's reliance on dignity, and the gravitas afforded the value all relate to Germany's efforts to ensure the Nazis' rise to power and persecution and brutality against particular groups never happen again. By contrast, in America, particular Supreme Court justices have championed human dignity as a key value to underlie specific express constitutional guarantees. Human dignity has never achieved (nor will it achieve) the strength or consistency of application and meaning as its German counterpart.*

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## I. INTRODUCTION

In *The Origins of Totalitarianism*,<sup>1</sup> political philosopher Hannah Arendt wrote this response to the horrors of the Holocaust<sup>2</sup> and related refugee issues:

Human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.<sup>3</sup>

This article asks whether Germany and America have fulfilled Arendt's aspiration for their nations' citizens, in the limited sense of whether citizens of the United States and Germany enjoy the guaranteed human dignity Arendt envisioned.<sup>4</sup>

In many ways, studying the Holocaust is a study of human dignity, its advancement and deprivation. During the Holocaust, the Nazis deliberately stripped Jews<sup>5</sup> of their dignity through torture, discrimination, ghettoization, destruction of their livelihoods and sacred objects, and deprivation of food, sanitation, and other necessities of life.<sup>6</sup> This article focuses on two themes relating to the Holocaust and human dignity: first, the Nazis treated Jews and other victims as sub-human, completely negating their human dignity, and, second, the Nazis persecuted groups based on a fixed characteristic, like religion, sexual orientation, or race. These themes will underlie questions about the extent to which the Holocaust informs human dignity in the constitutional jurisprudence of America and Germany.

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<sup>1</sup> HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1973), available at <https://archive.org/details/originsoftotalit00aren>.

<sup>2</sup> Holocaust literally means burnt offering. LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS XV* (1975). In this article, the Holocaust means the mass murder of approximately "6 million Jews by the Nazis and their followers in Europe during the years 1933-1945. Other individuals and groups were persecuted and suffered grievously during this period, but only the Jews were marked for complete and utter annihilation." JEWISH VIRTUAL LIBRARY, available at [http://www.jewishvirtuallibrary.org/jsource/Holocaust/wiesenthal\\_glossary.html#32](http://www.jewishvirtuallibrary.org/jsource/Holocaust/wiesenthal_glossary.html#32).

<sup>3</sup> ARENDT, *supra* note 1, at ix.

<sup>4</sup> This is not a study of Arendt or her philosophies. Her quote is simply the jumping off point for studying the Holocaust and human dignity.

<sup>5</sup> The Nazis and Third Reich victimized groups other than Jews including homosexuals, gypsies, and people with mental and physical disabilities. I refer to Jews throughout the article because this was the largest group the Nazis terrorized and to avoid the clumsiness of continuing to repeat the various groups the Nazis targeted.

<sup>6</sup> NORA LEVIN, *THE HOLOCAUST: THE DESTRUCTION OF EUROPEAN JEWRY 1933-1945*, 205 (1968).

As a result of the Holocaust and World War II, human rights groups and governments sought to “officially” protect human dignity. This protection took the form of declarations and constitutions, such as the Universal Declaration of Human Rights and West Germany’s Basic Law, Article 1, which makes human dignity inviolable. Human dignity was included in Germany’s Basic Law to ensure, “Never Again,”—“never again a self-destruction of democracy as in 1933, and never again a total neglect of human rights...”<sup>7</sup> According to commentators discussing the origins of Germany’s post-war constitutional jurisprudence, “[i]n the shadow of the Holocaust, lawmakers made dignity the cornerstone of Germany’s legal architecture binding all three powers.”<sup>8</sup> “In reaction to the horrors of Nazi Germany, they based the new constitution on the principle of human dignity and the recognition of human rights, recognized in Article 1.”<sup>9</sup> The drafters inserted human dignity in the Basic Law to protect citizens against “humiliation, stigmatization, and torture.”<sup>10</sup> Other nations have more recently, in response to other events, included human dignity protection in their governing laws.<sup>11</sup>

The United States Supreme Court followed these entities in naming human dignity as a concept to protect constitutional interests. After the war and Universal Declaration, “the Court embraced dignity as something possessed by individuals,” rather than just entities, relying on the concept in its constitutional interpretation.<sup>12</sup> Commentators opine that in response to the

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<sup>7</sup> Dieter Grimm, *Dignity in a Legal Context and as an Absolute Right* in UNDERSTANDING HUMAN DIGNITY 384 (Christopher McCrudden ed., 2013) [hereinafter HUMAN DIGNITY] (“Dignity thus added something to the traditional bill of rights, for which no necessity had existed in previous constitutions written in the light of their historical context.”).

<sup>8</sup> Hannes Rosler, *Dignitarian Posthumous Personality Rights—An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT’L L. 153 (2008).

<sup>9</sup> Brun-Otto Bryde, *Fundamental Rights as Guidelines and Inspiration: German Constitutionalism in International Perspective*, 25 WIS. INT’L L.J. 189, 194 (2007) (“In reaction to the abuse of state power, they were careful in drafting judicial safeguards against the abuse of state power...”). At the time of the article, Brun-Otto Bryde was judge of the Federal Constitutional Court of Germany.

<sup>10</sup> *Widow’s Child Welfare Case*, 1 BVerfGE 97 (1951).

<sup>11</sup> See Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963 (1997); See Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903 (2000); Other nations have included human dignity as the core value in their constitutional jurisprudence. See Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331 (2012) (describing the constitutions of France, Canada, Israel, and South Africa for their reliance on human dignity).

<sup>12</sup> Julie Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1939 (2003) (“Our review of the deployment of the term dignity of persons in the constitutional law of the United States demonstrates that use of the word began during World War II and expanded as the term was embraced in the 1948 Universal Declaration of Human Rights and in other nations’ constitutive legal documents.”).

war and adoption of these international legal norms, the Court “changed the content of U.S. constitutional law to name dignity as a distinct and core value.”<sup>13</sup> “By the end of the war, the concept of human dignity was firmly entrenched in the Court’s constitutional jurisprudence, ... .”<sup>14</sup>

Focusing on Germany and America, this article examines how the Holocaust and more specifically the Nazis’ deliberate deprivation of victims’ dignity informed current notions of human dignity in German and American constitutional jurisprudence. The article focuses on Germany and the United States because these two Western liberal democracies have laws that guarantee certain human rights, while the two differ markedly in terms of the role of human dignity, making for valuable distinctions and comparisons. In American constitutional jurisprudence, liberty enjoys a paramount role based on the Founding Fathers’ distrust of government and need to defend against tyranny and government intrusion.<sup>15</sup> Human dignity, not explicitly mentioned in the United States Constitution, serves as a value the Supreme Court has applied to varying degrees,<sup>16</sup> underlying certain constitutional protections. Under German law, on the other hand, human dignity is paramount, protecting the personhood of each individual against socialist and nationalist tendencies.<sup>17</sup> This article examines the extent to which these differences result from cultural norms that existed long before World War II, from the specific atrocities of the Holocaust, or from a combination of the two.

The article proceeds with Part II describing the historical development of human dignity in German and American constitutional jurisprudence. Part III explores certain aspects of the Holocaust, specifically, the myriad ways the Nazis deliberately dehumanized victims, working to destroy their dignity by the laws leading up the Final Solution<sup>18</sup> as well as by ghettoization

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<sup>13</sup> *Id.* at 1941.

<sup>14</sup> Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U.L. REV. 381, 397 (2011).

<sup>15</sup> Edward Eberle, in one of his many comprehensive articles comparing German and American law, summarizes the key difference between the two nations’ constitutional jurisprudence as “the vision of the Constitution they are pursuing, an American constitution of liberty as compared to a German constitution of dignity.” Edward J. Eberle, *Equality in Germany and the United States*, 10 SAN DIEGO INT’L L.J. 63, 120 (2008).

<sup>16</sup> Two fairly recent articles chronicle the Courts’ use of human dignity. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (providing data regarding the Court’s use of the term human dignity in both majority and dissenting opinions); Daly, *supra* note 14, at 414 (describing the use of the term from the time John Roberts became Chief Justice until the article was written: “Of more than 400 cases, only thirty even mentioned the term ‘dignity.’ Sixteen of those associate it with inchoate ideas or institutions, such as courts and judicial proceedings or states, Indian tribes, and foreign nations in their claims of immunity.”).

<sup>17</sup> See Bryde, *supra* note 9.

<sup>18</sup> The Final Solution was “the code name assigned by the German bureaucracy to the annihilation of the Jews.” DAWIDOWICZ, *supra* note 2, at xiii.

and treatment in concentration camps. The article also briefly addresses in Part IV the honor facet of human dignity, which the Nazis used to advance their nationalist agenda. The final section of the article, Part V, illustrates with key cases the constitutional jurisprudence of Germany and the United States with an eye toward the degree to which violations of human dignity during the Holocaust shaped the nature of human dignity as reflected in the cases. The article looks at four specific areas of jurisprudence: privacy/personality, equality, criminal law protections, and speech.<sup>19</sup>

Though much has been written about human dignity, commentators have not examined the extent to which the Holocaust, the historic event immediately preceding the arrival of human dignity as the lodestar constitutional value and one that changed the international human rights landscape, informed the meaning and scope of the value. This article examines the ways in which the Nazis' treatment of Holocaust victims shaped the particular nature of the value in constitutional jurisprudence.

Ultimately, for all that others have written, the article concludes that attributes the American concept lacks, and the German concept provides, result not merely from cultural differences but *primarily* from the nations' underlying motivations to embrace this value. Germany embraced the value in a desperate effort to ensure the horrors inflicted on Jews and others would never occur again. The American value differs markedly from its German counterpart. The Court applies the value in an inconsistent manner because in American jurisprudence, the value is a luxury, championed by certain Justices,<sup>20</sup> who aspire to elevate the plight of certain citizens.

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<sup>19</sup> I chose these areas to explore among the many that I could have selected, like the right to die. Germany is currently examining its right to die jurisprudence. See Soraya Sarhaddi Nelson, *When and How to Die: Germany Debates Whose Choice It Is*, NPR NEWS STATION (Aug. 7, 2014), <http://www.wbur.org/npr/279046327/when-and-how-to-die-germany-debates-whose-choice-it-is>. ("Chancellor Angela Merkel's new government says the current approach to assisted suicide in Germany won't do. It is seeking a nationwide discussion this year to establish what euthanasia advocates fear will be a de-facto ban on assisted suicide in Germany.") I also did not explore positive rights, like the right to subsistence living.

<sup>20</sup> See *infra*, p. 14 (discussing different justices' use of the term). In *Gomez v. United States*, 503 U.S. 653 (1992), Justice Stevens dissented from the Court's opinion holding capital punishment by gas constitutional under the Eighth Amendment. He talked about how in 1937, the public considered a gas chamber a humane form of execution. However, "[f]ifty-five years of history and moral development have superseded that judgment. The barbaric use of cyanide gas in the Holocaust, the development of cyanide agents as chemical weapons, our contemporary understanding of execution by lethal gas, and the development of less cruel methods of execution all demonstrate that execution by cyanide gas is unnecessarily cruel." *Id.* at 657; (Stevens, J., dissenting).

## II. THE HOLOCAUST AND SURROUNDING EVENTS ELEVATED HUMAN DIGNITY IN CONSTITUTIONS, JURISPRUDENCE, AND HUMAN RIGHTS DOCUMENTS

In 1948, the Universal Declaration of Human Rights and the United Nations Charter recognized the human dignity of each member of the human family and identified this dignity as “the foundation of freedom, justice and peace in the world.”<sup>21</sup> The first line of the Declaration's Preamble recognizes “the inherent dignity and... the equal and inalienable rights of all members of the human family.”<sup>22</sup> Article 1 of the Declaration states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>23</sup> Mary Ann Glendon calls human dignity, which Eleanor Roosevelt emphasized should be included in the document, the “obvious candidate” for the Declaration's ultimate value.<sup>24</sup>

These proclamations, arising “[i]n the wake of the horrors of World War II,”<sup>25</sup> were aimed at protecting all men and women against humiliation by the state and at ensuring their equal access to human rights. While the Nuremberg Principles, guidelines developed in Washington to classify certain acts as crimes against humanity, were aimed at punishing the barbaric acts of WWII, the Declaration was meant to prevent such acts from occurring again.<sup>26</sup> The Preamble specifically identifies what the Declaration is meant to prevent, reciting that “[...] disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of

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<sup>21</sup> Universal Declaration of Human Rights, G.A. Res. 217, at 71, U.N. Doc. A/810 (Dec. 12, 1948), *available at*

[http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf). The Preamble identifies the inherent dignity and equal rights of all members of the human family as “the foundation of freedom, justice and peace in the world.” *Id.*

<sup>22</sup> MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* xv-xvi, Appendix 7 (2001).

<sup>23</sup> *Id.*; Universal Declaration of Human Rights *available at*

[http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

<sup>24</sup> Mary Ann Glendon, *Procter Honoria Respectful: Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153, 1172 (1998).

<sup>25</sup> Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202, 206 (2008); Libby Adler, *The Dignity of Sex*, 17 UCLA WOMEN'S L.J. 1, 10 (2012) (“The invocation of the dignity and rights of man has to be seen as a counter-thesis and social-ideology of the Free World to the ideologies of the Axis Powers and in particular to National Socialism.”) (citing Yehoshua Arieli, *On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 1, 3 (David Kretzmer & Eckart Klein eds., 2002)).

<sup>26</sup> GLENDON, *supra* note 22, at xvi.

mankind,....”<sup>27</sup> Dignity and rights are interwoven in these documents;<sup>28</sup> dignity is “the tuning fork” according to which rights are harmonized, the “ultimate value” that gives coherence to human rights.<sup>29</sup>

Most commentators agree that human dignity as expressed in the Universal Declaration of Human Rights is intrinsic to every person.<sup>30</sup> It does not depend on a person’s merit or wealth.<sup>31</sup> “[D]ignity signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human. This is a necessary, not a contingent, feature of all humans; it is permanent and unchanging, ... .”<sup>32</sup>

In United States Supreme Court jurisprudence, the concept of human dignity has enjoyed a much-discussed, and somewhat baffling, evolution. Although the United States Constitution does not include the term human dignity, the Supreme Court has mentioned human dignity countless times, with ebbs and flows in frequency of use.<sup>33</sup> According to commentators, United States Supreme Court justices began to rely on the concept of human dignity to protect citizens against state interference in part as a result of the emergence of the concept in international law.<sup>34</sup>

Defining human dignity (both what it is—value or right—and what it means) within the realm of American Supreme Court jurisprudence has kept commentators busy. In 1984, Jordan Paust described human dignity as an “increasingly vital and vibrant constitutional precept.”<sup>35</sup> Relying in part on

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<sup>27</sup> GLENDON, *supra* note 22, at 174 available at <http://www.un.org/en/documents.udhr>. According to Glendon, French delegate Renee Cassin wanted to specifically reference the atrocities of World War I and World War II but the drafters removed the reference to these historic events to avoid linking the Declaration to particular events. *Id.* at 176.

<sup>28</sup> *Id.*

<sup>29</sup> Glendon, *supra* note 24, at 1172.

<sup>30</sup> Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES* 12 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter *THE CONSTITUTION OF RIGHTS*]; Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in *THE CONSTITUTION OF RIGHTS*.

<sup>31</sup> Bedau, *supra* note 30; Gewirth, *supra* note 30, at 153; (describing how “dignity signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human. This is a necessary, not a contingent, feature of all humans; it is permanent and unchanging, ...”).

<sup>32</sup> Gewirth, *supra* note 30.

<sup>33</sup> See Jordan Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *How. L.J.* 145, 148 (1984); Henry, *supra* note 16 (Henry provides an empirical study of the Court’s use of the term dignity, tracking the Court’s use of the term whether the Court is referring to the dignity of a state, court, or person).

<sup>34</sup> Resnick & Suk, *supra* note 12, at 192 (“As a result of WWII when legal and political commentary around the world turned to the term dignity to identify rights of personhood... Dignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents.”).

<sup>35</sup> Paust, *supra* note 33, at 148.

William Parent's book of essays about human dignity and Paust's piece,<sup>36</sup> I wrote an article in 2006 identifying eight constitutional areas in which the Court has treated human dignity as a constitutional value.<sup>37</sup> Other scholars continued the discourse, striving to define the concept,<sup>38</sup> describe the Court's multiple uses of the value,<sup>39</sup> tie the concept to a particular aspect of constitutional jurisprudence,<sup>40</sup> and debate the nature of the concept (as a value, right, or other).<sup>41</sup> In the past couple years, scholars continue to develop and

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<sup>36</sup> William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS.

<sup>37</sup> In 2006, I arranged the value according to various constitutional claims, such as human dignity underlying the Fourteenth Amendment Liberty Interest relating to marriage and intimate acts or as the value underlying Fourth Amendment protection against unreasonable searches and seizures. See Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 741 (2006).

<sup>38</sup> Henry, *supra* note 16, at 17; (offering a typology reflecting five distinct conceptions of dignity: institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 193 (2011) (identifying three different conceptions of human dignity the Supreme Court has used in its jurisprudence: 1) dignity as individual autonomy, 2) dignity as positive maintenance of a particular life style; and 3) dignity as recognition of individual group differences—and recommending constitutional courts settle on a particular conception). These typologies certainly help better understand the scope and content of human dignity as the Supreme Court has expressed the value.

<sup>39</sup> *Id.* (both Henry and Rao describe ways in which the Court has applied the concept).

<sup>40</sup> Christopher A. Bracey, Symposium: *Race Jurisprudence and the Supreme Court: Where do we Go from Here?: Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 655 WIS. L. REV. 101 (2008) (describing interplay between human dignity and privacy against the backdrop of the Fourth Amendment).

<sup>41</sup> See Goodman, *supra* note 37; See Parent, *supra* note 36.

expand the commentary on human dignity in the Supreme Court jurisprudence.<sup>42</sup> The concept, once underdeveloped in the academic community, now enjoys a considerable cache of articles.<sup>43</sup>

The American concept of human dignity underlying human rights and constitutional guarantees is thought to come from the German philosopher Immanuel Kant, who posited, “to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.”<sup>44</sup> He defined dignity as “a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence.”<sup>45</sup> Kant’s “formula of ends” meant that people should behave in such a way “that you treat humanity, both in your person and in the person of each other individual, always at the same time as an

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<sup>42</sup> This is by no means a comprehensive list of recent articles. See Barroso, *supra* note 11, at 360 (describing the minimum content of human dignity as a transnational concept to include these three elements: “(1) the intrinsic value of all human beings, as well as (2) the autonomy of every individual, (3) limited by some legitimate constraints imposed such autonomy on behalf of social values or state interests (community value)”); Henry, *supra* note 16 (providing empirical evidence of the United States Supreme Court’s use of the notion of human dignity. Henry offers a typology of the term reflecting five conceptions of dignity: institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity.”); Rao, *supra* note 38 (identifying three different concepts of human dignity the Supreme Court has used in its jurisprudence—dignity as individual autonomy, dignity as positive maintenance of a particular life style; and 3) dignity as recognition of individual group differences—and recommending constitutional courts settle on a particular conception); Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 292 (2013) (proposing courts rely on human dignity as a constitutional constraint “to limit criminalization of victimless crimes to alleviate the pressures on the criminal justice system”); Neomi Rao, *Capitalism, Markets, and the Constitution: The Thirtieth Annual Federalist Society National Student Symposium on Law and Public Policy—2011: IV. The Welfare State and American Exceptionalism: American Dignity and Healthcare*, 35 HARV. J.L. & PUB. POL’Y 171 (2012); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L LAW 655 (2008), available at [www.iilj.org](http://www.iilj.org).

<sup>43</sup> I have not attempted to list all the articles, just a sampling of those from the 90s and early 2000s that deal specifically with human dignity in Supreme Court jurisprudence. See Judith Resnik & Julie Chi-Hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1941 (2003) (the Supreme Court has “changed the content of U.S Constitutional law to name dignity as a distinct and core value.”); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004); Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Discourse*, 65 MONT. L. REV. 15 (2007); Gewirth, *supra* note 30, at 10; Erin Daly provides a comprehensive description of human dignity in her book, *Dignity Rights*. Daly posits the United States Supreme Court’s conception of human dignity is underdeveloped compared to the concept enjoyed by other nations. She offers the history and then, in providing the recent court’s use of the value, provides two different conceptions of the term. See ERIN DALY, *DIGNITY RIGHTS* (2013).

<sup>44</sup> McCrudden, *supra* note 42, at 660.

<sup>45</sup> Englard, *supra* note 11, at 1918-20 (relying on IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*).

end, never as a mere means.”<sup>46</sup> Other scholars have ascribed religious ideology<sup>47</sup> as well as other philosophical underpinnings to the value.<sup>48</sup>

The term human dignity as related to human rights first appeared in Supreme Court jurisprudence in the mid-40s around the time of the drafting of the international human rights documents. The word “dignity” appeared in earlier Supreme Court opinions concerning, for example, the dignity of the sovereign state.<sup>49</sup> Before this, although the term appeared in other nations’ constitutions,<sup>50</sup> “English and early American law cared not a whit for ‘human dignity.’”<sup>51</sup>

In 1944, Justice Frank Murphy used the term “dignity” in his dissent in *Korematsu v. United States*.<sup>52</sup> Fred Korematsu was convicted of remaining in a designated military area in violation of the requirement that persons of Japanese ancestry be excluded from that area.<sup>53</sup> The Court upheld the exclusion based on military necessity with Justice Black, writing for the majority, saying the Court “could not reject the finding of the military authorities” that the exclusion was necessary.<sup>54</sup>

In his dissenting opinion, Justice Murphy opposed the race-based classification based on human dignity concerns:

To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies

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<sup>46</sup> *Id.*

<sup>47</sup> See David Hollenbach, *Experience and History, Practical Reason and Faith* in McCrudden, *supra* note 7, at 134 (discussing Catholicism’s conception on human dignity); See Samuel Moyn, *The Secret History of Constitutional Dignity*, in HUMAN DIGNITY 96 (“Contrary to familiar beliefs, it was not West Germany that first constitutionalized dignity as a leading principle anyway. That distinction belongs to the Irish.”)

<sup>48</sup> McCrudden, *supra* note 42, at 658-662; (provides a comprehensive look at the historical roots of the human dignity idea). According to many, the idea of human dignity stems from the Judeo-Christian belief that every person is created in the image of G-d; Rao, *supra* note 25 at 205. This is certainly the view of the Israeli constitution. The Torah provides “G-d created mankind in his own image and likeness and instructed each person to love his neighbor as himself.” Accordingly, because humanity is created in the image of God we are all equal in God’s eyes. Scholars refer to this principle as *Kevod ha-Beriyot*, created in G-d’s image. Because all people are created in G-d’s image, each person is deserving of respect and honor. England, *supra* note 11, at 1906.

<sup>49</sup> Paust, *supra* note 33, at 148.

<sup>50</sup> McCrudden, *supra* note 42, at 664.

<sup>51</sup> Raoul Berger, *Brennan, “Dignity,” and Constitutional Interpretation*, in THE CONSTITUTION OF RIGHTS.

<sup>52</sup> *Korematsu v. United States*, 323 U.S. 214, 240 (1944); Justice Murphy also dissented in *Screws v. United States*, 325 U.S. 91, 135 (1945), a case in which the Court considered the constitutionality of police officers’ convictions under Section 20 of the federal criminal code. Justice Murphy stated that by beating an African-American man to death, police had deprived him of the “respect and fair treatment that befits the dignity of man, a dignity recognized and guaranteed by the Constitution.”

<sup>53</sup> Korematsu’s residence was in San Leandro, California, one of the areas from where all persons of Japanese ancestry were excluded. *Id.* at 226.

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

to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.<sup>55</sup>

Justice Murphy described the military orders as falling “into the ugly abyss of racism”<sup>56</sup> and as going beyond the brink of constitutional power.

Two years before *Korematsu*, Justice Murphy referred explicitly to the Nazis’ treatment of Jews during the Holocaust in a case involving an appellant’s conviction for violating the curfew order imposed on persons of Japanese ancestry within a prescribed area. In *Hirabayashi v. United States*,<sup>57</sup> the Court affirmed Hirabayashi’s conviction for violating an order requiring all persons of Japanese ancestry residing in certain areas be within their residence daily between 8:00 p.m. and 6:00 a.m. Concurring in *Hirabayashi*,<sup>58</sup> Justice Murphy compared the American government’s military order to how the Nazis treated the Jews living in Germany:

Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe.<sup>59</sup>

Justice Murphy was vehemently opposed to discrimination of any type, and the events in Europe during his tenure on the Court informed his opinions.<sup>60</sup> On January 30, 1944, approximately one year before the Allies liberated Auschwitz and during the same year as *Korematsu*, Justice Murphy

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<sup>55</sup> *Id.* at 240 (Murphy, J., dissenting).

<sup>56</sup> Justice Murphy was the first to use the term “racism” in a Supreme Court opinion. Frank Murphy Hall of Justice, *available at* <http://detroit1701.org/Frank%20Murphy%20Hall%20of%20Justice.html>.

<sup>57</sup> *Hirabayashi v. U.S.* 320 U.S. 81, 109 (1943).

<sup>58</sup> Justice Murphy stated he was concurring only because of the emergency conditions. “When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.” *Id.* at 114.

<sup>59</sup> *Id.* at 111 (Murphy, J., concurring).

<sup>60</sup> Justice Murphy again called forth the notion of dignity, this time “human dignity,” in his dissent in *Re Yamashita*, 327 U.S. 1 (1946). Tomoyuki Yamashita, a general of the Japanese army who was convicted by a military commission of violating laws of war, sought a writ of habeas corpus challenging the jurisdiction and legal authority of the military commission that convicted him. The Court denied the petition for certiorari. In his dissent, Justice Murphy wrote, “[I]f we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.” *Id.* at 29 (Murphy, J., dissenting). Justice Murphy ended his lengthy dissent with another reference to dignity: “While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others.” *Id.* Commentators link Justice Murphy’s Catholic faith and concerns for labor to his strong interest in and reliance on human dignity. See McCrudden, *supra* note 42; See Theodore J. St. Antoine, *Justice Frank*

formed the National Committee Against Nazi Persecution of Jews.<sup>61</sup> Serving as committee chair, he announced the committee was created to combat Nazism as well as anti-Semitism in the United States, to “rally the full force of public consciousness in America against the persecution and extermination of Jewish men, women, and children.”<sup>62</sup> The eleven committee members included U.S. Vice President Henry A. Wallace, Governor Leverett Saltonstall of Massachusetts, and prominent business and church leaders.<sup>63</sup>

After this auspicious beginning, human dignity continued to play a role in American constitutional jurisprudence. Several Supreme Court justices have referred to the concept, while Justices Murphy, Frankfurter,<sup>64</sup> Brennan,<sup>65</sup> and Kennedy have given the value the most “air time,”<sup>66</sup> relying on it to underpin explicit constitutional guarantees.

In marked contrast to the United States, in Germany human dignity enjoys explicit recognition as the primary value of the Basic Law of the Republic of Germany (“Grundgesetz für die Bundesrepublik Deutschland”).<sup>67</sup>

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*Murphy and American Labor Law*, 100 MICH. L. REV. 1900, 1924 (2002) (“he brought to the law and the art of judging some eminently worthy values. Among them was an unceasing determination to see realized in the daily lives of ordinary people such basic human rights as freedom of expression, fair and equal treatment, personal dignity, and the capacity to form organizations to promote their political, economic, and social well-being.”) Yet, arguably, the horrors of World War II, in response to which he formed the group described herein, also contributed to his inclusion of this value in his jurisprudential decision-making.

<sup>61</sup> NATIONAL COMMITTEE AGAINST NAZI PERSECUTION OF JEWS FORMED IN WASHINGTON, (Jan. 31, 1944), available at <http://www.jta.org/1944/01/31/archive/national-committee-against-nazi-persecution-of-jews-formed-in-washington>.

<sup>62</sup> *Id.* On May 28, 1944, the committee, chaired by Justice Murphy, endorsed the demand for establishing “free ports” of entry in the United States for Jews of Europe fleeing Nazi persecution.

<sup>63</sup> NATIONAL COMMITTEE, *supra* note 61.

<sup>64</sup> Justice Felix Frankfurter used the term dignity in 1943 as part of the rationale for requiring that those who are arrested are taken before the committing authority without delay in *McNabb v. United States*, 318 U.S. 332, 343 (1943) (“The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”) He also used the term in his concurring opinion in *Glasser v. United States*, 315 U.S. 60, 89 (1942), involving a defendant’s Sixth Amendment rights: “Whether their [the Bill of Rights] safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances.” (Frankfurter, J., concurring).

<sup>65</sup> Justice Brennan, after serving in World War II as an Army Judge, served as a judge in New Jersey courts before joining the Supreme Court in 1956. He was Catholic, as was Justice Frank Murphy who relied heavily on human dignity in his decision-making. See Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. ST. L. REV. 665 (2013). According to Leslie Meltzer Henry, Brennan “invoked ‘dignity’ in an astounding thirty-nine opinions during his tenure on the Court.” Henry, *supra* note 16, at 171; See Berger, *supra* note 51; Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998).

<sup>66</sup> See Henry, *supra* note 16 (comparing frequency of use of the concept).

<sup>67</sup> Eberle, *supra* note 11, at 971; See Barroso, *supra* note 11.

In 1946 and 1947, the German states of West Germany included human dignity as an integral part of their initial constitutions. The initial draft of the Basic Law of 1949 contained the following text for the state's constitution: "The dignity of the human personality is inviolable. All public authorities are obliged to respect and protect human dignity."<sup>68</sup> As amended, the final version of the Basic Law, adopted on May 23, 1949, stated as follows: "The dignity of man is inviolable. To respect and protect it is the duty of all state authority."<sup>69</sup>

The German constitutional architecture differs from that of the United States. When Germany reunified in 1990, the Basic Law, which its drafters meant as a temporary fix for West Germany until a permanent constitution could be drafted, became the foundational legal document.<sup>70</sup> German law provides value-oriented priorities of rights, with human dignity weighing most heavily.<sup>71</sup> The purpose of this hierarchy was to emphasize those values under German law that, in Nazism's shadow, would "restore the centrality of humanity to the social order, and thereby secure a stable democratic society..."<sup>72</sup> The drafters focused on natural law to ensure that certain objectively ordered principles "were not to be sacrificed for the exigencies of the day, as had been the case during the Nazi era."<sup>73</sup> As such, unlike in the United States where human dignity suffers the indignity of being an unnamed value, human dignity enjoys an express role in German constitutional jurisprudence.<sup>74</sup>

The German Basic Law contains both objective and subjective rights; the objective rights *obligate* the government "to realize in society the set of objective values embodied in the Basic Law."<sup>75</sup> Accordingly, the state has

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<sup>68</sup> Ariel L. Bendor & Michael Sachs, *The Constitutional Status of Human Dignity in Germany and Israel*, 44 ISR. L. REV. 25, 28 (2011).

<sup>69</sup> *The Basic Law of Germany*, available at [www.bundestag.de/blueprint/servlet/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](http://www.bundestag.de/blueprint/servlet/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf); Christoph Goos, *Restoring Human Dignity in Post-Nazi Germany*, in HUMAN DIGNITY. As amended in December 1993, Article (1) reads, "Human dignity is inviolable. To respect and protect it is the duty of all state authority."

<sup>70</sup> Ernest Benda, *Fifty Years of German Basic Law The New Departure for Germany: the Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMUL. REV. 443, 445 (2000); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value*, 78 TUL. L. REV. 1549, 1552 (2004).

<sup>71</sup> Krotoszynski, *supra* note 71, at 1156.

<sup>72</sup> *Id.* (quoting Eberle, *supra* note 11); Benda, *supra* note 1, at 445 ("The Basic Law of 1949 was obviously an answer to the system of National Socialism.").

<sup>73</sup> Marc Chase McCallister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 496 (2004) (citing EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES (2002)).

<sup>74</sup> Eberle's articles identify differences and similarities with regard to privacy issues and equality stemming from Germany's treatment of human dignity as a fundamental constitutional value. See Eberle, *supra* notes 11, 15.

<sup>75</sup> Eberle, *supra* note 11, at 968.

affirmative obligations to secure certain rights.<sup>76</sup> German constitutional rights are also subjective (individuals may exercise these), for example, creating for German citizens a sphere of privacy that the government must not infringe upon.<sup>77</sup>

Germany's Federal Constitutional Court ("Bundesverfassungsgericht") (hereinafter "the Court") has authority to act as the "final arbiter of the Constitution."<sup>78</sup> All courts within the German court system must refer a case to the Court if the dispute involves a potential violation of the Basic Law.<sup>79</sup> The Court may review all constitutional aspects of a statute, not just those involved in a specific dispute; it may also play "an informal, consultative role when the parliament is considering new legislation."<sup>80</sup>

The European Convention on Human Rights ("ECHR") and the European Union's Charter of Fundamental Rights, both of which require member states to comply with certain human rights, also influence German law.<sup>81</sup> Thus, as one commentator has noted, "member states like Germany are subject to two constitutional orders: European and national."<sup>82</sup> Although the ECHR does not mention human dignity,<sup>83</sup> the European Court of Human Rights has ruled the "very essence of the Convention is the respect for human dignity and human freedom,"<sup>84</sup> and the European Court has relied on human

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<sup>76</sup> See David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 9 GER. L.J., 2179, 2205 (2008). This social state concept is discussed in greater detail concerning the Abortion I decision below where the Court determined the government must protect the interests of the fetus against deprivations of its constitutional right to life.

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

<sup>78</sup> DONALD P. KOMMERS AND RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (3d ed. 2012); Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact of Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. COMP. & INT'L L. 111, 134 (2003).

<sup>79</sup> Boyne, *supra* note 78, at 110.

<sup>80</sup> *Id.* The Court is divided into two senates—Senate One and Senate Two—each with exclusive jurisdiction and its own administrative personnel. KOMMERS & MILLER, *supra* note 78, at 18. Individuals or entities vested with constitutional rights may bring complaints to the Court after exhausting administrative remedies. Boyne, *supra* note 78, at 134. Oral arguments are rare in constitutional cases. *Id.* at 27.

<sup>81</sup> See Eberle, *supra* note 15, at 92.

<sup>82</sup> *Id.* at 92-93.

<sup>83</sup> See Jean-Paul Costa, *Human Dignity in the European Court of Human Rights*, in HUMAN DIGNITY ("[T]he very establishment of the Council of Europe in 1949 and the elaboration of the Convention, the first treaty prepared within its framework, were the work of persons firmly opposed to the atrocities and barbarity of the Second World War.") Other European treaties such as the Revised European Social Charter, the Convention on Human Rights and Biomedicine, and the European Charter of Fundamental Rights (part of the Lisbon Treaty) rely on human dignity as an underlying, core value. See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 105 (2011).

<sup>84</sup> Arthur Chaskalson, *Dignity as a Constitutional Value: A South African Perspective*, 26 AM. U. INT'L L. REV. 1377 (2011) (citing *S.W. v. United Kingdom*, 335 Eur. Ct. H.R. (ser. A) 28, para. 44 (1995)).

dignity in cases ranging from inhumane treatment as well as unequal treatment of women.<sup>85</sup>

According to commentators, human dignity under the German Basic Law equates with “inner freedom.”<sup>86</sup> This meaning, as well as the nature of protection arising from it, clearly derives from the Holocaust. As described in Part III, the Gestapo’s goal was to “break” the prisoners’ wills and spirits (many committed suicide rather than forego their dignity).<sup>87</sup> In response, drafters needed to protect “personhood” at all costs, as the Holocaust and Nazism arose from a lack of established democratic institutions and government to protect “personhood.”<sup>88</sup> “The designation of human dignity as the central value of the German legal order reflects the intention to elevate Germany beyond the inhumanity of Hitler Germany, with a view to ensuring the totalitarianism does not find ground in Germany *ever again*.”<sup>89</sup>

Others describe the meaning of human dignity as more similar to the commonly accepted American notion of dignity using the Kantian “object” formula.<sup>90</sup> For instance, in the 1977 *Life Imprisonment Case*, the Constitutional Court used the “object-formula” to strike down as unconstitutional a statute that required the penalty of life imprisonment without the possibility of parole for anyone who killed another out of wanton cruelty or to conceal another crime.<sup>91</sup> The Court emphasized the need to protect human dignity as follows: “The state cannot turn the offender into an object of crime prevention to the detriment of his or her constitutionally protected right to social worth and respect.”<sup>92</sup>

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<sup>85</sup> Eberle, *supra* note 15, at 131-32; McCrudden, *supra* note 42, at 28.

<sup>86</sup> Christoph Goos, *Restoring Human Dignity in Post-Nazi Germany*, in HUMAN DIGNITY.

<sup>87</sup> *Id.* at 88; See Eberle *supra* note 11, at 967 (“Seeking distance from the horrors of Nazism, the Basic Law made a sharp break from this immediate past, instead drawing deeply upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant.”).

<sup>88</sup> Goos, *supra* note 86.

<sup>89</sup> Rainer Ebert & Reginald M.J. Oduor, *The Concept of Human Dignity in German and Kenyan Constitutional Law*, THOUGHT AND PRACTICE: A JOURNAL OF THE PHILOSOPHICAL ASSOCIATION OF KENYA, VOL. 4 NO. 1, 43-73 (June 2012).

<sup>90</sup> McAllister, *supra* note 73, at 497 (“The drafters of the 1949 Basic Law drew heavily from the ideas of Immanuel Kant, who argued that one should never treat humans as objects of manipulation, but always as ends. Kant explicitly grounded this mandate in terms of human dignity, stating that “man regarded as a person... possesses... a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.”).

<sup>91</sup> Section 211 of the Penal Code at that time required a mandatory life sentence for anyone who “killed another out of wanton cruelty or to cover up some other criminal activity.” KOMMERS & MILLER, *supra* note 78, at 363. After the Court’s decision in *Life Imprisonment*, the Parliament amended the law to allow “courts to suspend a life sentence when the situation warranted the offender’s release from prison.” *Id.* at 368.

<sup>92</sup> The Court held the statute prescribing the mandatory life sentence had enough room for the adjudicator to use a proportionality assessment to determine if the life sentence was warranted to survive constitutional muster. *Id.* at 367-68; See Rao, *supra* note 25, at 212 (quoting *Life Imprisonment Case*, June 21, 1977, 45 BVerfGE 187 “The state strikes at the

As shown in this article, three *fundamental* differences arise when comparing human dignity as a constitutional value in these two jurisdictions, all three of which relate to the Holocaust. First, the German Court *consistently* relies on human dignity as the value ensuring citizens constitutional rights. The second difference is the value's gravitas. In Germany, it arose out of necessity, in response to a very particular need; the value stands on its own as that which protects citizens from various interferences and forms of ill-treatment. The value also requires the German government to provide a certain standard of living.<sup>93</sup> Third, because of Germany's Holocaust experience and need to ensure "never again," the concept of human dignity as part of the nation's jurisprudence gained a particular meaning to avoid the specific atrocities of that period—the degradation, dehumanization, and persecution of a particular group. The meaning emphasizes the "inner sphere" of freedom—that which the Nazis' fought to destroy in Jews during the Holocaust.

In American jurisprudence, human dignity as a constitutional value lacks the same consistency of application, gravitas, and meaning;<sup>94</sup> it arose as a value championed by certain justices, with its strongest period around the time of the Civil Rights movement.<sup>95</sup> In America's jurisprudence, the Court's reliance on human dignity as a constitutional value is spotty; certain justices rely on it to a substantial degree, while others fail to mention the concept. In American jurisprudence, the value underlies constitutional guarantees, rather than bearing its own weight.<sup>96</sup> The next section illustrates Nazis' deprivation of Jews' human dignity during the Holocaust to illuminate why human dignity has the strength, consistency, and meaning that it has under German law.

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very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom.”)

<sup>93</sup> KOMMERS & MILLER, *supra* note 78, at 60 (“In the German understanding, positive rights embrace not only a right to certain social needs, such as a right to a minimum standard of living, but also a right to the *effective* realization of certain personal liberties.”) (emphasis in original).

<sup>94</sup> Daly, *supra* note 14, at 414 (describing the Roberts Court's use of human dignity “as if dignity cannot carry its weight on its own.”).

<sup>95</sup> *Id.* at 398 (“It would not come as a surprise to anyone that the 1960s saw the first real flourishing of the concept of human dignity in Supreme Court jurisprudence, the most significant example of which is *Miranda v. Arizona*.”). In America, the Holocaust certainly motivated many leaders to act with regard to civil rights for African Americans. Rabbi Joachim Prinz, once a prominent rabbi in Berlin, escaped the Holocaust to the United States in 1937, where he became active in the Civil Rights movement. He helped organize the 1963 March on Washington, during which Prinz spoke immediately before Dr. Martin Luther King, describing his role as a rabbi in Berlin under the Hitler regime, saying, “[t]he most urgent, the most disgraceful, the most shameful and the most tragic problem is silence.” Joachim Prinz, *available at* <http://www.joachimprinz.com/index.htm> (last visited Nov. 28, 2014).

<sup>96</sup> Daly, *supra* note 14, at 414 (describing the Roberts Court's use of human dignity “as if dignity cannot carry its weight on its own.”).

### III. THE NAZIS DELIBERATELY STRIPPED VICTIMS OF THEIR HUMAN DIGNITY DURING THE HOLOCAUST

Accounts of Holocaust atrocities routinely emphasize the Nazis' deliberate stripping of Jews' human dignity both in the pre-war period, with the Nuremberg Laws beginning in 1935, and with the pogroms, ghettos, and concentration camps during the years 1938-1945.<sup>97</sup> One of the most pernicious features of the Holocaust was the deliberate, public degradation of the Jews, which, according to some and as discussed below, helped facilitate the Final Solution.<sup>98</sup> Israeli author Ze'ev Sternhell,<sup>99</sup> summarized this disregard for the Jews' humanity as follows: "In the world of the Holocaust, Jews had no dignity. Jews were human powder, human dust. They were shot as dogs and cats were never shot. They were treated worse than animals."<sup>100</sup> With regard to the Holocaust, two primary themes emerge involving human dignity: the Nazis' treatment of the Jews reflected utter disregard for their victims' humanity and potential for suffering—the Nazis viewed and treated victims as subhuman,<sup>101</sup> and, second, the Nazis' discriminated against Jews based on a fixed and arbitrary attribute, their religion.

Nazis brutalized the Jews throughout the entire time period of the Holocaust from 1933–1945<sup>102</sup> by deliberately and severely degrading and humiliating them. Arguably, much of this was done in public so the German population would "bear witness" to the degradation.<sup>103</sup> During the mid-30s,

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<sup>97</sup> This article is not meant to suggest that deprivation of human dignity of a group based on a fixed attribute was limited to Nazis' treatment of Holocaust victims. In *Plantations and Death Camps*, historical theologian Beverly Mitchell describes the compelling similarities between slavery in America and the Holocaust in terms of persecutors' treatment of victims. See BEVERLY EILEEN MITCHELL, *PLANTATIONS AND DEATH CAMPS, RELIGION, IDEOLOGY, AND HUMAN DIGNITY* (2009).

<sup>98</sup> See Peter Loewenberg, *The Kristallnacht as a Public Degradation Ritual*, available at <http://leobaecck.oxfordjournals.org> (opining the Nazis' public humiliation and depersonalization of Jews was what allowed the Third Reich to facilitate the Final Solution).

<sup>99</sup> ARI SHAVIT, *MY PROMISED LAND* 139 (2013). Shavit describes how Sternhell, whose family perished in the Holocaust, survived by being raised Catholic.

<sup>100</sup> *Id.*

<sup>101</sup> I use the term "dehumanization" deliberately throughout the article because the definition—"to deprive of human qualities, personality, or spirit"—best captures what the Nazis sought to accomplish with regard to the Jews before the Final Solution. See MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/dehumanize>.

<sup>102</sup> Loosely, the progression went like this: discrimination and denying civil rights, pogroms, ghettoization, concentration camps, Final Solution. See Levin, *supra* note 6; DAWIDOWICZ, *supra* note 2.

<sup>103</sup> See Loewenberg, *supra* note 98.

Nazis confiscated the Jews' artwork, jewelry, and sacred objects<sup>104</sup> to undermine their honor.<sup>105</sup> German laws deprived Jews of their livelihoods, citizenship, and basic rights. Later, Germans forced Jews to wear yellow armbands to both identify and degrade them.<sup>106</sup> "Branding Jews publicly in this manner [with yellow armbands] furthered their already great humiliation; wearing such a visible target among such a hostile populace also caused Jews to feel great insecurity."<sup>107</sup> The beatings and physical abuse were certainly part of the humiliation. As one survivor noted, "[t]he most painful part of beatings is the insult which they imply."<sup>108</sup>

The Nazis routinely referred to Jews as animals—beasts or pigs.<sup>109</sup> Nazi propaganda showed Jews as animals, vermin, or monsters.<sup>110</sup> Recently, a German newspaper apologized after publishing a cartoon depicting Facebook founder Mark Zuckerberg as an octopus with a large, hooked nose, which reminded many of the Nazi era depictions of Jews in propaganda material.<sup>111</sup> German Jewish wine merchant Leopold Obermayer, after objecting

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<sup>104</sup> The Torah is the most sacred object in Jewish observance. If someone drops a Torah on the floor, the community must fast for a year. The Nazis stole, burned, and defiled Torahs to further denigrate the Jews. Ritual Objects, THE TORAH, THE SHERWIN MILLER MUSEUM OF JEWISH ART, available at

[http://jewishmuseum.net/?page\\_id=127#sthash.0AM8uZ7L.dpuf](http://jewishmuseum.net/?page_id=127#sthash.0AM8uZ7L.dpuf) ("When the Nazis were defeated, one of the world's greatest collections of Jewish art had been seized from the deported and murdered European Jews. After the war, the Government of Czechoslovakia used this material to organize one of the best Jewish museums in the world.").

<sup>105</sup> DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS 138 (1996).

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

<sup>107</sup> *Id.* See Philip Friedman, *The Jewish Badge and the Yellow Star*, in ROADS TO EXTINCTION: ESSAYS ON THE HOLOCAUST (Ada June Friedman ed., 1980) (describing the reaction of German scholar Dr. Herbert Morgen to the Jews of Eastern Europe wearing a yellow Star of David on their arms or backs, as follows: "As an external sign of belonging to their tribe the Jews carry—depending on the directive of the Landrat—a yellow Star of David or a yellow triangle or something like it on their breasts and back. The general impression one receives of this human mass is appalling. And one quietly arrives at the conclusion that one is dealing here with a completely degenerate, inferior part of human society.").

<sup>108</sup> VIKTOR E. FRANKL, MAN'S SEARCH FOR MEANING 24 (1959).

<sup>109</sup> See Loewenberg, *supra* note 98, at 309-23 (describing Jews as elks with hooked noses). In one Nazi propaganda film, *The Eternal Jew*, the Jews of Europe are repeatedly compared to a hoard of rats, which spread disease, etc...; Viktor Frankl describes a guard calling him a pig and swine and saying "you'll die like an animal." FRANKL, *supra* note 108, at 25.

<sup>110</sup> In *The Eternal Jew*, a propaganda movie produced by Goebbels, the audience sees rats emerging from a sewer, and then sees Jews in the Lodz Ghetto. The narrator says that, as rats are the vermin of the animal kingdom, Jews are the vermin of the human race and similarly spread disease, corruption, and destruction. See DAVID LIVINGSTONE SMITH, LESS THAN HUMAN: WHY WE Demean, ENslave, and EXTERMINATE OTHERS 139 (2012); SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS, Volume I, 100 (1997) (describing the scene of swarms of germ-carrying rats in *The Eternal Jew* as part of the discussion of Hitler's vision and description of his enemy—the Jews).

<sup>111</sup> Kate Lyons, *German Newspaper is Accused of Anti-Semitic Propaganda over Cartoon Depicting Mark Zuckerberg as Big-Nosed Octopus*, DAILY MAIL ONLINE, Feb. 25, 2014, <http://www.dailymail.co.uk/news/article-2567167/Caroon-German-newspaper-depicting->

to his mistreatment at Dachau, was told, “You are not a human being, you are a beast!” He was called a Jewish pig and then forced into an unlighted cell with arms tied behind his back. He was forced to urinate and defecate in his clothing.<sup>112</sup>

This deliberate dehumanization of Jews started long before the War. Laws aimed at discriminating against and persecuting Jews began in the early 1930s with the Law for the Restoration of the Professional Civil Service.<sup>113</sup> The Nuremberg Laws, passed in September 1935, “reduced the entire Jewish population of Germany to twentieth-century helots.”<sup>114</sup> The “Law Respecting Reich Citizenship of September 15, 1935,” provided that only persons of “German or related blood” could be German citizens (the law defined Jews negatively as someone ineligible for German citizenship), while the “Law for the Protection of German Blood and German Honor” prohibited marriage and sex between Jews and Germans.<sup>115</sup> By 1937, Jews lacked all civil rights and employment opportunities; they were no longer German citizens.<sup>116</sup>

During the pogroms of 1938, Nazis destroyed synagogues (every synagogue in Germany), vandalized Jewish businesses and dwellings, rounded up thousands of Jews to send to work camps, and injured or killed Jews.<sup>117</sup> During this period, the Nazis’ goal was to severely demean the Jews of Germany and Poland.<sup>118</sup> Commentators describe the systematic degradation of the Jews of Germany during the pogroms as the most significant feature of these reigns of terror. During Kristallnacht,<sup>119</sup> on November 9–10, 1938, Jewish

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Mark-Zuckerberg-octopus-taking-world-starkly-reminiscent-Nazi-anti-Semitic-propaganda.html. (“The nefarious Jew/octopus was a caricature deployed by Nazis. That was used pretty much as a staple by the Nazis in terms of their hateful campaign against the Jews in the 1930s. [An] exaggerated Jewish nose removes any question if this was unconscious anti-Semitism.”) (quoting Rabbi Abraham Cooper, Associate Dean of the Simon Wiesenthal Centre).

<sup>112</sup> FRIEDLANDER, *supra* note 110, at 114.

<sup>113</sup> LEVIN, *supra* note 6, at 60 (“On April 4, 1933, Jews were barred from civil service and public employment at all governmental levels—the first law specifically dealing with Jews.”).

<sup>114</sup> *Id.* at 68. A “helot” is a “member of a class of serfs in ancient Sparta.” See MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/helot>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 73.

<sup>117</sup> See Loewenberg, *supra* note 98 at 313..

<sup>118</sup> FRIEDLANDER, *supra* note 110, at 276.

<sup>119</sup> Kristallnacht (“The Night of Broken Glass”) was a pogrom that occurred allegedly in response to the assassination by a 17 year-old Jewish student, Hershl Grynszpan, of Ernst vom Rath, a German official after Grynszpan’s parents were expelled from Germany. During the pogrom, synagogues and over 7,000 Jewish businesses were destroyed by fire. Thousands of Jews were tortured and about 30,000 Jewish men were arrested and sent to Buchenwald, Dachau, and Sachsenhausen concentration camps. See DAWIDOWICZ, *supra* note 2, at 100-01; LEVIN, *supra* note 6, at 78.

men were made to march over prayer shawls,<sup>120</sup> read Mein Kampf, raise money to pay the government back for the destruction caused by the Nazis,<sup>121</sup> urinate in public,<sup>122</sup> and watch as Torah scrolls were desecrated and destroyed.<sup>123</sup> “The pogrom and the initiatives that immediately followed have quite rightly been called ‘a degradation ritual.’”<sup>124</sup>

Throughout this period before the Final Solution, German policies were aimed at making the Jews of Germany and Eastern Europe “socially dead,”<sup>125</sup> and separating them from society like a leper community. By perceiving Jews as socially dead, many Germans viewed them as “bereft of some essential human attributes and undeserving of essential social, civil, and legal protections. They do not believe that the socially dead are capable of being honorable.”<sup>126</sup> As a result of this perception, scholars posit the German population would not bestow any honor or respect on them, as they viewed them as inferior and not worthy of respect.<sup>127</sup> The “socially dead” idea directly relates to the Kantian “object” formula.<sup>128</sup> The socially dead are equal in status to objects, inferior to the prevailing group and having no value other than their objective – work or slavery.<sup>129</sup>

After Germany occupied Poland in September 1939, Jews were forced into ghettos under the governance of German civil authorities. “The marking of Jews with the Jewish star, restrictions on their movement, confiscation of their property, conscription into forced labor, and the establishment of Jewish Councils were completed within the first few months of [German] civil

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<sup>120</sup> Loewenberg, *supra* note 98, at 313 (“In Baden-Baden the Jewish men were marched through the city, then made to walk over prayer shawls, singing the Horst Wessel Lied twice. Dr. Arthur Flehinger reports that he was forced to read Mein Kampf aloud while being struck on the back of his neck. During the lull we all had to troop out into the courtyard to relieve ourselves.”).

<sup>121</sup> DAWIDOWICZ, *supra* note 2, at 38 (describing how on November 12, 1938, Goring imposed a one-billion-mark penalty on the Jews); MARION A. KAPLAN, BETWEEN DIGNITY AND DESPAIR 122 (1998).

<sup>122</sup> Loewenberg, *supra* note 98.

<sup>123</sup> FRIEDLANDER, *supra* note 110, at 278 (“A shouting SA man climbed to the roof, waving the rolls of the Torah: ‘Wipe your asses with it, Jews,’ he screamed while he hurled them like bands of confetti on Karnival.”).

<sup>124</sup> *Id.* at 277 (citing PETER LOEWENBERG, THE KRISTALLNACHT AS A PUBLIC DEGRADATION RITUAL).

<sup>125</sup> GOLDHAGEN, *supra* note 105, *but see* CLAUDIA CARD, CONFRONTING EVILS, TORTURE, GENOCIDE, 262 (2010) (noting that the view that Jews were “socially dead” during the Holocaust is controversial as some believe the Holocaust did not natally alienate Jews, who still had strong family and cultural ties.) This term is often used to describe slaves. Orlando Patterson used the term for the “violent domination of natally alienated and generally dishonored people.”

<sup>126</sup> GOLDHAGEN, *supra* note 105, at 168.

<sup>127</sup> *Id.*; Loewenberg, *supra* note 98 at 322 (“the Jews became, in the eyes of the Nazis and of many Germans, different people, or non-people”).

<sup>128</sup> *See* notes 43- 45 *supra* and accompanying text...

<sup>129</sup> GOLDHAGEN, *supra* note 105, at 169 (“Slaves are to be fed adequately and kept healthy, so that they can produce. Jews were purposely starved, so that they would weaken and die.”).

rule.”<sup>130</sup> By 1940, the Warsaw Ghetto (the largest ghetto in Europe during the war) imprisoned nearly half a million Jews within its walls.<sup>131</sup> As one commentator described, Jews were “tightly, almost hermetically, sealed...” within the stone or brick walls of the European ghettos.<sup>132</sup> Many Jews starved to death or died of typhus within the ghettos. The degradation of ghetto life came, in large part, from the complete loss of freedom and productivity, starvation,<sup>133</sup> and overcrowding.

Countless examples exist of Jews striving to maintain their dignity in the ghettos, despite unimaginable conditions. “The Germans expected the ghettos to disintegrate into dens of depraved criminals.”<sup>134</sup> However, those living in the ghettos engaged in learning, arts, and culture.<sup>135</sup> Zelig Kalmanovich, a Jewish scholar who lived and died in the Vilna Ghetto,<sup>136</sup> said “[h]istory will cherish your memory, people of the ghetto. Your least expression will be studied, your struggle for human dignity will inspire poems...”<sup>137</sup> Another commentator describes acts of courage and kindness in the ghettos: “Under unimaginable pressures, human values did not dissolve completely.”<sup>138</sup>

In the concentration camps, nudity,<sup>139</sup> starvation, beatings, shaved heads,<sup>140</sup> prison uniforms, and number tattoos (prisoners’ names were never used) all served as the Nazis’ means of deliberately dehumanizing<sup>141</sup> those in the camps. Arendt described this intentional deprivation as follows: “The real horror began, however, when the SS took over the administration of the camps. The old spontaneous bestiality gave way to an absolutely cold and

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<sup>130</sup> LEVIN, *supra* note 6 at 205.

<sup>131</sup> DAWIDOWICZ, *supra* note 2 at 289.

<sup>132</sup> *Id.* at 205.

<sup>133</sup> “German policy was to starve the Jews, and starvation stalked the great ghettos of the General government.” *Id.* at 289.

<sup>134</sup> LEVIN, *supra* note 6, at 225.

<sup>135</sup> *Id.*; STEVE LIPMAN, LAUGHTER IN HELL, THE USE OF HUMOR DURING THE HOLOCAUST 149- 151 (1991).

<sup>136</sup> DAWIDOWICZ, *supra* note 2, at 175.

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

<sup>138</sup> *Id.* at 224.

<sup>139</sup> “The gender-specific humiliation of women forced to undress in front of strange men is also noted in the diaries and memoirs of their husbands, fathers and sons, who were also distraught at the intentional degradation and mortification of their women. While men refer to the trauma of their own undressing and processing when they were inducted into the concentration camps, or previously in home searches in the ghettos, they describe the shock of their forced nakedness and the crisis of being stripped of their identity, individuality and personhood.” WOMEN IN THE HOLOCAUST, *available at* <http://jwa.org/encyclopedia/article/women-in-holocaust>.

<sup>140</sup> GOLDHAGEN, *supra* note 105, at 175 (“[T]he Germans typically sheared the inmates’ hair, making them more of an indistinguishable mass.”).

<sup>141</sup> Miriam Webster defines dehumanize as “to deprive of human qualities, personality, or spirit.” *See supra* note 101.

systematic destruction of human bodies, calculated to destroy human dignity.”<sup>142</sup> In Auschwitz, the Nazis never used prisoners’ names—“the mark of humanity,” instead tattooing each with a number to serve as their only form of identification.<sup>143</sup> The Nazis dehumanized their victims so that the Jews would match the Nazis’ perception of the Jews as subhuman.<sup>144</sup>

Having arrived at a concentration camp and been unloaded from the cattle trucks, men and women were separated, children staying with their mothers. After registration, prisoners had to undress and have their hair shaved before showering. They usually had their own clothing taken away, which would be replaced by a striped uniform. This process was designed to remove any remnants of human dignity or personal identity.<sup>145</sup>

Again, concentration camp survivors describe examples of attempts to retain some dignity, often through studying, caring for others, sharing food, and maintaining religious observance.<sup>146</sup> Viktor Frankl, in describing men in the camp giving away their only food and comforting others, explained the one (and only) thing the Nazis could not destroy—“the last of the human freedoms – to choose one’s attitude in any given set of circumstances, to choose one’s own way.”<sup>147</sup> This inner freedom plays a key role in the German conception of human dignity under the Basic Law.

The Holocaust is certainly not the only historical event that involves the themes described herein: deliberate degradation of a mass group(s) of victims identifiable by a fixed characteristic. Genocide<sup>148</sup> in Darfur and Sudan are obvious examples.<sup>149</sup> In addition, Beverly Mitchell<sup>150</sup> describes how slavery in the United States involved many of the same assaults on human dignity as

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<sup>142</sup> ARENDT, *supra* note 1, at 454.

<sup>143</sup> GOLDHAGEN, *supra* note 105, at 176.

<sup>144</sup> *Id.* at 174-75.

<sup>145</sup> *Processing and Routines*, THE HOLOCAUST EXPLAINED, <http://www.theholocaustexplained.org/ks3/the-camps/daily-life/processing-and-routines/#.U6joxI1dUSh> (last visited Nov. 26, 2104).

<sup>146</sup> See KAPLAN, *supra* note 121 (describing the myriad ways in which the Jews of Nazi Germany attempted to maintain their dignity).

<sup>147</sup> FRANKL, *supra* note 108, at 66.

