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Law and Religion in Plymouth Colony

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ABSTRACT

2020 marks the 400th anniversary of the planting of Plymouth Colony. Although the literature about Plymouth is voluminous, the discussion about law and religion has been inappropriately superficial to date. This article addresses the Pilgrims' conception of law on matters of religion and the new insights into the Pilgrims' story that can be ascertained by focusing on law.

"Law" has been defined in many different ways by many different people throughout history. Aristotle, Cicero, Thomas Aquinas, and other proponents of natural law argued that law is the exercise of reason to deduce binding rules of moral behavior from nature's or God's creation. The renowned English positivist John Austin, in contrast, maintained that law is the command of the sovereign. To Karl von Savigny and other proponents of the so-called historical school, law is the unconscious embodiment of the common will of the people. To the philosophical school, law is the expression of idealized ethical custom. The dominant contemporary view seems to be that law is the reflection of social, political, and economic interests.

For the Pilgrims of Plymouth Colony, law was both the memorialization of their commitment to the Word of God and an instrument for exercising social control so as to effectuate that commitment. The Pilgrims, of course, used law to regulate the more mundane aspects of life as well. Indeed, quantitatively speaking, more laws were enacted by the Pilgrims that addressed the day-to-day activities of life in Plymouth Colony than memorialized the Pilgrims' commitment to eternal glory in the afterlife, but the latter was unquestionably more important, qualitatively speaking, than the former. In the oft-quoted words of a young William Bradford, "to keep a good conscience, and walk in such a way as God has prescribed in his Word, is a thing which I must prefer before you all, and above life itself."

KEYWORDS

Plymouth Colony, law, religion, colonial America

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> "It hath bine our Indeaver in the framing of our lawes … to promote the comon good both of church and State, both att pesent and for future; and therefore so fare as we have aimed att the Glory of God; and common good, and acted according to God; Bee not found a Resister but Obedient, lest therby thou resist the Ordinance of God, and soe incurr the displeasure of God unto Damnation. Rom. 13. 2."
>
> —By order of the General Court of New-Plymouth
>
> Nathaneel Morton, clarke, September 29, 1658

I. Introduction

2020 marks the 400th anniversary of the planting of Plymouth Colony by a group of strict Calvinists commonly known as "Pilgrims."[1] The Pilgrims fled England as Separatists: they denied the validity of the Church of England and wished to practice their faith in their own way.[2] This article explores the role *law* played in effectuating the Pilgrims' project prior to Plymouth being absorbed by Massachusetts Bay in 1692. Although the literature about Plymouth Colony is voluminous, the discussion about law and religion has been inappropriately superficial to date.[3] To make the point more directly, law is shaped by many factors. But law also shapes other concerns—be they economic, political, social, or religious—and no disquisition

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1 The appellation "Pilgrims" traces to an observation by the most famous of their community, William Bradford. *See* Nathaniel Philbrick, Mayflower: A Story of Courage, Community, and War 7 (2006) (quoting Bradford's remark, "they knew they were pilgrims"). Bradford, in turn, was referencing *Hebrews* 11:13 ("These all died in faith, not having received the promises, but having seen them afar off, and were persuaded of them, and embraced them, and confessed that they were strangers and pilgrims on the earth.").

2 The "Puritans," in contrast, immigrated to Massachusetts Bay in 1630 as members of the Church of England who desired to reform, rather than abandon, that church. *See, e.g.*, J. W. Bumstead, *A Well-Bounded Toleration: Church and State in the Plymouth Colony*, 10 J. of Church & State 265, 265-66 (1968). Some scholars no longer capitalize terms such as "Puritan" and "Separatist" in order to avoid the impression—mistaken, in their view—that practitioners had coherent programs. *See, e.g.*, Michael P. Winship, Godly Republicanism: Puritans, Pilgrims, and a City on a Hill 111, 119 (2012).

3 Nathaniel Philbrick's *Mayflower* is a recent contribution of note to the literature about Plymouth Colony. *See* Philbrick, *supra* note 1. For the first full-length scholarly study of Plymouth, *see* George D. Langdon, Jr., Pilgrim Colony: A History of New Plymouth, 1620-1691 (1966). For a more recent revisionist account that concentrates on the lives of the Pilgrims before they planted Plymouth Colony, *see* Jeremy Dupertuis Bangs, Strangers and Pilgrims, Travellers and Sojourners: Leiden and the Foundations of Plymouth Plantation (2009). George L. Haskins published an article about Plymouth's legal heritage almost six decades ago, but that article had very little to say about law and religion and spoke in only general terms about law itself. *See* George L. Haskins, *The Legal Heritage of Plymouth Colony*, 110 U. Pa. L. Rev. 847 (1962); *see also* George L. Haskins, *Law and Colonial Society*, 9 Am. Q. 354 (1957) (discussing law and society in colonial America writ large). Haskins's major work was about the first two decades of Massachusetts Bay Colony. *See* George Lee Haskins, Law and Authority in Early Massachusetts: A Study in Tradition and Design (1960).

about the history of Plymouth Colony would be complete without acknowledging how large a role the law itself played in the Pilgrims' design. In short, this article is not about the economic, political, or social history of Plymouth Colony. Other scholars have written books and articles about those topics. This article is about the Pilgrims' conception of law on matters of religion and the new insights into the Pilgrims' story that can be ascertained by focusing on law.[4]

A complete accounting of the Pilgrims' travails prior to their arrival at Plymouth is unnecessary for the legal history of Plymouth Colony in religious matters that this article endeavors to present.[5] Suffice it to say that, after troubles in England during the reign of King James I—who, upon ascending to the throne in 1603, had pledged to put an end to church reform movements in England and to punish critics of the Church of England—the Pilgrims sojourned among the Dutch beginning in or about 1607. But as merely one tolerated sect among many in the Netherlands, the Pilgrims not only began to fear they would lose their identity, they came to resent "ye great licentiousnes of youth in that countrie and ye manifold temptations of ye place."[6] The lighthearted Dutch maintained Sunday as a holy day, and thus as a day for celebration: "simply laughing and tossing off another pot of beer when told it should be endured grimly as penance."[7]

Theological and ecclesiastical considerations made matters worse. The Pilgrims supported a "Brownist", or Congregational, ecclesiastical polity of independent congregations, whereas the Dutch church maintained a hierarchical structure with synods, assemblies, and other central governing bodies.[8] John Robinson, one of the founders (along with Robert Browne) of the Congregational Church and the pastor of the Pilgrim church in the Netherlands, criticized the Dutch church for a number of their practices. He thought that ministers in the Dutch church were pretentious and had too much power. He rejected the idea that only ministers could preach because "preaching was a lay function" and "it was the province of the entire eldership to teach as well as govern."[9] According to Robinson, the "administration of sacred rites was the pastor's only distinctive function."[10] He also criticized the Dutch church's use of set prayers, even the Lord's Prayer: "Anybody could read a

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4 To state the obvious, this article is also not about Massachusetts Bay Colony and it is not a comparison of Plymouth with Massachusetts Bay (or with any other colony or country … or with the First Amendment of the U.S. Constitution). I offer those sorts of comparisons in a book I am currently writing. This article is not that book. *See generally* Peter Onuf, *Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective*, 46 Wm. & Mary Q. 341 (1989) (arguing that historians' criticism of the largely text-centered methodology of academic lawyers is often unfair and sometimes misleading); Richard J. Ross, *The Legal Past of Early New England: Notes for the Study of Law, Legal Culture, and Intellectual History*, 50 Wm. & Mary Q. 28 (1993) (commending the work of previous scholars of colonial America, yet emphasizing the need for new approaches).

5 For that accounting, *see* Bangs, *supra* note 3.

6 As quoted in George F. Willison, Saints and Strangers 103 (1945).

7 Willison, *supra* note 6, at 103. Willison apparently embraced a Nathaniel Hawthorne-like view of Puritanism. *See generally* Nathaniel Hawthorne, The Scarlet Letter: A Romance (1850).

8 Willison, *supra* note 6, at 104.

9 *Id.*

10 *Id.*

prayer. It was altogether as puerile a performance as for a child 'to read of a book or a payer (saying), Father, I prey you give me bread, or fish, or an egg.'"[11] The Dutch could not be true Christians, Robinson maintained, so long as they continued "benightedly celebrating Easter and Christmas, for which there was no warrant in Scripture."[12]

In addition, the Pilgrims appeared to adhere to millenarian ideas, believing that the end of the world was near and that repentance was needed.[13] Pilgrims, like most Protestants of the day, held Catholics in particular in contempt. William Bradford, who would become the longest-tenured governor of Plymouth Colony and the person whose journal would help to mythologize Plymouth's history,[14] referred to the Roman Church's history as a story of "pontifical lasciviousness" where "libidinous beasts" such as John XIII satisfied their "fleshy lusts" by preying upon the youth until Rome was nothing more than "an abominable warehouse of all spiritual and corporal fornications," where "deflowering, ravishing, incests, and adulteries are but a sport."[15]

Bradford also complained about "Episcopacy," or the Church of England. Although the English Reformation had released England from Rome's hold, Bradford insisted that, in retaining a hierarchy of bishops with coercive powers, it did not go far enough. Bradford did consider Presbyterian churches to be true churches, but he felt they likewise erred in maintaining a centralized hierarchy.[16] For Bradford, only Congregational churches such as those of the Pilgrims, which had no ecclesiastical hierarchy and which consisted solely of groups of voluntary believers, were entirely in line with the spirit of the Gospel.[17] Bradford wrote in his history of Plymouth Colony that the Pilgrims sought

> y^{e} right worship of God & discipline of Christ established in y^{e} church, according to y^{e} simplicitie of the gospell, without the mixture of mens inventions, and to have & to be ruled by y^{e} laws of Gods word, dispensed in those offices, & by those officers of Pastors, Teachers, & Elders, &c. according to y^{e} Scripturs.[18]

As will be seen, Bradford's position was reflected in Plymouth Colony's laws: the Pilgrims did not seek to coerce residents in their settlement into worshiping as they

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11 *Id*.

12 *Id.* Some revisionist historians of Plymouth Colony are critical of Willison's book, in large part because it is "old." *See, e.g.*, Bangs, *supra* note 3, at 614. In my view, scholars need to resist the temptation of suggesting that anything written about a subject before they turned their attention to it is poorly done.

13 *See, e.g.*, Philbrick, *supra* note 1, at 6.

14 *See* William Bradford, History of Plymouth Plantation (1856). Many editions of Bradford's history have been published over the years.

15 As quoted in Bernard Bailyn, The Barbarous Years: The Peopling of British North America: The Conflict of Civilizations, 1600–1675 at 363 (2012). Bradford spent a portion of his later years learning Hebrew and writing dialogues, including the one from which the above quotation draws. *Id.* at 357-64.

16 *See id.* at 357-64. Bradford's complaints about Presbyterianism were similar to those Robinson had offered against the Dutch church.

17 *See id.* at 363-64.

18 Bradford, *supra* note 14, at 4.

did; instead, they "warned away" those who did not practice Christianity in a pure fashion.[19]

II. The Mayflower Compact of 1620

No longer comfortable with the situation in the Netherlands, and having begun to irritate the generally amenable Dutch, the Pilgrims prepared for a voyage to the New World. They had nowhere to settle legally unless either the Virginia Company of London or the Virginia Company of Plymouth (England)—with the latter soon to be reorganized as the Council for New England—authorized it.[20] The Pilgrims' Separatist orientation made their quest for a patent difficult. In 1619 the Virginia Company of London finally issued a patent to John Wyncop, a minister in the household of the Countess of Lincoln (patents and compacts were granted in a personal name). Wyncop soon died, however, and the process commenced anew.

The next patent secured for the Pilgrims' voyage to America was one for a particular plantation—in other words, a franchise under the jurisdiction of an official governing body (in this case, Jamestown) that possessed some independent rights—granted by the Virginia Company of London to John Peirce and associates on February 2, 1619/20.[21] The text of the first Peirce Patent has not survived, but like other patents for particular plantations it probably granted permission to attempt a settlement within the jurisdiction of the official governing body under whom it was franchised (again, Jamestown).

The Pilgrims who voyaged to America in 1620 expected to settle near the mouth of the Hudson River but, "whether by accident or design,"[22] they landed near Cape Cod instead, which was outside the area where the Peirce Patent allowed them to plant and which made their settlement illegal. Because the Pilgrims had no legal document authorizing them to settle where they landed, they fashioned the Mayflower Compact, which has been characterized by historians as "the first

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19 Willison, *supra* note 6, at 318. Tocqueville famously noted that never was there an institution more like a medieval village than an American township because both were highly regulated as to who could reside in them. For example, the Salic Law mandated that no one could remain in a settlement without the unanimous consent of the inhabitants, and that the person would be required to remain a year and a day before he could live there permanently. *See, e.g.*, Susan Reynolds, Kingdoms and Communities in Western Europe, 900-1300 at 114 (2d ed., 1997).

20 The background details of the planting of Plymouth Colony have been widely chronicled. *See, e.g.*, Langdon, *supra* note 3; Philbrick, *supra* note 1. The Virginia Company of London had jurisdiction over an area from the Carolinas to northern New Jersey. The Virginia Company of Plymouth had jurisdiction over the area from southern New Jersey to Maine. Some overlap existed.

21 The English American colonies did not adopt the Gregorian calendar until 1752, and citations in this article to pre-1752 Julian calendar dates between January 1 and March 25 reference both the Gregorian and Julian years.

22 The Laws of the Pilgrims (A Facsimile Edition of the Book of the General Laws of the Inhabitants of the Jurisdiction of New-Plymouth, 1672 & 1685) viii (editor's introduction) (John D. Cushing ed., 1977); *See generally* Samuel Eliot Morison, *The Mayflower's Destination, and the Pilgrim Fathers' Patents*, 37 Pub's of the Col. Soc'y of Mass. 387 (1959).

voluntary constitutional instrument to be framed in North America"[23] and "a document that ranks with the Declaration of Independence and the United States Constitution as a seminal American text."[24] But it had no legal force as recognized by any outside authority. That said, the Mayflower Compact illuminates that Congregationalism in the "pure" form the Pilgrims envisioned was the animating principle of Plymouth Colony and that the Pilgrims planned to use law to effectuate that animating principle.[25] The Mayflower Compact proclaimed, in pertinent part, that the Pilgrims had "undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*" and "by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony."[26]

The settlers who voyaged on the *Mayflower* numbered 132: 102 passengers and 30 crew. Forty-four were "committed" Pilgrims; and of those 44, 18 were men, 11 were women, and 15 were children.[27] Forty-one persons signed the Mayflower Compact. When the *Mayflower* returned to England in April of 1621, the Pilgrims sent back a request for a patent to remain where they were. Their request was granted later that same year by the Council for New England in what has become known as the "Second Peirce Patent," which was valid for seven years.[28] If at the end of those seven years the Pilgrims' settlement was successful, then a new permanent patent would be issued. The settlers were empowered to make laws and govern themselves, as long as they did so in accordance with English custom and usage.

In 1628, after satisfying the seven-year requirement, the Pilgrims applied for a permanent patent from the Council for New England. That patent, commonly known as the "Warwick Patent," was granted in 1629/30 to "William Bradford and his associates."[29] Bradford initially had tried, but failed, to secure a royal charter for Plymouth.[30] The Warwick Patent repeated the animating principle of the colony: "that they may bee incouraged the better to proceed in soe pious a worke which may

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23 Cushing, *supra* note 22, at ix (editor's introduction).

24 Philbrick, *supra* note 1, at 42.

25 Montesquieu famously argued that each form of government has an animating principle—a set of "human passions that set it in motion"—and that each form can be corrupted if its animating principle is undermined. Charles de Montesquieu, The Spirit of the Laws 21, 30 [1748] (Anne M. Cohler et al. ed. & trans., 1989).

26 The Mayflower Compact of 1620, http://avalon.law.yale.edu/17th_century/mayflower.asp. The Mayflower Compact is reprinted in many other places. *See, e.g.,* The Compact with the Charter and Laws of the Colony of New Plymouth: Together with the Charter of the Council at Plymouth, and an Appendix, Containing the Articles of Confederation of the United Colonies of New England, and Other Valuable Documents 19-20 (William Brigham ed., 1836) (hereinafter cited as "Plymouth Colony Laws"). The original has been long lost. The reprinted language is from Bradford's manuscript.

27 *See, e.g.*, Bailyn, *supra* note 15, at 329.

28 The Second Peirce Patent is reprinted at, among other places, http://www.histarch.illinois.edu/plymouth/piercepat.html.

29 *See* Charter of the Colony of New Plymouth Granted to William Bradford and His Associates, http://avalon.law.yale.edu/17th_century/mass02.asp. The Warwick Patent is also reprinted in, among other places, Plymouth Colony Laws, *supra* note 26, at 21-27.

30 *See, e.g.*, Cushing, *supra* note 22, at x (editor's introduction).

especially tend to the propagation of religion."[31] In 1640/1 Bradford relinquished full interest in the Warwick Patent to "the Freemen of this Corporacon of New Plymouth."[32]

III. The Code of 1636

In 1636 Plymouth's general court appointed a committee of eight men to prepare, in conjunction with the governor and the assistants, a code of laws for Plymouth.[33] The committee's charge was "to peruse all the laws, orders and constitučons of the plantačons within this government that so those that are still fitting might be established; those that time hath made unnecessary might be rejected; and others that were wanting might be prepared, that so the next court they might be established."[34] Prior to the committee's formation Plymouth's laws tended to be improvised: "A few scattered enactments had been placed on the books, but for the most part the Pilgrims used the Scriptures, the Mosaic Code in particular, as legal writ."[35] For example, on December 17, 1623 the first law enacted in the colony decreed that "all criminal facts, and also all matters of trespasses and debts between man and man," should be tried by a jury.[36] Other early laws, such as March 29, 1626 laws against exporting timber, "corne, beans, or pease" and prohibiting local craftsmen from working for strangers, were adopted to help ensure the preservation of the fledgling colony.[37] Religious references were strewn throughout the early laws. A 1632/3 law about the need to fortify the fort, for instance, was justified on the basis that "christian wisdom teacheth us to depend upon God in the use of all good meanes for our safety."[38]

A leading historian of Plymouth's legal heritage called the code of laws that was enacted in Plymouth on November 15, 1636 "the first American constitution"[39] because that code was more than a mere compilation and revision of existing laws: it articulated the powers and form of the colony's government and contained a bill of rights. As such, "the 1636 code established a constitution of the type that was to become familiar in America after the Revolution."[40]

The 1636 code addressed basic problems common to all communities: crime, inheritance, marriage, the regulation of livestock, and the like. But Plymouth's religious foundations were also apparent in the code. Not only was

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31 Charter of the Colony of New Plymouth Granted to William Bradford and His Associates, *supra* note 29.

32 William Bradford, &c. Surrender of the Patent of Plymouth Colony to the Freeman, http://avalon.law.yale.edu/17th_century/mass05.asp.

33 *See* Plymouth Colony Laws, *supra* note 26, at 35-36.

34 *Id.* at 36.

35 Willison, *supra* note 6, at 317.

36 Plymouth Colony Laws, *supra* note 26, at 28.

37 *See id.* at 28-29.

38 *Id.* at 31.

39 Haskins, *The Legal Heritage of Plymouth Colony*, *supra* note 3, at 848.

40 *Id.* at 849. Some scholars disagree with Haskins about the primacy of Plymouth Colony's laws. For example, Edgar J. McManus insists that Massachusetts Bay Colony's laws were more influential. *See* Edgar J. McManus, Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692 at 16-17 (1993).

seemingly everyone in the colony—from the governor to "any residing within the government"[41]—expected to swear an oath that concluded with "So help you God who is the God of truth and punisher of falsehood,"[42] government officials (assistants and constables, in particular) who were required to make decisions involving individual persons were instructed to exercise the "wisdom" and "discretion" with which God had endowed them.[43] "Holy days" were to be designated periodically by the governor and the assistants for purposes of "humiliation" and "thanksgiving."[44]

The 1636 code's use of the Bible in crafting provisions related to crime illustrated "the continuing importance of the religious ideals which had inspired the founding of the colony."[45] The code likewise reflected the Pilgrims' concern about the regulation of personal behavior as a manifestation of living a Godly life. Detailed provisions were included in the 1636 code and subsequent laws about drinking, gaming, idleness, lying, swearing, and related vices. Drunkenness, for example, was defined in a 1646 law with particular specificity: "And by drunkennesse is understood a person that either lisp or faulters in his speech by reason of over much drink, or that staggers in his going or that vomitts by reason of excessive drinking, or cannot follow his calling."[46] The 1636 code itself included a catch-all provision authorizing grand juries to inquire "into the abuses & breaches of such wholesome lawes & ordinances as tend to the preservačon of the peace and good of the subject."[47]

The "rudimentary" declaration of rights contained in the code of 1636 was "the first enactment of its kind in America."[48] The preamble guaranteed to Plymouth's inhabitants the rights and liberties of Englishmen.[49] The following provisions were then interspersed throughout the code:

> [N]o imposičon law or ordnance be made or imposed upon or by ourselves or others at present or to come but such as shall be made or imposed by consent according to the free liberties of the state and Kingdome of Engl. and no otherwise.[50]
>
> That all trialls whether capitall or between man & man be tryed by Jewryes according to the presidents of the law of Engl. as neer as may be.[51]
>
> That the lawes and ordnances of the Colony & for the government of the same be made onely by the freemen of the Corporačon and no other, provided that in such rates & taxačons as are or shall be laid upon the

41 Plymouth Colony Laws, *supra* note 26, at 40.
42 *See, e.g.*, *id.* at 40.
43 *Id.*
44 *Id.* at 48.
45 Haskins, *The Legal Heritage of Plymouth Colony*, *supra* note 3, at 851.
46 Plymouth Colony Laws, *supra* note 26, at 84.
47 *Id.* at 41.
48 Haskins, *The Legal Heritage of Plymouth Colony*, *supra* note 3, at 854.
49 *See id.*
50 Plymouth Colony Laws, *supra* note 26, at 36.
51 *Id.* at 42.

> whole they be without partiality so as the freeman be not spared for his freedome, but the levy be equall. And in case any man finde himselfe aggrieved, that his complaint may be heard & redressed if there be due cause.[52]

Notably, religious freedom in the modern conception of that ideal was not among the identified liberties because the Pilgrims were committed to the perfection of their religious faith rather than to toleration of different faiths. Concisely put, the Pilgrims believed that the inhabitants of Plymouth Colony should be free to worship *as God ordained*. Numerous laws enacted after the 1636 code went into effect made this fact abundantly clear. For example, a March 3, 1638/9 law forbade "p^rfane swearing and cursing,"[53] while a law enacted at the June 10, 1650 general court session demonstrated that the Pilgrims' Separatist orientation was the only acceptable religious perspective in the colony. That law decreed:

> That forasmuch as there risen up amongst us many scandalus practices which are likely to prove destructive to our churches and common peace; That whosoever shall heerfter set up any churches or publicke meetings diverse from those allreddy set up and approved, without the consent and approbacon of the government or shall continew any otherwise set up without concent as aforsaid shalbe suspended from having any voyce in towne meetings and presented to the next generall Court to receive such punishment as the Court shall think meet to inflict.[54]

Laws were also enacted in the June 10, 1650 general court session against "villifying the minestry" and profaning the Lord's Day.[55]

The June 6, 1651 general court session opened with an additional law enforcing Plymouth's animating principle that took the form of imposing a ten shillings fine on any person who failed to attend church or who "doe assemble themselves upon any pretence whatsoever in any way contrary to God and the allowance of the Government."[56] Persons who violated that law in "any lazey slothfull or profane way" were subject to an additional ten shillings fine and to being "whipte."[57]

The first law passed during the June 5, 1655 legislative session reinforced Plymouth's animating principle: "That such as shall deney the Scriptures to bee a rule of life shall receive Corporall punishment according to the discretion of the Majestrate soe it shall not extend to life or limb."[58] This same legislative session saw laws enacted that forbade a minister from vacating his congregation for lack of pay unless and until the magistrates permitted it and that authorized the magistrates to compel the congregation to pay the minister, if necessary.[59]

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52 *Id.*
53 *Id.* at 65.
54 *Id.* at 92.
55 Plymouth Colony Laws, *supra* note 26, at 92.
56 *Id.* at 93.
57 *Id*.
58 *Id*. *at* 99.
59 *See id.*

A law was enacted during the June 6, 1656 legislative session prohibiting "Indian[s] from firing guns on the Sabbath or answare it at their prill."[60] The initial law enacted in the June 3, 1657 session required each town in the colony to select four men to assess taxes to support "an able Godly Teaching Minister which is approved by this Government."[61] The 1657 session also forbade any inhabitant of Plymouth from bringing "any quaker rantor or other notoriouse heritiques" into the colony.[62] A related law barred any inhabitant of "this Govrment" from "entertain[ing]" a Quaker because, the law asserted, Quaker "doctrine and practices manifestly tends to the subversion of the foundamentalls of Christian Religion Church order and the civill peace of this Govrment."[63] The penalty was five pounds per violation or "bee whipt."[64] The "rantor or quaker" was to be jailed until he reimbursed the costs of his imprisonment and extradition.[65] The anti-Quaker law concluded by decreeing that no Quaker meetings were permitted anywhere in Plymouth "under the penaltie of forty shillings a time for every speaker and forty shillings a time for the owner of the place that pmits them soe to meete together."[66] The "object" of Plymouth's general court was clear: "the glory of God" and "the free exercise of the leave and liberty of our consciences"—but, again, not liberty of conscience for those holding different religious beliefs—"in the publick worship & service of God wherever we should settle."[67]

IV. The Revised Code of 1658

On September 29, 1658 Plymouth's general court published a "revised" code of laws.[68] The revised code is more accurately characterized as a "collection" of laws "scattered through voluminous records" with "such amendments as the community demanded."[69] The following epigraph appeared at the bottom of the revised code's title page: "Bee subject to every Ordinance of Man for the Lords sake. 1 Peter 2cond 13th."[70]

The revised code opened with an "Address" by the general court to the inhabitants of Plymouth Colony that reaffirmed the government's commitment to Plymouth's animating principle and to the use of law to effectuate the animating principle: "God gave them right judgements and true Lawes … grounded on Principles of Morall Equitie, as that all men Christians espetially, ought alwaies to have an eye therunto, in the framing of theire Politique Constitutions … which hath its Originall from the Law of God."[71] The general court's Address reminded the

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60 Plymouth Colony Laws, *supra* note 26, at 100.
61 *Id.* at 101-02.
62 *Id*. at 102-03.
63 *Id.* at 103.
64 *Id.*
65 Plymouth Colony Laws, *supra* note 26, at 103.
66 *Id.* at 104.
67 *Id*. at 49, 50.
68 *Id.* at 105.
69 *Id.* at ix. That part of the Plymouth Colony Laws compiling the 1658 revised code included only new laws and existing laws that were materially altered. *See id.* at 121.
70 Plymouth Colony Laws, *supra* note 26, at 105.
71 *Id.* at 106.

inhabitants that "the Magistrate hath his power from God."[72] The Address closed with the passage that served as the epigraph that opened this article.

The revised laws themselves continued to reflect the general court's commitment to the perfection of Plymouth Colony's Christian faith. For example, persons convicted of adultery were to be "severely punished" by being whipped on two separate occasions: once in front of the convicting judicial body and a second time as "the Court shal order."[73] The adulterer also was required to "weare two Capitall letters viz. A D. cut out in cloth and sowed on theire uper most Garments on their arme and backe."[74] Persons caught traveling on the "Lords day" were subject to a twenty-shilling fine or four hours in the stocks.[75]

Harsh treatment against Quakers continued, in large part because of their perceived desire to "destroy" the existing religious order.[76] The general court decreed that October 21, 1658 was to be a day of fasting and humiliation to appease "Gods despleasure" that was manifested in, among ways, the "leting loose as a scourage vpon vs those freeting gangreinlike doctrines and psons commonly called Quakers."[77] No "Quaker Rantor or any such corrupt pson" could be admitted as a freeman in the colony or vote in elections.[78] Persons who opposed "the good and wholsome laws" of the colony or who were "manifest opposers of the true worship of God" were also prohibited from being freemen.[79]

Lastly, the importance of law in Plymouth Colony was manifested by the final enactment in the 1658 revised code: every town in the colony was required to possess a book of laws that would be read "oppenly" every year.[80]

Laws continued to be enacted after the publication of the 1658 revised code reflecting Plymouth's commitment to the Word of God rightly understood. For example, the June 7, 1659 general court session pressed ahead with the colony's harsh treatment of Quakers by mandating the seizure of "Quakers bookes epistles or writings" found in the colony.[81] The desire to rid the colony of Quakers was so great that the general court authorized the government to pay Quakers' moving expenses, and any fines a Quaker incurred while residing in Plymouth would be forgiven if the Quaker left.[82] Further, a law was passed that named specific freemen who were empowered to attend Quaker meetings for a short time "to endeavor to

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72 *Id*. at 107.

73 *Id*. at 113. Unlike in Massachusetts Bay Colony, adultery was never a capital crime in Plymouth Colony.

74 *Id.*

75 Plymouth Colony Laws, *supra* note 26, at 113.

76 McManus, *supra* note 40, at 184.

77 3 Records of the Colony of New Plymouth in New England 151 (Nathaniel B. Shurtleff ed., 1855) (hereinafter cited as "PCR"). Shurtleff edited volumes 1-8. David Pulsifer edited volumes 9-12.

78 Plymouth Colony Laws, *supra* note 26, at 113-14; *see also id.* at 120 (calling for the erection of a "work-house" for Quakers and others who endeavored to "subvert civill state" and "pull downe all churches and ordinances of God to thrust us out of the ways of God").

79 *Id.* at 113-14.

80 *Id.* at 121.

81 *Id.* at 122.

82 *See id.*

reduce them from the error of theire ways."[83] Interestingly, the 1651 law punishing absence from church on Sunday was replaced in 1659 with a less severe law that omitted the possibility of whipping the offender.[84]

The legislative assault on Quakers continued in the June 10, 1660 general court session. That session opened by reiterating that Quaker "doctrine and practices manifestly tends to the subversion of the foundamentals of Christian religion Church order and the Civill peace of this Government."[85] Laws were enacted during the session that prohibited any inhabitant from "entertain[ing]" a Quaker under penalty of a five pound fine and whipping, that required Quakers apprehended in the colony to be committed to "Jayle" and then to be "publickly whipt" if they refused to leave, that fined anyone who hosted or permitted a Quaker meeting, that authorized inhabitants to apprehend Quakers, and that forbade inhabitants from furnishing a horse to a Quaker because a horse allowed a Quaker "the more speedy passage from place to place to the poisoning of the Inhabitants with theire cursed Tenetts" and a horse also helped a Quaker avoid apprehension.[86] Bringing a Quaker into Plymouth was likewise prohibited.[87]

The focus on Quakers continued in the June 4, 1661 general court session. Marshals and constables were instructed to whip Quakers, "or cause them to be whipt with rodds; soe it exceed not fifteen stripes."[88] Quaker meetings continued to be forbidden, with the penalty increased to forty shilling or a whipping for anyone who permitted one.[89] The owner of a house that hosted a Quaker meeting was subject to a five pound fine and to being "publickly whipt."[90] Specific freemen were again authorized to attend Quaker meetings to try to persuade Quakers of the errors of their ways and "Marshall Gorge Barlow" was empowered to arrest Quakers "in any pte of this Jurisdiction."[91]

The 1662 general court session was silent about Quakers. Protecting the colony's religious foundation remained the primary purpose of the law, however. Laws were enacted that recommended that a part of every whale "cast" on shore be appropriated for the support of the ministry and "ordinary keepers" were prohibited from selling wine or liquor on the "Lords day."[92] Alleged violations of previously enacted laws about public worship were to be "carefully looked into and p^{r}vented."[93]

This pattern continued in the 1663 general court session. For example, a law was passed that declared that no new settlement could be established in Plymouth

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83 Plymouth Colony Laws, *supra* note 26, at 125.

84 *See id.* at 123.

85 *Id.* at 125-26.

86 *Id*. at 126-27. The laws about entertaining Quakers and hosting Quaker meetings were repealed in 1661. Another law imposed a fine if the "overseer" of any military squadron in the colony failed to present a list of soldiers who did not bring their "armes" to church on Sunday. *Id*. at 128.

87 *See id.* at 127.

88 Plymouth Colony Laws, *supra* note 26, at 130.

89 *See id*.

90 *Id.* at 130-31.

91 *Id*. at 130. As hostile to Quakers as Plymouth's laws plainly were, no Quakers were sentenced to death in the colony. *See* Edwin Powers, Crime and Punishment in Early Massachusetts, 1620-1692: A Documentary History 330 (1966).

92 Plymouth Colony Laws, *supra* note 26, at 135, 137.

93 *Id*. at 138.

Colony "without a competent companie or number of Inhabitants as the Court shall judge meet to begine a societie as may in a measure carry on thinges in a satisfactory way both to Civill and Religious respects."[94] Existing settlements such as "Saconeesett" and "Acushenett" that had already been established without a sufficient number of inhabitants were required to raise funds to "procure an able Godly man for the dispensing of Gods word amongst them."[95] The general court expressed a willingness to assist any "plantation" in the colony in raising funds to ensure "the minnestry of the word of God amongst them."[96]

The June 8, 1664 general court session focused on trying to convince the crown to confirm Plymouth's patent and on a boundary dispute with Rhode Island.[97] Effectuating the Pilgrims' founding purpose returned to the general court's agenda in 1665: anyone who failed to attend church on Sunday by "jesting sleeping or the like" was to be "sett" in the "stockes."[98] The June 7, 1666 session saw the general court taking "notice of great neglect of frequenting the publicke worship of God upon the Lords day" and empowering the "Celectmen in each Towneship" to require "an account of them" and "returne theire names to the Court" if they failed to provide a satisfactory explanation.[99]

The July 2, 1667 general court session enacted laws establishing a procedure for distressed estates of ministers and encouraging Plymouth's townships to appropriate funds "towards defraying of the charge of the History of Gods dispensations towards N.E. in generall in speciall towards this collonie."[100] No laws about religion were enacted in 1668. The 1669 general court session reiterated the requirement that constables were to "take notice" of persons who "sleep or play about the meeting house in times of the publicke worship of God on the Lords day."[101] Persons who rode in an "unesessary violent" fashion were to have their names presented to the general court.[102]

The animating principle was again the dominant concern during the 1670 general court session. The 1657 law that had been dedicated to raising ministers' salaries was amended to permit the general court to appoint two people in each town to raise funds for "theire minnesters maintainance."[103] A related law specified that in towns where there was no resident minister, the general court could levy a tax "for building of a meeting house or for incurragement of a minnester to labour amongst them or other such pious uses as the Court may improve it in theire good."[104] Another law mandated that the names of any persons who "slothfully doe lurke att hom or gett together in companie to neglect the publicke worship of

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94 *Id.* at 142.
95 *Id.* at 142-43.
96 *Id.* at 143.
97 *See, e.g.*, Plymouth Colony Laws, *supra* note 26, at 144-45.
98 *Id.* at 147.
99 *Id.* at 150. The 1666 session also repealed the magistrates' exemption from taxes. *See id.* at 151.
100 *Id*. at 152, 153.
101 *Id.* at 158.
102 Plymouth Colony Laws, *supra* note 26, at 158. Another law specified that recourse to the laws of England was appropriate when "there is noe other law provided by this Court more suitable to our Condition." *Id*. at 159.
103 *Id.* at 159.
104 *Id.* at 160.

God or prophane the Lords day" be submitted to the general court.[105] The 1670 session also found the general court appointing a committee to once again revise Plymouth's laws.[106]

V. The Revised Code of 1671

The 1671 general court session provided a succession plan if "God should take away the Gov^{r} by death or otherwise deprive of us his healp": the eldest magistrate was to complete the governor's one year term.[107] In addition, the revised code authorized in 1670 was completed and printed. The epigraph on the title page once again read: "Be subject to every Ordinance of Man for the Lord's sake. 1 Pet. 2. 13."[108] Chapter I of the 1671 revised code contained nine "Generall Fundamentals" that were declared "inviolable."[109] Fundamental 4 specified that no inhabitant of the colony could be made to suffer other than through "some express Law of the General Court of this Colony, the known Law of God, or the good and equitable Laws of our Nation suitable for us."[110] Fundamental 8 was an ode to the animating principle itself:

> 8. That whereas the great known end of the first comers, in the year of our Lord, 1620, leaving their Native Country, and all that was dear to them there; transporting themselves over the vast Ocean into this remote waste Wilderness, and therein willingly conflicting with Dangers, Losses, Hardships and Distresses sore and not a few; WAS, that without offence, they under the protection of their Native Prince, together with the enlargements of his Majesties Dominions, might with the liberty of a good conscience, enjoy the pure Scriptural Worship of God, without the mixture of Humane Inventions and Impositions: And that there children after them might walk in the Holy wayes of the Lord. … And whereas by the good Hand of our God upon us, many others since the first comers are for the same pious end come unto us, and sundry others rise up amongst us, desirous with all good conscience to walk in the Faith and order of the Gospel; whereby there are many churches gathered amongst us walking according thereunto. … It is therefore for the Honour of God and the propagation of Religion, and the continued welfare of the Colony Ordered by this Court and the Authority thereof, That the said Churches already gathered, or that shall hereafter be orderly gathered, may and shall from time to time by this Government be protected and encouraged, in their peaceable and orderly walking, and the Faithful, Able, Orthodox, Teaching Ministry thereof, duely encouraged and provided for; together with such other Orthodox able Dispensers of the Gospel, which shall or

105 *Id.* at 161.
106 *See id*. at 163.
107 Plymouth Colony Laws, *supra* note 26, at 164.
108 *Id.* at 239.
109 *Id*. at 241, 243.
110 *Id.* at 241.