<sup>148</sup> The 1948 UN *Convention on the Prevention and Punishment of the Crime of Genocide* defines genocide as acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” “While genocide is almost always accompanied by mass killing, this crime is an attempt to destroy the group, not necessarily to murder every member of that group. Some call genocide ‘the crime of crimes.’ Others label genocide as the ultimate crime against humanity because the aim of genocide is to eradicate a part of humanity.” Definition of Genocide in United Nations working paper *available at* [http://www.un.org/en/holocaustremembrance/EWG\\_Holocaust\\_and\\_Other\\_Genocides.pdf](http://www.un.org/en/holocaustremembrance/EWG_Holocaust_and_Other_Genocides.pdf).

<sup>149</sup> See William L. Saunders Jr. & Yuri G. Mantilla, *Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan*, 51 CATH. U. L. REV. 715 (2002).

<sup>150</sup> MITCHELL, *supra* note 97, at 106.

the Holocaust and involved persecution based on a single attribute.<sup>151</sup> Some have distinguished the Holocaust from slavery based on the perpetrators' treatment of slaves as "human capital"; thus slave owners took some care with the slaves to ensure their ability to work.<sup>152</sup> With Jews during the Holocaust, on the other hand, a concentration camp survivor described prisoners as "a bit of sandpaper which, rubbed a few times, becomes useless and is thrown away to be burned with the garbage."<sup>153</sup>

William Parent summarizes the Nazis' assault on their victims' dignity as follows:

The Nazis despised the Jews (as well as homosexuals, the retarded, and the physically weak), and their systematic deprecation of an entire class of people should strike a responsive chord in the hearts of all people committed to the ideal of human dignity.<sup>154</sup>

The next two sections describe opposite sides of the human dignity coin. The first identifies a paradox concerning human dignity—showing how Nazis and other groups have used the concept, linking it with honor, to "level up" those who share attributes with the governing group (and thus demeaning those who do not share the attributes). The final section of the article shows the other side of human dignity—how German and American courts have relied on the concept to advance human dignity, treating the value as intrinsic to all human beings.

#### IV. THE HUMAN DIGNITY PARADOX: NAZIS USED THE CONCEPT OF HUMAN DIGNITY—EQUATED WITH HONOR—TO PROMOTE NAZISM AND FASCISM

Although this article is premised on the notion that human dignity came to the foreground as a constitutional right or value because of the Holocaust and World War II, the underlying principle of human dignity *as honor* was a driving force in Germany both before and during the war. Philosophers, both German and American, discussed human dignity long before the war,<sup>155</sup> and Judeo-Christian philosophers also identified human dignity as a foundational principle. Both the Catholic Catechism and Judaism teach that individuals have dignity because they are created in G-d's image.<sup>156</sup>

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<sup>151</sup> *Id.*; See Parent, *supra* note 36, at 60 ("It is most revealing, from a philosophical standpoint, to realize that the oppression and murder of Jews under Hitler had its origin in the same kind of contemptuous attitude that marked the practices of slavery and segregation in America."); See also Bernard R. Boxill, *Dignity, Slavery, and the Thirteenth Amendment in THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 30.

<sup>152</sup> BENJAMIN B. FERENCZ, *LESS THAN SLAVES* (1979).

<sup>153</sup> *Id.*

<sup>154</sup> Parent, *supra* note 36, at 60.

<sup>155</sup> See McCrudden *supra* note 42; See Glensy, *supra* note 83, at 77 (discussing the history of the term dignity states, "Thomas Paine eloquently invoked the 'natural dignity of man' as the reason to protect individual rights that transcend authoritative rule.").

<sup>156</sup> *Id.*; See Glensy, *supra* note 83, at 76; *Genesis* 1:26-27.

Human dignity as honor (in an honor-based culture) means something very different from human dignity as the drafters of the Universal Declaration of Human Rights envisioned it, to mean the intrinsic worth of every person as a “fundamental, egalitarian, humanistic value.”<sup>157</sup> Regarding Israeli law’s conception of human dignity, Dr. Orit Kalder describes how Zionism began as an honor culture, “stressing national Jewish power and ‘masculine’ militant honor” and has shifted over time to a more dignity-based culture, with dignity in the sense described above.<sup>158</sup> Arguably, as described here, Nazism reflected and capitalized on Germany’s honor-based culture, while, after the war, the drafters of the Basic Law deliberately adopted a different conception of human dignity—the one found in the Universal Declaration of Human Rights.

Keeping this distinction between types of human dignity in mind, with one tied directly to the idea of honor, commentators describe how in Germany, “contemporary German institutions of dignity have a Nazi history.”<sup>159</sup> But, this history is not in the sense of rights arising out of the horrors of the Holocaust but rather dignity arising as part of the fascist ideology. James Whitman describes the Nazi’s conception of human dignity as a part of the ideology of the socialist regime:

The Nazi regime, like other fascist regimes, made great efforts to proclaim the importance of “honor”—and most especially the importance of the honor of low-status persons, as long as they were racially German.<sup>160</sup>

The Nazis used the concept of human dignity as a vehicle for “leveling-up” lower class members of the German population (as long as they were racially German).<sup>161</sup> “The uncomfortable paradox...” Whitman asserts, “is that much of this leveling up took place during the fascist period, for fascist politics involved precisely the promise that all members of the nation-state

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<sup>157</sup> Orit Kamir, *Honor and Dignity Cultures: the Case of Kavod and Kvod ha-adam in Israeli Society and Law*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002), available at [http://sitemaker.umich.edu/Orit\\_Kamir/files/dignity99.pdf](http://sitemaker.umich.edu/Orit_Kamir/files/dignity99.pdf).

<sup>158</sup> *Id.* at 4; In an honor-based culture, dignity arises out of feelings of guilt and degradation, as experienced in the forming of the State of Israel by the refugees from Eastern Europe and Holocaust survivors. Even those not in the Holocaust felt shame and guilt over the way Jews had been degraded in Europe. “Zionism transformed pain, widely felt by European Jews as a result of the continuous assault on their dignity and human rights, into anger in the context of national honor.” *Id.* at 17.

<sup>159</sup> Whitman, *supra* note 43, at 1187.

<sup>160</sup> *Id.* at 1187-88 (“Of course the insistence on honor for Germans was paired with the insistence on the dishonor of others – of persons who were ‘sick or foreign’”).

<sup>161</sup> *Id.*

would be equal in ‘honor’...,”<sup>162</sup> making all racially pure German “masters.”<sup>163</sup>

The Nazi doctrine of National Socialism in Germany relied heavily on racialism. “The original ‘pure’ concept held that only the ‘uncontaminated’ population between the Elbe and Weser rivers were ‘pure Nordic Germans’: these were to constitute the elite leadership and eventually provide the sold population of Germany.”<sup>164</sup> The racial definition was expanded to include all Germans, “Mediterranean Italians and Oriental Japanese.”<sup>165</sup> The definition of “German” continued to expand, except for Jews (and gypsies, homosexuals, etc...) who continued as the inferior race, contaminating the superior German race.<sup>166</sup> The Nuremberg Laws, which discriminated against the Jews in employment and all civil rights, contained detailed definitions of what constituted a German or of German descent—based on the notion of equal honor and respect for all Germans, which excluded those of an inferior race.<sup>167</sup>

Human dignity as it relates to advancing nationalism is not unique to Nazi Germany, nor is the paradox of human dignity as both advancing the cause of nationals and oppressing non-nationals. Herbert Kelman describes the human dignity/nationalism paradox this way: for nations to truly ensure the human dignity of their citizens based on a nationalistic ideology, the nations must yield some of their national sovereignty to global concerns and must cater to ethnic divisions within the population.<sup>168</sup> “Thus the ideology of the nation-state, by insisting that the task of meeting the needs and interests of the population must be entrusted to the unit that reflects their national identity, becomes dysfunctional ... .”<sup>169</sup>

Germany deliberately adopted “a constitution of dignity” in response to the war.<sup>170</sup> As shown below, the Holocaust not only motivated the West German drafters to include the concept of human dignity but also shaped

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<sup>162</sup> *Id.* at 1166.

<sup>163</sup> *Id.*; Whitman refers to notions of privacy and personality under German law as fitting with the “revolution of leveling up.” *Id.* at 1169.

<sup>164</sup> LEVIN, *supra* note 6, at 37.

<sup>165</sup> *Id.* at 37.

<sup>166</sup> *Id.* at 60. Nora Levin also describes how the Nazis defined Aryan as part of laws and regulations prohibiting Jews from civil service and public employment. The regulations relied on the definition of people of non-Aryan descent as “someone who had one Jewish parent or Jewish grandparent.”

<sup>167</sup> *Id.*

<sup>168</sup> Herbert C. Kelman, *Nationalism, Patriotism, and National Identity: Social-Psychological Dimensions*, in PATRIOTISM IN THE LIVES OF INDIVIDUALS AND NATIONS, (Daniel Bar-Tal and Ervin Staub eds., 1997).

<sup>169</sup> *Id.* at 187.

<sup>170</sup> Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT’L L. 1, 18 (2008); See Kamir, *supra* note 157, at 12 (contending Germany shifted its concept of dignity as a reaction to Hitler). He contends that Israel made this deliberate shift with the law in the 1990s and in the Courts in the 1980s.

the *nature* of human dignity as the preeminent value underlying German constitutional law.

V. THE HOLOCAUST SHAPED THE *NATURE* OF HUMAN DIGNITY AS REFLECTED IN GERMAN CONSTITUTIONAL JURISPRUDENCE WHILE HUMAN DIGNITY IN AMERICAN JURISPRUDENCE AROSE AS A VALUE CHAMPIONED BY CERTAIN JUSTICES IN CONNECTION WITH INTERNATIONAL HUMAN RIGHTS

This section views the constitutional jurisprudence of Germany and America in the shadow of the Holocaust, using this lens to explore four areas: privacy/freedom of personality, equality, criminal law protections, and free speech.<sup>171</sup> At the outset, a difference exists when comparing the two because the German Basic Law is deliberately values-oriented with human dignity at its core, unlike the United States Constitution, which does not even mention the term. Germans “commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights, and duties.”<sup>172</sup> By contrast, in American jurisprudence certain justices have treated human dignity as a value underlying express (and implied) constitutional guarantees, but they have applied the value inconsistently both in terms of strength and meaning.<sup>173</sup>

At the same time, a substantial difference exists between the nations’ jurisprudence because Germany’s concept of human dignity is motivated by the Holocaust and ensuring “never again.”<sup>174</sup> The Holocaust shapes *the nature* of human dignity in German constitutional jurisprudence, revealing the concept is weightier (has more substance and consistency) because of this motivation. To that end, under German law human dignity protects an inner sphere of freedom hardly acknowledged in American jurisprudence. In American law, other values have alighted to the foreground based on historic and cultural motivations, leaving human dignity as a value justices use only to bolster constitutional guarantees.

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<sup>171</sup> I chose these four areas as a fairly random sampling of areas of constitutional jurisprudence. Other areas of interest, not included because of space constraints, would be the right to die and right to economic assistance.

<sup>172</sup> Rao, *supra* note 25, at 219.

<sup>173</sup> See Goodman, *supra* note 37; See Daly, *supra* note 14, at 417 (discussing *Indiana v. Edwards*, 554 U.S. 164 (2008), which Daly describes as the first case in which the justices struggle to identify the specific meaning of the value; Justice Scalia describes the meaning as “the supreme human dignity of being master of one’s fate rather than a ward of the State—the dignity of individual choice.” *Edwards*, 554 U.S. at 186-87).

<sup>174</sup> This does not necessarily present *another* distinction when comparing German and American constitutional jurisprudence because arguably the German Basic Law is a values-oriented constitution because the Holocaust informs Germany’s jurisprudence.

A. PRIVACY/RIGHT OF PERSONALITY:

Comparing privacy jurisprudence of America and Germany illustrates a major distinction in conceptions of human dignity: for Germans, human dignity means inner freedom and freedom to develop one's personality,<sup>175</sup> while in America, privacy equates with liberty—freedom from government intrusion—and autonomy—freedom to choose.<sup>176</sup> This section looks at privacy issues relating to marriage, abortion, and contraception.

In American constitutional jurisprudence, human dignity enjoys a robust, though implicit, role in cases involving marriage, procreation, contraception, and other intimate matters engaging the Due Process Clause of the Fourteenth Amendment.<sup>177</sup> Although the Constitution does not mention privacy, the Supreme Court has found an implied right to privacy, based, in part, on human dignity. Beginning in the 1960s with *Griswold v. Connecticut*,<sup>178</sup> which involved the dispensing or use of birth control devices, and *Eisenstadt v. Baird*<sup>179</sup> in the 1970s, and coming to the forefront fairly recently in *Lawrence v. Texas*,<sup>180</sup> the Supreme Court has treated human dignity as a value linked directly to liberty, granting individuals protection against unwarranted government intrusion in their homes, bedrooms, and private affairs between consenting adults. In *Lawrence*,<sup>181</sup> Justice Kennedy relied on human dignity when describing how the Texas anti-sodomy law at issue demeaned those subject to its prohibition.<sup>182</sup> The Court overturned *Bowers v. Hardwick*,<sup>183</sup> holding that a Texas law prohibiting homosexual

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<sup>175</sup> See Eberle, *supra* note 11.

<sup>176</sup> *Id.*

<sup>177</sup> The Amendment provides in part that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend IV.

<sup>178</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Court first recognized the right to personal privacy under the Fourth and Fifth Amendments, made applicable to the states by the Fourteenth Amendment. The Court ruled unconstitutional a Connecticut statute prohibiting the dispensing or use of birth control devices to or by married couples. In an opinion by Justice Douglas, the Court relied on “penumbras” emanating from the specific guarantees of the Bill of Rights. The opinion emphasized the sanctity of marriage, stating, “[w]e deal with a right of privacy older than the Bill of Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” *Id.* at 486.

<sup>179</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (establishing the right of unmarried people to possess contraceptives).

<sup>180</sup> *Lawrence v. Texas*, 539 US 558 (2003).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 575-78 (Justice Kennedy discusses the stigma “all that imports for the dignity of the persons charged.” “The State cannot demean their existence or control their destiny by making their private conduct a crime.”).

<sup>183</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

sodomy violated the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy described the privacy interest at stake as follows: “It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>184</sup>

With regard to abortion,<sup>185</sup> in 1992, in revisiting its abortion jurisprudence from *Roe v. Wade*,<sup>186</sup> the Court in *Planned Parenthood v. Casey*,<sup>187</sup> described a woman’s right to choose as follows:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, its meaning, of the universe, and of the mystery of human life.<sup>188</sup>

Justice Stevens, concurring in part and dissenting in part in the opinion, described a woman’s “authority” to choose whether to have an abortion as “an element of basic human dignity.”<sup>189</sup>

Commentators note the “intertwining nature of dignity, liberty, and privacy”<sup>190</sup> in these cases. American jurisprudence *implicitly* reflects some nexus between indignities suffered by Holocaust victims relating to their loss of freedom, free will, and privacy and the protections afforded under this jurisprudence. As Erin Daly notes, “[t]his notion of dignity as protection against forced surrender of control over the course of one’s life is consistent with the global jurisprudence that equates dignity with autonomy.”<sup>191</sup>

In Germany, privacy protection (also known as protection of personality), arising largely under Basic Laws, Articles 1 and 2,<sup>192</sup> allows for “a con-

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<sup>184</sup> *Id.* at 567.

<sup>185</sup> Commentators have compared abortion to the Holocaust. See WILLIAM BRENNAN, ABORTION HOLOCAUST (1983); *But see* Ellen Goodman, *Reserve Words about Nazis for the Reich*, HARTFORD COURANT, June 6, 1995, A9 (1995); Robert G. Weisbrod, *Legalized Abortion and the Holocaust*, THE JEWISH VETERAN, Jan.-Mar. 1982.

<sup>186</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>187</sup> *Planned Parenthood v. Casey* 505 U.S. 833 (1992) (plurality opinion) (reaffirming *Roe*’s basic holding, yet holding the legislature could constitutionally limit the right to abortion).

<sup>188</sup> *Id.* at 851 (plurality opinion).

<sup>189</sup> *Id.* at 916 (Stevens, J., concurring in part, dissenting in part).

<sup>190</sup> Daly, *supra* note 14; See Rao, *supra* note 25, at 204 (“Individual liberty and freedom from interference emphasize the primacy of the individual, a being who chooses his own life. When courts invoke dignity in the context of holding off the government, they are invoking the idea that dignity rests in individual agency, the ability to choose without state interference.”).

<sup>191</sup> Daly, *supra* note 14, at 422.

<sup>192</sup> The right to privacy comes from four constitutional provisions: Article 1 of the Basic Law which provides the inviolability of human dignity; Article 2(1)’s right to personality; the privacy of posts and telecommunications under Article 10, and Article 13’s guarantee of inviolability of the home.

stitutionally protected inner sphere of privacy, or an ultimate domain of inviolability, in which persons are free to shape their lives as they see fit.”<sup>193</sup> The law also protects an “outer sphere” of privacy, which relates primarily to activities like “traveling abroad, engaging in the sport of falconry, or horse riding in the woods,....”<sup>194</sup> In Germany, the privacy guarantee primarily involves the “inner sphere”—a person’s inner freedom of personality, rather than the American concern with privacy, as it relates to non-interference with family and other intimate matters.<sup>195</sup> Germany’s Court “has constructed an affirmative obligation on the part of the state to create the conditions that foster and uphold this privacy sphere.”<sup>196</sup>

The right to personality in Article 2(1) is inextricably linked to the inviolability of human dignity,<sup>197</sup> and the right protects both freedom of action and a personal sphere that includes privacy, informational self-determination, and control over one’s reputation.<sup>198</sup> One commentator describes the right of personality this way:

The constitutional right of personality basically allows the individual to control her interactions with society and the manner in which society perceives her. This includes, among other aspects, what Anglo-American jurists label the right to privacy and the right to reputation. Since Article 1 requires all state organs not merely to respect, but also positively protect human dignity, the right of personality is enforceable against private persons and entities and not only against the authorities.<sup>199</sup>

The inner-sphere of personality protection is more robust than the outer sphere under German Law.<sup>200</sup>

The German protection of one’s personality includes controlling access to personal information. Eberle describes “the novel concept of informational self-determination” as allowing for personal control over “such matters as how to present one’s self in society, including control over one’s words, images, portraits, reputation, and critically in the computer age, control over access to and use of personal information.”<sup>201</sup> To that end, in the *Census Act Case* of 1983,<sup>202</sup> the Court discussed the bounds of the right of informational self-determination with regard to a statutory provision that

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<sup>193</sup> KOMMERS & MILLER, *supra* note 78, at 405.

<sup>194</sup> Eberle, *supra* note 170, at 24.

<sup>195</sup> Eberle, *supra* note 11, at 980.

<sup>196</sup> Nicole Jacoby, *Redefining the Right to be Let Alone: Privacy Rights and the Constitutionality of Technical Surveillance Measures in Germany and the United States*, 35 GA. J. INT’L & COMP. L. 433 (2007).

<sup>197</sup> KOMMERS & MILLER, *supra* note 78, at 355.

<sup>198</sup> Eberle, *supra* note 11, at 967.

<sup>199</sup> Elad Peled, *The Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 735, 770 (2012).

<sup>200</sup> See Eberle, *supra* note 11, at 971.

<sup>201</sup> *Id.*

<sup>202</sup> *Census Act Case*, 65 BVerfGE 1; KOMMERS & MILLER, *supra* note 78, at 408.

required citizens to provide such information as their mode of getting to and from work, occupation, and work hours. Relying on Basic Law Articles 1(1) and 2(1), the Court held it must protect the individual “from the unlimited collection, storage, use, and transmission of personal data as a condition for free personality development under modern conditions of data processing.”<sup>203</sup>

In positing that the drafters of Article I meant “inner freedom” when declaring the inviolability of human dignity, Christoph Goos contends the framers were informed by experiences of Holocaust survivors.<sup>204</sup> Goos describes how Viktor Frankl<sup>205</sup> reported that in concentration camps “the last vestiges of personality were erased there.”<sup>206</sup> Goos also provides the German philosopher’s description of Nazi camps as “institutions of desubjectification.” Frankl described the struggle to maintain inner freedom in the camps as follows:

Every day, every hour, offered the opportunity to make a decision, a decision which determined whether you would or would not submit to those powers which threatened to rob you of your very self, your inner freedom; which determined whether or not you would become the plaything of circumstance, renouncing freedom and dignity to become molded into the form of the typical inmate.<sup>207</sup>

From survivor and other accounts and historical documents relating to the drafting of Article I, Goos concludes the German Basic Law Article I focuses specifically on that which had proven so vulnerable to Holocaust victims—inner freedom—the inner component of the human personality.<sup>208</sup>

In *Lebach*,<sup>209</sup> complainant was convicted as an accessory to an armed robbery; the case attracted a good deal of media attention. After complainant completed his sentence, a German television station sought to present a documentary showing his photograph, identifying him by name, and describing personal details about him. He sued to enjoin the broadcast based on his right of personality and human dignity. In agreeing that his privacy

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<sup>203</sup> Eberle, *supra* note 11, at 1000. As Eberle notes, the Court’s concern here hearkens back to Kant and the “danger of converting human beings into mere objects of statistical survey, depersonalizing the human element.” The Court upheld the constitutionality of certain of the requirements, striking down three provisions, including one that allowed for comparisons between local housing registries and census data because that information might allow authorities to identify particular individuals; KOMMERS & MILLER, *supra* note 78, at 411.

<sup>204</sup> Goos contends it was not so much the influence of Kantian and Catholic thought that led to the inclusion of this provision. Goos, *supra* note 86, at 92.

<sup>205</sup> *Id.* at 88; William Parent also describes the experiences of Viktor Frankl in his article on human dignity. Parent, *supra* note 36.

<sup>206</sup> Goos, *supra* note 86, at 88.

<sup>207</sup> VIKTOR E. FRANKL, *MAN’S SEARCH FOR MEANING* (1959), available at <http://www.pbs.org/wbgh/questionofgod/voices/frankl.html>.

<sup>208</sup> Goos, *supra* note 86, at 92; *But see* Whitman, *supra* note 43.

<sup>209</sup> *Lebach*, 35 BVerfGE 202 (1973); KOMMERS & MILLER, *supra* note 78, at 479-83.

interests outweighed the freedom of expression concerns, the Court talked about protecting the complainant's inner sphere: "The rights to the free development of one's personality and human dignity secure for everyone an autonomous sphere in which to shape one's private life by developing and protecting one's individuality." In discussing proportionality, the Court explained that once the public's interest in the crime subsides with the passage of time, "the criminals' 'right to be left alone' fundamentally increases in importance...."<sup>210</sup>

German jurisprudence also reflects the communal norm of advancing the role of marriage and family,<sup>211</sup> while at the same time protecting the couple's intimate sphere of privacy. Basic Law article 6(1) protects marriage, stating, "Marriage and the family shall enjoy the special protection of the state."<sup>212</sup> In a case challenging a German statute requiring a couple to file a joint tax return if the woman earned money other than by a regular salary,<sup>213</sup> the Court calls article 6(1) "a value-setting fundamental norm"<sup>214</sup> that requires the state to protect marriage and family. In striking down the law, the Court held that it was unconstitutional as both a violation of women's equal rights and also the prohibition against impairing "the formation of the private marital sphere."<sup>215</sup>

With regard to abortion, in 1975 (*Abortion I*), and again in 1992 (*Abortion II*), the German Constitutional Court upheld the constitutionality of criminalizing abortion based largely on human dignity of the "developing life" as well as the state's *obligation* to protect all life.<sup>216</sup> According to the Court, both the human dignity provision and Article 2(2)(1),<sup>217</sup> which protects life, apply to the "developing life within the mother's womb."<sup>218</sup> At the same time, the Court noted the countervailing right "of a woman freely to develop her personality also lays claim to recognition and protection."<sup>219</sup> The Court determined the human dignity right to life outweighs a woman's right to self-determination and privacy.<sup>220</sup>

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<sup>210</sup> KOMMERS & MILLER, *supra* note 78, at 482.

<sup>211</sup> *Id.*

<sup>212</sup> *The Basic Law of Germany*, *supra* note 69.

<sup>213</sup> *Joint Income Tax Case* (1957) 6 BVerfGE 55. In this case, the woman earned income from her retail shop, which meant that she had her husband, a retired civil servant who received a pension, had to file a joint return and pay more than if they filed separately.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 9 GER. L. J., 2179, 2205 (2008).

<sup>217</sup> *The Basic Law of Germany*, *supra* note 69 ("Every person shall have the right to life and physical integrity.").

<sup>218</sup> *Abortion I*, 39 BVerfGE 1 (1975); KOMMERS & MILLER, *supra* note 78, at 373.

<sup>219</sup> KOMMERS & MILLER, *supra* note 78, at 376.

<sup>220</sup> *Id.* ("In the ensuing balancing process, 'both constitutional values must be perceived in their relation to human dignity as the center of the constitution's balancing system.'").

Germany's abortion jurisprudence—about protecting prenatal life—is directly and explicitly linked to the Holocaust. “The forced abortion and sterilization campaigns of Nazi Germany played a defining role in shaping the normative core of the Basic Law.”<sup>221</sup> In *Abortion I*, the Court emphasized the historical underpinning of its decision: “the categorical inclusion of the inherently self-evident right to life in the Basic Law may be explained principally as a reaction to the ‘destruction of life unworthy to live,’ the ‘final solution,’ and the ‘liquidations’ that the National Socialist regime carried out as governmental measures.”<sup>222</sup> Accordingly, human dignity in German privacy-related jurisprudence gains its import and meaning from the Holocaust.

The Holocaust directly and expressly informs Germany's freedom of personality and privacy guarantees. These guarantees are very different from privacy protection in American jurisprudence because of European cultural differences and because the Holocaust casts a shadow on German jurisprudence that means focusing on inner freedom—freedom of personality and reputation, as well as outer freedom. It protects that which the Nazis deliberately sought to destroy by dehumanizing their victims, stripping them of free will and uniqueness of personality. American privacy law focuses on protection against state intrusion without this focus on protecting inner freedom.

#### *B. EQUALITY:*

As described above, discussions of the Holocaust often involve the themes of pervasive discrimination and persecution against a group based solely on that group's religion (or ethnicity or sexual orientation). Certainly in Germany, the Basic Law's human dignity provision and anti-discrimination provisions are specifically aimed at avoiding the pernicious discrimination and persecution of the Nazi era. In the United States, the equality-based human dignity cases reflect an eagerness to advance the civil rights of particular groups. This is the one area of American jurisprudence where, arguably, human dignity as a constitutional value arose largely in response to War II through one of its champions, Justice Murphy, though, for some time after the war, human dignity did not succeed in outweighing other competing values. In America, human dignity as a constitutional value underlying equality jurisprudence gained prominence during the 1960s Civil Rights movement.

In Germany, Article 3 of the Basic Law governs equality, providing the following specific guarantees:

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<sup>221</sup> Vanessa Macdonnell & Julia Hughes, *The German Decisions and the Protective Function in German and Canadian Constitutional Law*, 50 OSGOODE HALL L.J. 999, 1008 (2013).

<sup>222</sup> *Abortion I* in KOMMERS & MILLER, *supra* note 78, at 375; See Reva Siegel, *Dignity and the Duty to Protect Unborn Life*, in HUMAN DIGNITY 514 (noting the dissenting justices' reliance on the fact that the National Socialists had criminalized abortion); Benda, *supra* note 70, at 446 (citing *Abortion I*: “The Basic Law contains principles... which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism. The almighty totalitarian state demanded limitless authority over all aspects of social life and, if pursuing its goals, had no regard for individual life.”).

1) All persons shall be equal before the law; (2) Men an(d women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist; (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.<sup>223</sup>

As in the United States, the German Court allows for distinctions based on gender or other classifications only when a compelling reason exists for these distinctions. For instance, in the *Nocturnal Employment Case*,<sup>224</sup> a female bakery supervisor was fined for hiring women to work in her bakery at night in violation of a law prohibiting women from working in certain jobs at night. Even though *she* did not work at night (her employees did), because the state fined the supervisor, she filed a constitutional complaint based on Basic Law Articles 1 and 3. The Court reviewed the law to determine whether the distinction (applying to only women) was “indispensably necessary to the solution of problems that, by their nature, can arise only for women or only for men.”<sup>225</sup> Finding it was not, the Court held there were “no distinctions between them of such nature and weight as to justify the difference in treatment.”<sup>226</sup> The Court applied a level of review requiring the distinction be “indispensably necessary to the solution of the problems that, by their nature, can arise only for women or only for men.”<sup>227</sup>

In American jurisprudence, human dignity underlies the Fourteenth Amendment Equal Protection guarantee that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>228</sup> The value plays a fairly prominent role in the recent *United States v. Windsor*<sup>229</sup> decision and in cases regarding racial equality with access to education, accommodations, and economic assistance from the government. The Court con-

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<sup>223</sup> In 1994, *Basic Law* Article 3 (Equality before the law) was amended to say “No person shall be disfavoured because of disability.” *The Basic Law of Germany*, *supra* note 69; *See* KOMMERS & MILLER, *supra* note 78, at 435. Critics of the *Basic Law* had challenged the original equality provisions for failing to include protection of disabled citizens, and in 1994, Article 3(3) was amended to prohibit any disadvantages based on disability. *See* KOMMERS & MILLER, *supra* note 78, at 435 (“Considering that Article 3(3) of the Basic Law was meant to protect groups persecuted during the Nazi regime, exclusion of the disabled from its explicit terms represented an even more glaring omission.”).

<sup>224</sup> *Nocturnal Employment Case*, 85 BVerfGE 191 (1992); KOMMERS & MILLER, *supra* note 78, at 428.

<sup>225</sup> KOMMERS & MILLER, *supra* note 78, at 429.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* Eberle refers to the Germany Court’s review of the constitutionality of gender distinctions as strict scrutiny. Eberle, *supra* note 15, at 89.

<sup>228</sup> U.S. CONST. amend XIV.

<sup>229</sup> *U.S. v Windsor*, 133 S. Ct. 2675 (2013).

siders “suspect classifications,” like race under a strict scrutiny review, requiring the distinction to be “narrowly tailored” to “achieve a compelling government interest.”<sup>230</sup>

In *Brown v. Board of Education*,<sup>231</sup> for instance, the Court sought to advance the human dignity of African-American children by striking down the “separate but equal” doctrine.<sup>232</sup> The Court never used the term human dignity; yet, the Court emphasized the demeaning impact on African-American children of having to attend a separate school from their white counterparts:

To separate them from others of a similar age and qualification solely because of their race generates a feeling of insecurity as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>233</sup>

Later cases such as *Heart of Atlanta Motel, Inc. v. United States*,<sup>234</sup> *Roberts v. Jaycees*,<sup>235</sup> and recently *Windsor* show the Court relying on human dignity to bolster equal protection under the Fourteenth Amendment. In *Heart of Atlanta Motel*, the Court sought to eliminate the indignity of racial discrimination in accommodations. Later, in *Jaycees*,<sup>236</sup> which involved gender discrimination, the Court adopted the reasoning of *Heart of Atlanta Motel* to uphold as constitutional a statute prohibiting gender discrimination,<sup>237</sup> noting “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.”<sup>238</sup>

The *Windsor* Court relied on “basic due process and equal protection principles applicable to the Federal Government”<sup>239</sup> under the Fifth Amendment to strike down as unconstitutional the definition of marriage under the

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<sup>230</sup> Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739 (2014).

<sup>231</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>232</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>233</sup> *Brown*, 347 U.S. at 494.

<sup>234</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (In an opinion by Justice Clark, the Court upheld the constitutionality of the Civil Rights Act of 1964, emphasizing the legislative history of the Act: “The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of public access to public establishments.’”).

<sup>235</sup> *Roberts v. Jaycees*, 468 U.S. 609, 609, 625 (1984) (recalling the stigmatizing injury from discrimination in case involving gender discrimination).

<sup>236</sup> *Id.*

<sup>237</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (for Supreme Court’s discussion of which level of scrutiny to apply to gender discrimination cases).

<sup>238</sup> *Id.* at 625.

<sup>239</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

federal Defense of Marriage Act (“DOMA”), which excluded same-sex partners.<sup>240</sup> In the majority opinion, Justice Kennedy describes the manner in which DOMA interferes with the rights of those in states allowing same-sex marriage as follows:

The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the statute. It was its essence.<sup>241</sup>

According to one commentator, “[t]he foundation of the court’s opinion and its real importance, lie in its insistence on human dignity as a constitutional value, one that stands at the heart of our longstanding commitment to equal protection of the laws.”<sup>242</sup>

As shown, under both American and German jurisprudence, equality and human dignity go hand in hand, with the Courts striking down as antithetical to human dignity classifications based on fixed characteristics like race and gender. Judge Kennedy notes in *Windsor* that the Fifth and Fourteenth Amendments “withdraw [...] from Government the power to degrade or demean....”<sup>243</sup> by laws that treat individuals unequally. In Germany, in response to the Holocaust, and in America, in response to the odious discrimination that motivated the Civil Rights movement, human dignity as a constitutional value serves to protect against reoccurrence of the pernicious discrimination that severely tainted both nations’ past.

### C. CRIMINAL LAW PROTECTIONS: VIOLATIONS OF FOURTH AND EIGHTH AMENDMENTS/ CAPITAL PUNISHMENT/ TREATMENT OF THE ACCUSED AND PRISONERS

In both American and German constitutional jurisprudence, human dignity underlies the constitutional protections afforded defendants and the criminally accused; yet, under America law, this protection lacks the consistency of its German counterpart. This section is divided into two parts: the first discusses treatment of prisoners and the criminally accused while the second discusses death penalty jurisprudence.

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<sup>240</sup> The statute defined marriage as “only a legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife.” *Id.* at 2683 (citing 1 U.S.C.S. § 7). In the case, Edith Windsor and Thea Spyer were legally married in Canada, and their marriage was recognized under the laws of New York.

<sup>241</sup> *Id.* at 2693. He talks again of dignity in discussing rights and responsibilities under the law. “Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities.”

<sup>242</sup> Cass R. Sunstein, *Gay-Marriage Ruling Safeguards Human Dignity*, Bloomberg, June 26, 2013, <http://www.bloomberg.com/news/print/2013-06-26/gay-marriage-ruling-safeguards-human>.

<sup>243</sup> *Windsor*, 133 S. Ct. at 2695.

## 1. Treatment of Prisoners and the Accused

In American jurisprudence regarding Fourth Amendment due process protection against unreasonable searches and seizures, the Court's language suggests an unwavering commitment to human dignity; however, the results belie this unwavering commitment. In *Rochin v. California*,<sup>244</sup> the Court, in an opinion by Justice Frankfurter, held police violated defendant's due process rights when after arrest for allegedly possessing morphine in violation of California law, "he was handcuffed and taken to a hospital. At the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine."<sup>245</sup> In the Court's reasoning, Justice Frankfurter described the force used as brutal and "offensive to human dignity."<sup>246</sup> In 1984, the Court again struck down as unconstitutional a bodily intrusion where police sought to compel a criminally accused to undergo surgery to remove a bullet that might implicate the accused.<sup>247</sup> In applying the Fourth Amendment protection, the Court described the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."<sup>248</sup>

Yet, in the late 1980s, with the government's "War on Drugs,"<sup>249</sup> the Court became more likely to permit state-sanctioned bodily intrusions. In *Skinner v. Railway Labor Executives' Ass'n*,<sup>250</sup> the Court affirmed the constitutionality under the Fourth Amendment of mandatory blood and urine

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<sup>244</sup> *Rochin v. California*, 342 U.S. 165 (1952) (the "shocks the conscience" decision).

<sup>245</sup> *Id.* at 166.

<sup>246</sup> *Id.* at 174. *But see* *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court reached the opposite result, holding the intrusion constitutional, for mandatory testing of a criminally accused's blood for alcohol content. The Court, in an opinion by Justice Brennan, described the Fourth Amendment as protecting "personal privacy and dignity against unwanted intrusion by the State." *Id.* at 767. The blood tested passed constitutional muster only because the test chosen to measure blood-alcohol was reasonable under the circumstances and was performed in a reasonable manner.

<sup>247</sup> *Winston v. Lee*, 470 U.S. 753 (1984).

<sup>248</sup> *Id.* at 761.

<sup>249</sup> In October 1986, President Reagan signed an omnibus drug bill, appropriating \$1.7 billion to fight the drug crisis. The bill created mandatory penalties for drug offenses. *Thirty Years of America's Drug War: a Chronology*, FRONTLINE PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/> (last visited Aug. 4, 2014). The drug "crack" gained public attention in November 1985, when a New York Times cover story detailed the expanding use of the drug in New York. *Id.* Around that time, Nancy Reagan's "Just Say No" anti-drug campaign gained national attention.

<sup>250</sup> *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1988); *See also* *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), in which the Court upheld the constitutionality of drug testing of United States customs official employees directly involved in drug interdiction, required to carry a firearm, or who handled classified material. The program required drug-testing by urinating in private with a monitor of the same gender

tests for railroad employees under regulations promulgated by the Federal Railroad Administration. The Court held no warrants or reasonable suspicion were required before the testing because, in the balance, the government had a strong interest in obtaining the test results to ensure public safety. The employees had a diminished expectation to privacy because the test's intrusiveness was minimal.<sup>251</sup>

Justices Marshall and Brennan dissented in *Skinner*, emphasizing the indignity and humiliation suffered by employees at having the sample taken.<sup>252</sup> Urination is "among the most private of activities," according to the dissenting Justices, especially with a monitor listening at the door.<sup>253</sup> Justice Marshall likened the assault on personal dignity in *Skinner* to the World War II relocation-camp and McCarthy-era cases in terms of the denials of liberty in times of perceived necessity.<sup>254</sup> He wrote of the danger of sacrificing "fundamental freedoms" in the name of exigency: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."<sup>255</sup>

Just as in the late 1980s when human dignity failed to prevail over competing government concerns in Fourth Amendment decisions regarding employee drug testing, the value failed to govern the Court's decision-making involving suspected drug trafficking at international borders and in homes. In *Segura v. United States*,<sup>256</sup> petitioners challenged a suppression ruling on

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on hand to listen for the sound of urination. The Court upheld the testing of employees directly involved in drug interdiction or required to carry a firearm. The Court held the program was not motivated by a perceived drug problem within the service but rather by "the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances." *Id.* at 674. Justices Brennan, Scalia, Stevens, and Marshall dissented. Justice Scalia mentioned personal dignity three times in his dissenting opinion. He described the drug testing as "particularly destructive of privacy and offensive to personal dignity." *Id.* at 680 (Scalia, J., dissenting). "I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use." *Id.* at 681. Justice Scalia concluded his dissent with a powerful statement regarding the role of human dignity in Fourth Amendment jurisprudence: "Those who lose... are not just the Customs Service employees, whose dignity is thus offended, but all of us--who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content..." *Id.* at 687.

<sup>251</sup> *Id.* at 627-33.

<sup>252</sup> *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 644 (1989) (Marshall J., dissenting) ("Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the 'personal privacy and dignity against unwarranted intrusion by the State' against which the Fourth Amendment protects.").

<sup>253</sup> *Id.* at 645.

<sup>254</sup> *Id.* at 635.

<sup>255</sup> *Id.*

<sup>256</sup> *Segura v. United States*, 468 U.S. 796 (1985).

grounds police made an illegal entry into their apartment. Specifically, the officers arrested Segura, an alleged drug trafficker, outside his apartment building, then led him upstairs, entered the apartment without permission or consent, and made a cursory search, seeing drug paraphernalia. The police left the “pre-warrant evidence” and took those arrested to headquarters. Two Drug Task Force agents remained in the apartment, and approximately twenty hours later, the officers obtained a search warrant and conducted a thorough search of the apartment. The Court held the seizure was reasonable under the totality of the circumstances.

The dissenting Justices described the agents' occupation of the apartment as both an unreasonable “search” and an unreasonable “seizure” in violation of the Fourth Amendment. Justice Stevens ended the dissenting opinion, saying: “The forefathers thought this was not too great a price to pay [for the exclusionary rule] for the decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect.”<sup>257</sup>

More recently, human dignity again failed to prevail in *Atwater v. City of Lago Vista*,<sup>258</sup> which involved a warrantless search after Atwater was arrested for failing to have her children in seatbelts. The Court held that though the arrest was inconvenient and humiliating and Atwater suffered a “pointless indignity,”<sup>259</sup> it was not “so extraordinary” as to violate the Fourth Amendment.<sup>260</sup> In her dissenting opinion, Justice O'Connor spoke of the indignity Atwater suffered as a result of the warrantless search: “The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness.”<sup>261</sup>

The United States Supreme Court has applied human dignity to treatment of prisoners under the Eighth Amendment protection against cruel and unusual punishment.<sup>262</sup> In *Hope v. Pelzer*,<sup>263</sup> the Court struck down as unconstitutional an Alabama prison's practice of handcuffing misbehaving prisoners to a hitching post. In describing the humiliating nature of the hitching post punishment (in the sun, without adequate water or bathroom breaks), the Court emphasized that what underlies the Eighth Amendment “is nothing less than the dignity of man.”<sup>264</sup>

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<sup>257</sup> *Id.* at 839 n.31 (Stevens, J., dissenting).

<sup>258</sup> *Atwater v. City of Lago Vista* 532 U.S. 318 (2001).

<sup>259</sup> *Id.* at 346-47.

<sup>260</sup> *Id.* at 354.

<sup>261</sup> *Id.* at 368 (O'Connor, J., dissenting).

<sup>262</sup> “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment.” U.S. CONST. amend VIII.

<sup>263</sup> *Hope v. Pelzer*, 536 U.S. 730 (2002).

<sup>264</sup> *Id.* at 738.

Accordingly, in American jurisprudence, human dignity plays an *inconsistent*<sup>265</sup> role in protecting the human dignity of defendants, the criminally accused, and, as shown below, those convicted of capital offenses. The Court at times relies heavily on the value, expressing its commitment to human dignity in no uncertain terms, to secure the interests of the criminally accused or potential suspects. In other cases, also involving bodily intrusions or the indignities of arrest, the Court fails to even mention the value. As one commentator notes, “[u]nfortunately, the rights supposedly guaranteed by the Fourth Amendment have been slowly eroded over the past few decades.”<sup>266</sup>

In German jurisprudence regarding the treatment of prisoners and the accused, the Court consistently speaks of, and relies on, human dignity, and capital punishment certainly presents that stark difference between the two. As described in Part II, in the *Life Imprisonment* case, the Court struck down as unconstitutional a statute that required the penalty of life imprisonment without the possibility of parole for anyone who killed another out of wanton cruelty or to conceal another crime.<sup>267</sup> The Court emphasized the need to protect human dignity as follows: “The state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom.”<sup>268</sup> The Court noted the legislature’s interest in the “community’s social life” and balanced this against each person’s ability to shape his own life.<sup>269</sup> The Court also noted the historical trend in punishment toward “more humane and differentiated forms of punishment.”<sup>270</sup>

Following *Life Imprisonment*, in *Lebach*,<sup>271</sup> the Court ruled that the under Articles 1 and 2(1), prisons were required to adopt measures to ensure prisoners’ rehabilitation while in prison so that the prisoners would be prepared to rejoin society.<sup>272</sup>

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<sup>265</sup> This article is not meant to place any judgment in terms of whether the role is good or bad – just to mention that here it is inconsistent.

<sup>266</sup> John W. Whitehead, *Upending Human Dignity and Shattering the Fourth Amendment Strip Searches*, 39 HUM. RTS. Q. 17 (2013).

<sup>267</sup> After the Court’s decision in *Life Imprisonment*, the Parliament amended the law to allow “courts to suspend a life sentence when the situation warranted the offender’s release from prison.” KOMMERS & MILLER, *supra* note 78.

<sup>268</sup> Rao, *supra* note 25, at 216 (quoting *Life Imprisonment Case*, June 21, 1977, 45 BVerfGE 187).

<sup>269</sup> *Id.*

<sup>270</sup> KOMMERS & MILLER, *supra* note 78, at 366.

<sup>271</sup> *Lebach* 35 BVerfGE 202 (1973).

<sup>272</sup> KOMMERS & MILLER, *supra* note 78, at 368; See Amanda Ploch, *Why Dignity Matters: Dignity and the Right (or Not) to Rehabilitation from International and National Perspectives*, 44 INT’L L. & POL. 887 (2012) (illustrating how The German legal system places much more emphasis on the rehabilitation purpose of punishment than its American counterpart). *Lebach* is also a free speech case as described in Part V(D).

With regard to treatment of the accused, the German Court has interpreted Basic Law Article 2(2),<sup>273</sup> the “physical integrity clause,” to prohibit a court-ordered spinal tap to determine a defendant’s participation in a crime and has also invalidated use of a polygraph for the same purpose.<sup>274</sup> The Court called attaching a defendant to a polygraph machine “an inadmissible invasion of a person’s innermost self and a violation of human dignity.”<sup>275</sup> The physical integrity clause forbids torture and requires that punishment be humane and proportionate to the crime.<sup>276</sup>

Concerning search and seizure, Article 10 of the Basic Law provides for the secrecy of mail, postal service, and telecommunications, while Article 13 provides that “the home is inviolable” and searches may be ordered “only by a judge.”<sup>277</sup> Under the German law’s proportionality principle,<sup>278</sup> the Court ruled in the *Global Positioning System* case that GPS surveillance, along with the other methods of surveillance the police used, was constitutional over petitioner’s complaint that the cumulative effect of the surveillance violated his autonomy and “informational self-determination” as part of his privacy and dignity interests.<sup>279</sup> The Court relied on the principle of subsidiarity to find that the Code of Criminal Procedure requires judges to review the cumulative effect of surveillance and that the least intrusive modes of surveillance must be exhausted (or considered) before more invasive means could be authorized.<sup>280</sup>

On February 20, 2001, both the United States and German Courts issued search and seizure decisions concerning privacy in the home. In the German case, the Court reaffirmed the requirement of a court-issued search warrant before police can search a home.<sup>281</sup> This holds true even when (given

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<sup>273</sup> Article 2 provides for the right to life and to physical integrity.

<sup>274</sup> See Eberle, *supra* note 11; KOMMERS & MILLER, *supra* note 78, at 363.

<sup>275</sup> Eberle, *supra* note 11, at 977; KOMMERS & MILLER, *supra* note 78, at 419.

<sup>276</sup> Eberle, *supra* note 11, at 975; Currie, *supra* note 213, at 2205.

<sup>277</sup> *The Basic Law of Germany*, *supra* note 69.

<sup>278</sup> See Currie, *supra* note 216, at 2201-02 (Explaining in this case, it meant that police methods must be proportional to the “seriousness of the offense and the strength of the suspicion.” In general, the principle means, “even when the legislature is specifically authorized to restrict basic rights, the restrictions may go no further than necessary.”).

<sup>279</sup> 2 BvR 581/01 (2005) available at

[http://www.bverfg.de/entscheidungen/rs20050412\\_2bvr058101.html](http://www.bverfg.de/entscheidungen/rs20050412_2bvr058101.html); Regarding the “inner sphere” he argued the surveillance “exposed too much personal information to the government, shining a light, as it were, on his innermost thoughts and permitting the police to construct a comprehensive personality profile.” Jacqueline E. Ross, *Germany’s Federal Constitutional Court and the Regulation of GPS Surveillance*, 6 GER. L. J. 1805 (2005), available at [www.germanlawjournal.com](http://www.germanlawjournal.com).

<sup>280</sup> 2 BvR 581/01 (2005); Ross, *supra* note 279, at 1808.

<sup>281</sup> Dominik Hanf, *Constitutional Court Reaffirms Privacy of the Home in Search and Seizure Decision*, 2 GER. L. J. (2001), available at

<http://www.germanlawjournal.com/index.php?pageID=11&artID=57>; 2 BvR 1444/00 (2001), available at [http://www.bverfg.de/entscheidungen/rs20010220\\_2bvr144400.html](http://www.bverfg.de/entscheidungen/rs20010220_2bvr144400.html).

the challenges of fighting organized crime) the public prosecutor believes there is an urgent need for the investigation.<sup>282</sup> The Court held the search of complainant's home unconstitutional because an independent judge had not authorized the search. In *Illinois v. McArthur*,<sup>283</sup> on the other hand, the United States Supreme Court ruled police acted reasonably in refusing to allow the petitioner to enter his home unaccompanied by a police officer for two hours while awaiting a judicial search warrant. The majority held that this restriction on petitioner's access to his home was reasonable, and therefore lawful, in view of the circumstances.<sup>284</sup>

Arguably, both nations have had to weaken certain protections against state interference with civil liberties in response to the threat of terrorism.<sup>285</sup> Yet, German jurisprudence in this area, as well as in its penal system generally, reflects a deliberate, thoughtful reaction against laws enacted by the Nazis during World War II.<sup>286</sup> As one commentator describes, "the primary concern following the division of the German Empire into occupation zones and continuing throughout the early years of the Federal Republic of Germany, was to eliminate the worst excesses of the Nazi era and to carry out particularly urgent changes."<sup>287</sup>

## 2. Capital Punishment

In Germany, capital punishment is unconstitutional based on the protection of life. West Germany<sup>288</sup> abolished the death penalty in 1949, with Article 102 of the Basic Law stating, "The death penalty is abolished."<sup>289</sup> Scholars disagree about Germany's reasons for abolishing capital punishment. According to Charles Lane in *The Washington Post*:

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<sup>282</sup> *Id.*

<sup>283</sup> *Illinois v. McArthur*, 531 U.S. 326 (2001).

<sup>284</sup> Hanf described the difference in constitutional approaches as follows: "Starting from these different constitutional foundations, the Courts are clearly charged with different tasks. The Supreme Court sought to strike a balance of interests that supports a (more) flexible privacy guarantee while the FCC [German Federal Constitutional Court] engaged in outlining the balance of interests with respect to a (more) absolute guarantee of privacy." Hanf, *supra* note 281.

<sup>285</sup> Boyne, *supra* note 78, at 166.

<sup>286</sup> Albin Eser, *Major Stages of Criminal Law Reform in Germany*, 30 *ISR. L. REV.* 28, 30 (1996) ("The numerous changes in criminal law introduced by Nazi legislation were characterized by extreme severity in general deterrence, such as the uncurtailed expansion of capital punishment. Most of those alterations, including the measure regulating castration of dangerous sexual offenders, and the imposition of criminal liability by analogy, were abolished after the collapse of the Third Reich.").

<sup>287</sup> *Id.* at 31.

<sup>288</sup> Communist East Germany kept the death penalty until 1987.

<sup>289</sup> Article 102 of the Basic Law.

Article 102 was in fact the brainchild of a right wing politician who sympathized with convicted Nazi war criminals—and sought to stop their execution by British and American occupation authorities. Far from intending to repudiate the barbarism of Hitler, the author of Article 102 wanted to make a statement about the supposed excesses of Allied victors' justice.<sup>290</sup>

Others contend it was simply the government's unwillingness to revisit the horrors of Nazism and the Nazis' execution of so many.<sup>291</sup> “[I]t is most likely that the lingering memories of the horrors of the Nationalist Socialist (Nazi) Party rule under Adolph Hitler influenced the constitutional abolishment of capital punishment. The number of circumstances authorizing the death penalty had greatly increased during the Nazi regime's power.”<sup>292</sup>

On the other hand, generally, human dignity has not prevailed in outweighing government interests in America's perplexing Eighth Amendment death penalty jurisprudence. The United States Supreme Court continues to hold the punishment constitutional except for under the particular circumstances described below. Justice Stewart, writing for the plurality in *Gregg v. Georgia*,<sup>293</sup> noted that a penalty must accord with the dignity of man pursuant to the Eighth Amendment. The *Gregg* plurality concluded the punishment of death for deliberate murder was not the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. Unlike in German constitutional jurisprudence, the Supreme Court fails to *prioritize* human dignity concerns in the death penalty cases.

In *Atkins v. Virginia*,<sup>294</sup> the Court struck down as unconstitutional the execution of a defendant with an intellectual disability,<sup>295</sup> emphasizing human dignity concerns arising from an evolved moral standard, a national consensus that it is morally wrong to impose the death penalty on mentally retarded.<sup>296</sup> Yet, nowhere in *Atkins* does the Court discuss or describe the particular indignity suffered by the mentally retarded death row inmate on being executed.

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<sup>290</sup> Charles Lane, *The Paradoxes of a Death Penalty Stance*, June 4, 2005, WASH. POST, June 4, 2005, [www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301450](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/03/AR2005060301450). Lane's article also appeared in the Atlantic.

<sup>291</sup> Carol D. Rasic, *Making the Criminal Defendant's Punishment Fit the Crime: The Contrast Between German and U.S. Laws of Sentencing*, 7 N.Y. INT'L L. REV. 62, 66 (1994).  
<sup>292</sup> *Id.*

<sup>293</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion).

<sup>294</sup> *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>295</sup> In *Atkins*, the Court refers to the defendant as mentally retarded. In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Court switches to the term intellectual disability “to describe the identical phenomenon.”

<sup>296</sup> *Id.*

Recently, in *Hall v. Florida*,<sup>297</sup> the Court affirmed its *Atkins* decision, holding that Florida's law requiring an I.Q. below 70 for an intellectual disability was unconstitutional because it did not allow a defendant who scored a 71 on the test to offer additional evidence of disability.<sup>298</sup> The 5-4 decision by Justice Kennedy reads like a primer on the role of human dignity in Eighth and Fourteenth Amendment jurisprudence. Justice Kennedy mentions the term "dignity" eight times in the opinion, stating that "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."<sup>299</sup> Justice Kennedy explains that imposing the death penalty on an intellectually disabled person "violates his or her inherent dignity as a human being."<sup>300</sup>

The United States Supreme Court's death penalty jurisprudence is troubling because, more so than in other constitutional jurisprudence, the Court's language regarding the Eighth Amendment belies the outcome. The Court, while expressly identifying human dignity as underlying the Eighth Amendment, has upheld most death penalty statutes, stating that public morality questions should be left to the legislature. In *Gregg*, Justice Stewart reminded the reader that public perception of the death penalty is not the sole consideration: "The court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment."<sup>301</sup> Yet the Court contemplated the role of human dignity, this guiding precept, in words only, as nowhere in its analysis does the Court weigh human dignity concerns against the state's interests in deterrence, retribution, and incapacitation.

Only in *Roper v. Simmons*,<sup>302</sup> does the Court's death penalty jurisprudence strike a similar chord to German jurisprudence and reflect an implicit link to the Holocaust. The *Roper* Court notes that respect for human dignity under the Eighth Amendment applies to all—"even those convicted of heinous crimes."<sup>303</sup> This strikes a similar chord to German jurisprudence in

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<sup>297</sup> *Id.*

<sup>298</sup> The evidence of Freddie Lee Hall's mental challenges was substantial. *Id.* at 1990-91 ("With respect to the murder trial given him in this case, Hall's counsel recalled that Hall could not assist in his own defense because he had 'a mental... level much lower than his age,' 'at best comparable to the lawyer's 4-year-old daughter.' A number of medical clinicians testified that, in their professional opinion, Hall was 'significantly retarded'; was 'mentally retarded'; and had levels of understanding 'typically [seen] with toddlers.').

<sup>299</sup> *Id.* at 1016.

<sup>300</sup> *Id.* at 1017. According to Kant we possess human dignity because of our ability to reason; yet, the Court has advanced the dignity of only the death row inmates who lack the ability or maturity to reason. Interestingly, in right to die jurisprudence, the Court has expressed a willingness to advance the human dignity of the competent patient but not of the incompetent patient. See Goodman, *supra* note 37, at 782.

<sup>301</sup> *Gregg v. Georgia*, 428 U.S. at 173 (plurality opinion).

<sup>302</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>303</sup> *Id.* at 560.

which the Court ruled that human dignity is inviolable even to those convicted of heinous crimes, as in the *War Criminal* case, where the German Court noted “human dignity may not be denied to an offender, notwithstanding the gravity and barbarity of the crime.”<sup>304</sup>

#### D. SPEECH

Freedom of speech under the First Amendment<sup>305</sup> is a much more robust guarantee, based in part on human dignity concerns, in America than in Germany. For instance, hate speech, including speech denying the Holocaust, is allowed as free speech in America but prohibited as an affront to human dignity in Germany. At the same time, reputational interest is a much stronger value in Europe. In America, where liberty reigns supreme, as opposed to Germany where human dignity reigns supreme, human dignity produces very different outcomes in speech-related constitutional cases. Arguably and understandably, cultural differences between the two nations as well as the Holocaust influence these differences.<sup>306</sup> As one commentator noted, “[w]hile the metaphor of a ‘marketplace of ideas’ and confidence in John Stuart Mill’s thesis that ultimately the truth will prevail sharply drives America’s First Amendment jurisprudence, Germany’s conditional protection of speech reflects the country’s strong desire to distance itself from the totalitarian excesses of the Nazi era.”<sup>307</sup>

In America, the Constitution protects most speech, including hate speech, as in *Cohen v. California*,<sup>308</sup> the 1971 case in which the Court overturned Paul Cohen’s arrest for wearing a jacket that said “f\*\*k the draft.”<sup>309</sup> Justice Harlan noted the purpose of preserving human dignity in striking down the government’s case. Citing the concurring opinion by Justice

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<sup>304</sup> KOMMERS & MILLER, *supra* note, 78 at 369 (citing *War Criminal Case*, 72 BVerfGE 105 (1986)).

<sup>305</sup> The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

<sup>306</sup> Commentators offer different opinions on the extent to which Nazism (its policies, law, and ideologies) shaped modern Germany’s conceptions of human dignity as applied in constitutional jurisprudence. While most commentators agree the concept was the new government’s attempt to remedy ills and depravity of Nazis and ensure no repetition, Professor Whitman contends a more direct connection between Nazism and human dignity, saying “important threads of continuity connect the fascist era, horrific as it was, with the subsequent era of dignity.” See Whitman, *supra* note 43. Professor Whitman contends Nazis’ concern with reputational honor informed laws to redistribute honor to all members of the Volk. To this end, Nazis passed laws against insulting ordinary people. *Id.*; *But see* Gerald Neuman, *On Fascist Honour and Human Dignity in DARKER LEGACIES OF EUROPE* 267 (Christian Joerges & Navraj Ghaleigh eds., 2003).

<sup>307</sup> Boyne, *supra* note 78, at 152 (2003).

<sup>308</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>309</sup> *Id.*

Brandeis in *Whitney v. California*,<sup>310</sup> Justice Harlan noted that freedom of expression “will ultimately produce a more capable citizenry and more perfect polity and... no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>311</sup> The *Cohen* Court held that petitioner’s conviction for engaging in offensive speech should be reversed, as petitioner’s speech was not “fighting words” likely to promote violence.<sup>312</sup>

In 1969, the Court unanimously struck down the conviction of Clarence Brandenburg, a Ku Klux Klan leader who had urged his followers at a rally in Ohio to “send the Jews back to Israel,” “bury blacks,” and take “revengeance” on politicians who showed too much sympathy for non-whites.<sup>313</sup> The Court held that because his words did not call for immediate violence, his conviction for inciting violence could not stand. In 1977, the United States Supreme Court ruled that Nazis could march at a rally in Skokie, Illinois, despite the obvious offense to the many Holocaust survivors living in Skokie.<sup>314</sup>

In libel/reputational injury decisions under United States law, and contrary to German jurisprudence, human dignity as a value underlying liberty and freedom of speech has prevailed over a human dignity interest in the reputation of the one allegedly libeled. In *Rosenblatt v. Baer*,<sup>315</sup> for instance, a journalist challenged a judgment awarding damages to a county building supervisor based on an allegedly libelous story in which the journalist alleged the supervisor overspent public funds on a public facility. Having recently adopted the *New York Times v. Sullivan* test,<sup>316</sup> the Court held the building supervisor was a public figure and thus could not recover damages for libel based on the proof adduced at trial.<sup>317</sup>

Justice Stewart, in his concurring opinion, championed “the right of a man to the protection of his own reputation.”<sup>318</sup> This right, according to Justice Stewart, “reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty.”<sup>319</sup> Justice Stewart acknowledged that the protection of private personality is left primarily to the individual states. “But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.”<sup>320</sup>

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<sup>310</sup> *Whitney v. California*, 274 U.S. 357, 375-77 (1927).

<sup>311</sup> *Cohen*, 403 U.S. at 24.

<sup>312</sup> *Id.* at 20.

<sup>313</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 446 (1969) (per curiam).

<sup>314</sup> *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (per curiam).

<sup>315</sup> *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

<sup>316</sup> *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>317</sup> *Id.* (The Court remanded the case for retrial on the actual malice issue.).

<sup>318</sup> *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

The First Amendment free speech protection prevailed in *Rosenblatt* over protection of an individual's reputation.<sup>321</sup> In American jurisprudence, the notion of human dignity underlying the right to protection of personality lacks the fortitude of the same protection under German law.

Unlike in American libel jurisprudence, personality protection under German law often bests free speech protections, particularly with public figures. In *Soraya*,<sup>322</sup> for instance, the Court awarded damages in favor of the Princess of Iran after a tabloid published a fictitious interview with the Princess, describing alleged intimate details concerning her private life. Based on the freedom of “personality and dignity of an individual,” with regard to the inner sphere of intimate matters, the Court upheld a damage award against the publisher of the tabloid.<sup>323</sup>

German free speech jurisprudence also reflects the *communitarian* idea of human dignity,<sup>324</sup> illustrated in European and certainly German law, as well as the protection of the inner sphere of freedom described in Part V(A). As such, community norms at times require the state to prohibit certain behavior to protect the dignity of the citizenry.<sup>325</sup> Under this approach, the state seeks to enforce certain norms and judgments (for instance, prostitution is degrading to those who engage in it and those who partake of it) to advance the dignity of citizens and the community. As Eberle says, “the community envisioned by the Basic Law is one where individuality and human dignity are to be guaranteed and nourished, but with a sense of social solidarity and responsibility.”<sup>326</sup>

Unlike in the United States where freedom of speech is paramount and trumps other interests (often in the name of human dignity), in Germany

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<sup>321</sup> In *Paul v. Davis*, 414 U.S. 693 (1976), ten years after *Rosenblatt*, a defamation action was brought by a criminally accused, after police distributed a flyer with his photograph and the caption: “Active Shoplifters.” The plurality held protecting reputation alone will not suffice for due process protection. Justice Brennan, in his concurrence, described the Court’s role as ensuring the “constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.” *Id.* at 723 (Brennan, J., dissenting).

<sup>322</sup> *Soraya*, 34 BVerfGE 269 (1973); Eberle, *supra* note 170 at 25.

<sup>323</sup> *Id.*

<sup>324</sup> See Rao, *supra* note 25, at 212 (“Over the last sixty years, the legal concept of human dignity has been firmly rooted in the soil of European constitutionalism and has drawn much of its meaning from the traditions found there—including communitarianism and a commitment to the social welfare state.”).

<sup>325</sup> In Germany, the human being is “an autonomous person who develops freely within the social community.” and is not “an isolated and self-regarding individual.” KOMMERS & MILLER, *supra* note 78, at 359 (quoting *Mephisto*).

<sup>326</sup> Eberle, *supra* note 11, at 974.

human dignity often serves as the impetus to *regulate* speech.<sup>327</sup> This is illustrated most poignantly with laws regulating Holocaust denial in Germany, discussed after a brief introduction to free speech rights in Germany.

Article 5 protects freedom of speech, the press, and the arts, as follows:

Everyone has the right freely to express and disseminate his opinion in speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.<sup>328</sup>

In *Mephisto*, the Court balanced freedom of expression against a reputational, human dignity interest, and the personality interest in protecting the inner sphere won, largely because of the communitarian concerns and the human dignity at stake. In *Mephisto*, the adopted son of the actor Gustaf Grundgens sought to enjoin publication of *Mephisto*, a novel by Klaus Mann that portrayed the deceased actor Grundgens as a traitor and Nazi sympathizer. The Court held the guaranteed protection of human dignity applies equally to the deceased and enjoined the publication.<sup>329</sup> In weighing the various interests, the Court noted that the right to freedom of artistic expression “is based on the Basic Law’s image of man as an autonomous person *developing freely within the social community*,”<sup>330</sup> emphasizing the communitarian concern. The deceased actor’s human dignity prevailed over the Article 5 free speech interests.

Similarly, the Court weighed the dignity/personality interests of a politician (against whom disparaging cartoons were published—cartoons featuring him as a pig engaged in sexual activity) above freedom of expression of the artist in *Straub Caricature*.<sup>331</sup> In the case, the Court held that although the cartoons were entitled to protection under Article 5(3), the magazine had gone too far in attacking the personal dignity of the politician parodied in the drawings.<sup>332</sup>

Under German law, denying the Holocaust violates the prohibition against “utterances which tend to insult, intimidate or harass a person or

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<sup>327</sup> One commentator refers to freedom of speech as the “Rodney Dangerfield” of fundamental rights in Germany; “it does not get much respect.” Krotoszynski, *supra* note 70, at 1552. Germany is far from alone in this regard. “Canada, Britain, France, Germany, the Netherlands, South Africa, Australia and India all have laws or have signed international conventions banning hate speech.” Adam Liptak, *Hate Speech or Free Speech? What much of the West bans is protected in U.S.*, N.Y. TIMES, June, 11, 2008, <http://www.nytimes.com/2008/06/11/world/americas/11iht-hate.4.13645369.html>.

<sup>328</sup> Article 5(1) of the Basic Law.

<sup>329</sup> KOMMERS & MILLER, *supra* note 78, at 520.

<sup>330</sup> Rao, *supra* note 25, at 220; KOMMERS & MILLER, *supra* note 78, at 520.

<sup>331</sup> Krotoszynski, *supra* note 70.

<sup>332</sup> *Id.* at 1576.

groups or utterances capable of instigating violence, hatred or discrimination.”<sup>333</sup> The German constitutional jurisprudence in this area reflects the nation’s commitment to guarantee the human dignity of its citizens.

In 1991, a regional group of the extremist right-wing National Democratic Party of Germany (“NPD”) invited Holocaust denier David Irving<sup>334</sup> to speak at a conference. The Munich government permitted the group to meet but prohibited any mention of the “Auschwitz Hoax” idea. After learning that Irving would ignore the prohibition, the government relied on the Public Assembly Act to prohibit the meeting. The NPD sued, claiming the government’s position was an unconstitutional violation of its right to free expression under Article 5(1).<sup>335</sup>

In finding no violation of Article 5(1), which guarantees freedom of expression and dissemination of opinion, the Court balanced the Article against the dignity interest in protecting the personality of the Jewish people who would be insulted by the group’s Holocaust denial. The Court held that “[w]hen expressions of opinion are seen as formal insult or vilification, protection of the personality normally comes before freedom of expression.”<sup>336</sup> The Court also found that the prohibited statements denying the Holocaust are false and thus not protected under Article 5(1).<sup>337</sup> The Court distinguished statements of Holocaust denial from statements, for example, challenging Germany’s role in the outbreak of the war, which, presumably, the Constitution would protect as interpretations. Irving went on to gain infamy after suing Professor Deborah Lipstadt for libel in the Royal Courts of London,<sup>338</sup> a case that Irving lost after Judge Gray found that Irving had deliberately perverted the historical evidence to make it align with his politics and fondness for Hitler.<sup>339</sup>

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<sup>333</sup> §130(2) German Penal Code.

<sup>334</sup> Irving is a British Holocaust denier who has written books in which he praises Hitler’s role in WWII, calls him a friend to the Jews during the War, and denies the Nazis used gas chambers to exterminate Jews during the Holocaust. See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST*, 179-81 (The Free Press 1993). He has written more than thirty books, mostly involving WWII and the Third Reich. In some he praises Hitler’s role in WWII, claiming he was a friend to the Jews who had no knowledge of the Final Solution until late in the war. DEBORAH LIPSTADT, *HISTORY ON TRIAL* (2005).

<sup>335</sup> Krotoszynski, *supra* note 1, at 1593.

<sup>336</sup> *Holocaust Denial Case* (1994) 90 BVerfGE 241; KOMMERS & MILLER, *supra* note 78, at 494; Krotoszynski, *supra* note 70, at 1593-94.

<sup>337</sup> Krotoszynski, *supra* note 1, at 1594.

<sup>338</sup> DEBORAH LIPSTADT, *HISTORY ON TRIAL* (2005); *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B.D. Apr. 11, 2000), available at <http://www.holocaustdenialontrial.org/trial/judgement/13.34>. Lipstadt won the case after a ten-week trial, with Judge Charles Gray finding Lipstadt had satisfied her burden under British libel law of proving the truth of her statements about Irving’s Holocaust denial.

<sup>339</sup> *See id.*

In a fairly recent German speech case,<sup>340</sup> the Court upheld as constitutional a law punishing “any person who, publicly or in assembly, disturbs the peace by approving, glorifying or justifying the National Socialist rule of violence... in a manner violating the dignity of the victims.”<sup>341</sup> The complainant in the case was planning to organize an open-air event “In Commemoration of Rudolf Hess”<sup>342</sup> in the town of Wunsiedel, Germany. The Court held that despite Article 5’s protection of freedom of expression, the Basic Law was meant to “consciously and decisively make a break from the Nazi era”: the Basic Law can “almost be understood as the exact opposite of the totalitarianism of the Nazi regime.”<sup>343</sup> Accordingly, the Court allowed for the law prohibiting the assembly.<sup>344</sup>

German speech jurisprudence thus reflects a strong reaction against the Nazis’ dehumanization of Jews. It relies on human dignity to protect citizens’ inner sphere of freedom, which the Nazis deliberately targeted and destroyed. It also reflects a more explicit connection to the Holocaust in the form of regulating hate speech and assemblies of pro-Nazi groups. The jurisprudence is aimed at tamping down offensive ideas to protect the dignity of the victims’ of Nazi brutality. American speech jurisprudence takes a wholly different tack—encouraging the speech, even when offensive, to tamp it down. These differences illustrate the ways in which the Holocaust shaped German law’s concept of and reliance on human dignity; in American jurisprudence, human dignity bolsters free speech guarantees but serves no role, concerning speech, in protecting the inner sphere of personality.

## VI. CONCLUSION

The Holocaust was the past century’s watershed event in terms of changing the landscape of politics and human rights. This article examines not the lessons learned but rather what steps Germany and the United States have taken to ensure these events will not occur again. The article compares United States to German jurisprudence relating to human dignity to show-

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<sup>340</sup> *Wunsiedel*, 1 BvR 2150/08, available at

[http://www.bundesverfassungsgericht.de/entscheidungen/rs20091104\\_1bvr215008.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20091104_1bvr215008.html).

<sup>341</sup> § 130.4 of the Criminal Code.

<sup>342</sup> Rudolf Hess was Adolf Hitler’s deputy; he was buried in Wunsiedel. For several years, Neo-Nazi groups organized memorial marches in Wunsiedel for Hess each year with the number of participants ranging from 120 in 1988 to more than 1,100 in 1990. According to *the Guardian*, (July 20 2011), the family of Rudolf Hess arranged with the cemetery to have Hess’s remains exhumed, cremated, and scattered at sea to stop the neo-Nazis from visiting his grave. See Siobhan Dowling, *Rudolf Hess’s body Removed from Cemetery to Deter Nazi Pilgrims*, THE GUARDIAN, July 21, 2011, <http://www.theguardian.com/world/2011/jul/21/rudolf-hess-body-removed-nazi>.

<sup>343</sup> Dietmar Hipp, *Germany’s Nazi Exception, Constitutional Court Oks Curtailing of Free Speech*, SPIEGEL ONLINE, (Nov. 18, 2009), <http://www.spiegel.ed/international/germany/-s-nazi-exception-constitutional-court-oks-curtailing-of-free-speech-a-662031-druck.html>.

<sup>344</sup> Of course, this is contrary to the American notion that the “marketplace of ideas” is the best protection against an undemocratic form of government.

case differences that exist because of the Holocaust's impact on German jurisprudence. It illustrates that America's lackluster concept and reliance on human dignity stem from the absence of such a compelling motivation—necessity in Germany's case. The Nazis strove to dehumanize the Jews and, in response, Germany's constitutional jurisprudence aims at elevating the human dignity of all. The question remains to what extent Germany, the United States, and the international community have fulfilled Arendt's aspiration of providing human dignity with a "new guarantee."



# REASONABLE DOUBTS OR DOUBTABLE REASONS? THE CASE FOR AN OBJECTIVE STANDARD

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## ABSTRACT

*Although the standard of proof in criminal trials has been much debated, culminating in a variety of proposals for reform in recent years, one central element has largely escaped scrutiny: does the standard refer to how much the jurors have been persuaded, or, instead, to how much has been established by the evidence? More particularly, does the canonical phrase “proof beyond a reasonable doubt” (BARD) refer to doubts jurors actually have, or to doubts a reasonable juror should or would have? Is the standard, in other words, subjective or objective? To date, no legal source or authority resolves this ambiguity, though much turns on which version jurors apply, as the two readings could yield opposing verdicts. Many jury instructions, nevertheless, favor a subjective notion of proof, directing jurors to consider the case proven just to the extent that they feel sure of the defendant’s guilt. This article argues against that interpretation, drawing on the Supreme Court’s landmark decision in *In re Winship* (1970), together with considerations from legal, ethical and epistemological theory. These considerations count decisively against equating proof with factors special to particular parties in particular cases, which – I will show – includes a juror’s having no reasonable doubts. This argument reflects a more general observation about which kinds of reasoning are appropriate for the application of legal rules, and on the difference between proof and persuasion.*

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I. INTRODUCTION

The standard of proof in criminal trials has been much discussed in recent years, culminating in a variety of proposals for reform or reformulation, all centering on questions such as how high or uniform the standard should be,<sup>1</sup>

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<sup>1</sup> See, e.g., Eric Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 104-10, 147-78 (2003) (arguing that BARD should be viewed as higher than the “preponderance of the evidence” standard for civil trials but should be allowed to vary by case in the level or extent of proof required) and Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1374 (1971) (the BARD standard “insists upon as close an approximation to certainty as seems humanly attainable in the circumstances”). See, also, *Commonwealth v. Ferreira*, 373 Mass. 116, at 130 (1977) (proof beyond a reasonable doubt requires a higher degree of certainty than one would demand for all other decisions affecting one’s own life); EDWARD

how precisely it should be defined,<sup>2</sup> and how the competing arguments or “narratives” should be compared in light of it.<sup>3</sup> In contrast, scant attention has been paid to a lingering ambiguity at the heart of the standard,<sup>4</sup> which could have dramatic consequences for the outcome of criminal trials, and which would have to be resolved before any of the proposed reforms could be implemented.<sup>5</sup> The ambiguity lies in the immortalized requirement that a defendant be convicted if and only if he is proven to have committed every element of the offense charged “beyond a reasonable doubt” (BARD).<sup>6</sup> Whatever else is unclear about this standard and how to apply it, at least one question concerns its very subject matter: does the notion of proof “beyond a reasonable doubt” refer to doubts jurors actually have, or to doubts that a reasonable juror *could* have? Is BARD, in other words, a *subjective* standard – concerned with a juror’s state of mind, or an *objective* standard – concerned with some feature of the evidence?

An objective standard of proof focuses on whether the evidence justifies doubts, while a subjective standard addresses whether the evidence leaves jurors actually entertaining reasonable doubts. Put more precisely: on an objective standard, the state has proved its case BARD if and only if the *evidence* does not warrant having any doubts about the defendant’s guilt, whatever the jurors actually feel. On a subjective standard, by contrast, the state

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J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, §12.10, at 354 (4th ed. 1987) (proof BARD is proof to a degree that one would not hesitate to act on it); *Victor v. Nebraska*, 511 U.S. 1, 26 (1994) (proof BARD leaves the juror “firmly convinced” of the defendant’s guilt); *Burnett v. Nebraska*, 86 Neb. 11 (1910) (proof BARD is proof to the extent that no reason could be given to fellow jurors in support of doubt).

<sup>2</sup> See, e.g., *United States v. Reives*, 15 F.3d 42, 45 (4th Cir. 1994). See also Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955, 1965 (1995). But see Larry Laudan, *Is Reasonable Doubt Reasonable?* 9 LEGAL THEORY 318 320-22 (2003) (arguing that the standard should be sharpened and further elaborated to include instructions as to how to weigh the empirical evidence similar to the guidelines scientists use).

<sup>3</sup> See, e.g., Michael S. Pardo, *Second-Order Proof* Rule 61 FLA. L. REV. 1083, 1105 (2009) (proposing that jurors apply BARD by determining whether the evidence can be plausibly explained by a set of facts that includes the defendant’s innocence).

<sup>4</sup> Some scholars have mentioned the ambiguity in question, though they attribute it to interpretations of the standard, rather than the standard itself. See, e.g., Michael S. Pardo, *Id.*, at 1094, and LARRY LAUDAN, TRUTH, ERROR AND THE CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 51 (2006). Laudan concludes that the standard itself is subjective, but – for reasons he takes to be self-evident – wrongly so. I will argue, to the contrary, that the balance of legal authority gives us little reason to read BARD subjectively, and, at the same time, that the case for an objective standard – which I make here – is far from self-evident, despite my agreement with Laudan as to why it is a more intuitive and practicable approach to investigating evidence. See, also, Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 690 (1998).

<sup>5</sup> The reforms that center on instructing jurors as to how to weigh evidence, for example, simply assume that BARD should be understood objectively – as a function of objective properties of the evidence. But, as I will explain, there are reasons to interpret BARD subjectively, whereby these epistemological instructions would be inappropriate. See *infra* Part II.

<sup>6</sup> *In re Winship*, 397 U.S. 358, 365 (1970).

has proved its case BARD if and only if the jurors, after reviewing the evidence, *entertain* no reasonable doubts, themselves, about the defendant's guilt. The subjective standard, in other words, directs jurors to introspect about their own mental states (eg. are they sure he did it?) after reviewing the evidence.

To be clear: the two standards do not always come apart (as discussed in Part III(a)). Some types of subjective certainty in observers, such as an umpire's conviction that the runner is safe or a police officer's having no doubt that a driver was tailgating another, consciously track what the observers believe a reasonable person should likewise think, if she could perceive what they did. The umpire, for example, does not believe it would be reasonable for someone else in his shoes to judge the player out. In those sorts of cases, we could say that not only are the observers subjectively certain, but they also judge it unreasonable for someone else to think differently, at least if she had the same evidence. And that is precisely what the *objective* standard equates with proof BARD. Therefore, this type of subjective (or intersubjective) certainty is, despite its being a form of subjective certainty, functionally equivalent to what the objective standard equates with BARD.

Far more important, for present purposes, is where the standards come apart: when, for example, a juror is subjectively certain about the defendant's guilt, but considers doubts reasonable, on an objective assessment of the case. That is when the two standards call for opposing verdicts. And this sort of dilemma is quite common, with much turning on which standard of proof a jury follows. Consider the following examples:

1. A man is accused of breaking into a house and robbing it. A neighbor says she witnessed the break-in, which she describes in elaborate and consistent detail, including both the defendant's facial features and movements as he brushed past her own home, and the terrified state she was in as she peered out the window. Yet on cross-examination she admits to having misspoken earlier, when she told the court she never met the defendant, a vagrant who had recently taken to pan-handling in the area. In fact, it emerges, she'd run into him a week earlier, after which she had told friends she was uneasy about his presence in the neighborhood.

The jurors, nevertheless, believe her testimony. Her demeanor, her eye contact, and her unflinching consistency in retelling her detailed account over days of direct testimony and cross-examination, all persuade them that she is speaking sincerely and competently. But they are sophisticated jurors, aware that they are far from human lie detectors. And they know that there are grounds to discredit her testimony, which are not far-fetched.

On the subjective standard, they should convict. The fact that they have no doubts that the incriminating witness is speaking truthfully gives them no doubts – reasonable or otherwise – that the defendant committed the crime. And that state of mind is precisely what the subjective standard of proof equates with “proof beyond a reasonable doubt.”

On the objective standard, by contrast, they would be justified in acquitting him. Whatever they believe, they can hardly deny that it would be reasonable to doubt the defendant's guilt. The witness's having spoken falsely, her unease about the defendant's remaining in the neighborhood – a possible, if unlikely, motive to frame him – are grounds to suspect her testimony. That they believe her anyway may be a basis to feel sure he did it, but it is not a basis to rule out doubts as unreasonable. And as long as doubts are reasonable, then the objective standard directs them to acquit, no matter how they feel or what they think happened.

2. A defendant is shown to have said he'd like to kill his boss (who he knew planned to fire him), adding that he could do it by spiking her coffee with anthrax. He also boasted that there'd be no evidence of his crime if he carried it out. Sure enough, a week later, she's hospitalized for anthrax traced to her coffee. He's arrested, and it's shown he lied about his alibi. But no physical evidence links him to the poison or the scene.

Jurors in this case may have no doubt that the defendant committed the murder. As before, then, a subjective reading of BARD would direct them to find him guilty. But the evidence does not render the possibility that he's innocent implausible, in part because it involves nothing that seems to rule out a different person committing the crime, whose reason or connections to it remain unknown so far. Given that this possibility is reasonable on the evidence, the objective version of BARD favors acquittal.

3. A defendant is found to have motive, opportunity and the skill to have committed the crime, multiple eyewitnesses say they saw her do it, her fingerprints were found at the crime scene and she has no alibi. But when she testifies in her own defense, saying she was sleeping at the time, at least one juror finds her credible and sincere. He is as convinced of her sincerity as of anyone's he can recall, for all the reasons and criteria he's ever used, conscious and unconscious, to judge sincerity. He has no doubt she was speaking truthfully.

On the objective standard he should arguably vote to convict, as the evidence seems to rule out her innocence as a reasonable possibility. But on the subjective standard, he must focus on how sure he is, and in this case he is indeed doubtful. Moreover, the doubt is arguably reasonable, in that it is based on his carefully considered judgment of her sincerity, as she spoke throughout her testimony. That judgment – that someone is not lying – is generally sufficient to guide jurors in evaluating the testimony they hear. At any rate, it is a faculty of judgment that one reasonably relies upon, and here it grounds doubt about the defendant's guilt. As a result, the juror should acquit her.

4. During a key eyewitness's testimony, a juror who once worked as a prosecutor notices that the state switched examiners, suddenly sending a young, less experienced ADA to question the witness. She recalls that prosecutors in that district had a custom of doing this when the junior ADA directly coached the witness. Therefore, she infers that this particular witness, too, may have been coached, and so she wonders whether he is speaking frankly and sincerely.

The testimony itself, however, seems airtight, and highly incriminating – it confirms every detail of the state's theory, as first presented in opening arguments. If reliable, it leaves no room for doubt. But the juror cannot herself rely on it. Her reservations are justified, perhaps, but not objectively warranted by the evidence that the DA presented (which, arguably, includes the testimony, but not the fact of which prosecutor elicited it).

On the subjective standard, the juror should vote to acquit because she has a reasonable doubt. On the other hand, the evidence presented does not objectively warrant any doubt. The objective standard, then, seems to call for conviction.

As these examples show, a verdict could turn on whether the requirement of proof BARD directs jurors to assess whether they have doubts, or merely think doubt compatible with the evidence. The notion of "reasonable doubt," on its face, gives no obvious resolution to this ambiguity. Many jury instructions, however, take a decided stance on it, expressing a subjective reading of proof beyond a reasonable doubt.<sup>7</sup> That is, they direct jurors to assess how certain or persuaded they find themselves of the defendant's guilt after hearing the state's case, or whether they harbor doubts. They advise, for example, that jurors equate proof BARD with proof "you would be willing to rely upon...in the most important of your own affairs."<sup>8</sup>

Here I will argue for an objective reading of the criminal standard of proof, in general, and BARD in particular, in that it is required by uncontested principles often grouped under the heading "the rule of law", most importantly the requirement that a legal rule be applied in a way that generalizes to like cases. As I will show, that constraint can only be satisfied using the *objective* standard of proof. Moreover, I will attempt to refute the worry that an objective standard places undue burdens on how citizens may think and deliberate freely in their roles as jurors, and that it denies the public the right to render a factual verdict on what happened.

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<sup>7</sup> See, e.g., Ninth Circuit Model Jury Instructions 3.04 (1984) (proof BARD is "proof that leaves you firmly convinced"); First Circuit Criminal Jury Instructions 3.02 (2012) ("if...you are satisfied beyond a reasonable doubt"); Delaware Pattern Criminal Jury Instructions 2.6 (2010) (BARD is "proof that leaves you firmly convinced"); *State v. Wilson*, 686 So.2d 569 (Fla. 1996) (return "not guilty" if "there is not an abiding conviction of guilt, or...a conviction...which is not stable but which wavers and vacillates"), recommended in Florida Standard Jury Instructions In Criminal Cases 2.03 (2000).

<sup>8</sup> See, e.g., Fifth Circuit Criminal Jury Instructions 1.06 (1990); See also LEONARD B. SAND ET. AL., MODERN FEDERAL JURY INSTRUCTIONS 4-8 (2002).

This article proceeds in four parts. First, I will briefly illustrate the extent to which, despite a growing scholarly consensus to the contrary, legal authority is undecided on whether BARD should be understood subjectively or objectively, as it was even in the era of the now outmoded “moral certainty” standard. Yet, as I will show, many jury instructions take a decidedly subjective approach to BARD: they direct jurors to base their conclusions either on how subjectively sure they feel, or whether they subjectively experience doubts. Part II offers a rationale for why they might do so: I attempt, there, to motivate the subjective BARD standard, or at least to show why it is not easily dismissed or ridiculed. Part III, on the other hand, begins the argument for the objective standard. I will argue that a juror’s conclusion that the state proved its case amounts to the application of a legal rule, and is therefore subject to the constraints we place on state actors applying legal rules. Most important among those constraints is that a legal rule like BARD be applied on the basis of factors that generalize to like cases, rather than factors that are special to the particular case or the parties to it. As I will show, only the objective BARD standard meets this criterion, and for that reason it should be preferred.

Part IV addresses the objection that the objective reading of BARD places undue burdens on a juror’s thinking and deliberating about the case. Section IV: B responds to the specific concern that the objective standard precludes jurors drawing on their unique experiences and skills. I will show why an objective standard can, in fact, accommodate different jurors bringing their individual talents, experiences and perspectives to bear on the evidence. Finally, Part IV: C returns to some of the considerations that favor a subjective standard: for example, that a jury trial is a search for truth, and its conclusions – that someone committed a crime, for example – should be sincerely believed by those who render them, rather than merely presented as highly probable given the evidence. I will try to reconcile these concerns with an objective BARD standard.

If, as this article argues, the standard of proof in criminal trials is best understood objectively, then jurors should have occasion to take the view that they are absolutely certain the defendant is guilty, or have no doubts about it, but feel the state failed to prove it. “I’m sure he did it, but there’s reasonable doubt,” would express a sensible reaction to at least some cases. In contrast, on the subjective standard, that reaction would be plainly incoherent, because a juror’s lack of reasonable doubts after hearing the evidence *is* what constitutes proof BARD. That is the interpretation – adopted by many jury instructions and some scholars – that this article aims principally to refute.

## II. WHAT LEGAL SOURCES SAY

### A. LEADING CASE LAW ON BARD

The scholarly consensus on the criminal standard of proof appears to be that it is a subjective standard, as evoked by frequent reference to landmark cases that talk of jurors being “firmly convinced” or reaching a “state

of subjective certainty.”<sup>9</sup> Yet a close reading of the authorities that gave rise to this widespread impression supports an alternative explanation, as well, which is that they simply did not contemplate the subjective-objective distinction at all. Legal authority is, in other words, simply under-theorized with respect to whether the standard of proof, and BARD in particular, refer to doubts left open by the evidence or doubts in the minds of jurors.

In earlier centuries, the law seemed clearer on this issue, with a variety of authorities in the Anglo-American tradition equating “proof beyond a reasonable doubt” with “moral certainty” in the guilt of the defendant.<sup>10</sup> Indeed, 20<sup>th</sup> century courts, in breaking with the “moral certainty” understanding, expressly equated the phrase “moral certainty” with a jurors’ state of mind, which they dismissively contrasted with “evidentiary certainty.”<sup>11</sup> In fact, the historical record reveals the meaning of “moral certainty” to be more nuanced and its evocation of a juror’s psychological state misleading.

The phrase “moral certainty” harkens back to an earlier form that English juries took, namely as ad hoc investigators, neighbors of the parties to the case who were already familiar with the key facts.<sup>12</sup> They interviewed witnesses, gathered evidence, and formed a conclusion as to what happened, on the basis of which the perpetrator was punished or let go. Yet they were also aware of the limitations of such inquiry and, just as importantly, the moral responsibility to punish only the guilty. For reasons drawn from Christianity, but which resonate in purely secular ethics, as well, jurors were presumed to be in abject terror of meting out punishment, especially the death penalty, on anything short of certainty – lest they bloody their hands against the innocent.<sup>13</sup> Yet, as was also well appreciated, their empirical investigations could yield only highly probable conclusions, often based on testimony, which fell short of the type of “absolute” certainty then ascribed to mathematical truths or divine knowledge, or the sense of scientific certainty associated with immediate sense data.<sup>14</sup> This presented a practical problem: how could aptly fearful jurors ever feel justified in convicting anyone?<sup>15</sup>

To address this pragmatic concern, the category of “moral certainty” was developed to refer to a conclusion sufficiently warranted (hence “certainty”), by evidence such as testimony and second-hand reports, so that one

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<sup>9</sup> See, e.g. Lillquist, *supra* note 1, at 99 n.29 (2002); DAN SIMON, IN DOUBT 195 (2012); Laudan, *supra* note 2.

<sup>10</sup> See, e.g., JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008).

<sup>11</sup> See, e.g., *Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

<sup>12</sup> See, e.g., Barbara Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600-1850*

<sup>13</sup> WHITMAN, *supra* note 10, at 10-14.

<sup>14</sup> See Shapiro, *supra* note 12, at 158.

<sup>15</sup> This practical concern is sometimes put as though it addresses the task of comforting jurors and judges, rather than proving the case. See, e.g. Miller Shealy, *A Reasonable Doubt about “Reasonable Doubt,”* 65 OK. L. REV. 225, 229-30 (2012). But the dichotomy is false, insofar as the *reason* jurors needed to be comforted was, at least in substantial part, to be reassured of not punishing based on error. See, e.g.,

would be morally justified in acting on it (hence “moral”).<sup>16</sup> This standard, then, addresses the level of certainty required for conviction – specifically advising that it falls short of either scientific certainty about the facts or analytic or mathematical certainty about the concepts involved.<sup>17</sup> It also addressed the subject matter of the certainty involved, namely that it was the sort of probabilistic certainty, or near certainty, that pertains to empirical evidence such as testimony, which always allows at least the possibility of error. What the “moral certainty” standard did *not* address, however, was whether the certainty in question was a state of certainty in the minds of jurors or a state of the evidence that justified being certain. In short, the standard did not address the question at hand – should the standard of proof be objective or subjective? – nor did it lean in either direction, despite subsequent interpretations to the contrary.<sup>18</sup>

The “moral certainty” standard was decisively rejected in the 20<sup>th</sup> century, which might have led some to hope the precise nature of the standard of proof would be clarified, at least with respect to whether it was objective or subjective. Such hope, however, would have been disappointed. In the second half of the century, the Supreme Court did, in fact, speak directly to the nature of the standard, historically revising its procedural and legal status. The case, *In Re Winship*,<sup>19</sup> involved a juvenile defendant in New York accused of stealing from a pocketbook left in a locker room. The standard of proof that New York had applied to juvenile defendants was one of preponderance of the evidence, rather than the more demanding standard reserved for criminal trials of adults. The defense sought to overturn the guilty verdict on grounds that the young man had a right to the higher standard of proof; indeed, it was argued that all citizens, young and old, have a basic right to the highest standard of proof in criminal trials. The Court agreed. Rather than see BARD as expressing a moral requirement for responsible decisionmaking, the Court in *In Re Winship* redescribed the standard as an essential element of due process.<sup>20</sup> As Justice Brennan’s oft-cited opinion puts it:

Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.<sup>21</sup>

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<sup>16</sup> This is an odd use of the word “moral,” as it does not refer to ethical doctrines or guidelines, but simply to a subject matter most identified by what it is not, namely physical science, math, logic or divine knowledge.

<sup>17</sup> See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1177 (2003).

<sup>18</sup> See, e.g., *Cage*, 498 U.S., at 41.

<sup>19</sup> 397 U.S. 358 (1970).

<sup>20</sup> *Id.* at 365.

<sup>21</sup> *Id.*

While the case became the most decisive authority in subsequent legal treatment of the BARD standard, it offers little guidance on the ambiguity at issue here. Indeed, it contains grounds for both an objective and a subjective reading.<sup>22</sup> The language of Justice Brennan's opinion, for example, explicitly rejects the "moral certainty" phrase and calls for a focus on the evidence, instead (apparently taking that to be in tension with "moral certainty"). That seems to direct jurors away from their own subjective states and towards more objective data. In other words, it could be seen to support an objective standard. But that interpretation would be too quick. Both the subjective and objective standard, as described here, are compatible with requiring jurors to consider all the evidence before deciding; indeed, as we will see, even the jury instructions that expressly adopt the subjective standard tend to insist that jurors reach a verdict only after carefully considering the evidence.<sup>23</sup> In dispute is whether they may convict if their review of the evidence leaves them personally convinced or not doubting, as the subjective standard might require, or whether they must regard the evidence as *objectively ruling out* any reason to doubt.

Aside from the wording by which the case describes the BARD standard, a key focal point in *Winship* is its historic casting of BARD as an element of due process. Yet that treatment, too, offers conflicting signals on the question of whether BARD is subjective or objective. For example, the Court cites a scholarly article that explicitly invokes a subjective understanding of BARD, as "impress[ing] on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."<sup>24</sup> Yet the Court justifies BARD's role in due process with the following principle:

No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them... *is sufficient to show* beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged [emphasis added].<sup>25</sup>

Notice that here the authority cited by the *Winship* court invokes an objective reading of BARD, as it directs jurors to form judgments about what the evidence supports (or is "sufficient to show"), rather than – as the subjective standard directs -- how much it persuades them or leaves them with no doubts. In short, the leading case enshrining BARD as an element of due process is ambiguous on whether BARD is subjective or objective.

The subsequent cases that speak most directly to the objectivity or subjectivity of BARD offer scarcely more clarity. In *Johnson v. Louisiana*, the Supreme Court upheld a conviction for armed robbery reached by a jury that

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<sup>22</sup> *But see* LAUDAN, *supra* note 2, at 320 (claiming that nearly all Supreme Court cases describing BARD favor a subjective reading).

<sup>23</sup> *See infra*, Section I: C.

<sup>24</sup> *Id.* at 363, quoting Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 4 FAMILY L.Q. 1, 26 (1967).

<sup>25</sup> *Id.*, quoting *Davis v. United States*, 160 U.S. 469, 484 (1895).

split nine to three in favor of conviction (where the state sought hard labor as a punishment, Louisiana allowed verdicts by supermajorities short of unanimity). The defense argued that the disagreement of three jurors meant that the state had failed to prove its case BARD.<sup>26</sup> Again, the court rehearsed the same formulation, quoted in *Winship*, on the need for jurors to reach a “subjective state of certitude” to find guilty.<sup>27</sup> However, in its own discussion of the case, the Court expressly distinguished between whether doubts were held, and whether they “exist.” As the Court stated: “want of jury unanimity is not to be equated with the existence of a reasonable doubt.”<sup>28</sup> The Court emphatically rejected the claim that “doubt of a minority of jurors indicates the existence of a reasonable doubt.”<sup>29</sup> If, however, subjective certainty were equivalent to proof beyond a reasonable doubt, as the subjective standard provides, then the distinction that concerned the court would be nonsensical. The existence of reasonable doubt, or its absence, would be identified with the requisite number of jurors having or lacking it, respectively. The Court’s reasoning, and its reference to the “existence” – as distinct from the experience – of doubts, seems to point to an objective understanding of BARD, even as it recited the subjective language of *Winship*. The opinion, in other words, points – again – in both directions.

In *Victor v. Nebraska*, the Supreme Court upheld a conviction despite the jury instructions used at trial, which included the outmoded phrase “moral certainty.”<sup>30</sup> The case actually combined two distinct actions, one in California and one in Nebraska, both murder cases in which the defendant was accused of fatal shootings. In both cases, the instructions upheld by the court described reasonable doubt as “such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused.”<sup>31</sup> Needless to say, “having an abiding conviction” – even without the phrase “moral certainty” – describes a state of mind, not the warrants of evidence. And the Court expressly affirmed that persuading the jurors to the level of “having an abiding conviction...correctly states the government’s burden of proof.”<sup>32</sup> The *Victor* court also rehearsed the phrase of earlier cases that described BARD as requiring jurors to “reach a subjective state of near certainty.”<sup>33</sup> So parts of the opinion definitely support a subjective BARD.

Yet the same opinion also described as unconstitutional any instruction that would allow a juror to convict merely if she is convinced “based on strong likelihood and firm conviction” of the defendant’s guilt, “even though

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<sup>26</sup> 406 U.S. 356 (1972).

<sup>27</sup> *Id.* at 360.

<sup>28</sup> *Id.* at 363.

<sup>29</sup> *Id.*

<sup>30</sup> 511 US 1 (1994).

<sup>31</sup> *Id.* at 12.

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

<sup>33</sup> *Id.* quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

the government has failed to *prove* his guilt beyond a reasonable doubt [emphasis in original].”<sup>34</sup> This distinction between proof and persuasion, or “firm conviction,” presupposes an objective reading of the BARD standard, inasmuch as a subjective reading *equates* BARD with such states as “a firm conviction.” The Court also described BARD as “probabilistic,” requiring a “high probability” that the defendant committed the crime, which might be contrasted with a mere high degree of subjective certainty to that effect.<sup>35</sup> Furthermore, the author of the case, Justice O’Connor, wrote in an earlier concurrence that a state failed to meet its burden of negating an affirmative defense “beyond a reasonable doubt...if there was so much as a reasonable possibility that [the] defense had merit.”<sup>36</sup> In other words, the actual existence of a reasonable possibility – regardless of whether jurors entertained it – was enough to find reasonable doubt. That, of course, points decidedly toward an objective standard, as reflected in at least some of Justice O’Connor’s language in *Victor*, as well. As with earlier cases, then, the doctrine points towards both objective and subjective readings of BARD, leaving the central ambiguity in place.

#### B. APPELLATE REVIEW

*Winship* and its progeny, including the influential cases just mentioned, offer conflicting descriptions of the criminal standard of proof, at least with respect to whether it is objective or subjective. Yet the question of how BARD is to be applied is arguably independent of how it is described; what matters more, it might be thought, is how Courts assess jurors’ actual application of the standard when they review it on appeal. The appellate standard of review, however, does not, in fact, resolve the ambiguity surrounding BARD. The standard was most prominently enunciated in *Jackson v. Virginia*,<sup>37</sup> which the Supreme Court in 2011 explicitly reaffirmed in *Cavazos v. Smith*.<sup>38</sup> *Jackson* involved an ex-convict who shot and killed his friend, firing the gun at least twice, in what he alleged was self-defense. The defendant sought Habeas Corpus relief upon conviction. That a murder took place was undisputed; at issue was whether the prosecution had proved the element of premeditation.

The Supreme Court affirmed the trial judge’s decision to uphold the guilty verdict: a guilty verdict, said the court, is evaluated as to whether a “rational trier of fact,” viewing the evidence “in the light most favorable to

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<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 14.

<sup>36</sup> *Gilmore v. Taylor*, 508 U.S. 333, 346 (1993).

<sup>37</sup> 443 U.S. 307, 315 (1979).

<sup>38</sup> 2011 U.S. LEXIS 7603 (2011).

the [prosecution],” could have found the defendant guilty beyond a reasonable doubt.<sup>39</sup> Here, the evidence brought to show premeditation – the re-loading and refiring of the gun, for example – could have led a rational juror to find it proven beyond a reasonable doubt that the killing was premeditated, or so the court reasoned. Importantly, the court distinguished between whether it agrees that guilt was proven BARD and whether a rational trier of fact could have found as much.<sup>40</sup> This might seem, on the surface, to suggest a subjective standard, distinguishing between what is reasonable, objectively speaking, and what rational triers of fact might conclude. Indeed, that distinction was reinforced by the court’s directive that the evidence be read in the light most favorable to the prosecution, resolving all conflicts in the evidence in the state’s favor.<sup>41</sup> Needless to say, ignoring all countervailing evidence is not always likely to be a reasonable conclusion, objectively speaking. So, again, the court’s standard of review seems, at first glance, to favor a subjective notion of BARD. On the other hand, the Court’s reference to disagreeing with the jury verdict would be odd on the subjective standard, which equates verdicts with jurors reporting their state of mind. Can the court meaningfully disagree that jurors felt as they claim they did?

Indeed, the opinion has multiple elements of both the objective and subjective standards. On the one hand, the court used “rational” and “reasonable” interchangeably in describing a model factfinder.<sup>42</sup> That suggests that the question of whether a reasonable juror could have found the case proven BARD amounts to whether such a finding is objectively reasonable, which resonates with the objective standard. On the other hand, even the subjective state of certainty, or of having no doubts, is subject to rational norms. For one could plausibly ask whether a rational person could be subjectively certain in such circumstances. Granted this would not be an evaluation of a judgment, to which “reasonable” or “rational” seem more suited. But it is common to regard certain psychological states besides judgment, including certainty or uncertainty, as subject to norms of rationality.<sup>43</sup> When there are obvious holes in the evidence, for example, it is sensible to look suspiciously upon someone who is nevertheless subjectively certain. That subjective state seems open to criticism. Similarly, as will be discussed in the next section, there may be standards for when it is reasonable or rational to feel sure of something. In other words, the standard of review set forth in Jackson is compatible with *both* the objective and subjective standards. It therefore fails to resolve the ambiguity any better than the caselaw on BARD instructions.

As already noted, none of these cases directly take up the question of whether the criminal standard of proof should be understood subjectively or objectively; indeed, I have been arguing, legal authorities have yet to do so.

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<sup>39</sup> *Id.* at 326.

<sup>40</sup> *Id.* at 334.

<sup>41</sup> *Id.* at 319.

<sup>42</sup> For a reading along these lines, see Michael S. Pardo, *Rationality*, 64 ALA. L. REV. 141, 147 (2013).

<sup>43</sup> See, e.g., RONALD DE SOUSA, THE RATIONALITY OF EMOTION 5-6 (1990).

But they are brought here simply to illustrate that even where the most authoritative court expressly discusses the meaning and requirements of BARD, it alternates between the two standards. At most, one could conclude that in the past half century the Supreme Court has moved from a vague standard (“moral certainty”) to one rooted more explicitly in the evidence. But the language of the landmark court decisions enshrining BARD as Constitutionally mandated, and those dictating the standard of review, leave open whether the standard of proof jurors should apply – *after* reviewing all the evidence – is subjective or objective.

### C JURY INSTRUCTIONS

Given that the phrase “proof beyond a reasonable doubt” is open to either subjective or objective interpretations, and that legal authority has gone in both directions, one might expect jury instructions to diverge along objective and subjective lines. That expectation, however, would be unmet. A majority of jurisdictions, in fact, have – following the Supreme Court – adopted versions of the instruction he recommended by the United States Judicial Center:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime or crimes charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.<sup>44</sup>

Similarly, the Ninth Circuit presents the following model instructions on BARD:

Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty... If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.”<sup>45</sup>

The Alaska state court system uses a similar model: “Proof beyond a reasonable doubt must be proof of such a convincing character that, after consideration, you would be willing to rely and act upon it without hesitation in your important affairs. A defendant is never to be convicted on mere suspicion or conjecture.”<sup>46</sup>

On all of these instructions, jurors are asked to assess their state of mind: are they “firmly convinced,” for example, or “convinced beyond a

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<sup>44</sup> Quoted in *Victor*, 511 U.S., at 27 (J. Ginsberg concurring).

<sup>45</sup> Ninth Circuit Model Jury Instructions 3.04 (1984).

<sup>46</sup> Alaska Criminal Pattern Jury Instructions 41 (2011).

reasonable doubt,” or “willing to rely” on their conclusion “without hesitation.” These are, then, decidedly subjective standards.

Consider, in contrast, the language favored by Second and Fifth Circuit courts: “Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.”<sup>47</sup> Here the focus is not on how persuaded the jurors actually find themselves but on how a reasonable person would respond to the evidence. This points the inquiry towards the evidence and its objective implications, and away from how it happens to move the jurors.

Most instructions, however, like the USJC and 9<sup>th</sup> Circuit, and the one used by the trial court in *Victor*, clearly call for a subjective standard: jurors assess their own state of conviction, or persuasion, based on their review of the evidence. Thus, in a situation like Case 1 above, wherein a witness’s incriminating testimony struck them as undoubtedly sincere, jurors would be directed by these instructions to find that the state proved its case: the evidence – her apparent sincerity and the absence of any exculpatory evidence – does in fact leave them “firmly convinced,” without doubt. Importantly, the jurors can conclude this about themselves even if they would regard failing to be convinced, by the same evidence, as not altogether unreasonable.

Still, it will be noticed that the instructions cited above do require that jurors assess the state’s case “after...consideration of all the evidence”<sup>48</sup> rather than, say, their own values or experiences: the USJC version, still the most common instruction, calls on jurors to make the decision “based on your consideration of the evidence.” This might invite the suggestion that, for all the instructions’ subjective language (“firmly convinced,” “conviction”), they in fact demand an objective inquiry. Once a juror is forced to focus on the evidence, it could be argued that she is already required to disregard some of her actual subjective reactions, to wit: any not grounded in the evidence.

This way of reading objectivity into the standard, however, would be forced. As in the case of the alleged burglary witness, the subjective standard is compatible with focusing exclusively on the evidence. For it was the apparent sincerity of the state’s key witness that, we suppose, prompted the jurors’ state of subjective certainty. Rather than some factors external to the evidence or prior to the trial, it was precisely the evidence in that case that, we assume, convinced the jury to such a high degree. Nevertheless, their state of certainty or doubtlessness is entirely compatible with regarding doubts as reasonable. If asked, ‘Are you sure he’s guilty?’ they would, of course, answer affirmatively. Yet if asked whether it would be reasonable to doubt the defendant’s guilt, they would likewise have to answer yes, as well. For that reason, these instructions point decidedly toward a subjective standard, for all their focus on the evidence.

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<sup>47</sup> Quoted in *United States v. Savulj*, 700 F.2d 51, 69 (2d Cir. 1983).

<sup>48</sup> See, *supra* note 45.

### III. WHY EVEN CONSIDER A SUBJECTIVE STANDARD?

Despite the adoption of a subjective standard of proof by many jury instructions, it appears that legal authorities did not directly address the subjective-objective distinction when they had occasion to assess or even formulate such instructions.<sup>49</sup> It might be thought, then, that once the question is considered, the objective standard emerges the obvious favorite, with its focus on what seems to matter in the case – the evidence – rather than on the jurors’ minds or, put less flatteringly, their feelings. Larry Laudan, for example, criticizes the subjective interpretation compellingly as follows:

[T]his focus on a juror’s mental state is more than a little curious...doctors don’t decide whether they have the right diagnosis of a puzzling disease by scrutinizing their own mental states but rather by reviewing the clues and symptoms that they have to hand and seeing whether those factors strongly support the diagnosis, according to accepted rules of theory evaluation.<sup>50</sup>

Indeed, the standard itself, on the subjective reading, directs jurors to consult their state of mind, as Laudan observes. But that may seem less striking when seen in context: jurors are only directed to apply this standard “after a careful and impartial consideration of all the evidence.”<sup>51</sup> In this sense, a juror is less like a doctor using her own certainty to reach a diagnosis, and more like a DMV examiner using his sense of safety in a teenager’s car, after driving with her for over an hour, to assess that she is a competent enough to be licensed. Clearly, the examiner’s mental state is not direct evidence of the teenager’s driving skill; the evidence lies, rather, in the way she parks, turns, stops, accelerates, and so on. But his subjective sense of safety is not supposed to be the reason the state judges her to be a good driver. Something closer to the reverse is true: the quality of her driving is supposed to be the reason he has this subjective sense, and this sense serves to us (and himself) merely as the indicator of what he already thinks of her driving.

Similarly, the certainty of jurors is not what first shows them the strength of the evidence they evaluate; it merely indicates that they already found the evidence persuasive. The subjective standard of proof, more broadly, rests on the empirical premise that the certainty of 12 independent people focusing on the same evidence and nothing else for many hours, and being exposed to the countervailing considerations of any dissenters (and the opposing arguments of attorneys), will likely reveal that the evidence is strong.<sup>52</sup> The force of this revelation is perhaps stronger in light of the fact

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<sup>49</sup> See *supra* section I:a

<sup>50</sup> Laudan, *supra* note 2 at 318.

<sup>51</sup> Ninth Circuit Model Jury Instructions, *supra* note 45. See, also, *People v. Antommarchi*, 80 N.Y.2d 247, 252-253 (1992), for a similar statement of the juror’s responsibility to consider all and only the evidence, before deciding on the defendant’s culpability.

<sup>52</sup> For all the intuitiveness of this procedural approach to truth-tracking, it is in fact suspect in light of empirical findings in the psychology of criminal trials and group dynamics in

that jurors are instructed on the presumption of innocence, which, on one interpretation, would have them start from a skeptical stance towards the state's case, and convict only if they have been transformed by the evidence from doubters to unambivalent believers.<sup>53</sup> Put more crudely: that the evidence persuaded, under such conditions, could reasonably indicate that it is persuasive.

Aside from these reasons to consider jurors' certainty sufficient for conviction, there are independent reasons to deem it necessary. First, jury trials are commonly associated with a search for truth, and convictions with judgments about how someone behaved.<sup>54</sup> Similarly, legal punishment has been described as an expression of society's disapproval or condemnation or similar view of the convicted defendant's behavior.<sup>55</sup> These are not ordinary judgments; they are public statements understood as, *inter alia*, settling a factual question: did the defendant commit the crime? Norms of sincerity require that ordinary assertions express the actual beliefs of those who voice them.<sup>56</sup> Findings of guilty, however, are far weightier than ordinary assertions; they do not purport to express merely the *momentary*, revisable, beliefs of the jury, but the final word on what took place. As a result, sincerity should require something more than ordinary belief – something closer to outright belief, or certainty, about the defendant's guilt. In short, if the American community is to declare someone a criminal, it should do so with a high degree of certainty about what it is committing to the public record. Since jurors are charged with reaching such a finding, it makes sense to charge them with the psychological requirements of sincerity, as well.

Finally, requiring certainty is a way of forcing people to take responsibility for their judgments. Announcing that she is sure of her conclusion leaves a juror little room to distance herself from it; she cannot later say, "Well, I had my doubts," or "I just went with the crowd." Requiring certainty, then, enhances the jurors' responsibility *both* for the punishment they enable and the description they commit to the historical record. That, too, is a reason to require subjective certainty before finding someone guilty.

Again, these considerations do not count against the objective standard; they merely suggest that subjective certainty is necessary for conviction. That, of course, allows for a hybrid standard whereby a juror must convict

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general, including the discovery that when groups of people attempt to reach a resolution, they exert pressure towards consensus, resolution, rationalization, and vindication of the prevailing starting intuitions. *See, e.g.*, DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE SYSTEM* 29 (2012).

<sup>53</sup> *See, e.g.*, Henry L. Chambers, *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 674 (1998), arguing that the significance of the jurors' subjective certainty lies in large part in their transformation from skeptics, at the start of the trial, to absolute believers in the defendant's guilt.

<sup>54</sup> *See, e.g.*, Charles Nesson, *The Evidence or the Event?* 98 HARV. L. REV. 1357, 1360 (1985) ("A trial is ostensibly structured as a truth-seeking process").

<sup>55</sup> For the seminal articulation, *see* Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965).

<sup>56</sup> J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 50 (1962).

if and only if he is subjectively certain that the defendant is guilty *and* doubts would be unreasonable on the evidence. But once certainty is required, and we concede that it may also be a good proxy for the strength of the evidence, at least as these jurors saw it, the case for adding an objective component is weakened. That is, unless there is something independently wrong with the subjective standard that counts strongly against it, regardless of these virtues. I now turn to an argument to that effect.

#### IV. WHY AN OBJECTIVE STANDARD?

##### A. THE RULE OF LAW

As noted, no law or doctrine or explicit legal rule appears to have settled or even addressed the question of how to apply the standard of proof in criminal trials. Yet the best case for applying it objectively is, perhaps, too basic to be enunciated as a legal rule, because it pertains to how legal rules themselves are applied – that family of norms often grouped under the heading “the Rule of Law.” In particular, it rests on what Jeremy Waldron has called “the requirement of generality.”<sup>57</sup> That requirement is that legal decisionmakers should decide a case only on grounds that would apply to like cases; they should, in other words, act for reasons that generalize.<sup>58</sup> In particular, they should not decide a party’s legal fate in a way that intentionally treats her differently from a relevantly similar party in a relevantly similar case.<sup>59</sup>

The requirement of generality – that rules of law, and their application, generalize to like cases, even if only hypothetical like cases – is uncontroversial and bolstered by multiple justifications.<sup>60</sup> Indeed, it has been identified with justice itself, notably by H.L.A. Hart: “to apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in

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<sup>57</sup> Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 18 (2012).

<sup>58</sup> *Id.*

<sup>59</sup> The importance of this requirement becomes more striking when, as is often the case, legal rulings and decisions are explicitly grounded in facts about the case – that is, the decision is this way, as opposed to that way, because the facts turned out one way rather than another. As Neil MacCormick argues, if the facts of some case are such as to justify a certain outcome, “it must be so in all cases.... The ‘because’ of justification is a universal nexus, in this sense: for a given act to be right because of a given feature, or set of features, of a situation, materially the same act must be right in all situations in which materially the same feature or features are present.” NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW 91 (2005).

<sup>60</sup> See, e.g., Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210, 219 (2d ed. 2009) (arguing that generality is required so that a clear norm is acted upon in each legal decision); H.L.A. HART, THE CONCEPT OF LAW 157, 161 (1994) (arguing that justice requires treating people consistently and by the same rules).

different cases is the same general rule, without prejudice, interest, or caprice.”<sup>61</sup> Failing to satisfy the requirement of generality can be called unlawful – not merely in that it may violate established legal directives,<sup>62</sup> but in that it ceases to be “law” in a natural sense of the term. As Waldron puts it, a decision that violates the requirement of generality “seems to be the rule of a person over the parties appearing in the case in front of her, not the rule of law.”<sup>63</sup>

Importantly, singling citizens out in this way is not the same as having an unequal or even a negative impact on them. It is not, in other words, a failure to treat “like cases alike,” as rule of law norms are sometimes summarized.<sup>64</sup> Indeed, most jurors will serve only once, never having the chance to treat multiple parties consistently, and no principles of consistency like *stare decisis* apply to verdicts, in any event. So it bears emphasis that a legal decision-maker violates the generality requirement, hereafter “Generality,” if and only if his decision is based not on a legal rule or reason that would, in principle, yield the same outcome for anyone else similarly situated. Put differently, it is to judge them according to factors that necessarily do not apply to similarly situated others. And treating defendants as unique, in this respect, is traditionally thought to matter independently of how such treatment practically affects them.<sup>65</sup>

Consider, for example, a federal judge who regularly presides over 4<sup>th</sup> amendment motions to suppress evidence, many of which implicate the rule

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<sup>61</sup> See Hart, *Id.*

<sup>62</sup> Indeed, being treated unequally, even intentionally, could only give rise to a cause of action if it inflicted some sort of harm, material or expressive, and there was no rational basis for the treatment. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (holding that sentencing discrimination violates equal protection).

<sup>63</sup> Waldron, *supra* note 57, at 19.

<sup>64</sup> The directive to “treat like cases alike,” has been seriously challenged. See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) and Andrei Marmor, *Should Like Cases Be Treated Alike?* 11 LEGAL THEORY 37 (2005). But see, e.g., Erwin Chemerinsky, *In Defense of Equality: a Reply to Professor Westen*, and JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 109-41 (2012). The debate centers on, among other things, whether there is any special reason to worry about unequal treatment per se, over and above the justice and rightness of how each person is treated. That issue is orthogonal to the present discussion, however, which is less about the relational question of how multiple people are comparatively treated, and more about the substantive question of whether people are treated as subjects to distinct general norms. That a legal act or decision fails to generalize to like cases is not itself the problem with violations of Generality; it is merely the form that all such violations take.

<sup>65</sup> See, e.g., *Neal v. Delaware*, 103 U.S. 370, 394 (1881) (striking down a verdict in which jury selection intentionally excluded African Americans without inquiring whether the exclusion prejudiced defendant); *Ballard v. United States*, 329 U.S. 187, 195 (1946) (“The injury of unequal treatment is not limited to the defendant - there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts”). See, also, William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 9-19 (2011).

that, all else equal, the court should suppress evidence yielded by a search of places or objects in which the owner had “a reasonable expectation of privacy.”<sup>66</sup> This particular judge, let us suppose, has his own test for deciding when the 4<sup>th</sup> amendment was violated in that way: would he feel his sense of privacy offended by the search in question?

Although there may be a variety of objections to such a decision procedure, one would surely be that it singles people out for exclusion from the rule of law, where “law” is understood as a general rule, principle or norm that applies equally to all similarly situated parties. Against such a requirement, parties in this judge’s court would be subject to the question of how he feels in this case, rather than how a rule applies to it. Indeed, by definition the judge would be applying a standard – ‘would I feel as though my privacy was violated?’ – that does not generalize to others who are similarly situated, because most otherwise identical searches would not be assessed as to whether *this judge’s* sense of privacy was violated. Indeed, even the judge’s own future subjects could, on his test, face a different outcome, as his sense of privacy may become jaded or entrenched over the years. The standard is necessarily particular and perspectival, and so it violates Generality. And as I noted, this would be so even if, as a matter of fact, the application of the judge’s private sense of invasion would track the results of a universal standard. Nevertheless, his subjects could justifiably complain that they were not treated like similarly situated citizens, in that they were not judged by the same rule or reason that applies to others – which is to say not judged by a rule or reason at all.

Among the first legal theorists to extend this rule of law principle to juries was Charles Nesson, who argued that a verdict, particularly in criminal trials, is a communication to the public about the way legal rules apply to them.<sup>67</sup> In particular, it expresses that when the facts are a certain way, the state’s reaction will be a corresponding way, as well. That is why, according to Nesson, juries must make judgments about what happened, rather than merely probabilistic assessments of the evidence or reports of pure emotional reactions.

Although I will return more critically to this particular conclusion,<sup>68</sup> the reasoning for it is equally apt for the present discussion. In rendering a verdict, a jury is, indeed, applying a legal rule and communicating it as such, namely the due process requirement that a defendant be convicted only upon proof beyond a reasonable doubt. If, in contrast, a jury was merely charged with deciding what took place – as the deceptive label “finders of fact” may be superficially understood<sup>69</sup> – then the requirement of generality would be inapplicable. They would have no obligation to treat defendants in a way

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<sup>66</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>67</sup> See Nesson, *supra* note 54.

<sup>68</sup> See, *infra*, Part IV:C

<sup>69</sup> I say “superficially” because jury findings are not even ostensibly offered as synonymous with factual conclusions, notably when jurors find a defendant “not guilty,” which signifies only that they failed to find the defendant proven guilty.

that generalizes, because their finding would not be a way they treat defendants at all. It would simply be a factual conclusion, leaving to the court the decision of how to treat defendants on the basis of it. But following *Winship*, jurors were expressly charged with more than a factual determination: they are the sole party in the trial process that determines whether a defendant's due process right to a standard of proof has been upheld. They are, in other words, the custodians of the standard of proof, and their verdict is not only a judgment about events – if it is that – but a determination that a right was upheld, a standard met. A legal decision of this sort, then, is akin to those of judges and other legal decisionmakers, in that it amounts to an application of a legal rule to particular cases.