> may be placed in any Township in this Government, where there is or may be defect of Church Order.[111]

Chapter II of the 1671 revised code memorialized the capital laws. Many traced directly to the laws of God. The first two capital laws, idolatry and blasphemy, cited Bible verses to justify the imposition of the death penalty.[112] The other capital offenses, many of which also found support in the Bible, were treason, conspiring against the government of the colony or a particular town, willful murder, manslaughter, murder by guile or poisoning, witchcraft, bestiality, sodomy, bearing false witness, man-stealing, cursing or smiting one's father or mother, disobedience by a child, rape, and willful burning of a house or ship.[113]

Chapter III covered criminal laws. Because the revised code was a compilation of existing laws, many of the criminal laws that were intertwined with the animating principle were mentioned above: adultery, fornication, carnal copulation after contract, profane swearing, profanation of the Lord's day, missing church services, speaking contemptuously about the Bible or a minister, heresy, and smoking on Sunday.[114] Robbery on the Sabbath was to be punished by branding the offender on the forehead.[115] A person committing a "dangerous Error or Heresie" about the "Christian Faith or Religion" could be banished.[116] Plymouth's inhabitants also had a "duty to restrain or provide against such as may bring in dangerous Errors or Heresies, tending to corrupt or destroy the souls of men."[117]

Chapter IV catalogued actions at law,[118] Chapter V canvassed the various courts in Plymouth Colony,[119] and specified that an inhabitant needed to be "Orthodox in the Fundamentals of Religion" to be admitted as a "freeman" of the colony and to vote in town meetings. "Apostates from the Fundamentals of Religion" were to be disenfranchised.[120]

Chapter VI addressed presentments, indictments, jurors, and juries;[121] and Chapter VII covered constables.[122] Both chapters touched upon the animating principle. For example, inhabitants were reminded in Chapter VI that law-breaking "tend to the hurt and detriment of Religion, Civility, Peace, society or neighborhood,"[123] while Chapter VII empowered constables to "Apprehend without Warrant" inhabitants engaged in "Sabbath-breaking," among other offenses,[124] and concluded by requiring both constables and town selectmen to "diligently look after such as sleep or play about the Meeting house, in times of the public Worship

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111 *Id.* at 242-43.
112 *See* Plymouth Colony Laws, *supra* note 26, at 243-44.
113 *See id.* at 244-45.
114 *See id.* at 245-52.
115 *See id.* at 246.
116 *Id.* at 248.
117 Plymouth Colony Laws, *supra* note 26, at 248.
118 *See id.* at 252-56.
119 *See id.* at 256-62.
120 *Id.* at 258.
121 *See id.* at 262-63.
122 *See* Plymouth Colony Laws, *supra* note 26, at 264-68.
123 *Id.* at 263.
124 *Id.* at 266.

of God on the Lords-day … as also such as practise unnecessary violent Riding on the Lords-day."[125]

Chapter VIII concerned ministers' maintenance; the education of children; the misspending of time; and the registration of marriages, births, and burials.[126] The section on the maintenance of ministers opened by noting "the great prejudice to the souls" of the inhabitants of any town that did not have a minister and decreed that "the whole, both Church and Town are mutually ingaged to support the same."[127] Taxes were to be levied in each town to pay the minister.[128] If a town failed to levy the tax, the general court would levy it for them.[129] The lack of religious liberty in the modern conception of that ideal was manifested again by the concluding paragraph of the section on minister maintenance where it was decreed that "no publick meeting" could be held without the general court's approval in order to ensure orthodoxy in "the Fundamentals of Religion."[130] The section on the education of children emphasized that children needed to be able to read so that they were "able duely to read the Scriptures" and "to understand the main Grounds and Principles of Christian Religion, necessary to Salvation."[131]

Chapter IX was dedicated to the day-to-day operation of the towns,[132] and Chapter X regulated lands, inheritance, and wills.[133] Chapter XI addressed fishing and fish,[134] Chapter XII covered military affairs, and included a provision providing for lifetime support of any soldier injured during military service.[135] Chapter XIII addressed ordinaries and forbade the selling of alcohol on the Sabbath.[136] Chapter XIV prohibited "Indians" from profaning the Sabbath by "Hunting, Fishing, Fowling, Travailing with burdens, or by doing any servile work thereupon."[137] Chapter XV focused on horses.[138]

Laws continued to be enacted after the publication of the 1671 revised code. In the 1672 legislative session the general court recommended that the towns contribute financially to Harvard College "from whence through the blessings of God issued many usefull persons for publique service in church and Comonwealth."[139] The pattern of law reform persisted in 1673 with the general court recommending that a committee consolidate the colony's laws into "one vollume."[140] An additional law was enacted in 1674 once again prohibiting ordinary keepers from serving alcohol on the Sabbath.[141] In 1675 the general court decreed that a church be erected in each

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125 *Id*. at 268.
126 *See id.* at 268-73.
127 Plymouth Colony Laws, *supra* note 26, at 269.
128 *See id.*
129 *See id.* at 270.
130 *Id.*
131 *Id.*
132 *See* Plymouth Colony Laws, *supra* note 26, at 273-78.
133 *See id.* at 279-82.
134 *See id.* at 282-84.
135 *See id.* at 285, 286.
136 *See id.* at 286, 287.
137 Plymouth Colony Laws, *supra* note 26 at 288.
138 *See id.* at 291-93.
139 *Id.* at 167.
140 *Id.* at 170.
141 *See id.* at 171.

"Towne of this Govrment for the Towne comfortably to meet in to worship God."[142] If this was not done, the governor and magistrates were empowered to appoint a "pson or psons" to build the church and charge the inhabitants of the particular town for doing so.[143]

The November 4, 1676 general court session—a session convened shortly after the March 12 attack on Plymouth by Native Americans during King Philip's War (1675-1678)—devoted a lot of attention to protecting Plymouth from "Indians." For example, selling or giving guns to Indians was punishable by death.[144] The June 5, 1677 session returned the focus to the animating principle. More specifically, the general court expressed concern about the continuing problem of "the raiseing of a comfortable and certaine maintenance for the minnesters of the Gospell in this Collonie" and centralized the compensation system as a way to try to solve the problem.[145] The 1678 session decreed that towns unable to financially support a minister were to be assisted by the general court.[146] A related law mandated that a church be "erected finished repaired and inlarged as there shalbe need" in every town in Plymouth.[147] Inhabitants who failed to take the oath of fidelity were prohibited from voting in town meetings because they "doth much obstruct the carrying on of religion in the publicke weale" and "intruders" in the colony were to be warned to leave so as to prevent "prophanes increasing in the Collonie which is soe provoakeing to God and threatening to bringe Judgment upon us."[148]

The 1679 and 1680 general court sessions enacted no legislation relating to the animating principle, and the 1681 session passed a minor law requiring that one-quarter of every military company bring their arms to meetings on Sunday.[149] The animating principle was front and center during the July 7, 1682 session: no one was allowed to "attend servile worke or labour or any sports" on days "appointed by the Court for humilliation by fasting and prayer or for publicke Thanksgivieng," and no one was permitted to travel on Sunday without a "Tickett."[150]

The 1683 and 1684 general court sessions focused on non-religious matters such as military defense of the colony and the repair of roads.[151] The general court in 1685 ordered the town of Dartmouth to raise twenty pounds "for the encouragemtt of som to preach the word of God among them."[152] In 1685 the laws were again revised and printed.[153] The 1685 revised code did not differ materially from the 1671 edition. Courts of selectmen were empowered to convict and punish persons for "Sabbath-breaking" and "Indians" were not allowed to "*Powwow* or perform outward Worship to the Devil or other false God" or "resort to any English house on the Lords day."[154]

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142 Plymouth Colony Laws, *supra* note 26, at 175.
143 *Id.* at 175-76.
144 *See id.* at 178.
145 *Id.* at 186.
146 *See id.* at 187.
147 Plymouth Colony Laws, *supra* note 26, at 187.
148 *Id.* at 188.
149 *See id.* at 188-93.
150 *Id.* at 199.
151 *See id.* at 201-06.
152 Plymouth Colony Laws, *supra* note 26, at 206.
153 *See id.* at 293-301.
154 *Id.* at 298-99.

The importance of law in Plymouth Colony was again highlighted in the very first law enacted in the June 1686 general court session: "the Lawes that have been lately printed and having been ordered sometime since to be published in the severall Towns shall be of force and put in execution having respect to such additions and alterations as shall be made by this Court."[155]

Plymouth was a part of the Dominion of New England from the second half of 1686 to 1689 and there were no general court records for that time period. The June 1689 general court session celebrated the end of the "Illegall arbitrary power of S^{r} Edmond Andros" and the resumption of the "said former way of Government according to such wholesome Constitutions rules and orders as were here in force in June 1686."[156] A day of thanksgiving was called.[157] The May 20, 1690 session ordered a "hearty thanks" on behalf of the colony "to the Honorable Sir Henry Ashurst & the reverend M^{r} Increase Mather & y^{e} reverend M^{r} Ichabod Wiswall for their care & service for y^{e} good of this Colony."[158] Among their contributions was helping to ensure "that the Gospel be preached in the severall Towns."[159]

VI. Confederation with Puritan Colonies and Miscellaneous Laws

The animating principle was reflected in non-statutory laws too. On May 29, 1643, for example, Plymouth entered into a confederation with the Puritan colonies in New England—Massachusetts Bay, Connecticut, and New Haven—for the purpose of mutual defense.[160] The Articles of Confederation opened by proclaiming that the Gospel rightly understood was the animating principle of all four of the colonies: "Whereas wee all came into these parts of America with one and the same end and ayme namely to advaunce the Kingdome of our Lord Jesus Christ and to enjoy the liberties of the Gospell in puritie with peace."[161] The Articles went on to emphasize that, although the "firme and perpetuall league of Friendship" was established for defensive purposes, the survival of the colonies was essential "for preseruing and propagateing the truth and liberties of the Gospell."[162]

The Articles of Confederation was re-authorized in 1672 to recognize that "Newhauen" colony had become "one with Conecticott."[163] The commitment to protecting the animating principle remained the rationale for the confederation.[164]

Miscellaneous orders and instructions reflected the animating principle as well. For example, orders promulgated by Plymouth's general court regulating the

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155 *Id.* at 207.

156 *Id.* at 209. Edmund Andros was an English colonial administrator in North America. He served as governor of the Dominion of New England during most of its three-year existence. *See, e.g.*, Mary Lou Lustig, The Imperial Executive in America: Sir Edmund Andros, 1637–1714 (2002).

157 *See* Plymouth Colony Laws, *supra* note 26, at 211.

158 *Id.* at 234.

159 *Id.* at 235.

160 *See, e.g.*, *id.* at 307.

161 *Id.* at 308.

162 Plymouth Colony Laws, *supra* note 26, at 309.

163 *Id.* at 319.

164 *See id.* at 314, 315.

remote plantation of "Kennebeck" included a list of capital crimes rooted in the Bible.[165] In 1643, the general court issued orders for the establishment of a military company in the "Towns of Plimouth Duxburrow and Marshfield" that mandated that military exercises were "alwayes begun and ended with prayer" and that there be "one procured to preach them a sermon once a yeare."[166] On February 22, 1664/5 four propositions were presented to the general court of Plymouth Colony by "his Majesty's Commissioners" on behalf of an increasingly skeptical king. Proposition 3 asked whether men and women of "orthodox opinions" could be "admitted to the Sacrament of the Lord's supper, and their children to baptisim."[167] The general court's carefully worded answer was yet another indication of the importance of effectuating Plymouth's animating principle:

> 3. To the third we cannot but acknowledge it to be a high favour from God and from our sovereign, that we may enjoy our consciences in point of God's worship; the main end of transplanting ourselves into these remote corners of the earth, and should most heartily rejoice, that all our neighbours so qualified as in that proposition, would adjoin themselves to our societies according to the order of the gospel, for enjoyment of the sacraments to themselves and theirs, but if, through different persuasions respecting church government, it cannot be obtained, we would not deny a liberty to any according the proposition, that are truly conscientious, although differing from us, especially where his majesty commands it, they maintaining an able preaching ministry for the carrying on of public sabbath worship, which, we do not doubt, is his Majesty's intent, and withdraw not from paying their due proportions of maintenance of such ministers, as are orderly settled in the places where they live, until they have one of their own, and that in such places, as are capable of maintaining the worship of God in two distinct congregations. We being greatly encouraged by his Majesty's gracious expressions in his letter to us, and your honour's further assurance of his Royal purpose, to continue our liberties, that where places, by reason of our paucity and poverty, are uncapable of two, it is not intended, that such congregations as are already in being should be rooted out, but their liberties preserved, there being other places to accommodate men of different persuasions in societies by themselves, which, by our known experience, tends most to the preservation of peace and charity.[168]

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165 *See, e.g.*, *id.* at 322, 324 ("Sollem Conversing or compacting with the Divil by way of Conjurecon or the like"; "Wilfull Prophaning of the Lords day").

166 *Id.* at 325.

167 Plymouth Colony Laws, *supra* note 26, at 327.

168 *Id.* at 327-28. The Act of Surrender of the Great Charter of New England to His Majesty of 1635 also had noted that the purpose for founding the New England colonies was "the propagation and establishing of true Religion in those parts." *Id.* at 333, 334.

In what is best referred to as a "legality" rather than a law, Plymouth, like other New England colonies, opened each year's general court session with an annual election sermon.[169] The religious foundations of the colony were typically referenced.[170]

VII. Judicial Decisions

Plymouth Colony's courts frequently punished sinful behavior.[171] The available records suggest that sexual misconduct was the most common offense.[172] Four cases involved sodomy. On August 6, 1637 John Allexander and Thomas Roberts were convicted of homosexual sodomy. Allexander, who had a prior conviction, was "censured by the Court to be seuerely whipped, and burnt in the shoulder wth a hot iron, and to be p[er]petually banished the gouerment of New Plymouth, and if he be at any tyme found wthin the same, to bee whipped out againe by the appoyntment of the next justič, &c, and so as oft as he shall be found wthin this gouernment."[173] Roberts "was censured to be severely whipt" and enjoined from owning land.[174] On March 1, 1641/2 Governor Bradford, sitting as a magistrate, sentenced Edward Michell for one count of sodomy upon a man and for one upon a woman to be "presently whipt at Plymouth, at the publike place, and once more at Barnestable, in convenyent tyme, in the presence of Mr. Freeman and the committees of the said towne."[175] Edward Preston, who was the man with whom Edward Michell had engaged in sodomy, was sentenced to the same punishment for the same offense and also for trying to sodomize a third man.[176] John Keene, the man who "resisted the temptation," was "appoynted to stand by whilst Michell and Preston are whipt, though in some thing he was faulty."[177]

The Plymouth Colony records document two rape trials. In the first, Ambrose Fish was convicted by the court of magistrates in 1677 of raping Lydia Fish. His punishment was not the statutorily-decreed penalty of death, however. Instead, the court of magistrates "centansed" him to "suffer corporall punishment by being

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169 A "legality" is a "law" produced outside of a formal governmental setting that was generated from a widely-accepted repetitive social practice "within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest." Christopher Tomlins, *Introduction* to The Many Legalities of Early America 1, 2-3 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

170 *See, e.g.*, R. W. G. Vail, *A Checklist of New England Election Sermons,* Am. Antiq. Soc'y 233, 259 (1936).

171 The organizational history of Plymouth's courts is discussed in Scott Douglas Gerber, A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787 at 69-72 (2011). Plymouth's colonial court records are not complete, but they are nevertheless plentiful. *See* Powers, *supra* note 91, at 400. Powers describes Plymouth's criminal justice records.

172 The Plymouth Colony records about sexual misconduct are collected at http://www.histarch.illinois.edu/plymouth/Lauria2.html. The Pilgrims believed that sex was to be enjoyed only in marriage to fulfill God's plan for procreation.

173 PCR, *supra* note 77, at 1:64.

174 *Id.*

175 *Id.* at 2:35.

176 *See id.* at 2:35-36.

177 *Id.* at 2:36.

publickly whipt att the post."[178] Capital punishment was not imposed in the second of the rape cases, either. The court of magistrates noted in that 1682 case that the defendant was "but an Indian, and therfore in an incapasity to know the horiblenes of the wickednes of this abominable act, with other cercomstances considered, hee was centanced by the Court to be seuerly whipt att the post and sent out of country."[179]

Four reported cases of buggery are memorialized in the Plymouth Colony records. In 1642 Thomas Graunger was sentenced to death by Governor Bradford for "buggery with a mare, a cowe, two goats, diuers sheepe, two calues, and a turkey."[180] The next year John Walker was ordered by the governor to appear before the governor and assistants to answer the charge against him of "lying with a bitch,"[181] and in 1665/6 William Honeywell was acquitted by the general court of the charge of "buggery with a beast."[182] The case that tied the charge most explicitly to the animating principle involved Thomas Saddeler. The 1681 indictment read as follows:

> Thomas Saddeler, thou art indited by the name of Thomas Saddeler, of Portsmouth, on Road Iland, in the jurisdiction of Prouidence Plantations, in New England, in America, labourer, for that thou, haueing not the feare of God before, nor carrying with thee the dignity of humaine nature, but being seduced by the instigation of the diuill, on the third of September in this psent year, 1681, by force and armes, att Mount Hope, in the jurisdiction of New Plymouth, a certaine mare of a blackish couller then and therre being in a certaine obscure and woodey place, on Mount Hope aforesaid, neare the ferrey, then and there thou didst tye her head vnto a bush, and then and there, wickedly and most abominably, against thy humaine nature, with the same mare then and there being felloniously and carnally didest attempt, and the detestable sin of buggery then and there felloniously thou didest comitt and doe, to the great dishonor and contempt of Almighty God and of all mankind, and against the peace of our soû lord the Kinge, his crowne, and dignity, and against the lawes of God, his Ma^{tie}, and this jurisdiction.[183]

Saddeler was convicted by a jury and sentenced to be whipped, sit in the gallows with a rope around his neck, and banished from the colony.[184]

In 1641, Thomas Bray, a single man, and Anne Linceford, the wife of Thomas Linceford, were convicted of adultery and "vncleanesse," for which they were publicly whipped and required to "weare (whilst they remayne in the goûment) two letters, viz[;] an AD for Adulterers, dāly, vpon the outeside of their vppermost garment, in a most emenet place thereof."[185] Scores of additional adultery,

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178 PCR, *supra* note 77, at 5:245-46.
179 *Id.* at 6:98.
180 *Id.* at 2:44.
181 *Id.* at 2:57.
182 *Id.* at 4:116.
183 PCR, *supra* note 77, at 6:74-75.
184 *See id.*
185 *Id.* at 2:28.

fornication, attempts and propositions, lascivious and suspicious conduct, and miscellaneous sex offenses are chronicled, albeit concisely, in the Plymouth Colony records.[186] The sentences imposed were sometimes barbaric (e.g., "burned in the face with a hott iron").[187] Although the recorded case descriptions are brief, several unambiguously reflected a commitment to the animating principle. For example, in March 1685/6 Matthew Boomer Jr. was convicted of, among other offenses, "breaking the Sabboth by sufering his Indian seruants to hunt on the Saboth day," for which he was fined twenty shillings.[188] On May 7, 1661 Ann Sauory was convicted by the court of assistants of "being att home on the Lords day with Thomas Lucas att vnseasonable time, namely, in the time of publicke exercise in the worship of God, and for being found drunke att the same time vnder an hedge, in vnciuell and beastly manor."[189] She was sentenced to sit in the stocks.[190]

Plymouth Colony's courts tried individuals for non-sexual offenses against God too. At least eleven men and one woman were executed for murder. The first was John Billington, one of the original *Mayflower* passengers, who had been convicted of shooting a neighbor "with a gune, whereof he dyed."[191] After the leaders of Plymouth Colony had consulted with Governor John Winthrop of Massachusetts Bay Colony about whether Billington "ought to dye, and the land purged of blood" as the Bible had commanded, Billington was hanged.[192] Significantly, at the time of Billington's sentencing, murder had not yet been made a capital statutory crime and Billington was sentenced to death solely on the basis of Scripture.

With respect to examples of non-sex offenses that were not capital crimes, on July 5, 1635 Thomas Williams was charged with "speaking profane & blasphemous speeches against y^{e} majestie of God."[193] Williams was acquitted, "though the Goue^{r} would haue had him punished wth bodly punishmente, as y^{e} case seemed to require."[194] On December 1, 1640 Governor Bradford discharged the presentment against Mark Mendlowe for "drawing eel pott[s]" on the Sabbath because Mendlowe had done so out of "neccessyte."[195] On March 2, 1640/1 Edward Hall was sentenced to the stocks for profane swearing.[196] On June 1, 1641 George Willerd was indicted for criticizing the churches in Plymouth and Massachusetts Bay for not baptizing infants.[197] On October 2, 1651 eight individuals were prosecuted for "the continewing of a meeting vppon the Lords day from house to house, contrary

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186 For example, on October 3, 1665 Sarah Ensigne was convicted of committing "whordom" and sentenced to be whipped "att the carstaile." *Id*. at 4:106. Bradford expressed concern in his history of Plymouth Colony about the frequency of "unclainnes" among the inhabitants. Bradford, *supra* note 14, at 459. He also noted that alcohol abuse was a common problem. *See id.* at 459.

187 PCR, *supra* note 77, at 1:132.

188 *Id.* at 6:178.

189 *Id.* at 3:212.

190 *See id.* at 3:212.

191 As quoted in Powers, *supra* note 91, at 301.

192 *Id*.

193 PCR *supra* note 77, at 1:35.

194 *Id.*

195 *Id.* at 2:4.

196 *See id.* at 2:9.

197 *See id.* at 2:17.

to the order of this Court enacted June the 12th, 1650,"[198] while five days later Arthur Howland was convicted by Governor Bradford of "not frequenting the publicke assemblyes on the Lords daies" and admonished to "labore to walk inofensiuely."[199] On February 3, 1656/7 Sarah Kerbey was sentenced to be whipped for causing a disturbance during church for a second time.[200]

Plymouth's court records report only one trial for witchcraft. In 1677 Mary Ingham was indicted for having "malliciously procured much hurt, mischeiffe, and paine unto the body of Mehittable Woodsworth … causing her … to fall into violent fitts" until she was "almost bereaued of her sences."[201] The jury found her not guilty.[202]

VIII. Conclusion

"Law" has been defined in many different ways by many different people throughout history. Aristotle, Cicero, Thomas Aquinas, and other proponents of natural law argued that law is the exercise of reason to deduce binding rules of moral behavior from nature's or God's creation. The renowned English positivist John Austin, in contrast, maintained that law is the command of the sovereign. To Karl von Savigny and other proponents of the so-called historical school, law is the unconscious embodiment of the common will of the people. To the philosophical school, law is the expression of idealized ethical custom. The dominant contemporary view seems to be that law is the reflection of social, political, and economic interests.

For the Pilgrims of Plymouth Colony, law was both the memorialization of their commitment to the Word of God and an instrument for exercising social control so as to effectuate that commitment. The Pilgrims, of course, used law to regulate the more mundane aspects of life as well. For example, a law enacted on March 29, 1626 prohibiting houses in the colony from being covered with "any kind of thatche as straw reed &c." was designed to reduce the risk of fire destroying the settlement,[203] while a July 1, 1633 law forbade inhabitants from pulling up footpaths "for driving of cattle or the like" because residents needed functioning walkways.[204] A 1637 law established "Ducksborrow" as a township,[205] and a 1651 law required

198 PCR, *supra* note 77, at 2:162.

199 *Id.* at 2:174. For a ten-year period between 1633-1643, six cases involving violations of the Lord's day in Plymouth Colony resulted in two fines, two whippings, one bond for good behavior, one sentencing to the stocks, and one banishment. *See* Powers, *supra* note 91 at 406 (table 3). Between 1652-1661, three cases of blasphemy resulted in two fines or whippings and one badge of shame; four cases of Sabbath-breaking led to two fines and two other penalties; four cases for absence from church netted one fine and three admonitions; twenty-six cases of attending Quaker meetings, four cases of holding Quaker meetings, and two cases of harboring Quakers were each penalized by fine. *See* McManus, *supra* note 40, at 206 (appendix C).

200 *See* PCR, *supra* note 77, at 3:111, 112. She was admonished the first time. *See id.* at 3:96 (March 5, 1655/6).

201 *Id.* at 5:223.

202 *See id.* at 5:224.

203 Plymouth Colony Laws, *supra* note 26, at 29.

204 *Id.* at 34.

205 *Id.* at 57.

coopers to make full-sized casks.[206] Many other examples could be cited. Indeed, quantitatively speaking, more laws were enacted by the Pilgrims that addressed the day-to-day activities of life in Plymouth Colony than memorialized the Pilgrims' commitment to eternal glory in the afterlife, but the latter was unquestionably more important, qualitatively speaking, than the former. In the oft-quoted words of a young William Bradford, "to keep a good conscience, and walk in such a way as God has prescribed in his Word, is a thing which I must prefer before you all, and above life itself."[207]

The Pilgrims were largely unsuccessful in using law to exercise social control on matters of religion. For example, as the above discussion makes clear, many towns failed to support their ministers, which was why the general court kept enacting laws to get them to do so. But the Pilgrims were successful in the symbolic use of law to memorialize their commitment to the Word of God rightly understood. In fact, they continued to use law in that fashion throughout the entirety of Plymouth's existence as a separate colony.

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206 *See id.* at 94.

207 As quoted in Cotton Mather, Magnalia Christi Americana: or, the Ecclesiastical History of New-England (1702), available at https://archive.org/details/magnaliachristia00math/page/n6, p. 81. Bradford would later hold Plymouth Colony together by force of his personality. When he died, it began falling apart. *See, e.g.*, Mark L. Sargent, *William Bradford's 'Dialogue' with History,* 65 New England Q. 389 (1992).

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Cartel Control of Attorney Licensure and the Public Interest*

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ABSTRACT

The purpose of regulating any profession is to assure competent practitioners, particularly where its absence can cause irreparable harm. Regulatory "licensing" ideally achieves such assurance, while at the same time avoiding unnecessary supply constriction. The latter can mean much higher prices and an inadequate number of practitioners. Regrettably, the universal delegation to attorneys of the power to regulate themselves has led to a lose/lose system lacking protection from incompetent practice while also diminishing needed supply. The problem is manifest in four regulatory flaws:

First, state bars—in combination with the American Bar Association—require four years of largely irrelevant higher education for law school entry. Most of this coursework commonly has nothing to do with law.

Second, and related, these seven-years of mandatory higher education (that only the United States requires for attorney licensure) impose extraordinary costs. Those costs now reach from $190,000 to $380,000 in tuition and room and board per student—driven by shocking tuition levels lacking competitive check.

Third, attorney training focuses almost entirely on a few traditional subjects, with little attention paid to the development of useful skills in most of the 24 disparate areas of actual practice (e.g., administrative, bankruptcy, corporate, criminal, family, taxation, et al.). And schools often pay scant attention to legislation, administrative proceedings, or the distinct areas of law that will be relevant to a student's future practice.

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* The word "cartel" is used purely according to its economic definition—"a grouping of producers who work together to protect their interests." *See Cartels*, Economics Online, www.economicsonline.co.uk/Business_economics/Cartels.html.

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Fourth, state bars rely on supply-constricting bar examinations of questionable connection to competence assurance. In the largest state of California, the bar examination fails about 2/3 of its examinees. This system has fostered an opportunistic cottage industry of increasingly expensive preparatory courses that further raise the cost of becoming an attorney—even after 7 years of higher education.

Meanwhile, the bars regulating attorneys in the respective states:

a) Do not treat negligent acts as a normal basis for discipline (outside of extreme incapacity);
b) Do not require malpractice insurance—effectively denying consumer remedies for negligence;
c) Do not allow clients injured by malpractice to recover from "client security funds";
d) Do not require post-licensure "legal education" in the area of an attorney's practice;
e) Do not test attorneys in the area of practice relied upon by consumers—ever; and
f) Respond to cost-effective, technology-centric solutions to legal problems not by regulation to assure consumer benefit, but by attempts to categorically foreclose them in favor of total reliance on often unavailable/expensive counsel.

No area of state regulation has more openly violated federal antitrust law than has the legal profession. The United States Supreme Court held in 2015 that any state body controlled by "active market participants" in a profession regulated is not a sovereign entity for antitrust purposes without "active state supervision." Yet four years later, attorneys continue to regulate themselves without such supervision, overlooking the threat of criminal felony and civil treble damage liability.

KEYWORDS

Consumer Protection; Antitrust; Attorney Regulation; Legal Education; Student Debt

CONTENTS

I. Introduction

An incompetent or dishonest attorney can visit irreparable harm upon his or her clients, and lessen the fairness and efficacy of the judicial system that is central to our democracy. Attorneys and physicians have a more compelling justification for a licensure requirement to practice than do barbers or astrologers (which California once seriously considered licensing). But these supply constraints have their own negative effects. They mean higher prices and diminished availability of needed services. So how do we reconcile these two legitimate and somewhat conflicting features? The question raised here is how to accomplish that balance, and just as importantly who should be doing the balancing.

It is critical to recognize that existing systems of entry in the licensed professions are controlled by those currently practicing in the professions. Although current practitioners may have advantageous knowledge about needed performance, the professions' control of their own supply gives rise to the appearance of a serious conflict of interest. Our regulatory systems raise the proverbial drawbridge for the benefit of those already in the castle. Those with an occupational self-interest decide who will be allowed to offer services in the future. This article questions whether this process reflects functioning democracy—one in which the People control the state, not the special interests.

Two facts make this a timely legal and ethical issue.

First, supply control through licensure is a restraint of trade that artificially affects prices—a *per se* antitrust offense when performed by horizontal competitors.

Second, the U.S. Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S.___, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), recently held that state regulatory boards controlled by "active market participants" in the trade or profession being regulated categorically lack sovereign status, and may not claim state action immunity for anticompetitive decisions made in the regulatory context unless an independent state body actively supervises all final decisions.

This profound legal circumstance raises particular questions as to the supply of attorneys in an era in which an increasing number of people in the U.S. report that they cannot afford a lawyer—and in which an estimated 75% of litigants in civil court are unrepresented.[1] It is time to revisit the wisdom and motivations behind deeply-engrained barriers to entering the legal profession. These barriers have been erected and maintained by attorney-dominated state bars across the country, with little-to-no supervision. Of specific and immediate concern are: 1) unprecedented student debt resulting from the skyrocketing costs of education (both undergraduate and at law schools); 2) unparalleled higher education prerequisites to licensure compared to other nations, without proof that seven years of higher education provides actual assurance of attorney competence; 3) declining bar exam pass rates nationwide, on an exam that has not been proven in content or cut score to correlate at all with competence assurance (especially given the evolution of legal practice in this technological age); and 4) un-redressed consumer harm resulting from failure to measure attorney competence at any point after the bar examination,

[1] William D. Henderson, *Legal Market Landscape Report Commissioned by the State Bar of California*, at 20 (July 2018).

and a profession-controlled system that generally does not provide a safety net to compensate victims who are injured by attorney error.

We ended the medieval guilds that controlled entry into occupations with good reason. Have we now resurrected them without proper checks?

This article seeks to measure and evaluate the performance of the legal profession in its own regulation, not based on our self-interested notions of public-spirited dedication to the common good, but based on what actually happens, what it costs, and how its justifications may not exist by any good faith measure.

It is possible to have both enhanced supply of attorneys and assured competence. Currently, we have neither. Here we propose ten reasonable corrections to the existing system that will bring about much–needed reform to the legal profession.

II. The Anticompetitive Underpinnings of Attorney Licensure in the United States

A. Attorney Self-Regulation and the State of the Legal Services Market

It has been well-documented for quite some time that indigent populations cannot access the legal services they need. According to a 2017 report, 86% of the civil legal problems reported by low-income Americans over the scope of one year received inadequate or no legal help.[2] And 71% of low-income households experienced at least one civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care.[3] These problems are not limited to the indigent. More and more individuals across the U.S. report that they cannot afford a lawyer.[4] Indeed a recent report found that a full 76% of civil cases in state courts involve a self-represented party.[5]

The diminishing ability of a majority of people in the United States to access legal services calls for a careful reexamination, starting with the origins of our current system. We can no longer ignore that onerous barriers to enter the profession, and ethics rules preventing the delivery of legal services through less expensive means, are the direct result of regulatory capture. Indeed, all of these artificial barriers—from exorbitantly difficult bar examinations to outright prohibitions on providing less expensive and more accessible legal services despite clear market demand—have been erected under the guise of "public protection" by those who directly benefit from their exclusionary outcomes: attorneys themselves.[6]

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2 Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* at 6 (June 2017). Prepared by NORC at the University of Chicago for Legal Services Corporation, Washington, DC.

3 *Id.*

4 Henderson, *Legal Market Landscape Report, supra* note 1, at 19-21.

5 *See* Paula Hannaford-Agor JD, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, at iv (National Center for State Courts 2015).

6 Henderson, *Legal Market Landscape Report, supra* note 1, at 21.

How has this occurred? Attorneys are regulated on a state-by-state basis, in varying forms and with varying levels of oversight by the respective state supreme courts. But this state regulation necessarily involves state rules and practices that may violate federal antitrust law. By its very nature, licensing is a means of controlling supply; the profession is establishing through its admissions rules an artificial barrier to entering the legal profession. In doing so, it artificially affects prices. This is a form of price fixing, considered unreasonable "*per se*" under the Sherman Act.[7] State regulators, including state bars, may nevertheless impose otherwise anticompetitive policies if they qualify for "state action immunity." The problem is, the U.S. Supreme Court has made clear that regulatory boards controlled by "active participants" in the trade or profession being regulated (e.g., state bars comprised of a majority of attorneys, and all of them are) cannot qualify for this immunity unless they can show that they are being independently and actively supervised by the state.

As noted, this principle was cemented by the Supreme Court's holding in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.[8] In that holding, Justice Kennedy wrote for the majority as follows:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.[9]

This is precisely what has been allowed to occur for decades with respect to the regulation of the legal profession, and the reason why the market for legal services is in desperate need of reform.

But state bars (and state supreme courts) across the country have been slow to recognize the anticompetitive implications of the landmark *North Carolina* holding on the existing regulatory structures for attorneys in every single state—structures that are obviously controlled by active market participants. Per the Supreme Court's decision, the only way to ensure that these state bars are not adopting anticompetitive policies is to ensure that their actions are "clearly articulated and affirmatively expressed as state policy," and that the state is independently and "actively" supervising them.[10] The Supreme Court, and the Federal Trade

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7 *U.S. v. Socony-Vacuum Oil*, 310 U.S. 150 (1940). Regulatory schemes also implicate a separate "*per se*" antitrust offense in the form of a horizontal "group boycott"—an exclusion of competitors by a group of professionals already in the field. *See Klor's, Inc. v. Broadway-Hale Stores, Inc*., 359 U.S. 207 (1959).

8 *N.C. State Bd. of Dental Exam'rs v. FTC,* 574 U.S ___, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015).

9 *Id.* at 1111. *See also id.* (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

10 *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110 (citation omitted).

Commission in its subsequently-issued Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Active Market Participants,[11] have set forth clear minimum requirements for establishing active supervision to assure that public decisions are made by an entity other than one controlled by the regulated trade or profession.

The Court has identified only a few constant requirements of active supervision:

> The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the State." Further, the state supervisor may not itself be an active market participant.[12]

State supreme courts—the state entities that are charged with "supervising" attorney regulation—are ill-equipped to actively supervise decisions by market participants. They are passive bodies, accustomed to resolving disputes brought before them. They lack the mechanisms for independent supervision, or for analysis as to the potential anticompetitive impacts of the policies adopted and implemented among the state bars.[13] To the authors' knowledge, no state Supreme Court has engaged in the type of supervision set forth in the *North Carolina* decision—with independent decisionmakers who do not participate in the market reviewing the substance of potentially anticompetitive decisions with veto power.[14]

Furthermore, such courts tend to embody confidence in their own profession and its membership, particularly where those persons are respected leaders, and may have been appointed to their state regulatory posts by the court itself. For example, as discussed *infra*, the California Supreme Court is currently, to its credit, investigating the bar exam cut score, and other entry restraint practices that

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[11] https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

[12] *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116–17 (citations omitted); *See also* FTC guidance, *supra* note 11, at 9.

[13] Some have even questioned whether state Supreme Court justices themselves are "active market participants" since they are attorneys capable of returning to private practice and may stand to benefit from the protectionist policies adopted by the state bars. *See* Tom Gordon, *State Bar of California Governance in the Public Interest Task Force*, Responsive Law (Apr. 22, 2016), https://www.responsivelaw.org/uploads/1/0/8/6/108638213/responsive_law_comments_to_ca_governance_task_force.pdf

[14] The *North Carolina* holding calls into question earlier Supreme Court precedent pertaining to anticompetitive conduct by State Bars. For example, *Bates v. Arizona*, 433 U.S. 350 (1977), held that the Arizona State Bar qualified for state action immunity from the antitrust laws, finding that the Arizona Supreme Court itself had adopted the rules in question and the Bar was merely enforcing those rules. *Id.* at 361. But this decision long preceded *North Carolina's* poignant discussion of precisely how a state must actively supervise "active participants" in a profession who are engaged in anticompetitive practices using the state regulatory apparatus. Nor did the *Bates* court consider the extent to which the Arizona Supreme Court had delegated its regulatory power to active market participants. *Hoover v. Ronwin*, 466 U.S. 558 (1984), which contained a similar holding pertaining to the Arizona Supreme Court, similarly lacks the active supervision analysis.

lead the majority of examination takers in California to flunk. But it is delegating the information gathering and consideration of alternatives to State Bar entities controlled by practicing attorneys. State supreme courts may qualify as independent supervisors for antitrust purposes. But they must be "active." It should go without saying that they must not delegate their supervisory role straight back to the very entities with an ulterior economic interest in the outcome.[15]

In the four years since the Supreme Court issued the *North Carolina* decision, state supreme courts have done little to supervise or curb protectionist behavior by state bars across the country. For example, in 2018, the Washington State Bar Association refused to add Limited License Legal Technicians (LLLT) and Limited Practice Officers (LPOs) to its Board of Governors, even despite the Washington Supreme Court's order that they do so.[16] In 2018, the Florida Bar sought an injunction against TIKD, an app which connects consumers to lawyers to represent them in traffic court, for the unauthorized practice of law.[17] The New Jersey Supreme Court declined to review a bar ethics opinion prohibiting lawyers from participating in fixed fee legal services platforms such as Avvo Advisor—an action which ultimately prompted Avvo to cease this service nationwide.[18] State supreme courts' practice of delegating competition-related decisions to their attorney-controlled state bars is prevalent across the nation. Their impact is acutely felt by those who cannot afford legal services as a result of the radical supply diminution and absence of alternative legal services from these cartel restrictions.