The juror's legal determination, then, is subject to the same rule of law principles as any other, including the requirement of generality. It would violate Generality if it were applied in a special, case-specific way, treating a particular defendant or case as though they were not subject to a norm or rule that generalizes to others. For example, jurors in an imaginary jurisdiction might follow a rule by which a defendant is proven guilty of sexual assault if and only if, after considering all the evidence, they felt afraid to leave him in a room with one of their family members who resembled the victim. Among other defects, this rule would violate Generality in that it would treat the defendant according to the entirely unique, case-specific question of whether *these particular jurors* had a certain feeling (fear of the defendant's repeating the offense in certain contexts). True, there would of course be other objections to the rule, not least the apparent irrelevance to the question of guilt or innocence. But even if that worry could be addressed – perhaps they could consider only fear that was prompted by the probability of his guilt on the evidence – there would still be the problem of jurors applying their own private, case-specific reactions. Other defendants, even if relevantly identical to this one, would *intentionally* be held to a different standard, that of whether the jurors in *their* cases would fear their release in that way.

Notice that two features characterize legal determinations that violate Generality in the ways just described. First, the decision is grounded in a private reaction. By private, I mean a reaction that the legal decisionmaker undergoes, rather than an action she takes or performs or a stance she endorses or agrees to abide by. It is, at least in substantial part, a psychological state that is internal to her. Second, it is particularistic. By “particularistic” I mean the reaction is not understood, by those who have it, to be the same reaction that other reasonable people would or should have in the same circumstances. It does not present itself phenomenologically as the required or appropriate reaction for similar cases.<sup>70</sup> Embarrassment over some blunder, for example, is a particularistic reaction; my embarrassment at being seen running for a plane, and missing it, does not take itself to be the appropriate reaction of others in the same circumstances. I may have the reaction even

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<sup>70</sup> By “similarly situated”, I am referring to external circumstances, such as whichever events or facts prompt the reaction. Clearly a *psychologically* similar person would be expected to react similarly.

as I know it would be perfectly appropriate for others not to have it, or at least not as strongly as I do. That is what makes the reaction particularistic.

That feature is added here because if a private reaction were experienced as that of any reasonable person, then a rule based on it would not be case-specific, after all, and would not violate Generality. For example, if a police officer were supposed to detain anyone whom she perceived as intoxicated, say, then although the *form* of the rule would be particular and case-specific – anyone *she* perceived – it would apply to like cases, in that what she perceived could reasonably be imputed to others in like cases. So in deciding that she perceived Smith to be drunk, she could reasonably be deciding, at the same time, that others would or should decide the same. Perception is not a particularistic reaction. In contrast, if the rule were to treat as intoxicated anyone whose behavior made her fear them or their companions, then it would fail to generalize to like cases, as this reaction is essentially – and taken to be – particularistic.

My central thesis is that the subjective reading of the criminal standard of proof puts in place just such a particularistic standard, and therefore violates Generality. Indeed, it is in important respects like the fear-based standard just described. Recall that the subjective standard would direct jurors: ‘convict if and only if, after considering the evidence, you *experience no reasonable doubts* that the defendant committed every element of the charged offense.’ As with fear, this subjective state of doubtlessness is a private reaction that is particularistic to those who have it, and so not applicable to otherwise identical cases – the same facts, for example, with the same evidence – in which the jurors do not feel that way.

This can be seen clearly in cases where the two standards come apart: when a subjective standard directs conviction but an objective one calls for acquittal. That would occur whenever a juror feels certainty or harbors no doubts about the defendant’s guilt, but judges doubt to be reasonable, say, on the part of someone else. In such a case, convicting, as directed by the subjective standard, would be to render a decision one knows is not based on factors that call for the same result in like cases. It would be to convict when, in the juror’s own judgment, acquittal would be reasonable, too. For that reason, it violates Generality.

It might be thought, however, that such cases are exceptional, maybe impossible, because in practice the standards never do come apart. Having no doubts, it might be thought, just *is* thinking one *ought* to have no doubts in the same circumstances, and that it would be unreasonable to respond differently. In a wide range of cases, however, it is common to be subjectively certain about something while, at the same time, believing it can be reasonably doubted. Consider the example of everyday trust. One trusts a close friend, perhaps, consciously deciding to resist or ignore at least some doubts that might become warranted by the available evidence. In this case, one may

knowingly, even happily, reach a state of subjective certainty while acknowledging that others, less trusting, could have some reason to doubt.<sup>71</sup> In a more extreme example, those who profess strong religious faith claim to do the same – to feel subjectively certain while knowing the evidence renders doubt reasonable or at least could potentially do so.<sup>72</sup> Even everyday cases of credence that fall short of trust involve this duality: one takes a stranger at his word when he gives directions, entertaining no doubts, even while knowing that very little evidence supports his reliability. The point of these examples is not to compare them to jury deliberation, but to show that being sure about something need not be in any tension with allowing that others may reasonably doubt it.

These claims – about the compatibility of subjective certainty with finding doubt reasonable – should not be mistaken for empirical generalizations. It may be that, as things turn out, most people only trust when they have no reason to doubt,<sup>73</sup> or that very few faithful concede that doubt would ever be reasonable. And perhaps everyone who takes directions in the street harbors at least some lingering doubt as to their sincerity. The examples are brought, instead, to show that *if* people find themselves subjectively in no doubt about some claim, it does not follow that they consider doubt unreasonable. Put differently, subjective certainty or doubtlessness that P, and considering doubts that P reasonable (even if one doesn't have them), are phenomenologically compatible. And that implies that one can be subjectively certain of a defendant's guilt, say (like a stranger's sincerity), while thinking it reasonable for others to doubt it. In other words, subjective certainty is particularistic; it does not take itself to be the appropriate reaction of any reasonable observer.

If that is right, then, on pain of violating the rule of law requirement of generality, a juror should not use her own lack of reasonable doubts as the basis for determining that the state met its burden of proof. Doing so would apply a standard that is private and particularistic, in direct tension with the rule of law norms just discussed.

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<sup>71</sup> This is not to suggest that trust is fact-insensitive, or insensitive to reasons. Although some trust theorists describe the state as non-epistemic – that it is not a matter of assessing evidence – it may still require that one does not have reasons to *disbelieve* or expect the contrary of what one is trusting will be the case. See Richard Holton, *Deciding to Trust, Coming to Believe*, 72 AUSTRALASIAN J. PHIL 63, 76 (1994).

<sup>72</sup> See, e.g., JOSEPH B. SOLOVEITCHIK, THE LONELY MAN OF FAITH 94-5 (1965) (“The very instant, however, that the man of faith transcends the frontiers of the reasonable and enters into the realm of the unreasonable, the intellect is left behind and must terminate its search for understanding... This unique message speaks of... acting irrationally instead of always being reasonable.”); JOSEPH CARDINAL RATZINGER (POPE BENEDICT XVI), INTRODUCTION TO CHRISTIANITY 20 (1969) (“[T]he believer knows himself to be constantly threatened by unbelief, which he must experience as a continual temptation... it is not until belief is rejected that its unrejectability becomes evident”).

<sup>73</sup> In that case, however, it arguably is not trust at all, as it does not involve relying on their goodwill. See, e.g., Annette Baier, *Trust and Antitrust*, 96 ETHICS 231, 234 (1986); and Marc A. Cohen and John Dienhart, *Moral and Amoral Conceptions of Trust, with an Application in Organizational Ethics* 112 J. BUS. ETHICS 1-13 (2013).

## B. REASONABLE PRESUMPTIONS

There is, however, one way the subjectivist about the standard of proof might convincingly respond. While subjective certainty may be phenomenologically compatible with considering doubts reasonable, the two states may be unable to coexist in a fully rational agent. Put differently, it may be *unreasonable* to be both subjectively certain of a defendant's guilt and, at the same time, aware that doubt is reasonable. In that case, any *reasonable* juror who became certain of a defendant's guilt would, *ipso facto*, deny that there is reasonable doubt. If we stipulate, further, that all legal decisionmakers – judges and factfinders alike – are held to norms of reasonableness, in addition to the principles of the rule of law, then the subjective standard would simply collapse into the objective one: reasonable jurors applying the subjective standard would convict if and only if they judge doubt to be unreasonable (which, on this hypothesis, simply follows from their subjective certainty).

Indeed, since Locke, epistemologists have been tempted by the thought that one should only believe something to the extent that it is likely to be true given what they know.<sup>74</sup> If some claim is or should be taken to be 85% likely, one should be precisely 85% certain of its truth or, as it is sometimes put, one should believe it to a degree of 85%, just 15% short of outright belief.

But this evidentialist stance, despite prominent contemporary advocates,<sup>75</sup> has been forcefully challenged.<sup>76</sup> And it is arguably less applicable to the case at hand – that of the psychological state of subjective certainty, as contrasted with the judgment that something is certain.<sup>77</sup> First, note the cost: applying such evidentialism to the state of subjective certainty would call on people, on pain of irrationality, to entertain or experience all doubts it is reasonable to have. Many, perhaps most, everyday decisions based on subjective certainty or doubtlessness (for example, being sure that someone is wounded or that the cry “Help!” is not a prank) would be rendered unreasonable, along with acting on some putative truth we don't consider important enough to assess further. And of course, cases of trust and faith would be unreasonable, as well. It may prove exhausting even just to aspire to entertain and experience all warranted doubts.

There is, however, an obvious ground, already mentioned, to reject such a requirement and to think it reasonable to be subjectively certain in the face

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<sup>74</sup> For a contemporary defense, see, e.g. JONATHAN ADLER, *BELIEF'S OWN ETHICS* (2002); and, on the threshold of likelihood (or lack thereof) justifying outright belief, Richard M. Foley, *The Epistemology of Belief and the Epistemology of Degrees of Belief*, 29 AM. PHIL.Q 111, 112 (1992)

<sup>75</sup> See, e.g., Bas van Fraassen, *Calibration: A Frequency Justification for Personal Probability*, in R.S. COHEN & L. LAUDAN (EDS.), *PHYSICS PHILOSOPHY AND PSYCHOANALYSIS: ESSAYS IN HONOR OF ADOLF GRUNBAUM* 295-315 (1983).

<sup>76</sup> See, e.g., Michael Caie, *Calibration and Probabilism*, 1 ERGO 1-37 (2014).

<sup>77</sup> See, e.g., Foley, *supra* note 74, at 112.

of warranted doubt. Simply put, the norms of interpersonal communication prescribe such a state. As has been much discussed with respect to testimony, it is reasonable to presume that a speaker is sincere, unless and until one has positive reasons to suspect otherwise.<sup>78</sup> Importantly, though, the probability of sincerity, on the evidence available to the listener, is hardly uniform, and often – as in communication with strangers – not obviously high enough that doubting it would be unreasonable. If we were to treat people’s statements and behavior as evidence, their assertions would not be taken at face value and presumed truthful, but instead evaluated for the probability that they indicate the speaker’s true beliefs. Often enough, on that proposal, we should not take people at their word, but simply suspend judgment pending further empirical evidence.<sup>79</sup> Yet the norms of interpersonal communication entitle us *not* treat the assertions of others as evidence or mere data; we take them at their word, until given a distinct reason not to do so.<sup>80</sup> That means that people are normatively entitled to be subjectively certain, or at least not to doubt, even when it may be reasonable to do so on evidentiary grounds.

Jurors, in the end, may not be entitled to this presumption of sincerity when evaluating witnesses. Indeed, if the arguments here are right, that presumption clashes directly with the presumption of innocence. But in other contexts, such as ordinary conversation, these same jurors are entitled – some would say invited<sup>81</sup> – to presume sincerity. Even in the courtroom context, the witnesses and prosecutors speak to them or address remarks to them, thereby triggering the conversational context that ordinarily involves the same presumption. Importantly, that presumption is reasonable, even if there is insufficient evidence to support it. It is, in other words, reasonable not to doubt someone’s sincerity even when the evidence warrants such doubt or hardly counts against it.

The implications for the standard of proof are clear: it is reasonable to be certain or to entertain no doubts about something, such as a speaker’s sincerity, while considering doubts about it reasonable. It is, then, similarly reasonable to be subjectively certain that someone is guilty, while at the same time thinking doubt about it reasonable, too. And, again, such certainty or doubtlessness is equated with finding a defendant proven guilty, on the subjective reading of BARD. That reading, then, equates proof of guilt with a

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<sup>78</sup> See, e.g., Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457, 467-69 (1993) (Burge speaks of an “entitlement” to take a speaker at her word); and Richard Moran, *Getting Told and Being Believed* 5 PHIL. IMPRINT 1-3 (2005).

<sup>79</sup> See, e.g., Moran, *supra*, at 6-7.

<sup>80</sup> *Id.* at 21. See also Richard Moran, *Problems of Sincerity* 105 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 341, 355 (2005). Moran presents the presumption of sincerity – he calls it simply a reason to believe a speaker – as based on the speaker’s assumption of responsibility or accountability for what he is directing the listener to believe. This, however, does not mean the listener is unreasonable in believing it; Moran’s argument merely presents a different *source* of the reason to believe than mere evidence.

<sup>81</sup> See, e.g., Paul Faulkner, *What is Wrong with Lying* LXXXV PHIL. & PHENOM. R. 535, 539-51 (2007).

juror's private and particular reaction, which it is not unreasonable for him to have. Deciding to convict on such a basis, then, violates the rule of law principle of generality; it fails to treat defendants like others in relevantly similar situations, in that it knowingly applies to them a standard or test (am I, in particular, convinced of their guilt?) that will not be applied to similarly situated others. For that reason, again, it should be rejected as a standard of proof.

### C. NO EXCEPTIONS?

This conclusion, of course, may seem to prove too much, at least in light of certain well-settled practices like jury nullification.<sup>82</sup> As is well known, a jury may decide that despite the guilty verdict they would reach by routine and consistent application of the standard of proof, countervailing considerations in the case justify acquittal. Needless to say, such a practice, on its face, violates the requirement of generality, at least with respect to the standard of proof.<sup>83</sup> I say "on its face" because a jury's decision to nullify might well amount to a principled conclusion that generalizes, to the effect that in like cases, this otherwise exceptional verdict should be reached. But we should grant that jurors, and for that matter judges, police officers and other official applicers of laws and legal rules, occasionally see fit to make an exception, and excusably so. Indeed, we would regard a judge or police officer as monstrous, or at least unvirtuous, if she never acted leniently out of mercy, sympathy, generosity or even brute pity.<sup>84</sup> Yet the foregoing arguments may be read to stand against such paragon displays of humanity.

In response to this worry, two points should be made clear. First, the rule of law considerations that require generality and equality are not the only ones facing law enforcers. There are, indeed, countervailing considerations, including whichever ones may justify or at least excuse exceptions, and which – if followed generally – may not ultimately undermine the institutional practice they violate, or not enough to be impermissible.<sup>85</sup> This is simply a familiar feature of morally weighty decisions. Second, these sorts of exceptions arguably are justified or excusable to the extent that they *are* exceptions. Yet the subjective standard of proof would not merely allow a departure, in particular cases, from a general application of a rule; it would enact a necessarily particularistic application in every case. On the subjective standard of proof, every jury in every case would be deciding whether a defendant's due process right was upheld on the basis of factors (their own subjective certainty) that do not generalize to like defendants. Needless to say, that is well beyond an occasional exception.

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<sup>82</sup> See, e.g., *Standefer v. United States*, 447 U.S. 10, 22 (1980).

<sup>83</sup> The practice is, perhaps for that reason, been described as "lawless, a denial of due process." See *United States v. Washington*, 705 F.2d 489, 494 (D.C.Cir.1983) (*per curiam*).

<sup>84</sup> The Supreme Court in *Standefer* noted that rules protecting the unassailability of verdicts "permit juries to acquit out of compassion or compromise." *Standefer*, 447 U.S., at 22.

<sup>85</sup> See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 132-37 (1988).

On the other hand, this universalistic characterization of the subjective standard may invite an opposite concern: if the subjective standard is indeed applied to *all* cases, equally, then how is it not general? The standard itself is the general norm that is being applied, equally, in all cases. Indeed, *every* juror applies the same test (how sure am I?) in the same way, on the subjective reading of BARD. That may seem to be sufficiently general, after all. So it bears re-emphasizing that the problem I pose for the subjective standard of proof is not that the standard itself is an instance of particularism in violation of Generality. The problem is, instead, that the subjective standard enacts the unequal, particularistic application of *another* legal rule – the due process requirement that every defendant be convicted only upon proof beyond a reasonable doubt. The subjective standard invites jurors to apply *that* standard in a particularistic, unequal way (am *I* sure he did it?), one which thereby fails to generalize to like cases. And for that reason, again, it should be rejected in favor of the objective standard of proof.

#### D. THE OBJECTIVE BARD STANDARD

Recall that on the objective standard, a defendant has been proven guilty if and only if the evidence warrants no doubt that he committed every element of the offense charged. It is not enough that a particular juror have no doubts; she must regard doubts as unreasonable for *anyone* to have as to the defendant's guilt.

The benefits of this standard follow straightforwardly from the drawbacks, just presented, of the subjective standard. A judgment that the evidence warrants no doubt is a general judgment about the evidence, which applies to like cases. Given relevantly similar facts and pieces of evidence, the same burden of proof will have been satisfied (or unsatisfied). This allows jurors to reach in good faith the application of legal standards that their findings already project themselves to be: statements about how much evidence is sufficient to meet the state's burden of proof, and about whether a defendant's due process rights have been upheld.

That said, the benefits of the objective standard should not be overstated. I have been careful, in particular, not to claim that jury findings on the objective standard will be *true* or *accurate* general legal judgments about the evidence. The objective warrants of evidence are difficult to assess, particularly with the growing use of specialized expertise – forensic science, statistics, and psychology, for example. One could guess that most jurors are, if anything, more competent to assess whether a piece of evidence happened to convince them than whether the same conclusion should reasonably be drawn by others.

In light of these considerations, it bears emphasis that the arguments for the objective standard – at least the ones advanced here so far – are not merely, if at all, about its likeliness to track the correct judgment; that argument has been made elsewhere<sup>86</sup> and is, in any event, a matter of continued empirical scrutiny. Rather, the arguments here are about the requirements

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<sup>86</sup> See, e.g., Laudan, *supra* note 2, at 318.

of the rule of law, specifically the requirement to treat defendants as subject to the same legal rights and standards as others similarly situated. It is an argument already familiar in its application to judges. A judge who simply decides which result he favors in a particular case, without regard to legal rules or standards, is diserving his subjects regardless of whether his conclusions happen to mirror what they would have been under a good faith conclusion of law. Applying legal rules and standards to individuals is constitutive of how the state treats them as subjects. In particular, it respects the rule of law as applied equally to defendants, with no one treated as special or as arbitrarily meriting a higher (or lower) standard of proof.

An objective standard of proof, then, is a way jurors respect defendants as subjects to law and legal rules more broadly understood. Indeed, the juror's application of the objective standard is, following *Winship*, the *only* part of the trial process in which an impartial party ensures that defendants' due process rights are respected, whether that standard directs them to convict or acquit.<sup>87</sup> Judges, as noted earlier, are empowered to act on the standard of proof only when they find that no reasonable person could have followed it to the verdict reached. That leaves in place all verdicts that *might* have been reached by reasonable jurors applying the appropriate standard, but which in fact involved no such application. Jurors can get it wrong, or apply the wrong standard, without implicating a judge's review. For that reason, it is entirely in their hands whether a defendant will be treated as subject of a generalizable standard of proof, applying to like defendants in like cases. They ensure this lawful treatment of defendants only by applying the objective standard of proof BARD.

## V. OBJECTIONS

### A. DEMANDS ON JUROR THINKING

The upshot of the preceding argument is that jurors should treat their findings as legal determinations that generalize to like cases, which requires that they apply the objective BARD standard. Specifically, they must find a defendant proven guilty if and only if it would be unreasonable, on the evidence, to harbor any doubts that she committed every element of the offense charged. As already noted, this standard amounts to an epistemological judgment about the warrants of evidence, at least as much as a factual judgment about guilt or innocence.

The following worry might, then, be raised: this standard may demand too much of jurors. In particular, the difference between the objective and subjective standards – on its face – may be too subtle to guide the question of how jurors apply the standard of proof. After all, even Supreme Court cases evince confusion, or at best under-theorization, about this distinction. This paternalistic concern is, then, a subspecies of the worry, expressed by

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<sup>87</sup> This fact is emphasized in Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions* 67 TENN. L. REV. 47, 49 (1999).

courts and legal scholars, that BARD resists definition and should at times be left undefined.<sup>88</sup> Here, it takes the form of worrying that jurors cannot easily grasp the difference between having doubts – after reviewing the evidence -- and finding them warranted by the evidence. It is simply too subtle, rarified and abstract, best confined to scholarly journals. So, it would follow, there is no ground to urge that jury instructions and courts adhere to one or another version of these distinct readings of the standard of proof.

Without prejudging empirical questions,<sup>89</sup> it should simply be pointed out that this worry conflates two very different issues. One is the conceptual question of how a subjective and an objective BARD standard differ, which it may be conceded, *arguendo*, is subtle and abstract. Another is the practical *task* of applying each standard distinctly from the other. As long as jurors can do the latter, I want to suggest, it hardly matters whether they can expertly grasp the former. My claim rests on the familiar observation that to perform a task does not require understanding the ways it differs from subtly different tasks.<sup>90</sup> Consider that many people correctly describe some events as “ironic” and others as merely “surprising” or “odd.” If asked to identify events that fit into the different categories, they will likely assign different answers to different cases. But they might find it exceedingly difficult to *account* for the difference between these categories: to answer the question, What is the difference between an ironic and merely unexpected event?

Similarly, on the arguments presented so far, the subjective and objective standards of proof task jurors with two different practical questions. On the subjective version, they would be instructed as follows: do you have no reasonable doubts that the defendant committed every element of the offense charged? On the objective version, in contrast, the question would be along the lines of: can you conceive of plausible scenarios, which fit the evidence, in which the defendant is innocent?<sup>91</sup> Whether jurors can competently perform these different tasks, not confusing one with the other, is distinct from whether they can articulate or explain the difference between them. My claim has been that these tasks are different, in substantial ways, and that jurors should be directed to apply the second, objective one.

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<sup>88</sup> See, e.g., *United States v. Reives*, 15 F.3d 42, 45 (4th Cir. 1994). See also Note, *Reasonable Doubt: An Argument Against Definition*, *supra* note 2, at 1965 (1995).

<sup>89</sup> There is, however, some empirical evidence suggesting that jurors do appreciate the ambiguity that concerns this article, which prompts them to demand clarification of “reasonable doubt.” See Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions* 17 L.& SOC. REV. 153, 169, 174-5 (1982).

<sup>90</sup> For a related observation, see GILBERT RYLE, *THE CONCEPT OF MIND* (1949), especially Chapter II on the distinction between what he calls “knowing how” and “knowing that.”

<sup>91</sup> It will be recognized that this is the standard that had long been used by at least some jury instructions for circumstantial evidence cases, though, as Laudan points out, there seems to be little reason to distinguish the juror task there from that of other criminal trials. See Laudan, *supra* note 2, at 322.

## B. SPECIAL JURORS

The upshot of the previous argument is that a juror should only judge the evidence as proof BARD when it would be unreasonable for *anyone* to doubt guilt. There is, however, an important class of cases that may seem like counterexamples to the thesis. I refer to jurors with specialized or expert interpretive skills, though the objection applies equally to jurors who draw on unique experiences to interpret the evidence in ways their fellow jurors cannot.<sup>92</sup>

Consider a juror with an extraordinary memory, which she has spent decades sharpening and developing. A psychologist by training, she can recall every detail of a conversation or monologue she hears, and has become especially sensitive to inconsistencies. Suppose she finds herself on a larceny trial in which the case against the defendant is solid and compelling – except that he has an alibi to which he sticks, and is corroborated by four others in lengthy testimony spread out over eight months. Unlike her peers, however, this juror – using her extraordinary gifts – recalls that all four witnesses, as well as the defendant, used uncannily similar, nearly verbatim (and idiomatically quirky) descriptions of the alibi, to that point that it would be nearly impossible that they answered naturally and spontaneously. But spread out as these “recollections” were, this particular juror is the only one capable of catching the damning consistency between them. Even the prosecutors miss it.<sup>93</sup>

Now she is certain of the defendant’s guilt: his claim to the contrary proved, in her expert eyes, to be a lie, and but for this testimony the case points compellingly to guilt. The problem is, arguably, that she cannot consider other jurors unreasonable for crediting him and his alibi witnesses. The prosecutor could not shake the defendant or expose the weaknesses in his account, or the suspicious resemblances among his backers. Indeed, he seemed unaware the defendant was lying. It is, rather, her special expertise that – supplementing the state’s case – exposed the reasons to convict. What seems to ensnare the defendant most is that she, of all people, turned up improbably in the jury. This type of case, in other words, presents a challenge to the thesis here. It seems the juror is applying the objective standard – focusing on the warrants of the evidence – but in a way it would be unreasonable to expect of anyone else.

In reply, it should be recalled that this problem trades on the same ambiguity that plagues the standard of review, as discussed earlier.<sup>94</sup> The question of what a reasonable juror would do, on the one hand, is distinct from

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<sup>92</sup> For discussion of a parallel instance of this phenomenon – when legal observers draw on unique experiences or perspectives to illuminate objective legal evidence -- see e.g. L.M. Alcoff, *Sotomayor’s Reasoning* 48 J. PHIL 122 (2010).

<sup>93</sup> See e.g. Daniel J. Kornstein, *A Tragic Fire – A Great Cross Examination*, N.Y. L.J. Mar. 28, 1986 at 2 (uncannily consistent testimony has been used to discredit witnesses on grounds it betrays obvious staging).

<sup>94</sup> See, *supra* section I:B

what it would be reasonable for her to do, on the other. Reasonable jurors make mistakes – as many disagreements with them presuppose – but these mistakes do not necessarily render them unreasonable people. Otherwise, as I argued earlier, every judicial review of a jury decision would amount to re-deciding it for them.<sup>95</sup> Still, even a mistake made by a reasonable juror, using reasonable methods, is itself still *unreasonable*. Misreading the evidence, even in a way that reasonable jurors would misread it, still amounts to misreading, in which case it is still unreasonable. And treating identical, obviously coached testimony as the truthful responses of independent witnesses is, in fact, unreasonable.

Understood in this light, the features that this expert juror uses to infer his insincerity are, in fact, objective features of that evidence: the identical words and phrases used in all five testimonies. All of these were presented as evidence, and in her judgment, they leave no room for doubt that his only exculpatory evidence – the alibi – is a fraud. In other words, for all her specialized contributions, her reasoning is ultimately simply applying the objective standard in the ordinary way: she is concluding that the evidence, on its face, renders doubt unreasonable. Although her fellow jurors may not have the skill to perceive this, what they miss are features of the evidence, not her special take on it.

Ultimately, then, the specially skilled juror is merely a more dramatic illustration of a phenomenon that arises in all cases: different jurors will draw on their own different backgrounds and resources to interpret the evidence that prosecutors merely present. For some, these resources will be assets, while others will be biased, blinded or hampered by them. Yet all will equally apply the objective BARD standard to the extent that they base their conclusions on what they consider is warranted by the evidence alone. While the output of this operation will differ across jurors, just as judges, prosecutors and law enforcement officials differ even in their good faith application of rules, the standard here is the same.

### C. *WHITHER TRUTH AND SINCERITY?*

It has been argued so far that an objective reading of BARD is preferable to a subjective one, because the former respects the rule of law requirement to treat like defendants alike, whereas the latter licenses particularistic findings that self-consciously fail to generalize to other cases. Still, there were virtues of the subjective standard mentioned earlier that the preceding argument does not address – virtues that seem now, at first glance, to be lost by the objective standard.

In particular, it was pointed out that a trial is often understood as a search for truth, and its outcome the final word on a matter of historical record.<sup>96</sup> As a result, sincerity may require that the authors of this final word actually believe it – indeed, that they believe it with the high confidence that

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<sup>95</sup> *Id.*

<sup>96</sup> Nesson, *supra* note 54.

such a fateful and lasting condemnation should require. As noted, the subjective standard has a way of ensuring such sincerity: it requires that jurors believe in the defendant's guilt with utmost certainty before finding guilty.

What about the objective standard? The question may seem at first misguided, because BARD is a standard of proof, not necessarily a guide to the content or meaning of verdicts. Perhaps proof BARD is but one of several necessary conditions for finding a defendant guilty – another one being actual belief in his guilt. Yet the requirement of proof BARD is the main guideline for jurors on how to think and reason as they reach a verdict (along with a few other instructions aimed more narrowly at restricting their focus to admissible evidence). If there is some further requirement that jurors actually believe a defendant's guilt, before convicting him, it is not specified at any point in the trial process. Moreover, on the objective standard, there seems little room for a juror's convictions about what actually happened to do any work. The evidence either does, or does not, warrant reasonable doubts. If the evidence is compatible with reasonable doubts, then a juror must find that the state did not prove its case – regardless of whether she thinks the defendant guilty. If, in contrast, the evidence rules out the defendant's innocence, as objectively unreasonable, then it must be conceded that the government has proven its case. Conceding that the government has proven a defendant guilty would make it exceedingly difficult for a juror to decline to convict on the basis of continuing doubts (“I know it's an airtight case,” she may be forced to admit, “but I still think there must be some way she didn't do it...”). A juror would be forced either to accept the government's claims or acquit even while conceding the case was proven. So as a practical matter, a juror's subjective beliefs will not count much when she doubts in the face of what she takes to be proof BARD.

In short, on the objective standard, there is very little room in the process for a juror's actual beliefs about what took place to make any difference. And yet, the trial is – at least in popular understanding – a final word on what happened, rather than merely an epistemological investigation into the warrants of evidence. Such fateful factual condemnations should be sincere. And sincerity requires, among other things, beliefs.<sup>97</sup> How, then, does the descriptive function of verdicts become sincere on the objective BARD standard?

In answer it should be recalled that the jurors are not the ones sentencing a defendant or reaching a verdict. It is, rather, a set of legal institutions – the court, and the justice system more generally.<sup>98</sup> The jury is simply one arm of this institution, charged with evaluating the evidence to determine whether a defendant has been proven guilty. But it is the institution of the court, as a whole, that produces the final output – the statement about what happened.<sup>99</sup> Consider that judges often decide on the degree of punishment for a convicted defendant without any assistance from the jury or any role

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<sup>97</sup> See, e.g. AUSTIN, *supra* note 56.

<sup>98</sup> See Nesson, *supra* note 54.

<sup>99</sup> *Id.*

in assessing whether the defendant committed the crime. That means that a judge need not believe the defendant she sentences is guilty. If punishment and sentencing depended for sincerity on their deciders actually believing in their warrant, then these practices must also be deemed insincere, especially on expressive theories of punishment.<sup>100</sup> A more plausible reading, however, is that judges decide sentencing *on behalf of a court*, which has judged someone guilty, say, as a result of a jury's finding. The overall judgment, then – that the defendant committed the crime and should be sentenced – is no more the jury's than the judge's, but is, rather, the judgment of the court as an *institution*.

Importantly, the sincerity of an institutional statement or pronouncement need not turn on that of particular people who participate in them.<sup>101</sup> Consider that the IRS often accuses people of delinquency. One can suppose it has a computer that matches people to their tax deadlines and amount owed, and then singles a few out for delinquent status. A different program, perhaps, then generates an accusation of delinquency and a demand for payment and penalty fees. Through this process, it can be said that the IRS has accused these select citizens of delinquency. And there is no reason to think the accusation insincere. But there is also no individual person who actually believes the accusation.

It may be suggested, as Cass Sunstein has argued in a related context, that there is nothing for an institution – like a court, a legal system or a jury – to be sincere.<sup>102</sup> Sincerity presupposes psychological entities like beliefs and intentions undergirding the statements in question, and institutions – even those made up of people, like jurors, lawyers and judges – do not reach conclusions as products of their beliefs or intentions. Conclusions are reached, rather, by a complex negotiation of different individuals with clashing beliefs and intentions, compromising on a settled outcome. It would be a mistake, on this line of reasoning, to ascribe some “internal” belief or intentional state to an institutional pronouncement, like a verdict, that might render it sincere

Against this view, as I have argued elsewhere,<sup>103</sup> there are in fact reasons to call an institutional statement sincere, after all, though – the above objection notwithstanding – such sincerity need not depend on the psychological states of the institutional decisionmakers. Rather, such sincerity depends on whether the institution is disposed to act in a way that is consistent with the normative stance expressed, and that the expression was itself acting on this disposition. It does not matter, then, if this process involves actual human beings forming beliefs about a defendant's guilt. A criminal trial or court is

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<sup>100</sup> See Feinberg, *supra* note 55.

<sup>101</sup> As I argue elsewhere, in “*Toward a Theory of Institutional Attitudes*” (forthcoming).

<sup>102</sup> See, e.g., CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 23-36 (1996); and especially CASS SUNSTEIN, *CONSTITUTION OF MANY MINDS* 87-113 (2009) (arguing that institutional decisions lack reasons because the reasons that motivate individual members to agree on an institution-wide decision cannot be aggregated or abstracted to apply to the institution as a whole).

<sup>103</sup> As I argue in *More than Words: Stances as an Alternative Model for Apologies, Forgiveness and Similar Speech Acts* 114-138, Doctoral Dissertation, Department of Philosophy, UCLA (2013).

not, after all, a collective of individuals playing equal part; it is an institution. What matters, instead, is whether that guilt's being determined (eg. by a jury trial applying the objective BARD standard) played the right kind of causal role in causing the verdict to be what it was. On that model of sincerity, jury verdicts can be sincere statements of fact even on a BARD standard that is purely epistemological. Or, put differently, the trial can produce a sincere *historical* verdict, even when it is reached by jurors acting mainly as *epistemologists*. On this model, the court as a whole decides what happened, along with its punitive consequences, but it delegates to juries the task of determining what was proven by the evidence.

## VI. CONCLUSION

The analysis so far has been an attempt to take a plainly underspecified standard, the standard of proof in criminal trials, and argue for an interpretation that best rationalizes and fits with the requirements of due process and widely shared rule of law principles. That inquiry, I claim, points more plausibly to an objective standard than a subjective one. That is because, among other reasons, the fact that evidence caused certain jurors to become subjectively certain is not one that can be used to treat like defendants equally. Only an objective standard of proof directs jurors to make a judgment about the evidence that generalizes to like cases. Jurors should, therefore, understand and apply BARD objectively. A jury instruction might reflect this conclusion by including the following constraint: “proof beyond a reasonable doubt refers to that state of the cases wherein the evidence leaves no basis to reasonably doubt that the accused committed every element of the crime with which he is charged.”

In contrast, most present-day jury instructions direct jurors away from the evidence and towards their own minds, especially when they feel sure of the defendant's guilt. Surprisingly, almost none of them instruct jurors to check their subjective certainty against the evidence. Exactly how seriously to take this state of affairs – which I have argued amounts to misleading jurors as to their obligations set by rule of law principles – depends on an empirical question: how do jurors interpret the instructions? This question marks an important starting point for future research, but even as regards the effect of accurate instructions on verdicts, it is important to keep in mind that success need not be measured dichotomously, as all or nothing. As with the standards applied to judges and law enforcement officers, the BARD standard has the power to focus attention on certain tasks that might otherwise be ignored. Consider that, aside from jury instructions, jurors receive misleading signals from litigants. The state argues that an event definitely took place, while the defense, if following standard principles of zealous advocacy, argues that the event definitely did not take place, and purports to

demonstrate as much.<sup>104</sup> The jury is thereby treated as a pack of investigators, much as their role was first understood centuries ago,<sup>105</sup> attempting to discover the truth among competing historical accounts. That kind of task implicates distinct types of epistemic norms, those of – for example – inference to the best explanation, considerations of simplicity, elegance, parsimony, narrative fit and perhaps other indicia of plausibility.<sup>106</sup>

In contrast, on the objective BARD standard, the focus is less on what happened than on what, hypothetically, *could* have happened given the evidence. That calls for an entirely different sort of task, and a different use of one's skills and faculties. The jurors are no longer called upon to weigh between conflicting accounts, deciding which is more plausible, but instead to decide what possibilities are left open by the evidence (regardless of how the various litigants characterized it), and how likely they may be. In particular, they are directed to consider grounds for doubt that were not raised, perhaps because the defense was insufficiently competent to raise them, but which the evidence leaves open. It should be noted that this different orientation, characteristic of the objective BARD standard, is not exclusively defense-friendly. Prosecutors may be prone to overstep their evidentiary bounds, claiming that a crime was committed with malice and cruelty – when the evidence supports only the claim that the crime was planned and coldly calculated. By shifting their focus to the objective warrants of the evidence, an objective BARD standard advises jurors not to place too much weight on the precise narrative offered by the parties to a case; they need not hold prosecutors, for example, to the full extent of their depiction of the defendant. In short, the objective standard advises jurors not to think of themselves as historical or scientific investigators, choosing between rival accounts or theories, but as epistemologists, imaginatively drawing out the hypothetical scenarios left open or closed off by the admissible evidence. Even if they fail to apply the standard perfectly, the attempt to do so would hopefully shift their focus away from their own mental states, and toward the evidence itself. On the foregoing arguments, that would be a change for the better.

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<sup>104</sup> For the classic defense of this view of a defense attorney's role, see MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 72,177 (1990).

<sup>105</sup> See, e.g., Shapiro, *supra* note 12.

<sup>106</sup> See, e.g., PETER LIPTON, *INFERENCE TO THE BEST EXPLANATION* 66-70 (1991).



# A RESPONSE TO *CHICAGO RAILWAY*: MINNESOTA FARMERS' FIGHT FOR LOWER RAILROAD RATES IN THE 1890s

Matthew P. Jobe\*

## ABSTRACT

*In March of 1890, the U.S. Supreme Court ruled in Chicago Railway that the reasonableness of a railroad rate set by the Minnesota Railroad and Warehouse Commission (RWC) was “eminently a question for judicial investigation, requiring due process of law for its determination.” Courts around the country now had the authority and duty to overturn rates if they unreasonably deprived railroads of profits from their property.*

*This Article decenters the Supreme Court and is a constitutional history from below. It contends that the conflict between Minnesota farmers and railroads continued in full force after 1890 and that farmers actually achieved significant victories by passing legislation that gave the state more control over the railroad industry. It also argues that, because the Court only put an imprecise limitation on rate setting in Chicago Railway, farmers and their allies effectively secured lower railroad rates by bringing complaints to the RWC and winning at the state supreme court. This Article shows the extent of the farmers' success by describing the key developments in Minnesota between 1890 and 1898, when the Supreme Court again weighed in on the question of reasonable rates.*

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## I. INTRODUCTION

On June 22, 1887, farmers from the boards of trade of four small Minnesota towns just south of Minneapolis and St. Paul brought a complaint to the newly created Minnesota Railroad and Warehouse Commission (RWC). They asked the RWC to order the Chicago, Milwaukee, and St. Paul Railway to decrease the rates it charged to transport milk.<sup>1</sup> The complaint claimed that the costs set by the railroad were discriminatory, “exorbitant[,] and so unreasonable as to make it unprofitable for farmers to produce and ship milk to the Twin Cities.”<sup>2</sup> The railroad vigorously resisted the RWC’s order to lower rates by litigating the decision all the way to the U.S. Supreme Court. The highest court in Minnesota affirmed the RWC’s decision, ruling that the RWC had final authority to set railroad rates.<sup>3</sup> In March of 1890, the U.S. Supreme Court reversed, holding in *Chicago Railway* that the reasonableness of a railroad rate set by the RWC was “eminently a question for judicial investigation, requiring due process of law for its determination.”<sup>4</sup> Courts

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<sup>1</sup> RICHARD C. CORTNER, *THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 37 (1993).

<sup>2</sup> *Id.* Milk-producing farmers testified before the RWC that they could not survive under the current charges, noting that it cost about one-third of the value of the milk to get it twenty-five miles. *Id.* at 38.

<sup>3</sup> *Id.* at 48.

<sup>4</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418, 458 (1890).

around the country now had the authority and duty to overturn rates if they unreasonably deprived railroads of profits from their property.

Often, *Chicago Railway* is cited as part of the beginning of the Court's adoption of a substantive component of due process under the 14th Amendment, through which it ostensibly protected property rights.<sup>5</sup> This Article does not intend to enter the debates about the origins of *Lochner* and substantive due process, but rather is a legal history from below.<sup>6</sup> The intention is to come down from Congress and the hallowed chambers of the Supreme Court, and focus primarily on state actors in Minnesota. Historian Richard C. Cortner took some steps toward decentering the Supreme Court in his investigation of the events and personalities in Minnesota leading up to the Court's decision in *Chicago Railway*.<sup>7</sup> His book contributes to a fuller understanding of the *Chicago Railway* case by placing it in its local context. But he only goes part of the way. He emphasizes the role of Minnesota politicians and delineates the legal claims of the railroad owners, thereby neglecting to delve into the activities and opinions of Minnesota farmers.<sup>8</sup> Additionally, Cortner fails to adequately address the ramifications of this case. He prematurely and inaccurately declares victory for the railroads in *Chicago Railway*.<sup>9</sup> He interprets the waning influence of the Populist Party in Minnesota in 1892 as evidence that "the battle that had produced the Supreme Court decision[...] of 1890 had come to an end."<sup>10</sup>

This Article shifts the lens from a vertical view of the development of law to a horizontal one.<sup>11</sup> A Supreme Court decision is always only one moment in an ongoing process of law creation. And in this case, the Supreme

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<sup>5</sup> CORTNER, *supra* note 1, at xiii; see also Michael G. Collins, *Before Lochner-Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1293 (2000) (The Court "addressed the substantive limits on such rate making, declaring that no state could [set] 'a tariff of rates... which is so unreasonable as to practically destroy the value of property' of the carriers."); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 246, 247-248, 264 (Lawrence M. Friedman & Harry N. Scheiber, eds., 1978).

<sup>6</sup> Cf. Kyle T. Murray, *Looking for Lochner in All the Wrong Places: The Iowa Supreme Court and Substantive Due Process Review*, 84 IOWA L. REV. 1141 (1999). In his Note, Murray focuses on state supreme court cases in Iowa but, unlike this Article, he is primarily concerned with shedding light on the beginnings of substantive due process: "The decision [*Chicago Railway*], a marked departure from earlier precedent and a precursor of the Supreme Court's disposition in *Allgeyer* and *Lochner*, indicated a new-found reluctance to defer to the legislature's assessment of reasonableness." *Id.* at 1165.

<sup>7</sup> See CORTNER, *supra* note 1.

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

<sup>9</sup> *Id.* at 129.

<sup>10</sup> *Id.*

<sup>11</sup> Other legal historians have taken a similar approach. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010). In this book, Goluboff shows how African-American workers participated in the creation of law by presenting grievances to the NAACP and the Civil Rights Section of the Department of Justice.

Court “law” left much in play for other actors. This Article’s new perspective moves the focus away from the Court and instead inquires into what happened on the ground after *Chicago Railway*. Based on investigation of new sources, it shows that a constitutional history centered on the Supreme Court tells only part of the story. Delving into the ways that *Chicago Railway* constituted political and legal actors illuminates how Minnesotans worked within and around the decision to further their own interests.

This Article contends that the conflict between the farmers and the railroads continued in full force after 1890 and that farmers actually achieved significant victories by passing legislation that gave the state more control over the railroad industry. It also argues that, because the Court only put an imprecise, interpretable limitation on rate-setting in *Chicago Railway*, farmers and their allies effectively secured lower railroad rates by bringing complaints to the RWC and winning at the state supreme court. This Article shows the extent of the farmers’ success by describing the key developments in Minnesota between 1890 and 1898, when the Supreme Court again weighed in on the question of reasonable rates in *Smyth v. Ames*.<sup>12</sup> Finally, it provides a context that reorients our understanding of *Chicago Railway* and *Smyth*.

Part I asserts that *Chicago Railway* and continued frustrations with the economy led Minnesota farmers to become more active in politics, take extreme policy positions, and lobby for interventionist legislation. Part II describes the gains made by farmers in bringing complaints to the RWC. Moving to legal theory, Part III shows that some of these farmers and their allies, in the context of *Chicago Railway*, advanced radical positions concerning legal and constitutional doctrine.<sup>13</sup> But Part IV notes that most mainstream legal players with the ability to affect judicial decisions in Minnesota took advantage of the malleable reasonableness standard in *Chicago Railway* by promoting or adopting an interpretation that would implement their policy goals.<sup>14</sup> The Minnesota Supreme Court chose a reasonableness inquiry that favored the state regulation desired by farmers and local shippers and ruled on their behalf in *Steenerson v. Great Northern Railway*.<sup>15</sup>

## II. FARMERS RESPOND WITH POLITICAL ACTION

The financial difficulties farmers confronted in the 1890s and the ruling in *Chicago Railway* contributed to their rising political participation. Activist farmers and their allies formed third parties and advocated systemic change that was not adopted or implemented by mainstream politicians. Farmers and

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<sup>12</sup> *Smyth v. Ames*, 169 U.S. 466 (1898).

<sup>13</sup> I define as “radical” or “extreme”, commentators who pushed for policies like government ownership of railroads, the end of judicial review, or drastic cuts in railroad rates.

<sup>14</sup> I define as “mainstream” those judges, lawyers, and bureaucrats who, in working to address the problem of burdensome railroad rates, accepted the existing legal framework and respected the Supreme Court’s authority.

<sup>15</sup> *Steenerson v. Great Northern Ry. Co.*, 72 N.W. 713 (Minn. 1897).

other Populists widened the spectrum of political discourse, but their third parties had only limited success. However, Minnesota farmers achieved some of their goals by working with the Republicans and Democrats (the major parties). Due to pressure from farmers, the Minnesota legislature passed various advantageous laws in the 1890s that gave the state more power to regulate the railroads.

#### A. FARMERS' FINANCIAL PREDICAMENTS

In the early 1890s, farmers in Minnesota had a sharp negative reaction to the Supreme Court's decision in *Chicago Railway* because of frustration with low crop prices and perceived economic injustices. The price at which farmers sold their wheat "was an essential element in determining the net income" of most farmers in Minnesota, so the fall in wheat prices in the 1890s posed a fundamental problem.<sup>16</sup> The price of wheat had risen in the 1870s, but steadily declined through 1889, see-sawed until 1891, and then decreased significantly through 1896.<sup>17</sup> The specifics are telling. In Crookston, a city in northwestern Minnesota where many local farmers sold their wheat, the price was 87 cents per bushel in October of 1890. In 1891, the price fell to 79 cents, it decreased to 62 cents in 1892, and in October of the recession year 1893, farmers only received 49 cents per bushel.<sup>18</sup> Farmers' grievances went beyond the inadequate money they received for their crops. They faced rising prices for machines, fuel, and materials to build their homes and barns.<sup>19</sup> They faced discriminatory classification of the grade of their wheat and had no choice but to pay the high prices businesses charged to store the grain in warehouses and ship it to larger markets.<sup>20</sup> Finally, the farmers did not see good weather and bumper crops every year. In sum, monopolistic activities by businesses and the evolving grain market made it challenging for producers to achieve financial stability and success.

The exasperation of farmers is exemplified by this complaint: "Our land is very rich and for six years we have had good crops in the Red River Valley, but somehow we don't get along though we economize every way we can and work hard."<sup>21</sup> This man went on to acknowledge that almost all the farmers in the area had mortgaged all of their land even though "Uncle Sam" had given them the property in the first place.<sup>22</sup> Another farmer, trying

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<sup>16</sup> HENRIETTA M. LARSEN, *THE WHEAT MARKET AND THE FARMER IN MINNESOTA: 1858–1900* 166 (1926).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 201.

<sup>19</sup> See John D. Hicks, *The People's Party in Minnesota*, 5 MINN. HIST. BULL. 531, 532–33 (1924).

<sup>20</sup> *Id.*

<sup>21</sup> LARSEN, *supra* note 16, at 167 (quoting 3 FARM, STOCK, AND HOME, Sept. 1887, at 307). This farmer was reacting to the fall of prices in the 1880s, but accurately reflects the frustration of farmers as prices dropped in the early 1890s.

<sup>22</sup> *Id.*

his hand at shipping wheat, harangued that “the farmer’s wives and daughters w[ill] still have to wear garments made of flour sacks ornamented with the four X brand,” which he claimed was not uncommon in his agricultural district.<sup>23</sup> By claiming that hard-working farmers could not make enough of a profit to buy fabric for clothes for their wives, he attempted to appeal to people’s emotions and spur political change. Opponents argued that the standard of living for farmers had risen by the 1890s.<sup>24</sup> In response, one man, after accounting for the cost of producing his crops, concluded that he had made a profit of \$117.75 for the year. This amount of money would not sufficiently cover the cost of clothes, groceries, books, newspapers, interest on debts, and school items for the seven people in his family.<sup>25</sup> Although most Minnesota grain growers did survive from year to year, they were saddled with debt and did not feel that the income they earned rewarded them in proportion to their labors.

Deeply frustrated, many farmers looked for places to assign blame. Although farmers could not alter the overall market, they did believe they could attack the costs imposed by middlemen like the terminal grain elevators and the railroads. The problem, they argued, was that these corporations skimmed off significant profits, which accounted for the “leak [of the value of the wheat] between the producer and consumer.”<sup>26</sup> Farmers felt entitled to a higher percentage of the final price parties paid for the grain.

In 1890 and 1891, the *Great West*, a newspaper supporting reforms to benefit producers, claimed that the fifty-four cent difference in wheat prices in Crookston, Minnesota and Liverpool, England could not be accounted for solely by the cost to transport the wheat. They asserted that middlemen, the millers and wheat merchants, stole thirty to forty cents from the value of the wheat.<sup>27</sup> They had credible complaints: for over six years the largest terminal elevator in Minneapolis made an average of thirty percent on a capital investment of \$825,000.<sup>28</sup> Likely exaggerating, the radical Populist Ignatius Donnelly claimed that a billion dollars had been stolen from Minnesota and Dakota farmers in twenty years.<sup>29</sup> Contradicting Donnelly, historian Henrietta Larsen analyzed the disparity in wheat prices between production and consumption and concluded that it could actually be explained mostly by transportation costs.<sup>30</sup> But what is important is that producers truly felt and

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<sup>23</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 60 (1892).

<sup>24</sup> LARSEN, *supra* note 16, at 167.

<sup>25</sup> LARSEN, *supra* note 16, at 167 (quoting *Great West*, Mar. 1892, at 1).

<sup>26</sup> LARSEN, *supra* note 16, at 171, 198–99.

<sup>27</sup> *Id.* at 198–99.

<sup>28</sup> *Id.* at 203.

<sup>29</sup> LARSEN, *supra* note 16, at 199 (quoting the ST. PAUL PIONEER PRESS, Sept. 19, 1892, at 4). Ignatius Donnelly was active in politics for much of the latter half of the 19th Century. He often advocated radical policy changes and influenced the development of the Farmers’ Alliance in Minnesota and the Populist Party at the state and national levels. See JOHN D. HICKS, *THE POPULIST REVOLT 205–237* (1959); see also MARTIN RIDGE, *IGNATIUS DONNELLY: PORTRAIT OF A POLITICIAN* (1962).

<sup>30</sup> LARSEN, *supra* note 16, at 202.

believed that they were being unjustly deprived of the profits on their wheat, and that this perception caused them to take action. Additionally, Larsen acknowledges that specific complaints about high rates charged by railroads in Minnesota did have some merit,<sup>31</sup> which is the focus of much of this Article.

There is reason to believe that some farmers were fatalistic and myopic, which may have impeded progress.<sup>32</sup> Critics pointed out that farmers should not have been so dependent on one crop, whose market price continued to fall. Instead, they should have diversified by engaging in dairy farming and raising hogs.<sup>33</sup> Additionally, farmers exhibited self-interest in their excitement over a potential rate war in 1895: those who had diversified by planting potatoes saw “potatoes by the billion” that year.<sup>34</sup> They hoped that one railroad would lower rates in order to attract shippers, precipitating a rate war resulting in much lower rates across the board.<sup>35</sup> Farmers were excited by the prospect of large profits. This anecdote suggests that, unsurprisingly, though farmers were economic underdogs, they were self-seeking actors like the railroad owners. And, the more extreme among them did not consider that, in order to sell their crops, they needed the railroads, grain elevators, and millers to be economically stable. Regardless of how realistic their expectations were, in the 1890s, farmers and other allies effectively lobbied and advocated for their interests.

### *B. MINNESOTA PASSES MODERATE LAWS*

Before delving into the specifics of the fight over the rates charged by railroads after *Chicago Railway*, it is necessary to discuss how the growing political activity of farmers and their allies led to legislative victories in the 1890s. Political mobilization had existed before *Chicago Railway*, but the case fomented even greater participation and organization.

In the 1880s, individual farmers in states such as Illinois, Wisconsin, Iowa, Nebraska, the Dakotas, and Minnesota formed groups collectively called the National Farmers' Alliance.<sup>36</sup> The Minnesota Farmers' Alliance (Alliance) initially denied any desire to enter politics as a third party. Instead, it attempted to “secure legislation through the older parties [Republicans and Democrats]... for the benefit of the rural classes.”<sup>37</sup> Groups of farmers coordinated to elect to the state legislature farmers and “friends of the farmers.” Their efforts led to tangible results. The Minnesota legislature passed a

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<sup>31</sup> *Id.*; see also, Hicks, *supra* note 19, at 532.

<sup>32</sup> LARSEN, *supra* note 16, at 170–71.

<sup>33</sup> LARSEN, *supra* note 16, at 168; see also Childs on Values, ST. PAUL DAILY GLOBE, July 6, 1895 (describing how, during oral argument, Judge Kerr, who overturned the RWC's decision to lower rates in the *Steenerson* case, pointed out that farmers in southern Minnesota had diversified and become prosperous).

<sup>34</sup> *Murphies Galore*, ST. PAUL DAILY GLOBE, Sept. 5, 1895.

<sup>35</sup> *Id.*

<sup>36</sup> HICKS, POPULIST REVOLT, *supra* note 29, at 96–100.

<sup>37</sup> Hicks, *People's Party*, *supra* note 19, at 535.

law creating the state Railroad and Warehouse Commission in 1885, and gave it increased regulatory powers in 1887.<sup>38</sup> Specifically, the legislature gave the RWC “plenary power” to set the rates charged by railroads, a level of control exceeding that of the federal Interstate Commerce Commission.<sup>39</sup> The railroads also had many representatives in the legislature and campaigned to defeat Alliance candidates in 1889.<sup>40</sup> In that year, many Alliance members were not re-elected, and the remaining men “fell to fighting among themselves, and were unable so much as to select a candidate for speaker whom they could all support.”<sup>41</sup> Because the disunity thwarted efforts to secure “further remedial legislation,” a “ground swell” of discontented farmers pushed for the creation of a more unified political party.<sup>42</sup>

John D. Hicks, a historian who wrote extensively on Populist movements, points to the failure of the Alliance legislators in 1889 as the source of Minnesota’s strong third-party political movement in the 1890s.<sup>43</sup> However, the outrage over the holding in *Chicago Railway* was a more central reason for unified political action by rural interests. The Supreme Court announced its decision on March 24, 1890, and on April 1st, the Minnesota Farmers’ Alliance met to discuss the decision.<sup>44</sup> The St. Paul Daily Globe wrote that the decision “fanned the indignation and dissatisfaction of the farmers of Minnesota into a white heat.”<sup>45</sup> The Alliance, led by Ignatius Donnelly, decided to work with labor organizations and adopted a resolution that called for “independent political action,” the nomination of a state and Congressional ticket, and concerted effort with Alliance organizations in neighboring states.<sup>46</sup> The rapid response by the Alliance and its acerbic language angrily condemning the Court’s decision to favor the railroad corporations over rural producers are evidence that *Chicago Railway* was a major impetus for widespread radical political activity in Minnesota.

Prompted by local chapters, the state-wide Alliance held a convention in St. Paul on July 16, 1890 at which it nominated a full field of candidates committed to furthering policies in the interest of farmers.<sup>47</sup> Sidney M. Owen, the editor of a well-known Minneapolis farm journal, beat Ignatius Donnelly in the nomination for governor. That fall, the Alliance Party had its first and best political showing. Republican William R. Merriam won the

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<sup>38</sup> *Id.* at 535.

<sup>39</sup> CORTNER, *supra* note 1, at 26.

<sup>40</sup> Hicks, *People’s Party*, *supra* note 9, at 535–36.

<sup>41</sup> *Id.* at 536.

<sup>42</sup> *Id.*

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

<sup>44</sup> *Judges Denounced*, ST. PAUL DAILY GLOBE, Apr. 2, 1890, at 1.

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

<sup>46</sup> *Id.*

<sup>47</sup> Hicks, *People’s Party*, *supra* note 19, at 537. Larsen noted that farmers believed in the importance of political power because coercive legislation by the state could affect “the distribution of the value of a product.” Larsen, *supra* note 16, at 171.

race for governor with 88,111 votes, the Democrat, Thomas Wilson, received 85,844 votes, and Owen garnered 58,513 votes for the Alliance.<sup>48</sup> The Alliance did better in the Congressional and state elections, winning two of the five district seats, and about a fourth of the seats in the state house and senate.<sup>49</sup>

As a newly formed third party with unprecedented success in seeing its candidates elected, the Alliance had high hopes for the future. But, the farmers quickly found that, despite the common goals they shared with a few Republicans and many Democrats, they struggled to pass any truly effective legislation. They failed in an attempt to make grain elevators and warehouses public and to give the state “the right to fix the rates of storage.”<sup>50</sup> Another law that did not garner support by a majority would have provided that “any railroad company collecting or receiving more than a fair and reasonable rate for passengers of freight shall be deemed guilty of extortion” and fined up to \$5,000.<sup>51</sup> Finally, a major piece of legislation specifically addressed the limitations imposed by the Supreme Court in *Chicago Railway*. The Donnelly-Currier bill would have set “a uniform rate per pound for mile on all rail shipments,” and made the rates imposed by the Commission “*prima facie* reasonable” and “in effect until invalidated by courts.”<sup>52</sup> The Senate rejected the bill, and it was defeated in the House by a close vote of 56 to 48.<sup>53</sup> However, the legislature did pass a law implementing parts of the original bill.<sup>54</sup> These laws proposed by the Farmers’ Alliance aimed to circumvent the *Chicago Railway* decision would have led to sweeping power over the railroads. The policy goals expressed by this legislation show that a sizeable minority of Minnesotans were hostile to the railroads and desired drastic measures. The farmers did not willingly accept the Supreme Court’s message that the Constitution viewed railroad property interests as sacred.

The political climate in Minnesota evolved rapidly as agitators nationwide formed the Populist Party in Cincinnati in May of 1891. Donnelly, an active participant at the convention, came back to Minnesota and convinced most of the members of the Farmers’ Alliance to join this new national party.<sup>55</sup> Despite some resistance and concern that national issues would take precedence over state goals, the Populists in Minnesota won the day. They nominated Donnelly for governor in July of 1892 and announced a platform that echoed the one that had just been adopted by Donnelly and others at

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<sup>48</sup> Hicks, *People’s Party*, *supra* note 19, at 539.

<sup>49</sup> *Id.*; see also LARSEN, *supra* note 16, at 207.

<sup>50</sup> Hicks, *People’s Party*, *supra* note 19, at 540.

<sup>51</sup> *Judges Denounced*, *supra* note 41.

<sup>52</sup> CORTNER, *supra* note 1, at 119.

<sup>53</sup> *Id.* at 120.

<sup>54</sup> 1887 Minn. Gen. Laws 179.

<sup>55</sup> Hicks, *People’s Party*, *supra* note 19, at 542. Donnelly was known for being abrasive, hostile, and radical. His fiery passion was both a boon and an obstacle throughout his political career. His involvement with the national Populist Party caused some of his detractors in the Alliance party to resist joining the new Populist movement. *Id.* at 542–43.

the Populist party's convention in Omaha.<sup>56</sup> The Minnesota Populists, though, emphasized state issues, demanding state control of corporations and transportation companies, and erection by the state of terminal elevators at Minneapolis, St. Paul, and Duluth.<sup>57</sup> Even as the Republicans, led by Scandinavian Knute Nelson, attempted to draw in disgruntled Alliance members, the Populists truly expected to win. But, evincing the challenges faced by third parties in the U.S. political system, the Minnesota Populists fared poorly in 1892. Losing the gubernatorial race to Nelson, Donnelly received 18,000 fewer votes than Owen had in his bid for governor just two years earlier.<sup>58</sup> The Populists won only one out of seven Congressional district seats, and only put two dozen candidates in the state legislature (compared with the forty-five Alliance members who won in 1890).<sup>59</sup>

Even though the Populist Party did not secure the election of most of its candidates, all was not lost for farmers. Governor Nelson had appealed to the farmers (and received votes from many of them) and promised to push for moderate legislation increasing state control of the railroads.<sup>60</sup> Cortner's claim that the battle which had "produced the Supreme Court's momentous decision[... had come to an end" with the Populist Party's losses in 1892 is simply not true.<sup>61</sup> His conclusion is belied by the laws passed by the Minnesota state legislature in 1893.<sup>62</sup> Although Populist candidates did not fare well, candidates from the two major parties implemented some of the less extreme planks of the Populist platform.<sup>63</sup>

In 1893, the Minnesota legislature passed a law increasing the punishment for individuals convicted of creating pools and trusts.<sup>64</sup> Another law provided for condemnatory proceedings when sites for elevators were refused, breaking "the legal position of the railroads in maintaining that they had complete control over the granting of sites."<sup>65</sup> A law that provided for the erection by the state of an elevator at Duluth, to be managed and operated by the RWC, "was precisely what the Populists had demanded in their

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<sup>56</sup> *Id.* at 543.

<sup>57</sup> *Id.* at 543–44.

<sup>58</sup> *Id.* at 546.

<sup>59</sup> *Id.* at 545–46. Hicks suggests that this loss was due in part to the division among reformers themselves concerning the abandonment of the local Alliance party. He also explains that 1892 was a presidential year, so voters were less willing to stray from the two major political parties and risk voting for Populists with little chance of winning.

<sup>60</sup> *Id.* at 547.

<sup>61</sup> CORTNER, *supra* note 1, at 121.

<sup>62</sup> Cortner's position is also contradicted by the fact that Minnesota producers continued to fight for lower rates throughout the 1890s. As described in detail in Part II, Section A, the RWC sometimes vindicated their complaints and required railroads to charge less for transporting grain and goods.

<sup>63</sup> Hicks points out that one of the ways third parties can have influence on legislation is by compelling the older parties to "take up and make effective the radical plans they oppose." Hicks, *People's Party*, *supra* note 19, at 547.

<sup>64</sup> *Id.* at 547.

<sup>65</sup> LARSEN, *supra* note 16, at 210.

platform.”<sup>66</sup> And, the most important piece of legislation for farmers had the strong support of Governor Nelson himself. It gave the RWC the power to inspect and supervise the grain elevators and warehouses.<sup>67</sup> Finally the state had put in place “an impartial arbitrator between farmers and wheat buyers.”<sup>68</sup> Minnesota farmers and Populists saw considerable victories in the legislation passed this term. But the absence of laws addressing the rates charged by railroads is noteworthy. The primary reason, one further addressed in Part II, is that farmers were already securing lower rates in some cases by bringing complaints to the RWC. A secondary reason is that *Chicago Railway* had made railroad rates a contentious and murky issue. In some ways, it was easier to pass other laws that served producers’ interests and alleviated their other burdens.

As the years passed, Republicans and Democrats continued to support some of the policies advanced by Populists and farmers. So, even though fewer Populist candidates were elected in Minnesota as the 1890s unfolded, farmers had the ear of moderate politicians. In its 1894 platform, the Republican Party asserted that “farmers and all other producing classes [were] entitled to cheap and suitable facilities for storing, shipping and marketing their products” and favored the enactment of laws compelling railroads to “render efficient and approved service at fair and reasonable rates without favor of discrimination to persons or places.”<sup>69</sup> While not as radical as the Populists, which advocated government ownership of the railroads and reclamation of excessive railroad land grants among other things,<sup>70</sup> the Republicans maintained a position of some state intervention. This was enough to attract moderate voters.

Battles continued in ensuing years. Populists still proposed some radical legislation concerning the railroads and grain warehouses. In 1897, farmers again introduced a bill that would fix the rates on transporting grain and hard coal across the board.<sup>71</sup> They attempted to circumvent the tedious process of going through the RWC to get lower rates. One representative claimed farmers and producers were “burdened beyond endurance” and begged his peers to make the railroads “cease their extortion.”<sup>72</sup> Although the bill failed, producers later convinced enough members of the legislature to make a less drastic change. A law was passed which gave the RWC the power to “investigate rates and recommend changes on [its] own initiative

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<sup>66</sup> Hicks, *People’s Party*, *supra* note 19, at 547–48. The elevator was never built because the state attorney general rejected the project and the state supreme court agreed, declaring the law unconstitutional and void. The point, though, is that Populist interests in Minnesota did have sufficient democratic support to pass this major legislation on behalf of farmers.

<sup>67</sup> LARSEN, *supra* note 16, at 212–13.

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

<sup>69</sup> *The Platform*, ST. PAUL DAILY GLOBE, July 12, 1894.

<sup>70</sup> Hicks, *People’s Party*, *supra* note 19, at 550.

<sup>71</sup> *Dealt a Knock Out*, ST. PAUL DAILY GLOBE, Feb. 27, 1897, at 1.

<sup>72</sup> *Id.* As an interesting side note, some of the opponents of the bill argued that lowering rates would just hurt wage earners who worked for the railroad. From this perspective the passage of the bill pitted the interests of one group of struggling laborers against another.

without requiring any complaint.”<sup>73</sup> In the 1898 session, three more pieces of legislation offered protection for the farmer. One law provided for the licensing of merchants by the RWC. Another created a board in the inspection department of the RWC to hear appeals from the decision of the chief inspector regarding the grading of grain. Finally, the legislature made the RWC more democratically accountable by enacting a law providing for the popular election of its three members.<sup>74</sup>

By the close of the 19th Century, Minnesota farmers and producers had successfully lobbied for laws limiting the power of railroads and grain elevators. In spite of the challenges created by *Chicago Railway*, producers were able to further their policy goals. They passed legislation that affected the many parts of the market not foreclosed by the Court’s holding. Farmers also organized politically and shaped the development of the Populist Party and the evolution of the Republican Party. Although third party candidates with more extreme ideas did not win many elections, the popular support for some of their ideas shines forth in the laws enacted in the 1890s. The mainstream politicians had to take the radical actors seriously because the latter had substantial backing. And, although the political influence of the railroads effectively stopped the boldest measures, farmers and their allies harnessed their outrage over *Chicago Railway* in order to enact pro-producer legislation in the 1890s.

### III. LOWER RATES WITH THE ASSISTANCE OF THE RWC

Farmers were not discouraged by the *Chicago Railway* decision. The ruling both enraged and motivated them. In conjunction with the push for broad policy enactments to protect their interests, producers took advantage of the structure of the Railroad and Warehouse Commission. Knowing full well the possibility that the courts could overturn a decision that set “unreasonably” low rates, groups representing farmers and shippers still went to the RWC to ask for reduced rates. Sometimes they made demands that were quite extreme. They pushed the boundaries within which the RWC was willing to act. Overall, they saw positive results for their efforts as the RWC often showed sympathy to their complaints. As for the RWC, it took a moderate approach. Despite the Supreme Court’s basic message in *Chicago Railway* that railroad property should be protected, the RWC worked for modest rate decreases for the benefit of farmers. Finally, this Part illuminates how it would be difficult to see the strategies and successes of these actors if just looking down from the Supreme Court. The constitutional history is enriched by viewing the horizontal activities of the farmers, bureaucrats, and politicians.

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<sup>73</sup> LARSEN, *supra* note 16, at 251.

<sup>74</sup> *Id.* at 250.

A. MINNESOTA PRODUCERS SUCCESSFULLY SEEK RATE REDUCTIONS

Before looking at the extent of the farmers' achievements before the RWC, it is necessary to briefly explain how it functioned with respect to railroad rates. The RWC could only investigate the reasonableness of rates (or tariffs) after an individual, firm, or organization submitted a complaint laying out specific grievances. Upon receipt of the complaint, it "acquired supervision" over the railroads and could begin investigation of "any evil incident to the question of tariffs."<sup>75</sup> Before altering rates, the RWC had to give proper notice and conduct a hearing at which both parties had the opportunity to present evidence and call witnesses.<sup>76</sup> If the RWC concluded that the rates charged by railroads were discriminatory, unreasonable, or unequal, it could order the railroad to reduce them. In 1891, after the failure of the Donnelly-Currier bill that would have set rates for every line of road in the state, the Minnesota legislature responded to the *Chicago Railway* decision by amending the 1887 Act. As required by the Supreme Court in *Chicago Railway*, the amendment provided for judicial review of the RWC's decisions.<sup>77</sup> However, the legislature did two things to limit the impact of the Court's holding. First, it commanded that courts treat the RWC's ruling as *prima facie* evidence that the rate "so made is equal and reasonable."<sup>78</sup> Second, those rates would be "in full force and effect during the pendency of any appeal."<sup>79</sup> This system ensured that the rates set by the RWC would take effect immediately and that it would not be easy for railroads to convince courts to strike them down.

Farmers and other producers were able to secure lower rates by submitting complaints to the RWC, but the trajectory of their cases unfolded in a variety of ways. In a case from 1891, simply bringing a complaint caused the targeted railroad to acquiesce and lower rates without a command by the RWC. The farmers alleged that the railroad discriminated in its grain rates in favor of a station on a parallel line of its road. When brought to the attention of the railroad's officers, they remedied the situation by reducing rates for shipments from four small towns in central Minnesota to Duluth, Minneapolis, and St. Paul.<sup>80</sup> The discrimination in rates must have been obvious and making the change must not have been a major detriment to the railroad because it did not even contest the accusations. Most cases were not resolved this easily.

In another instance, a threat by the RWC provided the impetus for railroad action. Here, the aggrieved party submitted proof that the Great North-

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<sup>75</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 23 (1893).

<sup>76</sup> *Id.*

<sup>77</sup> 1887 Minn. Gen. Laws 179.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 22-23 (1892).

ern and Eastern Railways demanded a higher rate from an intermediate station to Duluth than from St. Paul to Duluth.<sup>81</sup> Those who shipped from stations on the way from St. Paul to Duluth thought it unfair that they had to pay more to send their goods a shorter distance. The RWC agreed, concluding that the practice violated state and interstate railroad law.<sup>82</sup> When the railroads claimed that the RWC of Minnesota did not have jurisdiction because the railroad line at issue stretched into neighboring Wisconsin, the RWC threatened to take the case to the ICC, which could take action. Finally, the railroads submitted, lowering their rates between twenty-five and forty percent.<sup>83</sup> The RWC happily reported that the issue was resolved without litigation or unnecessary expense or delay.<sup>84</sup>

Negotiation between the complainant and the railroad was another method of resolution. In 1892, a local Alliance group representing farmers from the area around Mankato, Minnesota asserted that rates charged for shipping flaxseed, wheat, and flour from their community were “unequal and discriminating.”<sup>85</sup> The railroads denied the allegations, claiming that the revenue they received for shipping the grain did not even “pay the actual expense of operation.”<sup>86</sup> The parties went back and forth, but, four months after the Alliance filed the initial complaint, they eventually came to a compromise when the railroads agreed to reduce the tariffs.<sup>87</sup> In this encouraging incident, realistic people on both sides produced a solution advantageous for all: the railroads avoided the expense of arguing their case before the RWC and the courts while the farmers saw a reduction in what they had to pay to ship what they produced.

The final set of circumstances in which farmers got what they wanted was through a ruling by the RWC after a hearing on the merits of the complaint. In 1893, Elias Steenerson, a farmer and politician from northwestern Minnesota, brought a case requesting an end to rate discrimination against farmers in his part of the state. After three days of hearings in February of 1894, the RWC ruled on behalf of Steenerson and issued a detailed rate schedule that established the price per bushel in five mile increments.<sup>88</sup> The railroads fought a hard battle and continued to resist by appealing the ruling

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<sup>81</sup> *Id.* at 33–35.

<sup>82</sup> *Id.* at 35.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 35–36.

<sup>85</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 14 (1893). The attorneys representing the Alliance included farmers who had advocated for pro-producer laws as members of the legislature such as E.M. Pope and F.M. Currier. CORTNER, *supra* note 1, at 25–26, 119–120.

<sup>86</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 18 (1893).

<sup>87</sup> *Id.* at 20. E.M. Pope also convinced a railroad to lower rates in 1895. He submitted a complaint to the RWC accusing the Omaha Railway of setting unreasonable rates on the shipment of coal. Again, the RWC did not have to mandate a lower tariff because the railroad agreed to decrease rates and Pope withdrew his complaint. R.R. & Warehouse Comm’n of Minn., Ann. Rep., 24–28 (1896).

<sup>88</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 9–10 (1895).

to the district court.<sup>89</sup> Another example in which the RWC issued a decision after the presentation of evidence by both sides occurred in 1898. The complainant argued that two railroads were discriminating against the village of Lake Benton in favor of Canby and Porter, other stations on the same line of road. The RWC rejected the railroads' defenses and ordered a rate reduction from sixteen to fourteen cents per hundred pounds of grain.<sup>90</sup> As seen in these two cases, the RWC did not quit if the filing of a complaint or negotiations did not cause the railroads to reduce rates on their own. If necessary, the RWC did not hesitate to pursue valid complaints, conduct investigations, and order a decrease in rates.

Overall, producers had success forcing railroads to lower rates by working with the RWC. *Chicago Railway* did not do much to stop rates from being lowered in Minnesota in the 1890s; the tenor of the commissioners generally favored the farmers. However, farmers did not always win. E.M. Pope, who had success before the RWC on multiple occasions, failed in one case because he did not follow the procedures mandated by law. His complaint stated generally that rates were "excessive, unequal, and discriminatory." In the railroad's response, it noted that the relevant statute required the party bringing the case to specify particular rates, "particular articles and kinds of freight," and the particular points on the line of road for which rates were unreasonable.<sup>91</sup> The RWC agreed with the railroad and demanded further clarity. Pope responded by withdrawing the complaint.<sup>92</sup>

The RWC thwarted the request for fair rates more directly when it carefully considered a case and ruled in favor of the defendant railroad. In 1894, the Commission determined whether the railroads imposed excessive rates for the shipment of hard and soft coal and wood 213 miles from Duluth to Moorhead, Minnesota. It held that charging \$2.25 per ton of coal was acceptable and that no evidence suggested the rates for transporting wood were unfair.<sup>93</sup> The RWC responded to a slightly different concern in 1895. Addressing a complainant's frustration over passenger rates, it determined that the tariff was "equal, fair, reasonable, and just."<sup>94</sup> Interestingly, the RWC did not deal with the price of transporting grain in either of these examples.

Overall, the RWC employed its powers to lower farmers' shipping costs. Yes, it is likely that the RWC determined that some complaints asking for lower tariffs on grain shipment were not worthy of investigation. And

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<sup>89</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 36 (1896). The railroad won at the district court but then lost at the Supreme Court. *Steenerson v. Great Northern Ry. Co.*, 72 N.W. 713 (Minn. 1897). The reasoning in these decisions is analyzed in detail in Part IV of this Paper.

<sup>90</sup> *Victory for Lake Benton*, ST. PAUL GLOBE, Apr. 23, 1898, at 8.

<sup>91</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 38–39 (1894).

<sup>92</sup> *Id.* at 40.

<sup>93</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 12 (1895). However, the RWC ordered one defendant, which charged \$3 per ton, to lower its rate.

<sup>94</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 32 (1896).

yes, the RWC (or the railroads, if the parties negotiated a deal) did not always lower rates to the extent the farmers desired.<sup>95</sup> But, in no major case did the RWC hold hearings and then deny a request to reduce the price for shipping grain. The RWC, an arm of the democratically elected legislature, sided overwhelmingly with farmers in the 1890s.

#### B. THE RWC EXPANDS ITS AUTHORITY AS IT HELPS FARMERS

The RWC also made requests for policy changes in the absence of specific complaints by farmers. It acted first and foremost to protect people from discriminatory and excessive rates, but also desired to obtain power as a bureaucratic agency. Existing in an era before the development of the administrative state, the RWC needed resources sufficient to carry out its statutory mandate. A major concern involved money to defend its decisions in court. The holding in *Chicago Railway* meant that the RWC had to employ lawyers, investigators, experts, and administrative staff when railroads or other parties challenged its decisions. In 1895, the commissioners wrote to the Senate of Minnesota asking for funding for litigation.<sup>96</sup> They delineated the reasons why such litigation was expensive, noted that the legislature had not appropriated money for this purpose, and claimed that this problem was the “most serious limitation of [the RWC’s] power in the way of regulating and controlling rates.”<sup>97</sup> For the RWC to act effectively in implementing its rulings on behalf of producers, the power of the purse was indispensable.

Additionally, for efficiency and legitimacy reasons, the RWC wanted courts to respect its role as trier of fact. On appeal, it would be inappropriate and inefficient to have the district court hear all the testimony already offered at the hearing before the RWC and to allow defendants to produce new evidence. The RWC convincingly argued that it would be unfair to overturn its decision to set lower rates based on information it did not have the opportunity to consider before issuing the order.<sup>98</sup> Here, the RWC did not dispute the legality of judicial review. But it did assert that a reviewing court “should pass upon... whether the order made [was] reasonable” after considering only the record from the extensive hearings conducted by the RWC itself.<sup>99</sup> In framing this as the proper procedure, the RWC interpreted its authority broadly and rejected giving railroad defendants a second bite at the apple with respect to the introduction of evidence.

Finally, the RWC expanded its reach by assuring interested parties that it would assist in investigating interstate claims even though it did not have power to set rates for interstate lines of road. Responding to a complaint by the Farmers’ Alliance, Secretary Teisberg of the RWC concluded that the

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<sup>95</sup> In the *Steenerson* case, Elias Steenerson asked the RWC to reduce rates by thirty-three percent. The RWC ruled on his behalf, but gave a cut of almost fifteen percent. *Farmers Victorious*, ST. PAUL DAILY GLOBE, Sept. 11, 1894, at 1.

<sup>96</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 9, 12 (1896).

<sup>97</sup> *Id.* at 11–12.

<sup>98</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 9 (1897).

<sup>99</sup> *Id.* at 10.

farmers were also concerned with exorbitant interstate rates, not just high intrastate rates. Instead of ignoring their case or rejecting it without advice, he promised to forward any interstate complaint buttressed by relevant facts to the ICC and to assist with the investigation of the merits of the claim.<sup>100</sup> The Minnesota RWC was more than willing to cooperate with the ICC in order to realize the common goal of setting fair and reasonable rates to alleviate the financial burdens on farmers. In advocating for itself, it advocated for the producer. Still, some farmers wanted more.

### C. FARMERS' OTHER STRATEGIES

In spite of the fact that the RWC favored the farmers over corporations, oftentimes groups representing farmers remained unsatisfied. They wanted more assistance and deeper cuts in rates. This brief section describes other unique ways that farmers tried to solve their problems.

Besides working to pass legislation or submitting complaints to the RWC, farmers engaged in secondary activities, including lobbying. Impatient with the limited action by the RWC, in January 1892, a group of Alliance members visited the capitol of Minnesota and communicated the Alliance's feeling that the RWC was failing "to do its duty."<sup>101</sup> They met with Commissioner George Becker, who articulated that the RWC was going as far as the law authorized it. The RWC could only prosecute charges brought by injured parties, would do so "to the fullest extent of its powers[,] and [would] endeavor to secure justice for all parties." The *St. Paul Daily Globe* concluded that the farmers were at least partially satisfied with Becker's explanation.<sup>102</sup>

The farmers' serious intentions to do whatever possible to remove the burdens foisted on them by the railroads also come forth in an 1893 letter to Governor Nelson. Farmers from Polk County in northwestern Minnesota demanded a fifty percent reduction of rates on lumber and a thirty-five percent reduction of rates on grain. They implored the Governor to command the commissioners to lower the rates and insisted that he remove them from office if they refused to listen.<sup>103</sup> Needless to say, the centrist Governor Nelson did not engage in this blackmailing of government employees. The farmers wanted rapid changes, which were impossible considering the limitations placed on the RWC by law. The emotional and radical outpouring of desperation by these farmers evinces their belief that the state was not doing enough. So, although the RWC arguably did its best, some farmers continued to plead for greater action.

In fact, one farmer from North Dakota, D.W. Hines, decided to build 200 miles of a "farmers' railroad" from the middle of North Dakota to a

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<sup>100</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 27-28 (1893).

<sup>101</sup> *Becker Budgets Not*, ST. PAUL DAILY GLOBE, Jan. 9, 1892.

<sup>102</sup> *Id.*

<sup>103</sup> R.R. & Warehouse Comm'n of Minn., Ann. Rep., 50 (1894).

line that connected to Duluth, Minnesota.<sup>104</sup> His vision was a road built exclusively by farmers, who would also be the stockholders and managers. He wanted to “break down the monopoly of railroads” and create a more direct route to transport grain.<sup>105</sup> Understandably, many critics mocked Hines’ plan as quixotic. But, for a period of time, it seemed that the farmers might actually prevail. Hines accumulated \$100,000 in stock subscriptions, farmers did some of the grading work, and railroad contractors considered bidding upon the laying of the track.<sup>106</sup> But, alas, the dream proved too good to be true. Hines never completed the railroad. In fact, his unconventional views on railroads and religious issues got him in trouble. Minnesota newspapers noted that the state eventually committed him to an insane asylum for his religious mania.<sup>107</sup> Although Hines’ fellow citizens had concerns with his religious views, his ability to organize farmers throughout North Dakota and Minnesota illuminates the plight and innovation of these farmers. They were willing to fund and build a portion of a railroad themselves. They went to great lengths in an attempt to get their wheat to market more cheaply in order to retain a larger percentage of the profits.

In sum, farmers attacked unreasonably high rates in myriad ways. They turned legislative victories into real results through the RWC. Farmers presented complaints to the RWC, negotiated with specific railroads, and pushed the RWC to order shipping charges to be reduced. Additionally, teams of farmers lobbied commissioners and politicians. The RWC, although unwilling to take too much from the railroads, did its part by petitioning the state legislature to pass laws that would allow it to do work on behalf of farmers. The Supreme Court could not prevent this activity with a ruling as vague and subject to circumvention as *Chicago Railway*; a few federal judges’ concern with constitutional protection of property rights did not significantly restrain Populist mobilization by farmers in Minnesota. However, farmers and their allies did not see all of their goals come to fruition. They did not get a drastic decrease in rate cuts across the board, but rather had to pressure railroads by proceeding on a case-by-case basis. Conservative and moderate forces in the state believed that because railroads were necessary to transport grain and goods to market, the state could not completely undermine their ability to make money. Still, the farmers effectively worked with the RWC to lower unreasonable and discriminatory rates. They assiduously worked for change, and their passionate political activity produced meaningful results.

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<sup>104</sup> *Farmers Hines’ Railroad*, MINNEAPOLIS TRIBUNE, Mar. 25, 1896, at 4.

<sup>105</sup> *A Railroad Farming Farmer*, ST. PAUL DAILY GLOBE, Dec. 7, 1895.

<sup>106</sup> *Ready to Lake Track: “Farmer Hines” Railroad Project is Progressing Finely*, MINNEAPOLIS TRIBUNE, June 10, 1896; *Farmers in Earnest: The Hines Road is Certain to be Built*, ST. PAUL DAILY GLOBE, Apr. 2, 1896.

<sup>107</sup> *Farmers Hines Insane*, MINNEAPOLIS TRIBUNE, July 25, 1897.

#### IV. LEGAL THEORIES AND *CHICAGO RAILWAY*

Farmers' wins at the RWC were not always the end of the story. *Chicago Railway* gave railroad corporations the opportunity to contest the "reasonableness" of any decision by the RWC that mandated lower rates. To maintain their victories, farmers and their supporters not only had to be able to win at the legislature and the RWC. They had to be prepared to engage in legal battles. This Part shows how Populist legal ideas framed an outer edge of the doctrinal debates. It also describes the initial reactions and legal interpretations of *Chicago Railway* by parties hostile to the Court's ruling. The doctrine was in flux, and lawyers, politicians, and intellectuals offered various legal justifications for state control over railroads. This Part also provides the background and foundation necessary for Part IV, which delves into the more narrow doctrinal debate in Minnesota about reasonable rates.

##### A. MINNESOTA POPULISTS ATTACK THE STATUS OF RAILROADS IN THE ECONOMY

Some Minnesota Populists advocated fairly radical treatment of railroads. They employed legal and constitutional claims that, despite being rejected by courts and mainstream thinkers, were based on plausible arguments. Using robust language of justice and good government, their arguments starkly contrasted those of federal judges obsessed with private property. Populists pushed the theoretical discussion away from traditional views on property rights. Specifically, they attacked corporate power as a threat to constitutional and republican values and pushed for government ownership of the entire railroad industry. Their extreme ideas created room for more centrist approaches, which were adopted by political and legal leaders in Minnesota.

A major concern for Populists throughout the country was the growth of monopolies and corporate power. The problem was that monopolistic practices had "altered the character of American law, removed basic safeguards to personal and political liberty, and denied the autonomous existence of the state as the custodian of individual security and the nation's welfare."<sup>108</sup> Many Populists thought corporations ought to be "subsumed within the jurisdiction of the government" and subject to the rule of law.<sup>109</sup> Minnesota farmers expounded on their idea of the true meaning of democracy as they attacked business conglomerations. One editorial in the Minnesota publication of *Farm, Stock and Home* assailed the "high-handed monopolies" in the United States, characterizing them as "a menace to the democratic quality of our institutions...."<sup>110</sup> Another writer argued that two options existed. He believed that the United States must either nationalize labor and capital "in the interests of all the people" or accept "the other alternative, an American Monarchy[.]"<sup>111</sup> Ignatius Donnelly's influential voice was

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<sup>108</sup> Norman Pollack, *THE JUST POLITY: POPULISM, LAW, AND HUMAN WELFARE* 5 (1987).

<sup>109</sup> *Id.*

<sup>110</sup> *Monopolies and Trusts*, *FARM, STOCK AND HOME*, March 1, 1888.

<sup>111</sup> *FARM, STOCK AND HOME*, Nov. 1, 1889.

not silent either. He called for laws to “limit and circumscribe the growth and power of those unnatural and irresponsible beings and provide for their ultimate extinction, and thus make this indeed a government of the people, by the people and for the people, and not a government of money, by money, and for money.”<sup>112</sup> Referencing the preamble of the Constitution and the Gettysburg Address, he unabashedly proclaimed his vision that democratic and constitutional principles favored the common masses over aggregated wealth.

In *Great West*, another Minnesota periodical aimed at farmers and Populists, an editor commented extensively on how the language and spirit of the Declaration of Independence and the Constitution envisioned governmental restrictions on property and capital. First, the author noted that people are “endowed by their Creator (not by the State) with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.”<sup>113</sup> He pointed out that the founders “did not regard property or its accumulations, now universally termed ‘capital,’ as a creature to be viewed as a partner, and co-equal with ‘liberty’ or the ‘pursuit of happiness.’... Nor did the Constitution of the Union recognize capital as a factor of civilization.”<sup>114</sup> Capital had this status, the editor argued: “its creation, its tenure, its value, its use, possession and enjoyment is ever to be subject to the law—while the law is to have its base only in the ‘consent of the governed.’”<sup>115</sup> He forcefully concluded by declaring that the right residing in the people “to control capital by legislation... is an absolute right.”<sup>116</sup> The reasoning in this article challenged the legal theories of lawyers and judges concerned with protecting property rights from state intervention. Minnesota farmers and Populists did not hesitate to share their own convictions about the implications of the ideas in America’s founding documents.

Angry with the Court’s decision to interfere with the state’s attempt to lower railroad rates, Minnesota Populists applied their general legal and political principles to a specific issue: government ownership of railroads. Many farmers thought that constitutional and political theories provided the intellectual basis for the notion that the state should own and operate railways. An editorial in *Farm, Stock and Home* demanded that government “own and control the railways of the nation, and operate them in the interest of the people” in order to preserve “government of the people, as [the] founders intended it should be.”<sup>117</sup> Addressing the skeptics within Minnesota’s Farmers’ Alliance, proponent William M. Gamble asserted that government railroads would be an “extension of the functions of the state,” the theory being “that the state is a co-operative institution possessing the power

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<sup>112</sup> Ignatius Donnelly, ST. PAUL REPRESENTATIVE, June 7, 1893.

<sup>113</sup> GREAT WEST, July 25, 1890.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

<sup>117</sup> *Government by Railroads*, FARM, STOCK AND HOME, Sept. 15, 1890, at 351.

of coercion.”<sup>118</sup> Combatting cries that government ownership was a form of unwanted paternalism, he creatively argued that paternalism cannot exist in a republic: “[a] republic is a government of the people, and in it the people are supposed, through their political organizations, to do certain things for themselves, and in no sense do they do these things as a father does something for his children.”<sup>119</sup> Frustration with the *Chicago Railway* holding motivated some Minnesota farmers to call for government operation of railroads and to frame this appeal as consistent with constitutional and republican principles.

The reasoning of Minnesota farmers and Populists increased the credibility of their policy positions with respect to monopolies, railroads, and concentrated capital. But, their arguments were not perfect. First, their reliance on an ostensibly republican interpretation of the Constitution ignored the fact that many of the founders desired a Constitution that safeguarded private property. Also, claiming that monopolies acted against the will of the people was undermined by the people’s true desires as seen through the political process: a majority of the citizenry had voted for only limited intervention in the railroad industry. Finally, these Minnesota theorists had to face the reality that, despite their reading of the Constitution, many of the people in power, those in the federal judiciary, ardently believed that the Constitution protected private interests.<sup>120</sup> Notwithstanding the flaws, Minnesotans promulgated imaginative and innovative theories that gave voice to a constitutionalism in accordance with their goals.

#### B. FARMERS’ AND BUREAUCRATS’ LEGAL REACTIONS TO CHICAGO RAILWAY

While some Minnesotans waged broad legal attacks on the economic power of railroads, others concerned with railroad rates commented directly on the legal meaning of *Chicago Railway* and attacked the judiciary as an institution. The reaction of the Farmers’ Alliance to the decision was one of pure outrage. These farmers believed that the decision destroyed the *Granger Cases* and eviscerated the power of Minnesota’s RWC by subjecting every rate it set to endless litigation.<sup>121</sup> The Alliance called this a “second *Dred Scott* decision,” whose holding depended on mere technicalities.<sup>122</sup> Immediately gravitating toward the surest way to strip the Court of its power, the farmers called for a constitutional amendment to “abolish this new slavery” and stop the corporate domination of the people.<sup>123</sup> In an interesting analogy, the Alliance compared the constitutional structure of government of the United States to that of England. It claimed that, in England, a group of

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<sup>118</sup> William M. Gamble, FARM, STOCK AND HOME, Dec. 15, 1891.

<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., *Chicago, Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418, 453 (1890); *Ames v. Union Pac. Ry. Co.*, 64 F. 165, 189 (1894).

<sup>121</sup> *Judges Denounced*, ST. PAUL DAILY GLOBE, Apr. 2, 1890, at 1.

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

<sup>123</sup> *Id.*

judges would never be allowed to “nullify an act of parliament” because there the people are “properly omnipotent.”<sup>124</sup>

In fact, initial indignation prompted the executive committee of the Minnesota Farmers’ Alliance to pass a resolution in favor of “exterminating the supreme court.”<sup>125</sup> However, tempers cooled a little and the Alliance abandoned this proposition, instead condemning the Court’s power of judicial review because “there is not warrant for it in the constitution [*sic*] of the United States.”<sup>126</sup> The Alliance leader Ignatius Donnelly explained. He argued that nothing in the text of the Constitution gave the Supreme Court the power to “override the will of the whole people expressed through Congress.”<sup>127</sup> Donnelly also claimed that Art. III, Sec. 2 gave Congress the power to regulate the appellate jurisdiction of the Court.<sup>128</sup> But, in *Chicago Railway*, the Court had overturned part of a state law rather than an act of Congress. Donnelly detested this version of judicial review as well. He decried the “steady encroachment of the judiciary upon the legislative and executive branches of the state government” and praised the “grand doctrine that all power must ultimately rest with the inhabitants of the land making laws through their duly chosen representatives.”<sup>129</sup> Overall, Donnelly and the Farmers’ Alliance railed against all courts that abrogated the will of the people as set forth by legislative enactments.

Despite the threat of future judicial review, individual farmers felt they had the authority to challenge the Court’s decision. In 1892, a farmer sent a letter to the RWC begging the commissioners to reduce rates. He acknowledged that the Court might “nullify their action,” but said that the people would respond as they did to *Dred Scott*, by reversing the decision through a political revolution at the ballot box.<sup>130</sup> The Farmers’ Alliance and other individual farmers did not bow deferentially to the Supreme Court. They did not believe that a palpably wrong decision had to be respected as good law. Instead, they strategically compared it to *Dred Scott*, a past case they thought to be a clearly erroneous application of judicial review and equally offensive to the rights of man. Although many of them were not trained in law, they knew enough to express their legal opinions and demand justice with great conviction.

Railroad commissioners involved with the rate issue on the state and national level also grappled with the *Chicago Railway* decision. In April of 1892, a national convention of railroad commissioners was held at the office of the (ICC) in Washington, D.C. Bureaucrats from all over the country met to discuss railroad policy issues. Two Minnesotans were in attendance: Secretary A.K. Teisberg and Commissioner George L. Becker.<sup>131</sup> These men served on the Minnesota RWC for much of the 1890s and made many of the

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<sup>124</sup> *Id.*

<sup>125</sup> GREAT WEST, May 16, 1890.

<sup>126</sup> GREAT WEST, May 30, 1890.

<sup>127</sup> *Watch the Courts*, ST. PAUL REPRESENTATIVE, June 21, 1893, at 1.

<sup>128</sup> *Id.*

<sup>129</sup> Ignatius Donnelly, ST. PAUL REPRESENTATIVE, June 7, 1893.

<sup>130</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 49 (1893).

<sup>131</sup> Proceedings of a Nat’l Convention of R.R. Cmm’rs, at 7 (1892).

important decisions concerning rates, which were detailed in Part II. At the convention, they considered the Report from the Subcommittee on Reasonable Rates, which was made up of other state commissioners. The Report addressed the *Chicago Railway* decision and made legal and policy arguments for legislative rate setting.

Unlike the farmers in Minnesota, who correctly realized that the Supreme Court had paved the way for judicial intervention in rate setting, the Subcommittee interpreted the holding of *Chicago Railway* more narrowly. Speaking equivocally at first, the Report argued that legislative bodies had the power to fix maximum rates, which were binding “unless some fundamental principle of justice [was] clearly violated.”<sup>132</sup> This would seem to permit courts to overturn rates that egregiously interfered with railroads’ property interests. But the Report then claimed that, in *Chicago Railway*, the Supreme Court did not overturn the doctrine of legislative control of rates. The only due process problem with the Minnesota statute was the failure to require an opportunity for the railroads to present their case at a hearing before commissioners set new rates.<sup>133</sup> The Report argued that this view of *Chicago Railway* was also sustained by the 1892 case of *Budd v. New York*, which upheld the regulation of grain elevators and said that rates set directly by a legislature were not subject to judicial review.<sup>134</sup> The Subcommittee on Reasonable Rates attempted to construe the Court’s recent rulings as consistent with the *Granger Cases*, which sanctioned broad state power to set rates. Although this interpretation of *Chicago Railway* was not shared by most Minnesota judges and lawyers (as will be described in Part IV), or by the Supreme Court itself in later cases, the Subcommittee’s Report shows that the law was still unstable in the early 1890s. Because of this, activists, politicians, and railroad commissioners were comfortable with promoting a particular interpretation that they believed was based on sound legal claims and would allow for the implementation of their idea of just policies.

Minnesotans who attended the Convention or read the Report also came across more general reasons for substantial governmental control of railroad rates. Maintaining that the “right and duty of public control” of the railroad industry was no longer a disputable question, the Report said that the general welfare requires that railroads “submit to public control for the common good” because they are a “business affected with the public interest.”<sup>135</sup> Like radical Minnesota farmers, the commissioners professed concern for the common people; in contrast to the farmers, though, they demanded the imposition of reasonable rates, not wholesale governmental ownership. The authors of this Report also grounded their legislative aim in

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<sup>132</sup> Report of Subcommittee on Reasonable Rates, Proceedings of a Nat’l Convention of R.R. Cmm’rs, at 31 (1892).

<sup>133</sup> *Id.* at 31–32.

<sup>134</sup> CORTNER, *supra* note 1, at 129 (citing *Budd v. New York*, 143 U.S. 517, 528, 538–47 (1892)).

<sup>135</sup> Report on Reasonable Rates, at 34.

the sacred idea of “equality before the law.”<sup>136</sup> They decried rate discrimination as “evil.”<sup>137</sup> The Report attacked the favoritism shown by railroads to certain individuals, businesses, and localities as an unacceptable violation of the fundamental principle of equal treatment.<sup>138</sup> Lastly, the Report cited facts and figures. It noted that, in the fourteen years before 1890, in the eleven central farming states, railroad earnings had gone up 175% and the value of wheat and corn had only increased 57%.<sup>139</sup> This disparity meant that railroads were reaping an even greater percentage of the earnings from farm work than they had in the past.<sup>140</sup> After being exposed to these ideas in defense of government regulation of rates, Secretary Teisberg and Commissioner Becker returned to Minnesota with further ammunition to use against those who resisted intervention by the RWC.

Theorists, farmers, politicians, and bureaucrats had a range of justifications for denouncing the economic influence of railroads and condemning the Court’s *Chicago Railway* decision. Populist intellectuals and certain groups of farmers came to the most extreme conclusions. Ignatius Donnelly and the editors of *Great West* and *Farm, Stock and Home* cleverly worked within the set of prevailing legal doctrines to advocate for government ownership of the railroads and a Supreme Court with no power to favor corporate interests over those of the producing class. They massaged and manipulated ideas like justice, government by consent, republicanism, and slavery in order to support conclusions that differed significantly from theorists who ardently defended private property rights. The bureaucratic railroad commissioners rejected the more radical positions at their national Convention. But, they also engaged in creative interpretation of legal doctrine and agreed with Populists and farmers in that the law supported meaningful government control of railroad rights.

## V. THE (NEARLY) IMPOSSIBLE QUESTION: HOW SHOULD COURTS DETERMINE WHETHER RATES ARE REASONABLE?

The convictions of Populist theorists and farmers made them less willing to work within the framework established by *Chicago Railway*. These personalities based their push for state control of railroads on innovative legal commentary, but their views did not capture the sensibilities of the majority of citizens or Supreme Court justices. Some farmers and their allies realized that, after *Chicago Railway*, victory for farmers depended in part on the ability to win when railroads attacked the RWC’s lower rates in the courts. Key figures in Minnesota acquiesced to the general reasonableness inquiry announced by the Supreme Court. Some strategically framed the reasonableness question in favor of railroads, while others argued for a highly

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<sup>136</sup> *Id.* at 39.

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

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *See* Part I.A.

deferential reasonableness standard that would endorse most state intervention. The vacuous nature of the Court's decision in *Chicago Railway* caused Minnesotans to press for definitions of reasonable rates that would lead to results in harmony with their normative agendas. In *Steenerson*, the Minnesota Supreme Court chose a doctrinal test that led to the conclusion that the decrease in rates mandated by the RWC was reasonable and did not unjustly deprive railroads of their property.<sup>141</sup>

A. COMMISSIONER BECKER FOR FARMERS, JUDGE BREWER FOR RAILROADS AND INVESTORS

Mainstream legal actors who accepted the authority of the Supreme Court did agree that courts could overturn rates that unreasonably interfered with railroads' property interests. From this starting point, though, the issue was wide open. George Becker gave voice to one side of the spectrum as he thought it essential to inquire into the needs of farmers when considering the reasonableness of rates charged by the railroads. Becker, the lone Democrat on the three-man board of the RWC during the early 1890s, often found himself in the minority.<sup>142</sup> He rejected the notion that politicians and lawyers should only be worried about what a decrease in rates would do to railroads.

In *Chicago Railway*, the Court suggested that when lower courts reviewed shipment rates set by state bodies, they should focus on the railroad. The Court felt that the Due Process Clause of the 14th Amendment required judges to intervene to protect the property of citizens and corporations.<sup>143</sup> Interpreting this general ruling, railroads argued that they were entitled to "earn a reasonable return on the capital invested" based on what it originally cost to construct the road.<sup>144</sup> Becker asserted that other issues were more pertinent. For him, a "fundamental" principle was that "money invested in railroads [was] no more sacred than money invested in any other branch of business" and so was not entitled to special protection.<sup>145</sup> He did not care about the building costs or the road's obligations to stock and bondholders.<sup>146</sup> Becker justified his position by hearkening back to the complaint by many farmers that the railroads issued watered stocks.<sup>147</sup> He claimed that, when raising capital, railroad owners often sold bonds at a discount, and "each dollar of bonds carrie[d] with it, as a gratuity, a dollar of common or

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<sup>141</sup> *Steenerson v. Great Northern Ry. Co.*, 72 N.W. 713 (Minn. 1897).

<sup>142</sup> *Becker on Freight Rates*, ST. PAUL DAILY GLOBE, Sept. 24, 1894, at 4.

<sup>143</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm'n*, 134 U.S. 418, 458 (1890).

<sup>144</sup> *Becker on Freight Rates*, ST. PAUL DAILY GLOBE, Sept. 24, 1894, at 4.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Watered stock is most simply defined as stock issued at some discount so that it has less value than what is represented on its face. The purported value of the stock is often greater than the value of the company's assets. ALFRED WILLIAM BAYES, *THE LAW OF PARTNERSHIPS* 77 (2d ed. 1921).

preferred stock, or both.”<sup>148</sup> Therefore, he concluded, a reasonable rate did not have to ensure dividends for stockholders or a fair rate of interest on the railroads’ bonds.<sup>149</sup>

To be sure, Becker did not approve of rates so low that they would threaten railroads’ ability to function in Minnesota. Instead, he wanted to reverse the focus. He thought it was just to look at the question of reasonable rates “from the standpoint of a man who pays the freight.”<sup>150</sup> He resisted establishing rates that would “crush the farmers,” demolish “the industries of the country,” or “render[]” “every farmer... a pauper.”<sup>151</sup> Becker and others who agreed with him portrayed the situation in terms reminiscent of Populism, pitting the general citizenry against railroad owners and capitalist investors. Becker and his allies believed that “the shipper is really everybody because he handles the produce which everybody buys or sells.”<sup>152</sup> They noted that consumers purchased railroad transportation whenever they bought food, clothes, or other items. Also, farmers were just as entitled to a profit as railroads.<sup>153</sup> By shifting the locus of analysis to the needs of farmers, Becker could and did maintain that rates which cut deeply into the revenue of the railroads were in fact reasonable. To him, the Supreme Court’s preoccupation with railroad property improperly ignored the financial distresses that producers confronted. Becker set forth a unique reasonableness analysis that he hoped would prompt courts to uphold the RWC’s decisions to decrease freight rates.

When Minnesota state judges considered appeals from the RWC, they could look to an alternative perspective that diverged considerably from Becker’s. Minnesota newspapers summarized and analyzed the 1894 decision by Justice Brewer in the federal circuit court in Nebraska.<sup>154</sup> In *Ames v. Union Pac. Ry. Co.*, Brewer found that the maximum rates of freight set by the Nebraska legislature unconstitutionally deprived the railroads and their investors of their property.<sup>155</sup> Before engaging the question, Judge Brewer admitted that the test to determine the reasonableness of rates was “not fully settled” and doubted whether a single rule, “applicable to all cases,” could be laid down.<sup>156</sup> Still, he pushed forward and picked a standard that showed his sympathy to railroad investors.

Brewer acknowledged that if the proceeding at issue was one to condemn property for public use, the railroad would receive remuneration for the present value of the property. He also admitted that the current value of the railroads, the cost of reproducing them, was less than the value of its

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<sup>148</sup> “Reasonable Rates,” ST. PAUL DAILY GLOBE, Feb. 27, 1894.

<sup>149</sup> *Id.*

<sup>150</sup> *Becker on Freight Rates*, ST. PAUL DAILY GLOBE, Sept. 24, 1894, at 4.

<sup>151</sup> *Id.*

<sup>152</sup> “Reasonable Rates,” ST. PAUL DAILY GLOBE, Feb. 27, 1894.

<sup>153</sup> *Id.*

<sup>154</sup> *See, e.g., We Have Read It*, ST. PAUL DAILY GLOBE, Dec. 17, 1894, at 4.

<sup>155</sup> *Ames v. Union Pac. Ry. Co.*, 64 F. 165, 189 (C.C.D. Neb.1894).

<sup>156</sup> *Id.* at 177.

outstanding stocks and bonds.<sup>157</sup> But, he concluded that the actual investment, “as expressed... by the stocks and bonds, [was] not to be ignored,” and that “justice demand[ed] that everyone should receive some compensation for the use of his money or property.”<sup>158</sup> After crunching the numbers, Brewer held that the tariff fixed by the state of Nebraska was unreasonable because it deprived the property owners (the holders of stocks and bonds) “of all chances to make profit” and compelled them “to pay out of their pockets all the losses.”<sup>159</sup>

By ensuring that a rate schedule could not jeopardize shareholder property, the court in *Ames* protected those wealthy enough to make the risky decision to purchase watered stock rather than the average producer who labored every year in the hopes that he would be able to feed and clothe his family. In fact, the opinion did not once mention producers. In contrast to Becker’s call to consider the farmers, it never referenced them or their fellow citizens who convinced the legislature to set maximum rates. The court gave a legitimate, reasonable legal answer to the question of whether a rate is reasonable. In doing so, it opted to come down clearly on the side of railroad investors, and rejected other possible doctrinal interpretations. When Minnesota courts heard an appeal from a reduction in rates commanded by the RWC, they faced competing and conflicting visions of *Chicago Railway*.

#### *B. BACK AND FORTH IN THE STEENERSON CASE*

A major ramification of the Supreme Court’s decision to base *Chicago Railway* on the vague requirement that rates to transport goods be reasonable was that Minnesota legal actors could persuasively set forth disparate standards for reasonableness. The lack of clarity created by the Court persisted in Minnesota throughout the 1890s. As laid out above, the complex and unresolved nature of the legal doctrine allowed Minnesota farmers to achieve many of their goals through legislation and the RWC. However, Minnesota courts were eventually forced to take a stance. They had to decide how to answer the reasonableness question and thereby choose whether to cabin the victories realized by the farmers and their supporters. The variations in the rulings that culminated in the Minnesota Supreme Court decision of *Steenerson v. Great Northern Ry. Co.* illuminate the contingencies that existed.

It is sometimes easy to forget that real people bring their complaints to court. Students of history must not overlook the individuals that stand to gain or lose from a high court’s decision. These actors have the power to shape the law. As referenced briefly in Part II, Elias Steenerson from Polk County in northwestern Minnesota filed a complaint with the RWC late in 1893. This call for action came after years of falling wheat prices in which

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 177–178.

<sup>159</sup> *Id.* at 189.

farmers struggled to avoid going deeper in debt.<sup>160</sup> Additionally, the complaint claimed that railroad rates had remained the same during the past four years despite a twenty to forty percent decrease in operating costs.<sup>161</sup> These facts prompted Steenerson to argue that the freight rates charged to ship grain from East Grand Forks, Fisher, and Crookston, Minnesota to Duluth and Minneapolis were excessive and unreasonable. The RWC conducted a hearing and agreed to reduce rates and end discrimination against these and other points on the line.<sup>162</sup> Steenerson had demanded a decrease of thirty-three percent. The RWC, with George Becker as one of its three Commissioners, compromised and ordered a reduction of almost fifteen percent.<sup>163</sup> Becker was able to convince his peers that the farmers needed relief, but the Great Northern Railway quickly appealed the decision.

With no binding precedent, the district court in Ramsey County, Minnesota had to figure out whether the Commission had set unreasonably low rates. In this incredibly complicated case, Judge Kerr first stated that the court would have to figure out the present value of the railroad because “the law could not deprive the owner of property of a fair return of profit upon the value thereof.”<sup>164</sup> Both parties agreed that the best way to deduce the present value was to determine the current cost to reproduce the railroad. This was a fair way to determine value in this case because the court concluded that the stocks and bonds of Great Northern were not watered—they did not exceed the “actual cost of constructing and equipping the railway.”<sup>165</sup>

The “most difficult problem” and dispositive question was how to apportion the railroad’s past earnings from interstate traffic in a way that fairly captured the amount earned within the state of Minnesota.<sup>166</sup> The court needed this information to determine if the rates set by the RWC would be confiscatory. The road’s total revenue from shipping in Minnesota in 1894 would be compared to the projected revenue after implementation of RWC’s order to decrease rates. The court felt that its obligation under the law was to make sure the railroad would be able to cover its costs after the reduction in rates.

It was simple enough to find out how much the railroad made by transporting goods from one part of Minnesota to another. It was more difficult for the court to figure out what percent of the money earned from carrying goods across state lines should count as profits in Minnesota. The state and Great Northern both offered a way to determine how to apportion interstate earnings. The RWC argued that gross earnings on interstate traffic should be counted as in-state revenue based on the proportion of the miles traveled

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<sup>160</sup> See *supra* Part I.A at note 18.

<sup>161</sup> *Farmers Victorious*, ST. PAUL DAILY GLOBE, Sept. 11, 1894 at 1.

<sup>162</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 36 (1896).

<sup>163</sup> *Farmers Victorious*, ST. PAUL DAILY GLOBE, Sept. 11, 1894 at 1.

<sup>164</sup> R.R. & Warehouse Comm’n of Minn., Ann. Rep., 38 (1896).

<sup>165</sup> *Id.* at 39–40.

<sup>166</sup> *Id.* at 40.

in the state to the miles traveled outside the state.<sup>167</sup> For example, if Great Northern made \$100,000 from interstate transport and twenty percent of its mileage was in Minnesota, then \$20,000 would be the portion of in-state earnings. In contrast, Great Northern wanted to take into account various costs and apportion based on net earnings.<sup>168</sup> Considering these factors when doing the calculations would lead to a lower value for the road's in-state revenue.

Unsurprisingly, the application of these two methods of calculating total earnings would lead to opposite conclusions. If the court accepted the state's procedure, which the RWC had applied and judged as fair, the court would find that the rates set "were not... unreasonably low."<sup>169</sup> On the other hand, Great Northern's method would prompt the court to overturn the RWC's ruling.<sup>170</sup> Judge Kerr knew full well what the outcome would be for each of his options. He chose to accept Great Northern's arguments, used their way of determining the apportionment of earnings on interstate traffic, and overturned the RWC's decision to decrease rates.<sup>171</sup> To be fair, Judge Kerr truly believed he made the right decision and that Great Northern's claims had more merit. He genuinely thought that ruling the other way would unjustly ruin Great Northern and other railroads.<sup>172</sup> However, the fight was not over. The Minnesota Supreme Court would weigh in next.

The highest court in Minnesota came out the other way, further proving that the outcome of these cases depended on which side the court favored when it picked the tests and factors for determining if rates were reasonable. At each step of the way, the supreme court applied a reasonableness standard that helped the farmer's case against the railroad.

First, in a point of agreement with the district court, Judge Canty of Minnesota's Supreme Court ruled that Great Northern was only entitled to make income based on what it would currently cost to reproduce the railroad.<sup>173</sup> Going further than the lower court, the supreme court said that it was "perfectly immaterial" whether the railroad was mortgaged for two or three times what it would currently cost to reproduce it due to the fact that construction costs had gone down.<sup>174</sup> Showing less sympathy than Judge Brewer in Nebraska or Judge Kerr in the district court, Judge Canty wrote that money invested in railroads should be "subject to [the same] vicissitudes as capital invested in other enterprises."<sup>175</sup>

In addition to treating the financial interests of stockholders and railroads with indifference, Canty empowered the RWC by holding that courts should only base their reasonableness analysis on the evidentiary findings of

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<sup>167</sup> *Id.* at 41.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 42.

<sup>171</sup> *Id.* at 42, 44, and 47.

<sup>172</sup> *Id.* at 47.

<sup>173</sup> *Steenerson v. Great Northern Ry. Co.*, 72 N.W. 713, 715 (Minn. 1897).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

the RWC. It interpreted the statute in question in a way that restricted district courts from trying “the facts in controversy de novo,” pointing to the doctrinal understanding that “the fixing of rates is a legislative or administrative act, not a judicial one.”<sup>176</sup> In contrast to the U.S. Supreme Court in *Chicago Railway*, which carved out a major role for courts by creating judicial review of rates set by state commissions, the high court in Minnesota felt it appropriate to, if at all possible, show deference to the legislature and its administrative bodies.<sup>177</sup>

Canty’s opinion for the court also chose to favor the RWC by construing the relevant statute to place the burden of proof on the railroad for many key issues. Canty again refused to pity the railroads when he demanded that feeder or extensions of a line be self-supporting. He noted that some portions of the railroad west of Minnesota in Dakota were “unbusinesslike ventures and speculations” and were encumbrances on the rest of the line because they did not turn a profit.<sup>178</sup> Minnesota patrons should not be forced to pay higher rates to make up for the losses on these unprofitable portions, reasoned Canty. And, the railroad had the burden to prove that each part of the line for which it charged rates to make a reasonable income was self-supporting.<sup>179</sup>

Great Northern also had the burden to show that the rates fixed by the commission were confiscatory. Specifically, Canty required the railroad to demonstrate that the RWC’s apportionment of the gross interstate earnings on the mileage basis was “unfair and inequitable.”<sup>180</sup> He then listed all of the facts the railroad had to prove to make out its case.<sup>181</sup> The district court should not have simply applied a different standard for apportioning interstate earnings. Instead, Great Northern had full responsibility to affirmatively prove the rates would destroy its ability to turn a profit. In *Steenerson*, the supreme court saddled the railroad with obligations to submit lots of evidence, make numerous calculations, and point out every flaw of the RWC’s reasoning if it wanted to overturn the RWC’s rates.

The court continued to move against the railroad. Applying a holistic and realistic assessment of Great Northern’s finances, Canty found various reasons to conclude that the RWC’s imposition of lower rates would not unreasonably hinder the road’s ability to make a profit. To begin with, Canty held that rates did not have to assure railroads as great an income on the value of its terminals.<sup>182</sup> He thought that the reasonable income a railroad should make on this property was less than the reasonable income it was entitled to for other portions of the road because terminals were in urban

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<sup>176</sup> *Id.* at 716.

<sup>177</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418, 458 (1890).

<sup>178</sup> *Steenerson*, 72 N.W. at 715.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 725.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 714.

and suburban areas where the market price of property was growing rapidly.<sup>183</sup> Because of increasing property values, the railroad received some return on its terminals irrespective of what it charged its patrons to use the road. This was not an insignificant gloss on what level of income rates should afford railroads in order for them to be deemed reasonable. Instead of deciding that Great Northern should be able to make a five percent income on all of its property, Canty held that it was entitled to a five percent return on the \$30,000,000 value of its normal roads, but only earnings of two-and-a-half percent on the value of its terminals, which was \$14,000,000.<sup>184</sup> Because it guaranteed less income for Great Northern, this approach made it more likely that a court would find RWC's rates reasonable.

Finally, the court chided Great Northern for engaging in creative, but deceptive, accounting. Judge Canty found it problematic that, in complaining that the RWC's rate schedule would be confiscatory and unduly onerous, Great Northern "presented to the court only a part of its entire railway system" while ignoring other parts that might have been more profitable and therefore able to make money even if lower prices were charged.<sup>185</sup> Canty also noted that Great Northern "absolutely controlled" a steamship company and a coal company, whose profits depended "almost wholly" on its dealings with Great Northern.<sup>186</sup> Most importantly, the officers of Great Northern had the ability to divide the joint profits "as they [saw] fit."<sup>187</sup> Canty held that, with this conglomeration of railroads and other corporations, Great Northern was responsible for showing that the division of profits between itself and these other corporations was "fair and reasonable."<sup>188</sup> Based on Canty's lengthy speculations in the opinion,<sup>189</sup> he clearly believed Great Northern engaged in devious, unethical bookkeeping in an attempt to convince the RWC and the district court that the rates set by the RWC would not produce enough income for the railroad to stay afloat.

With two concurrences and no dissent, the Minnesota Supreme Court unanimously ruled to reverse the district court.<sup>190</sup> The court defended the authority of the RWC and affirmed the decision giving relief to farmers. According to the Populist-leaning *St. Paul Globe*, the decision in *Steenerson* saved farmers \$2,000,000 that year.<sup>191</sup> The court had the ability to do this doctrinally because the United States Supreme Court had left the door wide open. By requiring courts to determine when railroad rates were unreasonable, but abstaining from promulgating a clear rule, legal minds could disagree about the appropriate way to answer the reasonableness question without blatantly opposing the authoritative Supreme Court. And that is exactly what happened in Minnesota and other states in the 1890s.

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 724.

<sup>185</sup> *Id.* at 727.

<sup>186</sup> *Id.* at 727–28.

<sup>187</sup> *Id.* at 728.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 727–28.

<sup>190</sup> *Id.* at 729.

<sup>191</sup> *On the Supreme Bench*, *ST. PAUL GLOBE*, Nov. 6, 1898.

Commissioner Becker, working for the best possible outcome for farmers, had wanted a judicial inquiry that gave great weight to their interests. Other Minnesotans were compelled by Judge Brewer's concern for investors' property and his method of weighing the factors relevant to railroad profits. Judge Kerr, who considered factors that would have led to a ruling for Steenerson and the farmers, ultimately decided that Great Northern and its property needed protection. Finally, the Minnesota Supreme Court commented on a litany of issues, holding that Great Northern had not met its burden of proof. In determining to what extent rates could be lowered without unconstitutionally depriving railroads of their property, the court overtly opted for a standard with minimal protection for railroads. It gave lip service to the duty imposed on it by the Supreme Court in *Chicago Railway*, but created a doctrinal framework that allowed the RWC to reduce railroad rates for Minnesota farmers.

## VI. CONCLUSION

The Minnesota Supreme Court's holding in *Steenerson* was both a legal and political victory for farmers. In 1894, Democrats and Populists had struck a bargain and campaigned to elect Judges Daniel Buck and Thomas Canty to the Minnesota Supreme Court.<sup>192</sup> Farmers saw the positive result of this coordination in Judge Canty's majority opinion in *Steenerson*.<sup>193</sup> Eight years after *Chicago Railway*, farmers and their supporters had done much to shift the balance of economic power away from railroads. This Article has shown that farmers, who faced financial trouble, responded with action to the Supreme Court's decision to protect railroads in *Chicago Railway*. Though disadvantageous, the Court's ruling left the farmers many options moving forward. Farmers organized political parties, used political clout to force moderates to compromise, and passed legislation that gave the state authority to intervene for their benefit. They also utilized the structure of the RWC to achieve lower rates.

The Court's nebulous command to consider reasonableness when reviewing rates also allowed for divergent interpretations of doctrinal issues. Some commentators theorized outside mainstream legal thought, but farmers ultimately needed allies at the RWC and on the bench when railroads appealed a RWC order to lower rates. Minnesota courts had a variety of frameworks to choose from when conducting a reasonableness inquiry. In *Steenerson*, the Minnesota Supreme Court decided to expound upon the general standard pronounced in *Chicago Railway* in a way that favored farmers over railroads.