B. The Role of the ABA as Cartel Overseer

Headquartered in Chicago, the American Bar Association ("ABA") is a horizontal trade group of attorneys.[19] It boasts 400,000 members across the country, and its law school accreditation process affects every member of the public who seeks out a lawyer. Nineteen states and four territories require a degree from an ABA-

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15 *See* http://www.cpil.org/download/4.4.17.letter.Supreme.Court.follow.up.pdf.

16 *See, e.g.,* Washington State Bar Association Bylaws VI. 2. c.; *In the matter of the approval of amendments to WSBA Bylaws regarding members of the Board of Governors*, Supreme Court of Washington, Case No. 25700-B-483 (January 4, 2018).

17 *TIKD Servs. LLC v. Fla. Bar*, No. 17-24103-CIV, 2018 WL 4521198 (S.D. Fla. Sept. 20, 2018).

18 ACPE Joint Opinion 732, CAA Joint Opinion 44, UPL Joint Opinion 54, https://www.judiciary.state.nj.us/notices/2017/n170621f.pdf.

19 American Bar Association, *About the American Bar Association*, https://www.americanbar.org/. Although much of this article focuses on the self-interested practices of the ABA and state bar organizations, a *caveat* is appropriate. The attorneys who are a part of these organizations engage in laudatory and admirable work that is in the public interest. They include, for example, just within the ABA, the Center for Professional Responsibility, the Commission on Homelessness and Poverty, the Center on Children and the Child Litigation Rights Committee, among others. The critique herein is not intended to impugn a large part of the work of the ABA or state bars. Far from it. But the incidence of self-interested regulatory practice remains a serious problem that functions apart from conscious intent, and separate from the admirable work of many of its leaders and members.

accredited law school in order to take their bar exams.[20] If a law school does not conform to the standards of the ABA and pay the fees associated with accreditation,[21] its graduates cannot sit for the bar in other states that require it.[22] Indeed, any law school administrator is likely to admit that a major concern is the ABA accreditation visit that involves inspections, interviews and critiques of law school governance and policies. Even though the ABA is not a government entity,[23] part of its function is so closely intertwined with attorney regulation that it effectively functions as one—albeit one run by lawyers and lacking democratic legitimacy. Its actions all but carry the force of law.[24] Although its officers and agents are well-intentioned and engage in many salutary projects, it stands as a substantial impediment to attorney licensure in the public interest.[25]

As this article will explore, many of the factors contributing to what can best be described as a "failed market" for legal services have at their origin policies that were developed, and in some cases enforced, by the ABA. From stringent standards for law school accreditation (including a minimum number of costly tenured faculty and a unique-to-the-U.S. bachelor's degree requirement for all entering law students), to its model rules of professional conduct (prohibiting multijurisdictional practice, corporate ownership of law firms, and "fee sharing" with non-lawyers), the ABA has played a significant role in erecting the barriers to entering the legal

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20 *See* Judith Gundersen and Claire Guback, *Comprehensive Guide to Bar Admission Requirements 2019* at 10 (ABA 2019), http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf.

21 American Bar Association, *Schedule of Law School Fees* (Mar. 18, 2019 11:00 AM), https://www.americanbar.org/groups/legal_education/accreditation/schedule-of-law-school-fees/. Annual fees range from $18,175 for schools with enrollment of fewer than 400 full-time JD students to $29,480 for schools with enrollment of 1,201 or more full-time JD students. *Id. See also* Letter from Hon. Solomon Oliver, Jr., Chairperson, & Barry Currier, Managing Director of the ABA Section of Legal Education and Admissions to the Bar, to ABA Law School Deans, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2014_memo_re_law_school_fees.authcheckdam.pdf (explaining a three-percent increase in annual fees and an increase in the fee to apply for provisional ABA approval from $30,000 to $80,000).

22 *Id.*

23 *See supra* note 20 ("The American Bar Association is one of the world's largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities.").

24 Law schools are free to choose not to pursue ABA accreditation, but their graduates will be unable to practice in nearly a third of the states in the union. *See ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019*, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf; *see also ABA-Accredited Law School*, The Princeton Review, https://www.princetonreview.com/law-school-advice/law-school-accreditation ("Since passing the bar is a requirement for the practice of law almost everywhere, a degree from a school without ABA–accreditation is usually a ticket to nowhere.").

25 Notably, the antitrust division of the U.S Department of Justice has, on occasion, brought actions against the ABA. *See, e.g. U.S. v. American Bar Ass'n*, 135 F. Supp. 2d 28 (D.D.C. 2001) (challenging certain anticompetitive practices the ABA used in its law school accreditation process).

profession and the high costs of legal services.[26] On the other hand, if willing, it has the potential to implement sweeping positive changes to the profession.

III. Existing Barriers to Entering the Legal Profession

A. Law School Qualification: The Undergraduate Travail

Undergraduate College Education Costs

Undergraduate college education costs nationally continue to rise rapidly above inflation. In 1988, public college tuition cost an average of $3,360 per year.[27] That figure was $10,230 per year in 2018–19.[28] Over the same period, tuition and fees at private non-profit colleges climbed from $17,010 to $35,830 per year.[29] For all four years at private non-profit schools, the total has risen from $68,040 to $143,320 for tuition alone.[30]

Room and board has also increased. When including room and board with tuition those numbers jump from $9,480 per year in 1988 to $21,370 per year in 2018–19 for public schools and from $24,800 per year in 1988 to $48,510 in 2018–19 for private non-profits.[31] Including only basic tuition and room and board, the total cost of a four year undergraduate education is now $85,480 for in-state public college students, $149,720 for out-of-state public college students, and $194,040 for private school students.[32] And these figures exclude other often-substantial costs

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[26] The full time tenured faculty requirement for law schools noted above is a typical example of an ABA-facilitated restraint of trade as it prevents law schools from hiring more adjunct faculty. *See* https://www.americanbar.org/groups/legal_education/resources/standards/. Bringing adjuncts into law schools to teach practical skills has several advantages. These are practicing professionals with experience their tenured peers often lack. And a long-term rise in the number of adjuncts could allow for the hiring of fewer tenured faculty, thereby allowing for tuition reductions. However, the ABA's accreditation guidelines for law schools mandate a minimum size for full-time faculty. *See also* Deborah L. Cohen, *To Teach or Not to Teach: Adjunct Work Can Come with a Hefty Price*, ABA Journal (Aug. 1, 2012), http://www.abajournal.com/magazine/article/to_teach_or_not_to_teach_adjunct_work_can_come_with_a_hefty_price/; *see also* Debra Cassens Weiss, *Adjunct Law Prof: A Low-Paying Job, If You Can Get It*, A.B.A. J. (Sep. 30, 2010), http://www.abajournal.com/news/article/adjunct_law_prof_a_low-paying_job_if_you_can_get_it/.

[27] *See*https://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-and-board-over-time.

[28] *Id.*

[29] *Id.*

[30] *Id.* Note these figures use 2018 dollars to adjust for inflation.

[31] CollegeBoard, *Trends in College Pricing 2018*, at 9 (2018), https://trends.collegeboard.org/sites/default/files/2018-trends-in-college-pricing.pdf.

[32] Attendance at a public college for a non-resident of that state may be compelled based on limited facilities in a student's home state—particularly in the many states of small population. It may also be compelled due to family, spousal, military or employment changes or needs. Some states will allow a shift into resident tuition status prior to the completion of four or more years of college there. Such students may incur tuition/room and board charges in the $70,000 to $90,000 range while attending over four years.

that have also suffered major increases beyond inflation over the last thirty years, including transportation, communications, clothing, books, and food—all beyond what a college would provide.

College education today puts an unprecedented burden on families. Students and their parents are borrowing and sacrificing pensions to pay for education. In contrast to the dramatic rise of college costs, median family income in constant dollars nationally went up marginally from $51,973 in 1987 to $57,617 in 2016—the most recent Census Department figure. Basic college costs have increased from 20.4% of median income in 1971 to 51.8% today.[33]

Certainly there are benefits to a liberal arts education, including many of the courses discussed *infra*, but the evolving economy offers work in diverse, changing, and specialized fields increasingly unconnected to this lengthy and expensive precursor. The issue raised is not whether we must eliminate non-career-oriented courses altogether, but whether such courses need to include up to 40 three-unit subjects over four years, as opposed to a somewhat smaller number.

Four Years of Undergraduate Expense and Coursework as a Prerequisite to Law School

Throughout the United States, law school entry is essentially barred to anyone without a full undergraduate degree.[34] The crushing debt load on today's students, and the questionable relevance of many curricular choices, properly raises the following question: can four years of undergraduate education be conscionably justified as a mandatory prerequisite to law school? Virtually the entire world requires five years of total higher education to practice law. The United States generally requires seven. Is this burdensome prerequisite justified?

The United Kingdom teaches law as an undergraduate course of study lasting three years, followed by a one-year full-time practical skills training course, followed in turn by a one-year pupillage or apprenticeship in the case of barristers,[35]

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[33] https://college-education.procon.org/view.resource.php?resourceID=005532; note that these figures are gathered by gender and these are the median percentages as to males. The percentages as to females, with somewhat lower median income, are measurably higher.

[34] As part of its accreditation process, the ABA requires four years of undergraduate education as a prerequisite to law school entry. *See ABA Standards and Rules of Procedure for Approval of Law Schools 2018-2019*, *supra* note 24, at Standard 502(a). Note that the ABA does permit "three plus three" programs, where students enroll in three years of undergraduate study followed by three subsequent years of study at a law school to earn both a bachelor's degree and a JD. *Id.* at Standard 502(b); s*ee, e.g.*, *3 + 3 Law Program with Albany Law School*, University at Albany, State University of New York, http://www.albany.edu/advisement/albany_law_3+3.shtml *Prospective Students*, Tulane University Law School, http://www.law.tulane.edu/tlsadmissions/index.aspx?id=208. While certainly a step in the right direction to reduce student debt, these programs are rare and do not substantially address the mix of current problems, including the excessively irrelevant and costly undergraduate years.

[35] https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/becoming-a-barrister/, http://www.barcouncil.org.uk/becoming-a-barrister/how-to-become-a-barrister/. The three stages of training are known as the academic stage, the vocational stage, and the pupillage.

or two years of a practice-based training contract in the case of solicitors.[36] From the moment most law students begin university study, the education focuses on the practice of law. The doctrinal study in the first three years serves as a basis for future practical training.[37] For both solicitors and barristers, that practical training takes the form of a one-year course, designed to bridge the gap between the academics of the first few years and the apprenticeship to follow.[38] Thereafter, pupillage is a requirement before any student becomes a barrister,[39] as is two years of practice-based training for solicitors.[40]

In contrast to this British model, the pattern of most other nations,[41] or even the specialized undergraduate education undertaken (or necessitated) for graduate degrees in engineering or medicine (e.g., pre-med), American law schools do not require any particular type of prerequisite learning beyond a bachelor's degree.[42] As a result, some law students begin learning legal doctrine four years after their English counterparts.[43] By that point, middle or lower-class American law students have borrowed six figures to pay for four years of required university study in what is often unrelated subject matter.[44]

To be sure, there is value in a general liberal arts education and in courses separate and apart from a future occupation. But as time and expenses increase, more careful thought as to the connection between the required number of courses and an articulable end purpose is warranted. At some point, relevance becomes relevant. For example, a review of the undergraduate courses for recent applicants to the University of San Diego School of Law[45] includes one typical student with the following courses: Peace Theories, Intermediate Arabic, Physical Education, African Music, Human Sexual Behavior, Visual Design and Dress, Intermediate Poetry Writing, Motivation, Trigonometry, Living in Multi-Cultural Society,

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36 See https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/; https://www.barcouncil.org.uk/careers/general-information-and-faqs/faqs/.

37 https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/becoming-a-barrister/.

38 *Id.*

39 *Id.*

40 *See* https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/.

41 *See, e.g.,* University of Sydney's description of four-year bachelor of laws program, https://sydney.edu.au/law/study-law/our-law-degrees/bachelor-of-laws.html; Trinity College of Dublin (four year law program), https://www.tcd.ie/law/programmes/undergraduate/llb#Structure; University of Cambridge, UK (three year program), https://ba.law.cam.ac.uk/studying-law-at-cambridge/.

42 *See* Law School Admissions Council, *Statement on Prelaw Preparation*, it should be noted that the current British requirement for three years of study for a 'qualifying LLB' will shortly no longer apply and will be replaced by a requirement to pass the Solicitors' Qualifying Examination (SQE). *See* https://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/sqe-overview/ ("The ABA does not recommend any undergraduate majors or group of courses to prepare for a legal education. Students are admitted to law school from almost every academic discipline.").

43 *See id.*; The Bar Council, *supra* note 35; The Law Society, *supra* note 36 at 6.

44 *See* American Bar Association, *Preparing for Law School*, http://www.americanbar.org/groups/legal_education/resources/pre_law.html.

45 Co-author Fellmeth has served on the University of San Diego School of Law Admissions Committee since 1993. These examples are from the transcripts of reasonably typical student applicants.

Human Osteology, Introduction to Archeology, Strategies in Stress Management, and Artist's Perspective: Drawing. Another student in this law school application pool took the following college classes: Keyboard Skills, Harmony, Jazz Combo, History of Rock Music, Instrumental Improvisation, Poetic Imagination, Comic and Tragic Vision, Wild Times, Prison Gangs, French Cinema, Juvenile Gangs, and Realism and Romance.

While many courses listed on some applicants' transcripts do suggest law school relevance, such as courses in economics, sociology, history, and even direct law content choices in constitutional or criminal law subjects, they tend not to be the majority or even a substantial percentage of courses undertaken by law school applicants.

In light of the dubious relevance of many undergraduate courses to the practice of law, we must consider the costs to students' families, the ever-growing burden of student debt,[46] and the supply reduction impact for those who would benefit from affordable legal services. Over the last two decades, burgeoning creativity of course ideas—ranging from a course on Beyoncé to two units for "bowling"—raise concerns over these factors in our regulation of entry into the legal profession.

B. Increasing Law School Costs and Debt

Increasing Costs of Law School

Adding to the sobering financial situation facing many of today's entering law students is an even more extreme upward trend—the cost of law school itself. Often starting out with debt from four years of mandatory undergraduate education, students without independent sources of funding must borrow three more years' worth of tuition and housing, in addition to other expenses. Law school is thus a substantial financial barrier to entry into remunerative attorney employment in the U.S.

The total cost of a legal education now approaches or exceeds the median cost of a home in the United States.[47] In terms of tuition alone, Columbia leads the pack at $69,916 per year.[48] The average private non-profit law school tuition nationally is $47,754 in 2018 dollars.[49] For public law schools the average tuition is $27,160. Tuition by itself is now at an expected sum of approximately $80,000 to $144,000 for the typical three-year term of law school attendance. This sum does not include housing, transportation, food, books, or bar exam review courses—or the opportunity costs of three years' foregone employment.

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46 Education loans are rarely dischargeable, even in bankruptcy, and can have a pervasive effect on the credit rating of delinquent borrowers, including employment, apartment rentals, and other needed borrowing.

47 As of December 2018, the median home price in the United States was $240,000. *Home Prices in the 100 Largest Metro Areas*, Kiplinger (March 10, 2019, 10:00 AM), https://www.kiplinger.com/tool/real-estate/T010-S003-home-prices-in-100-top-u-s-metro-areas/index.php.

48 https://data.lawschooltransparency.com/costs/tuition/?scope=schools.

49 https://data.lawschooltransparency.com/costs/tuition/?scope=national.

This tuition increase is not a product of inflation. A recent study concludes: "[L]aw school tuition increases exceed the inflation rate between 1985 and 2018. In 1985, the average private school tuition was $7,526 (1985 dollars), which would have cost a student $17,520 in 2018. Instead, average tuition was $47,754 (2018 dollars)."[50] Accordingly, private law school was 2.73 times as expensive in 2018 as it was in 1985 after adjusting for inflation.

> In 1985, the average public [law] school tuition was $2,006 (1985 dollars) for residents, which would have cost a student $4,670 in 2018 dollars. Instead, average tuition is $27,160 (2018 dollars) for residents. In other words, public [law] school [tuition for in-state students] was 5.82 times as expensive in 2018 as it was in 1985 after adjusting for inflation.[51]

In addition to law school tuition, students must find a way to pay for three years of living expenses. A survey of the 203 ABA-accredited law schools nationally from 2011–12 to 2018–19 found only 43 with small decreases in living expenses, whereas 153 had increases—104 of which exceeded the 11.4% cost of living (CPI) increase for this period.[52]

On average, a law student can expect to spend $20,000 to $24,000 per year on living expenses, with California school living expenses often between $30,000 and $37,000.[53] Assuming a conservative $20,000 figure, this adds $60,000 over three years to the total law school tuition figures discussed above, for a total of $140,000 for tuition and living expenses at a public law school, and $200,000 for a private non-profit law school. These figures are on top of the sums already paid for undergraduate tuition and housing of $50,000 to $188,000 for those previous four years.

In short, the seven-year cost of public education for attorney licensure, including only tuition and housing, is now an expected $190,000 at public schools for in-state students[54] and $388,000 at private non-profit—with these unprecedented numbers likely to continue to increase well above inflation.[55]

The Setting: Actual Law School Tuition and Market Dysfunction

Assuming a competitive market, how do prices of this type increase at levels largely disparate from cost factors? The adage "competition drives prices toward costs," with higher demand rewarding those who offer a comparable product at a lower price, does not seem to apply to this service market. Costs have increased somewhat

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50 *Id.*

51 *See id*. Tuition for out-of-state attendees is substantially higher—approximately $35,000.

52 https://data.lawschooltransparency.com/costs/living-expenses/.

53 *Id.*

54 As discussed *supra*, in the context of undergraduate costs, out-of-state students attending a public law school will pay somewhere between these two figures, likely in the $250,000 to $300,000 range.

55 These totals assume maintenance of low-cost room and board for undergraduate education and assume no further increases above inflation for tuition or law school living expenses. Both of these assumptions are unlikely. As noted above, these numbers do not include many other costs, including books, loan interest, clothes, or transportation.

for faculty salaries, but at no level close to tuition increases.[56] Nor are other cost increases apparent that explain them. One major factor in this competitive failure is what may be termed the "Cuisinart effect." *Cuisinart*[57] was a vertical price fixing case in which an appliance manufacturer cut off retailers who lowered prices below the suggested retail price of its products. The reason for insisting on higher prices than others rested on Cuisinart's public relations approach—that its products were "clearly superior" to others, and that its superiority was understandably reflected in its higher price. If its price were to be lowered to those of competitors, the public implication would be that others were of equal or higher quality. The same concern demarks the public persona of many trade names, from Mondavi Cabernet to Cadillac.

This perception, that comparative quality is manifested in price, is a core part of law school tuition increases. It is common for the administration and faculty of law schools to measure their tuition levels based on those of their competitors, with subjective quality of the school a major factor. Hence, when law school faculties consider increasing tuition by two-to-three times inflation levels, the discussion is invariably as follows: "We would note that our three rival law schools, not up to our caliber, have increased their tuition 3–5% and will be at a higher level than are we. We risk a public impression that we are of inferior quality if we fail to match or exceed their tuition levels." And the pattern of such effective "price leadership" increases suggests that this same conversation is hardly unusual.

The "Cuisinart effect" in its original application involved a vertical price fixing case, but its anticompetitive impact in the horizontal context has a much more deleterious impact. It allows these prices to be raised well above theoretically competitive levels through a pattern of price leadership and replication. Any one competitor who raises tuition then causes other law schools to move up in price by a similar degree. The normal drive of competition seeking to win customers through efficiencies or reducing costs—and hence prices—is not a predominant factor.[58] Recent trends in applications and admissions illustrate the market anomaly for law school education. Law school applications fell dramatically from 2010 to 2016—perhaps partly reflecting tuition increases, as well as other factors.[59]

With demand reduced, the typical competitive response would be to lower prices to generate additional business (applicants). This would be particularly true for any high fixed-cost enterprise, such as law schools.[60] But that did not and

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56 *See* Scott Jaschik, *What You Teach is What You Earn*, Inside Higher Ed, https://www.insidehighered.com/news/2016/03/28/study-finds-continued-large-gaps-faculty-salaries-based-discipline.

57 *See In re Grand Jury Investigation of Cuisinarts, Inc*., 516 F. Supp. 1008, 1010–11 (D. Conn.) (recounting the proceedings in the criminal case, which resulted in a *nolo contendere* plea and a $250,000 fine). The DOJ also brought a companion civil case that was resolved by consent decree. *See United States v. Cuisinarts, Inc*., Civ. No. H80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Mar. 27, 1981).

58 David Segal, *Law School Economics: Ka-Ching!*, N.Y. Times, July 16, 2011, https://www.nytimes.com/2011/07/17/business/law-school-economics-job-market-weakens-tuition-rises.html.

59 Applicants per year fell from 100,000 in 2002 to 82,900 in 2009–10 to 56,500 in 2015–16. *See* https://data.lawschooltransparency.com/enrollment/demand-for-law-school/.

60 Law schools have a high percentage of fixed costs that do not vary with added students (e.g., real estate, staff and faculty with tenure who are not easily reduced in size

does not occur. One source summarizes the trend: "Compared to the peak in JD enrollment in 2010 (147,525 students), overall JD enrollment was down 24.3% in 2018."[61] But even this extraordinary demand reduction did not yield the normal market response in the form of enhanced price competition. Instead, law schools continue to eschew transparent price competition in favor of a burgeoning, but secretive means of competing, as reflected in the actual tuition charged to each student.[62]

A law school advertising $50,000 in annual tuition does not necessarily charge $50,000 per student. According to a 2017 study analyzing ABA grant and scholarship data, the median private law school discounted tuition by 28.3%, with an average scholarship of $20,129.[63] Few are aware that such discounts (and affordable law school opportunity, for many) are primarily driven by two numbers: Law School Admission Test (LSAT) scores and college grade point average (GPA).[64] While certainly important indicators, the disproportionate weight of these particular factors is driven by the pervasive influence of, and law school preoccupation with, the *U.S. News & World Report* law school rankings. [65] Indeed, law school

notwithstanding fewer students). Indeed, when a law school's attendance drops 20% to 30%—as has occurred in many campuses after 2010—a natural response in an assumed competitive market would be to lower prices as necessary to fill the empty seats, each one of which involves little additional marginal cost. A tuition of just $5,000 would add significant net income to such an enterprise. Note that such reductions and bargains are part of the fabric of other high fixed cost service industries*, e.g.*, hotels and airlines among many others — all of which compete vigorously with discounts and bargains for customers to occupy otherwise empty rooms or seats. *See also* Segal, *supra* note 58.

61 https://data.lawschooltransparency.com/enrollment/all/. Although interestingly, law school enrollment increased slightly for the first time in nearly a decade in 2017-2018 in a phenomenon some experts deem the "Trump bump," this increase does not make up for the near decade of decline. *See* Staci Zaretsky, *Law School Enrollment Is Up for the First Time in Nearly a Decade*, Above the Law, Dec. 14, 2018, https://abovethelaw.com/2018/12/law-school-enrollment-is-up-for-the-first-time-in-nearly-a-decade/; Ilana Kowarski, *Law School Applicant Increased This Year*, U.S. News & World Report, Jan. 29, 2018, https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-01-29/law-school-applications-increased-during-president-trumps-first-year.

62 Law schools are convinced that price is not the factor that influences choice, and, in fact, its reduction is viewed as a competitive problem consistent with the *Cuisinart* scheme described *supra*. They would rather suffer serious customer shortfall than admit to lower price as a basis for consumer selection. *See also* Segal, *supra* note 58.

63 Tyler Roberts, *How Much Law Schools Are Discounting Tuition*, 21 preLaw, at 13 (Winter 2018); Tyler Roberts, *Which Schools Are Discounting Tuition the Most?*, 27 Nat'l Jurist, at 13 (Winter 2018).

64 *Id.*

65 The degree of influence of these rankings is extreme. Many law schools have staff and faculty focusing substantial time and resources to the ratings of this publication and believe that it is a major factor in school selection by students. The direct ranking *vis-à-vis* rival law schools has a major effect. Note that many elements of the *U.S. News* ranking have merit in judging quality. For example, it measures class size per faculty member, faculty publications and citations, ratings of faculty by peers, bar passage rates, and timely employment of graduates. But it also excludes aspects important to legal education—from assuring competent attorneys in areas of actual practice, to a curriculum that is directed to that purpose.

admissions offices meticulously calculate exact medians for a prospective entering class and offer tuition subsidies to those with the highest scores.[66]

The over-emphasis on two numbers distorts student evaluation and inhibits a more balanced judgment. But those two numbers make up 90% of the *U.S. News* rating of law school "selectivity."[67] Students lacking financial resources that might otherwise allow them to enroll in an LSAT prep course or pay for tutoring in college suffer financial barriers to law school entry and a legal career. Instead, they borrow to pay the "sticker price" tuition—often hundreds of thousands of dollars, on top of what they may have already had to borrow to go to college. In doing so, these individuals end up subsidizing tuition discounts for those with higher college GPAs and LSAT scores. [68]

Public Subsidy and Loans: Overall Student Debt

Law school graduates carry record debt into their bar examination crucible. Of the 181 law schools tracked by *U.S. News*, the percentage of 2018 students carrying substantial debt varied from 34% to 100%.[69] The amount of the debt of graduating students by school varied from $68,743 at University of North Dakota to $212,576 at Southwestern Law School.[70]

These education loans are rarely dischargeable—even in bankruptcy. Available and secured federal and non-federal loans for law students (and indeed all graduate

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66 Co-author Fellmeth has been on his Law School Admissions Committee since the 1990s and contends that there are many factors properly relevant apart from the GPA raw number. They commonly include obstacles: A student achieving a 3.3 GPA while having to work full time and/or take care of a child or ill grandparent might be more impressive than a 3.5 from a full time student at a school with a relatively liberal grading pattern. Another student may have suffered a major injury or disease and managed to overcome it, manifesting courage and tenacity. Or a student may have had a weak freshman year, a first year away from home, and then recover to sequentially increase the GPA every year thereafter to a 4.0 senior year performance. In addition, difficult courses may warrant more consideration, but the overall GPA is not so adjusted in the *U.S. News* rankings. Similar excluded variables compromise the accuracy of the LSAT test score. Take an immigrant from Bosnia whose family was forced to flee to Russia when she was 8, and then at age 16 immigrated to the United States, who achieved an LSAT score in the 60th percentile—in her third and newest language. Should she be dismissed in favor of a student from a wealthy family in the 70th percentile, who attended private schools and had access to tutors?

67 *See Methodology: 2019 Best Law Schools Rankings*, https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology; *see also* Malcolm Gladwell, *The Order of Things*, The New Yorker, https://www.newyorker.com/magazine/2011/02/14/the-order-of-things.

68 This is not to say that equitable factors enjoy no consideration. For those with LSAT and GPA scores on "the bubble" (not as high as desired but close) there will be more particularized consideration. But the ranking based on the two numbers must be overcome with a burden not easily met. In contrast, unless there is a criminal or ethical issue, a high score will usually qualify an applicant for admission *ipso facto*, and usually with a generous tuition discount. *See also* Roberts, *supra* note 63 (*How Much Law Schools are Discounting Tuition*) at 13.

69 *See* https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/page+4.

70 *Id.*

students) have declined markedly since 2010.[71] Total student loans grew to $125.6 billion in 2010, but have since declined to $105.5 billion in 2017–18, while tuition and living costs climbed substantially over the same period.[72]

C. Law School and the Education of Attorney Practitioners

Existing Law School Curriculum

As discussed above, undergraduate education does not necessarily have the same connection to law school as does the typical academic record of those seeking engineering, science or medical advanced degrees. Then, once a student is admitted, the law school curriculum itself lacks correlation to the actual practice of law.

Most law schools present a core of required courses that consume the first year and sometimes part of the second year. Traditionally, required courses include contracts, torts, property, civil procedure, constitutional law, legal ethics, and several other courses varying by school. But there are several deficiencies in most curricula. First, the courses tend to focus on the judicial branch, with most of them revolving around a "casebook" text. The adjustment of curricula to changes in society, including our political and legal systems, is glacial.[73] For example, a large portion of current law practice involves, in some way, the legislature and executive branch agencies. The former enacts the laws, and the latter implement the laws through important rulemaking and enforcement procedures. Attorneys must often interpret these laws in order to advise their clients on compliance, or litigate alleged violations. But few law schools include substantial curriculum offerings in those and other areas of burgeoning practice.

Second, the courses typically do not lead students into actual areas of practice in terms of functional knowledge. The era of Abraham Lincoln, where an attorney practices "law" and will draft a will, defend a client in criminal court, and then litigate a divorce, is no longer practical. We present 24 areas of law commonly practiced in the United States, as follows: (1) immigration law; (2) criminal law; (3) property law; (4) probate, trust and estate planning law; (5) general corporate, securities and commercial law; (6) family law; (7) environmental law; (8) civil rights law; (9) administrative and regulatory law; (10) antitrust and economic

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71 *See* https://trends.collegeboard.org/student-aid/figures-tables/total-federal-and-nonfederal-loans-over-time.

72 *Id*.; *see also* https://data.lawschooltransparency.com/costs/living-expenses/; https://data.lawschooltransparency.com/costs/tuition/?scope=national.

73 Law school administration and faculty are understandably influenced by their own experience. We all have a tendency to project our own model onto those we wish to teach. But practical legal experience is not common among tenured law faculty. Not many have conducted a trial, argued appellate cases or had to deal with a caseload of clients. Their concerns are with important ethical and philosophical issues, which do facilitate legal and citizen intelligence. But we are not educating large numbers of future appellate justices or law professors. Even for these latter functions, professors also specialize in only one or several subject areas themselves. The vast majority of graduates will be practitioners faced with client problems such as an unruly child, a fraudulent business partner, or a grandfather who wants to emigrate from South Korea. The skills to enable competent services in this latter domain of real world problems warrant high priority in law school education.

crime law; (11) personal injury and consumer law (including product liability, property damage, and class action law); (12) labor/employment law and worker compensation; (13) real estate and construction law; (14) insurance law; (15) admiralty law; (16) bankruptcy law; (17) elder law; (18) education law; (19) health care law; (20) medical malpractice; (21) legal malpractice; (22) military law; (23) patent and trademark law (IP); and (24) tax law.

It is possible for some attorneys to practice in two, or perhaps three, of these 24 areas. But each involves substantial differences. An attorney who practices as a criminal defense attorney (or prosecutor) follows very different precedents and procedures from one handling divorces in family court. An attorney in bankruptcy court will have little in common in terms of the "what" or the "how" of practice with one practicing in juvenile dependency court. Many of these areas involve entirely disparate courts, with their own complex rules and procedures: juvenile dependency or delinquency court, bankruptcy court, probate court, Offices of Administrative Hearings adjudicating regulatory cases, immigration courts, military JAG proceedings and others—have marked differences. Each requires substantial specialized knowledge and experience to practice competently.

The generality of law school coursework is based on a collegial ethic that the Socratic Method (the practice of challenging students in class with repeated and pointed questions) leads to a superior mind—one able to identify inconsistencies. It facilitates the ability to pierce shallow rhetoric and sophistry. It allows students to "think like a lawyer." These fundamentals are undoubtedly valuable. But they begin only in the fifth year of American legal education—after four years of potentially unrelated (but still mandatory) undergraduate coursework. The assumption that the Socratic Method alone constitutes an effective means of educating 21st century attorneys seems dubious. Skyrocketing education costs, increasing practice specialization, technology, and the need for attorneys who are ready to begin practicing upon licensure should prompt a reevaluation of the way our country teaches law. How should we balance doctrinal coursework and practical skills training?

Moreover, even after four years of potentially irrelevant college coursework, three years of substantive law classes, and life-altering debt, aspiring attorneys are not even finished with doctrinal work. For the vast majority of bar applicants, existing law school coursework is insufficient to prepare graduates to take and pass the required state bar examinations. As described *infra*, the esoteric and impractical nature of the exams has spawned a national cottage industry of "Bar Preparation" providers, which charge ever-increasing sums of thousands to teach—*after* law school has concluded—the 10 to 15 subject areas most states cover, including the standard Multistate Bar Examination (MBE) given as a part of the bar exam in all states.[74] This cottage industry (perhaps understandably) does not advocate for bar exam reform that might lessen demand for its services.

[74] A typical charge ranges from $1,000 to $4,200, with several months of study—including lectures, written material and practice examination. *See* https://abovethelaw.com/2013/05/which-bar-exam-prep-course-is-the-best-2/.

The Practical Skills Training Movement

In the spring of 2012, the State Bar of California created the Task Force for Admissions Regulation Reform ("TFARR"), to examine whether the State Bar should develop a regulatory requirement for a pre-admission practical skills training program. In finding that the Bar should adopt a new set of regulations to focus on competency and professionalism, TFARR's Phase I report observed that "the rapidly changing landscape of the legal profession, where, due to the economic climate and client demands for trained and sophisticated practitioners fresh out of law school, fewer and fewer opportunities are available for new lawyers to gain structured competency training early in their careers."[75] The Task Force identified three specific and interrelated sources of concern that prompted the need for its action, with crushing student debt burden as the common thread: 1) recent law graduates with no prospects are forced into solo practice to pay off loans before they may be competent to practice, at great risk to the clients they serve; 2) with fewer young attorneys in a financial position to perform *pro bono* or public service work, low-income access to the judicial system suffers; and 3) law school debt puts becoming an attorney beyond reach for those lacking pre-existing family wealth.[76]

Ultimately, TFARR recommended three new requirements to practice law in California: (1) fifteen units of practical coursework before bar admission;[77] (2) fifty hours of legal services to *pro bono* clients or clients of modest means (before or after admission); and (3) ten hours of Mandatory Continuing Legal Education focused on practical skills.[78] Phase II of the Task Force issued a second report with recommended implementation strategies for each of these three recommendations the following year.[79]

These recommendations superficially addressed some problem areas. But they left untouched a system that foists deeply indebted, brand-new market entrants with no experience onto the most vulnerable segments in our society—and only for brief stints, so they could avoid meaningful commitments to client service. Indeed, the new recommendations would make it even more difficult to become a lawyer,

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75 *See* Phase I Final Report at 14 (June 2013), http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf.

76 *Id.* at 1, 5.

77 Around the same time, the ABA adopted a new experiential learning requirement, requiring six hours of study for ABA-accredited law schools, as articulated in Standards 303 and 304. https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.pdf.

78 *See* Phase I Final Report, *supra* note 75 at 1.

79 Phase II Report, (Sept. 2014), available at http://www.calbar.ca.gov/portals/0/documents/bog/ bot_ExecDir/2014_TFARRPhaseIIFinalReport_092514.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/ bot_ExecDir/2014_AttachmentA_ImplementingRulesfor15units.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_AttachmentB_ImplementingRulesfor50hoursprobono.pdf; http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/2014_AttachmentC_ImplementingRulesfor10hourscompetencytraining.pdf.

without addressing the root causes of harm to consumers as a result of the supply reduction imposed by the current regulatory framework.[80]

D. State Bar Examinations as Entry Barriers

Today, all 50 states require that applicants pass some version of a bar examination to qualify for attorney licensure.[81] This examination is a significant barrier to entering the legal profession, and at the same time is produced and administered by what the U.S. Supreme Court deems "active market participants" in the trade or profession involved—lawyers.[82] Nearly every state in the union delegates the regulation of lawyers to lawyers themselves, who then, in turn, often defer in matters of entry policy to the nationwide trade association they control—the American Bar Association—as discussed above.

The conflict of interest in our system of attorney regulation is apparent. When a profession is allowed to regulate itself—to gauge the appropriate incoming supply and the amount of competition it will encounter (i.e., the number of new attorneys admitted with each bar exam administration)—it runs afoul of both the Sherman Act and also fundamental principles of our democracy.[83] The state is supposed to make decisions in the interests of the people—*all* of the people—not only professionals with a vested interest in high entry barriers.

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[80] TFARR's final recommendations were released just as the Bar was facing a period of political and internal turmoil as the Board of Trustees voted to terminate the Bar's Executive Director, Joseph Dunn, just two months later. With long and protracted litigation pending, as well as new executive leadership and increased scrutiny from the legislature, these recommendations largely fell by the wayside for several years. Ultimately, the *pro bono* recommendation was opposed by the legal services sector, who did not have the resources to supervise the influx of attorneys under this recommended regime. And Governor Jerry Brown vetoed a 2016 bill, SB 1257 (Block), which would have imposed the 50 hour *pro bono* requirement, stating that a state mandate for *pro bono* service cannot be justified, as "[l]aw students in California are now contending with skyrocketing costs . . . and many struggle to find employment once they are admitted to the Bar." He further stated that, "it would be unfair to burden students with the [*pro bono*] requirements . . . [and] [i]nstead, we should focus on lowering the cost of legal education and devising alternative and less expensive ways to qualify for the Bar Exam. By doing so, we could actually expand the opportunity to serve the public interest." The 15 hours of practical coursework recommendation was never implemented either. The bar did, however, adopt the recommendation for ten hours of MCLE for new attorneys. *See* 23:1 Cal. Reg. L. Rep. 172 (2017).