But, the struggle did not end with *Steenerson* or the legislative victories of the 1890s. The Supreme Court weighed in a year later when it ruled on the *Aymes* case.<sup>194</sup> It upheld Judge Brewer's decision in the circuit court and

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<sup>192</sup> Hicks, *People's Party*, *supra* note 19, at 545, n. 29.

<sup>193</sup> *Steenerson v. Great Northern Ry. Co.*, 72 N.W. 713 (Minn. 1897).

<sup>194</sup> *Smyth v. Ames*, 169 U.S. 466 (1898).

set forth factors for lower courts to consider when determining whether rates unconstitutionally deprived railroads profits from their property.<sup>195</sup> State legislatures, Congress, administrative agencies, politicians, and citizens continued to grapple with the perpetually evolving legal doctrine as they attempted to set rates that would satisfy constituents but also not be overturned by the courts.<sup>196</sup> Not until 1944 did the Supreme Court abdicate, deciding that it would no longer review railroad rates.<sup>197</sup> Finally, democratically elected governing bodies could freely set any rate to ensure that railroad patrons were not burdened with excessive costs. That is the policy Minnesota farmers wanted from the beginning.

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<sup>195</sup> *Id.* at 546–547 (When determining the fair value of the property of the railroad, the “original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration.”).

<sup>196</sup> See BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 186–89 (1998).

<sup>197</sup> *Id.* at 189 (citing *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 601–02 (1944)).



# THE HISTORY OF JUDICIAL SELECTION REFORM IN TEXAS

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&

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## ABSTRACT

*Texas is often considered the perfect illustration for the recent era of judicial selection politics complete with the huge amounts of campaign financing, intense interest group participation, and plenty of mudslinging evident in many states that use some form of election process to choose their judges. Several states have also experienced their share of scandals that have resulted in reform movements and significant changes. Major scandals have rocked the Texas judiciary but only incremental reforms have been successful despite reform efforts spanning decades. This begs the question – why? This article uses a detailed case study approach to try to offer an explanation. The findings are complex, with both institutional and political reasons, but the story is definitely an interesting one.*

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## I. INTRODUCTION

Every state has its own unique history of deciding the proper method for choosing judges. Factors influencing how a state selects judges include:

the year it joined the Union, the amount of corruption in the state government, the level of public support for reform, and the interests or actions of the key players in the state government.<sup>1</sup> Texas is certainly no exception. This paper considers these factors using Texas as a case study because of its long standing use of partisan elections (every year since 1876), the fact that Texas is seen as a benchmark for the problems that come with judicial elections, and also because the movement for reform in the state has certainly seen its highs as well as its lows over the course of over twenty years. Texas was the first state that saw campaign contributions for judicial elections rise significantly, (to previously unimaginable levels) with a 250 percent increase in money spent and a 450 percent rise in number of contributions between 1980 and 1986, when the issue first came to prominence.<sup>2</sup> The 1988 Supreme Court elections became the most expensive in state history when \$12,000,000 was spent for six seats.<sup>3</sup> Spending continued at high rates as the seven winning candidates raised over nine million dollars from 1992 until 1997, with over forty percent of campaign funds either contributed by lawyers or by their clients.<sup>4</sup> Charges of impropriety and calls for reform were stated often, as “60 Minutes” aired two reports on the Texas Judiciary asking if justice was for sale in 1987 and 1998.<sup>5</sup> Democratic plaintiffs’ lawyers spent the most money in the early 1980s in order to further their efforts in expanding tort judgments in a traditionally conservative state with pro-business leanings.<sup>6</sup> By the late 1980s, it was defense attorneys in civil cases, doctors, insurance companies, and other business interests who would be spending millions of dollars to elect judges to favor them in a state that was continuing its generally conservative tradition while becoming a Republican dominated state.<sup>7</sup> This paper draws on an empirical study carried out by the first author (as part of his dissertation)<sup>8</sup> with a view to first understanding and then explaining judicial election outcomes in Texas in relation to the specific historical and political context in which these elections occurred. The dissertation was aimed at explaining who won those elections and why those independent variables (political party, campaign financing, etc.) were significant. The variables that held the most significance in explaining who won the elections were political party, campaign financing, incumbency, judicial experience, and success in the nonpartisan state bar poll. The winning

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<sup>1</sup> ANTHONY CHAMPAGNE & KYLE CHEEK, JUDICIAL POLITICS IN TEXAS: PARTISANSHIP, MONEY, AND POLITICS IN STATE COURTS 17-20 (2005).

<sup>2</sup> *Texas Judicial Selection*, AMERICAN JUDICATURE SOCIETY, available at <http://www.ajs.org>. (last visited Mar. 20, 2005).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> CHAMPAGNE & CHEEK, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2.

<sup>8</sup> Billy Monroe, *Judicial Selection in Texas: A Study of Election Outcomes 1988-2004* (May 2008) (unpublished Ph.D. dissertation, University of Texas at Dallas).

candidates were members of the dominant party (Republicans since 1994), raised and spent more money, already held the position, had more experience, and had more support from the legal profession (an important interest group) than their opponents in Texas during the chosen time period of 1988-2004. One of the chapters, which became the basis for this paper, was a discussion of the political context of this time period. Some states have a tradition of selecting their judges through some form of appointment (e.g. New Jersey).<sup>9</sup> Other states have retained elections, but have moved from partisan elections to nonpartisan elections (e.g. Minnesota).<sup>10</sup> The largest reform movement occurred when many states adopted the merit plan (e.g. Oklahoma).<sup>11</sup> Several states have large amounts of money being spent on judicial elections and scandals are certainly not unique to Texas. Reform movements have also obviously been successful in other states. As stated below, Texas has had state constitutions that allowed for their judges to be selected through appointment, so it is not as if reforming judicial selection is a foreign concept to the people of this state. The questions then are how or why Texas is different from these other states.

One major reason why the reform movement has only led to incremental changes in Texas is because of the influence of several key interests within the state, which all benefit by keeping partisan elections as the judicial selection mechanism.<sup>12</sup> Party affiliation is always very important in explaining election outcomes so the political parties have no incentive to move to an alternative system.<sup>13</sup> Baum's study found that voters in partisan judicial elections tend to vote based on party affiliation because of uncertainty about the qualifications of judges.<sup>14</sup> Judicial elections have traditionally been characterized by few contested positions and strong incumbency advantages. As a result, there was little need for extensive campaigning, with candidates for judicial positions required only to discuss their qualifications. The announce clause of Minnesota's Canons of Judicial Ethics prohibited candidates from discussing their position on issues that could come before them if they were elected. The Supreme Court decision in *Republican Party of Minnesota v. White*<sup>15</sup> altered the judicial electoral process by declaring the announce clause a violation of the judicial candidate's First Amendment rights to freedom of speech that could be abridged only if the state could demonstrate a

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<sup>9</sup> *New Jersey Judicial Selection*, AMERICAN JUDICATURE SOCIETY, available at <http://www.ajs.org>. (last accessed June 20, 2014).

<sup>10</sup> *Minnesota Judicial Selection*, AMERICAN JUDICATURE SOCIETY, available at <http://www.ajs.org>. (last accessed June 20, 2014).

<sup>11</sup> *Oklahoma Judicial Selection*, AMERICAN JUDICATURE SOCIETY, available at <http://www.ajs.org>. (last accessed June 20, 2014).

<sup>12</sup> CHAMPAGNE & CHEEK, *supra* note 1.

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

<sup>14</sup> LAWRENCE BAUM, INFORMATION AND PARTY VOTING IN 'SEMIPARTISAN' JUDICIAL ELECTIONS, 9 POL. BEHAVIOR 62-74 (1987).

<sup>15</sup> *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

compelling interest for the restriction.<sup>16</sup> This decision is likely to accelerate the trend towards what Schotland calls “nastier, noisier, and costlier” modern judicial elections.<sup>17</sup> The importance of partisanship is also manifested by the level of straight ticket voting. In 2004, fifty-five percent of Republicans and forty-five percent of Democrats voted straight tickets in Texas elections.<sup>18</sup>

As discussed previously, campaign financing is also a significant variable influencing judicial elections, with the amounts spent on campaigns in Texas among the highest in the nation.<sup>19</sup> Spending by candidates and special interest groups in all states with judicial elections dramatically increased in recent years and this has led judicial elections to mirror other elections in the political arena.<sup>20</sup> It should also be noted that research has identified a correlation between campaign contributions and judicial decisions in Texas courts, with judges voting conservatively on landmark cases and in cases in the months prior to an election.<sup>21</sup>

A variable related to both partisanship and campaign financing is interest group participation. The trend shows a movement towards more extensive financing and campaigning by judges because of interest group involvement, which could compromise the impartiality of the judiciary when a matter involves a campaign supporter.<sup>22</sup> The interest groups themselves also provide large amounts of money to candidates and extensively campaign for the ones they want to be elected, so the degree of interest group support or opposition to a candidate should be considered an important explanatory variable in determining election outcomes.<sup>23</sup> Minority groups, have also recently begun to win elections, so they obviously have reservations about changing the selection system after finally seeing partisan elections lead to more representation.<sup>24</sup> In the Texas judiciary in 2000, 15% of judges identified themselves as other than Caucasian.<sup>25</sup> This percentage may not seem substantial,

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<sup>16</sup> *Developments Following Republican Party of Minnesota v. White* 536 U.S. 756 (2002), AMERICAN JUDICATURE SOCIETY (May 2007), www.ajs.org.

<sup>17</sup> Roy A. Schotland, *Republican Party of Minnesota v. White: Should Judges Be More like Politicians?* 41 JUDGES' JOURNAL 7-10 (2002).

<sup>18</sup> Kristan Mack, *Straight-Ticket Voters Urged to Change Ways*, HOUSTON CHRONICLE (Nov. 2006), <http://www.chron.com>.

<sup>19</sup> CHAMPAGNE & CHEEK, *supra* note 1; *Financing Judicial Elections*, *supra* note 20.

<sup>20</sup> Chris W. Bonneau, *What Price Justice(s)? Understanding Campaign Spending in State Supreme Court Elections*, 5 STATE POLITICS & POLICY Q., 107-125 (2005); Melinda Gann Hall & Chris Bonneau, *In Defense of Judicial Elections: Controversies in Electoral Democracy and Representation* (2009).

<sup>21</sup> Madhavi M. McCall & Michael McCall, *Campaign Contributions, Judicial Decisions, and the Texas Supreme Court: Assessing the Appearance of Impropriety*, 90 JUDICATURE 214-25 (2007).

<sup>22</sup> CHAMPAGNE & CHEEK, *supra* note 1.

<sup>23</sup> Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391-1409 (2001).

<sup>24</sup> *Id.*

<sup>25</sup> Anthony Champagne, *The Politics of Judicial Selection*, 31 POLICY STUDIES JOURNAL, 2003, 413-19.

but Hurwitz and Lanier's study found that only 5.9% of all judges sitting on state benches were black, 2.8% were Hispanic, and 1.1% were Asian-and-Pacific-American, so Texas seems to be ahead of the curve in terms of the racial diversity among its judges.<sup>26</sup> Incumbents want to keep their positions, and the status quo of partisan elections has clearly benefited them, so concessions would have to be made to protect them or they would provide resistance to wholesale reforms.<sup>27</sup> This paper explores judicial selection methods and proposals for reform in Texas from 1845 when it achieved statehood up to the present day. The powerful interests in the movement for reform that began in 1946 before gaining steam in the early to mid 1980s, and the strong opposition to reform which has led to no change in the status quo will both be described. We conclude with a legislative history of key bills debated in the effort to reform judicial selection in Texas.

## II. A BRIEF OUTLINE OF JUDICIAL SELECTION METHODS IN TEXAS FROM 1845 TO THE PRESENT

When Texas first joined the Union, the original state constitution provided for judges to be appointed by the governor with Senate consent for six-year terms, so this state does have limited experience with the appointment system, albeit long ago.<sup>28</sup> However, the electoral system is much more ingrained in a state known for placing a high value on individual responsibility and governmental accountability.<sup>29</sup> The original Reconstruction Constitution of 1866 guaranteed judicial elections for the first time, with tenures ranging from ten years for Supreme Court justices, to four years for county level judges.<sup>30</sup> The 1869 Constitution again provided for gubernatorial appointment with Senate consent for terms ranging from four to nine years.<sup>31</sup> The current constitution, (written in 1876 as a direct response to the governorship of E.J. Davis)<sup>32</sup>, provided once again for the election of judges for terms ranging from two to six years, to eliminate the possibility of the abuse of the appointment power (or too much centralized power for that matter).<sup>33</sup> The Court of Criminal Appeals was established in 1891, with elected judges, to give the state two high courts (one for civil appeals and the other for

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<sup>26</sup> Mark S. Hurwitz & Drew Lanier, *Women and Minorities on State and Federal Appellate Benches, 1985 and 1999*, 85 JUDICATURE, 84-92 (2001)..

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> E.J. Davis was a former Union general who served as Governor during the end of Reconstruction after the American Civil War. The government during the period was very powerful (some would say corrupt) and was very unpopular among the Texas citizens. Once Reconstruction ended, and the Union Army left, Democrats retook control of state offices and wrote the 1876 Constitution to overrule Davis's policies and avoid similar ones in the future.

<sup>33</sup> *Id.*

criminal ones).<sup>34</sup> The fact that these selection methods and terms of service are expressly written in the existing constitution means that any change ending judicial elections must occur through constitutional amendments, which are difficult to pass through the state legislature because they need a supermajority of votes in favor, and also require ratification by Texas voters.<sup>35</sup> Texas, however, is able to change from partisan election to nonpartisan election of judges without a constitutional amendment.<sup>36</sup>

The reform movement began in earnest in 1946. The Texas Civil Judicial Council proposed an amendment to the Texas Constitution calling for the merit selection (appointment/retention election) of judges, but the legislature failed to pass the bill.<sup>37</sup> The bar had shown widespread support for merit selection in 1949 (by a two to one margin).<sup>38</sup> The Civil Judicial Council, the State Bar Committee on the Administration of Justice, and Advisory Committee on Revision of Judicial Selection of the Texas Constitution, all endorsed merit selection in 1953.<sup>39</sup>

The year 1962 brought the endorsement of Chief Justice Robert Calvert for merit selection, as well as a poll of Texas lawyers showing majority support for abandoning partisan elections with a plurality favoring merit selection.<sup>40</sup> The movement strengthened once more in the 1970s, beginning in 1971 when Chief Justice Calvert formed a task force to draft a proposed constitutional amendment to improve the administration of the Texas judiciary. The task force originally proposed a commission selection plan for judges in 1971.<sup>41</sup> Starting in the fall of 1972, several citizens' conferences were held to provide discussion forums and the final product from the task force was presented to the 1973 legislature. The proposal again called for merit selection, with a provision that if voters rejected merit selection, then a nonpartisan election proposal would be presented to the voters.<sup>42</sup> The legislature rejected the proposal, but the movement gained new life when Texas approved the establishment of a constitutional revision commission. The commission proposed widespread modernization of the Texas Constitution, including plans for either merit selection or nonpartisan elections, with merit selection being the first choice.<sup>43</sup> In 1974, a constitutional convention was held to write a new constitution, but for many reasons, (mostly political) such as the lack of strong leadership, the right to work issue, and the fact that the convention was considered a regular session of the Texas Legislature

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 83.

<sup>39</sup> *Id.* at 83.

<sup>40</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 83.

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; AMERICAN JUDICATURE SOCIETY, *supra* note 2.

in which other pressing issues had to be handled resulted in all constitutional revision proposals being rejected.<sup>44</sup>

### III. THE KEY INTERESTS IN THE JUDICIAL SELECTION DEBATE

Texas was for over 100 years a one party state, so partisan elections were generally supported because they remained low-key affairs with limited public interest and low levels of money spent.<sup>45</sup> The Democratic governors would appoint fellow party members to fill vacancies so the any competition was usually left to the primary elections.<sup>46</sup> The Democratic primary elections typically saw a battle between liberal and conservative members of the party in an effort to gain election, with usually either moderate or conservative judges being elected.<sup>47</sup> Incumbency played a major role and guaranteed election in most instances, especially since many judges were originally appointed before having to run for election.<sup>48</sup> There were some reform movements, as previously discussed, but no changes occurred.

However, the political environment changed dramatically in the late 1970s and early 1980s when Republicans started winning major statewide elections, and the party continued to grow in power, gaining control of all major state executive, legislative and judicial offices by the late 1990s.<sup>49</sup> The winning party is and almost always will be in favor of keeping partisan elections because this is the way it increases its power base.<sup>50</sup> This fact is especially true since Texas seems to go in cycles of one party dominance, and there is a reliance on straight ticket voting, with only a relatively brief time of true two party competition.<sup>51</sup> The party in power usually opposes judicial selection reform.<sup>52</sup> The Republicans supported merit selection until the party started winning elections on a grand scale and became the strongest force in maintaining the status quo.<sup>53</sup> The Democrats have consistently favored partisan election; perhaps because they know that at some point they will be in power once again statewide and they have remained powerful in south Texas.<sup>54</sup> Many qualified judicial candidates from both parties have been defeated simply because they have been members of the “wrong” political party in that year’s election. A “coattail effect” is created when a particularly strong candidate for a position at the top of the ballot (i.e. U.S. President, U.S. Senator or State Governor) has major success in winning their election

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<sup>44</sup> KAREN O’CONNOR ET AL., *AMERICAN GOVERNMENT: CONTINUITY AND CHANGE*: 2006 TEXAS EDITION 779-80 (2006).

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

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *The Politics of Judicial Selection*, *supra* note 25.

<sup>49</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 86-87.

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

<sup>51</sup> *Id.*

<sup>52</sup> *The Politics of Judicial Selection*, *supra* note 25.

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

<sup>54</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 105.

and that leads to even more success because fellow party members win their elections for positions that garner less media or public attention. Republican Ronald Reagan in 1980 led to many Republican wins while Democrat Lloyd Bentsen led to Democratic wins in 1982 (showing a substantial coattail effect from top of the ticket voting).<sup>55</sup>

The second major development was the increased specialization within the State Bar.<sup>56</sup> What used to be a group of professionals who practiced a wide variety of legal specialties became a highly specialized set of lawyers who had their own political agendas. This fact became especially important in civil law, where, unlike criminal law, large amounts of money can be involved. Two groups ended up forming – the plaintiffs’ bar that represents injured individuals in torts cases and the pro-business defense bar. The plaintiffs’ bar has traditionally favored partisan election because Texas is typically a conservative state with a pro-business atmosphere, so Governors would generally favor those same businesses and make conservative appointments.<sup>57</sup> Contributions from the plaintiffs’ bar, however, can influence the outcome of judicial elections by leading to the election of pro-plaintiff judges.<sup>58</sup> Their viewpoint would definitely seem to be losing popularity since the Republicans have gained dominance – campaign contributions provided an ability to influence government in the past, but that has been severely limited recently.<sup>59</sup> Of course, in Texas’ current pro-business Republican climate, the political influence of the plaintiffs’ bar is very limited, unlike in the 1980s when the plaintiffs’ bar had influence in Democratic circles because of their campaign funding and ideological agreement with the liberal wing of the Democratic Party.<sup>60</sup> The pro-business nature of the state traditionally leads defense lawyers to favor merit selection for the exact same reason that plaintiffs’ lawyers have tended to oppose it—conservative governors will tend to select conservative, pro-business judges.<sup>61</sup> However, since Republicans started winning and making decisions favorable to their interests, defense lawyers have proven more supportive of the current system of selection – if it is not broken, why fix it?<sup>62</sup> They are still more supportive of the merit plan than the plaintiffs’ bar, but they are also enjoying majority status so they have been far less active in supporting selection reforms.<sup>63</sup> Anthony Champagne and Kyle Cheek discuss these phenomenon extensively in their book on judicial politics in Texas and additional research by Champagne show not only how the state bar has splintered into multiple factions but also how much they tried to influence judicial elections through their cam-

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<sup>55</sup> *Id.* at 87.

<sup>56</sup> *See generally* AMERICAN JUDICATURE SOCIETY, *supra* note 2.

<sup>57</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 106.

<sup>58</sup> *Id.*

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

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

<sup>61</sup> *Id.* at 106-07.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

campaign spending and other electioneering activities to convince voters to support their chosen candidates based on their ideological preferences. Conservative defense lawyers (who support Republicans) and the more liberal plaintiffs' bar (who support Democrats) have been more than happy to provide campaign contributions to their chosen parties or candidates, while also being very willing to campaign on their behalf. The research has also shown that similar events have occurred in several other U.S. states where lawyers have tried to influence judicial elections to increase their chances of winning in court and helping their clients by having judges elected that are more sympathetic to their cause.<sup>64</sup>

Judges in Texas generally have opposed judicial selection reform.<sup>65</sup> They gained their position from a partisan election system and, at least in years where partisan sweeps have not occurred, incumbent judges have been very favorable to the existing system of selection. To the extent that judicial selection reform is supported by incumbent judges, they want to be guaranteed political security. As a result, it has been politically necessary for appointment proposals to grandfather incumbent judges into the new system of selection. Some incumbent judges favor nonpartisan elections to avoid the insecurity of party sweeps, but they certainly would not be opposed to smaller districts, which would diminish their base of political support. The status quo is what they will favor most, at least in their public comments, to keep the support of the Republican Party, and because they have been successful under the partisan election system, as long as the Republican Party is dominant and judicial elections are not competitive, incumbent judges have no real incentive to change.<sup>66</sup>

A major development affecting judicial selection politics in the state is the growth of urban counties and the corresponding increase in the strength of minorities within the political arena. The major urban counties (Dallas and Harris counties especially) grew at tremendous rates within a very short amount of time. This situation led to much larger judicial districts where hundreds of thousands of voters would have to choose their judges on ballots with as many as seventy positions on them. Judicial candidates would have a nearly impossible task of trying to canvass all the voters in their district in elections that already were considered to have low visibility for voters, only becoming worse with the growth in these counties and with the growth in the number of judges. Name familiarity, and especially party identification, seemingly have become the deciding factors for voters in urban counties while rural counties either did not have contested elections or the candidates were well known in their communities.<sup>67</sup>

The related development was the increased political power of Hispanics and blacks, along with women. One of the biggest reasons was an increase

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<sup>64</sup> CHAMPAGNE & CHEEK, *supra* note 1; Champagne, *Interest Groups and Judicial Elections*, 34 Loy. L.A. L. Rev. 1391 (2001).

<sup>65</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 108-09; Champagne, *The Politics of Judicial Selection*, *supra* note 25.

<sup>66</sup> *Id.* at 108-09.

<sup>67</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 90-91.

in the population of these groups – especially Hispanics. This increased power led to movements to increase the representation of these groups in state offices, including the state judiciary, where they have been historically underrepresented. Advocates of merit selection argued that partisan elections were one of the causes of the underrepresentation, while merit selection would help improve the representation of women and minorities. Advocates for partisan elections made the claim that the merit plan would only reduce opportunities for women and especially minorities because the appointment system is political in nature and did not guarantee the appointments of minorities. It was argued that Republican governors in particular had little incentive to appoint blacks and Hispanics to the bench, given that these groups were overwhelmingly Democratic in their voting behavior.<sup>68</sup>

Minorities were finally starting to win at least some judicial elections (assuming they are Republican in statewide elections or the dominant party in local elections) so they saw it as a step backward to change the system. Some people argue that nonpartisan elections would benefit minorities since most tend to be Democratic in what is now a Republican state. Minorities could win more easily since they will not have to suffer the consequences of straight-ticket Republican voting. The counterargument is that many minorities are straight-ticket Democratic voters, so losing the party label would mean lower turnout on judicial elections, causing minorities to have less political influence. The result is that minorities tend to favor judicial election with small judicial districts (smaller than countywide ones). Blacks tend to favor districts that follow county commissioner boundaries while Hispanics favor following the state house district lines.<sup>69</sup>

The fact that several state representative districts have large Hispanic populations makes it seem likely that more Hispanic candidates could win elections if judicial districts in Harris and Dallas counties were drawn according to state representatives' districts. Given that one of the four county commissioner's precincts in both Dallas and Harris counties are African-American precincts, African-Americans have preferred that judicial districts be drawn according to county commissioner's precincts. This dispute over the boundaries of judicial districts that are smaller than counties created an impasse in the judicial reform movement, because Hispanics and African-Americans have been unable to agree upon the appropriate district boundaries.<sup>70</sup>

#### IV. INTERIM REPORTS, SCANDALS, LAWSUITS AND LEGISLATIVE ACTION

The first major legislative action in the 1980s was the Select Committee on Judicial Selection, which met in 1982 and prepared an interim report to be presented to the 68<sup>th</sup> Legislature in 1983. The report detailed judicial selection in Texas by detailing the benefits and problems of partisan elections,

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<sup>68</sup> *Id.* at 92-93.

<sup>69</sup> *Id.* at 107-08.

<sup>70</sup> *Id.*

merit plans, and nonpartisan elections. The committee discussed several ideas over the course of their meetings. The most wide-ranging ones advocated the nonpartisan election of appellate judges, nonpartisan election of district court judges, as well as the extension of terms from four years to six for trial court judges and six to eight years for appellate judges. Many members of the committee came to believe that these three measures were too extreme, so its final recommendations took a much smaller and more incremental approach. The final recommendations included mandatory education/training for judges, stronger enforcement of sanctions for misconduct, making actions of the Judicial Conduct Commission open to the public, limiting the campaign fundraising timeline, drawing single member districts for the two high courts (excluding the presiding judges), and the creation of a “merit screening commission” that the governor is allowed to use at their discretion.<sup>71</sup>

The next biennium led to another interim report to the 69<sup>th</sup> Legislature by the Select Committee on the Judiciary. Their recommendations were significantly different from the previous report. The committee advocated merit selection with retention elections for all appellate judges, with the local governments (either the county or the judicial district) having the option of using the plan for district and county judges. Nonpartisan selection commissions would be created to recommend candidates to the governor for vacancies. Alternative recommendations included nonpartisan elections and the removal of judicial elections from straight ticket balloting, with terms of office being extended by two years. Increased pay for trial court judges, creating funds for judicial salaries and retirement benefits, limiting campaign contributions to \$5,000 per source, and other changes to improve the administration of the Texas judicial system were also proposed. These reports came out at a very important time because the Republicans were just gaining strength by winning major statewide elections. Problems were also already beginning to show in the judicial election system with major campaign financing, low voter information, and judicial quality suffering, as an accused criminal was elected to the Texas Supreme Court in 1976 (who was later convicted and resigned in disgrace). Champagne and Cheek provide an excellent discussion of these events and evidence of the problems happening during this time period.<sup>72</sup> Both of these interim reports would be introduced in their respective legislative sessions as constitutional amendments or bills to reform the state judiciary, but they would never win the number of votes to guarantee passage. Similar legislation would again be proposed in the 1990s.<sup>73</sup>

The reform movement gained momentum once again in 1986, when Texas Supreme Court Chief Justice John Hill made judicial selection reform his personal crusade, even resigning from the court in 1987 to campaign for

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<sup>71</sup> *Select Comm. on Judicial Selection of the Texas House of Representatives*, 1981-1982 Leg., 68<sup>th</sup> Sess., available at <http://www.lrl.state.tx.us> (last modified Apr. 4, 2005).

<sup>72</sup> Anthony Champagne and Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 Fordham Urb. L.J. 907 (2001).

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

merit selection. Hill was well known in Texas as a leading trial lawyer, as Secretary of State under Governor John Connally, as a Texas Attorney General, and as the first Democratic gubernatorial candidate to lose in the general election in 100 years (when he lost to William Clements in 1978).<sup>74</sup> Chief Justice Hill formed the Committee of 100 to examine judicial selection and judicial campaign financing in Texas.<sup>75</sup> Hill's proposals focused on the district and appellate level courts, and argued that changes must be made since excellent judges were losing simply due to their party affiliation, or were resigning because they wanted to avoid the negative elements of elections (raising money and campaigning primarily). Some candidates simply changed their party label because they could see the growing power of the Republican Party or used their name recognition to win easily. The public did not know who the judges were anymore, because there were so many in the large urban counties. An additional issue was that the state judiciary did not accurately reflect state demographics, since there had been a dramatic increase in the Hispanic population and the existence of a strong black community as well, especially in the urban areas. Yet, in 1986 there were only a handful of black and Hispanic judges. The biggest problem, of course, was the influence of large amounts of money being raised and spent in the election campaigns, with campaigns for the Texas Supreme Court spending millions of dollars. The fact that the money was coming from a small group of special interests, many of which came before the court on a regular basis (so they had a direct stake in the decisions made), only made the situation more problematic. Texas politics had reached a very intriguing time with the rise of the Republican Party after roughly 100 years of being powerless.

The committee consisted of public citizens appointed by Hill, the Speaker of the House, and the Lieutenant Governor with several public hearings occurring throughout the state as well. The Speaker and Lieutenant Governor would play limited roles by their own choice and that would prove to be a major problem. The committee proposed what became known as the "Texas Plan", advocating merit selection of all levels of state judges. There was to be a nonpartisan nominating commission to review candidates' qualifications and to choose three candidates. The commission would have fifteen people, (nine lawyers and six non-lawyers) chosen by a mix of the Governor, Lt. Governor, Speaker, President of the State Bar, and state chairmen of the two political parties, with no judges being allowed to serve on the commissions and with a legal admonition to select judges with consideration given to racial, ethnic and gender diversity. The Governor would then choose one of the three candidates as their nominee with Senate confirmation. The judges would have to win periodic retention elections to remain in office (one year after appointment and then every six years thereafter). The hope was clearly that state judges would be selected in a nonpolitical way in which

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<sup>74</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 84-86

<sup>75</sup> Comm. of 100 for the Merit Selection of Judges, *The Texas Plan: Merit Selection of Judges*, (1986-1987), available at <http://www.lrl.state.tx.us> (last modified Apr. 4, 2005).

merit was the most important criteria instead of partisanship or money considerations.<sup>76,77</sup>

The Texas Plan generated major opposition from the very beginning when the Committee of 250 was formed. The group was composed primarily of county chairpersons from both major political parties who favored partisan elections to protect their power. Plaintiffs' lawyers (who did not want to lose gains made in tort law with the appointment of defense-oriented judges), organized labor, and even six members of the Texas Supreme Court joined the Committee of 250 to oppose the proposal. The major arguments included the fundamental question of "Who picks the pickers?" with the belief that the process would still be eminently political because the party chairpersons were included as commission members, as well as elected officials who had to have a degree of partisanship to protect their job security. The state Senate confirmation could even be seen as political in nature if senatorial courtesy played too large of a role. Also, in Texas there is a long-standing tradition that the state Senate will not confirm any appointee whom the state senator from the appointee's district objects. Their beliefs were that the Committee of 100 was elitist, that merit plans were undesirable, and that judicial accountability would be lost. Another major argument was that the judicial selection system in Texas was actually an appointive system because fifty-nine percent of appellate judges and forty-four percent of trial court judges originally were appointed rather than elected in 1987.<sup>78</sup> The 1982 Legislative Interim Report shows that number to be seventy percent of all Texas judges being appointed.<sup>79</sup> Personal attacks were also made against Chief Justice Hill, because originally the Texas Supreme Court Chief Justice was a part of the nominating commission as well, and opponents saw his efforts as a power-grab, especially if he chose to run for governor in 1990. Chief Justice Hill resigned from the court in an effort to end those criticisms, while establishing the Committee for Merit Election (MeritPAC) to raise money, and later Texans for Judicial Excellence to advocate reforms.<sup>80</sup> Opposition to the Texas Plan was also announced by state minority interest groups, which argued that white males dominated the merit systems in other states, and also that they had no incentive to support change because they were starting to win elections. Minorities wanted increased representation. Rural areas also did not support change because either they did not have competitive races or were small enough to not have the problems of urban counties. Chief Justice Hill attempted to answer these criticisms by trying to show that the plan would not be discriminatory in nature by increasing minority representation on the selection commissions, and by strengthening the language to encourage diversity in appointments. Hill refused to place any quotas or other measures of proportional representation in the plan. Hill

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<sup>76</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 84-86, 92-93.

<sup>77</sup> Comm. of 100 for the Merit Selection of Judges, *The Texas Plan: Merit Selection of Judges*, (1986-1987), available at <http://www.lrl.state.tx.us> (last modified Apr. 4, 2005).

<sup>78</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 93-95.

<sup>79</sup> 1981-1982 Leg., 68<sup>th</sup> Sess., *supra* note 29.

<sup>80</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 97.

also tried to make the option available for counties to choose whether or not to participate, but even that had partisan overtones because of the demographic makeup of the state. The larger urban counties, which were the main targets for reform, were also the Republican dominated counties. The smaller rural counties tended to be Democratic Party strongholds. Republicans clearly opposed reforms just as they were finally starting to win elections. Some states with merit plans exclude rural areas from coverage, but to reform the urban counties while leaving the rural counties alone seemed to show an anti-Republican bias. It should also be emphasized that Hill had been a major figure in Democratic Party politics, a Democratic gubernatorial candidate, and someone who might possibly again seek the governorship. As a result, he was not the ideal person to win the trust of Republicans for judicial selection reform.<sup>81</sup>

The lack of a major coattail effect in the 1986 elections further increased the opposition to the Texas Plan because it was argued that the instability problems on the bench were temporary and lessened any sense of urgency. The 1986 elections were not handled well by Hill supporters, who could argue that 1986 was the exception rather than the rule (but chose not to) and the trend from 1980 would return soon. Corruption scandals did occur during this timeframe. The “60 Minutes” broadcast centered on the refusal of the Texas Supreme Court to hear an appeal filed by Texaco in a lawsuit where they had been sued by Pennzoil. Texaco was facing an \$11,000,000,000 judgment. Appearances of impropriety existed because Pennzoil’s PACs and lawyers had contributed large amounts of money (\$355,000) to the campaigns of several sitting justices.<sup>82</sup> Texaco’s PACs and lawyers had also contributed to the justices, but had contributed less.<sup>83</sup> The other major scandal centered on the case, *Manges v. Guerra*. The Guerra family had won a judgment for \$882,000 against Clinton Manges in a mineral leases tort law decision. The verdict was upheld in the intermediate appeals court and appealed again to the Texas Supreme Court. Clinton Manges hired Pat Maloney, Sr. as his attorney for the Supreme Court appeal. Several sitting justices, C.L. Ray, William Kilgarlin and Ted Robertson, had received large sums of campaign funds (\$100,000 each) from Manges and Maloney. Ray and Kilgarlin voted in favor of Manges while Robertson originally recused himself. When it became clear that Manges was going to lose his appeal, Robertson immediately changed his vote from recusal to one in favor of reversal. The Guerra family later filed a motion to have Justices Ray, Robertson and William Kilgarlin recuse themselves. They refused to do so. The trouble was just beginning for Justices Ray and Kilgarlin. Justice Ray held a fundraiser in 1984 where he told a litigant that if he did not win his case currently before the court, he would win the next one and continued by discussing the court’s deliberations. In 1985, Ray had attempted to transfer cases from one court of appeals to another at the request of Pat Maloney,

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<sup>81</sup> *Id.* at 93-95.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 40-41, 93-97.

Sr., a major contributor to Ray. Pat Maloney Jr. took two of Kilgarlin's law clerks to Las Vegas, and Kilgarlin used his office to help obtain funding for a lawsuit against a former law clerk who had testified against him during a legislative hearing. These predicaments would become a full-fledged public scandal that led to sanctions against Justices Ray and Kilgarlin.<sup>84</sup> A slow response by the Commission on Judicial Conduct until after the close of the 1987 legislative session, and the increased importance of budget deficits and tax increases made reform unlikely.

Additionally, the corruption scandal involving Governor Bill Clements and Southern Methodist University played a role in stopping the momentum of reform because it made judicial selection reform really low on the public agenda due to the public's focus on the Governor's scandal. It was hard to attack corruption on the Texas Supreme Court when the Governor was involved in a much more visible scandal. Governor Clements had gradually become an advocate for reform after supporting elections for several years. The scandal gave him no political leverage or real credibility to lobby for selection change. The legislation never made it out of committee even after the proposal was modified to have merit selection for only the appellate bench, but that also led to criticism of partisanship, since that would have shifted power back to defense oriented law, as it was the appellate bench that was responsible for the change to more plaintiff friendly decisions.<sup>85</sup>

1988 would also bring a major lawsuit against the state of Texas by the League of United Latin American Citizens (LULAC), on behalf of ten individuals. LULAC filed suit under Section 2 of the Voting Rights Act of 1965, arguing that the election of trial court judges on a countywide basis had unfairly limited the voting power of minorities.<sup>86</sup> The federal district court sided with the plaintiffs, but gave the state legislature the opportunity to solve the problem without the court imposing a solution unilaterally. Governor Clements called a special legislative session, but would not support the single member district solution advocated by LULAC. Clements and the Democratic leaders in the state House of Representatives did promise to support merit selection in the next regular session of the State Legislature. LULAC and other minority groups opposed this solution, mainly because Governor Clements had a terrible record of appointing minorities for state offices when given the opportunity. The district court rejected both merit selection and county wide district-based elections. Instead, the federal court issued an order requiring nonpartisan elections in the state's nine most populous counties and imposing smaller judicial districts. The Fifth Circuit Court of Appeals reversed the decision on appeal, arguing that Section 2 did not apply to judicial elections. The U.S. Supreme Court rejected this decision by the Fifth Circuit and remanded the case to the Court of Appeals. The appeals

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<sup>84</sup> *Id.* at 40-41.

<sup>85</sup> *Id.* at 96-98.

<sup>86</sup> DANIEL BECKER & MALIA REDDICK, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES, *available at* [http://judicialselection.com/uploads/documents/jsreform\\_1185395742450.pdf](http://judicialselection.com/uploads/documents/jsreform_1185395742450.pdf) (last visited June 21, 2014).

court decided in favor of the minority plaintiffs so it would be left to the legislative and executive branches to settle the dispute. The Texas Legislature failed to pass anything more than a resolution expressing support for the settlement proposed by Attorney General Dan Morales, but the resolution did not have the force of law. The settlement proposal called for most of the judges in the affected counties to be elected by sub-districts (state representative districts in four counties, county commissioners' districts in three counties, and justice of the peace districts in one county). Three Republican judges, including the Chief Justice of the Texas Supreme Court, objected to the proposal. Morales tried to have the judges excluded from challenging the settlement, but the Court of Appeals would not allow that.

In 1993, the Fifth Circuit ruled that LULAC had failed to prove a Section 2 violation, completely reversing the original federal district court ruling. The Fifth Circuit's finding was that race did not explain the outcomes of countywide district court elections - party affiliation did. Another problem with the decision of the district court included the failure to take into account that a major reason for the lack of minority judges was the lack of eligible candidates because there were so few minority lawyers. The Fifth Circuit also recognized the governmental interest in county-wide elections because they encouraged judicial accountability and that the county is the basic unit of government in Texas. As a result, there was no violation. Five years of litigation had brought no success for the plaintiffs.<sup>87</sup>

In 1989-1990, the Committee on the Judiciary prepared another report and presented it to the 72<sup>nd</sup> Legislature meeting in 1991.<sup>88</sup> The report again compared the various selection methods with the benefits and problems of each possibility. It provided a long list of all the criticisms for each system. Partisan elections have the wide range of problems previously discussed, despite being the system that maximizes voter participation (relative to other systems), by reducing the proportion of gubernatorial appointments and by providing a voter veto mechanism on an unpopular appointment. The committee argued that merit selection failed to depoliticize judicial selection, increased the rivalry between the two competing Bar factions, indirectly created life tenure for judges, and allowed political dominance of selection commissions by certain groups. Merit plans also failed to solve the minority representation issue, enhanced the ability of interest groups to manipulate retention elections, and kept the public out of the decision-making process by lowering voter awareness. Nonpartisan elections were seen as troublesome because they failed to depoliticize the judiciary, decreased voter turnout and awareness, increased the influence of ballot position or name recognition, and increased election costs while still retaining the problems of implicit party affiliation. Particular attention was given to state judicial districts, in

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<sup>87</sup> *Id.* at 147-51; DANIEL BECKER & MALIA REDDICK, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES, available at [http://judicialselection.com/uploads/documents/jsreform\\_1185395742450.pdf](http://judicialselection.com/uploads/documents/jsreform_1185395742450.pdf) (last visited June 21, 2014).

<sup>88</sup> *Comm. on the Judiciary of the Texas House of Reps.*, 1989-1990 Leg., 72<sup>th</sup> Sess., available at <http://www.lrl.state.tx.us> (last modified April 4, 2005).

much more detail than previous reports, and the argument that they have no logical or reasonable configuration. The legislative decision, which was substantiated by the Fifth Circuit Court of Appeals, was that the judicial districts are based on the county—the basic system of local government in the state of Texas. The report argues that the districts are clearly not based on population, geography, or caseloads for the court – clearly implying that gerrymandering has occurred. Examples are the three districts made up of non-contiguous counties (Districts 83, 100, 109), District 27 being contiguous for only four miles, and numerous counties being in at least two different geographic districts (Anderson County as one example being in four different districts). They violate the principle of “one man, one vote”, but judicial districts are not required to be apportioned on the basis of population.<sup>89</sup>

Constitutional and statutory provisions listed in the report also make single member districts, smaller districts, or other reforms rather difficult. The report continued by discussing the longtime refusal of the Texas citizenry to support nonelective systems, and then sheds light on a selection method that has gained very little attention before the report was published (and since, for that matter) which is proportional voting. Proportional voting requires multimember districts and would be similar to proportional representation schemes used for legislative elections in Europe (for example the German Bundestag or the Israeli Knesset). The judicial selection issue continues to be framed as an argument between accountability versus independence for judges with Texas clearly favoring accountability. The judicial districts were originally drawn to coincide with how the local governments, known as counties, were structured in the state. Counties were never drawn with race in mind, according to the legislature. The Fifth Circuit Court of Appeals agreed and said that counties were drawn mainly for geographical reasons (people could travel to the county seat in one day’s time). The authors of the report however, believed that race or other discriminatory reasons were at least partially responsible for why the districts are drawn how they are, no matter what the Fifth Circuit decided. The demographics and design of the judicial districts had similarities to many districting plans that were judicially overturned when being applied to school boards or Congressional districts. An in-depth discussion was included regarding the ramifications of legal challenges to the Texas judicial election system under the Voting Rights Act of 1965 and what the burden of proof would be (it had moved from simply proving a discriminatory result to a higher burden of proving discriminatory intent in 1990). The report made it clear that major reform away from judicial elections was unlikely because of the requirement of a constitutional amendment. If judicial elections continued, then the trial court districts should be based on population alone. The report advocated smaller, single member judicial districts in urban areas. Retention elections were also briefly studied in the report and no real conclusions were drawn – because

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<sup>89</sup> *Comm. on the Judiciary of the Texas House of Reps.*, 1989-1990 Leg., 72<sup>th</sup> Sess., available at <http://www.lrl.state.tx.us> (last modified April 4, 2005).

of the problem of limited data.<sup>90</sup> It must be noted that this particular report was written with a very clear agenda in mind in terms of trying to persuade the Texas Legislature to adopt the course of action listed above, in order to rectify what the report's authors considered to be blatant racial bias and to negate the Fifth Circuit's ruling in the LULAC case. The argument that gerrymandering occurred in judicial districts can easily be countered by the fact that the districts were indeed based on counties that simply had uneven populations, and that the examples cited constituted only a handful of the 254 judicial districts in Texas.

In 1994, Lieutenant Governor Bob Bullock, one of the few high ranking Texas politicians that made judicial selection reform a priority, created a committee to provide a reform proposal. He was concerned about the role of money in judicial elections and he feared that the U. S. Department of Justice would not allow the creation of new courts after charges of discrimination were filed by minorities, so, truly meaningful reform was the goal for this committee. Three Democratic and three Republican State Senators (one being Hispanic, while another was black) were selected. The Hispanic senator was closely tied to Latino civil rights groups and the black senator with African-American civil rights groups. Four judges were also selected (one Republican) who were the Presiding Judge of the Court of Criminal Appeals and three members of the Texas Supreme Court (the Chief Justice and two associate justices). The President of the Texas Trial Lawyers Association played a key advisory role, as did a representative of the Texas Civil Justice League, a key business group in the state. One notable absence was John Hill, who was seen as too much of a political lightning rod. It became quickly obvious that because of the wide range of competing interests, compromise would be necessary.<sup>91</sup>

There was significant support on the committee for merit selection, with blacks and Hispanics willing to go along if more representation on local courts was guaranteed through elections and smaller local districts. Businesses were willing to sacrifice some trial courts in exchange for appointed appellate courts. Plaintiffs were somewhat supportive of the idea of smaller judicial districts for trial courts. There was still significant opposition by Republicans. Harris and Dallas county trial judges, who did not like change in their constituencies, also expressed a great deal of opposition. The final plan was for appellate judges to be appointed by the governor with trial judges, especially in urban areas, to be initially elected in nonpartisan elections with the county commissioners' precincts forming the districts before facing retention elections in the future. The plan seemed to generate widespread support, since the ones who wanted merit selection received their wish while the plaintiffs' bar and minorities gained the smaller districts they wanted and all concerns over selection commissions became a moot point. Opposition still remained from Hispanics, however, who did not benefit from increased representation in smaller districts based on county commissioners' precincts, so

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<sup>90</sup> *Comm. on the Judiciary of the Texas House of Reps.*, 1989-1990 Leg., 72<sup>th</sup> Sess., available at <http://www.lrl.state.tx.us> (last modified April 4, 2005).

<sup>91</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 98-101.

they wanted even smaller districts (state House districts) and the political parties lost power with appointive appellate judges and with nonpartisan district court elections. Governor Bush voiced opposition, in order to appease the Republican Party, and Democratic Speaker of the House Laney was opposed as well, so the measure passed the Senate but failed in the House (a pattern that would occur almost every biennium after the 1994-1995 one). Hispanic House members tried to change the planned judicial districts from county commissioners' precincts to state representatives' districts, but that gained widespread opposition from business and Republican interests so another chance for judicial reform failed.<sup>92</sup>

The political interests involved in judicial selection did come together during that 1995 legislative session and passed the Judicial Campaign Fairness Act of 1995 that led to incremental reforms such as campaign contribution limits.<sup>93</sup> More specifically, the act limited individual campaign contributions to either \$5,000 (Supreme Court and Court of Criminal Appeals) or between \$1,000 and \$5,000 (all other judicial candidates – depending on the population of the judicial district). Law firms could give no more than \$30,000 to each candidate. Candidates for the two high courts are also allowed to accept no more than \$300,000 from PACs. Courts of appeals candidates were limited to receiving between \$52,500 and \$75,000 in total PAC contributions (depending on size of district) while all other candidates were limited to between \$15,000 and \$52,500 (again depending on size of the district). Voluntary expenditure limits were established and candidates had to file a sworn declaration of whether or not they would voluntarily comply with or if they were planning on exceeding these limits. The only way that these limits would have any effect on the election campaign would be if both candidates agreed to abide by them. These voluntary expenditure limits were \$2,000,000 for the high courts, between \$350,000 and \$500,000 for the courts of appeals, and between \$100,000 and \$350,000 for all other candidates (again depending upon size of district). Contributions or expenditures made by any committee formed on behalf of a candidate or by a political party were to be considered as money raised or spent by the candidates. All limits were per candidate and per election cycle.<sup>94</sup> Of course, there is little incentive for candidates to follow the voluntary limits since the objective is to win the election and they are not breaking any laws even if they outspend the opposition by a large margin. The one possible benefit is that the judicial candidates can advertise that they are in compliance with the Act, in an effort to be upstanding citizens and increase their appeal to the voters.

The 1995 session also saw the introduction and debate of thirty bills regarding judicial elections. Nine joint resolutions were introduced to amend the Texas Constitution and reform judicial selection by advocating nonpartisan elections, gubernatorial appointment with retention elections to follow, and redrawing judicial districts. The other twenty-one bills dealt with these

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 98-102.

<sup>94</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2.

same issues, as well as administrative details or incremental reforms such as regulating campaign finance. The only successful measure was the Campaign Fairness Act of 1995 and all the other measures died in committee, were withdrawn, or were stalled in the House after passing the Senate.<sup>95</sup>

In 1996-1997, The Texas Committee on Judicial Efficiency, based on recommendations made by the judicial selection task force created by Chief Justice Tom Phillips (described in the following paragraphs), advocated lengthening terms of service to eight years for appellate judges and six years for district judges. They also advocated a plan where judges would be selected following the “appoint-elect-retain” plan.<sup>96</sup>

The 1997 legislative session also saw two significant reform proposals with one being sponsored by Senator Rodney Ellis and the other by Senator Robert Duncan. The Ellis plan called for the appointment of appellate judges with district judges elected in nonpartisan elections. They would then run in retention elections with district judges facing another nonpartisan election later on. In counties with over a million people, district judges would be elected from commissioners’ precincts. The Duncan proposal called for the appointment of appellate judges, who would then face a partisan election once their appointed term was completed, and then face retention elections with no straight ticket voting allowed. Neither plan had enough support from the important interest groups. The Duncan plan did not receive enough support from minorities due to the lack of providing for their representation, and the plan did not discuss district judges. The Ellis plan had the opposite problem – not enough support from non-minority legislators. The hope was for some form of compromise between the two plans where the appellate judiciary would be appointed along with small trial court districts. Minority leaders were adamant that all judicial selection changes must include both the trial and appellate judges. The compromise was made by creating an appointed bench on all levels with districts drawn on commissioners’ precinct lines. The judges would then run in a nonpartisan primary election with a runoff if no one gained fifty percent of the votes. The winner would serve four years and then run in a nonpartisan retention election. Hispanics and incumbent judges still showed heavy opposition so the plan failed once more.<sup>97</sup>

The 1997 session would ultimately see a total of sixteen bills, including seven joint resolutions to amend the Constitution, regarding selection reform. A third Senate Joint Resolution, written by Pete Gallegos, called for the appointment of the appellate bench, with retention elections, along with nonpartisan elections of district judges. The most populous counties within the state would draw judicial districts that followed either commissioners’ court precinct lines or those that mirror state representative districts. Other proposals discussed included the appointment, initial nonpartisan election,

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<sup>95</sup> *Judicial Elections Bills and Legislation*, TEXAS LEGISLATURE ONLINE, available at <http://www.capitol.state.tx.us> (last modified Jan. 15, 2011).

<sup>96</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2.

<sup>97</sup> CHAMPAGNE & CHEEK, *supra* note 1, at 102-103.

and then a retention election for judges in the future. Changing judicial districts and incremental reforms again came up for discussion, such as campaign finance restrictions and changing the requirements for qualifying to serve as district judges. HJR 69 and HB 1175 called for nonpartisan election of appellate judges passed the House, while three proposals (SB 409/SJR 23, SB 621/SJR 25, SB 628/SJR 26) related to appointment of appellate judges, nonpartisan election of district judges, and the elimination of straight ticket voting. All were passed by the Senate Jurisprudence Committee before stalling on the Senate floor. The one bill that did pass both houses to become law dealt with more regulation of political contributions or expenditures in judicial elections. All other bills were either withdrawn after reaching the floor or died in committee.<sup>98</sup>

The final interim report came from the Senate Committee on Jurisprudence in 1998 and was submitted to the 76<sup>th</sup> Legislature. This report paid particular attention to judicial selection, campaign finance, judicial districting, and expanding diversity. The committee argued that the bipartisan nature of the Texas Legislature and Governorship made it the right time for serious judicial reform. It called for the elimination of straight ticket voting, the setting of even lower campaign contribution limits, the prohibition of fundraising by judges who are running unopposed, giving financial assistance to traditionally disadvantaged law students in an effort to increase minority representation among lawyers and judges, empowering the Legislative Redistricting Board to redraw judicial districts, and voter information pamphlets. The committee noted that support for elections, while still strong, had been waning due to the perceived unfairness resulting from the influence of money of judicial decision-making and other improprieties. The Judicial Selection Task Force report published in 1997, created by Chief Justice Tom Phillips the year before, was also discussed and detailed how the Task Force was evenly split between the following two proposals. One plan had gubernatorial appointments with supermajority Senate confirmation that would also force judges to face contested, nonpartisan initial elections with retention elections thereafter. The other plan called for gubernatorial appointments for appellate vacancies with Senate consent, with nonpartisan retention elections thereafter. Lower court judges would run in contested, nonpartisan elections initially before facing retention elections or more nonpartisan elections thereafter depending on length of service. These recommendations were placed into legislative proposals with very little success.<sup>99</sup>

In the 1999 legislative session, twenty bills (including six proposed constitutional amendments) were debated. The bills again called for various forms of appointment, nonpartisan elections, partisan elections, retention elections, the use of districts following either the county commissioners' precincts or state representative lines, changing qualification requirements for district judges, elimination of straight ticket voting, a countywide referendum in Harris county for a public vote on which selection method to use,

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<sup>98</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2; *Judicial Elections Bills and Legislation*, *supra* note 95.

<sup>99</sup> 1989-1990 Leg., 72<sup>th</sup> Sess., *supra* note 90.

providing voter information guides, and even abolishing the Texas Court of Criminal Appeals. SJR 9 and SB 59, which called for an appointive-retention system for appellate judges passed the Senate, but died in the House committee. Governor Bush also vetoed the bill calling for voter information pamphlets. SB 1726 was the one bill passed, which related to the filing of campaign finance reports. Every other proposal would die in committee or be withdrawn.<sup>100</sup>

In the 2001 legislative session, a total of twenty-three bills were debated, including four constitutional amendment proposals. The proposals included gubernatorial appointment for the two high courts, elimination of straight-ticket voting, regulating campaign contributions, providing voter information guides, changing judicial districts or requirements for district judges, creating a vacancy when a judge ran for other elective offices, non-partisan elections, retention elections, and public financing for judicial elections. The voter information law was passed along with more campaign finance regulations. The judicial candidates would be required to file statements detailing their education, professional experience, and biographical information as part of these voter information guides. SJR 3 and SB 129 which called for gubernatorial appointment of the two high courts was passed by the Senate and the House Judicial Affairs Committee, but died without a House floor vote when the session ended. Everything else was withdrawn, died in committee, passed one chamber but not the other, or was vetoed by the Governor. The Texas Secretary of State has never implemented the publication of the voter information guides.<sup>101</sup>

In 2003, Senator Duncan introduced a bill (SB 794) where the governor, with Senate consent, would appoint all Texas judges. They would then run in retention elections. The bill did have bipartisan support, but it would again pass the Senate while dying in the House. The problem was that the Republican Party leadership opposed reform and opposition was starting to include more Democrats who shared Chief Justice Phillips's belief that a major Democratic resurgence would soon occur as a result of changes in Texas demographics. The Mexican American Legal Defense and Education Fund also led the opposition to the bill. The Republican Party mounted a serious effort to kill the bill. Chief Justice Phillips, a Republican who supported reform for several years previously, was attacked bitterly by the party for his position (led by Chairwoman Susan Weddington) and the party's website even provided a petition to sign that urged House members to protect citizens' rights to elect judges. The bill was about to be passed out of committee with majority support before Republican Speaker Tom Craddick, a very powerful opponent of reform, made sure the bill died in committee. It soon became obvious that becoming the majority party had moved the Republican Party away from favoring reform to now opposing it.<sup>102</sup>

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<sup>100</sup> *Judicial Elections Bills and Legislation*, *supra* note 97.

<sup>101</sup> *Id.* AMERICAN JUDICATURE SOCIETY, *supra* note 2; Texas Secretary of State. *available at*: <http://www.sos.state.tx.us> (last accessed July 11, 2014).

<sup>102</sup> *Judicial Elections Bills and Legislation*, *supra* note 95; CHAMPAGNE & CHEEK, *supra* note 1, at 103-05.

The 2003 legislative session would end up with eighteen bills introduced regarding judicial elections and judicial selection reform, including four constitutional amendment proposals. Proposals included gubernatorial appointment, nonpartisan elections, limiting the period of time when candidates could accept contributions as well as other restrictions on campaign finance, retention elections, changing district judge requirements, and electronic reporting of campaign finances. The bills that were passed by the Legislature discussed the ballot placement for judicial offices and campaign finance restrictions. Everything else died in committee.<sup>103</sup>

The 2005 legislative session had five bills debated in committee, including two Joint Resolutions to amend the constitution. The proposals called for gubernatorial appointment of judicial offices with either retention election or nonpartisan elections to follow. The House Judiciary Committee and the Senate Jurisprudence Committee were the ones who oversaw the bills. Barring a miracle or a strong lobbying effort, the bills seemed unlikely to be passed into law from the beginning and would most likely either die in committee or pass the Senate before failing in the House.<sup>104</sup> HB 964, an incremental piece of legislation dealing with the filing fees for certain courts of appeals judges, was the only one of the five bills able to pass to become law. The other four bills all died in the committees of their respective chambers.<sup>105</sup>

The 2007 and 2009 legislative sessions would basically be a repeat of what happened in 2005. Six bills would ultimately be introduced, including two Joint Resolutions for constitutional amendments. State Senator Robert Duncan, a longtime leader of the reform movement, would write the Senate bills. The bills would again call for a combination of gubernatorial appointment and either nonpartisan or retention elections for the judges to remain in their position. Four of the bills were defeated in the committees and the other two failed to be passed by its respective chamber in a floor vote. The 2011 session had Senator Duncan introduce SB 1718, which called for the continued use of partisan elections to gain office and gubernatorial appointments when filling vacancies, but it also called for the use of either nonpartisan retention elections to stay in office after the initial term expires. The bill died in committee. In 2013, HB 2772 was passed into law, creating yet another interim committee (consisting of six members of each chamber) to study state judicial selection methods and write a report for the Legislature. The bill does have some interesting provisions because of the wide variety of judicial selection options that the committee will discuss and research – including lifetime appointment, appointment for a specific term, appointment followed by some form of election (partisan, nonpartisan, or retention), partisan election for open seats, non partisan elections for incumbents, or any

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<sup>103</sup> *Judicial Elections Bills and Legislation*, *supra* note 95.

<sup>104</sup> *Id.*; Interview with Lisa Kaufman (Former General Counsel for State Senator Robert Duncan), (Apr. 4, 2005).

<sup>105</sup> *Judicial Elections Bills and Legislation*, *supra* note 95.

other combination that the committee sees fit. The committee has until January 6, 2015 to make its recommendation.<sup>106</sup>

## V. PUBLIC OPINION ON TEXAS JUDICIAL SELECTION AND CONCLUSIONS

Public opinion polling has regularly shown that Texans overwhelmingly support judicial elections. For example, a 1997 Texas poll showed that fifty-two percent of respondents supported electing judges, while only fourteen percent supporting appointment. Of the fifty-two percent, sixty-two percent of them preferred nonpartisan elections.<sup>107</sup> The 1990 Interim Report to the 72<sup>nd</sup> Legislature quoted polling done in the Democratic Primary where eighty percent of voters favored election and a Texas poll that same year stated seventy-one percent of Texans favor judicial election.<sup>108</sup> The interesting, and conflicting, part of the story in the 1997 poll is that fifty-five percent of those polled agreed that elections placed more political pressure on judges than appointment and seventy-two percent believed campaign contributions influence how judges decide cases. A 1998 poll done by the Texas Supreme Court stated that eighty-three percent of Texas citizens, sixty-nine percent of court personnel, seventy-nine percent of attorneys, and forty-eight percent of judges polled believed that campaign contributions played a significant role in judicial decision-making. A 1999 poll, done by the Texas Supreme Court (along with the State Bar of Texas and the Texas Office of Court Administration) showed forty-two percent of attorneys, fifty-two percent of judges, and fifty-four percent of court personnel preferred nonpartisan elections while only eleven percent of attorneys, twenty-one percent of judges, and twenty-eight percent of court personnel supported partisan elections. Another 2002 poll, done by Campaigns for People, stated that fifty-nine percent of Texas voters disapproved of gubernatorial or legislative appointment of judges, rather than election with forty-five percent strongly disapproving. Eighty-three percent of voters did support nonpartisan election with seventy-seven percent believing that campaign contributions played a significant role in how judges make decisions. Seventy-three percent favored public financing of elections while eighty-six percent supported voter information guides. This result is not surprising since fifty-five percent of those in that poll reported having little or no information regarding candidates in past elections.<sup>109</sup>

These results would seem to show that there is a relatively high level of support for reforming the partisan election system. The problem is that the key interests described above gain too many benefits from the partisan election system and are successful in manipulating the political and legislative process to make sure reform does not occur, since they are powerful enough

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<sup>106</sup> *Judicial Elections Bills and Legislation*, TEXAS LEGISLATURE ONLINE, available at <http://www.capitol.state.tx.us> (last accessed July 15, 2014).

<sup>107</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2; CHAMPAGNE & CHEEK, *supra* note 1.

<sup>108</sup> 1989-1990 Leg., 72<sup>th</sup> Sess., *supra* note 88.

<sup>109</sup> AMERICAN JUDICATURE SOCIETY, *supra* note 2.

to do so. In an interview with Lisa Kaufman, now former general counsel for State Senator Robert Duncan, she explained why reforms have failed and what the future might entail. Political parties will never want to give up power, so the best opportunity will be when there is a strong competition between the two parties, as in the late 1980s to early 1990s. One-party dominance will destroy any chance for reform because the majority party will not want to give away power and the minority party will not have the votes to do so. Demographic changes may also lead to a new possibility for reform because the increasing minority populations should help strengthen the power of the Democratic Party, if current voting trends hold. The 2006 election has already provided a perfect example of how much more competitive judicial races are about to become. Judicial races have historically been the first indicators for electorate party shifts because of the reliance on straight ticket voting. The Democrats were able to sweep all forty-two contested judicial elections in Dallas County, the first Texas County to shift Republican in the 1980s. The Democrats have been gaining support in Dallas County for several years – President Bush received only fifty percent of the vote in the 2004 presidential election, which of course is very low when considering he won sixty-one percent statewide. The Republicans argued that they simply needed to do a better job of increasing turnout from their party supporters and that the Republican deficit was simply because the Democrats were so successful nationwide. That debate has only just begun.<sup>110</sup>

Another key factor is the presence of strong leadership from the Speaker of the House, the Lieutenant Governor, and the Governor for reform to occur. The Speaker and Lieutenant Governor must be supportive because political power in the Texas Legislature is centralized, and as a result they control the agenda and can determine on their own if bills pass (as history has shown). It is no coincidence that meaningful reforms were passed in the Texas Senate when Bob Bullock, a very popular and powerful Lieutenant Governor, took an active interest in making judicial selection reform a priority. Few judicial bills have passed since his departure - all of which have only included incremental changes. The Governor must also be supportive because of both the veto power and any opposition by the state's Chief Executive for reform will only strengthen the fortitude of interest groups that would oppose reform because of self-interest or philosophical reasons. One major problem for the Bullock reforms was that Speaker Laney and Governor Bush opposed reform. Later, all top state officials (Governor Perry, Lieutenant Governor Dewhurst, Speakers Craddick and Strauss, and even Texas Supreme Court Chief Justice Jefferson) either have not made it a priority on the policy agenda or have voiced opposition to reform, if not both. Reform bills have found success in the Senate, but fail in the House partly due to this opposition, partly because of biennial sessions where meaningful reform of anything takes years (see school finance), and partly because reform requires a constitutional amendment unless the reforms simply entail moving from partisan elections to nonpartisan ones.

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<sup>110</sup> Aman Batheja, *Will Dallas County Political Shift Move West?* FORT WORTH STAR TELEGRAM (Dec. 2006), available at <http://www.dfw.com>.

The bills that have passed the Senate also typically do not benefit Hispanics, who have very powerful allies in the Texas House of Representatives. The fact that the Texas citizenry have remained relatively uninformed or apathetic, despite the aforementioned scandals (The Guerra and Texaco cases being prime examples), has only made the reform effort even more of a daunting task for people who want to see change. It should also be noted that the scholarly literature has shown evidence that judicial quality (in terms of experience, etc.) and diversity (race or gender) are basically the same regardless of selection system. The fact that an appointment system does not guarantee any improvement for states when compared to elections only bolsters the likelihood that the status quo of partisan elections will continue in Texas.<sup>111</sup> Reform will have to come in the form of either strong leadership, or in a major rise in public support forcing the issue (unlikely because of the value placed on accountability). Demographic trends show a rise in minority populations and a possible resurgence in Democratic Party support, so the best chance at reform will probably be when or if that occurs as long as one-party dominance does not occur. Bipartisanship will clearly be necessary for reform bills to pass the Legislature. The constitutional amendment election by the Texas citizens would be intriguing, hard to judge, and would depend on how much interest group activity was taking place. It will definitely be a very interesting few years in Texas politics for a variety of reasons. The biggest reason is the changing demographics. The increase in Hispanic voters gives hope for the Democrats since Hispanics tend to vote for their party<sup>112</sup>. The 2014 election will also likely be a strong indicator of the political future in Texas. Wendy Davis is the strongest Democratic candidate since Ann Richards<sup>113</sup>. The Texas Republican Party has also become more and more conservative in recent years (due to the strong influence on the Tea Party and the election of their favored candidates like Ted Cruz). Relatively moderate Republicans like David Dewhurst have been losing primary elections in 2012 and 2014. Recent Texas Governors (George W. Bush especially) have gained support from Hispanics by promoting policies that are favorable to them, especially regarding immigration<sup>114</sup>. The Texas Republican Party and its chosen candidates of 2012 and 2014 have made it clear that they do not support

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<sup>111</sup> Henry Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32.3 U.

MIAMI L. REV. 509-41 (1978); Nicholas Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 315 SOC. SCI. Q. 71 (1990).

<sup>112</sup> Sylvia Manzano, *Changing Demographics in Texas and the Politics of Immigration*, LATINO DECISIONS (Feb. 26, 2012)

<http://www.latinodecisions.com/blog/2014/02/26/changing-demographics-in-texas-and-the-politics-of-immigration/>.

<sup>113</sup> Sally Kohn, *Wendy Davis is One Step Closer to Turning Texas Purple*, DAILY BEAST (Mar. 18, 2014), <http://www.thedailybeast.com/articles/2014/03/18/wendy-davis-is-one-step-closer-to-turning-texas-purple.html>.

<sup>114</sup> Manzano, *supra* note 112.

those immigration and other policies aimed at cultivating Hispanic voters<sup>115</sup>. Putting it all together: not only could the Democrats become a strong contender for Texas voters, but it could be the perfect time for judicial selection reform because of the possibility of two party competition. As Lisa Kaufman stated, that will be the best time for reform<sup>116</sup>. Otherwise, it could just be a situation of history repeating itself if the Democrats become the dominant party once again.

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<sup>115</sup> Marice Richter, *Texas Republicans Adopt Hardline on Immigration and Gay Rights*, HUFFINGTON POST (June 8, 2014), [http://www.huffingtonpost.com/2014/06/08/texas-republicans-gay-rights\\_n\\_5469979.html](http://www.huffingtonpost.com/2014/06/08/texas-republicans-gay-rights_n_5469979.html).

<sup>116</sup> Interview with Lisa Kaufman, (April 4, 2005).



CHANDLER V. CAPE: AN ALTERNATIVE TO PIERCING  
THE CORPORATE VEIL BEYOND *KIOBEL V. ROYAL  
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ABSTRACT

*For over a century, since the case of Salomon v. Salomon, litigators have attempted without success to pierce the corporate veil of corporations in order to sue the holding companies for the torts committed by their subsidiaries. However, Salomon v. Salomon is still good law and the concept of separate legal personality is established all over the world. Recently, United States litigators have attempted to establish a cause of action based on a combination between common law torts and the violation of customary international law. However, this approach too has been unsuccessful. In Kiobel v. Royal Dutch Petroleum, the Supreme Court of the United States ruled against holding the multinational corporation liable for the violation of customary international law committed by its subsidiary. The current issue is what strategy human rights litigators might adopt in front of United Kingdom courts in these types of cases. This article suggests that human rights activists should argue that holding corporations are liable for the human rights abuses committed by their subsidiaries on the basis of domestic tort law rather than customary international law. In this context, the line of cases, which was first established with Lubbe v. Cape and then further developed with Chandler v. Cape, offers an alternative to either piercing the corporate veil or establishing a cause of action based on a combination of tort and customary international law. In Chandler, the U.K. Court of Appeal held the holding company directly responsible for the human rights violations committed by its subsidiary without the need to address the issues related to piercing the corporate veil or customary international law. Chandler has the potential to become an authority not only in the United Kingdom, but also abroad as it establishes a parent company's duty of care toward its subsidiary's employees. However, the case left some unanswered questions, such as whether the parent company owes a direct duty of care toward third parties and whether this could be applicable to the multinational context. This article will address these questions by analyzing Chandler v. Cape and its application in the Dutch decision of Akpan v. Royal Dutch Shell.*

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### I. INTRODUCTION

The issue of whether multinational companies are liable for human rights abuses committed by their subsidiaries is an important one for both human rights and corporate law. On the one hand, corporate lawyers and the judiciary embrace the concept of separate legal personality established in the well-known case of *Salomon v. Salomon*.<sup>1</sup> According to this traditional view, multinational corporations are nothing other than a group of persons who were born in different countries, are living in different countries, are subjected to different legal regimes and somehow interact through commercial and contractual relationships.<sup>2</sup> On the other hand, human rights activists and progressive academics see multinational corporations as super-powers that are able to shape our lives yet escape legal liability for the damage that their operations can cause by establishing multiple and complicated chains of subsidiaries.<sup>3</sup>

In recent years, litigators have attempted to hold multinational corpora-

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<sup>1</sup> See *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.L.).

<sup>2</sup> See, e.g., Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

<sup>3</sup> See Elisabet Fura-Sandström, *Business and Human Rights: Who Cares?* LIBER AMICORUM LUZIUS WILDHABER: HUMAN RIGHTS, STRASBOURG VIEWS, 159 (2007); Surya Deva, *Human Rights Standards and Multinational Corporations: Dilemma Between 'Home' and 'Rome'*, 7 MEDITERRANEAN J. HUM. RTS. 69 (2003); JOHN BRAITHWAITE & PETER DRAHOS, NEOLIBERALISM OR REGULATORY CAPITALISM?, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER, 1-31 (2008).

tions responsible when a human rights violation occurs. Their goal was to establish a precedent holding a western multinational corporation responsible for the human rights abuses committed by its subsidiary incorporated in a developing country. One of the most sophisticated attempts to hold the parent company liable for the violations committed by its subsidiary was to interpret the U.S. Alien Tort Statute (ATS)<sup>4</sup> as referring to customary international law and applicable to multinational corporations. So far this attempt has been only partly successful after the U.S. Supreme Court ruled in *Kiobel v. Royal Dutch Petroleum* in favor of Royal Dutch Petroleum and against the human rights victims.<sup>5</sup> On the other side of the Atlantic, scholars discuss how to replicate the *Kiobel* recipe in the United Kingdom. They assume that customary international law is the tool to address the issue of corporations violating human rights. According to such approach, the main issue to be analyzed now is whether United Kingdom courts are ready to establish a cause of action based on customary international law against multinational corporations for the human rights violations committed by their subsidiaries.<sup>6</sup> However, this article argues that this is the wrong issue to be raised in English courts. Since the U.S. Second Circuit and Supreme Court rulings in *Kiobel*, domestic courts have been reluctant to rule that customary international law allows victims of human rights abuses to sue multinational corporations.<sup>7</sup> After the *Kiobel* ruling in the United States, the business and human rights movement cannot afford a second *debacle* in front of United Kingdom courts. This is why the issue that should be raised before United Kingdom courts is whether there is a cause of action to hold multinational companies liable based on domestic private law, rather than customary international law. In this sense, this article analyzes a line of United Kingdom cases that established a cause of action to sue a holding company in torts for the abuses committed by its foreign subsidiary. This line of cases was first introduced by the House of Lords in *Lubbe v. Cape*<sup>8</sup> and has now developed further in the more mature Court of Appeal decision in *Chandler v. Cape*.<sup>9</sup> This article analyzes *Chandler* as a real alternative to either piercing the corporate veil or a customary international law based argument. *Chandler* establishes a cause of action against multinational companies incorporated in the United Kingdom for the abuses committed by their foreign subsidiaries in developing countries. This article will first consider the concepts of separate legal personality and piercing the corporate veil after the recent United Kingdom Supreme Court decision in *Prest v. Petrodel*,<sup>10</sup> second analyze *Chandler*; and third provide an example of how *Chandler* is applicable to a multinational corporate context by discussing the Dutch Hague District Court case *Akpan v.*

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<sup>4</sup> 28 U.S.C. § 1350, (1948).

<sup>5</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 1; 133 S. Ct. 1659 (2013).

<sup>6</sup> Simon Baughen, *Holding Corporations to Account: Crafting ATS Suits in the UK?* 2 BR. J. AM. LEG. STUDIES 533 (2013).

<sup>7</sup> See, e.g., *Giraldo v. Drummond Co.*, 2013 WL 3873960 (N.D. Ala.); *Balintulo v. Daimler*, 727 F.3d 174 (2d Cir. 2013).

<sup>8</sup> *Lubbe v. Cape plc.*, [2000] UKHL 41.

<sup>9</sup> *Chandler v. Cape plc.*, [2012] EWCA Civ 525 (appeal taken from Eng.).

<sup>10</sup> *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34.

*Royal Dutch Shell*.<sup>11</sup>

## II. A FIRST UNSUCCESSFUL ATTEMPT: THE INDIRECT LIABILITY OR PIERCING THE CORPORATE VEIL

*Salomon* established that each company is a separate legal entity from its shareholders. A full analysis of *Salomon* is beyond the scope of this article; however a few remarks are key to understanding whether human rights activists are currently able to sue multinational corporations.

In 1862 Mr. Salomon, a sole trader owning a leather shop, transferred its business to a limited liability company. Salomon himself became a preferred creditor of his own company. When the company failed, Salomon was repaid as a preferred creditor with the result that other creditors were not able to obtain repayment in full. These creditors then sued Mr. Salomon claiming that the company was a fraud and wanting to hold Mr. Salomon personally liable. Mr. Salomon rebutted that third party creditors could hold only the company liable as the company is a separate legal person from its shareholder(s). As the business was incorporated as a limited liability company, third party creditors could seek liability only to the extent that the company had sufficient resources to repay them. The House of Lords agreed with Mr. Salomon and ruled that a company is a separate legal entity from its shareholder(s). In addition, in case of a limited liability company, third parties may hold the company liable, but will get compensated only to the extent of its resources.<sup>12</sup>

Since 1862 it is not only United Kingdom courts that have confirmed *Salomon* to be good law; all foreign legal systems have adopted the *Salomon*'s recipe into their corporate law. The concept of separate legal personality is currently accepted as the basis of any corporate legal system worldwide.<sup>13</sup>

*Salomon* is not a human rights case, but it is extremely relevant to current human rights litigation. In a modern case scenario the third party creditors could likely be the victims of human rights violations, and the shareholder, Mr. Salomon, would be a holding corporation. If we adapt the *Salomon* case scenario to the current globalized business world, we would have the classical human rights case against a multinational corporation: the holding company/shareholder would be incorporated in a financial center, such

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<sup>11</sup> Akpan v. Royal Dutch Shell PLC, Arrondissementsrechtbank Den Haag [District Court of The Hague], Jan. 30, 2013, Case No. C/09/337050/HA ZA 09-1580 (ECLI:NL:RBDHA:2013:BY9854), (Neth.) available in English at <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo>.

<sup>12</sup> *Salomon v. Salomon & Co. Ltd.*, [1897] A.C. 22 (H.L.) 29-58.

<sup>13</sup> "Most advanced legal systems recognize corporate legal personality while acknowledging some limits to its logical implications" *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34 ¶17. Separate legal personality is the basic principle of corporate law, allowing one or more persons to run a business in the capacity of a corporation instead of sole trader. See DAVID KERSHAW, *COMPANY LAW IN CONTEXT* 3-46 (2012).

as London, and its subsidiary would be incorporated in a developing country. Typically, the *Salomon* holding corporation would have enormous resources, while the *Salomon* subsidiary would have limited resources. Should the human rights victim seek to hold the subsidiary liable, its resources would be insufficient to compensate the creditors. Should the victim attempt to hold the parent company liable in the United Kingdom, h/she would bump up against a separate legal person and would not be able to recover damages against the holding company,<sup>14</sup> unless they can persuade the court that there is a case for piercing the corporate veil.

Piercing the corporate veil is an exception to the rule of separate legal personality. In exceptional cases, courts may consider the shareholder and the company as a single person and hold the shareholder liable for the damages caused by its company.<sup>15</sup> In human rights litigation terms, by piercing the corporate veil, the victim of human rights abuses may sue the subsidiary and at the same time also impose liability on the holding company. Therefore, if the subsidiary is found liable, the victim of human rights abuses will recover also against the holding company. Human rights scholars have defined the liability of the holding company as *indirect* because the holding company is liable in its capacity of a shareholder for the damages caused by its subsidiary. In contrast, the subsidiary is *directly* liable to the human rights victim as it is the perpetrator of the alleged human rights abuses.<sup>16</sup>

For over a century following *Salomon*, litigators and academics have developed a number of arguments to challenge the separate legal personality principle in courts; however as of today the principle is still good law all over the world. It is beyond the scope of this article to discuss the different grounds upon which litigants sought to pierce the corporate veil.<sup>17</sup> Rather, we will focus on the recent U.K. Supreme Court decision in *Prest*, as it summarizes the current state of the law on piercing the corporate veil.

Mr. Prest was a wealthy married man. Most of his wealth was invested in multiple companies. Following their divorce, his wife sought to obtain ancillary relief orders against off-shore companies solely owned by Mr Prest. Prest argued that, as he was a separate legal person from his companies, his wife could seek orders against his personal wealth only. The wife argued that

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<sup>14</sup> *Id.* at 3-46. See, e.g., Gwynne Skinner et al., *The Third Pillar: Access to Judicial Remedies Human Rights Violations in Transnational Business Reports*, available at <http://accountabilityroundtable.org/analysis/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/>.

<sup>15</sup> There are a number of arguments in favor of piercing the corporate veil. The two main piercing the corporate veil exceptions may be labeled as “evading existing legal obligation” and “single economic unit” and will be further discussed *infra*. See generally KERSHAW, *supra* note 13, at 46-77.

<sup>16</sup> For the concept of direct and indirect liability see Liesbeth F. H. Ennekin, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT’L L. REV. 903 (2009); LIESBETH F. H. ENNEKIN, FOREIGN DIRECT LIABILITY AND BEYOND: EXPLORING THE ROLE OF TORT LAW IN PROMOTING INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY AND ACCOUNTABILITY (2012).

<sup>17</sup> See KERSHAW, *supra* note 13, at 46-77.

this case qualified as an exception for piercing the corporate veil. The Supreme Court of the United Kingdom unanimously held that when a corporation is established to evade an existing legal obligation, a court is entitled to pierce the corporate veil and hold the shareholder liable for its corporate torts.<sup>18</sup> Some members of the courts, such as Lords Sumption, JSC and Neuberger, PSC, went even further by arguing that evading existing legal obligation is the only basis for piercing the corporate veil.<sup>19</sup>

For human rights activists the question is whether the evading existing legal obligation theory may be applicable to human rights cases against multinational companies.<sup>20</sup> According to the evading existing legal obligation exception, the court is entitled to pierce the veil when the shareholder is establishing a corporation as a mean for evading its existing legal obligation. In this piercing theory, timing is key: the shareholder, i.e. the holding company, must first have a legal obligation toward a third party and, second, evade it through a subsidiary. If instead the holding corporation establishes its subsidiary, first, and subsequently its subsidiary acquires future legal obligations toward third parties, the holding corporation is not evading any existing legal obligation. In this latter case, the holding corporation never had any existing legal obligation toward third parties; it just established a subsidiary, which then acquired personal and future legal obligations. While in cases of existing legal obligations the court is entitled to pierce the corporate veil because the holding company had certain legal obligations, in the case of future legal obligations, the holding company has never had any legal obligation toward third parties. Instead, its subsidiary acquires legal obligations towards third parties as the only responsible entity.<sup>21</sup> The evading existing legal obligation exception would hardly ever be applicable to multinational corporations because typically subsidiaries are the only entities that

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<sup>18</sup> *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34.

<sup>19</sup> *Id.* at ¶18 Lords Sumption, JSC and Neuberger, PSC ruled that no argument other than evading existing legal obligation could be accepted as a basis for piercing the corporate veil. According to their views, piercing the corporate veil is a doctrine violating the basic principle of separate legal personality as established in *Salomon v. Salomon*. Therefore, English law does not admit any piercing the corporate veil argument except in case of fraud. The only admissible piercing the corporate veil exception is “*evading existing legal obligation*” because it reinstates the fundamental common law principle that no individual may conduct business by fraud. “[.T]he law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous dictum in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712: ‘No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...’” *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34 ¶18.

<sup>20</sup> This article refers to the concept of evading existing legal obligation as described by KERSHAW, *supra* note 13, at 54-57.

<sup>21</sup> *See* KERSHAW, *supra* note 13, at 46-77.

assume legal obligations toward third parties. It will rarely be the case, that a holding company would, first, assume an obligation toward a third party and, second, evade such legal obligation through its subsidiary. Typically, a holding company would first establish its chain of subsidiaries incorporated in different countries and then run the production/activity damaging third parties. In order to evade an existing legal obligation, the holding company should assume a legal obligation toward the victim. However, in the multinational corporate context, the holding company would typically have no relationship or obligations toward the human rights victim.<sup>22</sup> The evading existing legal obligation exception does not apply to the multinational corporate context because the holding company is not assuming, and evading, any obligation toward the victim.

While some members of the *Prest* court, such as Lords Sumption, JSC and Neuberger, PSC, seem to completely shut the door to any other plausible piercing the corporate veil theory,<sup>23</sup> others, such as Lord Mance, JSC and Baroness Hale, JSC, seem to be more open in their dicta to alternative piercing the corporate veil arguments.<sup>24</sup> But even if we assume that *Prest* leaves the door open to other theories, the issue is whether they would be applicable to hold a multinational company incorporated in the United Kingdom liable for the extraterritorial human rights abuses committed by its subsidiary. One argument, that we might call the single economic unit theory, precisely addresses this issue.<sup>25</sup> On this view, a court is entitled to pierce the corporate veil when, in a corporate group, the holding company fully manages its subsidiaries as if they were branches of one corporation. This argument is not based on any existing liability, but on the simple fact that under the guidance of the holding corporation, corporate groups are often acting as one entity. Therefore, the holding corporation, which is exercising complete control over the group, should be responsible for the wrongful acts committed by its subsidiaries.<sup>26</sup>

Given that *Prest* is silent on this matter, the leading case on single economic unit is the Court of Appeal decision in *Adams v. Cape*<sup>27</sup>. According to *Adams* a court may pierce the corporate veil based on the single economic unit argument only when the subsidiary is a totally inactive company. In *Adams* the totally inactive subsidiary was a company incorporated in Lichtenstein and could be defined as a complete empty shell not conducting any

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<sup>22</sup>See Skinner et al., *supra* note 14; see Celia Wells & Juanitas Elias, *Catching the Conscience of the Kings: Corporate Players on the International Stage*, in NON STATE ACTORS AND HUMAN RIGHTS 141 (Philip Alston ed. 2005); Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: the New Lex Mercatoria*, in NON STATE ACTORS AND HUMAN RIGHTS, *id.* at 177; David Weissbrodt & Maria Kruger, *Human Rights Responsibilities of Businesses as Non-State Actors*, *id.* at 315.

<sup>23</sup> *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34 ¶¶1-83.

<sup>24</sup> *Id.* at ¶¶ 84-102.

<sup>25</sup> This article refers to the concept of single economic unit as described by KERSHAW, *supra* note 13, at 60-75.

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

<sup>27</sup> *Adams v. Cape Industries plc*, [1990] Ch. 433.

activity. As the complete empty shell subsidiary is the only case when the single economic unit argument is applicable,<sup>28</sup> the argument is unlikely to be applicable to human rights litigation against multinational corporations. Typically in human rights cases, the subsidiary is not a totally inactive company, but is instead a company conducting a wrongful activity, which is adversely affecting stakeholders. The subsidiary is also likely to be a company with little resources which is the reason why the human rights victim aims to pierce the veil and target the holding company. However, under *Adams*, this would not be possible unless the company is totally inactive.

Therefore, in summary, the effect of these cases is that *Salomon* remains intact and the separate legal personality principle is still fundamental to any corporate legal system subject only to two exceptions. The first and only recognized piercing the corporate veil case, the *evading existing legal obligations* exception, is often not applicable to the multinational corporate context where typically subsidiaries are the only entities that assume legal obligations toward third parties. The second, the *single economic unit* exception, is not universally recognized and even if it were, it would be applicable only to totally inactive subsidiaries. As typically, subsidiaries violating fundamental human rights in developing countries are not complete empty shells, but instead they conduct wrongful activities the second exception is unlikely to be of much utility in human rights litigation.

### III. A SECOND UNSUCCESSFUL ATTEMPT: APPLYING CUSTOMARY INTERNATIONAL LAW

In the United States, litigators have attempted to find an alternative to piercing the corporate veil in the Alien Tort Statute (ATS), an unusual piece of legislation that links public international law to tort law. The ATS states:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.<sup>29</sup>

United States litigators have argued that the ATS is applicable to multinational corporations and refers, through the term *law of nations*, to customary international law, so that multinational corporations should be held accountable for the violation of customary international law committed by

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<sup>28</sup> *Id.* at 543.

<sup>29</sup> 28 U.S.C. § 1350, (1948). Historically, the purpose of the Alien Tort Statute was to ensure the protection of aliens against the violations of the Law of Nations. Courts have mostly ignored the Alien Tort Statute until recently, when they started to interpret it as a basis to assert jurisdiction over the violations of customary international law. See D.M. Golove & D.J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 NEW YORK UNIVERSITY LAW REVIEW, 932 (2010); J. Stewart, *The Status of the Law of Nations in Early American Law*, 42 VANDERBILT L. REV. 819 (1989).

their subsidiaries in developing countries.<sup>30</sup> In *Sosa v. Alvarez*,<sup>31</sup> the Supreme Court ruled that the ATS is a jurisdictional act, which does not create a cause of action based on customary international law, but entitles plaintiffs to bring actions in court for the violation of customary international law on the basis of a common law cause of action. Therefore, the arguments put forward against multinational corporations were based in part on common law torts but also on the violation of customary international law.<sup>32</sup> Although this approach was successful in some cases concerning private individuals,<sup>33</sup> when the issue of whether customary international law and the ATS are applicable to foreign corporations reached the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court in *Kiobel*, both courts ruled in favor of the multinational corporation. First, the Second Circuit dismissed the plaintiff's claim because it interpreted customary international law as a body of law not applicable against corporations.<sup>34</sup> Second, the Supreme Court ruled in favor of the multinational corporation on the basis of the presumption against extraterritoriality.<sup>35</sup> Despite the fact that suing corporations on the basis of the Alien Tort Statute/customary international law was unsuccessful,<sup>36</sup> scholars in the United Kingdom have already started debating whether U.K. courts would be willing to establish a cause of action based on customary international law against U.K. corporations.<sup>37</sup> However, this article suggests that human rights activists should change their litigation strategy and not replicate the same mistakes committed in *Kiobel* in front of U.K. courts. Suing multinational corporations on the basis of a combination of tort and customary international law may likely be unsuccessful not only in the United States but also in the United Kingdom, for the following reasons. First, customary international law is an undefined body of law. According to the Statute of the International Court of Justice, customary international law includes “[..i]nternational custom, as evidence of a general practice accepted as law[.]”<sup>38</sup> The list of “general practice[s] accepted as law”<sup>39</sup> that form customary international law varies from country to country and from court to court.<sup>40</sup> Therefore, domestic courts are generally reluctant

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<sup>30</sup> See Baughen, *supra* note 6. See also William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT’L L. 1045 (2012); Tyler Giannini & Susan Farbstein, *Will Kiobel Be Just an Aberration?*, 160 U. PENN. L. REV. 100 (2011).

<sup>31</sup> *Sosa v. Alvarez*, 542 U.S. 692, 724 (2004).

<sup>32</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, (No. 02 Civ. 7618) (S.D.N.Y. Mar. 31, 2004).

<sup>33</sup> See, e.g., *Sarei v. Rio Tinto*, 671 F.3d 736 (9th Cir. 2011).

<sup>34</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

<sup>35</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_\_, 133 S.Ct. 1659 (2013).

<sup>36</sup> See *Kiobel*, 621 F.3d 111; *Kiobel*, 569 U.S. \_\_\_, 133 S. Ct. 1659; See also, Dodge, *supra* note 30; Giannini, *supra* note 30.

<sup>37</sup> See the approach taken by Simon Baughen, who argues for United Kingdom courts to consider a cause of action based on customary international law; *supra* note 6.

<sup>38</sup> Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., J. L. Goldsmith & C. A. Bradley, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); see also

to establish a cause of action based on customary international law because this may be perceived as a decision based on a political, rather than legal, agenda.<sup>41</sup>

Second, even if domestic courts were to agree to include a defined number of rights in the customary international law list, this would not necessarily mean that they would be willing to apply customary international law against multinational corporations. Despite the growing consensus that customary international law should bind corporations as well as private individuals, there is no rule of law establishing a cause of action against multinational corporations based on customary international law.<sup>42</sup> After the U.S. Court of Appeals for the Second Circuit ruled against holding multinational corporations accountable for the violation of customary international law,<sup>43</sup> U.K. courts are even more unlikely to establish a cause of action against multinational corporations based on customary international law.

For these reasons, human rights litigators should base their claim in front of U.K. courts, on domestic tort law rather than public international law. Tort law has a number of advantages over customary international law. First, while customary international law refers to an undefined and limited list of egregious human rights violations, tort law has the potential to reach any wrongful act, from the violation of consumer rights to human rights violations that could potentially cause damage.<sup>44</sup> Second, by building an argument on tort law basis, human rights litigators avoid the issue of defining what customary international law is. All they have to prove is that the multinational company committed a wrongful act, which damaged the human rights victim.<sup>45</sup> Third, by applying tort law, domestic courts would not have the responsibility of extending the use of customary international law to multinational corporations. They will feel comfortable to rule in favor of the

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A. SCALIA, A MATTER OF INTERPRETATION (Amy Gutmann ed. 1998); *but see* L. HENKIN & S. CLEVELAND & L. R. HELFER & G. L. NEUMAN, & D. F. ORENTLICHER, HUMAN RIGHTS (2d ed. 2009); L. F. DAMROSCH, L. HENKIN, S. D. MURPHY, H. SMIT, INTERNATIONAL LAW CASES AND MATERIALS (5th ed. 2009); A. M. Slaughter A., *Judicial Globalization*, 40 VA J. INT'L L., 1103 (2000).

<sup>41</sup> *See, e.g.* how the United States Supreme Court ruled that kidnapping is not a violation of customary international law and the Alien Tort Statute does not create causes of actions in *Sosa v. Alvarez*, 542 U.S. 692 (2004). *See also e.g.* how the U.S. Court of Appeals for the Second Circuit ruled that customary international law is not applicable against corporations in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

<sup>42</sup> *See* AURORA VOICULESCU & HELEN YANACOPULOS, THE BUSINESS OF HUMAN RIGHTS: AN EVOLVING AGENDA FOR CORPORATE RESPONSIBILITY (2011); Deva, *supra* note 3; Wells & Elias, *supra* note 22; *see* Skinner et al., *supra* note 14; *see also* the Court of Appeal for the Second Circuit ruling in *Kiobel v. Royal Dutch Petroleum Co.* that customary international law does not include corporate liability: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). *See* Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in NON STATES ACTORS AND HUMAN RIGHTS 227 (Philip Alston ed. 2005).

<sup>43</sup> *See Kiobel*, 621 F.3d 111.

<sup>44</sup> *See* SIMON DEAKIN ET AL., MARKESINIS AND DEAKIN'S TORT LAW, (2013).

<sup>45</sup> *See* Ennekin, *supra* note 16; Henkin, *supra* note 40; Damrosch, *supra* note 40.

human rights victim without necessarily establishing a new customary rule of international law.<sup>46</sup> For these reasons this article now argues that human rights litigators should use tort law as a tool to hold multinational corporations responsible for the human rights abuses committed by their subsidiaries.

#### IV. CHANDLER

If we look at U.K. tort law, there is a line of cases that was first established with *Lubbe* and has now developed in the more mature *Chandler*, which could hold the key for human rights litigators seeking to hold a multinational company liable for the human rights violations committed by its foreign subsidiary. Although *Chandler* is not framed in human rights terms, it is potentially a revolutionary case because it places tort law at the service of the human rights cause. *Chandler* establishes a cause of action in tort that represents a meaningful alternative to either piercing the corporate veil or a cause of action based on customary international law. *Chandler* develops an alternative direct liability framework to piercing the corporate veil. Specifically in *Chandler*, English courts define the direct duty of care that holding companies own toward their subsidiaries' employees. The holding company's duty of care is labeled as *direct* because the holding company has a direct duty towards its subsidiary's employees and is answering directly towards them.<sup>47</sup> In such a direct liability framework, the issue of whether or not the subsidiary is itself liable towards its own employees is not at stake. In order to determine whether the holding company is in breach of its duty of care, the court has to consider only the parent company's actions or failures to act.<sup>48</sup>

While the House of Lords decision in *Lubbe*<sup>49</sup> and the High Court decision in *Newton-Sealey v. ArmorGroup Services Ltd.*<sup>50</sup> had already considered the possibility of holding a parent company liable for a breach of its duty of care, *Chandler* established a test to determine whether the parent company owns a duty of care. Chandler was an employee of Cape Building Products, a subsidiary of Cape Asbestos plc. Both companies were incorporated in the United Kingdom. There was no doubt that Chandler worked under unsafe conditions as he was producing bricks at the same site of a factory producing asbestos. After working for Cape for almost 50 years, Chandler was diagnosed with asbestosis, caused by asbestos inhalation. As Cape Building Products no longer existed and in any case had no insurance

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<sup>46</sup> See e.g. how the U.S. Court of Appeals for the Second Circuit ruled that customary international law is not applicable against corporations in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

<sup>47</sup> The definition of "direct" and "indirect" duty of care is based on Ennekin's approach to human rights claims; see Ennekin, *supra* note 16; for the concept of direct duty of care see generally KERSHAW, *supra* note 13, at 147-50.

<sup>48</sup> *Id.*

<sup>49</sup> *Lubbe v. Cape plc.*, [2000] UKHL 41.

<sup>50</sup> *Newton-Sealey v. ArmorGroup Services Ltd.* [2008] EWHC 233 (QB).

against asbestos related diseases Chandler sued the holding corporation, Cape Asbestos plc.<sup>51</sup> Although the claimant's case was not framed in human rights terms, it is clear that the right at stake in this case was the employee's right to health/work in a safe environment.

The issue was whether the holding company was directly liable for the violation of a direct duty of care toward its subsidiary's employee, Chandler. The Court of Appeal applied the previous tort decision in *Caparo Industries plc v. Dickman*.<sup>52</sup> According to *Caparo*, there is a duty of care between two parties when they are in a relationship of *proximity* and, based on such relationship, party A could reasonably foresee the damage suffered by party B. Traditionally, a relationship of *proximity* means that the parties are in a pre-tort relationship established before the damage occurred. The parties are intended here as perpetrator and victim of a tort or, if we consider this case in human rights terms, of a human rights abuse.<sup>53</sup> However, *Caparo* opens the door to a number of policy considerations that could establish proximity beyond the pre-tort relationship.<sup>54</sup> Previously, the High Court had already applied *Caparo* to a holding company in *Newton-Sealey*. In *Newton-Sealey* there is a traditional pre-tort employer/employee relationship. The holding company has a direct duty of care toward its subsidiary's employee if it can reasonably foresee the employee's injury, is [..i]n a relationship of proximity and [owes a...f]air, just and reasonable [..d]uty of care to the [..employee]."<sup>55</sup> In this case, the Armor Group, with two holding companies incorporated in the United Kingdom, had a subsidiary in Jersey, incorporated under Jersey law. Although the holding company was directly involved in Newton Sealey's hiring process, he was formally employed by its subsidiary as a security agent to work in Iraq. Newton-Sealey was injured in Iraq and decided to sue the two Armor holding companies under English law. He argued that Armor holding companies had a direct duty of care toward him, as an employee of the group and thereafter Jersey law would not be applicable to the English holding companies. The High Court held that the injury was reasonably foreseeable because the holding company was directly involved in both the recruitment of the employee and job operations in Iraq. Therefore, the employee had reasonable grounds to believe that he was working for the whole corporate group.<sup>56</sup>

The open question after *Newton Sealey* was: what are exactly the elements of proximity that would make a holding company accountable toward its subsidiary's employees? The relationship between the Armor holding company and Newton Sealey was sufficiently proximate because the holding company was involved in his recruitment, was directing the job assignments in Iraq and, therefore, the employee had the overall impression that he worked for the English Armor group. However, the court did not clarify

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<sup>51</sup> Chandler v. Cape [2012] EWCA Civ 525, X (appeal taken from Eng.).

<sup>52</sup> Caparo Industries plc v. Dickman, [1990] 2 AC 605.

<sup>53</sup> See DEAKIN, *supra* note 44, at 99-217.

<sup>54</sup> Caparo, [1990]; see DEAKIN, *supra* note 44.

<sup>55</sup> Newton-Sealey v. Armor Group Services Ltd. [2008] EWHC 233 ¶ 26.

<sup>56</sup> *Id.*; See KERSHAW, *supra* note 13, at 147-150.

what was the duty of care test applicable to future cases. It is only with *Chandler* that the Court of Appeal defined the duty of care that a holding company owns toward its subsidiary's employees. The Court of Appeal in *Chandler* explained the meaning of *foreseeability* and *proximity* in the context of the parent/subsidiary/employee relationship and established the following test. The parent corporation has a direct duty of care toward its subsidiary's employees when:

- [..(1)] the business of the parent and the subsidiary are in a relevant respect the same;
- (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- (3) the subsidiary's system of work is unsafe and the parent company knew, or ought to have known; and
- (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purpose of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.<sup>57</sup>

The *Chandler* duty of care test is innovative for the following reasons.

First, the Court of Appeal revisited the concept of assumption of responsibility. Traditionally *assumption of responsibility* means that a person assumes responsibility over a matter and thereafter is responsible for it. Traditionally, English courts interpreted the *assumption of responsibility* as voluntary and originating from a case scenario that would reasonably make others assume the defendant's accountability.<sup>58</sup> However, in *Caparo*, the House of Lords considers *assumption of responsibility* as just one of the possible grounds to establish that a defendant is in a relationship of *proximity* with its tort victim and leaves the door open to other theories that could establish a *proximity* beyond a pre-tort relationship.<sup>59</sup> Therefore, in *Chandler*, the Court of Appeal felt entitled to reinterpret the concept of *assumption of responsibility*. The Court reads it no longer as a voluntary act of the parent company to assume responsibility over its subsidiary's employees, but rather as a legal imposition of responsibility that arises when the parent com-

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<sup>57</sup> *Chandler*, [2012] EWCA Civ 525, 1313.

<sup>58</sup> See T. Bullimore, *Sins of the Father, Sins of the Son*, PROF. NEGL. 212, (2012).

<sup>59</sup> *Caparo*, [1990] 2 AC 605, 628-29; see DEAKIN, *supra* note 44, at 99-217.

pany knows or ought to know that the subsidiary is damaging its employees.<sup>60</sup> However, if it is not the voluntary assumption, what is it that establishes responsibility? It seems to be the overall control that the parent company has over the subsidiary's activities that would result in the parent company knowing or being in a position where it ought to know that the subsidiary was conducting risky activities.<sup>61</sup> Although in the case at hand Cape holding company fully owned its subsidiary, the Court specifies that this is not necessary to determine whether the parent company assumed responsibility over its subsidiary. It is sufficient that the parent company "[..h]as a practice of intervening in the trading operations of the subsidiary."<sup>62</sup> Once we establish that the holding company has such overall control, the parent company has a direct duty of care toward its subsidiary's employees.

Second, *Chandler* no longer requires the existence of a direct relationship between the employees and the parent company. In *Newton-Sealey* the court based its reasoning on the facts that the parent company conducted the employee's hiring process, contacted the employee several times and thereafter the employee felt that he was working and was affiliated with the corporate group as a whole. However, none of this evidence is present in *Chandler*; there is no allegation that the employee had any direct relationship with the parent company. Nevertheless, the Court of Appeal held the parent company liable because it was controlling the activities of its subsidiary. *Chandler* reinterprets the meaning of proximity, which is no longer the pre-tort relationship among the parties intended as victim and perpetrator, but instead the relationship between the holding company and its subsidiary.<sup>63</sup> The parent company liability does not arise from its actions toward the subsidiary's employees, but from its "omission to take steps or [..g]ive advice"<sup>64</sup> to the subsidiary in violation of its duty of care. Therefore, a direct relationship between the holding company and the employee seems no longer to be essential in order to establish the duty of care

Although *Chandler* established the most detailed duty of care test currently applicable to an English company, it left two main unanswered questions, which are key for human rights litigators: Does the duty of care extend to a) third parties?; and b) a multinational context?<sup>65</sup> The following sections will address these pressing questions.

#### A. THE APPLICATION OF CHANDLER TO THIRD PARTY VICTIMS

Chandler's test is clearly addressed to the subsidiary's employees. However, most human rights abuses affect third party creditors, who are not em-

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<sup>60</sup> *Chandler*, [2012] EWCA Civ 525,1308-09.

<sup>61</sup> See Martin Petrin, *Assumption of Responsibility in Corporate Groups: Chandler v. Cape plc*, 76(3) MOD. L. REV. 603, (2013); Vijay Ganapathy, *Stretching the Boundaries of Duty of Care*, J. PERS. INJ. L., 28, (2013).

<sup>62</sup> *Chandler*, [2012] EWCA Civ 525, 1313.

<sup>63</sup> *Chandler*, [2012] EWCA Civ 525, 1311-13; see Petrin, *supra* note 61.

<sup>64</sup> *Chandler*, [2012] EWCA Civ 525, 1311.

<sup>65</sup> See Skinner et al., *supra* note 14.

ployed by the corporation. Under Chandler, it is not clear whether the holding company owes a duty of care also toward third parties, such as, for example, people living in the vicinity of an oil spill. One of the key issues for human rights activists is to understand whether Chandler is applicable to third party victims.

It may be argued that the Chandler test would be also applicable to third parties because Chandler detaches the duty of care from the employee/parent company relationship. Unlike in *Newton-Sealey*, in Chandler it is clear that the duty of care does not derive from the relationship between the employee and the holding company, as there were no relevant relationships between them. Instead, the duty of care derives from the relationship between the subsidiary and the holding company.<sup>66</sup> If the control relationship between the parent company and its subsidiary is such as to establish that the parent company owes a duty of care toward its subsidiary's employees, what would prevent a court from finding that the parent company also had a direct duty of care toward the third parties victims? Chandler established that the duty of care derives from the parent company/subsidiary relationship, instead of that of employer/employee.

One element corroborating this liberal reading of Chandler is the House of Lords precedent, *Lubbe*, the first and only House of Lords case where the majority asserts the possibility of holding a parent multinational company liable for the torts committed by its foreign subsidiary. In this case, *Lubbe* and other employees were working for the South African subsidiary of Cape, a United Kingdom holding corporation. The employees and some third parties were severely damaged by asbestos products. They sued the holding company in the United Kingdom for the violation of a direct duty of care toward its subsidiary's tort victims. In this case, some plaintiffs were not employees but third parties victims of asbestos. Specifically, Lord Bingham of Cornhill described the *Lubbe* claim as "not against the defendant as the employer of that plaintiff [..but..r]ather [..a]gainst the defendant as a parent company".<sup>67</sup> Although the House of Lords did not get to the substantive corporate law question and decided the case on conflict of law grounds, it has already acknowledged that under certain particular circumstances, a holding company may have a direct duty of care toward its subsidiary's tort victims including both employees and third parties without making any distinction among plaintiffs.<sup>68</sup>

Therefore, although Chandler does not establish a direct duty of care toward third parties, human rights litigators have grounds to argue that such direct duty of care should be applicable to any human rights victim.

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<sup>66</sup> *Chandler*, [2012] EWCA Civ 525, 1311-13 (appeal taken from Eng.).

<sup>67</sup> *Lubbe*, [2000] UKHL 41¶6.

<sup>68</sup> *Lubbe*, [2000] UKHL 41; see Andrew Sanger, *Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of Its Subsidiary*, 71(3) CAMBRIDGE L.J. 478 (2012); Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013).

## B. THE EXTRATERRITORIAL APPLICATION OF CHANDLER

Another key issue for human rights activists is to understand whether *Chandler* is applicable to a multinational context. Both Cape and its subsidiary were located in the United Kingdom. However if courts interpret *Chandler* as applicable to companies incorporated in the United Kingdom only, *Chandler* would not be useful to human rights litigation against multinational companies.

Although *Chandler* does not specifically mention that the duty of care is applicable to multinational companies, there are reasons to believe that it would. In *Lubbe*, a case concerning a multinational corporation with the parent company incorporated in the United Kingdom and a subsidiary in South Africa, the House of Lords has already established the basis of the parent company's direct duty of care toward its subsidiary's employees<sup>69</sup>. Furthermore in *Newton-Sealey*<sup>70</sup>, the corporate structure included a foreign element because the parent company was incorporated in the United Kingdom and the subsidiary in Jersey, and one of the main arguments of the applicant was that the court should not apply unjust Jersey law to the British parent company.<sup>71</sup>

Therefore, absent a statement by the Court of Appeal in *Chandler* distinguishing the case from *Newton-Sealey* and *Lubbe* on the basis that Cape parent and subsidiary companies were both incorporated in the United Kingdom, human rights litigators may seek to apply *Chandler* to any holding company incorporated in the United Kingdom with either national or foreign subsidiaries.

## V. CHANDLER AS AN INTERNATIONAL HUMAN RIGHTS CASE: THE DUTCH INTERPRETATION

In the Netherlands, the Hague District Court applied *Chandler* to the Dutch case *Akpan* which concerned Royal Dutch Shell's environmental violations toward a Nigerian farmer. *Akpan* is a case of fundamental importance to human rights litigators for the following reasons. First, *Akpan* interprets *Chandler* as a human rights case that allows human rights victims to sue multinational corporations violating human rights through their foreign subsidiaries. Second, *Akpan* proves that *Chandler* is a revolutionary case that could be exported to other jurisdictions. Third, *Akpan* applies *Chandler* to third party victims in a multinational context. However, this article will mostly reject the interpretation of *Chandler* by the Hague District Court.

Mr. Akpan is a Nigerian farmer and fisherman who lives and works in a village close to the oil facilities of Royal Dutch Shell in Nigeria. In 2006

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<sup>69</sup>*Lubbe*, [2000] UKHL 41.

<sup>70</sup>*Newton-Sealey*, [2008] EWHC 233.

<sup>71</sup> See KERSHAW, *supra* note 13, at 147-50; Ennekin, *supra* note 16; Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT'L L. 846 (2013); *Newton-Sealey v. ArmorGroup Services Ltd.* [2008] EWHC 233 (QB); *Lubbe* [2000] UKHL 41.

and 2007 two major oil spills occurred (for approximately 629 oil barrels) in the oil facilities of Royal Dutch Shell, allegedly contaminating Mr. Akpan's farm land and causing damage to his health. The Hague District Court held that it had jurisdiction over the case and according to the Dutch conflict of laws rule, the applicable law was Nigerian law. The Hague District Court considered different substantive law questions that we will not address here, including whether the Nigerian subsidiary was liable for the oil spill<sup>72</sup>. As to the interpretation of *Chandler*, *Akpan* is particularly interesting because it applied *Chandler* to third parties. However, in the case at hand, the Hague District Court held that the relationship between the holding and subsidiary companies did not meet the *Chandler* test.

[..T]he special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries. The District Court is of the opinion that the latter relationship is not nearly as close, so that the requirements of proximity will be fulfilled less readily. The duty of care of a parent company in respect of the employees of a subsidiary that operates in the same country further only comprises a relatively limited group of people, whereas a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries.<sup>73</sup>

Furthermore, the businesses of Royal Dutch Shell holding company and subsidiary were not the same and therefore *Akpan*'s fact pattern did not meet the *Chandler* test (according to which the holding and the subsidiary companies have to conduct the same business).<sup>74</sup>

The ruling is very unclear. The Hague District Court seems to consider that the distance between the parent company and its subsidiary, the fact that the plaintiff is a third party instead of an employee and that the subsidiary and parent companies do not conduct the same type of business are all elements for distinguishing *Chandler* from *Akpan*. However, these are three separate issues: whether *Chandler* is applicable to a multinational company, whether *Chandler* is applicable to a third party and what should be the relationship between parent company and subsidiary to establish a duty of care.<sup>75</sup>

First, as analyzed above, there are a number of reasons to believe that *Chandler* is applicable extraterritorially. All previous cases concerning the

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<sup>72</sup> *Akpan*, *supra* note 11.

<sup>73</sup> *Id.* at 4.29.

<sup>74</sup> *Id.* at 4.31.

<sup>75</sup> See Ennekin, *supra* note 16; Nicola Jagers, Katinka Jesse & Jonathan Verschuuren, *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, AJIL UNBOUND, e36 (web exclusive) (2014) <http://www.asil.org/sites/default/files/AGORA/201401/AJIL%20Agora-%20Reflections%20on%20Kiobel.pdf>.

duty of care owned by the holding company, including the leading House of Lords decision in *Lubbe*, concern multinational companies and there is no reason to believe that *Chandler* is not applicable to all multinational companies that meet the *Chandler* test. The proximity or vicinity between the holding and subsidiary companies have nothing to do with the geographical proximity, but instead with whether or not the business of the holding company is closely connected with the activities of the subsidiary and, therefore, the holding company knows or ought to know the activities conducted by the subsidiary and their possible implications.<sup>76</sup>

Second, the Hague District Court applies *Chandler* to third parties and concludes that third parties do not meet the *Chandler* test because they are not proximate to the parent company.<sup>77</sup> This argument seems to mix two separate elements: whether the parent company has a duty of care towards third parties and whether the subsidiary and holding company are close enough to establish a duty of care. As analyzed above, no English court has ever applied *Chandler* to a third party tort victim. The *Chandler* test specifically refers to employees only. However, there are a number of grounds for believing that *Chandler* is applicable to third parties, as the duty of care seems no longer to depend on the employer/employees relationship, but instead on the subsidiary/holding company relationship. The requirement of proximity in *Chandler* is to be interpreted as the proximity between the parent company and the subsidiary, not between the parent company and the victim. The duty of care originates from the relationship parent company/subsidiary, instead of victim/parent company.<sup>78</sup>

Third, the Hague District Court considered whether the parent and the subsidiary were proximate enough to establish a duty of care and held that they were not as they were conducting two different businesses. Such argument is convincing because it correctly interprets *Chandler* as establishing a duty of care when the holding company effectively controls the business and activities conducted by its subsidiary. This is clearly not at stake when the parent company and the subsidiary conduct two separate businesses.<sup>79</sup>

For these reasons, *Akpan* is an excellent case for comparison. First, *Akpan* interprets *Chandler* as a human rights case. Second, in *Akpan* a foreign court recognized *Chandler* as an authority applicable extraterritorially in a multinational context. Third, *Akpan* opens the floor for discussion on whether, and on what terms, *Chandler* should be applicable to third parties victims, such as for example the victims of environmental abuses. However, *Akpan* mixes up several elements, such as extraterritoriality, third parties and the parent company/subsidiary relationship to prove that the case at hand does not pass the *Chandler* test. While the reasoning concerning the relationship between the holding company and its subsidiary is convincing,

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<sup>76</sup> *Id.*; see Sanger, *supra* note 68; Goldhaber, *supra* note 68; McCorquodale, *supra* note 71; *Chandler*, [2012] EWCA 525.

<sup>77</sup> *Akpan*, *supra* note 11; *Chandler*, [2012] EWCA 525.

<sup>78</sup> See Petrin, *supra* note 61; Sanger, *supra* note 68; Goldhaber, *supra* note 68; *Chandler*, [2012] EWCA 525.

<sup>79</sup> *Akpan*, *supra* note 13, at 4.31.

the reasoning concerning geographical proximity and third parties is not so. Based on *Akpan*, human rights litigators should argue, that *Chandler* is a human rights case which establishes a common law cause of action to sue a multinational holding company incorporated in the United Kingdom for the human rights violations committed through its foreign subsidiaries.

## VI. CONCLUSION

For over a century, litigators have been fighting against the separate legal personality principle and the *Salomon* precedent but their efforts to pierce the corporate veil have been unsuccessful. It is now clear from *Prest* and *Adams* that the piercing the corporate veil exceptions recognized in U.K. corporate law would be very rarely applicable to human rights violations committed by multinational corporations. The attempts by U.S. litigators to argue for an alternative cause of action against multinational corporations based on a combination of tort and customary international law have been similarly unsuccessful. This article has argued that *Chandler*, which establishes the parent company's direct duty of care toward its subsidiary's employees and is an authority both in the United Kingdom and abroad, is capable of providing a concrete solution and should now be recognized as a leading human rights case.



# AG-GAG: THE NEED FOR COMPROMISE IN THE FOOD INDUSTRY

Stephen R. Layne\*

## ABSTRACT

*Within the agricultural industry, a clash has developed between farmers and animal rights activists regarding undercover investigations of animal cruelty. Animal rights activists claim that instances of animal cruelty must be reported to the public at all costs, even if they have to deceive farmers in order to conduct their undercover investigations. Farmers have fought back by arguing that undercover investigations should be criminalized because they invade the farmers' privacy and cause economic harm to the agribusinesses. In response to this debate, many states have considered farm protection or ag-gag legislation, which generally criminalizes the undercover reporting of animal cruelty in agribusinesses. To effectively strike a proper balance between these contrasting positions, state legislatures need to provide specific examples of standard industrial practices so that those practices are not mistakenly reported as animal cruelty. Proposed provisions also include requiring a particular contact person in each agribusiness who is responsible for handling reports of animal cruelty, criminalizing employment fraud, and requiring rapid reporting of instances of animal cruelty by mandating a seventy-two hour reporting requirement. Enacting these provisions will protect the interests of both farmers and animal rights activists, while also avoid the constitutional difficulties posed by current proposed legislation.*

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## I. INTRODUCTION

The agricultural industry is an important part of the American economy, and meat and poultry production makes up a large portion of the industry.<sup>1</sup> Because of the industry’s size, issues tend to arise due to a lack of

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<sup>1</sup> See Sonci Kingery, Note, *The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 646 (2013) (arguing that ag-gag laws pose a threat to food safety and animal welfare as well as violate the First Amendment); NAT’L AGRIC. STATISTIC SERV., USDA, MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME 2012 SUMMARY 5 (2013), available at

supervision over the operations of each agricultural facility.<sup>2</sup> In 2009, a poultry farm in Maine called Quality Eggs of New England became the target of Mercy for Animals, an animal rights organization.<sup>3</sup> Quality Eggs was a large “factory poultry farm,” and Mercy for Animals sent undercover investigators to expose instances of animal abuse on the farm.<sup>4</sup> The undercover investigators found “birds trapped in the wire of their cages and workers throwing live birds into trash bins and breaking their necks.”<sup>5</sup> As a result of these revelations, a state governmental agency raided the farm, and a number of local grocery stores refused to continue doing business with Quality Eggs.<sup>6</sup> In addition to the adverse economic effects these terminated business relationships caused, Quality Eggs also had to pay damages and fines totaling over \$130,000.<sup>7</sup>

As the conduct at issue in the Quality Eggs example clearly constituted illegal animal abuse, Mercy for Animals charged on to uncover other businesses guilty of similar abuse.<sup>8</sup> In 2013, it conducted an undercover investigation at Pipestone System, a factory farm in Minnesota that supplies pork to Walmart.<sup>9</sup> The undercover investigator was an employee at the farm, and she documented instances of illegal practices<sup>10</sup> involving workers beating pigs and “slamming piglets into the ground.”<sup>11</sup> However, not all the practices she documented were illegal; in fact, the footage showed standard legal

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<http://usda01.library.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-25-2013.pdf> (revealing that the 2012 annual gross income in the United States from cattle and hogs increased to over \$90 billion).

<sup>2</sup> See Sara Lacy, Comment, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 130 (2013) (arguing that there is not enough supervision in the agricultural industry).

<sup>3</sup> Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1152 (2012) (providing an analysis of ag-gag laws under the First Amendment as well as providing specific instances of animal cruelty in the agricultural industry).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1153 (quoting *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Jan. 6, 2014)).

<sup>6</sup> Adam, *supra* note 3, at 1153.

<sup>7</sup> *Id.*

<sup>8</sup> See MERCY FOR ANIMALS, *supra* note 5.

<sup>9</sup> See Kare 11 Staff & Allen Costantini, *Allegations of Animal Cruelty Leveled Against MN Company*, KARE 11 (Oct. 29, 2013, 2:24 PM),

<http://www.kare11.com/story/news/crime/2013/12/03/3856345/> (providing a concrete example of an undercover investigation that exposed standard legal practices in addition to illegal animal cruelty and the farm’s reaction to this investigation).

<sup>10</sup> See *id.* Certain practices in the agricultural industry may at first glance appear to constitute animal cruelty, but in reality, the practices are followed throughout the industry and are not prohibited by animal cruelty statutes. Some common examples are castrating animals without anesthetics and forcing animals to live in cramped gestation crates. See *id.*

<sup>11</sup> See *id.*

practices in the industry, such as workers castrating piglets without anesthetics and the cramped gestation crates the pigs have to live in.<sup>12</sup> The farm owners quickly owned up to the fact that some of the workers' actions were impermissible; however, the owners also argued that the footage was an unfair portrayal of how they operated their farm on a daily basis, and portrayed legal industry practices in the same negative light as illegal animal abuse.<sup>13</sup> They also noted that the undercover investigator failed to report the abuse she uncovered while she was an employee, in violation of the farm's animal welfare policy.<sup>14</sup>

As these two examples demonstrate, the exposure of animal cruelty in the agricultural industry often involves competing interests. On the one hand, farmers and agribusiness owners, as an important part of the national economy, claim that they need protection from undercover investigators seeking to report instances of animal cruelty.<sup>15</sup> On the other hand, animal rights activists claim that instances of animal cruelty in the agricultural industry must be exposed.<sup>16</sup> Some state legislatures have recently addressed these conflicting concerns by advocating that undercover reporting of animal cruelty abuses should be prohibited through farm protection or "ag-gag" laws.<sup>17</sup> These laws vary in form, but in general, they operate to criminalize the undercover reporting of animal cruelty in agribusinesses.<sup>18</sup> While only seven states currently have farm protection laws on the books,<sup>19</sup> a significant number of states have considered farm protection bills within the last two years, and the issue will likely continue to be debated by state legislatures in the near future.<sup>20</sup> This Article considers these laws and proposals with a view

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<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.* The farm's animal welfare policy apparently required employees to take "specific actions" to prevent abuse, but the undercover investigator took no steps to report any of the abuse she witnessed to Pipestone Systems. See *id.*

<sup>15</sup> See Mike Glover, *Animal Abuse Video Bill: Ban on Undercover Filming of Livestock Operations Stalls After Tough Opposition*, HUFFINGTON POST (June 13, 2011, 9:29 PM), [http://www.huffingtonpost.com/2011/06/13/animal-abuse-videos-bill-livestock\\_n\\_875931.html](http://www.huffingtonpost.com/2011/06/13/animal-abuse-videos-bill-livestock_n_875931.html) (providing examples of arguments supporting ag-gag laws, including specific interviews with farmers).