[81] Four states (California, Vermont, Virginia, and Washington) permit individuals who have worked a designated period of time as an apprentice to a licensed attorney to skip law school all together and sit for the bar exam using their experience as a substitute for the law school experience. *See, e.g.,* Rules of State Bar of California, Rule 4.26; Rules of Admission to Bar of Vermont, Rule 7; Washington Courts Admission and Practice Rules, APR 6; Va. Code Ann. § 54.1-3926 (West). Very few applicants, however, are able to, or do, avail themselves of this unusual route. Additionally, Wisconsin admits students with diplomas from in-state law schools (University of Wisconsin and Marquette University) without taking the Wisconsin bar examination. *See* Wisconsin Supreme Court Rule 40.03 (Diploma Privilege).

[82] *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.

[83] *See supra*, Section II.

General Format of Existing Bar Examinations

Generally, bar exams are administered by each state twice a year for two days, and include the MBE, a 200-question multiple choice test developed by the National Committee of Bar Examiners (NCBE),[84] and an essay portion of the exam. The Uniform Bar Examination ("UBE"), now adopted by 33 states, is coordinated by NCBE and is composed of the Multistate Essay Examination, two Multistate Performance Test tasks, and the MBE.[85] It is uniformly administered, graded, and scored by user jurisdictions and results in a portable score that can be transferred to other UBE jurisdictions.[86] Other states, like California, develop their own essay portion of the exam.[87]

Even though the MBE and UBE are nationally-administered tests, each state sets its own "cut score" that will ultimately determine who passes the exam, and what the level of new attorney supply will be in that state.[88] And these cut scores vary wildly from state to state, from 144 and 145, respectively, in California and Delaware, to 129 in Wisconsin, with a national average around 135.[89] Not surprisingly, these variations yield varying pass rates among the states.

California's Ongoing Travail

California's pass rate, which has been consistently declining and hit a record low in July 2018 at 40.7% overall,[90] has driven California law schools in recent years to petition the Supreme Court, and the State Bar, to revisit its high cut score and take a closer look at the content of the exam itself.[91] Indeed, California's current cut score was set in 1986.[92] The Court ordered the Bar to study this issue, and the Bar underwent a series of studies in 2017 and 2018 on a compressed timeline at the Court's direction.[93] Over significant opposition from the Committee of Bar Examiners, which advocated for no change to the cut score, the Board of Trustees of the State Bar of California, after considering the results of the studies, and holding two public hearings, voted to present the Court with three options with respect to

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84 The MBE covers seven core subjects: civil procedure, constitutional law, contracts, criminal law, evidence, real property and torts. http://www.ncbex.org/exams/mbe/preparing/.

85 http://www.ncbex.org/exams/ube/.

86 *Id*.

87 http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination.

88 *See* National Committee of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 33–34, http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html#p=44.

89 *Id.*

90 http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-releases-july-2018-bar-exam-results.

91 *See* State Bar of California Bar Exam Evaluations Results, March 15, 2018, http://www.calbar.ca.gov/Portals/0/2018BarExamReport.pdf.

92 *Id*. at 8.

93 For a detailed history of the controversy spurred by the July 2016 bar exam results, and the studies conducted during this period, *see* 23:1 Cal. Reg. L. Rep. 158-161 (2017). Note that co-author Gramme served as the Assembly Judiciary Committee's appointee subject matter expert on the Standard Setting and Content Validation studies in 2017.

the cut score: 1) maintain the status quo at 144 overall; 2) lower it to 141; 3) lower it to 139.[94] The Court ultimately declined to lower the cut score, instead ordering the Bar to conduct further study.[95]

While these studies were ongoing in 2017, the California legislature added section 6064.8 to the Business and Professions Code, directing the Bar to "oversee an evaluation of the bar examination to determine if it properly tests for minimally needed competence for entry-level attorneys" and mandating that it "shall make a determination, supported by findings, whether to adjust the examination or the passing score based on the evaluation" at least every seven years or more frequently if so directed by the California Supreme Court. The Supreme Court likewise added California Rule of Court 9.6, effective January 1, 2018, which also requires a regular evaluation of the bar examination's validity. The California State Bar announced that it was commencing a California-specific Attorney Practice Analysis in December 2018 to "ensure that the California Bar Exam is relevant and tests what is needed by entry-level California attorneys."[96]

Also in December 2018, the Bar released the results of its fourth study on the California Bar Examination, *Performance Changes on the California Bar Exam, Part Two*. Based on data from 11 ABA-accredited California law schools who volunteered to participate, the study was designed to examine the correlation between California's steadily declining pass rate and law school attendee credentials (both prior to and during law school).[97] The study concluded, unsurprisingly, that law school GPA was the single best indicator of predicting success on the California Bar Exam.[98] Interestingly, however, the study found that the slight decline in undergraduate GPA and LSAT scores for law school applicants admitted in the most recent five years could only be attributed to *some* (between 20–50%) of the decline in bar exam pass rates; with the remaining portion of the decline "unexplained."[99]

As these studies —which are likely to take years—continue, the Bar is continuing to administer the same exam, with the same cut score, with no imminent plans to make further changes.

Questions Pertaining to Bar Exam Efficiency

As noted at the outset above, the core purpose of public regulation of attorneys (and many other trades and professions) is to assure practitioner competence and honesty. This assurance is paramount for members of the public, who rely on the

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94 *See* State Bar of California Bar Exam Evaluation Results, *supra* note 91, at 3.

95 23:1 Cal. Reg. L. Rep., *supra* note 93, at 158-161; 23:2 Cal. Reg. L. Rep. 254-58 (2018).

96 *See* http://www.calbar.ca.gov/About-Us/News-Events/News-Releases/state-bar-launches-california-attorney-practice-analysis-to-continue-bar-exam-study. To the authors' knowledge, California is the only state that imposes this level of psychometric analysis and validity with respect to its bar exam.

97 Roger Bolus, PhD., *Performance Changes on the California Bar Examination: Part 2* (Research Solutions Group, State Bar Dec. 20, 2018), http://www.calbar.ca.gov/Portals/0/documents/admissions/Examinations/Bar-Exam-Report-Final.pdf.

98 *Id.* at ii.

99 *Id.* at viii. This finding was significant in that much of the public comment in support of maintaining California's high cut score has attributed declining pass rates to law schools' willingness to accept lesser qualified applicants in the face of widespread declines in law school enrollment since 2011.

state to keep incompetent and dishonest people—who may impose irreparable harm on unsuspecting clients—from practicing law.[100]

Consider the following questions in evaluating whether a single examination (in the present format of bar examinations across the country) is properly achieving that stated purpose:

1. While a bar examination may have some relevance to competence, to what extent does it actually measure the knowledge, skills, and abilities that new lawyers entering the profession actually need to competently practice? This is a central tenet in justifying occupational licensure, and requirements to regularly validate the content of licensing exams via psychometric evaluation have been in place for all other occupations—from physicians to architects—(at least in California) for decades.[101] The State Bar of California is now undergoing this process, beginning with its California-specific "Attorney Practice Analysis," discussed above, and the NCBE is also now undergoing a three year study of the examinations it administers.[102] Only when these studies have been completed can one properly evaluate whether the content of the exams are actually measuring for these skills.[103]

2. In determining their respective bar examination "cut scores," are state bars appropriately ensuring that they are only excluding from admission those who are not "minimally competent" to practice law? While this is the psychometrically appropriate standard by which to measure and set the cut score for a licensing exam, state bars across the country have not typically adhered to this "do no harm" standard of entry into our profession.[104] Can any other standard be justified under the antitrust laws?

3. What are the implications of a system of undergraduate and then law school education now extant, in which graduates must pay thousands of additional dollars and three months of intense study to pass a purported general competence examination? In addition, should law students be forced to choose between courses on subjects that will be tested on the bar and courses covering the subject matter in areas where they intend to practice?[105]

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100 *See, e.g.,* Cal. Bus. & Prof. Code § 6001.1 ("Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. *Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.*") (emphasis added).

101 *See* Cal. Bus. & Prof. Code § 139; Center for Public Interest Law's Amicus Brief to Supreme Court of California dated October 2, 2017, discussing and attaching the California Department of Consumer Affairs' Licensure Examination Validation Policy, http://www.cpil.org/download/S244281_LB_CPIL.pdf.

102 The National Committee of Bar Examiners also established a "Testing Taskforce" in 2018, that will similarly conduct a three year comprehensive study of the bar exam. *See* https://www.testingtaskforce.org/about/.

103 *See* Michael T. Kane, *So Much Remains the Same: Conception and Status of Validation in Setting Standards* (2001), published in Setting Performance Standards: Concepts, Methods, and Perspectives 53–88 (Gregory J. Cizek & Robert J. Sternberg eds., 2001).

104 *See Standards for Educational and Psychological Testing* (AERA, APA, & NCME, 2014); R.K. Hambleton & M.J. Pitoniak, *Setting Performance Standards*, in Educational Management 433-70 (R.L. Brennan ed., 2005).

105 *See* February 1, 2017 letter from deans of 20 out of California's 21 ABA-accredited law schools to the California Supreme Court at 3 ("California's high cut scores generate

4. All practice areas are not equal in their potential to impose irreparable consumer harm. A criminal prosecutor is usually supervised by expert guides; a corporate contract attorney often has models and supervision, and sophisticated clients who are able to determine for themselves whether their attorney is performing competently. So which specialties deserve attention for competence assurance? Arguably, these would include areas where: (1) the client is not in a position to gauge competence; (2) the attorney is not subject to assured training and review before or during legal practice; and/or (3) counsel may engage in a single case or task that, standing alone, portends irreparable harm. What test for assurance of competence is provided for immigration law, juvenile law, family law, or landlord/tenant law—topics not tested on bar examinations, yet practice areas with enormous potential for consumer harm?

5. Do any states have any mechanism to ensure continuing competence in any given practice area over the entire 50-year career of an attorney? Do any require a minimum body of continuing legal education in the area of actual practice? Do any ever provide tests relevant to competence in such areas of practice relied upon by consumers?

6. Are supplemental tests designed for state certified "specializations" designed to protect consumers or do they serve as marketing tools enabling these specialists to charge higher prices to willing (and well-heeled) clients?[106] Does it matter that each of them is a label awarded by a group of practitioners currently practicing in that respective area of law?[107]

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pressure for California law schools to design their educational programs with even more focus on the bar exam itself than is required in other states. This may, in the margins, drive schools and students to additional emphasis on memorization, multiple-choice exam skills and overt test preparation rather than the full range of skills necessary for effective lawyering."), http://www.calbar.ca.gov/Portals/0/2018BarExamReport.pdf at 142–146.

106 Many states offer "certification" programs for practitioners in various legal specialties. Such specialization, with required examinations, work experience, etc. can contribute to market knowledge about a given practice area. However, that "label" is separate and apart from licensure, and is not required to practice in that area of law. Equally troubling is that the criteria for certification are overwhelmingly controlled by individuals who have already obtained these specializations—giving them a profit stake interest in raising the barriers for new market entrants. *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114.While it may be useful to advertise skills to sophisticated clients, it does not protect average consumers who are most likely to be irreparably harmed by attorney misconduct.

107 By way of illustration, the following are specialties certified as such by the California State Bar or its recently devolved associations: 1. Admiralty and Maritime Law, 2. Appellate Law, 3. Bankruptcy Law, 4. Criminal Law, 5. Estate Planning, Trust and Probate Law, 6. Family Law, 7. Franchise and Distribution Law, 8. Immigration and Nationality Law, 9. Legal Malpractice Law, 10. Taxation Law. In addition, the Bar "accredits" private attorney associations to certify attorneys in 11 additional areas of specialization, including: 1. Business Bankruptcy Law, 2. Consumer Bankruptcy Law, 3. Creditors' Rights Law (American Board of Certification) 4. Civil Trial Advocacy, 5. Criminal Trial Advocacy, 6. Family Law Trial Advocacy, 7. Social Security Disability Law (National Board of Trial Advocacy), 8. Elder Law (National Elder Law Foundation), 9. Legal Malpractice, 10. Medical Malpractice (American Board of Professional Liability Attorneys), 11. Juvenile Law (Child Welfare) (National Association of Counsel for Children).

The answers to these questions at this time are not favorable to the public interest.

IV. The State of the Market for Legal Services Nationwide

A. The Current Supply of Attorneys in the United States: Categories and Trends

Analyses of attorney employment divide the market into three basic parts: (a) the "legal services market" offering legal services to the public directly, (b) "in-house" attorneys working directly for corporations or other entities, and (c) government lawyers.[108]

The first market, offering services to the public, primarily work in law offices (95.1%); only 1% work for non-profit legal aid entities.[109] The second category, that of "in-house" lawyers, has increased 203% from 1997–2017—almost seven times more than those providing direct legal services to the public.[110] These are lawyers working for "industries other than legal services or government," (e.g., counsel for corporations or trade associations or other commercial entities). The third major sector consists of government attorneys, up 49% over the same 20-year period. The largest proportion work for local governmental entities (county counsel, district attorneys, city attorneys, et al.) the next largest grouping for the state (legislative staff, agency counsel, attorney general, et al., and the smallest for the federal government.[111]

Of the 1.3 million practicing attorneys in the U.S. in 2018,[112] however, there is a noticeably declining number who are actually representing individuals in areas such as personal injury, family law, or housing matters (also known as the "PeopleLaw" sector), as opposed to attorneys representing corporate or other entities (the "Organizational Client" sector).[113] Indeed, for the most recently-reported year of 2012, U.S. Census Bureau Economic Census data indicate that the amount of money individual consumers spent on legal services declined substantially— $7 billion—over just a five year period.[114] By contrast, the Organizational Client sector

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[108] *See*, *e.g.,* Henderson, *supra* note 1 at 1–9. As discussed below, there is also so a small but increasing fourth category, "Alternative Legal Service Providers (ALSPs)" and legal technicians—using internet and artificial intelligence tools to provide law related assistance.

[109] U.S. Census Bureau 2012 Economic Census; Henderson, *supra* note 1 at 2.

[110] *Id.* at 4–5.

[111] *Id*.

[112] According to ABA statistics, there are 1,338,678 resident attorneys in the United States in 2018. *See* https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf.

[113] Henderson, *supra* note 1 at 12–16. *See also* John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (rev. ed. 1994) ("Chicago Lawyers I"); John P. Heinz et al., *Urban Lawyers: The New Social Structure of the Bar* at 6–7 (2005) ("Chicago Lawyers II").

[114] U.S. Census Bureau 2012 Economic Census; Henderson, *supra* note 1, at 13.

increased its spending by over $26 billion.[115] Put another way, individuals in the U.S. spent an average of $187 per capita on legal expenses, while government entities spent approximately $100,000 annually, and Fortune 500 companies spent $160 million.[116]

Meanwhile, the price of legal services has been increasing markedly. From 1987 to 2016, the cost of legal services rose nearly twice as fast as the overall Consumer Price Index-Urban.[117] Legal services are not alone in this phenomenon. Prices for other "human-intensive" services, such as medical expenses and college tuition, have likewise been increasing at a much higher rate than worker income.[118] While consumers are continuing to pay the higher prices for medical services and tuition, however, they are largely choosing to forego legal services, regardless of the need.[119]

In economic terms, the decline of the PeopleLaw sector of the legal services market can be attributed to higher relative cost, shrinking demand, and an emerging market of "substitutions" for traditional attorney services in the form of "legal tech" services.[120] At the same time, in the Organizational Client sector, profits have increased much faster than the nation's GDP or the Consumer Price Index.[121]

As of 2017, 12.3% of Americans lived below the federal poverty line.[122] Legal aid addresses only a small percentage of their legal needs and remains a very small public subsidy account. But the current supply shortfall, combined with a lack of price bargaining, reaches well beyond impoverished Americans. It is not merely children in family or dependency court, or the victimized elderly, or immigrants whose children are taken from them, who lack legal services. The problem reaches into the middle and upper-middle classes. At this point it undoubtedly includes not only most of the population, but the vast majority.

One manifestation of the attorney services collapse is the growth of unrepresented parties in court. This is one setting where most citizens would want some attorney representation. One study by the National Center for State Courts looked at 925,344 cases—a sample drawn from a variety of ten urban counties nationally and representing 5% of the total court cases during the one year surveyed. It found that 76% of those cases involved at least one party who was "self-represented"—appearing without counsel. The range of costs in most of these cases was $40,000 to $120,000. The median value of a judgment obtained was $2,441.[123] Were affordable counsel to be available and competently functioning,

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115 *Id.*

116 *Id.* at 14.

117 *Id.* at 17-18. Note that Consumer Price Index-Urban is the inflation measure used in relevant studies by the Bureau of Labor Statistics.

118 *Id*.

119 *Id.*; Bureau of Labor Statistics Consumer Expenditure and Income data, https://www.bls.gov/opub/hom/cex/ home.htm.

120 Henderson, *supra* note 1, at 19. Note that this market is currently being hampered by existing ethics rules nationwide pertaining to the "unauthorized practice of law," multijurisdictional practice, corporate ownership, fee sharing, and advertising. *Id.*

121 *Id.*

122 See *Income and Poverty in the United States: 2017*, United States Census Bureau, https://www.census.gov/library/publications/2018/demo/p60-263.html.

123 The time period of the study was July 1, 2012 to June 30, 2013, *see* Paula Hannaford-Agar JD, Scott Graves, and Shelley Spacey Miller, *The Landscape of Civil Litigation*

how many of those court cases would be resolved between counsel quickly and at lower cost?

What is the relationship between the current and increasing inability for most individuals in the U.S. to pay for and obtain legal representation and recent underlying trends? The data suggest three interacting dynamics: (a) a shift to high-profit organizational (predominantly corporate) representation, (b) the trend towards high-remuneration "partnership status" as the ambition and focus of attorneys, and (c) a failure to lower prices to generate demand—the normal market response where unmet demand remains. Underlying these factors is a setting of supply restriction—barriers to entry that are imposed by the current system of high and increasing tuition costs and time covering seven years of higher education, followed by a bar examination obstacle of unclear relevance to on-point competence.

B. Legal Tech and Prospective Supply of Needed Legal Services

One new grouping of legal services has not been included in the surveys discussed above. They are commonly referred to as alternative legal services providers ("ALSPs").[124] These involve a mix of attorneys and business executives, increasingly using the Internet and often new technology termed artificial intelligence ("AI") to deliver legal services to consumers (likely those who may be unwilling or unable to pay for a private attorney).[125] Their potential market is vast, for it includes the millions of people—now the majority of the nation—who are not being served by traditional attorneys. This grouping includes entities such as Axiom, Intergreon, Elevate, Quislex, and UnitedLex.[126] They are private corporations, often financed by venture capital and private equity funding. They have evolved to provide specialized help to corporate counsel or others where such specialization can be used. On the "PeopleLaw" side, several have arisen to provide help to the largest area of unmet demand, the need for routine legal services to draft a will or review a contract or even start a small corporation.[127] These and other new legal assistance ventures use attorneys and the Internet. Some jurisdictions, such as the British Columbia model, even engage in online mediation to minimize the need for expensive court proceedings.[128]

These efforts and many more potential ventures of this type are impeded by two ABA Model Rules of Professional Conduct adopted by virtually every state: Rule 5.4, prohibiting non-lawyer ownership of a law firm,[129] and Rule 5.5, prohibiting "unauthorized practice of law," i.e., attorney functions performed by a non-

in State Courts (National Center for State Courts, 2015); *see* related information, http://www.courtstatistics.org/; *see also* Henderson, *supra* note 1, at 19.

124 Thomas Reuters, *Alternate Legal Service Providers 2019* (Jan. 2019), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/alsp-report-final.pdf?cid=9008178&sfdccampaignid=7011B000002OF6AQAW&chl=pr.

125 *Id*.

126 *Id.*; *see* also Henderson, *supra* note 1, at 10-12.

127 *Id*.

128 *Id*. at 20. Additionally, the UK and Australia permit and regulate ALSPs. *Id.* at 26-27.

129 American Bar Association Model Rules of Professional Conduct, Rule 5.4 (professional independence of a lawyer), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/.

attorney.[130] The rationale for these restrictions involves the preservation of "lawyer independence" and the prevention of "fee splitting" or financial arrangements providing funds to someone with a fiduciary duty to make the optimum referral—not influenced by a fee received from the beneficiary.[131]

There are some legitimate concerns related to these rules, but circumstances have made them largely disingenuous. In fact, private non-attorney ownership and control inhabits every corporation or other for-profit entity hiring an attorney as one of its officers or employees. If someone believes such persons are truly exercising "legal advice" separate from the profit-making purpose of the corporation, they are unfamiliar with the realities of law practice. Indeed, in the starkest example, the Big Four accounting firms employ attorneys providing legal services to all sorts of clients—individuals and entities. They are private corporations with investors and are not attorney-owned or controlled. They are in theory "under the supervision" of the client's other attorneys. Such other attorneys have the private interest of their client as a preeminent concern. And that reality is separate and apart from principles of legal ethics, which dictate attorneys' various duties to their clients.[132]

Three aspects of this new dimension for legal services warrant consideration. First, AI and the Internet are increasingly used for consumer benefit in many contexts, and across many professions, from automatic car braking to the reading of complex MRIs (possible for examinations 10,000 miles away). Second, given the extreme supply constriction from barriers to entry and the depletion of services for individuals discussed above, there is substantial unmet need likely reachable through modern technology.[133] Third, the costs of these services may be a fraction of the individualized attorney services option.

While it would make sense for those regulating the legal industry in the U.S. to recognize these overwhelming market signals and embrace new and innovative methods of increased access to legal services, the pattern thus far is to seek their

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[130] American Bar Association Rules of Professional Conduct, Rule 5.5 (unauthorized practice of law), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/.

[131] *See* Comments on American Bar Association Rules of Professional Conduct, Rule 5.4, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer/comment_on_rule_5_4/.

[132] *See, e.g.*, Rules 1.1–1.18 of the ABA Model Rules of Professional Conduct. Also note that even as to government attorneys, the notion that counsel operates with independent integrity is not an empirically verifiable proposition. *See* Fellmeth, *Walking the Line*, 15 CRLR 4 (Fall 1995) (reviewing judgments for violation of state Open Meeting, Public Records, and Administrative Procedure Acts and finding that even without the profit motive issue, government counsel have a cultural allegiance to the client to advance his or her or its interests provisions) *See* http://www.sandiego.edu/cpil/documents/Walking%20the%20Line.pdf.

[133] *See* Victoria Hudgins, *Survey: 69 percent of people would use online legal services over attorneys*, Law.com (Dec. 2018) (citing a Harris Poll where 82 percent of U.S. adults surveyed said they wanted alternatives to traditional lawyers when dealing with small legal matters, such as making a will and document review), https://www.law.com/legaltechnews/2018/12/12/survey-69-percent-of-people-would-use-online-legal-services-over-attorneys/.

limitation or elimination.[134] However, in 2018, the Board of Trustees of the State Bar of California formed the Task Force on Access Through Innovation of Legal Services, comprised of a mix of attorney and non-attorney members (a majority of whom are not attorneys), and charged with identifying possible regulatory changes to enhance the delivery of, and access to, legal services through the use of technology, including AI and online legal service delivery models.[135] It remains to be seen whether an attorney-dominated Board of Trustees will consider any recommended changes in this space.

Emerging developments in the legal technology space also raise issues with respect to attorney continuing competence and law school curriculum. With technology's increasing ability to replicate work that attorneys have traditionally performed (document review, contract drafting, legal research, etc.), regulators and law schools alike must reconsider the knowledge skills and abilities that lawyers as humans can uniquely deliver. Are existing continuing legal education models ensuring that attorneys are keeping up with this technology, and offering their clients the most efficient and accurate method of services?[136] Are attorneys incentivized to do so given the existing billable hour business model? Are law schools training law students about this emerging marketplace? Are "essential skills" such as empathy, technology, problem-solving, writing, time management, and client communication incorporated into law school core curricula?[137]

V. Ten Steps to a Lawful System of Attorney Entry and Regulation in the Public Interest

The data support increasing the supply of attorneys by multiple measures: the need for indigent representation, the lack of attorneys providing services to individual (as opposed to corporate) clients, and the high price of legal services—which now

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134 Daniel Conte, *Avvo Shuts Down its Legal Services Product in Wake of Ethics Opinions Warning Attorneys Not to Participate* (Aug. 14, 2018), https://www.hinshawlaw.com/newsroom-updates-avvo-shuts-down-its-legal-services-product-in-wake-of-ethics-opinions-warning-attorneys-not-to-participate.html; *see* New York State Bar Association, Opinion 1132 (Aug. 8, 2017), http://www.nysba.org/EthicsOpinion1132/; s*ee also* Tom Gordon, *ABA To Consider Proposed "Best Practices" for Online Document Preparers*, (Jan. 23, 2019), https://www.responsivelaw.org/blog/ny-bars-proposed-regulation-of-online-document-preparers-to-go-before-aba. *See also* Xiumei Dong, *Survey Finds Legal Industry in Last Place in AI, Machine Learning Adoption*, Law.com, (Nov. 19, 2018), https://www.law.com/therecorder/2018/11/19/survey-finds-legal-industry-in-last-place-in-ai-machine-learning-adoption/.

135 Co-author Gramme is serving as an attorney member of this task force, as well as the Association of Professional Responsibility Lawyers' Future of Lawyering Committee studying similar issues with respect to the ABA model rules.

136 *See* comment 8 to ABA Model Rule of Professional Conduct 1.1 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").

137 *See* Catherine Sanders Reach, *Essential Tech Skills for the New Lawyer*, ABA for Law Students (November, 2017), https://abaforlawstudents.com/2017/11/02/essential-tech-skills-for-the-new-lawyer/.

often places quality (or any) legal representation out of the reach of even the middle class. The dilemma becomes "how do we increase the supply of attorneys to address increasingly unmet legal needs without compromising competence?"

It is beyond time for us to recognize that the existing cartel-controlled legal profession in the United States is ill-equipped to address this dilemma. It does not stimulate supply, competitive pricing, or any kind of competence assurance (or other consumer protections) in actual areas of attorney practice. A review of the problems and available cures commend the following ten major reforms in legal practice regulation.

A. Reform the Entire Socratic Tradition for Legal Education

As a rational issue examined *tabula rasa*, how would we arrange the years of college education to qualify persons for attorney licensure and consumer reliance in relevant areas of law? If we were fashioning one from scratch, would we require four years of often substantially unrelated courses with the delay and costs noted above, followed by three years of largely cerebral generality, often lacking connection to the future practice of those students?

Today, law schools do not accept applicants without bachelor's degrees, and the American Bar Association will not accredit schools that do.[138] A rational prescription to stimulate both supply and competence, and which relevant evidence commends, would include three reform elements:

Employ a Five-Year Total Higher Education Path for Bar Licensure

The first two years would include liberal arts or other courses of interest to students. But of these likely 16 to 20 courses, three to five would have some colorable relationship to law: political science, economics, legal history, et al. Such college students could be admitted to law school following their second year.

Restructure Law School Curriculum

Law school would occupy the final three years, with the first year including Socratic Method teaching of fundamental subject areas (contracts, torts, civil procedure, constitutional law, property, legal ethics, evidence). Moreover, existing law school courses reflect an arcane mindset that elevates judicial precedents to the exclusion of other areas of legal practice. In particular, the legislative and executive branches are largely ignored, despite their obvious relevance to legal practice. Courses on legislation and on administrative law[139] are thus properly part of these first two

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138 American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools* 2018-19, at 32, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf

139 State regulatory agencies are particularly ignored, with few law schools teaching anything about a subject that determines the regulation of all trades and professions (including attorneys), the environment, education, and health. These agencies function primarily at the state level and knowledge of what they do and the procedural rules determining

years, as are courses involving newly emerging "essential skills," and elective courses related to areas of specialized interest: criminal, juvenile, environmental, or civil rights law. Of the typical eight to nine courses taken during the third year of law school, three could be follow-up courses in one of those separate areas of common practice explored in the second year, and the rest of the third year should consist of practical experience in an area of actual prospective practice. Hence, for the final year—and particularly the final semester—law schools would offer clinics, internships, externships and perhaps one semester of advanced placement in a particular area of practice.

Require "Concentrations" Pertaining To Desired Practice Area

The law school would formulate "majors" or areas of "concentration," consisting of collections of properly-sequenced courses and practical skills training relevant to an area of law.[140] Students who concentrate their studies develop a specific, heightened proficiency that is relevant to their future career. In addition, concentrations would be reflected on students' transcripts so that future employers may consider them in hiring. These features would facilitate student progress into a legal career, and ensure competence and readiness to practice in a specific practice area. Law schools should hire practicing attorneys in the relevant practice areas to serve as adjuncts, and provide contemporary skills-based training for law students.

B. Hold Law Schools Accountable for Tuition Pricing

The antitrust division of the U.S. Department of Justice should create a monitoring enforcement team to detect any and all indicia of price fixing in higher education, including law schools. This includes patterns of "price leadership," and other coordination by law schools, whether though the American Association of Law Schools, the American Bar Association, or any other mechanism.

Furthermore, law schools and other institutions of higher learning should be open and transparent to their prospective students about differential pricing options and data, including number and amounts of tuition "discounts" based on pre-admission statistics such as GPA or LSAT scores. These strategies, and the extent of their influence, must be disclosed to accomplish pricing information and tuition competition. Prospective students should know how much they are paying relative to other admitted students and the variables dictating those differences. Actual tuition, including net tuition amounts after "individual scholarship" reductions by the law school (not involving actual gifts or outside funded accounts) should be comparatively reported and published.

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their transparency, accountability, and legality should be a part of the curriculum of all schools.

140 An example is the University of San Diego, offering concentrations in: (1) Business and Corporate law, (2) Children's Rights, (3) Civil Litigation, (4) Criminal Litigation, (5) Employer and Labor Law, (6) Environmental and Energy Law, (7) Health Law, (8) Intellectual Property, (9) International Law, and (10) Public Interest Law. http://www.sandiego.edu/law/academics/jd-program/concentrations/. Each area has one or several required courses and a number of allowable electives. Completion of the requirements for such an area of concentration is part of the student's official transcript.

C. ESTABLISH ROBUST LOAN FORGIVENESS AND LEGAL EDUCATION SUBSIDY PROGRAMS

One way to ameliorate high education costs, while simultaneously addressing the widespread unmet legal needs in our country, is to provide loan forgiveness (also known as "loan repayment assistance programs") to attorneys who may be working to address those legal needs but earning a lower salary than they would if they chose to represent corporate clients.

Other professions have established systems for such assistance. Nationally, the Public Service Loan Forgiveness Program has been in effect since 2007, although its future is in doubt.[141]

More relevant, particularly for California, is the example provided by and for the medical profession: the California State Loan Repayment Program (SLRP).[142] It provides assistance to a broad array of health professionals, including doctors, dentists, nurses, social workers, therapists and pharmacists. The beneficiary must commit to practice in medically underserved areas for a minimum of two years and a maximum of four years, with $50,000 available the first year, $20,000 the second and third years and $10,000 the fourth year.[143]

Specifically, in 2002, the California Legislature established the Physician Corps Loan Repayment Program within the Medical Board of California.[144] In 2004, it was renamed the Steven M. Thompson Physician Corps Loan Repayment Program, and its administration was subsequently transferred to a foundation.[145] The Program is currently funded by an earmarked, mandatory surcharge on physician and osteopath licensing fees, an annual allocation of $1 million from the Managed Care Administrative Fines and Penalties Fund,[146] donations, grants,

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[141] The program allows people working for qualified organizations to repay some of their federal student loans based on a portion of their monthly income. After making 120 monthly payments, the remaining federal student loans are forgiven, with no cancellation-of-debt income tax consequences. Private loans are not eligible for PSLF. At this writing the program is still in effect, although there are competing bills pending in Congress to limit it (Promoting Real Opportunity, Success, and Prosperity through Education Reform Act (the "PROSPER Act"), 115th Congress (2017–2018), H.R. 4505, Rep. Foxx, https://www.congress.gov/bill/115th-congress/house-bill/4508/text#toc-H0DD0FF2E45414041A8FACE65B4BD4B73) and to expand it (Aim Higher Act, 116th Congress (2018-2019), H.R. 6543, Rep. Scott, https://www.congress.gov/bill/115th-congress/house-bill/6543.

[142] *See* https://oshpd.ca.gov/loans-scholarships-grants/loan-repayment/slrp/.

[143] https://oshpd.ca.gov/loans-scholarships-grants/loan-repayment/slrp/#provider-eligibility.

[144] AB 982 (Firebaugh) (Chapter 1131, Statutes of 2002).

[145] The Health Professions Education Foundation (HPEF) is a non-profit 501(c)(3) public benefit corporation housed within the Office of Statewide Health Planning and Development (OSHPD). Pursuant to Health & Safety Code sections 128330-128370, HPEF is required to submit an annual report to the California State Legislature documenting the performance of the Steven M. Thompson Physician Corps Loan Repayment Program (STLRP).

[146] This fund is administered by the Department of Managed Health Care in California and consists of administrative fines and penalties assessed in the process of licensing and regulating Health Care Service Plans. *See* Cal. Health & Safety Code § 1341.45(a).

voluntary contributions, and interest earned on surplus money investments.[147] The Program provides $105,000 in loan forgiveness for three years of service in designated "Medically Underserved Areas."[148] Although this and related programs do not create health care services for even a substantial part of the indigent, since 2013 this one program involving medical profession creation and contribution, has received 1,228 applications to 2018. The program has awarded more than $47 million and monitored the progress of 538 physicians providing direct patient care in 47 of California's 58 counties. Consistent with the intent of the program, 80 percent of the total recipients are certified in a primary care specialty.[149]

In contrast, attorney loan forgiveness has a very different record. Nationally, over 100 law schools do offer Loan Repayment Assistance Programs (LRAP) for graduates who pursue public interest work.[150] However, the number of recipients and the amounts involved are small and, although laudable, serve mostly as a symbolic commitment.[151] Aware of the problem of law school debt, some advocates in California attempted to create a credible system of repayment for those representing impoverished clients or doing public interest work for qualified 501(c)(3) charities. In 2001, Assemblymember Robert Hertzberg authored a bill to establish a "Public Interest Attorney Loan Repayment Program."[152] While the law has been on the books for over 18 years,[153] it has never been funded.

Subsidies for law school education should be enhanced from both public and charitable sources. Using the STLRP program as a model, the bars of every state should identify specific geographic and practice areas with the lowest rates of access to legal services and establish substantial loan forgiveness programs for attorneys who work to meet those needs. These programs should be funded with a

147 *See Steven M. Thompson Physician Corps Loan Repayment Program Annual Report to the Legislature*, at 3-4 (June 2017), https://oshpd.ca.gov/ml/v1/resources/document?rs:path=/Loan-Repayments-Scholarships-Grants/Documents/HPEF/Publications-Reports/HPEF-STLRP-Annual-Report-to-Legislature-2017.pdf. The total amount spent from all sources on this program from July 2015–November 2016 was $6 million. *Id*. at 4.

148 STLRP guidelines are in California Health and Safety Code Section 128550-128558 and the California Code of Regulations are in Title 22, sections 97931.01-97931.06.

149 *See Steven M. Thompson Physician Corps Loan Repayment Program Annual Report to the Legislature, supra* note 147.

150 See ABA description at https://www.americanbar.org/groups/legal_education/resources/student_loan_repayment_and_forgiveness/; *see also* https://www.psjd.org/getResourceFile.cfm?ID=112 for a discussion of the confluence of LRAPs with other potential assistance.

151 Based on the authors' survey of individual law school programs, amounts obtained in these programs vary under complicated formulae but are generally at or below $7,000 per year. These amounts here are generally less than one fifth the amount paid to physicians. Some LRAP programs may provide benefits for a longer period (many for up to five years and some for up to 10) where public interest law practice continues and with total income below $60,000 per year (with benefit reductions common where income is above $40,000). The average amounts provided are relatively small, particularly in relation to the over $140,000 in average accrued law school debt for graduates, and in relation to the benefits afforded by the professions. The percentage of a law school's graduates receiving assistance is typically less than 2%. They depend on law school created "funds" fed from charitable contributions and other limited sources.

152 AB 935 (Hertzberg) (Chapter 881, Statutes of 2001).

153 *See* Cal. Ed. Code § 69740, et seq.

mandatory surcharge on annual attorney licensing fees. They should also work with their respective state Attorneys General to earmark a percentage of civil penalties assessed to stabilize this fund, similar to the Managed Care Administrative Fines and Penalties Fund.

D. Rethink the Bar Examination

Each state should undertake, as California and the NCBE are now (and as other professions have done for decades), a regular psychometric evaluation of its licensing exam to ensure that the cut scores are properly evaluating minimum competence to practice law as it is currently being practiced.[154] Ideally, after completing law school, 80–90% of applicants should be passing the bar exam.

Specifically, the bar examination should test basic legal vocabulary and concepts, including the concept of judicial "precedents," and overarching legal principles pertinent to all practice areas: professional responsibility, contract law, torts, civil procedure, constitutional law, basic rules of evidence, and remedies. The additional competence assurance required for certain actual areas of practice requiring particular knowledge and where negligence will portend serious harm, should have additional qualification respectively, and regularly evaluated to ensure continuing competence.

Public protection, the purported justification for this arbitrary and notoriously difficult-to-pass examination, will be better achieved without an extreme barrier entry into the legal profession.

E. Require Law Schools to Achieve Minimum Bar Pass Rates

Once states have undertaken the appropriate analyses to ensure that the content and cut score of their respective bar exams are valid, they should then take measures to ensure that law schools within their jurisdictions are achieving a minimum pass rate.[155] For example, schools with less than 65% of their graduates passing the Bar within two years would be placed on probation, and ultimately be barred from access to the bar examination in their state, and required to return all tuition collected from the students who failed to meet that minimum and reasonable standard.

Such a standard is designed to ensure that schools not be tempted to admit students who do not have the skills necessary to pass the bar exam. The purpose of a law school is not to generate tuition, academic positions, law review articles, or conference gatherings. It is to prepare students for practice as ethical, competent attorneys serving the public. If their operation instead takes many thousands of dollars from youth and their families, incurs momentous debt, and yields little or no remunerative opportunity, that institution is not meeting the *raison d'etre* for its

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154 *See supra* Section III.D..

155 At this writing, the ABA has been engaged in a three-year debate as to whether to amend Standard 316 of its Standards and Rules of Procedure for Approval of Law Schools to require 75 percent of a school's bar exam takers to pass within two years of graduation, rather than the five years currently allowed. *See* Lyle Moran, *ABA Legal Ed Council Delays Decision on Stricter Bar Passage Standards*, ABA Journal, February 22, 2019, http://www.abajournal.com/web/article/aba-legal-education-council-delays-decision-on-stricter-bar-passage-standards.

existence. On the other hand, it does not make sense to impose such a standard until we can be sure that the exam itself, and the cut score, is designed to exclude only those who are not minimally competent to practice law.

F. Identify Specific Areas of Law Where Specialized Competence is Required

Rather than require a rigorous bar examination spanning multiple specialized practice areas as a requisite condition for all bar applicants, states should instead offer a basic examination (as described above), and then design a certification mechanism for attorneys who choose to practice in areas which pose the greatest risk of irreparable harm to the public. Indeed, some areas of law, such as immigration, juvenile dependency, criminal defense, landlord/tenant, and family law, are fields which may have devastating results on a client with just one case (i.e. deportation), and in which clients generally lack the ability to judge attorney competence for themselves (unlike corporate clients with general counsel who may more easily determine whether their attorneys are best serving their interests).

The bars of each state should consider which practice areas have the potential to impose the greatest harm to consumers, and then require attorneys who choose to practice in one of these areas to demonstrate minimal competence in their chosen field. This could include a state-issued "certification," which attorneys may achieve by passing a psychometrically-sound, practice area-specific examination, and/or working under the direct supervision of a current practitioner for a specified number of hours as an apprentice.[156] Attorneys would then be required to renew these certifications at regular intervals (such as every seven to ten years) to demonstrate continued competence, including knowledge of contemporary legal precedents.[157] These measures need not be expensive, onerous, or time consuming, and elective law school courses covering these fields could be designed to prepare applicants for the desired certification.[158]

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[156] Note that these proposed certifications are different than the existing "specialization" models, which currently serve as marketing tools, enabling attorneys to charge higher prices to sophisticated clients for the privilege of being represented by a legal specialist. *See supra* Section III.D.. Instead, these certifications would be issued by the bar, subject to relevant antitrust laws, and psychometrically validated, in order to ensure public protection.

[157] Indeed, to maintain certification for Cardiopulmonary Resuscitation ("CPR"), one must take a refresher course every two years. Why do we not require the same for licensed professionals?

[158] Flexible standards for practice in the event that a longstanding practitioner fails the re-certification exam could be available; for example, a 90-day probationary period could be imposed to allow time for a retake. This flexibility can be important for the clients of practitioners who might be harmed by the interrupted practice of their attorney. If competence cannot be demonstrated at the end of 90 days, the specialized practice in that area would cease.

G. Reform Continuing Legal Education to Require Continuing Competence in the Substantive Areas of Actual Practice

Many state bars require that attorneys complete a certain number of hours of "continuing legal education" ("CLE") over a specified number of years as a condition of license renewal. However, many do not require that these courses coincide with an attorney's area of actual practice, nor do they typically require any kind of assessment demonstrating retention of the information.

Such CLE requirements should be amended to require that at least half of the CLE hours be taken in the attorney's designated area of actual legal practice. Additionally, state bars should administer a psychometrically-sound, basic test in an attorney's chosen practice area at least every ten years as a condition of license renewal. If the attorney cannot initially pass the exam, he or she may be placed on probation for 60 days to retake the test. If unable to pass such a test in that specialty area after repeated attempts, the attorney should move to another area of practice where client reliance will not have the same consequences or where relevant competence is demonstrated.

H. Revise Existing Ethics Rules to Permit New and Innovative Methods for Delivering Legal Services

The use of modern technology is growing and permeating many trades and professions, including legal practice. As discussed in Section IV.B. above, the challenge facing all state bars is how to embrace emerging technologies to benefit those in need of legal services. Two variables are at issue which must be appropriately balanced: the advantage of additional services meeting demand, and the danger of abuse or malpractice with consumer harm resulting.

It is important that those regulating attorneys not over-enforce the "unauthorized practice of law" mantra in order to protect attorneys' "turf" and preserve their ability to charge higher hourly fees.[159] On the other hand, one obligation of regulators is to protect consumers from abuse by commercial interests in areas legitimately a part of, or closely related to, legal services.

Each state should appoint a commission, including (and perhaps a comprised of a majority of) non-attorneys to revisit rules governing the unauthorized practice of law, multijurisdictional practice, advertising, fee sharing, corporate practice, etc. Specifically, the commission should assess the historical purpose and impetus behind these rules, determine whether existing rules are achieving the aforementioned balance of access to legal services and public protection, and assess whether these rules are stifling the innovative delivery of legal services to a public which is in great demand of these services. Moreover, such a commission should consider not only potential reforms to business structures and technological innovations, but also consider whether new categories of licensure (akin to nurse practitioners in the medical profession) may be implemented in order to maximize access to legal services.

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[159] The North Carolina State Board of Dental Examiners was seeking to sanction and halt the practice of teeth whitening as the unauthorized practice of dentistry and to confine such brightening to practicing dentists. *See N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1111; discussion in Section II.A, *supra*.

I. Consider Mandatory Liability Insurance

Another measure that would protect the public from incompetent and unethical attorneys—but has been largely opposed by attorney-dominated state bars—would be to require attorneys to carry liability insurance as a condition of licensure. Indeed, existing attorney discipline systems across the country generally do not police negligent acts that may cause harm to consumers, and consumers are generally unable to recover against attorneys who do not carry insurance.[160]

The result of a lack of coverage is effective immunity from damage or restitution assessment for the vast majority of such attorneys. Plaintiffs' malpractice attorneys will not normally pursue cases where payment of judgments obtained is unlikely or uncertain. Further, states do not generally assure payment of malpractice judgments. In the case of California, the State Bar has a Client Security Fund, but it deliberately includes only dishonesty or damages arising from disciplinary proceeding proof, and excludes negligence or malpractice judgments.[161]

While many countries require attorneys to carry liability insurance to protect clients from precisely these harms, only two states in the U.S., Idaho and Oregon, maintain the same requirement.[162] In 2018, California convened a malpractice insurance working group to study this issue pursuant to a statutory mandate.[163] On March 15, 2019, however, the working group submitted a report to the Board of Trustees of the State Bar reflecting a sharply divided group, and finding that more data is required prior to making a recommendation regarding whether mandatory malpractice insurance is necessary.[164]

J. Reformulate State Bar Governance Structures to Comply with Antitrust Laws

Antitrust policy and compliance is a major issue for all state regulatory agencies; licensure decisions directly control the supply of legal services, with *per se* federal Sherman Act unlawful implications.[165] Thus, decisionmaking by state bar entities controlled by attorneys—i.e. "active participants" in the legal market—cannot enjoy immunity from the antitrust laws by claiming they are a state agency.[166] To protect themselves from potential antitrust liability—and more importantly to ensure the

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160 *See* Leslie C. Levin*, Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016), http://scholarship.law.ufl.edu/flr/vol68/iss5/2; Testimony of Robert C. Fellmeth to the State Bar of California's Malpractice Insurance Working Group, July 9, 2018, http://www.sandiego.edu/cpil/ documents/20180709_RCF%20Testimony_Final.pdf; Illinois Attorney Registration & Disciplinary Commission Annual Report of 2016, https://www.iardc.org/AnnualReport2016.pdf at 16 (finding 41% of sole practitioners in Illinois reported they did not carry malpractice insurance).

161 *See* Cal. Bus. & Prof. Code § 6140.5; see also testimony of Robert Fellmeth, *supra* note 160.

162 *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf.

163 *See* Cal. Bus. & Prof. Code § 6069.5; http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf.

164 http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000023886.pdf.

165 See detailed discussion in Section II, *supra*.

166 *N.C. State Bd. of Dental Exam'rs,* 135 S. Ct. at 1116.

adoption of policies that prioritize consumer (and not attorney) protection—state bar governance structures must be reformed in at least the following ways.

Eradicate Conflict of Interest Inherent in "Unified Bars"

Several bars across the country maintain a "unified" or "integrated" governance structure. Under this structure, a state bar serves as a trade association and also as a regulatory agency—in a single entity. This model gives rise to the appearance of impropriety. It poses an inherent conflict of interest between acting in the best interests of the legal profession and acting in the best interests of the public. This is a profound ethical problem. Recently, it has started to be addressed.

By way of example, in 2018, after 25 years of study and consideration of this proposition, the State Bar of California was statutorily required to "deunify," spinning off its 16 practice area-specific sections and other aspects that constitute direct trade association activities into a separate trade association, the California Lawyers Association.[167] The California Bar has been implementing this deunification in recent years, aiming to streamline what has expanded into a panoply of "sub-entities" operating under the umbrella of the Bar, and boasting 250 volunteers, even after the split of the sections.[168]

States that maintain an integrated structure should follow California's lead.

Comply with North Carolina State Board of Dental Examiners v. FTC

Ideally, governing boards charged with making decisions impacting the regulation of the legal profession should not be controlled by practicing attorneys who stand to benefit from the policies they adopt. Instead, boards should be comprised of a "public member" majority—who may consult attorneys for their expertise in the field, but whose ultimate allegiance is to public protection alone.[169]

If this option is not exercised, and the states opt to maintain an attorney-member majority, the only way to ensure that the boards are not acting anticompetitively and to guarantee state action immunity from federal antitrust laws is to establish a supervisory entity that reviews the board's decisions for anticompetitive effect. That review must explicitly not be symbolic or perfunctory, but must include analysis of anticompetitive impacts and have the clear authority to amend or reject all or any part of any decision being made.

For example, state supreme courts could appoint a body of experts, ideally including economists with antitrust expertise, educators, and others, to evaluate

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167 *See* SB 36 (Jackson) (Chapter 422, Statutes of 2017).

168 *See* Memo to the Board of Trustees from Richard Schauffler, Analyst of the Office of Research and Institutional Accountability, July 19, 2018 at 5, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000022371.pdf.

169 The landmark 2017 California legislation deunifying the State Bar of California also revised the composition of the State Bar Board of Trustees—eliminating six positions which were elected by California attorneys, and providing for more even distribution of attorneys (7) and non-attorneys (6). *See* SB 36 (Jackson), *supra* note 168. Although moving away from the extreme cartel structure of the past 80 years, the new governing body remains under the control of "active market participants." *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. 1101.

complaints, gather relevant evidence and advise the justices accordingly as to the potential anticompetitive impact of policies adopted by an attorney-controlled board.[170]

VI. Conclusion

The purpose of state licensure is to assure access to competent practitioners, especially when incompetence threatens irreparable harm. It is not to serve as a means for professions being regulated to artificially restrict supply so as to drive prices out of reach of the lower and middle classes.

As the 21st century ushers in a new era of technology and innovation, we find ourselves at a crossroads. Both the legal profession and the several states must choose whether they will continue to allow special interests to capture professional regulatory bodies and infect them with abject self-interest. Or, will they truly act in the best interests of the public?

As it stands, the fox guards the henhouse. There is little question that lawyers govern the legal profession for lawyers. The American Bar Association decides what law schools can and cannot do from sea to shining sea. This lawyer monolith all but decides how to become a lawyer, on behalf of lawyers, for the people of the United States.

And the cartel has acted exactly as one would expect—in line with its own interests. It has made it exorbitantly expensive to become a lawyer. A legal education takes seven years—four of which are unrelated to law. A law student must mortgage his or her future, at a total cost ranging from $190,000 and $380,000. And perhaps most disturbingly of all, the legal training that students do receive (in their final three years of those seven) often leaves them woefully unprepared. A student's textbook legal education is tangentially relevant at best to the one or two of 24 heavily specialized practice areas of modern law in which that student will eventually practice. Even the doctrinal classes are insufficient—students are almost universally funneled into expensive "bar preparation" classes to get them through licensing exams.

Those licensing exams have virtually nothing to do with the practice of law. They consist almost entirely of memorized subject matter that bears little resemblance to what lawyers do on a daily basis, scored by an arbitrary "cut score" to guarantee a high percentage of failures—in California, 60%.

Meanwhile, the state bars:

(a) Do not rank negligent acts as a normal basis for discipline (outside of extreme incapacity);

[170] There is little doubt that those involved in public regulation, including attorneys, generally believe that they serve the public interest, usually receiving little or no compensation. They subjectively believe that their mission is to serve the public interest. But the accumulation of persons into trade associations creates empathy lines that are rarely discussed openly. To illustrate, how often does a state bar discipline attorneys for over-billing? How often is the issue of knowing deceit in points and authorities, et al. subject to sanction or professional approbation? Or even discussed? How often do state bars study the impact of supply limitations *vis-à-vis* hourly prices?

(b) Do not require malpractice insurance—allowing attorneys to effectively escape sanctions or the obligation to pay for harm caused to their clients;
(c) Ensure that their "client security fund[s]" compensate injured clients for only theft, not malpractice (even where a judgment exists);
(d) Do not require continuing legal education to be in the areas in which attorneys practice;
(e) Most significantly, never test any attorney in any area of actual practice relied upon by consumers—ever, even in areas of law where clients are unable to gauge competence and a single case can mean ruination; and
(f) Confront and attempt to dismantle artificial intelligence and other technological solutions to legal problems, as an affront warranting elimination—even in situations when these solutions could be cheaper and more effective to clients than live lawyers.

The societal costs of lawyers regulating lawyers are dire. Legal services are so expensive that three quarters of legal cases involve an unrepresented party. The poor have token access to legal representation at best, and the situation is not much better for the middle class. At a certain point, it starts to look like the sticker price of legal education is rather the point of this endeavor—to drive up the cost of becoming a lawyer and to reduce competition for existing practitioners. The point of regulation should be to help the people who hire lawyers, not the lawyers themselves.

Critically, no area of state regulation more consistently overlooks the specter of federal antitrust liability than does the legal profession itself. The Supreme Court of the United States unambiguously held in 2015 that any state body controlled by "active participants" in the profession being regulated is not a sovereign entity for antitrust purposes. And yet the legal profession continues to use state machinery to regulate itself without active state supervision. Licensing without state action is supply control—price fixing, a *per se* Sherman Act violation. This poses an obvious problem, which should be a great motivator for change. State action immunity would be available if a state body without a conflict of interest actively supervised the attorney-run regulatory process. But so far, that has not happened.

The question remains. Will states seize upon the momentum of the 2015 *North Carolina State Board of Dental Examiners v. FTC* opinion and regulate in the interests of the people? Or will they continue to forsake their responsibility and allow special interests to grasp the reins?

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Henry Friendly and the Incorporation of the Bill of Rights

Thomas Halper*

ABSTRACT

This essay analyzes the response of one of America's pre-eminent judges, Henry Friendly, to one of the most far reaching constitutional developments of his time and our time, the incorporation of the Bill of Rights into the Fourteenth Amendment's Due Process Clause. In the course of addressing the issue, Friendly raised profound concerns about constitutional construction, federalism, the rule of law, and individual liberty that continue to resonate decades later.

KEYWORDS

Incorporation, Bill of Rights, Friendly

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Introduction

Henry J. Friendly is unknown to nearly all Americans. Indeed, if they were asked to identify him, some, focusing on his name, might imagine him a cartoon character with a hearty laugh. But Friendly was, in the words of a judge renowned for his acerbic evaluations, "the most powerful legal reasoner in American legal history"[1] and "the greatest judge of his time."[2] Born in 1903 in upstate New York, Friendly graduated first in his class at Harvard, and at Harvard Law School, where he "became a legend,"[3] his grades were perhaps the highest in its history. He then clerked for Justice Brandeis, practiced corporate law with great success for three decades, and in 1959 was appointed to the United States Court of Appeals for the Second Circuit, where he served until his death in 1986, a suicide. Extraordinarily productive, Friendly wrote over a thousand opinions, establishing a reputation for intellectual rigor and practicality that were unrivaled. Very much his own man, he was not intimidated by consensus and apparently took pleasure in pointing to emperors wearing no clothes.

What of incorporation? The Due Process Clause of the Fifth Amendment bars government from depriving "persons … of life, liberty or property without due process of law." On its face, the provision would appear entirely and literally procedural; government may deprive us of these things, provided that it follows due process. It may, for example, deprive me of life, but only if I have been properly charged, convicted, and sentenced, with all the rules of criminal procedure followed. But is this all there is to it? According to Hamilton, "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of the legislature."[4]

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1 Richard A. Posner, *Foreword*, David M. Dorsen, Henry Friendly: Greatest Judge of His Era xiii (2012).

2 Richard A. Posner, qtd. *in* Yale Biographical Dictionary of American Law 209 (Roger K. Newman ed., 2009). Justice Frankfurter said Friendly was "the best judge now writing opinions on the American scene." *Supra* note 1, at 356. Erwin Griswold, former Solicitor General and dean of the Harvard Law School, called him "the ablest lawyer of my generation." Erwin N. Griswold, *In Memoriam: Henry J. Friendly*, 99 Harv. L. Rev. 1720 (1986). Judge Aaron P. Brecher thought he was "the greatest judge of his era." Aaron P. Brecher, *Some Kind of Judge: Judge Henry Friendly and the Law of Federal Courts,* 112 Mich. L. Rev. 1179, 1193 (2014). Frederick T. Davis called him "an incomparably towering influence." Frederick T. Davis, *On Becoming a Great Judge: The Life of Henry J. Friendly*, 91 Tex. L. Rev. 339 (2012). Judge Pierre N. Leval observed that "Friendly was revered as a god in the federal courts." Pierre N. Leval*, On the Award of the Henry Friendly Medal to Justice Sandra Day O'Connor*, 15 Green Bag 2d. 257 (2012). Justice Thurgood Marshall said that "he stands on a pedestal all his own." Kirk Johnson, *A Solemn Tribute to Henry Friendly, a Quiet Giant of the Appellate Bench*, N.Y. Times, June 10, 1986. Judge Jon O. Newman considered Friendly "quite simply the pre-eminent appellate judge of his era." Jon O. Newman, *From Learned Hand to Henry Friendly*, N.Y. Times, Mar. 24, 1986.

3 Michael Boudin, *Judge Henry Friendly and the Mirror of Constitutional Law*, 82 N.Y.U. L. Rev. 975, 977 (2007). Paul F. Freund, the renowned constitutional scholar, used the same terms. Paul Freund, *In Memoriam: Henry J. Friendly*, 99 Harv. L. Rev. 1715 (1986).

4 4 The Papers of Alexander Hamilton 35 (Harold C. Syrett & Jacob E. Crooks eds. 1962).

Yet modern courts have disagreed, as they have devised the oxymoronic substantive due process that broadened the clause's impact.[5] If government, for instance, deprived me of life because I am left handed, it would not matter if it followed all the rules. The substance of the law is so irrational and arbitrary that regardless of how it was applied, it would deprive me of life without due process.[6] Accordingly, over the years, the Supreme Court has asked what "liberty" in the Due Process means, and has looked to the Bill of Rights for answers. But to whom does the Bill of Rights, routinely lauded as "an impenetrable bulwark against" government abuse,[7] apply?

Pre-Incorporation

Like so much else, it all begins with John Marshall, who thought the answer was so obvious that it was unnecessary for the victorious litigant even to state his case. *Barron v. Baltimore*, perhaps his last major opinion, saw Barron seeking damages from Baltimore for the results of harbor work, which rendered his wharf useless. Baltimore, he claimed, had taken his property for public use and denied him just compensation, contravening the Fifth Amendment's Takings Clause. The question, Marshall announced, was "of great importance, but not of much difficulty."[8] In a brief historical argument, Marshall observed that the Constitution had created a central government, that the Bill of Rights was adopted to guard against abuse of power by the central government, and that the states were governed by their own constitutions. Textually, he added, provisions of the Bill of Rights "contain no expression indicating an intention to apply them to the state governments."[9]

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5 Leading originalists have maintained that the original public meaning of "due process" barred arbitrary action by government because such actions represent the exercise of mere will, which is not authorized by the Constitution. Randy E. Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process Clause,* 60 William & Mary L. Rev. 1599 (2019).

6 Justice Benjamin Curtis made a similar argument a century and a half ago. The Due Process Clause, he wrote, "is a restraint on the legislative as well as on the executive and judicial functions of the government." Violations, he believed, contravened either the Constitution or "those settled usages and modes of proceeding existing in the common or statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of our country;" Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276, 277 (1856). Similarly, in *Munn v. Illinois*, involving a state price fixing statute, the Court held that under "some circumstances" such statutes may deny due process; 94 U.S. 113, 125 (1877). A careful study concluded, however, that "with respect to the broader police power and fundamental rights assertions of substantive due process . . . neither . . . had gained widespread support by the time of the Fourteenth Amendment's enactment in 1868." Ryan Williams, *The One and Only Substantive Due Process Clause,* 120 Yale L. J. 408, 498 (2010).

7 James Madison, 1 Annals of Cong. 457 (1789).

8 Barron v. Baltimore, 32 U.S. 243, 247 (1833), reaffirmed in Permoli v. New Orleans, 44 U.S. 589 (1845) and Mattox v. United States, 156 U.S. 237 (1833). Though Marshall focused on the Fifth Amendment, his argument was construed to apply to the entire Bill of Rights.

9 *Barron*, at 250.

Therefore, he concluded, it is "intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." [10] His focus was on the Bill of Rights as an instrument of federalism, that is, as enhancing states by restraining the central government, not as safeguarding individual liberty.

Marshall's analysis of the text skirted over a textual problem: though the First Amendment begins with "Congress," and the Seventh Amendment is expressly directed to "any court of the United States," the remainder of the Bill of Rights is silent as to its application. The Takings Clause, "written in the passive voice," for example, "invites the question *taken by whom*?"[11] If the *entire* Bill of Rights is directed only at the central government, why was the language of application not constant throughout? Why did all of the provisions not contain a central government-only application? Or why did none of them contain such an application, suggesting that it was implicit? That two amendments, the first and the seventh, were singled out may suggest that the remaining amendments should be treated differently.[12] Or should we rely on the legislative history of the Bill of Rights, as Marshall largely does, though legislative histories, as a recent justice reminds us, may be an unreliable technique for inferring meaning?[13] Is determining to whom the Bill of Rights applies truly "not of much difficulty"?[14]

Incorporation

Complicating matters is the Fourteenth Amendment adopted after the Civil War, chiefly to protect the freed slaves and their descendants from the predations of the white South. Section 1 provides, *inter alia*: "nor shall any state deprive any

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[10] *Id*. at 250-51. Madison, in introducing the Bill of Rights in Congress had proposed that "no state shall violate the equal rights of conscience, of the freedom of the press, or the trial by jury in criminal cases." *Supra* note 5, at 435. But his effort to make some of its provisions binding upon the states failed. Joseph Gales & William Seaton, History of Debates in Congress 448-59 (1834).

[11] Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005, 1012 (2011).

[12] Marshall thought it significant that, in the original pre-amended Constitution, clauses with no targeted application apply to the central government, while clauses expressly directed at states apply to the states. "There is a grammatical irony here, as the much-maligned passive voice turns out to be more determinate than its active-voice counterpart." *Id*., 1057. Marshall applied this principle to the Bill of Rights, ignoring that the provisions do not consistently follow this scheme. Barron v. Baltimore, 32 U.S. 243, 249 (1833).

[13] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 35 (1997); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993). (Scalia, J.).

[14] Prominent academic authorities seem agreed that Marshall was right. *See, e.g*., Laurence Tribe, American Constitutional Law 3 (1978); John H. Ely, Democracy and Distrust 196 n. 58 (1980); Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution (1996); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1199 (1992); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-67*, 68 Ohio St. L. J. 1509, 1530-32 (2007). *But cf*., William W. Crosskey, 2 Politics and the Constitution in the History of the United States 1049-82 (1953).

person of life, liberty or property, without due process of law"— an identical clause, except that it is directed at the states, to that found in the Fifth Amendment. What connection, if any, has the Fourteenth Amendment's Due Process Clause with the Bill of Rights?[15] One authority declared that "it is difficult to imagine a more consequential subject."[16] Another called it "[o]ne of the most controversial debates in constitutional law,"[17] and a third remarked that "[i]t never seems to die."[18]

Initially, the issue was limited in practical importance by the fact that the Bill of Rights had not yet become "a powerful brake on government."[19] But in *Hurtado v. California* (1884), Justice John Marshall Harlan the elder touched off the incorporation debate, arguing that history demonstrated that the Bill of Rights' grand jury provision applied to the states. "'Due process of law,' within the meaning of the Constitution," he said, "does not import one thing with reference to the powers of the states and another with reference to the powers of the general government."[20] The majority, however, followed the lead of Justice Curtis in *Murray's Lessee* in its emphasis on British practice, though noting that practice would be "preserved and developed by a progressive growth and wise adaptation to new circumstances and situations"[21] and not by rigidly adhering to old details of law and practice. The thrust of the Court's argument was that the Fourteenth Amendment's Due Process Clause guaranteed fundamental fairness, period.

Justice Hugo Black, in a famous dissent in a murder case involving self-incrimination,[22] argued forcefully that the legislative history of the Fourteenth Amendment "conclusively demonstrated" that it was intended to incorporate the entire Bill of Rights.[23] As to the majority, he said, "I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental

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15 Many authorities believe that incorporation should instead have involved the Fourteenth Amendment's Privileges and Immunities Clause, which is expressly directed at states. The privileges and immunities are not defined, but unlike the Bill of Rights that applies to persons (that is, everyone), apply only to citizens. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 163-74 (1998); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 195-203 (2004); Richard J. Aynes, *Ink Blot or Not: The Meaning of Privileges and Immunities*, 11 U. Pa. J. Const. L. 1295, 1310 (2009). The Court's ruling in the *Slaughter-House Cases* rendered this impossible. Slaughter-House Cases, 83 U.S. 36 (1873).

16 William W. Van Alstyne, *Foreword*, Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights ix (1986).

17 Gerhard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?* 94 Minn. L. Rev. 102, 103 (2009).

18 George C. Thomas III, *The Riddle of the Fourteenth Amendment*, 68 Ohio St. L. J. 1627, 1628 (2007).

19 Amar, *supra* note 14, at 205.

20 110 U.S. 516, 538, 541.

21 *Id.,* at 530.

22 Adamson v. California, 332 U.S. 46, 68 (1947). Black considered the dissent "his most important opinion." Roger K. Newman, Hugo Black: A Biography 355 (1998).

23 Black's position was supported in Crosskey, *supra* note 14, ch. 30, but famously challenged by Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan. L. Rev. 5 (1949). Black thought Fairman was biased and wrote the article "to get a job at Harvard." Newman, *supra* note 22, at 360.

fairness for the Bill of Rights."[24] Today, Black's views compete with three others. Selective incorporation, as set down by Justice Cardozo in *Palko v. Connecticut* would apply to the states only those portions of the Bill of Rights that are "the very essence of a scheme of ordered liberty."[25] A second view, espoused by Justices Brennan, Warren, and Goldberg,[26] would add to selective incorporation certain fundamental rights not listed in the Bill of Rights, like the right to privacy. A third approach connected with Justices Douglas,[27] Murphy, and Rutledge[28] would embrace not only total incorporation of the rights enumerated in the Bill of Rights, but also other fundamental rights not expressly mentioned but found to exist, like the right of a criminal defendant to be proved guilty beyond a reasonable doubt.[29] A different view would deny incorporation altogether, deriving rights simply from due process, which as Justice John Marshall Harlan the younger said, "stands … on its own bottom."[30] In his view, "due process of law requires only fundamental fairness."[31] This position, which had a vogue a century ago,[32] is now defunct.

By 1965, in any case, the process of selective incorporation had been operating for nearly three-quarters of a century. The Takings Clause was incorporated in 1897,[33] freedom of speech in 1925,[34] freedom of the press in 1931,[35] fair trial in 1932,[36] freedom of religion in 1934,[37] freedom of assembly in 1937,[38] establishment of religion in 1947,[39] right to a public trial in 1948,[40] protection against unreasonable searches and seizures in 1949,[41] freedom of association in 958,[42] prohibition against cruel and unusual punishment in 1962,[43] right to counsel in felony cases in 1963,[44]

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24 Adamson v. California, 332 U.S. 46, 89 (1947). Black was ready to incorporate the first eight Amendments, but not the open-ended Ninth. Griswold v. Connecticut, 381 U.S. 479, 507, 511, 519-20 (1965).The clear implication of Black's position was that he was advocating judicial self restraint, while Frankfurter, his chief rival on the Court and its most prominent spokesman for self restraint, was in defending a flexible selective approach embracing judicial activism. In the course of doing so, Black redefined the Bill of Rights as encompassing only the first eight amendments.

25 302 U.S. 319, 325 (1937).

26 Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

27 I*d*., 484. *See also* Poe v. Ullman, 367 U.S. 497, 509, 516.

28 Adamson v. California, 332 U.S. 46, 123-24 (1947).

29 *In re* Winship, 397 U.S. 358 (1970). Black dissented, as he did in Griswold v. Connecticut, 381 U.S. 479, 507 (1965).

30 Griswold v. Connecticut, 381 U.S. 479, 500 (1965).

31 Duncan. v. Louisiana, 391 U.S. 145, 171, 186-87 (1968).

32 *See, e.g.,* Twining v. New Jersey, 211 U.S. 78, (1908).

33 Chicago, Burlington & Quincy Ry. Co. v. Chicago, 166 U.S. 226 (1897).

34 Gitlow v. New York, 268 U.S. 652 (1925).

35 Near v. Minnesota, 283 U.S. 697 (1931).

36 Powell v. Alabama, 287 U.S. 45 (1932).

37 Hamilton v. Regents, University of California, 293 U.S. 245 (1934).

38 De Jonge v. Oregon, 299 U.S. 353 (1937).

39 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

40 In re Oliver, 333 U.S. 257 (1948).

41 Wolf v. Colorado, 338 U.S. 25 (1949).

42 NAACP v. Alabama, 357 U.S. 449 (1958).

43 Robinson v. California, 370 U.S. 660 (1962).

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

privilege against self incrimination in 1964,[45] right to confront witnesses, [46] and right to privacy in 1965.[47]

Yet it was at this time that Judge Friendly announced his displeasure with selective incorporation. In his 1965 Morrison Lecture to the California Bar Association, Friendly declared that "it appears undisputed" that selective incorporation has no historical basis and no theoretical foundation.[48] Though he was no doctrinaire advocate of judicial self restraint, he believed that here courts had gone too far. And the problem was practical, as well as theoretical, for what really troubled him was the assumption that the rights against the two levels of government "receive precisely the same protection."[49] Justice William Brennan, for example, had only a year earlier announced that guarantees in the First, Fourth, and Sixth Amendments "are all to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[50] Brennan, the supreme judicial politician, invited the Court "to consider incorporation clause by clause and right by right ... as a polite way of achieving total incorporation by indirection."[51]

Friendly's position was that as the states and the central government have differing constitutional responsibilities, the parameters of the rights should reflect these differences. Thus, as states "have primary responsibility for the security of persons and property," they should be allotted "more freedom as to a particular selected interest than the Court has chosen to give the Federal Government."[52] Adding to the importance of this consideration is that most provisions of the Bill of Rights are vague as to their contours, giving the Court more opportunities to exercise its subjective judgment.[53] A high degree of judicial subjectivity is incompatible with the rule of law, he believed. But once the Court's incorporation decision is made, it lasts "forever."[54]

To illustrate the point, Friendly discusses the Sixth Amendment as applied by the recent high profile case, *Escobedo v. Illinois*.[55] Escobedo was arrested and interrogated in connection with the fatal shooting of his brother-in-law. He asked to see his lawyer, who was in the same building, but the police refused. They also failed to advise him of his right to remain silent. After prolonged questioning, Escobedo made a damaging statement to a district attorney; the statement was admitted at trial; and he was convicted of murder. By a five to four vote, Justice Arthur Goldberg,

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45 Malloy v. Hogan, 378 U.S. 1 (1964).
46 Pointer v. Texas, 380 U.S. 400 (1965).
47 Griswold v. Connecticut, 381 U.S. 479 (1965).
48 Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 934 (1965). Similar sentiments were later voiced by Louis Lusky, By What Right? 163 (1975) and Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 112 (1986).
49 Friendly, *id*., at 936. Harlan agreed, denying that the Fourteenth Amendment's Due Process Clause "impose[s] or encourage[s] nationwide uniformity." Duncan. v. Louisiana, 391 U.S. 145, 172 (1968).
50 Malloy v. Hogan, 378 U.S. 1 10 (1964).
51 Amar, *supra* note 14, at 219, 220.
52 Friendly, *supra* note 48, at 936.
53 *Id.* 937.
54 *Id*. 940.
55 378 U.S. 478 (1964).

speaking for the Supreme Court, held that once a police investigation has targeted a suspect and taken him into custody, he must be advised of his right to remain silent and of his right to consult a lawyer. Unless he waives these rights, statements given in violation of these rules cannot be admitted in evidence. The result is justified by the Sixth Amendment's guarantee of a fair trial, he said, and made binding upon the states via the Due Process Clause of the Fourteenth Amendment.

Friendly finds no support for the decision, whether in the language of the Sixth Amendment or its history. The language of the Sixth Amendment indicates that the rights begin when prosecution begins, not at an earlier stage, as in this case. Moreover, historically the Framers' purpose was to ban the English practice of denying defendants charged with felonies other than treason the use of lawyers concerning matters of fact, which, again, was unrelated to this case. How, then, could the Sixth Amendment be introduced in *Escobedo***,** which arose out of an entirely different context?

But it is the impracticality of the Court's rigid standards that drew Friendly's contempt. Suppose, he asks, "there is often nothing save the interrogation of suspects on which to go, or at least to get started? Can the Sixth Amendment really mean that the only persons the police may interrogate are those on whom their inquiry has *not* 'begun to focus' … .?"[56] The Court is interpreting a Constitution, not writing a criminal code, he observes, and should avoid absolute rules that allow "no room whatever for reasonable difference of judgment or play in the joints."[57] "We have no basis for thinking that the founders would have wanted a single absolute to rule these congeries; since we do not know what they would have done and there is nothing like a consensus as to what should now be done, we had best stick fairly closely to what they said and, in the democratic tradition, afford opportunity for reasonable solutions by legislation, rule or decision, and empirical demonstrations of their merit."[58] Impeding efforts by states to devise workable means to meet their responsibilities, perhaps through innovation, "The Court disserves its great role as a vindicator of the Bill of Rights when it constructs from plainly inadequate data a generalization refuted by the common experience of mankind."[59]

With these views, Friendly opposed the conventional wisdom of the Warren Court, which saw the Bill of Rights almost entirely as a means of protecting individual liberty. Friendly was not insensible to these claims, but for him, as for Marshall, it also posed a central federalism issue. The scope of a particular right, he insisted, can be addressed only after determining against whom the right is supposed to prevail. Ironically, in this emphasis, Friendly not only looked backward to Marshall, but also forward to authorities writing after his, Friendly's, death, who also emphasized the federalism element.[60]

Friendly fought this battle alongside his "close friend"[61] Justice John Marshall Harlan the younger. Harlan had dissented in *Hogan v. Malloy* because the majority's incorporation was "freighted with their entire accompanying body of federal doctrine . . . . The ultimate result is compelled uniformity, which is inconsistent

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56 Friendly, *supra* note 48, at 948.
57 *Id.* at 954.
58 Henry J. Friendly, Benchmarks 258-59 (1967).
59 *Id.* at 273.
60 *E.g.,* Amar, *supra* note 14, chs. 11, 12.
61 David M. Dorsen, Henry Friendly: Greatest Judge of His Era 41 (2012).

with the purpose of our federal system."[62] Friendly and Harlan's was not always the losing side. *Miller v. California*, which established the basic obscenity rule, gave a central role to community standards,[63] for instance, and state criminal trials still need not require unanimous votes[64] or twelve person juries.[65] But, in general, incorporated rights are equally binding on the central and state governments.

Friendly's arguments arrive like hammer striking glass, leaving opposing views in pieces. His is the practical, nonideological voice discussing not the goals on which there is consensus but the means on which there is not. We all want the police to protect us, but not abridge our liberties. We all want to punish only the guilty and spare the innocent. But how is this to be accomplished? Courts speak easily of fairness, but what does this signify? We want, say, a football match to be fair; if one side has more players than the other or is awarded five goals for merely showing up, we would say that something is seriously unfair. Is this model transferable to criminal justice? One answer is: no. Where the competing football teams are of equal worth, the police and criminals are not. Thus, we permit the police to lie to criminals, for example, but not the criminals to lie to police. The criminal law is not a game; criminals are our enemy, not merely our competitors.

Yet can we be confident that the police are correct in claiming the suspect to be a criminal? So wary are we of the power of the state and the possibility of error that we stack many rules against it. Though the police may be certain he is guilty, the law compels us to presume the defendant is innocent and place the burden of proof upon the prosecution; too, the prosecutor is supposed to serve justice, while the defense attorney serves only his client, and unlike the prosecutor has no obligation to inform the other side of the evidence he intends to use. "Better that ten guilty escape than that one innocent suffer" is Blackstone's governing cliché.[66] Friendly might agree that this was the Court's position, too.