<sup>16</sup> See Kingery, *supra* note 1, at 680.

<sup>17</sup> See Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/> (coining the term "ag-gag" in reference to these laws that criminalize undercover investigations for animal cruelty).

<sup>18</sup> See *id.*

<sup>19</sup> See KAN. STAT. ANN. § 47-1827 (2006); MONT. CODE ANN. § 81-30-103 (2011); N.D. CENT. CODE § 12.1-21.1-02 (2011); IOWA CODE § 717A.3A (2012); UTAH CODE ANN. § 76-6-112 (West 2012); MO. REV. STAT. § 578.013 (2012); IDAHO CODE ANN. § 18-7042 (West 2014).

<sup>20</sup> See Kingery, *supra* note 1, at 663; Jessalee Landfried, Note, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 379 (2013) (examining the common forms of ag-gag laws under the First Amendment to determine which provisions would be unconstitutional).

to considering how a proper balance between the concerns of both farmers and activists might be achieved.<sup>21</sup>

Part II gives an overview of the agricultural industry in the United States and current patterns of regulation. Part III addresses specific instances of animal cruelty that have been revealed through undercover investigations and the negative effects such investigations have had on the industry. Part IV surveys the farm protection laws that state legislatures have considered to address the reporting of animal cruelty in the agricultural industry. Part V examines legal issues that have been raised by these farm protection laws. Part VI proposes legislation attempting to address and reconcile these interests.

## II. FACTORY FARMING AND THE PROBLEM OF REGULATION

In the United States, meat production represents a considerable section of the overall economy.<sup>22</sup> In 2011, the United States was the top producer of beef and the third highest producer of pork in the world.<sup>23</sup> In 2012, the total annual production of cattle and hogs in the United States increased 1% from 2011, and the gross income from that meat production increased 6% over the same time period.<sup>24</sup> Because of the size of the agricultural industry, much of the meat production in the United States has shifted from small farms into concentrated animal feeding operations (CAFOs)—also known as factory farms.<sup>25</sup> One author notes that because these CAFOs are “[r]esponsible for over ninety-five percent of the country’s chicken, eggs, turkey, and pork and over seventy-five percent of beef cattle, factory farming has become the dominant means of producing food for the American consumer.”<sup>26</sup> Unfortunately, the large size of these CAFOs and the relative lack of central oversight

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<sup>21</sup> See discussion *infra* Part IV.

<sup>22</sup> See Kingery, *supra* note 1, at 646 (stating that “meat production is a multi-billion dollar per year industry”). Kingery’s note also provides statistics related to the amount of meat production and the economic value of such production in the United States. See *id.* at 646-47.

<sup>23</sup> *Id.* at 646 (citing OFFICE OF GLOBAL ANALYSIS, BEEF AT A GLANCE (EXCLUDING VARIETY MEATS) (2012), available at <https://www.fas.usda.gov/http/CP2012/Beef-2012-Final.pdf>; OFFICE OF GLOBAL ANALYSIS, PORK AT A GLANCE (EXCLUDING VARIETY MEATS) (2012), available at <http://www.fas.usda.gov/http/CP2012/Pork-2012-Final.pdf>).

<sup>24</sup> See NAT’L AGRIC. STATISTIC SERV., *supra* note 1, at 5 (noting that cash receipts from the marketing of cattle and hogs also increased in the year 2012).

<sup>25</sup> Adam, *supra* note 3, at 1144. CAFOs are massive factory farms that cram thousands of meat animals “in extreme confinement, as a means of producing large quantities of meat at a low price.” *Id.* Unlike traditional family farms, CAFOs produce a vastly greater amount of products at a fraction of the cost. See Melanie J. Wender, Comment, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment*, 22 VILL. ENVTL. L.J. 141 (2011) (discussing how federal governmental subsidies have led to the shift away from small family farms to large agribusinesses).

<sup>26</sup> Adam, *supra* note 3, at 1144 (citing JONATHAN SAFRAN FOER, *EATING ANIMALS* 271 (2009)).

have brought with them increasing issues regarding animal cruelty, pollution, and food safety.<sup>27</sup> Opponents of factory farming argue that these issues significantly outweigh the benefits of rapid meat production and correspondingly lower costs of meat for consumers.<sup>28</sup>

Because large factory farming and slaughterhouse operations have raised significant concerns about food safety and animal welfare, consumers have given more attention to the regulations in place that govern these operations.<sup>29</sup> At the federal level, the Humane Methods of Slaughter Act (HMSA) provides for the regulation of the often hidden activities of large factory farms and other agribusinesses.<sup>30</sup> The HMSA seeks to ensure exactly what its name provides—that the slaughter of animals be done in a humane way.<sup>31</sup> Its “primary requirement [is] that ‘animals [be] . . . rendered insensible to pain before slaughter.’”<sup>32</sup> Nevertheless, animal rights activists claim that the HMSA is not being adequately enforced and is ineffective.<sup>33</sup>

The primary regulatory agency over the agricultural industry is the United States Department of Agriculture (USDA), which regulates domestic meat and poultry production through the Food Safety and Inspection Service (FSIS).<sup>34</sup> FSIS inspectors visit slaughterhouses and factory farms to observe animals for diseases or other negative characteristics indicating that they might pose a danger to consumers.<sup>35</sup> Recently, however, the FSIS has moved away from in-person observations to a form of record keeping,<sup>36</sup> leading to accusations that this form of regulation is ineffective.<sup>37</sup> One author argues

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Kingery, *supra* note 1, at 677.

<sup>30</sup> Michael Hill, Comment, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 671-72 (2010) (giving an overview of the Animal Enterprise Terrorism Act and examining the USDA’s current record of enforcement in the agricultural industry); see also Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901-1907 (2006) (setting up the federal guidelines that regulate slaughterhouses and factory farms).

<sup>31</sup> See 7 U.S.C. § 1902.

<sup>32</sup> Hill, *supra* note 30, at 673 (quoting 7 U.S.C. § 1902).

<sup>33</sup> See *id.*

<sup>34</sup> See Lacy, *supra* note 2, at 129.

<sup>35</sup> *Id.* at 133 (noting that FSIS inspectors observe “livestock before and after slaughter to look for signs of animals being unfit for the human food supply”).

<sup>36</sup> See *id.* (noting that the USDA in 1997 “abandoned its original ‘sight, touch, and smell’ inspection method and adopted the Hazard Analysis Critical Control Point (HACCP) system,” which primarily “focuses on industry involvement” (quoting Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 434 (2011))). Under the HACCP system, “the FSIS relies on the honor system and puts the onus on the facility to develop a HACCP plan based on its unique process and facility.” Pape, *supra*, at 438.

<sup>37</sup> See Lacy, *supra* note 2, at 133-34. The FSIS moved to record keeping in an attempt to “address[] critical points in the production process that lead to the highest risks of contamination” from unhealthy or inhumanely slaughtered animals. *Id.* at 133. This form of record keeping seeks to keep the industry involved, but critics claim that in reality, the

that “FSIS inspectors serve as the only check on production, which does not permit the level of surveillance required to make a practical difference in oversight and accountability.”<sup>38</sup> Consequently, in response to these less transparent record-keeping procedures, animal rights activists and consumers have devoted more attention to the inner workings of slaughterhouses and factory farms because they believe the government is not doing an adequate job of regulation.<sup>39</sup>

### III. REVELATIONS OF ANIMAL CRUELTY IN AGRIBUSINESS

This increased attention to the inner workings of slaughterhouses and factory farms is not a new development; rather, it has its roots in the well-known investigations of Upton Sinclair in the early 1900s.<sup>40</sup> Sinclair took the opportunity to work in several Chicago slaughterhouses, where “he documented spoiled meat turned into sausage, dead rats mixed into the meat, and pigs cannibalizing one another.”<sup>41</sup> Sinclair recorded these observations in *The Jungle*,<sup>42</sup> and these revelations provided the impetus for the Congressional Federal Meat Inspection Act of 1906, which sought to prevent such abuses in slaughterhouses through mandatory USDA inspections.<sup>43</sup> Nearly a century later, animal rights organizations, such as the Humane Society of the United States, Mercy for Animals, and People for Ethical Treatment of Animals, are still dedicated to conducting undercover investigations in agricultural operations to uncover instances of animal cruelty.<sup>44</sup> As a result, over seventy-five agribusinesses have had their inner operations exposed within

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record keeping is “deceptive” and has resulted in the industry closing itself off even more from the public. *Id.*

<sup>38</sup> *Id.* at 130.

<sup>39</sup> See Kingery, *supra* note 1, at 677; Hill, *supra* note 30, at 677.

<sup>40</sup> See Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10962 (2012) (providing data on the number of undercover investigations conducted in the United States as well as a constitutional analysis of ag-gag laws); Wayne Pacelle, ‘Ag Gag’ Laws Would Punish Whistleblowers, Protect Animal Abusers, HUMANE SOC’Y U.S. (Apr. 14, 2011), <http://hsus.typepad.com/wayne/2011/04/nytimes-whistleblowers.html> (giving a historical background of Upton Sinclair and the effect of his work).

<sup>41</sup> Bollard, *supra* note 40, at 10962.

<sup>42</sup> See UPTON SINCLAIR, *THE JUNGLE* 160-62 (1920) (1906).

<sup>43</sup> Pacelle, *supra* note 40; see also Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1260 (providing broad oversight and investigatory powers to the USDA to determine the health and safety of meat products).

<sup>44</sup> See Bollard, *supra* note 40, at 10962; see also Dan Flynn, *2013 Legislative Session Ends with ‘Ag-Gag’ Bills Defeated in 11 States*, FOOD SAFETY NEWS (July 30, 2013), <http://www.foodsafetynews.com/2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/#.UkNQEVvXiFc> (reporting the states who failed to pass ag-gag legislation and giving an updated outlook at the ag-gag law landscape).

the past two decades.<sup>45</sup> These undercover investigations have shaken the agricultural industry and the negative effects have prompted a strong backlash from farmers.<sup>46</sup>

#### A. HALLMARK MEAT PACKING COMPANY INCIDENT

In 2008, the Humane Society of the United States conducted an undercover investigation at the Hallmark Meat Packing Company, a large California slaughterhouse,<sup>47</sup> revealing Hallmark workers abusing “‘downed’ cows” by running into them with forklifts and committing various other atrocities.<sup>48</sup> The Humane Society recorded these abuses and released a video, showing that the National School Lunch Program received a majority of its meat from Hallmark’s diseased cows.<sup>49</sup> The public outrage that followed led to Hallmark recalling “over 143 million pounds of beef,” the largest meat recall in the history of the country.<sup>50</sup> The economic consequences ultimately resulted in the closure of the company.<sup>51</sup>

#### B. SPARBOE FARMS INCIDENT

Animal rights organizations did not limit their investigations to beef production; in 2011, Mercy for Animals conducted an undercover investigation at Sparboe Farms, a large poultry farm<sup>52</sup> and one of the top five egg producers in the United States, with operations in Iowa, Minnesota, and Colorado.<sup>53</sup> Undercover investigators, posing as employees, recorded numerous instances of animal cruelty while working on the farm.<sup>54</sup> Mercy for Animals released the

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<sup>45</sup> Bollard, *supra* note 40, at 10962 (noting that “[s]ince 1998, animal activists have conducted at least 76 undercover investigations at egg, pork, chicken, beef, dairy, deer, duck, turkey, and fish farms across the nation”).

<sup>46</sup> See Andrew Duffelmeyer, *Agriculture Industry Pushes to Make Undercover Filming of Farm Animal Abuse Illegal*, HUFFINGTON POST (Mar. 14, 2011), [http://www.huffingtonpost.com/2011/03/14/big-ag-animal-abuse-filming-video-illegal\\_n\\_835504.html](http://www.huffingtonpost.com/2011/03/14/big-ag-animal-abuse-filming-video-illegal_n_835504.html) (giving an immediate reaction to the Iowa ag-gag bill and providing the views of both opponents and proponents of ag-gag laws).

<sup>47</sup> See Adam, *supra* note 3, at 1151; Dara Lovitz, *Clash at the Farmer’s Fence: ‘Farm Protection’ and the Right to Know*, 35 PA. LAW. 36, 39 (2013) (providing a summary of the arguments supporting ag-gag laws as well as specific instances of animal cruelty in the agricultural industry).

<sup>48</sup> See Adam, *supra* note 3, at 1152.

<sup>49</sup> See Lovitz, *supra* note 47, at 39.

<sup>50</sup> See Adam, *supra* note 3, at 1152; Lovitz, *supra* note 47, at 39; Hill, *supra* note 30, at 656.

<sup>51</sup> Ethan A. Huff, *Iowa Passes Outrageous Law Demanding Total Secrecy over Factory Meat Filth and Cruelty Practices*, INFO WARS (Mar. 4, 2012), <http://www.infowars.com/iowa-passes-outrageous-law-demanding-total-secrecy-over-factory-meat-filth-and-cruelty-practices/> (outlining the potentially negative effects of the Iowa ag-gag bill).

<sup>52</sup> Adam, *supra* note 3, at 1153.

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

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

undercover footage, and ABC's *Good Morning America* news program broadcast "footage of workers at Sparboe Farms throwing chickens by the neck into cages, burning the beaks off of chicks without painkillers, and leaving dead chickens to rot in cages alongside live birds."<sup>55</sup> In response, McDonalds, up to that point a major business partner, severed its business ties with Sparboe.<sup>56</sup> Shortly thereafter, Target, Sam's Club, and Supervalu also broke off their business partnerships with Sparboe Farms.<sup>57</sup>

### C. E6 CATTLE COMPANY INCIDENT

In 2011 Mercy for Animals conducted an undercover investigation at E6 Cattle Company in Texas, a major player in the dairy industry,<sup>58</sup> revealing widespread atrocities such as workers beating the calves and then throwing the "[b]eaten calves, still alive and conscious . . . onto piles to slowly suffer and die."<sup>59</sup> The video footage also showed workers "bashing cows' heads in with pickaxes and hammers."<sup>60</sup> Although the owner of E6 Cattle Company claimed his employees were euthanizing frostbitten cows,<sup>61</sup> the footage was widely viewed by the American public, and as a result, the price of stock in the dairy industry as a whole fell, the point being that although many dairy farmers condemned the abuse that had occurred<sup>62</sup> the fall out from this individual occurrence was experienced by the entire industry.<sup>63</sup>

### D. TYSON PORK GROUP INCIDENT

In 2013, a Mercy for Animals undercover investigator took video footage of animal cruelty at a Tyson pig factory farm in Oklahoma.<sup>64</sup> The footage revealed such abuse as "workers throwing a bowling ball at a pig's head" and led to an investigation,<sup>65</sup> as a result of which the farm lost its contract with Tyson, which did a great deal of its business with Walmart.<sup>66</sup>

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<sup>55</sup> Bollard, *supra* note 40, at 10960.

<sup>56</sup> *Id.* (noting that prior to the *Good Morning America* broadcast, Sparboe "produced all eggs used by McDonald's restaurants west of the Mississippi River").

<sup>57</sup> *Id.*

<sup>58</sup> Adam, *supra* note 3, at 1154 (stating that E6 Cattle Company "rais[ed] over 10,000 calves for use in the dairy industry").

<sup>59</sup> *Id.* at 1555 (quoting Kevin Lewis, *Mercy for Animals Representative Hopes Company Owner Is Charged*, MY PLAIN VIEW (May 26, 2011), [http://www.myplainview.com/news/article\\_204fad26-6c5f-11e0-a7d9-001cc4c002e0.html](http://www.myplainview.com/news/article_204fad26-6c5f-11e0-a7d9-001cc4c002e0.html)) (describing the atrocities at the E6 Cattle Company).

<sup>60</sup> *See* Bittman, *supra* note 17.

<sup>61</sup> *See id.*

<sup>62</sup> Adam, *supra* note 3, at 1155.

<sup>63</sup> *See id.*; Bittman, *supra* note 17.

<sup>64</sup> *See* MERCY FOR ANIMALS, *supra* note 5.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (noting that Tyson was "a major pork supplier to Walmart").

### E. WIESE BROTHERS FARMS INCIDENT

Also in 2013, a Mercy for Animals undercover investigator in Wisconsin took video footage at Wiese Brothers Farms, which supplied cheese to DiGiorno,<sup>67</sup> showing “[w]orkers viciously kicking, beating and whipping cows in the face and body,” as well as dragging cows behind tractors.<sup>68</sup> The undercover investigator released the footage, which rapidly caught the public eye and caused DiGiorno to break off its business relationship with the dairy farm.<sup>69</sup>

### F. NEGATIVE EFFECTS OF UNDERCOVER INVESTIGATIONS ON THE AGRICULTURAL INDUSTRY

While these undercover investigations by animal rights organizations have resulted in the exposure and punishment of persons engaged in animal cruelty, they have had strong negative economic effects on the agricultural industry.<sup>70</sup> In cases such as the undercover investigation of the Hallmark Meat Packing Company, not only have farms lost revenue; the recalls of sick and diseased meat that have followed have led to a widespread loss of public confidence in the industry as a whole.<sup>71</sup> Additionally, as the Sparboe Farms investigation illustrates, once consumers view these instances of animal cruelty, they have a tendency to boycott these farms as a form of protest against the abuse that the investigation has exposed.<sup>72</sup> Supporters of farmers and agribusiness owners claim that undercover investigators have an underlying strategy of causing damage to the agricultural industry by releasing these videos, which impose significant costs.<sup>73</sup> They argue that these campaigns are ideologically motivated by a strong vegan agenda and moreover have achieved considerable success; they have succeeded in taking “a bite out of Americans’ appetite for meat.”<sup>74</sup> Even animal rights activists acknowledge the negative economic effects these undercover investigations cause factory farms and, by extension, the agricultural industry.<sup>75</sup>

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<sup>67</sup> *Id.*

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

<sup>69</sup> *See id.*

<sup>70</sup> *See* Kingery, *supra* note 1, at 666.

<sup>71</sup> *See id.*

<sup>72</sup> *See id.* (stating that “many consumers stop purchasing products from the farms featured in such videos”).

<sup>73</sup> Amanda Radke, *Do You Support Ag Gag Laws?*, BEEF (Mar. 14, 2012), <http://beefmagazine.com/blog/do-you-support-ag-gag-laws> (supporting the passage of ag-gag laws from the side of the farmer and arguing that activists “strategically release these videos to wreak havoc on the agriculture industry, which usually results in litigation, loss of jobs and a direct shot at the markets”).

<sup>74</sup> Susie Cagle, *Two Views on Ag-gags: The Investigator and the Farm Advocate*, GRIST (Apr. 25, 2013), <http://grist.org/food/two-views-on-ag-gags/> (providing an excellent summary of the views of proponents of ag-gag laws).

<sup>75</sup> *See* Adam, *supra* note 3, at 1155.

#### IV. AGRICULTURE'S RESPONSE TO THE WHISTLEBLOWERS

Because of the adverse economic effects these undercover investigations pose to the agricultural industry, farmers and agribusiness owners have successfully lobbied their state legislatures to consider, and in some cases pass, laws that are designed to give them a measure of protection.<sup>76</sup> At present, seven states have passed laws of this kind.<sup>77</sup> Over a dozen other states have recently considered farm protection legislation, but so far opponents have been able to defeat the proposed bills.<sup>78</sup>

##### A. THE NEED FOR LAWS TO PROTECT THE AGRICULTURAL INDUSTRY

While the undercover investigations of agricultural facilities have a fairly recent history, Kansas, North Dakota, and Montana each passed farm protection laws, also known as ag-gag laws, in the early 1990s.<sup>79</sup> Kansas passed a farm protection law in 1990, which “prohibit[s] anyone from entering an ‘animal facility’ to make audio or video recordings ‘with the intent to damage the enterprise.’”<sup>80</sup> In contrast, North Dakota’s 1991 farm protection law “forbids the act of filming or photographing an animal facility without the consent of the owner or operator, regardless of intent and without reference to damage.”<sup>81</sup> The law enacted in Montana in 1991 prohibits the making of audio or video recordings without the owner’s consent and “requires that the offender enter the property ‘with the intent to commit criminal defamation.’”<sup>82</sup> Thus, three states deemed the issue of undercover investigations in agricultural facilities serious enough to pass laws to protect the industry before high-profile investigations even occurred.<sup>83</sup>

The federal government has not directly addressed the issue of undercover investigations in the agricultural industry, but it did enact the Animal Enterprise Terrorism Act (AETA) in 2006.<sup>84</sup> The AETA provides that anyone who acts with the “purpose of damaging or interfering with the operations of an animal enterprise” and consequently “intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise” will be subject to punishment, depending on the level of economic damage or serious bodily injury that results.<sup>85</sup> As a result, anyone who damages an animal enterprise in an amount greater than

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<sup>76</sup> See Duffelmeyer, *supra* note 46.

<sup>77</sup> See discussion *infra* Subsection IV.B.1.

<sup>78</sup> See discussion *infra* Subsection IV.B.2.

<sup>79</sup> See KAN. STAT. ANN. § 47-1827 (2006); MONT. CODE ANN. § 81-30-103 (2011); N.D. CENT. CODE § 12.1-21.1-02 (2011).

<sup>80</sup> Landfried, *supra* note 20, at 391 (quoting KAN. STAT. ANN. § 47-1827).

<sup>81</sup> *Id.* at 392; see also N.D. CENT. CODE § 12.1-21.1-02.

<sup>82</sup> See Landfried, *supra* note 20, at 392 (quoting MONT. CODE ANN. § 81-30-103).

<sup>83</sup> See *supra* note 79 and accompanying text.

<sup>84</sup> See 18 U.S.C. § 43 (2012).

<sup>85</sup> See *id.* § 43(a)(1), (a)(2)(A), (b).

\$10,000 is liable under the Act.<sup>86</sup> The Act also criminalizes any acts of conspiracy or attempts to cause such economic damage.<sup>87</sup> It is unclear whether undercover investigations of animal cruelty on farms can be prosecuted under the AETA because although the Act “includes loss of profits in its definition of economic damages,”<sup>88</sup> it includes “an exception for any ‘lawful economic disruption’ caused by ‘reaction to the disclosure of information about an animal enterprise.’”<sup>89</sup> Accordingly, farm protection legislation at the state level is needed to clarify the position in this area.<sup>90</sup>

As support for farm protection legislation has gathered pace in additional states, farmers and agribusiness interests have developed their own terminology and rhetoric<sup>91</sup> in opposition to that of the animal rights activists, who refer to these laws as ag-gag laws.<sup>92</sup> Farm supporters argue that undercover investigations must be prohibited because they violate personal privacy and property rights while also labeling many legal industry practices as animal cruelty.<sup>93</sup> For example, farmers protest that certain undercover investigations include “recordings of practices that are perfectly legal, such as castration without anesthetics, [which] are then published to the media as though there is some cause for alarm with these standard agricultural procedures.”<sup>94</sup>

While proponents of farm protection laws admit that there are a few “bad apples” in the industry, they argue that these undercover investigations do not adequately represent the majority of farmers who manage their farms in an ethical manner.<sup>95</sup> They expose the fact that the majority of these investigations come from members of animal rights organizations, and they allege that these members initiate the abuse that they subsequently record.<sup>96</sup> Farmers argue that many of these undercover investigations take place in the context of employment fraud, where undercover investigators have lied to gain employment, the point being that their deceit should be regarded as undermining their credibility.<sup>97</sup> Proponents drum up additional support with a

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<sup>86</sup> Hill, *supra* note 30, at 655 (citing § 43(a)(2)(A)).

<sup>87</sup> Landfried, *supra* note 20, at 393 (citing § 43(a)(2)(C)).

<sup>88</sup> *See id.* (quoting § 43(d)(3)).

<sup>89</sup> *Id.* (quoting § 43(d)(3)(B)).

<sup>90</sup> *See id.* at 393-94.

<sup>91</sup> *See* Laura Hagen, 2012 *State Legislative Review*, 19 ANIMAL L. 497, 510 (2013) (providing an overview of the recent ag-gag laws passed in Iowa, Utah, and Missouri); *see also* Lovitz, *supra* note 47, at 37.

<sup>92</sup> *See* Bittman, *supra* note 17 (coining the term “ag-gag” in reference to these farm protection laws).

<sup>93</sup> Hagen, *supra* note 91, at 510.

<sup>94</sup> Lovitz, *supra* note 47, at 37.

<sup>95</sup> *See id.*; Radke, *supra* note 73.

<sup>96</sup> *See* Radke, *supra* note 73; *see also* Bollard, *supra* note 40, at 10962.

<sup>97</sup> *See* Flynn, *supra* note 44; *see also* Jennifer Viegas, *Factory Farming Videos Prompt ‘Ag-Gag’ Bills*, DISCOVERY NEWS (Jan. 31, 2012), <http://news.discovery.com/animals/factory-farming-videos-120131.htm> (providing the views of both sides of the ag-gag debate); Glover, *supra* note 15 (quoting Iowa Rep. Annette Sweeney who “‘believe[s] it is wrong to absolutely lie to get a job to try to defame the employer’”).

portrayal of farmers as the public-spirited providers of sustenance for the nation.<sup>98</sup> From this point of view farm protection laws provide a means of thanking farmers for the service that they render.<sup>99</sup>

## B. MODERN FARM PROTECTION OR AG-GAG LAWS

Proposals for farm protection legislation have met with a mixed response from state legislatures.<sup>100</sup> While many states have proposed farm protection bills, only four states have successfully passed the legislation.<sup>101</sup> In the remaining states, public opposition has largely led to the failure of the bills to pass.<sup>102</sup>

### 1. States That Have Successfully Passed Farm Protection Legislation

As a result of the lobbying of the agricultural industry and its supporters, a number of states have recently considered passing farm protection laws to protect farms from these undercover investigations.<sup>103</sup> Of the states that have considered such legislation, Iowa, Utah, Missouri, and Idaho now join Kansas, North Dakota, and Montana as states with farm protection laws in place.<sup>104</sup> Iowa's 2012 "ag-gag law aims to prevent employment fraud in the agricultural industry by criminalizing obtaining access to an agricultural facility by false pretenses, as well as intentionally making a false statement in an employment application with the intent to commit an unauthorized act in the facility."<sup>105</sup> Similarly, Utah's law "criminalizes obtaining employment in agricultural settings under false pretenses."<sup>106</sup> However, it also "criminalizes obtaining employment 'with the intent to record an image of, or sound from, the agricultural operation' when on notice that the owner does not authorize recording."<sup>107</sup> The law in Idaho passed in early 2014, and criminalizes "interference with agricultural production."<sup>108</sup> Notably, it also prohibits the obtaining of "employment with an agricultural facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers."<sup>109</sup>

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<sup>98</sup> Lovitz, *supra* note 47, at 38.

<sup>99</sup> *Id.*

<sup>100</sup> See discussion *infra* Subsections IV.B.1-2.

<sup>101</sup> See discussion *infra* Subsection IV.B.1.

<sup>102</sup> See discussion *infra* Subsection IV.B.2; Flynn, *supra* note 44.

<sup>103</sup> See Landfried, *supra* note 20, at 379 ("Two bills were introduced in 2011, six in 2012, and nine in 2013.").

<sup>104</sup> See IOWA CODE § 717A.3A (2012); UTAH CODE ANN. § 76-6-112 (West 2012); MO. REV. STAT. § 578.013 (2012); IDAHO CODE ANN. § 18-7042 (West 2014).

<sup>105</sup> See Landfried, *supra* note 20, at 396; IOWA CODE § 717A.3A.

<sup>106</sup> See Landfried, *supra* note 20, at 396; UTAH CODE ANN. § 76-6-112.

<sup>107</sup> Landfried, *supra* note 20, at 396 (quoting UTAH CODE ANN. § 76-6-112).

<sup>108</sup> IDAHO CODE ANN. § 18-7042 (West 2014).

<sup>109</sup> *Id.* § 18-7042(1)(c).

Finally, the Missouri law requires “‘farm animal professionals’ to share with law enforcement any recording depicting animal abuse or neglect. The recording must be unedited and must be submitted within twenty-four hours.”<sup>110</sup> Missouri’s law is significantly different from the other farm protection laws because it requires employees to rapidly report animal abuse, which would appear to have beneficial results of quicker prosecution of animal abusers and granting relief to the abused animals.<sup>111</sup> Thus, the farm protection laws successfully passed through 2014 primarily contained provisions criminalizing “[e]mployment fraud in agricultural settings” or “[d]elayed reporting of animal abuse.”<sup>112</sup>

## 2. States That Have Failed to Pass Farm Protection Legislation

In spite of the fact that Iowa, Utah, Idaho, and Missouri successfully passed farm protection laws by 2014, it is notable that similar legislative proposals in over a dozen other states have failed to become law<sup>113</sup> for a variety of reasons.<sup>114</sup> The proposals typically took five main forms: they criminalized (1) “[f]ilming any agricultural activities”; (2) “[e]mployment fraud in agricultural settings”; (3) “[d]istribution of agricultural recordings”; (4) “[t]respas in agricultural facilities”; and (5) “[d]elayed reporting of animal abuse.”<sup>115</sup> A significant number of the proposed farm protection laws took the first form, criminalizing the filming of any agricultural activities, and none of these proposed laws passed.<sup>116</sup> Several states also included provisions criminalizing employment fraud in agricultural settings, but most of

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<sup>110</sup> Hagen, *supra* note 91, at 515 (quoting MO. REV. STAT. § 578.013 (2012)).

<sup>111</sup> *Contra* Landfried, *supra* note 20, at 399-400 (arguing that the main point of rapid reporting of abuse legislation is to prevent undercover investigations of animal cruelty, not to benefit animals).

<sup>112</sup> *See id.* at 380; IOWA CODE § 717A.3A (2012); UTAH CODE ANN. § 76-6-112; IDAHO CODE ANN. § 18-7042; MO. REV. STAT. § 578.013.

<sup>113</sup> For failed ag-gag legislation that was considered in 2011 and 2012, see S. 1184, 2012 Gen. Assemb., Reg. Sess. (Fla. 2012); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 1369, 87th Sess. (Minn. 2011); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012); and S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011). For failed legislation that was considered in 2013, see H.R. 0110, 2013 Leg., Reg. Sess. (N.H. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); S. 391, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); Leg. 204, 103d Leg., 1st Sess. (Neb. 2013); S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); H.R. 683, 2013-2014 Gen. Assemb., Reg. Sess. (Penn. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013); S. 552, 51st Leg., 1st Sess. (N.M. 2013); Assemb. 343, 2013-14 Reg. Sess. (Ca. 2013); and see also Flynn, *supra* note 44.

<sup>114</sup> *See* Flynn, *supra* note 44. The Tennessee Governor vetoed the farm protection law passed by the state legislature, while Indiana used a “time-killing debate” to defeat its proposed farm protection law. *Id.* North Carolina merely “adjourned” to avoid enacting its proposed farm protection law. *Id.*

<sup>115</sup> *See* Landfried, *supra* note 20, at 380.

<sup>116</sup> *See* S. 552, 51st Leg., 1st Sess. (N.M. 2013); H.R. 683, 2013-2014 Gen. Assemb., Reg. Sess. (Penn. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); H.R. 5143, 97th Gen.

these provisions were in addition to the criminalization of the filming of any agricultural activities.<sup>117</sup> Certain states proposed laws criminalizing the distribution of agricultural recordings, and each of these proposed laws failed.<sup>118</sup> Some states sought to criminalize trespass in agricultural facilities,<sup>119</sup> and a fair number of states sought to criminalize the delayed reporting of animal abuse.<sup>120</sup> Even though only seven states currently have farm protection laws on the books, the conflict between animal rights activists and agribusiness owners will continue, and it is entirely possible that state legislatures who defeated farm protection legislation will revisit it in the near future.<sup>121</sup>

## V. RELATED LEGAL ISSUES

Because many states do not yet have farm protection laws on the books, complainants have not had much of an opportunity to bring challenges to farm protection legislation.<sup>122</sup> While the farm protection laws in Kansas, North Dakota, and Montana have been in place since the early 1990s, there have been no undercover films released in those states, and consequently, no charges have been filed under those laws, and no complaints have been raised.<sup>123</sup> Because of this sparse legal landscape, writers have conjectured as to how courts would rule on the constitutionality of these farm protection laws under a First Amendment analysis.<sup>124</sup>

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Assemb. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 1369, 87th Sess. (Minn. 2011); S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011).

<sup>117</sup> See Leg. 204, 103d Leg., 1st Sess. (Neb. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. 552, 51st Leg., 1st Sess. (N.M. 2013); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); H.R. 1369, 87th Sess. (Minn. 2011).

<sup>118</sup> See H.R. 5143, 97th Gen. Assemb. (Ill. 2012); H.R. 1369, 87th Sess. (Minn. 2011); S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); H.R. 683, 2013-2014 Gen. Assemb., Reg. Sess. (Penn. 2013). Indiana's proposed ag-gag law "charge[d] a person who 'distributes, disseminates, or transfers' an unauthorized recording of an agricultural facility, if the recording was made 'with intent to defame or directly or indirectly harm the business relationship between an agricultural operation and its customers.'" Landfried, *supra* note 20, at 397 (quoting S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013)). Pennsylvania's proposed ag-gag law "ban[ne]d 'uploads, downloads, [and] transfers' of unauthorized recordings." *Id.* (quoting H.R. 683, 2013-2014 Gen. Assemb., Reg. Sess. (Penn. 2013)).

<sup>119</sup> See S. 552, 51st Leg., 1st Sess. (N.M. 2013); S. 1184, 2012 Gen. Assemb., Reg. Sess. (Fla. 2012).

<sup>120</sup> See Assemb. 343, 2013-14 Reg. Sess. (Ca. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013); Leg. 204, 103d Leg., 1st Sess. (Neb. 2013); H.R. 0110, 2013 Leg., Reg. Sess. (N.H. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012).

<sup>121</sup> See Kingery, *supra* note 1, at 663; Adam, *supra* note 3, at 1164.

<sup>122</sup> See discussion *supra* Part IV (noting that only seven states have ag-gag laws, and the ag-gag laws in Iowa, Utah, and Missouri were passed in 2012, while Idaho's law just passed in 2014).

<sup>123</sup> See Landfried, *supra* note 20, at 392.

<sup>124</sup> See Kingery, *supra* note 1, at 667; Landfried, *supra* note 20, at 380; Adam, *supra* note 3, at 1131; Bollard, *supra* note 40, at 10966.

### A. POTENTIAL LEGAL CHALLENGES TO FARM PROTECTION LAWS

By examining both proposed and enacted farm protection laws, scholars have argued that certain forms of farm protection laws could be found to be unconstitutional because they may violate the First Amendment to the United States Constitution.<sup>125</sup> In this vein, the common farm protection law forms that criminalize the filming of any agricultural activities and the distribution of any agricultural recordings have come under strong scrutiny.<sup>126</sup> Opponents of farm protection legislation contend that these forms are not only content based, but also are in violation of prior restraint restrictions on speech and, therefore, are unconstitutional.<sup>127</sup>

The United States Supreme Court provided some direction on this issue in *United States v. Stevens*, where the Court invalidated a federal statute criminalizing the sale or possession of so-called crush videos, i.e., videos showing women in high-heeled shoes stomping small animals to death, on the grounds that it was overly broad.<sup>128</sup> The statute broadly prohibited “the knowing creation, sale, or possession of depictions ‘in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.’”<sup>129</sup> As the Court noted, this broad language could ban such commonly approved depictions as hunting videos, which, it presumed, was not the intent of the statute.<sup>130</sup> As a matter of fact, the defendant in the case was prosecuted for a dog-fighting video, not a crush video.<sup>131</sup> Consequently, because the statute banned all depictions of animal cruelty, it could not stand under the First Amendment because it was overly broad.<sup>132</sup> Opponents of farm protection laws thus have a strong argument that farm protection legislation criminalizing the filming of any agricultural activities and the distribution of any

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<sup>125</sup> See, e.g., Landfried, *supra* note 20, at 388-89 (arguing that “the agricultural-interference laws and distribution limitations are the most likely to be struck down as unconstitutional”); U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.”).

<sup>126</sup> See, e.g., Landfried, *supra* note 20, at 388-89.

<sup>127</sup> See, e.g., *id.* “Content-based restrictions on speech regulate subject matter or viewpoint” and are strictly scrutinized by the courts. *Id.* at 388 (citing *Galena v. Leone*, 638 F.3d 186, 199 (3d Cir. 2011); *Yursa v. Pocatello Educ. Ass’n*, 555 U.S. 353, 358 (2009)). Prior restraint restrictions on speech, on the other hand, would seek to prohibit the “expression of ideas prior to their publication,” and the courts look very unfavorably upon such restraints. *Id.* at 389 (citing *Near v. Minnesota*, 283 U.S. 697, 733 (1931) (Butler, J., dissenting); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)).

<sup>128</sup> See Mariann Sullivan, *Constitutionally Inconsistent: The Constitution and Animals*, 19 ANIMAL L. 213, 215-16 (2013) (examining the holdings of recent Supreme Court cases addressing animal cruelty); *United States v. Stevens*, 559 U.S. 460 (2010) (holding that a federal statute criminalizing depictions of animal cruelty was overly broad under the First Amendment). Sullivan notes that these videos are made in an attempt to “appeal to a particular sexual fetish.” Sullivan, *supra*, at 215; see also *Stevens*, 559 U.S. at 465-66.

<sup>129</sup> Sullivan, *supra* note 128, at 215 (quoting *Stevens*, 559 U.S. at 465).

<sup>130</sup> *Stevens*, 559 U.S. at 476.

<sup>131</sup> Sullivan, *supra* note 128, at 215; *Stevens*, 559 U.S. at 466.

<sup>132</sup> Sullivan, *supra* note 128, at 216 (citing *Stevens*, 559 U.S. at 476, 482).

agricultural recordings would fail First Amendment scrutiny because it is overly broad and bans videos far beyond the scope of recordings of animal cruelty.<sup>133</sup>

### B. OTHER RELEVANT CASES

In other cases, courts have touched on certain relevant legal aspects with regards to farm protection laws. For example, in *National Meat Ass'n v. Harris*, the Supreme Court took the position that federal laws have precedence over state laws with regards to the agricultural industry.<sup>134</sup> In that case, the Court considered whether the Federal Meat Inspection Act (FMIA), the federal law enacted following Upton Sinclair's investigation, preempted a California animal cruelty statute.<sup>135</sup> The Court concluded that the federal law preempted the California state law and held that "there should be national standards not just for what goes on inside the slaughterhouse, but also for whom the State of California can keep out of the slaughterhouse in the name of preventing cruelty to animals."<sup>136</sup> As a result, under this standard, state farm protection laws would be preempted if they conflicted with federal laws regulating the food industry.<sup>137</sup>

Critics labeling farm protection laws as ag-gag laws also argue that agribusinesses can protect their rights under existing law, citing *Food Lion, Inc. v. Capital Cities/ABC, Inc.* in support of that proposition.<sup>138</sup> *Food Lion* involved two ABC reporters who sought to conduct undercover investigations at Food Lion stores and obtained positions through the use of false

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<sup>133</sup> See Landfried, *supra* note 20, at 388-89.

<sup>134</sup> Sullivan, *supra* note 128, at 217 (positing that the Court held that "federal standards should be read broadly when applied to our food supply"); see *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (holding that federal law supersedes state law with regards to regulation of slaughterhouses).

<sup>135</sup> Sullivan, *supra* note 128, at 217 (citing *Nat'l Meat Ass'n*, 132 S. Ct. at 965). The FMIA seeks to protect the public health and welfare by ensuring that meat is "wholesome, not adulterated, and properly marked, labeled, and packaged." 21 U.S.C. § 602 (2012). It purports to accomplish these goals by requiring that animals be examined prior to slaughter and that the slaughter be carried out in a humane way. *Id.* § 603.

<sup>136</sup> Sullivan, *supra* note 128, at 217 (citing *Nat'l Meat Ass'n*, 132 S. Ct. at 973-74).

<sup>137</sup> *Cf. id.* (arguing that these federal standards for our food supply should be read broadly and would take precedence over conflicting state laws). In order to determine whether a state law is preempted by federal law, a court must first determine whether the state law conflicts directly with federal law. If there is a direct conflict, the federal law preempts the state law. See generally *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Alternatively, if "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," the state law will again be preempted. See *Rice v. Santa Fe Elevator Corp.*, 313 U.S. 218, 230 (1947).

<sup>138</sup> See Kingery, *supra* note 1, at 666-67 (arguing that "farmers harmed because of undercover videos shot by employees have a legal recourse against such employees under current law"); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 515 (4th Cir. 1999) (stating that "[a]s a matter of agency law, an employee owes a duty of loyalty to her employer").

identification.<sup>139</sup> Through the course of their investigations, these ABC reporters recorded undercover video “footage show[ing] Food Lion employees repackaging meat they knew to be expired, including adding barbeque sauce to expired chicken to mask the odor and allow for sale in the gourmet food section.”<sup>140</sup> After the undercover footage was released, “Food Lion sued ABC and the reporters for fraud, unfair trade practices, breach of the duty of loyalty, and trespass,” and Food Lion recovered over \$316,000 in damages at the trial court level.<sup>141</sup>

The Fourth Circuit reversed the trial court’s judgment and award of damages with regards to the fraud and unfair trade practices allegation.<sup>142</sup> It agreed with the trial court that the reporters had trespassed by breaching their duty of loyalty to Food Lion but awarded nominal damages in the amount of \$2.00 only.<sup>143</sup> Opponents of farm protection laws argue that *Food Lion* shows that farmers and agribusiness owners can successfully pursue employees who conduct undercover investigations under agency law.<sup>144</sup> However, proponents of farm protection laws can point to the relative ineffectiveness of this alternative, as Food Lion only recovered \$2.00 in compensatory damages from the undercover ABC reporters, whereas the actual harm caused was much greater.<sup>145</sup>

With regard to the farm protection laws that are currently in place in Kansas, North Dakota, Montana, Iowa, Utah, Missouri, and Idaho, there has only been one reported case where an individual has been charged with a violation.<sup>146</sup> In Utah, Amy Meyer had charges brought against her under the state farm protection law because she took video footage of acts at an agribusiness that she thought constituted animal cruelty, even though she was not an employee.<sup>147</sup> However, the charges against her were dropped because she took the video footage with her cell phone while she was on public property.<sup>148</sup> A group of plaintiffs in Utah have recently filed a lawsuit challenging the constitutionality of Utah’s farm protection law, but the case is

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<sup>139</sup> See Kingery, *supra* note 1, at 664-65; *Food Lion*, 194 F.3d at 510.

<sup>140</sup> Kingery, *supra* note 1, at 665 (citing *Food Lion*, 194 F.3d at 511).

<sup>141</sup> *Id.* (citing *Food Lion*, 194 F.3d at 510-11).

<sup>142</sup> *Food Lion*, 194 F.3d at 524.

<sup>143</sup> *Id.* The Fourth Circuit awarded nominal damages for trespass because that was “all that was sought in the circumstances.” *Id.* at 517. The district court awarded Food Lion “compensatory damages of \$1,400 and punitive damages of \$315,000” on the claim of fraud, which is likely why Food Lion did not seek additional damages for trespass in the district court. See *id.* at 524.

<sup>144</sup> Kingery, *supra* note 1, at 666-67.

<sup>145</sup> *Contra id.* at 667 (arguing that agency law gives agribusinesses a successful alternative to ag-gag laws).

<sup>146</sup> See Flynn, *supra* note 44; Landfried, *supra* note 20, at 392 (noting that there have been no prosecutions under the Kansas, North Dakota, and Montana ag-gag laws).

<sup>147</sup> Flynn, *supra* note 44.

<sup>148</sup> *Id.* Meyer’s situation is important because at present there have still not been any cases where individuals have been charged with violating a farm protection law. As a result, the constitutionality of such farm protection laws is still up in the air.

still pending.<sup>149</sup> As a result, it is difficult to predict what a court would hold if a defendant convicted under one of these farm protection laws questioned the law's constitutionality on appeal.<sup>150</sup>

Paradoxically, in Colorado, one of the states currently without a farm protection law, an individual was recently charged with animal cruelty for failing to turn in to the authorities undercover video footage that she recorded that "shows individuals pulling cattle by their ears, lifting them by their tails and forcibly removing them off trucks."<sup>151</sup> Taylor Radig, an animal rights activist, worked at the Quanah Cattle Company and took the undercover video footage; however, she did not report the abuse to the authorities until two months after she stopped working at the company.<sup>152</sup> According to the Sheriff's Office, Radig's failure to report the abuse constituted negligence and fell within the conduct prohibited by the animal cruelty statute.<sup>153</sup> Specifically, the Sheriff's Office suspected that Radig had participated in the incidents of abuse due to her failure to turn in the footage sooner.<sup>154</sup>

As has been pointed out, the Radig incident in Colorado yielded the counterintuitive result that one who exposes animal cruelty is charged with violating the state animal cruelty statute and highlights the need for farm protection legislation to contain provisions that will protect whistleblowers and those with a genuine concern to expose incidents of animal cruelty.<sup>155</sup>

## VI. PROPOSED LEGISLATION

As explained above, laws criminalizing the filming and distribution of agricultural activities are likely to founder on the rocks of a First Amendment analysis.<sup>156</sup> However, laws aimed at criminalizing employment fraud in the agricultural setting do not address free speech issues; rather, they seek to criminalize falsifying an application for employment and as a result, are

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<sup>149</sup> See *id.*; Stephen Wells, *Landmark "Ag-Gag" Lawsuit Fights Threat to Freedom of Speech*, ANIMAL LEGAL DEF. FUND (July 21, 2013), <http://aldf.org/blog/landmark-ag-gag-lawsuit-fights-threat-to-freedom-of-speech/> (describing the lawsuit and providing additional information on Amy Meyer); see also Civil Rights Complaint, Animal Legal Def. Fund v. Herbert, No. 2:13CV00679 (D. Utah July 22, 2013).

<sup>150</sup> See Flynn, *supra* note 44.

<sup>151</sup> Oliver Darcy, *Animal Rights Activist Who Recorded Undercover Videos at Cattle Company Cited for Animal Cruelty*, BLAZE (Nov. 23, 2013, 9:56 AM), [http://www.theblaze.com/stories/2013/11/23/animal-rights-activist-who-recorded-undercover-videos-at-cattle-company-cited-for-animal-cruelty/?utm\\_source=facebook&utm\\_medium=story&utm\\_campaign=ShareButtons](http://www.theblaze.com/stories/2013/11/23/animal-rights-activist-who-recorded-undercover-videos-at-cattle-company-cited-for-animal-cruelty/?utm_source=facebook&utm_medium=story&utm_campaign=ShareButtons) (providing the most up-to-date example of an undercover investigator who has been prosecuted for her subversive activities albeit under an animal cruelty law, not a farm protection law).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *id.*

<sup>155</sup> See discussion *infra* Part VI.

<sup>156</sup> Cf. Landfried, *supra* note 20, at 380 (noting the particular forms of ag-gag laws likely to be unconstitutional under the First Amendment).

likely constitutional.<sup>157</sup> In addition, any legislation aimed at criminalizing trespass in agricultural facilities is likely to withstand constitutional scrutiny under the First Amendment because it is not aimed at “issues of expression.”<sup>158</sup> Finally, laws seeking to criminalize the delayed reporting of animal abuse do not interfere with First Amendment rights and are likely constitutional as well.<sup>159</sup> While farm protection legislation is a divisive issue in society today, both the proponents and opponents of farm protection laws have arguments that need to be addressed.<sup>160</sup>

In addition, state legislatures should not include wording in their farm protection statutes directed at legitimate whistleblowers,<sup>161</sup> i.e., employees of the agricultural facility who obtained their positions without a hidden agenda of looking for evidence of animal cruelty within the facility.<sup>162</sup> Rather, the statutes should be directed at trespassers and people who make agricultural recordings through employment fraud by concealing their true intentions and lying about their membership in animal rights organizations.<sup>163</sup> Such laws directed at criminalizing trespass and employment fraud in the agricultural industry avoid First Amendment challenges.<sup>164</sup> The following suggestions may help.

#### A. PROVIDING A DISTINCTION BETWEEN LEGAL AND ILLEGAL PRACTICE

State legislatures should keep in mind the substantial, yet often competing, interests of food safety and animal welfare on the one hand and the economic importance of the agricultural industry on the other.<sup>165</sup> In working toward that end, the legislation should include provisions directed toward particular practices of animal abuse that must be reported.<sup>166</sup> The widespread view among animal rights activists is that large factory farm owners have successfully lobbied state legislators to propose legislation that essentially erects an impenetrable barrier blocking their internal operations from public view.<sup>167</sup> While this view may have validity in some circumstances, most farmers called for protective legislation to protect their businesses from

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<sup>157</sup> See *id.* at 396-97.

<sup>158</sup> See *id.* at 398-99.

<sup>159</sup> See *id.* at 399-400.

<sup>160</sup> See discussion *supra* INTRODUCTION.

<sup>161</sup> See Adam, *supra* note 3, at 1176 (arguing that states should “shift[] the critical focus from the messenger to the message”).

<sup>162</sup> See Landfried, *supra* note 20, at 395-96.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 397, 399.

<sup>165</sup> See Kingery, *supra* note 1, at 666, 677.

<sup>166</sup> Cf. Lovitz, *supra* note 47, at 37 (noting the confusion caused by undercover investigators reporting standard legal practices in the agricultural industry and clearly illegal animal abuse without differentiating the two).

<sup>167</sup> See, e.g., Kingery, *supra* note 1, at 681 (arguing that ag-gag legislation establishes an “iron curtain”).

the economic harm that has resulted from these undercover investigations.<sup>168</sup> As has been noted, most farmers do not permit their workers to engage in cruel practices, but undercover investigators have shown a tendency to lump legal practices in with illegal abuse, and uneducated consumers often cannot differentiate between the two.<sup>169</sup> While it may be idealistic to hope for consensus among farm owners and animal rights activists in the approach to legislation, state legislatures can avoid further disagreement by passing laws that provide examples of improper animal abuse that legitimate whistleblowers should report, while also noting specific standard legal practices in the industry that do not constitute illegal animal cruelty and should not be reported.<sup>170</sup>

#### B. CREATING AN ANIMAL WELFARE CONTACT PERSON IN THE AGRIBUSINESS

State legislatures should seek to create an avenue whereby employees of agribusinesses feel comfortable reporting any instance of illegal animal cruelty they see.<sup>171</sup> Legislation could require the creation of an animal welfare division in large factory farms or a particular contact person in the organization that employees can approach to report instances of illegal animal cruelty.<sup>172</sup> In that way, employees of agribusinesses would have a clear avenue to go through to report illegal animal cruelty.<sup>173</sup> Rather than holding onto video recordings to edit them and then going public with the footage, employees would be able to report illegal animal cruelty to their contact persons without fear of repercussion and would feel confident that the issue would be appropriately addressed.<sup>174</sup> Employees would also be able to approach their contact persons to discuss practices that may appear to constitute illegal

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<sup>168</sup> See Cagle, *supra* note 74; Radke, *supra* note 73.

<sup>169</sup> See Cagle, *supra* note 74; cf. Lovitz, *supra* note 47, at 37 (outlining the complaints of farmers towards undercover investigators who make it seem like standard practices are illegal).

<sup>170</sup> Cf. Hagen, *supra* note 91, at 510; Kare 11 Staff, *supra* note 9 (giving a recent example of a farm operation that suffered because standard legal practices were lumped in with instances of illegal animal cruelty).

<sup>171</sup> See Duffelmeyer, *supra* note 46.

<sup>172</sup> Cf. Lacy, *supra* note 2, at 130 (noting that the current system of regulation of large factory farms and agribusinesses does not provide the appropriate level of supervision); Kingery, *supra* note 1, at 677 (arguing that consumers must take the primary role in holding agribusinesses accountable because the government regulatory structure is inefficient).

<sup>173</sup> But cf. Kingery, *supra* note 1, at 679 (describing a situation where an employee reported animal abuse but the organization failed to take corrective action). By providing a clear organizational structure that employees should report illegal practices to, legislation could ensure that reports of illegal animal cruelty are not merely brushed aside by supervisors as someone else's responsibility.

<sup>174</sup> Cf. Duffelmeyer, *supra* note 46 (noting one of the major accusations farmers levy on reporters of animal cruelty, that they take their time editing the footage to enhance publicity).

animal cruelty, but in fact are standard practices, and as a result, such practices would not be automatically broadcast to the public as if the farm is acting illegally.<sup>175</sup> Legislation should then provide that these particular contacts in the organizations must report instances of illegal animal cruelty that their employees have brought to their attention or else they will be prosecuted under the law as well.<sup>176</sup>

### C. CRIMINALIZING EMPLOYMENT FRAUD

State legislatures should criminalize employment fraud, defined to target the animal rights activist who seeks employment with the underlying purpose of taking recordings.<sup>177</sup> One way to differentiate between these fraudulent employees and regular employees is to see if they have any ties to animal rights organizations.<sup>178</sup> While such investigations will not reveal fraudulent employees in every instance, hopefully the combination of these investigations with the creation of a proper avenue for employees to report illegal animal cruelty would result in fewer animal rights activists seeking to conduct undercover investigations.<sup>179</sup> State legislatures should derive their wording for the employment fraud provision from Iowa's farm protection law, which provides that anyone who "[o]btains access to an agricultural production facility by false pretenses" or "[m]akes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility" will be prosecuted under the law.<sup>180</sup> At the outset of hiring workers, farmers and agribusiness owners could have provisions on their employment applications asking if the applicants have any ties to animal rights organizations and are seeking employment with the farm to investigate animal cruelty.<sup>181</sup> If fraudulent employees lie during the application process, the employment fraud provision in a farm protection law will allow states to prosecute them and protect the confidence that farmers need to have in their workers.<sup>182</sup>

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<sup>175</sup> Cf. Kare 11 Staff, *supra* note 9 (showing farmers who wished their employee had reported the alleged abuse to them before going public because the footage involved illegal abuse in combination with standard legal practices).

<sup>176</sup> Cf. Kingery, *supra* note 1, at 680 (arguing that animal cruelty must be reported because of the many negative effects it has on the animals as well as our American society). By imposing legal requirements on these particular contact persons within agricultural organizations, state legislatures can ensure that illegal animal cruelty is dealt with quickly and efficiently.

<sup>177</sup> See Viegas, *supra* note 97.

<sup>178</sup> Cf. Glover, *supra* note 15 (providing arguments by farm supporters that states need to crack down on activist members of animal rights organizations who misrepresent themselves when applying for employment on the farms).

<sup>179</sup> See *supra* note 172 and accompanying text.

<sup>180</sup> See IOWA CODE § 717A.3A (2012).

<sup>181</sup> Cf. Glover, *supra* note 15 (showing the betrayal farmers feel when their trusted employees turn out to be undercover investigators); Viegas, *supra* note 97 (noting that farm supporters believe employment fraud is a serious issue that needs to be addressed).

<sup>182</sup> See, e.g., IOWA CODE § 717A.3A.

*D. IMPOSING A SEVENTY-TWO HOUR REPORTING REQUIREMENT*

Legislation also should call for prompt reporting of animal rights abuses in agriculture.<sup>183</sup> Such a provision would benefit farmers and agribusiness owners, as well as whistleblowers and animals, because it would swiftly address the problem.<sup>184</sup> Animal rights activists have complained that these provisions do not benefit the animals and are included to prevent undercover investigators from obtaining enough evidence of cruel animal practices.<sup>185</sup> However, a rapid reporting of animal abuse provision would ensure that illegal animal cruelty is prosecuted and would benefit the animals, as the sooner evidence of illegal animal cruelty is reported, the sooner the animals will gain relief from such abuse.<sup>186</sup> State legislatures should ensure that the provision applies to all members of the agricultural organization, including the contact persons that employees approach regarding illegal animal cruelty they observe.<sup>187</sup> As a result, illegal practices would not be passed to the contact persons and then disappear without corrective action being taken; rather, the contact persons would have a legal obligation to report illegal practices or face charges under the farm protection law themselves.<sup>188</sup> Missouri's farm protection law provides that recordings of illegal animal abuse or neglect must be reported to the authorities within twenty-four hours; however, a twenty-four hour reporting requirement does not appear to give enough time for employees to witness the illegal practices and then report them to their contact persons in the organization.<sup>189</sup> Consequently, a seventy-two hour reporting requirement like that proposed in Iowa appears more reasonable, as it would still ensure the rapid reporting of illegal animal cruelty, but it would also give enough time for employees to approach their contact persons who could then report the illegal practices to law enforcement.<sup>190</sup>

Therefore, when considering the provisions that should be included in farm protection legislation, state legislatures need to provide specific examples of standard industrial practices so that those practices are not mistakenly reported as animal cruelty.<sup>191</sup> State legislatures also should consider requiring a particular contact person in each agribusiness who is responsible

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<sup>183</sup> See, e.g., MO. REV. STAT. § 578.013 (2012).

<sup>184</sup> See Duffelmeyer, *supra* note 46.

<sup>185</sup> See Landfried, *supra* note 20, at 399-400.

<sup>186</sup> *But see id.* (providing the arguments on the other side supporting rapid reporting requirements of animal cruelty).

<sup>187</sup> *Cf.* Kingery, *supra* note 1, at 679 (documenting situations where supervisors failed to take any action with regards to reports of illegal animal cruelty).

<sup>188</sup> See *supra* note 174 and accompanying text.

<sup>189</sup> See MO. REV. STAT. § 578.013 (2012).

<sup>190</sup> See S. Amend. 3297, 84th Gen. Assemb. (Iowa 2011) (requiring that instances of animal cruelty be reported within seventy-two hours).

<sup>191</sup> See discussion *supra* Section VI.A.

for handling reports of animal cruelty.<sup>192</sup> A provision criminalizing employment fraud will likewise be necessary to protect the integrity of the relationship between farmers and their employees.<sup>193</sup> Finally, state legislatures need to require rapid reporting of instances of animal cruelty, probably by imposing a seventy-two hour reporting requirement.<sup>194</sup>

## VII. CONCLUSION

The issue of reporting animal cruelty in the agricultural industry is a divisive topic in today's society.<sup>195</sup> Animal cruelty must be prohibited, but at the same time, agribusinesses need protection from undercover investigators who would seek to harm the businesses.<sup>196</sup> Many states have turned to farm protection legislation in an attempt to address these concerns.<sup>197</sup> Even though the majority of states that have considered farm protection laws have failed to pass them,<sup>198</sup> state legislatures should revisit farm protection laws and pass laws incorporating provisions designed to prevent employment fraud and eliminate confusion over which practices constitute illegal animal cruelty in the agricultural industry.<sup>199</sup> Additionally, legislatures should include provisions that mandate the rapid reporting of any animal cruelty abuses uncovered by whistleblowers.<sup>200</sup> These provisions would benefit both farmers and animal rights activists while avoiding the constitutional difficulties posed by provisions that would criminalize the recording or distribution of instances of animal cruelty.<sup>201</sup> By excluding legitimate whistleblowers from employment fraud provisions, instances of animal cruelty will still be reported in a rapid fashion so that the wrongdoers can be punished.<sup>202</sup> The issue of reporting animal cruelty in the agricultural industry remains a hot topic, and state legislatures should address these concerns sooner rather than later for the benefit of both sides.<sup>203</sup>

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<sup>192</sup> See discussion *supra* Section VI.B.

<sup>193</sup> See discussion *supra* Section VI.C.

<sup>194</sup> See discussion *supra* Section VI.D.

<sup>195</sup> See discussion *supra* Part VI.

<sup>196</sup> See Glover, *supra* note 15.

<sup>197</sup> See discussion *supra* Part IV.

<sup>198</sup> See Flynn, *supra* note 44.

<sup>199</sup> See discussion *supra* Sections VI.A-C.

<sup>200</sup> See discussion *supra* Section VI.D.

<sup>201</sup> See discussion *supra* Part VI.

<sup>202</sup> See discussion *supra* Part VI.

<sup>203</sup> See discussion *supra* Part VI.



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