To which we can easily imagine Friendly asking, Why? A deontological view would hold that it is simply wrong to punish the innocent. Taken to the extreme, however, this would rule out all prosecutions, for it is obvious that even the best system will be imperfect and convict some innocent persons. Avoiding this absurdity, most of us are consequentialists. If the one innocent was convicted of a minor offense and the ten guilty were homicidal maniacs, we might feel comfortable tolerating the injustice. The point of criminal prosecution, then, is not only holding government to account. Rather, there are multiple goals, which necessitate trade-offs and compromises, not solely the narrow end targeted by the Court. "The true picture is not the solid sheet of black," Friendly wrote, "but a spectrum."[67] His is a powerful argument. His adherents, doubtless more likely to see themselves

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62 Malloy v. Hogan, 378 U.S. 1, 15 (1964). Later, Harlan would reject the claim that the Fourteenth Amendment's Due Process Clause "impose[s] or encourage[s] nationwide uniformity." Adamson v. California, 332 U.S. 46, 172 (1947).

63 413 U.S. 15, 30-34 (1973).

64 Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

65 Williams v. Florida, 399 U.S. 78 (1970); Colgrove v. Battin, 413 U.S. 149 (1973); Ballew v. Georgia, 435 U.S. 223 (1978).

66 William Blackstone, 4 Commentaries on the Laws of England 352 (1765-70); Alexander Volokh asks, why ten? Alexander Volokh, *n Guilty Men*, 146 U. Pa. L. Rev. 173 (1997).

67 Friendly, *supra* note 58, at 274.

the potential victims of predators than those charged with crimes, will find the protection he offers hard for them to reject.

After pausing for reflection, however, we might notice Friendly's apparent lack of interest in the plight of the suspect. Imagine (with Blackstone) that he is *not* guilty. Intimidated, confused, exhausted, perhaps inexperienced and not very bright, he might inadvertently seal his own doom. The police, after all, are not bound (nor should they be bound) by rules of conventional fairness. They may deceive or frighten or manipulate a suspect. And notwithstanding the suspect's formal, legal advantages, the state ordinarily possesses vastly greater resources, including more and better lawyers and more money to spend. Together, the vulnerability of the suspect and the resources of the state give the state substantial potential advantages.

As to the agents of the state, even if their motives are pure, they are human and therefore radically imperfect and prone to error, and may simply be mistaken. But as fallible humans, their motives may not always be pure. Perhaps, for instance, they are pressured by superiors to solve a case; perhaps, their judgment is bent by prejudice, ideology, greed, ambition or other extraneous factors. In these situations, a vulnerable suspect will require a lawyer even at an early stage, if he is to avoid disaster. And arguably the only way to ensure this protection is through rigid rules that defense attorneys can exploit. If the rules are flexible – in Friendly's terms, "reasonable" – the police or state's attorneys might twist them, and courts might cave in and give them their imprimatur. But if they are rigid, it is harder for them to be warped, bent or ignored; also, rigid rules provide an opportunity for courts to avoid responsibility for unpopular decisions by blaming them on the law makers, making it easier for them to do the right thing. Friendly is concerned with practicalities, but not with *these* practicalities.[68]

In this light, consider the venerable debate over policy versus rights. The policy side, as expressed by the distinguished English philosopher, H.L.A. Hart, holds that when the law is unclear, appellate courts are free to take policy consequences into account;[69] the rights side, as expressed by the distinguished American philosopher, Ronald Dworkin, holds that in such cases the court "respects or secures some individual or group right."[70] In the controversy, Friendly seems clearly to come down on the side of policy. He does so reluctantly, acknowledging that judges are not democratically accountable, that they lack relevant expertise, that they are not well suited at crafting political compromises, and that the "adversary system, even at its best, is poorly calculated to arrive at the truth."[71] Yet, tellingly, he observes, courts have openly made policy in the law of contracts and torts, and "few people today are concerned";[72] there may be a right for parties to reach an agreement for their mutual benefit, but if the purpose is to rob a liquor store, the law insists that their rights are trumped by the community interest in preventing and punishing theft.

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68 Friendly was by no means blind to the interests of the vulnerable. For example, he supported *Goldberg v. Kelly* (1970), a controversial ruling that required pre-termination hearings for welfare recipients threatened with denial of payments. Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975).

69 H.L.A. Hart, The Concept of Law 124-32 (1961).

70 Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1057, 1059 (1975).

71 Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Miami L. Rev. 21, 22-23 (1978).

72 *Id*. at 27. The same cannot always be said of constitutional decisions. *Id*. at 27-35.

And where Dworkin believes that a clash of rights makes for more sophisticated analysis, Friendly would say that it often leads to aggressive sloganeering that can erode civility and impede efforts at compromise.[73] Still, Friendly is more comfortable with courts overruling courts than overruling legislatures or executive agencies.[74]

As to courts creating rights, he is more emphatically negative. Viewing recent decisions on so-called victimless crimes, he wonders, "is there any end short of holding that the Due Process Clause enacted John Stuart Mill's *On Liberty*? As a citizen, I might agree . . ., but where do the courts get the power to decide this?"[75] Where law for Dworkin is a means to the end of individual fulfillment, for Friendly it is much less ambitious, perhaps simply an arrangement of rules and institutions that permit strangers to live together in relative peace and security, the alternative being Hobbes' intolerable chaos. Put differently, where Dworkin would choose justice over democracy, Friendly would choose democracy, perhaps partly because he is much less certain as to what justice is and why imposing his views is a good thing. He is not sure democracy will produce the best results, and he believes that few laws will benefit everyone equally, but he sees no better alternative and is consoled by the fact that it can usually correct its mistakes. Perhaps he would agree with Nietzche, who thought that "Justice originates among those who are approximately equally powerful," as they resolve their differences in the "character of a trade."[76] The political process, so often denigrated and ridiculed, is what Friendly would rely on.[77]

In this sense, Friendly was compelled to face what Daniel Bell famously called "the cultural contradictions of capitalism."[78] According to Bell, capitalism, built on thrift, hard work, self discipline, and efficiency, has given birth to a modernism characterized by self gratification, hedonistic consumption, unrestrained individualism, and contempt for bourgeois virtues. In his own habits and beliefs, Friendly certainly exemplified the traditional values, and yet he understood that his society was in the process of taking a newer path. His belief in democracy, however, limited what he thought he could do to turn things around, and in the end he seems to have adopted Holmes view that "if my fellow citizens want to go to Hell I will help them. It's my job."[79]

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73 In this, he predated Mary Ann Glendon, who critiqued rights talk as hostile to compromise, deaf to nuance and complexity, and indifferent to social responsibility. Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991).

74 Friendly, *supra* note 71, at 39.

75 *Id*. 36.

76 Frederich Nietzche, Basic Writings 148 (Walter Kaufmann ed. 1968).

77 Similarly, Isaiah Berlin believed that individuals naturally pursued ends that were incompatible and incommensurable (that is, could not be measured) with those pursued by others. Therefore, pluralism ought to be preferred not only out of expedience, but also out of principle. Isaiah Berlin, The Crooked Timber of Humanity (Henry Hardy ed. 1990) and Liberty (Henry Hardy ed. 2002).

78 Daniel Bell, The Cultural Contradictions of Capitalism (1976).

79 Oliver Wendell Holmes, 1 Holmes-Laski Letters 249 (Mark DeWolfe Howe ed. 1953).

It is hard to deny that incorporation "has, in general, dramatically strengthened the Bill [of Rights],"[80] which for over a century after its adoption had little practical effect. Incorporation enabled courts first to target states and having done so, address the more potent central government. Friendly might not have predicted this; indeed, he feared that applying the amendments to heterogeneous states might weaken the guarantees with the development of multiple qualifications and exceptions. But he clearly would still have maintained that the desirable end did not justify the improper means.

Friendly, like Harlan,[81] did not agree with Black that the entire Bill of Rights should be incorporated, but he understood and respected the rationale.[82] But if courts incorporate only some of its provisions, how to decide which ought to be selected? The Constitution, after all, does not rank them in importance, and nowhere does it authorize judges to do so. We may count the prohibition against quartering soldiers in the third amendment as unimportant,[83] but the Framers evidently disagreed. Should we honor their intent, on the theory that it helps us understand the purpose of the provision? Or should we adopt a living Constitution approach, maintaining that a Constitution needs to fit the times? When parsing the words of the Constitution, Holmes instructs us, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[84] But do we want unelected, unaccountable justices to arrogate to themselves the authority in effect to update the Constitution as they see fit? The results, after all, need not always benefit the weak and vulnerable; indeed, for decades, the Court honored liberty of contract, a right of its own devising, which inhibited the ability of government to protect workers.[85] Efforts to develop a rationale for selecting the rights to be incorporated, like Cardozo's, always turn out to be little more than invitations to subjective declarations; he believed that the ban on double jeopardy was not essential to a scheme of ordered liberty; years later, the Court disagreed.[86]

Which raises a pair of obvious questions. First, given the vagueness of most of the Bill of Rights, would total incorporation make much of a dent in judicial subjectivity? Terms like "unreasonable searches and seizures," "assistance of counsel," and "freedom of speech," after all, are hardly clear in their application. If

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80 Amar, *supra* note 14, at 290.

81 Duncan. v. Louisiana, 391 U.S. 145, 174 (1968).

82 Though they approached the Constitution very differently, Friendly admired Black's integrity and fought successfully for Harvard to award him an honorary degree. Boudin, *supra* note 3, at 995.

83 Morton J. Horwitz, *Is the Third Amendment Obsolete?* 26 Val. U. L. Rev. 209 (1991).

84 Missouri v. Holland, 252 U.S. 416, 433 (1920). Earlier, however, Holmes had warned against the view "that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon a conception of morality with which they disagree." Otis v. Parker, 167 U.S. 606, 608 (1903).

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

86 Benton v. Maryland, 395 U.S. 784 (1969). Arguably, Cardozo did not target double jeopardy *per se*, but, as he put it, "that kind of double jeopardy [that subjects appellant to] a hardship so acute and shocking that our polity will not endure it." The Court's position in Adamson that the self incrimination privilege applied only to the central government was reversed in *Malloy v. Hogan*. Malloy v. Hogan, 378 U.S. 1 (1964).

a state botches an execution, can it try again or will this be ruled out by the Eighth Amendment's ban on cruel and unusual punishment?[87] If police secretly secure a GPS tracking device to a car, have they violated the Fourth Amendment's ban on unreasonable searches and seizures?[88] May a state medical school reserve places for minority applicants or does this violate the Equal Protection Clause?[89] Reasonable judges will differ.

Second, why did the framers of the Fourteenth Amendment not spell out its impact on the Bill of Rights? Is the absence of evidence, evidence of absence? That is, would the framers have included an impact statement if they intended the Fourteenth Amendment to have such an impact? From this perspective, incorporation so greatly alters the federal relationship by effectively rewriting the Tenth Amendment that courts should be able to point to a specific warrant justifying this move. Berger argued that the purpose of the Fourteenth Amendment was to provide a constitutional rationale for the Civil Rights Act of 1866, which outlawed the notorious Black Codes, with the Due Process Clause intended to guarantee the judicial protection of these rights from state action.[90] Incorporation, he thought, was not in its framers' mind. Or is their leaving the question open a sign that they intended later courts to answer it?

As an appellate judge, Friendly was in a bind. He could not, like a Supreme Court justice, announce that precedents were wrongly decided and correct them. He was bound by the chain of command. And yet it is not hard to imagine him reading Berger and nodding in agreement. For Friendly's views seem to have anticipated Berger's, and pose the question as to how courts should identify and delimit rights. The answer, both seem to say, is that judges should examine the text and study the legislative history. If we cannot demonstrate incorporation (or at least selective incorporation) by text or history, it stands as merely another instance of judicial usurpation to be avoided. Here is the paradox: while Friendly was widely considered the preeminent practical judge, he was in fact guided by rather abstract notions: the role of the judge, the rule of law, the nature of federalism. His opponents, meanwhile, though often characterized as idealists,[91] focused on the real world consequences of their decisions. It is their views that have prevailed.

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87 Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 472 (1947).

88 U.S. v. Jones, 132 U.S. 945 (2012).

89 Regents of the Univ. of Calif. v. Bakke, 438 U.S. 379, 387, 402, 408 (1978).

90 Raoul Berger, Government by Judiciary 115-19 (1977). On the Bill of Rights not binding upon states, see 134-65. *See also* M. E. Bradford, Original Intentions: On the Making and Ratification of the United States Constitution 103-31 (1993).

91 *E.g.,* Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 Duke L. J. 133 (1991); Jeffery Toobin, *A Fair Shake and a Square Deal*, *in* Reason and Passion: Justice Brennan's Enduring Influence 271, (Joshua Rosenkranz & Bernard Schwartz eds., 1997).

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Bad Company: The Corporate Appropriation of Nature, Divinity, and Personhood in U.S. Culture

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ABSTRACT

In this article, I provide a cultural history of some of the critical predicates of corporate personhood. I track the Hobbesian lineage of the corporate form, but also the ways the corporation, ascribed with numinous agency and personhood, has filled the cultural space vacated by our transcendence of anthropomorphic notions of god and Nature.

The corporation was created through the consent of the sovereign, and its charter was formulated to reflect not only its uses, but its potential threat, particularly with regard to its concentration of power. Established under the aegis of individual states, the U.S. corporation was initially restricted to specific functions for limited periods. But corporations in many contexts not only have supplanted the Hobbesian state that created them, but displaced the individual person.

Corporations have become super-persons and forms of sovereigns themselves, in part by acquiring human rights and "personalities" and tethering them to the corporation's inhuman attributes. However, corporations don't just mimic human behaviors; at best simulacra, or imitations of human life, corporations challenge and destabilize the status of personhood, and what it means to be a person.

In the process, corporations have amassed not just wealth, but personhood (for example, in perhaps surprising ways, the personhood of African Americans). In many ways, the ever-increasing wealth gap in the United States is actually a personhood gap. The overarching effect of corporate personhood, which operates in tandem with privatization, is to dehumanize people, turning them into things that have no rights. Created to encourage entrepreneurial (or reckless and socially irresponsible) risk-taking and minimize personal liability, the corporation evolved into an entity that dynamically diminishes the personal.

The corporation represents a collective, transcendental body that has taken on the role of a deity, and, in U.S. ontology, of nature. The relationships between human and corporate personhood and identity implicate fantasies of the supernal; the super-human; immortality; and the transcendence of individuality. For these reasons, I treat the corporation not primarily as a commercial enterprise, but as a cultural phantasm, a kind of black hole that draws in more and more cultural phenomena

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into its orbit. The modern corporation has come to guarantee certain rights at a price, in much the way the Hobbesian state once did. People barter their attributes to corporations; but they are no longer trading liberty for security, but "souls" for identity. As the corporation comes to serve as the de facto guarantor and distributor of culture, it remains amoral at best, and in practice serves as a dominant pathological personality that helps reduce all human endeavor to commercial interest.

KEYWORDS

Corporate Personhood, Thomas Hobbes, Critical Legal Theory, Race, Citizens United case

CONTENTS

1. Introduction

In the manner of subliminal advertising, the corporate communications that warn you that someone might be stealing your identity also might be acknowledging that corporations are responsible for the biggest identity theft in history. If corporations are now alive, and have become persons, human beings might already be dead things. In this article, I provide a condensed, necessarily elliptical cultural history of some of the critical concepts pertaining to the impersonal impersonations that constitute corporate personhood. By examining the naturalization, animation, legal authorization and structural deification of the corporate person, I hope to illuminate the ways corporations walk, disembodied, among us.

In a prior publication, I coined the term corpography to connote the limited forms of self-representation—such as advertisements, filings, and corporate histories—that corporations can generate.[1] Advertising, the corporate speech I described as impersonal and depersonalizing, provides a primary means for creating corporate identities, which I define as only a network of representations that reify corporations as coherent, continuous and personalized entities. That discourse inures us to the fantasy that we can relate to corporations as organizations with intrinsic human(oid) characteristics, rather than as legal fabrications or bureaucratic machines. Though it is highly mediated, advertising is the closest thing to an autobiographical utterance a corporation can make. Most external biographical representations of a "corporation" internalize the fantasy that the corporate structure can be incarnated, and narrativize and dramatize the corporate brand as if it were in key registers personable, or impersonable.

I also argued that personhood is a zero sum game, and that the more "personhood" and human rights a corporation attains, the less of those traits and rights people retain. Because it is a purely metaphorical contrivance, the concept of corporate personhood is often represented through images of mechanical, generic, and vampyric forms of existence. In other words, impersonal corporate systems mimic human processes and interactions, or uncannily but defectively imitate and siphon the personal qualities of people—they are entities that steal identities. I focus here not on advertising, but the causes and effects of corporate ontology in the U.S. in cultural and legal terms.

I track the Hobbesian lineage of the corporate form, but also the ways the corporation has filled the cultural space vacated by our abnegation of anthropomorphic notions of god and Nature (i.e., other personified fictions of collective existence that preceded it. I capitalize Nature at points to connote a deified, impersonally personified, and transcendental entity). I briefly touch on the disturbing ways in which pantheist and neo-vitalist theories of Gaea, which personify Nature as a living Being with a soul and agency, can reflect corporate ontologies and help substantiate the legal and deontological frameworks that afford corporations souls and personhood. The pressing question is whether corporations conceptually are persons or nightmarish things impersonating persons.

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[1] *See* Richard Hardack, *New and Improved: The Zero-Sum Game of Corporate Personhood*, 37 Biography: Interdisc. Q. 36 (2014) (a special issue on life-writing and corporate personhood). All emphases in this article are added unless noted as "eio" (emphasis in original).

Commercial entities with strictly delimited rights and liabilities, corporations are created at the largesse of governments or sovereigns; as such, they are ineluctably artificial and contingent. In the well-known U.S. Supreme Court case of *Dartmouth College v. Woodward*, Chief Justice John Marshall asserted that "Being the mere creature of law, [the corporation] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."[2] Established by public charter and under the aegis of individual states, the U.S. corporation was initially restricted to specific functions, and often for limited periods and with caps on its accumulation of capital. The corporation existed through the consent of the sovereign, and was formulated to reflect not only its uses, but its hazards, particularly with regard to its concentration of power. Herbert Hovenkamp reminds us of a stricture that courts often forget, that "the corporation has only those powers granted to it by the sovereign."[3] But, as I argue throughout, corporations have become forms of sovereigns themselves, primarily by acquiring human rights and "personalities" and tethering those qualities to the corporation's inhuman attributes. Though now credited with personhood, corporations cannot act with univocal intention or possess agency. They are at best simulacra, imitations of human life. But corporations don't just mimic human behaviors; they chronically challenge and destabilize the status of personhood, and what it means to be a person.

The only interest a corporation has under its charter is commercial—it is created for a strictly mercantile purpose.[4] No autonomous person exists in the formal corporate domain to generate views, or voice speech, other than agents who make commercial representations regarding the corporation on its behalf. Many other groups and associations can voice any kind of speech—they are not bound by charters, and their privileges were not designed to be balanced by equivalent restrictions. No doubt, such entities face their own problems in voicing the views of a collective, but they are at least in critical ways disconnected from the directives and constraints of the for-profit corporation. Unlike NGOs, partnerships and most other organizations, the large corporation *a priori* creates a nearly absolute separation between not only owners and actors and agents, but between the empty, unpeopled structure of the corporation and the dehumanized people who serve it. It is worth noting that no partnerships ever have claimed a soul, and far fewer of them than corporations ever have threatened eco-systems, national financial systems, or the health of their customers.

In many ways, the ever-increasing wealth gap in the United States is actually a personhood gap. The effect of corporate personhood, which operates in tandem with privatization, is to dehumanize people, turning them into things that have no

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2 Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

3 Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593, 1645 (1988).

4 Non-profit corporations—for example, most universities—are distinct entities, but even they increasingly are infiltrated by the structures, expectations, and behaviors of for-profit corporations. Even most B corporations, the relatively miniscule number of corporations that are dedicated to social causes such as renewable energy, are still defined and constrained by the corporate form; while some of these businesses behave much more responsibly than the average corporation, they still use their social agendas to promote their businesses, and to brand themselves as putatively anti-corporate, while still taking advantage of the corporate form.

rights—not the right to have access to healthcare, education, or courts rather than arbitration; to retire; to unionize; to speak; and even to vote. Many of those rights have been directly and indirectly transferred to corporations that can lobby and set agendas ranging from taxation to healthcare, education, military spending, election rules, gerrymandering and campaign spending. As codified by the ironically titled *Citizens United* case, *infra*—the 2010 Supreme Court case that held that corporate money is speech and affirmed that corporations are people—corporations have come to control speech and representation in almost all media. It therefore becomes critical to track the manifold cultural, aesthetic, legal, and ontological inversions that have allowed corporations to regulate the state. The causes and effects of these inversions affect society at all levels and in all contexts. As one disturbing example, it is now commonplace for many corporations, even those not immediately involved in information technology or social media, to refer to persons as the products rather than the consumers. Virtually all media, which now includes everything from entertainment to politics, serve as a pretext or lure for corporate advertising and manipulation, and a distraction from corporate maneuvering. All these inversions and effects are intimately predicated on the notion that the corporation is now the person.

II. Incorporating Nature

To address the evolving and troubling relationship of the corporation to personhood in U.S. culture, one needs to consider its affiliations with, and divergences from, Nature and the nation-state. I argue that a once deified Nature, which was also putatively animated with some form of a soul, has been superseded directly by the Corporation with a soul, which begins to take on the exceptional, numinous, or inhuman characteristics of the divine—it is a disembodied, collective thing that is animated, ubiquitous and theoretically immortal. The corporation also is engaged in a zero-sum game with Nature, and finally the nation-state. According to Marx, "The devaluation of the human world increases in direct relation with the increase in value of the world of things."[5] Today, that world is represented by the corporation, the quintessential uncanny Thing whose "human" status, rights and qualities grow as, and only when, those of people are diminished. In tracing how the corporation comes to take on and over the attributes of Nature beginning around the time of the Civil War, one encounters a consistent rhetoric of merger, animation, impersonation, impersonality, artificial life or intelligence, and a transcendence of individual human identity common to both entities.

The relationship between human and corporate personhood and identity implicates our interactions with religion, deified Nature and sacrificial systems of gift exchange. For these reasons, I treat the corporation not primarily as a commercial enterprise—though its legal and economic functions are of course vital to its existence—but as a cultural phantasm, a kind of black hole that draws in more and more cultural phenomena into its orbit. In a variety of contexts, people barter their attributes to corporations—they are not trading liberty for security, but "souls"

[5] Karl Marx, The Economic and Philosophical Manuscripts: Early Writings 323-24 (Rodney Livingstone & Gregor Benton trans., 1975).

for identity. As I will argue, the contemporary corporation has come to guarantee certain rights at a price, in much the way the Hobbesian state once did. As the corporation comes to serve as the *de facto* guarantor and distributor of culture, it can be amoral at best, and in practice it serves as a dominant pathological personality and helps reduce all human endeavor to commercial interest. Almost everything produced in that culture will reflect that pathology and priority. Ironically, the expansion of corporate rights has periodically proceeded under the unwittingly masochistic claims of corporate owners, as in *Burwell v. Hobby Lobby Stores, Inc*.; it is as if hosts were agitating for the privileges and prerogatives of parasites.[6] Perversely, unaware they are participating in a zero-sum game, plaintiffs in these cases seek to transfer aspects of their own personhood and personal rights legally to the corporate form; it is quite the devil's bargain to attain "religious freedom" for your corporation at the expense of establishing, in ever expanding milieus, that corporations effectively have souls. As Richard Powers writes in his 1998 novel *Gain*, which is perhaps the first *bildungsroman* whose subject is a corporation, "He had lived long enough to see the constitutional amendment preventing any law that would abridge the privileges and immunities" of a corporation, "that legally created person. Such a law guaranteed the immortality dreamed of by the poets and prophets."[7] In other words, the corporation is not just a legally created

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6 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

7 Richard Powers, Gain 181 (1998). Burkhard Schnepel notes that for the anthropologist Sir Henry Maine, the defining trait of

> corporations, both sole and aggregate, is their perpetuity, assured by laws of intestate succession. Maine's maxim that 'corporations never die' puts the emphasis on the preservation and devolution of the collectively held universitas juris, the bundle of rights and duties . . . . Fortes writes . . . The point here is that it is not their co-existence as 'a plurality of persons collected in one body' that makes a group corporate, but their 'plurality in succession,' their perpetuity in time. Summing up these ideas [in *The King's Two Bodies*, Ernst] Kantorowicz says that "the most significant feature of the personified collectivities and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal.

Burkhard Schnepel, *Corporations, Personhood, and Ritual in Tribal Society: Three Interconnected Topics in the Anthropology of Meyer Fortes*, 21 J. Anthropological Soc'y Oxford 1, 6 (1990). As such, these entities also can displace the cultural centrality of familial succession. Though his work is dated, and according to James Dow conflates the precepts of Maines and Max Weber and generated the "muddled concept of corporation in Anthropology," Fortes focuses on the critically overlooked ontological features of the corporation. James Dow, *On the Muddled Concept of Corporation in Anthropology*, 75 American Anthropologist 904, 905 (1973).

Corporate personhood also destabilizes what Michael Vicaro terms the

> dualistic model of the self [that] is a central feature of philosophical liberalism. On one side of the liberal split-subject is the "private self," comprised of the unique particularities of one's corporeal and relational experiences; this private self is presumed to be inviolable and inaccessible to outside others but for the willfully consented to (and always imperfect) exchange of signs.

person, but a legally created deity, as it is immortal and bears a host of super-human attributes that violate the laws of "nature." (It also displaces the poet of nature and prophet of religion). As Melville might say, corporations guarantee immortality to impersonality at the expense of mortal individuals, an exchange that creates an inverse relationship between corporate and personal freedom.

In his recent novel *Glow*, Ned Beauman proposes that "killing a corporation was like killing a colony of sentient fungus. . . . United Fruit was a hundred and eight. Chevron was a hundred and eighteen. De Beers was a hundred and twenty. Unlike governments, corporations endured: deathless, efficient, self-renewing."[8] This corporate immortality, and the expansion of exceptional corporate rights and immunities, is achieved at the expense of individual rights and identities. Throughout the work of Ralph Waldo Emerson—the antebellum American transcendentalist whose writing here provides a useful framework with which to assess the personhood of the corporation—Nature controlled a similar process, which he considered a form of divine dispossession. To attain immortality in Nature or in the corporate form, one must divest oneself of individuality.

This corporate displacement fulfills an arc Melville first traced in full in *Moby-Dick*, which emblematically situates the failing ubiquity of Nature against the rising ubiquity of the corporation. The leviathan of Moby Dick—a term Melville partly developed from Thomas Hobbes, to whom I return—represents, among other things, the demonological transition from the U.S. conception of Nature as an American provenance that serves to guarantee a universal natural law, to a conception of the transnational corporation that is everywhere the same. In that novel, Ishmael comes up against "the unearthly conceit that Moby Dick was *ubiquitous*; that he had been encountered in opposite latitudes at one and the same instant of time. . . . [and] not only ubiquitous, but *immortal* (for immortality is but ubiquity in time")."[9] Melville realizes that we have begun to inhabit a world where, as David Harvey notes, "two events in quite different spaces occurring at the same time could so intersect as to change how the world worked."[10] In this context, Moby Dick emerges as the first postmodern animal; seen in many places at once, it is everywhere the same, here still

> On the other side stands the "public self," achieved by virtue of a process of "citizenly abstraction," by which the individual transcends private interests and becomes a representative of a rational community of impartial "stranger relations." The liberal individual thus maintains a natural, primary, and extra-discursive personhood, endowed with inalienable rights, and able through rational consent to take on temporarily on any number of subject-positions and citizenly roles. The liberal citizen, for example, must abstract himself or herself from private interests and concerns to occupy the position of a soldier or a public official, but this is an identity position maintained through consent that can be revoked, thus returning one to a neutral and inalienable core self.
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> Michael P. Vicaro, *A Liberal Use of 'Torture': Pain, Personhood, and Precedent in the U.S. Federal Definition of Torture*, 14 Rhetoric & Pub. Aff. 401, 414-15 (2011).

8 Ned Beauman, Glow 43 (2015).

9 Herman Melville, Moby-Dick; or The Whale 182-83 (Harrison Hayford, Hershel Parker, G. Thomas Tanselle, eds., 1988) [hereinafter referred to as *MD*].

10 David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change 265 (1990).

like a franchise of Nature. In this image of a kind of quantum Moby Dick, which can be located in either time or space but never both simultaneously, Ishmael begins to chart the way American economies—of corporate whaling, manifest destiny, and masculine identity—set the stage for universal American corporations and products, but he still imagines a counter-force of transcendental Nature that remains equally and genuinely universal. (Douglas Rushkoff uses the terms "digiphrenia" and "fractalnoia" to describe the way digital media has now effectively trained us to be and see in many places simultaneously, but also synchronize too much data into patterns and reconcile incompatible states of mind).[11] That process began as the nineteenth-century corporation began to assert its universal identity, reach and influence in many places at once). Ishmael also specifically tells us "'It's a mutual, joint stock world, in all meridians,'" situating the corporation as the force already everywhere displacing Nature in a world increasingly defined by U.S. commerce.[12] That joint-stock world must exist everywhere the same at once—in other words, it precisely takes over the function of the whale (nature) its corporate mission hunts to the brink of extinction.

In some ways unprecedented and anomalous in history, the corporation is a

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[11] Douglas Rushkoff, Present Shock: When Everything Happens Now 96-97, 201-03 (2013).

[12] *See MD*, *supra* note 9, at 62. Though manned by an Anarchasis Cloots convention of workers, *The Pequod*—from its Quaker financing to its role in the worldwide whale oil trade—also represents a distinctly corporate endeavor. Some critics rightly situate Starbuck as the epitome of rational commercial self-interest and Ahab as a figure who pathologically warps the profit motive (e.g., Paul Royster, *Melville's Economy of Language*, *in* Ideology and Classic American Literature 322 (Sacvan Bercovitch & Myra Jehlen eds., 1986)), but Ahab also serves partly as a heuristic for representing the monomaniacal corporate personality, and its narrow range of obsessive self-accretion. Ahab is not the exception that proves the rule, but an inevitable byproduct of the corporate enterprise, in much the way Kurtz in *Apocalypse Now* was not an aberration of the military ethos, but its apotheosis. What Herbert Marcuse described as the reductiveness of capitalism applies to Ahab and corporate personhood: "there is only one dimension, and it is everywhere and in all forms." Herbert Marcuse, One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society 11 (1964).
According to the New Zealand novelist Ian Wedde, whose 1986 novel *Symmes Hole* develops an alternate history of the Pacific written as an extended corporate biography, Ahab's is the incipient corporate enterprise of U.S. imperialism:

> No doubt about it, Captain Wilkes is Captain Ahab. . . . And Wilkes had a brilliant megalomania before which the democratic American ethos quailed. . . . But it gets even weirder. Wilkes was Ahab, and his backer was one of the spiritual fathers of American corporate vision protected by naval power. . . . behind the rapid debouchement of [Wilkes'] Great [Exploring] Expedition there lurks a shadowy . . . Rhode Island millionaire of the 1840s . . . and crank, one Jeremiah N. Reynolds [believer in the hollow earth, author of the original "Mocha Dick: Or the White Whale of the Pacific," and forbear of the R.J. Reynolds Tobacco dynasty] . . . . [H]e must have had some vision of corporate structures bestriding the Pacific. . . Reynolds wanted to get *inside*—and his descendants did: nuclear submarines and fast food. . . . the way was clear for enterprise that realized that corporate power loved the spaces between places just as much as the places.

Ian Wedde, Symmes Hole 152–54, 169 (1986).

private institution that is everywhere, and everywhere precisely the same—and hence not only immortal, but ubiquitous.[13] The franchise is one apotheosis of the corporate form; it is a kind of Platonic archetype that begins as an idea that is then reproduced endlessly to order. An infinitely replicable clone (or work of mechanical reproduction) without an original, the corporation can have the same identity always and everywhere, in some ways because it can have no identity at all, anywhere. In its modern form, it is already a purely digital/virtual/posthuman entity—without a body and yet omnipresent, existing in more than one place at the same time.

These initially maritime joint-stock companies, which settled the new world and for Melville were emblematized by the new global enterprise of whaling, were also intimately involved in all aspects of colonialism and the global slave trade—they were precursors of the modern corporation in many contexts. As Malick Ghachem notes, historians tend to assume the priority of the nation-state over such entities as the corporation as subjects of inquiry; but colonialism was advanced by conflicts between national trading companies as much as it was by disputes among the colonial powers themselves.[14] (As Joseph Slaughter proposes in slightly different but relevant contexts in discussing Robinson Crusoe, oaths "are also the forms that colonial charter companies used not only to subjugate native peoples

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[13] The "residence" and "citizenship" of a corporation matters of course in the context of jurisdiction and local regulation. In what typically involved a race to the bottom, U.S. corporations began to incorporate in states, primarily Delaware, that offered not only the most comprehensive legal system, but the most permissive rules for incorporation and corporate liability and taxation. While some states, such as California, enacted legislation related to incorporation that would protect shareholders, most corporations could simply shop for better provisions elsewhere. But the state of incorporation is largely a fiction of locality and specificity, and another provision that allows for the kind of conceptual disconnection endemic to the corporate form; it has little bearing on where a corporation actually conducts its business or its ontological status as stateless. Many corporations that incorporate in Delaware, for example, simply maintain the equivalent of a post box there, without any attendant human presence.

[14] Malick Ghachem, The Forever Company: How to Narrate the Story of an Eighteenth-Century Legal Person (The Case of the Campaignie des Indes), Address Before the Legal Bodies Conference, Leiden University Centre for Arts in Society (May 17, 2014). Corporate names often reflect the conceptual and linguistic processes of capitalist mergers, which in perverse ways appear to imitate what capitalists often fantasize represents the Darwinian violence of nature. Chemical Bank, for example, takes over or cannibalizes Chase Bank, but retains the "conquered" name or vanquished logo as its company brand. In this variation of what Richard Slotkin terms regeneration through violence, the victorious corporation incorporates to itself through forms of sublimated and sometimes direct aggression. *See generally* Richard Slotkin, Regeneration Through Violence (1973). This conglomeration and aggregation of the corporate form often has been marked by an exploitation of nature, colonialism, and aboriginal dispossession. A logic of corporate invasion presides over a wide array of displacements and transfers, especially the displacement of what were once native inhabitants and species. The specifically joint-stock hunt for Moby Dick in Melville's novel, for example, takes place aboard a ship named after the exterminated tribe *The Pequod*. In consonant fashion, the corporation takes over the symbol of that which it has incorporated in its mergers and acquisitions, and the primary telos of the corporation is to commercialize, supplant and finally incorporate, figuratively and literally, nature itself.

but also, in effect, to acquire international personality of their own").[15] A form of colonialism is inherent to aspects of the corporate enterprise, and the demands of capital, which seeks constant expansion into nature and other cultures associated with nature. In *The Ticklish Subject*, Slavoj Žižek contends that

> The danger to Western capitalism comes not from outside, from the Chinese or some other monster beating us at our own game while depriving us of Western liberal individualism, but from the inherent limit of its own process of colonizing ever new (not only geographic, but also cultural, psychic, etc.) domains . . . [until] Capital will no longer have any substantial content outside itself to feed on. . . . [W]hen the circle closes itself, when reflexivity becomes thoroughly universal, the whole system is threatened.[16]

According to Ghachem, the only check on post-national corporate power comes in the language of fraud; unless an endeavor amounts to actual fraud, a corporation's rights and privileges are largely seen as a matter of right, not a reversible or temporary grant created by state charter.[17] I argue that in the U.S., corporations began to supplant nation-states after they fully displaced Nature in the cultural functions they performed. The promethean state created the corporation that proceeded to subsume it. Nature was always a "transcendent" fiction of collective identity in U.S. culture, one that not only bore strong affinities with the corporation, but was ultimately revealed as its direct predecessor.

III. Corporate Mergers and Corporate Animation

To explain how the corporation emerges as the successor to or fulfillment of transcendental Nature, I here briefly address pantheistic (primarily) American writers who, perhaps unexpectedly, served as precursors to and harbingers of contemporary corporate culture. The type of transcendentalists most concerned with the collective and impersonal aspects of Nature, pantheists evoked its attributed power, scope, and functions in ways that consistently comport with the same vectors of the "animated" corporation. Many pantheistic depictions of merger with Nature either predict or are co-opted by the corporate age that soon follows. For example, in *All Is One: A Plea for the Higher Pantheism*, Edmond Holmes describes the fall of man from nature:

> The animism [that] peopled the outward world with nature spirits was the instinctive protest of man's heart against the materialism of his conscious thought. . . [When] animism fell into disrepute . . . . it made possible [] scientific exploration . . . . [but] as belief in the supernatural waned

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15 Joseph R. Slaughter, *However Incompletely, Human*, *in* The Meanings of Rights: The Philosophy and Social Theory of Human Rights 287 (Costas Douzinas & Conor Gearty eds., 2014).

16 Slavoj Žižek, The Ticklish Subject: The Absent Centre of Political Ontology 358 (2000).

17 Ghachem, *supra* note 14.

> . . . . especially in Protestant countries . . . materialism reject[ed] the supernatural, and [gave] a mechanistic explanation of life . . . . [the loss of animism]. . . . empt[ied] nature of her own spiritual life.[18]

The corporation both disembodies and reembodies this lost spiritual animism in the guise of a mechanical, mechanistic and deterministic artificial life, overlaid with a human face and soul. In his 1885 address to the Concord School of Philosophy, John Fiske asserted that everything in the world is animated or alive:

> [T]he universe as a whole is thrilling in every fibre with Life,—not, indeed, life in the usual restricted sense, but life in a general sense. The distinction, once deemed absolute, between the living and the not-living is converted into a relative distinction; and Life as manifested in the organism is seen to be only a specialized form of the Universal Life. . . . reappearing from moment to moment under myriad Protean forms . . . . [through] this animating principle of the universe.[19]

This specific process of animation is a kind of predicate for being imbued with a soul; for transcendental pantheists, all things have souls because Nature, in some impersonal way, is itself a living personified entity. But we will see this ascription of soul transfer to the animation and personification of the corporation.

Transcendentalists believed that some mysterious, ubiquitous principle or force infused universal Nature and also "animated" all people, representing an impersonal annexation of the personal. Such animation or life could not be restricted to people, or even organic matter; as Melville suggest throughout his novel *Mardi*, the entire world is alive, and has a soul. Animation is the principle of transcendental Nature that guarantees and connects all life, and renders all life equivalent: "With Oro [Pan], the sun is coeternal; and the same life that moves that moose animates alike the sun and Oro."[20] Babbalanja's description of his world of Mardi offers a blueprint for imagining an entire world that is a collective Being:

> I live while consciousness is not mine, while to all appearances I am a clod. And may not this same state of being, though but alternate with me, be continually that of many dumb, passive objects we so carelessly regard? Trust me, there are more things alive than those that crawl, or fly, or swim . . . . Think you it is nothing to be a world? . . . what are our tokens of animation? . . . Think you there is no sensation in being a rock?[21]

Consciousness here becomes potentially fungible or transitive, and Nature in effect serves to guarantee our continued existence, to bridge lacunae in consciousness and identity (in ways that adumbrate the function of the corporation). "Animation" is what turns mere matter into an entity characterized by some form of life, but

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18 Edmond Holmes, All Is One: A Plea for the Higher Pantheism 16-17 (1921).

19 John Fiske, The Idea of God as Affected by Modern Knowledge 149-51 (1899) (1885).

20 Herman Melville, Mardi and a Voyage Thither 615 (Harrison Hayford et al. eds., 1970) (1849).

21 *Id.* at 458.

without the intervention of an anthropomorphic deity. Adumbrating *Mardi*, James Russell Lowell complained of Emerson's Divinity School Address that he would not "hear the anointed Son of God/Made like themselves an animated clod."[22] Under the extended terms of such debates, the corporation itself comes to be animated and possess a form of consciousness.

For transcendentalists and some political theorists, Nature once served as the universal force that authorized American democracy (as well as manifest destiny). But as the nation-state came to be unified not by Nature—which was imagined to be everywhere the same—but corporate technologies such as the railroad and telegraph, the corporation became the new animated clod. A key question, since transferred to the corporation, is what kind of speech animated Nature could make. Emerson believed that "The Soul which animates nature is not less significantly published in the figure, movement and gesture of animated bodies, than its last vehicle of articulated speech . . . . A statue has no tongue, and needs none."[23] As Hawthorne writes in *The Marble Faun*, Americans easily are seduced by "the mystery, the miracle, of imbuing an inanimate substance with thought, feeling, and all the tangible attributes of the soul."[24] As if lamenting the disappearance of the Mardian world of animated nature, the contemporary American naturalist Annie Dillard asks, "Did the wind use to cry, and the hill shout forth praise? Now speech has perished from among the lifeless things of earth, and living things say very little to very few."[25] (As I begin to argue in "*Not Altogether Human": Pantheism and the Dark Nature of the American Renaissance* (2012), the animated corporation voices this now silent speech of Nature, and comes to serve as the centralized repository of collective speech, souls, and even life itself in the U.S. ethos). In the transcendental American grain, Nature was an often personified social construct, or fiction, that has an alleged intent and animates people. Ironically, as the corporation comes to assume the functions of Nature, it is supported by an ever-increasing array of technologies that enable it to simulate and transcend the ubiquity of natural forces.

The law itself once situated corporations as artificial constructions that mimicked nature. Some twentieth-century legal cases, for example, specify that the state animates corporations: "A corporation is a creature of the State. It owes its very being to the State. "Into its nostrils the State must breathe the breath of a fictitious life for otherwise it would be no animated body but individualistic dust [citation omitted].""[26] Such cases appropriately still treat the corporation as a kind of closely-held Frankenstein's monster, an animated thing of dust: "While the directors are chosen by the stockholders, they become, when elected and properly organized as a board, the agent of the corporation. It is by such means that animate force is

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22 John J. McAleer, Ralph Waldo Emerson: Days of Encounter 250 (1984).

23 VI, Ralph Waldo Emerson, *Behavior*, The Complete Works of Ralph Waldo Emerson VI 169 (1904) [hereinafter referred to as Works].

24 IV, Nathaniel Hawthorne*, The Marble Faun: Or, The Romance of Monte Beni*, *in* The Centenary Edition of the Works of Nathaniel Hawthorne 271 (William Charvat, et al. eds., 1968).

25 Annie Dillard, Teaching a Stone to Talk 69 (1982).

26 Cloverfields Improv. Assoc. v. Seabreeze Props., Inc., 32 Md. App. 421, 425 (Md. Ct. Spec. App. 1976).

given to an inanimate thing."[27] Contrary to most representations of corporations in films and texts, these courts treat the corporation as having no independent life at all, and as a mere contrivance: "Corporations are animated by people; those who control such corporations hire others to perform on the corporation's behalf."[28] This language modifies the descriptions found in text as such as *Mardi* in addressing the ways people and things manifest agency (and the natural and artificial signs of life), but the reality is that corporations are no longer animated people and states, but the reverse. As we shall see, cases have increasingly reified the fiction of the corporation as an animated person or entity unto itself.

After Lukács, Michael Rogin proposes that "every cog is human; when power is attributed to emblems, and they do human work, the writer has succumbed to animism."[29] Transcendental animism—the rhetoric that attributed life, personality and soul to aspects of Nature—was transferred to the corporate form.[30] According to Gregory A. Mark, the idea of a corporation imbued with life did not hold great influence in the United States: "Equally ill-fated were the attempts to animate the corporation, which were not generally taken seriously in America. Nonetheless, commentators recognized the births and deaths of corporations, and accepted that they possessed lives and the powers to will, to act, and to create."[31] But I would argue that this idea of animation, even if not taken seriously in the general culture until recently, has had profound ramifications and effects and is an indispensible facet of a religious and ontological discourse that pervades U.S. culture. Party as an outgrowth of the legal separation between corporate tortfeasor and individual liability, the corporation has come to possess a life of its own precisely independent of the people who allegedly animate it.

Disturbingly, some posthumanist and neo-vitalist theory, which tries to erase hierarchical distinctions between species and organic and inorganic matter, can

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27 Lamb v. Lehmann, 143 N.E. 276, 278 (Ohio 1924).

28 Chemtall, Inc. v. Citi-Chem, Inc., 992 F. Supp. 1390, 1403 (S.D. Ga. 1998).

29 Michael Rogin, Subversive Genealogy 115 (1983).

30 Though I don't have space to develop the claim here, I argue that *Avatar* unwittingly dramatizes the ways corporate personhood is predicated on commensurate discourses of primitivism and fetishized technology; its false opposition between the militarized mining corporation and the pantheist/animist tribe is dismantled not only by the overdetermined issue of incorporation—the fact that humans on Pandora can interact with nature only by assuming virtual bodies—but the fact that their access to this nature is purely virtual. They jack into computers the same way the Navi access their horses and other animals, with various forms of USB plugs. The film lays bare the pretense that humans can oppose a corporate culture by aligning themselves with a primitive tribe/ living world—precisely Melville's narrative in *Mardi*, whose living planet is an early version of Pandora. Perhaps unwittingly, the film exposes nature as having been always already a social/corporate/ virtual construct.
As if addressing *Avatar*, Žižek contends that "This new notion of life is thus neutral with respect to the distinction between natural and cultural (or 'artificial') processes—the Earth (as Gaia) as well as the global market both appear as gigantic self-regulated living systems." Slavoj Žižek, Interrogating the Real 85 (Rex Butler and Scott Stephens eds., 2006) (2005). In this new-age fantasy of cyberspace, we leave real bodies behind and become corporate or cyber bodies that efface nay remaining distinctions between nature, technology, and corporation.

31 Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. Chi. L. Rev. 1441, 1473-74 (1987).

play into the notion that the corporation is itself alive, and has personhood, rights, and a soul. For example, under Roberto Esposito's resuscitation of vitalism—which echoes antebellum pantheism, contends that all life is equal and should be approached impersonally, and is meant to transcend the limitations of the human/humanism—the impersonal corporation could also be considered alive.[32] Here, posthumanism can be used to advance the interest of the posthuman corporation, and the corporation, in precisely structural/impersonal terms, is effectively able to appropriate posthumanist personhood as, we shall see, it did the personhood of African Americans. Similarly, Jane Bennett's notion of enchanted matter, impersonal affect and heterogeneous/ distributive agency could also apply to the same kind of animism that gives corporations the ontological status of persons.[33] To deny the distinction between the living and the non-living can play directly into the absent hands of the corporation. Such theorists sometimes confuse the impersonal, which they tether to a rights discourse, with the egalitarian; the excesses that can mar personal discourses do not warrant their abandonment, but regulation.

In the United States, the history of the corporation also tracks the shift from romanticism to naturalism and back to neo-romanticism, all of which, perhaps surprisingly, maintain many of the same premises regarding the aggregate forces of Nature/the corporation, and primarily shift only their reaction to those premises. Under naturalism, nature represents an impersonal automaton, an emblem of brute/blind force. Yet as Walter Benn Michaels suggests—through the "discrepancy between the behavior of individuals and that of the aggregate"—Nature ultimately can turn everything into (and problematize the very notion of) a person: "dreaming of the "monstrous," [Frank Norris'] Presley [in *The Octopus*] is already dreaming of the corporation."[34] Here, impersonal transcendental Nature, which represents an aggregate mass, serves as a precursor to Norris' impersonal and effectively transcendental corporation—in this trajectory, the leviathan has turned into another large sea-kraken, but with more outreach.

IV. The Corporate Person

Beginning with Hobbes, the teleology of the corporate form would take it from being a surrogate for a deified Nature and "centralizing" nation-state to being their successor or near-successor. Melissa Aronczyk observes that corporate advertisers and branding agencies now legitimate and maintain the nation-state as one of our primary cultural reference points.[35] However, the corporation has in some ways overtaken the nation-state as the most significant producer of laws and cultural signifiers. (Jorg Kustermans argues that the nation-state also effectively utilizes its legal status to claim personhood, in a form of republican identity-construction comparable to the construction of individual personhood, but I would argue that

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[32] *See generally* Roberto Esposito, Bíos: Biopolitics and Philosophy (Timothy Campbell trans., 2008) (2004).

[33] *See generally* Jane Bennett, Vibrant Matter: A Political Ecology of Things (2010).

[34] Walter Benn Michaels, The Gold Standard and the Logic of Naturalism 211 (1987).

[35] Melissa Aronczyk, Branding the Nation: The Global Business of National Identity 64-65 (2013).

it is critical to differentiate formulations of individual personhood from those of aggregate personhood).[36] In the twenty first century, nation-states often fragment or become engaged in civil, sectarian, religious and postcolonial wars—corporations, by contrast, tend to consolidate and expand. As John Meyer and Patricia Bromley remark in addressing the recent rise of organizations generally world-wide, "An overarching explanation is that the dramatic limitations of the nation-state system, especially two horrific world wars, undermined government-based control, [thereby] creating supports for alternative forms of a more global social order."[37]

In the next section, I focus briefly on Richard Powers' novel *Gain* because it offers insights into the idioms of corporate biography, and provides a useful bridge from my preceding discussion of nature to the subsequent section addressing corporate agency and personhood. *Gain* presents a Joycean history of advertising language as it evolves from the familial and personal to the corporate. Literalizing the concept of the corporate legal fiction, Powers presciently wrote a biography of what emblematically began as a soap company as it regressed from the Revolutionary period to become a kind of postmodern golem. (Selling soap of course became the virtual signet of early television advertising, the quintessential mechanism for sponsoring content). Tracking the way the Clare Corporation produces increasingly deleterious products, Powers' narrator develops a biographical ontology and corresponding language that become ever more "corporatized" as they near the present. As it spans several hundred years, and businesses become more corporate and advertising more pervasive, the novel grows more impersonal in its precepts and characterizations; it is as if a roman à clef turned into a CGI biography scripted by an algorithm. Joseph Dewey suggests "the narrative of Clare International reads like an absorbing—and convincing—history."[38] But Paul Maliszewski believes *Gain* shifted its focus from personal history to what I would term a kind of corporate common law: "Powers read stories of real corporate characters and companies like Proctor & Gamble, Colgate and Lever, and found their stories Shakespearean. But the personification of Clare and its central role in the novel is less a matter of poetic than corporate law."[39] What Powers narrativizes is that the corporation takes over—

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36 *See generally* Jorg Kustermans, *The State as Citizen: State Personhood and Ideology*, 14 J. Int'l Rel. & Dev. 1 (2011).

37 John W. Meyer & Patricia Bromley, *The Worldwide Expansion of "Organization,"* 31 Soc. Theory 366, 368 (2013).

38 Joseph Dewey, Understanding Richard Powers 110 (2002).

39 Paul Maliszewski, *The Business of Gain*, *in* Intersections: Essays on Richard Powers 167 (Stephen J. Burn & Peter Dempsey eds., 2008). Though the issue is outside the scope of this essay, one should consider how corporations foster the erosion of privacy in contemporary U.S. culture—the hyper-voyeurism of contemporary reality TV and corporate journalism downplay facts, and promote forms of exposure, envy, schadenfreude and competition that are predicated on making the private public. In such contexts, Powers (along with Wallace) intimates that the corporation has ruined the genre of the novel, its language and epistemological ability to convey aspects of human interiority. The corporate formula becomes the formula for life-writing, and even reading. To redefine and "corporatize" individuality, corporations rely on conventions similar to those of Reality TV—archetypes, selves identified with/as generic competitive tropes, and an effectively medieval notion of identity (characters that are little more than drives, and simply personify vices such as envy). That strategy is exemplified and laid bare in the parodic but emblematic commercials that pretend to be mini soap opera

not only the town, but the idea of family, the bodies of its workers and consumers, and the precepts of narrative itself.

As David Foster Wallace intimates throughout *The Pale King*, the problem isn't just that contemporary corporations are treated as if they were people, but that people start behaving as if they were corporations.[40] For Wallace and Powers especially, corporations represent the denouement of a strain of biographical fiction—they emblematize a kind of dead-end, what George Steiner might consider the dissolution of an old and (putatively) communal cultural literacy, which is replaced by an ever more dominant corporate culture. By the end of the last millennium, Clare's "ads provided the backbone of shared culture, from playground to dinner table. . . . Old Native Balm engravings now went for thousands of dollars at auctions. A novelization of a series of commercials for Clare's leading over-the-counter painkiller ran for twelve weeks on the New York Times best seller list, and even made money as a film."[41] Writers such as Powers, Wallace and Don DeLillo dramatize the subordination and powerlessness of culture, of the biographical novel, when displaced by the life-writing, personhood and cultural influence of the corporation—these truths are not only stranger than fiction, they replace it.

Maliszewski cites Powers' own impression that "the literary approach" to business, which relies on humanist principles and characters to dramatize corporate systems, has become inadequate, and led him to pursue an articulation of the impersonal.[42] In other words, the old constraints of fiction prevent it from being able to apprehend the new contrivances of corporate fiction. Powers explicitly proposes that "the corporate protagonist's cycle of boom and bust [is] substituting for a narrative's rise and fall."[43] Powers' narrator then tells us, "with the right corporate structure, decisions practically handled themselves": that is, human agency, along with many of the very structures of narrative and biography and the human life cycle, recede or even disappear into impersonal discourse, and the recycling and inhuman cadences of corporate life cycles.[44] Such fictions narrativize not just an invisible hand, but the development of an entire corpus that is non-existent; in other words, we are left with decisions without decision-makers, shadows without casters, impersonators without persons.

Beginning with their Hobbesian chartered inceptions, corporations have always been artificial entities imbued with personhood, or souls. The deafening, largely unregulated speech they make in most contemporary societies is perversely proportionate to the absence of an identifiable speaker (behind the spokesperson)—ultimately, theirs is speech without an individual orator or source, but it generates a discourse that permeates everything. As Maliszewski notes, in *Gain* the protagonist's central mission is to discover the corporate source of her cancer, but no

dramas: the product (and product narrative) is intended to displace not just the person, but human personhood. Self-important "serious" ads now often rely on short attention span family dramas (barely-averted accidents, children growing up, break ups, break ins, etc.) that use products as placeholders for life events and relations. This corporatization of human affect warps narrative, biography, cultural literacy and most habits of reading.

40 David Foster Wallace, The Pale King (2011).

41 Powers, *supra* note 7, at 340-41.

42 Maliszewski, *supra* note 39, at 166.

43 Powers, *supra* note 7, at 166.

44 *Id.* at 288.

personal agency, no person, exists to be found.[45] The emblem for that contemporary corporation should be the unpersoned drone (whose recent emergence seems not accidental, but an outgrowth of assumptions related to corporate governance, responsibility and rights). Further, the biography of a corporation would be a close cognate of the biography of an unpersoned drone. Robert Mankoff, a *New Yorker* cartoonist, depicts God declaiming that "Switching to drones has made having to be everywhere at once much more manageable."[46] Here representing a kind of techno-necrotic "evolution" of Moby Dick, the drone that is everywhere at once is in some ways an appropriate mascot for the corporation: it elides agency and liability; is part of a tangled network of corporate profits and governmental/military collusion; and creates another nexus for a kind of corporate management of life and death. Unpersoned is a word that describes the effect of corporate culture on individuals, but also on social values. If we are becoming posthuman, we are also becoming unpersoned.

For Powers, well before the *Citizens United* case, *infra*, corporations had achieved personhood by hijacking the rights or privileges of persons, and specifically by co-opting the emancipation of slaves: "If the Fifth and Fourteenth Amendments combined to extend due process to all individuals, and if the incorporated business had become a single person under the law, then the Clare Soap and Chemical Company now enjoyed all the legal protections afforded any individual by the spirit of the Constitution."[47] As Powers contends, the corporation represents "an ingenious device for obtaining individual profit without individual responsibility. . . . He might have found the explication, clever, funny, perhaps even diabolical, if it weren't the absolute letter of the law." In this institutionalized fantasy—which represents a kind of collective return of the repressed—the law declares any corporation "one composite body: a single, whole, and statutorily enabled person."[48] Under a form of demonological logic, the once fragmented *body* of the statutorily disenfranchised slave—who was defined by the Constitution as being worth 3/5 of a person—is "unified" or, as Toni Morrison might say, re-membered in the collective, single super-body of the impersoned corporation.

But in the ontological and practical economic aspects of the zero sum game of personhood, corporate enfranchisement was gained at the expense of the disenfranchised. African-American slaves were freed and became legal persons under the aegis of due process, but corporations, the greater Elvis, effectively appropriated those rights. Corporations asserted they too had the rights of natural persons under the Fourteenth Amendment (petitions that have since grown into claims of aggregations of super rights, which allow corporations, in terms of reach and effect, to broadcast what are in effect millions of voices in their own names). Instead of being fractions of people, corporations became composites of all people. But African Americans had to invoke the rights of corporate persons to enforce their civil rights; they were able to challenge segregation under *Heart of Atlanta Motel Inc. v. United States*, not because it was illegal to discriminate against black people as persons, but because it was illegal to interfere with interstate commerce

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45 Maliszewski, *supra* note 39, at 163.

46 Robert Mankoff, *Switching to Drones Has Made Having to be Everywhere at Once Much More Manageable*, The New Yorker, Sept. 23, 2013, at 56.

47 Powers, *supra* note 7, at 159.

48 *Id.*

(specifically with black truckers seeking food and shelter while traveling in the segregated South) under the Commerce Clause.[49] Pilfering the personhood that African Americans had finally achieved, corporations also unwittingly appropriated and ironicized the term soul-brother. (This scenario perhaps represents the most egregious instance of a corporation stealing soul). The corporate strategy reflects not only a necessary legal tactic/feint to achieve an end; it initiates another move in the escalating zero sum game of corporate personhood.[50]

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[49] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[50] Responding to a challenge to the Civil Rights Act in 1964, for example, the Court stated that "Section 201 (a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin; and § 201 (b) defines establishments as places of public accommodation if their operations affect commerce or segregation by them is supported by state action." Katzenbach. v. McClung, 379 U.S. 294, 298 (1964). In effect, the Court had to address the district court's assertion that it was required to find a "demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce." *Id.* at 297. Partly because of precedent, the Court effectively decided that it could uphold the civil rights law only on the grounds that discrimination cumulatively affected interstate commerce. For example, addressing a civil rights law in the nineteenth-century, the Court had pronounced that "the first and second sections of the . . . "Act to protect all citizens in their civil and legal rights," are unconstitutional and void." Civil Rights Cases, 109 U.S. 3, 26 (1882). According to the Court, "The essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theatres; but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude." *Id.* at 9-10. In other words, congress did not have the right to legislate equality per se, especially proactively and with regard to individual persons:

> Has Congress constitutional power to make such a law? . . . It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the [civil] rights of the citizen, but corrective legislation . . .

Id. at 13. Even in the 1960s, the Court had to defer to a perceived lack of congressional authority to address issues of personal/civil rights as issues of human rights rather than, implicitly, as proto-corporate issues of commerce.

Part Two

I. The Two Sovereign Problem

> "We have to take the power back from the Parliament and put it where it belongs."
> "With the East India Company?" I proposed.
> "That is exactly right: with the East India Company, and the chartered companies, and those men of wealth and ingenuity who wield the power in our economy. To them must go the spoils of the earth, not members of parliament."
>
> David Liss, *The Devil's Company*[51]

The history of the corporation is closely connected to the history of the modern state, the abstract collective that provides an aggregate identity to those who belong to it or live under its field of influence. Hobbes could guarantee the continuity of the state by making it an impersonal entity that traversed the lifespans and limitations of individual rulers; the state was represented by particular sovereigns or men, but they were in a critical sense mere placeholders. Similarly, the corporation becomes an impersonal structure, precisely divorced from its owners or employees, who are not only temporary, but, in relative terms, fungible. Like the nation-state, the corporation is an impersonality we are in service to, but one that ultimately displaces and supplants its subjects; it is as if we have ended up as hosts to the impersonality, which has become more virulent, resistant, and embedded over time.

It is important to consider the relationship of the corporation, the current body of power in society, to its antecedent forms, particularly the bodies of Nature and the king. The corporate body retains but transforms the mystical and inhuman properties associated with the king's body; as with a sovereign body, it represents a conjunction of an extra-human body and an exceptional or non-human personality (though many now would allege that the king and corporation also are equally persons). Aggregate and symbolic bodies of power typically bear contradictory or mystical attributes. In many cultures, for example, "It was not proper to refer to [the king's] body or to imply that he had an ordinary human body at all. A special word was used instead, signifying the kingly personality."[52] Ironically, whereas "the crucial thing about the king is his uniqueness," the crucial thing about the modern corporation is its ubiquity and uniformity—it champions apparent uniqueness through its brute universality.[53] In the corporate state, the function of this collectivized body is still to represent power—but in the corporation it is stripped of the specific overlay of human personality (except as manifested in the ventriloquism of advertising).

Yet as Žižek might argue, a corporate figurehead typically must be created through a process of fetishization and reification, or

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51 David Liss, The Devil's Company: A Novel 118 (2009).
52 Elias Canetti, Crowds and Power 414 (Carol Stewart trans., 1973) (1960).
53 *Id.*

> the "false 'personalization' ('psychologization') of what are in fact objective social processes. It was in the 1930s that the first generation of Frankfurt School theoreticians drew attention to how—at the very moment when global market relations started to exert their full domination, making the individual producer's success or failure dependent on market cycles totally out of his control—the notion of a charismatic 'business genius' reasserted itself in 'spontaneous capitalist ideology,' attributing the success or failure of a businessman to some mysterious *je ne sais quais* which he possesses.[54]

Though this is a valid observation, it will perhaps come across as an exaggeration in some instances, in that CEOs such as Steve Jobs, sometimes in actuality rather just public perception, do exert significant (or virtually monopolistic) control over their corporations. But such charismatic personalities do not change the categorical nature of corporate personhood: the business leader serves to naturalize the notion that some person stands behind corporate personhood. The law transposes the relationship between persons to, or imposes it on, impersonal forces that annul personhood.

Hobbes' work remains critical for understanding the artificial person of the corporation and its relation to bodies—bodies of power, science fiction bodies, and dematerialized bodies. In political as well as sociological contexts, the corporation has become a less accountable version of the absolute sovereign, as well as the embodiment of actorhood and agency, Hobbes imagined that the state had to be. Beyond a king, the corporation is both hyper-embodied and disembodied. That erstwhile disembodiment of course does not diminish the materiality of the corporate form, even as a legal fiction, or its effects; that putative "immateriality" is a construct that serves to bolster and shield corporate power.[55] For Michaels, the possibility of a corporate person/personality without a body represents a form of idealism or fantasy—one, I would add, that further removes the corporation from the world of lived reality to the world of the sublime or numinous horror.[56] Michaels observes that "Whereas in a partnership, the death of a partner dissolves the partnership, in [the view of Josiah] Royce [the philosopher of American corporate life], no physical event can jeopardize the life of the corporate entity—its soul is immortal."[57] The corporation begins as a figurative, culturally-constructed body, but ends as a disembodied everlasting soul, and that trajectory remains related to U.S. conceptions of the materiality of collective Nature. The corporation and Nature are both fictions that we embody and reify, and to which we give a shape, characteristics, and even voice. (This premise also helps explain the narratives of some reflexive mysteries; because we must ventriloquize the dumb corporation and project its essence—the mysterious voice we cannot identify—the agents/actors of crimes we cannot trace or account for often turn out to be not just corporate malefactors, but us all along. The detective/analyst often seeks himself, and in the

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54 Žižek, *supra* note 16, at 49.

55 I develop my argument about the materiality of the corporation, and the corporate use of nature as camouflage, more fully in *New and Improved: The Zero-Sum Game of Corporate Personhood* (book in progress).

56 Michaels, *supra* note 34, at 189.

57 *Id.* at 188-89.

context of social "mysteries," corporations often serve as a screen for enacting our repressed social unconscious. In Lacanian terms, when we hear the corporation speak, it is our voice we are hearing, or getting back, distorted).

The corporation fulfills one particularly American cultural fantasy regarding the transcendence of materiality. The goal of Emerson's transcendentalism is to *transcend* both individuality and the male body—to merge into Nature, into the blithe air itself, and become a transparent eyeball that is nothing, but sees everything. Seeking to experience Nature as a disembodied and unobserved observer, Emerson wants to become invisible and immaterial, yet omnipresent. We can also transcend that self in the corporation, which is a form of virtual embodiment that, through the oxymoron/fiction of incorporation, generates an artificial person that has no body. As one of David Foster Wallace's characters in *The Pale King* observes, "Doesn't the term corporation itself come from body, like "made into a body"? These were artificial people being created."[58] In the ulterior logic of our culture, pervasive forms of artificial intelligence and artificial life are now also identified with the virtual and the post-human, and all these categories with the corporation. In addition, speculating on the future has become closely allied with the corporate form, which transcends individual life by creating a fictional, artificial being that never dies, never transmits an inheritance, and so forth—a monstrosity that is ubiquitous and yet locatable nowhere. True to its designation, the corporation is an animated corpse, an undead body imbued with artificial life that haunts our civilization. I argue elsewhere that contemporary representations of inhuman life—including zombies, aliens, and forms of altered or collective, but unintelligible, sentience—often bear a corporate residue because they reflect our anxiety not simply that corporations are creating alien forms of life, but that they reflect and have instigated the ways our own lives already have become alien and inhuman.

The modern form of the corporate enterprise also performs many of the precepts of poststructural semiotics—for example, it advances a deliberate disconnection of act/speech from source/intention. In most contexts, we have corporate signifieds, and, both legally and ontologically, no signifiers of a different sort—no one responsible for them legally or culturally. In symbolic and practical ways, as DeLillo intimates throughout *Mao II*, the corporation is, in dialectical fashion, both a cause and effect of the symbolic death of the author in our culture. The early twentieth-century populist orator Cyclone Davis asserted that he "would not be surprised to hear that some man had invented a machine for making books that dispensed with [the] author . . . and ground out paragraphs by steam."[59] The corporation relies on numerous machines that dispense with authors, or people altogether, effectively validating the poststructuralist notion of a text without an author, but also of the corporation itself as the ultimate author function. As I argue in a different context in *New and Improved*, the teleology of corporations is to dispense with people not just in their modes of production, but their organizational ontologies; their ultimate form of growth is to accrete the personhood of those who serve them. Lars Christensen and George Cheney propose broadly that all contemporary organizations, regardless of their sector, "are in the communications business," and that corporations generate their identities less through sales than messaging.[60]

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58 Wallace, *supra* note 40, at 140.

59 Michaels, *supra* note 34, at 209.

60 Lars Thøger Christensen & George Cheney, *Self-Absorption and Self-seduction in*

But I also would contend that corporations are not primarily communicating about products or even themselves: they are communicating, performing and proliferating an epistemology and ontology, and in this sense also serve as our last Big Others, systems without centers, disquisitions without speakers, constellations of effects and processes without causes or affects.

II. The Artificial Person

As we can see in many Hollywood films, some forms of such corporate ventriloquism are connected to anxieties regarding possession and dispossession: for example, the dead that colonize life, and speak through and inhabit us. The undead and the many forms of artificial or altered beings that look as if they were alive, but only imitate life, often have some affinity with the corporate person. What Hobbes describes as the artificial person of the corporation in part evolves into a form of artificial intelligence, embodied in the various science fiction and horror film impersonations of the human form. Aside from the fact that some corporations rely heavily on technologies that simulate and even replace life, and what we might term a myriad of reality simulators—from games to movies and Japanese sex robots—impersonated forms of reality are typically produced by, and are unnatural allies of, corporations because they all involve imitations of life. (Benjamin Sovacool argues that the corporation itself has emerged as an unrecognized form of instrumentally successful, but socially failing, technology).[61] The novelist Philip K. Dick became fascinated by Alan Turing's experiments to evaluate whether we can verify what it means to be human: specifically, whether machines can think, or convince us they are thinking, or, when not present, that they are actual human beings.[62] Turing's postulate was that something is human if it can convince another human it is. That assertion raises the question, how does the person doing the comparison know it is itself human? The corporate person is a quintessential generator and example of artificial intelligence. Dick's litmus test for a human being, however, was not whether it could convince a person it was human, but whether it possessed empathy,[63] a test a corporate person would fail, because it is programmed by law to care about profits above anything else. People almost have universally feared that some supernatural force or version of the devil could impersonate the human form. Our concern that we can no longer isolate or differentiate human from inhuman cogitation has of course increased with our reliance on virtual realities and internet communication, a world run by computers. Our fear now is not only that a corporation can impersonate the human form, but that the human form has become obsolete, and now impersonates the corporate form.

The characteristically artificial personhood of the corporation should now be situated in the context of the artificial world of simulations and computers, but also

the Corporate Identity Game, *in* The Expressive Organization: Linking identity, Reputation and the Corporate Brand 247, 249 (Majken Schultz et al. eds., 2000).

61 Benjamin K. Sovacool, *Broken by Design: The Corporation as a Failed Technology*, 15 Sci. Tech. & Soc'y 1, 2-5 (2010).

62 Emmanuel Carrère, I am Alive and You Are Dead: A Journey into the Mind of Philip K. Dick 132 (Metropolitan Books 2004) (1993).

63 *Id.* at 135.

of the collective body of the state—itself a kind of foundational science fiction motif. As Sharon Cameron summarizes the Hobbesian lineage of personhood,

> The word *person* confers status (designating a rational being in distinction to a thing or an animal), value, even equality; it establishes intelligibility within a political and legal system, indicating a being having legal rights or representing others' rights, either because he is a human being or *natural* person or because he is a corporate body or *artificial* person. (For Hobbes an artificial person must also be a natural person.) It does not, however, presume anything of substance, nor did the word *persona* from which it derived. A persona was never essential, since a persona is not an actor but the mask which covers the actor, or the character who is acted. . . .[64]

But Cameron partly misrepresents Hobbes in this context: Hobbes does not believe artificial persons also must be natural persons, only that they must be represented by agents who are natural persons. However, Hobbes does begin to erode the distinction between natural and unnatural in ways that prepare for the modern corporation. What he did not quite anticipate was that the leviathan of the state would give way to the far less "natural" leviathan of the corporation.

III. The New Leviathan

The legal creation of personhood made it possible to redefine human identity within the confines of the nation-state; ultimately, we could take personhood away by treating someone as a thing, or, conversely create personhood by treating a thing as if it had personal attributes and rights. In other words, if we begin with a definition of personhood that situates the concept as not simply constructed, but pointedly artificial, it is almost inevitable that our other institutions, such as corporations, will be defined under similar coordinates. Hobbes begins the subordination of personality to impersonality in his conception of the corporate form. As Cameron continues,

> For Hobbes, the definition of a person (or agent) is what we agree to treat as a person; a being is determined human not by philosophical definitions or by man, but by law. To be a person or agent, according to Hobbes, it is not sufficient to consider yourself a person; you must also be considered as possessing agency. In distinction, *personality* stresses self-ownership, the *of* or possessive through which individuality is identified as one's own. Impersonality is an idea that Eliot made commonplace. But whereas Eliot coined the word narrowly to indicate the extinction of personality that defines the artist, this extinction . . . has different contours . . ..

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64 Sharon Cameron, Impersonality: Seven Essays viii (2007).

for example, in attributing a new kind of exceptional, and exceptionally protected, agency to the impersonal.[65] Cameron develops a persuasive cultural reading of impersonality, but her focus does not extend to the corporation. Since the state is a precursor to and, in effect, author of the corporation, one should also consider the agency and personification of the modern nation-state as the historical backdrop for the staging of corporate personhood.

Hobbes is one of the first modern theorists of agency and agency law—his work addresses who can represent whom and what, on whose behalf, and with what responsibility and liability. As Quentin Skinner observes, Hobbes "informs us in Chapter XVI of *Leviathan* [titled "Of Persons, Authors and Things Personated"] that the state can actually be defined as "One Person."[66] Considering how impersonal beings or associations can act or have intent, Skinner notes that Hobbes somewhat disingenuously proposes that it is possible

> for an action genuinely to be attributed to a collectivity—or to an abstraction or even a thing—provided that one particular condition is met. The agent to whom the action is attributed must be represented by another agent who can validly claim to be 'personating' the first by way of acting on their behalf.[67]

Similar considerations apply to the corporation in terms of impersonality, ventriloquism, a kind of bootstrapped inhuman identity, and the attribution of liability. Hobbes elucidates the modern division between actual and artificial persons and what later emerges as an attendant split between agency and responsibility. Though he cites historical and cultural precedents for this split, Hobbes ultimately is making a contemporary legal justification for the distinction; the critical difference is not between human person and artificial collective, but human person acting on his or her own behalf and human person acting on behalf of someone or something else:

> PERSON, is he, whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether Truly or by Fiction. When they are considered as his own, then is he called a Natural Person and when they are considered as representing the words and actions of another, then is he a Feigned or Artificial person.[68]

In the language of artifice, fiction, acting, and impersonating, agency would have no logical constraints, as it is conceived as transitive; in *Leviathan*, to act is equally to do and to fake and impersonate. Hobbes here conceptualizes what we might call the modern imperson-nation, and the legal framework that sanctions and relies on corporations.

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65 *Id.* at viii (eio).

66 Quentin Skinner, *Hobbes and the Purely Artificial Person of the State*, 7 J. Pol. Phil. 1, 3 (1999).

67 *Id.* at 3-4.

68 Thomas Hobbes, Leviathan: Or, The Matter, Forme & Power of a Commonwealth, Ecclesiasticall and Civil 110 (A.R. Waller ed., 1904) (1651) (language modernized).

Addressing how Hobbes classifies fictions of personhood (which become salient for the creation of corporations), Skinner observes that

> Hobbes proposes no particular term to isolate this category, but it may be helpful to designate them purely artificial persons to distinguish them from those who voluntarily take on this status by authorizing others to represent them. . . . Hobbes [indicates] that two sub-classes need to be considered: those whose words and actions can be 'truly' attributed to them, and those who can only have words and actions attributed to them 'by Fiction.' Nothing further is said in *Leviathan* about the class of purely artificial persons who are also fictitious. But in *De Homine* it emerges that what Hobbes has in mind are the characters impersonated by actors on the stage: For it was understood in the ancient theatre that not the player himself but someone else was speaking, for example . . . .
>
> If I play the part of Agamemnon on the stage, the actions I perform . . . will not 'truly' be taken to be Agamemnon's actions, however, but only 'by fiction' and a willing suspension of disbelief. This will especially be the case if I follow the convention of pointing out that I am merely engaged in a performance.[69]

This formulation of acting and impersonation will later inform many aspects of the corporate enterprise, from the ascription of agency (but usually not liability) to corporate representatives to the reliance on actors who act as surrogate corporate persons in advertising.

Skinner identifies the initial bases for artificial agency or personhood, which also provide a foundation for the development of artificial rights:

> Hobbes regards some human beings as purely artificial in this sense. But he is more interested in the fact that various inanimate objects and even figments of the imagination can be classified in a similar way. . . . Since these are 'things Inanimate' they 'cannot be Authors, nor therefore give Authority to their Actors.'
>
> Nevertheless, they can perfectly well be personated or represented 'by a Rector, Master, or Overseer' who can be commissioned and thereby given authority to act on their behalf. Among imaginary objects he singles out the gods of the heathen. Such idols obviously cannot be authors, 'for an Idol is nothing.'" Nevertheless, in ancient times such deities were frequently recognized as having the ability not merely to own possessions but to exercise rights. As in the case of the hospital and the bridge, these capacities stemmed from the fact that authorized persons (in this case officiating priests) were assigned a legal right to act in their name.[70]

The corporation emerges as a successor to these deities, Nature, and finally the sovereign that created the corporation. (Over a protracted period, the Supreme Court

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69 Skinner, *supra* note 66, at 15.

70 *Id.* at 16.

has extended Hobbes' exegesis by declaring that corporations have become authors that not only have the right to express speech, but possess authentic, identifiably human voice and agency).

Hobbes, however, believed the representative/sovereign and those who authorized him were accountable for their actions, and that those actions could be directly ascribed to their agents; he authorized the exercise of power, not its absolution. But the power concentrated in the body of the sovereign has become concentrated in the body of the corporation—an artificial body even more removed from people. Wanting the state to restrain and regulate individual violence and economic crime, Hobbes believed an impersonal system could regulate the behavior of personal players. But the impersonal corporation increasingly took over, and it is in critical ways unregulated and unchecked in power; this denouement reflects a systemic corruption of the principles that hypothetically justified the legitimate but limited function of corporations. In this Hobbesian lineage, the sovereign state charters/creates/empowers the Mephistophelean corporation that will inevitably try to commit state parricide.

In *Leviathan*, Hobbes repeatedly prioritizes the shared, the proto-universal, and the common. The notion of the commonwealth is predicated on a sharing of things that cannot be divided: for example, the common interest; the common law; and what Hobbes frequently terms common discourse. According to Norberto Bobbio, Hobbes defines corporations as subordinate associations, which have as their ends "certain common activities for some common benefit or of the whole city."[71] Hobbes evidenced what J. G. A. Pocock situates as a humanist dedication "to the common weal," but that commitment was coterminous with his notion that the state was not a "common" republic per se, but a corpus with a prince as the head.[72] In structural terms, the contemporary corporation is programmatically able to consider and factor largely if not exclusively only the good of itself, not the common—it is a body that is at war with parts of itself. Common wealth in fact becomes a term that is incommensurate with the corporate charter; axiomatically, what is good for X corporation is not good for America, because corporate profit is designed to be extracted for select private interests at the expense of the public good. If, in Catholicism, personal wealth was an obstacle to the progress of the soul and a sign of preterition, the impersonal wealth of the corporation becomes, in sociological contexts, sacralized, and a sign not only of the corporation's status as saved, but as having a soul to be saved.

In Hobbes' writing, we can see that the creation of the modern state was in many ways coterminous with the creation of the proto-corporate enterprise. In *Leviathan*, Hobbes already envisioned corporations as parasites on the state and as corrupt bodies even as he valorized their advantages: he effectively warns us of "the great number of corporations which are, as it were, many lesser commonwealths in the bowels of the greater, like worms in the entrails of a natural man."[73] Hobbes still can imagine an assembly at which corporators gather to make and implement decisions:

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71 Norberto Bobbio, Thomas Hobbes and the Natural Law Tradition 179 (1993).

72 J. G. A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition 339 (1975).

73 Hobbes, *supra* note 68, at 241 (language modernized).

> In a body politic, for the well ordering of foreign traffic, the most commodious representative is an assembly of all the members; that is to say, such a one as every one that adventures his money may be present at all the deliberations and resolutions of the body, if they will themselves. For proof whereof we are to consider the end for which men that are merchants, and may buy and sell, export and import their merchandise, according to their own discretions, do nevertheless bind themselves up in one corporation. It is true, there be few merchants that with the merchandise they buy at home can freight a ship to export it; or with that they buy abroad, to bring it home; and have therefore need to join together in one society, where every man may either participate of the gain, according to the proportion of his adventure, or take his own, and sell what he transports, or imports, at such prices as he thinks fit. But this is no body politic, there being no common representative to oblige them to any other law than that which is common to all other subjects.[74]

Most contemporary shareholder meetings are removed from such a scenario not only because of our economies of scale, but because modern corporations are designed to separate shareholding owners from managers. One could say that instead of checks and balances, the corporate structure is designed to provide free passes.

The "body politic"—and the notion that society is an organic community, a social body—is supplemented and deformed by the corporation, another fictitious aggregate body, representing an entity that is precisely immaterial. If, in traditional, conservative social theory, "the presupposed organic unity of Society is perturbed by the intrusion of a foreign body," the unity of our society is now in many ways predicated on the presence of a *foreign* body—the corporation.[75] But in this schema, the very conceit that society is or should be an organic unity is, aside from posing inherent problems in a multicultural and hierarchical society, easily co-opted. One might say that the always phantasmic corporate body ventriloquizes a voice without a source. In the modern corporation, the Hobbesian social body is bifurcated to bypass common interest, which effectively means the public good itself becomes a foreign/alien element to the corporate body. (This bifiurcation is in some ways homologous with what Anna Grear documents at length, in the context of the legal creation of personality, as the "problematic gap that legal disembodiment creates between the living human being and the legal entity or construct taken to represent the human being."[76] The separation between artificial corporation and organic human being has, by the end of the nineteenth century, become absolute. By the time of *Button v. Hoffman*, U.S. courts had decided that even a corporation owned by a single person exists independently of that owner; Walter Benn Michaels contends that consequently the corporation no longer represents a veil concealing a man or woman, but is itself a new kind of person.[77]

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74 *Id.* at 164 (language modernized).

75 Žižek, *supra* note 29, at 127.

76 Anna Grear, Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity 149 (2010).

77 Button v. Hoffman, 20 N.W. 667 (Wis. S. Ct. 1884); Michaels, *supra* note 34, at 197.

IV. Mass Incorporation

As the idea has played out in U.S. culture, to incorporate is not to join a common society, but to transcend individuality—in a society putatively obsessed with individuality—in some larger natural or artificial body. To incorporate is in some ways to merge one's individual body into a collective body, to renounce human limitations, and, in the centuries after Hobbes, the common in favor of the private shareholder. But the paradox is that many corporations systematically invert the characteristics of the public and the private, from concepts of privacy to those of public benefit and welfare. In *Democracy in America*, Tocqueville concluded that pantheism, the aforementioned deification of an impersonal Nature, represented a seductive form of specifically American incorporation:

> If there is a philosophical system which teaches that all things material and immaterial . . . are to be considered only as the several parts of an immense Being, who alone remains eternal amidst the continual change and ceaseless transformation of all that constitutes him . . . such a system, though it destroy the individuality of man, or rather because it destroys that individuality, will have secret charms for men living in democracies. . . . It naturally attracts and fixes their imagination.[78]

In other words, Tocqueville situated Nature as the American leviathan. The transcendent system he evoked at first took the shape of Nature, to a lesser degree the nation-state, and finally, after the Civil War, the immense Being of the corporation.[79] Again, the corporate body is itself an amalgam, a conglomeration of bodies turned into something monstrous in scale and form, which is why it can be evoked via leviathans and artificial bodies of many kinds. The "body" or community we belong to is that of the corporation, which is no longer organized around or participates in any exchange involving the *munus* or gift, but transactions that are part of a zero sum game. While writers such as Hobbes, Tocqueville, and Emerson invoke a language that seeks "common" nature that will create a common wealth, the mass, immortal corporate version of that common body winds up impersonally seducing, absorbing and dissolving its members. In *Lectures on the Pantheistic Idea of an Impersonal Deity* (1864), Reverend Morgan Dix proposed we imagine "this indescribable, this immense condition, or mass, or state (or by whatever name you wish to call it) and you have before you the only eternal being. Let us apply to it, for the sake of convenience, the term God."[80] (One of Emerson's terms for the immense being of divine Nature was "the Over-Soul." It is particularly ironic that the corporation, which is immaterial, attains the figurative body with the most mass in the world). That immense, eternal corporate body was imagined to possess

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78 Alexis de Tocqueville, Democracy in America II 31-32 (Phillips Bradley, ed., Henry Reeve trans., Francis Bowen, rev., 1953).

79 Constraints of space prevent me from addressing a concept that is, in any case, likely familiar to most readers, but, as many critics have documented—particularly with regard to the way the fascist state promulgated fantasies of an "organic" body of society—the nation-state often has been devised in conjunction with images of a unified, mass body.

80 Rev. Morgan Dix, Lectures on the Pantheistic Idea of an Impersonal Deity 22 (1864).

a soul, but as it became increasingly impersonal, it also became clear it functioned without a mind.

After the Civil War, virtually all transcendental rhetoric of Union in Nature became deflected to rhetorics of incorporation (which in figurative terms also often entailed individual dismemberment). The sometimes seemingly abstract contest between the individual and the corporate mass is evident in more concrete terms, for example, in the jury instructions of an 1886 Mississippi Supreme Court case:

> This poor negro has the same right to have his matters adjudicated as the defendant, but things have come to such a pass in this country that a railroad company is very much injured if an humble man dares to bring them into the courts. If he dares to appeal to the juries of the country, it is high treason. I say you must consider who the parties are, and who is more likely to overawe witnesses, -a corporation of this sort, or a private individual. I put it to your own knowledge of human nature, whether it is not true that immense corporations, controlling immense armies of operatives, are not more likely to overawe witnesses . . . .[81]

Again, it seems illustrative that the personhood of an African American is here being pitted against the immense personhood of the corporation in terms of legal speech. Subsequent cases often have referred to the unprecedented power of "immense corporations,"[82] and to corporations as immense agglomerations: see, *e.g.*, *Nw. Union Packet Co. v. Shaw* (acknowledging that "that the transportation of the products of the country is mainly controlled by powerful corporations, representing immense aggregations of capital");[83] *McCarter v. Firemen's Ins. Co.* (addressing "the enormous extension of this business, by its concentration in the hands of immense corporations, by state regulations that amount to privileges");[84] *Com. v. Copperman* (stating that we live in the "days of giant corporations, great railroad companies, immense industrial and financial organizations");[85] and *Race Safe Sys., Inc. v. Indy Racing League* (referring to "an immense multi-national corporation").[86] As the Court noted—apparently without irony or alarm—most recently and disturbingly in *Citizens United v. Federal Election Commission*, "media corporations accumulate wealth with the help of the corporate form, [and] the largest media corporations have 'immense aggregations of wealth.'"[87]

Accumulation and aggregation are usually zero-sum games; the more money, power, sheer mass and ontological privilege corporations have, the less is left to individuals. As many science fiction films suggest, we increasingly feel as if we are being fed into a giant machine. Transcendentalists had fantasized that Nature was a bulwark against and alternative to the mechanistic corporation and the emerging corporate society, but the language used to evoke both entities revealed a discursive and ontological commonality. Emerson had wanted men to merge into Nature and

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81 Newman v. Vicksburg & M. R. Co., 64 Miss. 115, 122 (Miss. 1886).
82 St Louis Gaslight Co. v. City of St Louis, 84 Mo. 202, 204 (Mo. 1884).
83 Nw. Union Packet Co. v. Shaw, 37 Wis. 655, 660 (Wis. 1875).
84 McCarter v. Firemen's Ins. Co., 74 N.J. Eq. 372, 381 (Ct. Err. & App. 1909).
85 Com. v. Copperman, 26 Pa. D. 763, 769 (Pa. Com. Pl. 1917).
86 Race Safe Sys., Inc v. Indy Racing League, 251 F. Supp. 2d 1106, 1108 (N.D.N.Y. 2003).
87 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 348 (2010).

not society. In his overtly Hobbesian mode, Emerson notably warned in "Self-Reliance" that "Society is a joint-stock company, in which the members agree, for the better securing of his bread to each shareholder, to surrender the liberty and culture of the eater. The virtue in most request [sic] is conformity. Self-reliance is its aversion."[88] But by self-reliance, Emerson always meant god-reliance—reliance on an archetypal self that transcended individuality and became representative. Emerson believed only in an "aboriginal self," a self displaced by the archetypal and the Over-Soul.[89] Ironically, in trying to avoid merging with the corporate society/state, Emerson proposed merging with a Nature even more corporate, immense, impersonal and dispossessing.[90]

In *Moby-Dick,* Ishmael tries to imagine an alternative to the social-commercial enterprise of his nation, even as he embarks on a commercial whaling expedition, by "merg[ing his] own individuality" with Queequeg "in a joint stock company of two."[91] (Ishmael's opinion of actual corporate enterprises is evident in his observation that much as men in the ideal might be commendable, they "might seem detestable as joint stock-companies and nations").[92] In letters to Hawthorne, Melville expressed the same longing to merge male bodies to create a composite body, even while always acknowledging that such desires for transcendence were either absurd or potentially self-destructive: "spread and expand yourself, and bring yourself to the tinglings of life that are felt in the flowers and the woods, that are felt in the planets. . . . What nonsense! . . . This 'all' feeling, though, there is some truth in it."[93] What Romain Rolland later terms the oceanic feeling turns out to represent a longing to be immersed in a corporate form; we don't transcend painful, isolated individuality by trying to merge with Nature, but the corporation. As in *Mardi*, the pantheist spreads or merges into the immense body of Nature or the planet itself. Often used to evoke experiences of reverie with Nature, the discourse of merger generates a language of both social connection and utter disindividuation. As he grows more cynical than even Ishmael, the young pantheist Pierre, in Melville's next novel after *Moby-Dick*, represents the transition from transcendental to corporate pantheism. At first, the text assures us, "you lose your sharp individuality, and become delightfully merged in that soft social Pantheism, as it were, that rosy melting of all into one . . . no one draws the sword of his own individuality."[94]

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88 Emerson, *supra* note 23, at 49-50.

89 *Id.* at 63.

90 *See generally* my "Not Altogether Human": Pantheism and the Dark Nature of the American Renaissance (2012).

91 Melville, *supra* note 9, at 320.

92 *Id.* at 117.

93 Herman Melville, Correspondence 193-94 (Lynn Horth ed., 1993).

94 Melville, Pierre; or, The Ambiguities 250 (Harrison Hayford, Hershel Parker, G. Thomas Tanselle eds., 1968). Nathaniel Hawthorne also documents Americans' desire to transcend their atomized individualities in the same transcendental/corporate language: in *The House of the Seven Gables*, his narrator reflects on the ways a human procession "melts all the petty personalities of which it is made up, into one broad mass of existence—one great life—one collected body of mankind, with a vast, homogeneous spirit animating it." Nathaniel Hawthorne, The Centenary Edition of the Works of Nathaniel Hawthorne 2, 165 (William Charvat, et al., eds. 1965). Such descriptions are commensurate with those of Emerson or Tocqueville, save that that the anti-pantheistic Hawthorne typically imagines merger only in society. Hawthorne's narrator

Not coincidentally, when Pierre renounces his pantheism, he rages at an imagined Goethe: "Already the universe gets on without thee, and could still spare a million more of the same identical kidney. Corporations have no souls, and thy Pantheism, what was that? Thou wert but the pretentious, heartless part of a man. Lo! I hold thee in this hand, and thou art crushed in it like an egg from which the meat hath been sucked."[95] This passage succinctly dismantles the apparent opposition between Nature (pantheism) and corporation. Stripped of its soul, the corporate body is dismembered instead of unified; the many forms of American pantheism that would merge us into the body of universal Nature turn out to vivisect shareholders into organs and body parts.

I don't have space to document the assertion at length, but American pantheists emblematically seek to transcend the boundaries of individual male identity, and merge with other men into collective Nature; and they lose individual agency and will, believing that their actions become archetypal and even involuntary in Nature. These processes actually comport with the premises of, and culminate in, the post-industrial corporation. The language of pantheism is one of merger into Nature—a rosy melting of all into one, or the one into the divine All.[96] That rhetoric of merger in Nature has become that of corporate merger and incorporation. Ironically, though it remains the symbol of capitalism, the corporation from Hobbes onward is fiercely anti-individualistic in its organization, operation, premises and effects. If Hobbes conceived of the sovereign as a "God on earth," its initial extension and final successor, the corporation, this indescribable mass, comes to attain not only its own soul, but the power to create and steal souls, making it a kind corporate Over-Soul.[97]

Instead of merging with Nature, a prospect writers such as Emerson and Whitman extolled, people began merging into corporations: Michaels asserts, for example, that for Cyclone Davis, "the individual is merged in the money machine of which he is an integral part."[98] The corporation represents a mechanical version of a transcendental Nature that is revealed to have been mechanical all along. It is

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claims that "a family should be merged into the great, obscure mass of humanity": not into nature or the ocean itself, but into the "great current of human life." *Id.* at185, 256. But that great mass or immense Being often becomes a corporate entity, as partly again signaled by the role of the railroad in Hawthorne's novel.

95 Melville, *supra* note 94, at 302. Pierre's claim that corporations have no souls might be derived from James Fenimore Cooper's *The Bravo*, which vilifies the "soulless corporation[s]" of secret deliberative bodies, as well as a legal lineage traced back to England's Chief Justice Coke in the seventeenth century. James Fenimore Cooper, The Bravo: A Tale 170 (1859).

96 I address this dynamic of merging in full in "*Not Altogether Human,"* but D. H. Lawrence offers a useful summary, for example, of Whitman's pantheism: "Merging! And Death! Which is the final merge." D. H. Lawrence, Studies in Classic American Literature 178 (1964). Emerson and many pantheists fetishize this imagined merger as ego-transcendence; in *Moby-Dick*, Ishmael both is and warns us of the man who "takes the mystic ocean at his feet for the visible image of that deep, blue, bottomless *soul*, pervading mankind *and* nature . . . In this enchanted mood, thy spirit ebbs away to whence it came: becomes diffused through time and space: like Wickliff's pantheistic ashes . . . . Heed it well, ye Pantheists!" MD, *supra* note 9, at 159. That self is lost to the immense, overwhelming collective of Nature, which soon reemerges as the corporation.

97 Michael Hardt & Antonio Negri, Empire 85 (2000).

98 Michaels, *supra* note 34, at 200.

not merely a rhetorical echo that the process of commercial aggregation is called a corporate merger, another manifestation of the ways corporations imitate and usurp psychological and ontological characteristics of people. The sociologists John Meyer and R. L. Jepperson contend that in earlier

> religious polities, and in the secularized formations that eventually built upon them, spiritual charisma could be distributed across three main locations: (a) in a central institutional complex (a monarchy, a high Church, a state); (b) in the community as an organic body (that is, in a sacralized matrix of relations [e.g., a system of corporate orders]); or (c) in spiritualized subunits (namely, individuals empowered as souls carrying responsibility for responsible action, whether individually or associationally).[99]

Here, I invoke the corporate idiom more literally: in the United States, opposed for example to much of Europe and Scandinavia, the role of organic community and the public sphere is to some degree displaced or supplanted by the artificial corporation. But the corporation remains closer to what Nature once represented than to the modern nation-state, as it exists outside conventional limitations and, in some ways, even individual oversight or management. In Meyer and Jepperson's schema, it is the corporation that has become citizen four.

As Melville established in *Moby-Dick*, after Hobbes, a corporation functions as a collective being without a body, an abstraction incorporated as a fictional leviathan: for Powers, it is "*an aggregate giant*, one that summed the capital and labor of untold Lilliputians into vast, limbered Leviathan."[100] As Frederic Jameson notes, "The market is thus Leviathan in sheep's clothing"; or as Joel Bakan puts it, by the turn of the twentieth-century, "Corporations were now widely viewed as soulless leviathans."[101] In September 2014, *The New York Time*s reported that "a European publishing executive likened [Google] to a Wagnerian dragon."[102] Powers encapsulates the corporate octopus or leviathan as an all-encompassing monomaniacal distillation of new world co-option: "The limited-liability corporation: the last noble experiment, loosing an unknowable outcome upon its beneficiaries. Its success outstripped all rational prediction until, gross for gross, it became mankind's sole remaining endeavor."[103] It is the gross and ubiquitous leviathan that threatens not only to supplant all other forms of commerce, but all other forms of ratiocination and identity. (One of the most disingenuous and misguided pronouncements in the *Citizens United* holding is Justice Kennedy's assertion that "Corporations, like individuals, do not have monolithic views."[104] As

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99 John W. Myers & Ronald L. Jepperson, *The "Actors" of Modern Society: The Cultural Construction of Social Agency*, 18 Soc. Theory 109 (2000).

100 Powers, *supra* note 7, at 158.

101 Fredric Jameson, Postmodernism, Or, the Cultural Logic of Late Capitalism 273 (1991); Joel Bakan, The Corporation: The Pathological Pursuit of Profit and Power 17 (2005).

102 Danny Hakim, *Google is Target of European Backlash on U.S. Tech Dominance*, N.Y. Times, Sept. 9, 2014, at A1.

103 Powers, *supra* note 7, at 159.

104 Citizens United, 558 U.S. at 364.

I argue here and elsewhere, these are the only kind of views a corporation legally, and in most cases ontologically, can have. And as David Foster Wallace suggests in *The Pale King*, they precisely give rise to what is called "in economic terms [a] 'monoculture.'"[105] As George Steiner observes, in translatable contexts, "The thought of a more or less monoglot world is no longer inconceivable."[106] According to David Harvey, we should see post-war Fordism "less as a mere system of mass production and more as a total way of life," and one might modify that term as totalizing.[107] At the level that affects the vast majority of Americans on a daily basis, the culture of corporations is a monomaniacally monotonous infestation—it requires not just mass production and consumption, but mass culture, a kind of monopolistic consolidation of wealth, power, networks of distribution, and speech under the façade of diversity. It is not accidental, but a necessary consequence of corporate unification, universality and Hobbesian sovereignty that we increasingly are exposed, at any meaningful level and in almost the entire developed world, primarily to corporate media and art: the monopoly corporations most tend to effectuate is not primarily economic, but psychological, cultural, sociological, and ontological.

V. Behind the Veil

Hobbes imagined the very purpose of the corporation was to corner markets—and in some sense to consolidate those who give it agency into its aggregate being:

> The end of their incorporating is to make their gain the greater; which is done two ways: by sole buying, and sole selling, both at home and abroad. So that to grant to a company of merchants to be a corporation, or body politic, is to grant them a double monopoly, whereof one is to be sole buyers; another to be sole sellers. For when there is a company incorporate for any particular foreign country, they only export the commodities vendible in that country; which is sole buying at home, and sole selling abroad. For at home there is but one buyer, and abroad but one that selleth; both which is gainful to the merchant, because thereby they buy at home at lower, and sell abroad at higher, rates: and abroad there is but one buyer of foreign merchandise, and but one that sells them at home, both which again are gainful to the adventurers.[108]

Hobbes realized that unless restrained, the corporate structure would tend to generate monopoly, colonialism, and a concentration of wealth and power, but he was concerned with codifying the benefits of the novel form, not anticipating their pernicious mutations. Through the corporate entity and the conceptual corporation, we've created a system that encourages and necessitates the concentration of wealth and the circumnavigation of liability. Though the power

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105 Wallace, *supra* note 40, at 271.
106 George Steiner, Errata: an Examined Life 113 (1997).
107 Harvey, *supra* note 10, at 135.
108 Hobbes, *supra* note 66, at 164.

behind a corporation is usually diffuse in the sense of being unlocatable, Barry Lynn documents the rise of a powerful class that "communalized all its holdings" in corporations and "thus escaped the legal strictures that tie individual owners to real property. Even when that power is momentarily concentrated in the body of a real person . . . the interest remains only to maximize capital and hence power."[109]

What kind of person or personhood exists beneath the corporate veil, the legal shroud that obscures the non-existent Oz? For Hobbes, personhood itself is a mask or performance, and we all present ourselves to the world through personae that constitute personhood:

> The word person is Latin, instead whereof the Greeks have prosopon, which signifies the face, as persona in Latin signifies the disguise, or outward appearance of a man, counterfeited on the stage; and sometimes more particularly that part of it which disguises the face, as a mask or vizard: and from the stage hath been translated to any representer of speech and action, as well in tribunals as theatres. *So that a person is the same that an actor is*, both on the stage and in common conversation; and to personate is to act or represent himself or another; and he that acts another is said to bear his person, or act in his name . . . and is called in diverse occasions, diversely; as a representer, or representative, a lieutenant, a vicar, an attorney, a deputy, a procurator, an actor, and the like.[110]

Under Hobbes' framework, the primary character or dramatis persona in U.S. culture has become the corporate mask/person. It is necessary to digress here briefly to connect Hobbes' evocation of the representative actor to Emerson's conception of the representative man, because both types directly belong to the lineage of impersonal corporate personhood in the U.S. Emerson remains important here because his apparent idealization of American individualism turns out to be a representative proselytization for corporate identity.

Advocating that we pursue a purely representative, aggregated existence (which would ultimately entail an ascension to impersonal genius), Emerson is interested only in the "moments in the history of heaven when the human race was not counted as individuals, but was only the Influenced, was God in distribution."[111] God or the corporation gathers these distributed individuals or fragments into a collective mass existence that transcends locality and particularity. Contrary to popular misconceptions of his notion of self-reliance, Emerson rarely considers anyone or anything in individual terms: as he admonishes with unusual precision, "We fancy men are individuals; so are pumpkins."[112] Throughout his essays and journals, Emerson averred that God is "no respecter of persons," and that in our truest relations with the divine and ourselves "there is no personeity in it."[113] For

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109 Barry C. Lynn, Cornered: The New Monopoly Capitalism and the Economics of Destruction 242 (2009).

110 Hobbes, *supra* note 66, at 110 (language modernized).

111 I Ralph Waldo Emerson, *The Method of Nature*, Works, *supra* note 23, at 210.

112 III Ralph Waldo Emerson, *Nominalist and Realist*, Works, *supra* note 23, at 246.

113 Ralph Waldo Emerson, The Journals and Miscellaneous Notebooks of Ralph

Emerson, the representative man must "disindividualize himself" and align with "the universal mind."[114] "In "Fate," Emerson promises and warns that the Law of Nature "dissolves persons."[115] Again, the corporation now implements this law. Though his Laws of Nature promise a compensatory unity, Emerson periodically concedes the cost: "These forces are in an ascending series, but seem to leave no room for the individual."[116] In Emerson's highly corporate Nature, the uniformity and universality of natural law is paramount, and truth is effectively equivalent to mass; for Emerson, "the individual is always wrong."[117]

Emerson believed Nature spoke through him in ways that turned him into a kind of corporate spokesperson for larger forces: "Through me, God acts; through me, speaks."[118] Such sentiments recur throughout Emerson, though they are voiced most directly in his writings of experience. Emerson finally fears that "nothing is of us or our works—that all is of god. Nature will not spare us the smallest leaf of laurel. All writing comes by the grace of God."[119] A version of Tocqueville's immense divine being, the corporation again seems to displace the function of Nature; it bears the transcendental, collective identity that speaks through us. But even more ominously, the apparent opposition between Nature and corporation disappears, a process symbolically concluded as corporations begin to control most forms of media speech, patent genes and seeds, and effectively modify and create life.[120]

In Hobbes' proto-corporate conception, to be a person is already a corporate personification. Hobbes then distinguishes between personally-validated acts and authorized acts, which are essentially impersonal or impersonations:

> Of persons artificial, some have their words and actions owned by those whom they represent. And then the person is the actor, and he that owns his words and actions is the author, in which case the actor acts by authority. For that which in speaking of goods and possessions is called

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Waldo Emerson V 170 (William Gilman, et al. ed., 1965).

114 VII Ralph Waldo Emerson, *Art*, Works, *supra* note 23, at 48-49.

115 VI Ralph Waldo Emerson, *Fate*, Works, *supra* note 23, at 49.

116 X Ralph Waldo Emerson, *Perpetual Forces*, Works, *supra* note 23, at 72.

117 III Ralph Waldo Emerson, *Experience*, Works, *supra* note 23, at 69.

118 III Ralph Waldo Emerson, *Divinity*, Works, *supra* note 23, at 129.

119 Emerson, *supra* note 117.

120 Emerson's theory of self-reliance was misappropriated not via social Darwninism, as Howard Horwitz suggests, but by common misinterpretations that rely on generic and highly inapposite definitions of the self. For Emerson, self-reliance entails the evacuation of the individual self into an archetypal All or whole,--into a purely representative, typological , and finally corporate entity that eradicates false particularity. The transcendental corporate structure of agency Horwitz invokes is indeed Emersonian, but not because Emerson extolled individualistic exploits as they are commonly understood, but because for Emerson the transcendental individual is stripped of all individuality. The transcendentalist precisely transcends the self by merging into the divine aggregate, whether in Nature or the corporation. Howard Horwitz, The Standard Oil Trust as Emersonian Hero, Raritan 6.4 97 (1987). Emerson is then corporate in ways I would argue are disparate from those that Christopher Newfield identifies in other contexts. *See generally* Christopher Newfield, The Emerson Effect: Individualism and Submission in America (1996).

> an owner . . . speaking of actions, is called author. And . . . by authority is always understood a right of doing any act; and done by authority, done by commission or license from him whose right it is.
>
> From hence it follows that when the actor makes a covenant by authority, he binds thereby the author no less than if he had made it himself; and no less subjects him to all the consequences of the same. . . .[121]

The imperatives of impersonal corporations allow individuals to do what they likely would not do in their own names—they become authorized, or are given license, to act in ways individuals on their own would resist or reject. (In this sense, the corporation operates as the largest diffused military corp. in the history of the world). In considering who and what can be "personated," Hobbes adumbrates the contemporary animation of fictions and things:

> There are few things that are incapable of being represented by fiction. Inanimate things, as a church, a hospital, a bridge, may be personated by a rector, master, or overseer. But things inanimate cannot be authors, nor therefore give authority to their actors: yet the actors may have authority to procure their maintenance, given them by those that are owners or governors of those things. And therefore such things cannot be personated before there be some state of civil government.[122]

In the final teleology of the corporation, inanimate things will be able to become actors.[123] Like forms of AI, corporations, with varying degrees of plausibility, both imitate and transcend human beings. The corporation seems to be invisible, disembodied and immortal—all signs of ineffable power—and therefore seems to attain transcendent or numinous properties, and represent an immanent force. As I argue, the corporation thereby displaces Nature, the nation-state and to some degree almost all prior institutional aggregates.

Hobbes' disquisitions are concerned with the forms of safety and security that depend on the guarantees of the state, but also set the boundaries of what constitutes a person with rights and identity:

> Likewise children, fools, and madmen that have no use of reason may be personated by guardians, or curators, but can be no authors during that

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[121] Hobbes, *supra* note 66, at 110-11 (language modernized).

[122] *Id.* at 112.

[123] Our diurnal experience of the corporation inures us to systemic depersonalization. When a corporate on-hold message tells you "your call is very important to us," it mocks your personhood; making such statements is akin to telling every person you pass on the street indiscriminately and mechanically that you're in love with them. When I email Wells Fargo bank, I receive the following automated message: "Thank you for sending your service request to Wells Fargo. As one of our most valued customers, your questions and concerns are our highest priority." These sentences were at some point written by a person (though a functionally illiterate one, since my questions are not one of their most valued customers). But the absurdity of sending a generic, automated reply that claims to initiate a personal relationship—that values you personally, or recognizes you—communicates the essence of the artificial intelligence of corporate personhood.

> time of any action done by them, longer than (when they shall recover the use of reason) they shall judge the same reasonable. Yet during the folly he that hath right of governing them may give authority to the guardian. But this again has no place but in a state civil, because before such estate there is no dominion of persons.[124]

Here, Hobbes also considers the status of combinations of persons: what they represent; whom they can represent; and how they differ from individual actors:

> A multitude of men are made one person when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the unity of the representer, not the unity of the represented, that makes the person one. And it is the representer that bears the person, and but one person: and unity cannot otherwise be understood in multitude.
>
> And because the multitude naturally is not one, but many, they cannot be understood for one, but in any authors, of everything their representative say or do in their name; every man giving their common representer authority from himself in particular, and owning all the actions the representer does, in case they give him authority without stint: otherwise, when they limit him in what and how far he shall represent them, none of them owns more than they gave him commission to act.[125]

In elucidating the authority of the state, but also the authority collectives bestow upon agents, Hobbes advocates conditions of corporate organization that almost inevitably would be hijacked. People now surrender their rights and "ontologies" not just to governments, but corporations, which likely have a greater impact on our daily lives, environment, and identities than governments do. (Where citizens once putatively entered a priori "bargains" with the sovereign in exchange for order and safety, consumers now effectively enter innumerable a priori "bargains" with corporations surrendering not only their rights to sue, hold them liable, and so forth, but the possibility of living as free agents).

Today, the corporation acts as this Hobbesian unity—it is ubiquitous, inescapable and perhaps the greatest force of consolidation in history. According to Peter d'Errico, the role of the judiciary has been to turn the fiction of the corporate person from a legal abstraction into a "real" person that now exists independently of the state (and effectively exists sui generously), that could then negotiate with the state as an independent actor with all the rights of a person.[126] Such developments, and the aforementioned separation of capital from management, are scenarios Hobbes could not quite anticipate, and help vitiate the assurance of corporate accountability.

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[124] Hobbes, *supra* note 66, at 112. *See also* Richard Hardack, *Bad Faith: Race, Religion, and the Reformation of Welfare Law*, 4 Cardozo Pub. L. Pol'y & Ethics J. 539-649 (2006), for a comparison of how the U.S. government often has treated individuals and corporations in the context of welfare, gifts, oversight and public and private rights.

[125] *Id.* at 113 (language modernized).

[126] Peter d'Errico, *Corporate Personality and Human Commodification*, 9 Rethinking Marxism 100-01 (1996).

To sum up, Hobbes indicates that agents can impersonate anything; that all things can be personified; and by implication, that not only persons, but gods can be impersonated: as Hobbes avers, "Men Women, a Bird, A Crocodile, a Calf, a Dog, a Snake, an Onion, a Leeke [brooke], Deified."[127] The final species to add to that list is the corporation, or the corporate person—a deity made in man's worst image.

Conclusion

I. Fictions of Agency

> "In not having a face, or even body, the [corporate] Project garnered for itself enormous and far-reaching capabilities, while at the same time reducing its accountability and vulnerability—to almost zero. . . . There was no building, no Project Headquarters . . . . The Project was supra-governmental, supra-national, supra-everything—and infra too; *that's* what made it so effective."
>
> Tom McCarthy, *Satin Island*[128]

In the corporation, collective, impersonal biography overtakes the individual life narrative. Writers such as Powers and McCarthy narrativize what Robbie Floyd-Davis documents as the corporate cooption of narrative and biographical discourses, evident, for example, in the ways corporations hire academics—especially anthropologists, sociologists, and story-tellers—to help them directly and indirectly to tell stories about them.[129] In terms of production—films, media and publishing—but also their "self"-representation, corporations are the dominant aesthetic and ontological influence in our culture. The rise of the corporation coincides with the cultural shift from individual (or self, agent, author, authority, etc.) to system. Powers observes that Tom LeClair's definition of the systems novel assumes that "the individual human cannot be adequately understood as an autonomous, self-expressing, self-reflecting entity, but must be seen as a node of an immensely complex *network*."[130] We can see the corporation as one nexus for this network. Interested in transcendental connections that, in his own paraphrase of John Muir, hitch everything to everything else, Powers proposes a "new genealogy for th[at] systems novel," in which his hybrid form passes "'realism' through 'metafiction' through relational processes" and "refract[s] the private through the public."[131] According to Thomas Frank, management theorists "announced that the corporation, as a creature called into existence by the market, was of a special and

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127 Hobbes, *supra* note 66, at 74 (language modernized).

128 Tom McCarthy, Satin Island 123-24 (2015) (eio).

129 Davis-Floyd, *Storying Corporate Futures: The Shell Scenarios*, *in* Corporate Futures: The Diffusion of the Culturally Sensitive Corporate Form 141 (George E. Marcus, ed., 1998).

130 Powers, *supra* note 39, at 305-06.

131 *Id.* at 308-09.

even a superhuman nature," and, most absurdly, a vital force of democratization.[132] Such corporations exigently pervert the ideals of unfettered capitalist individualism they putatively advance, since they are predicated on aggregation, uniformity, mass production, and impersonal discourses that impersonate human communication. The celebrity generated by corporate media is also a kind of second-generation impersonator, one who often also—beyond the way all people construct or perform identities—already has changed his or her name, face, history, and persona. As I argue in "*New and Improved*," above the corporation has to generate spokespersons to stand in for and voice its absent center, and by structural necessity those spokespersons have purely corporate identities.

Legally created as a screen for individuals—to shield them from liability—the corporation has come to serve as a screen for the systemic displacement of the individual. That is, the corporation is socially and ontologically devised to perform tasks that individuals cannot pragmatically and economically, but also legally and ethically, pursue. It is an impersonal and pre-programmed system designed to coordinate behavior that could harm the common good. No single person is generally responsible for, or even perpetrating, the acts of a corporation, and usually no one can be held responsible; individuality is in fact systematically purged and evacuated from the system.

As intimated, writers have been positing for centuries that corporations emblematically have no souls, yet are still attributed with wills. Jameson details how the corporate form can thwart historical-materialist notions of agency and teleology: Marxists had trouble conceiving of

> Some nonindividual, meaningful, collective yet impersonal agency {the mode of production] . . . still somehow a "subject," like the individual consciousness, yet now immortal, impersonal in another way, collective beyond the dreams of populism . . . . the trust, the monopoly, the "soulfull" corporation, with its new corporate law.[133]

To Jameson, this new form eviscerates the predicates of the laissez-faire individual; citing Walter Benn Michaels' work on Frank Norris' novel *The Octopus*, Jameson suggests that the corporation simultaneously becomes intangible and a machine, because it never conjoins a soul with a body.[134] Like Nature before it, the corporation precisely accommodates contradictory traits because it has no intrinsic qualities: it is an amalgam of projections, fantasies, legal ascriptions, and appropriations. Quoting Michaels, Jameson assets that "The corporation comes to seem the embodiment of figurality that makes personhood possible, rather than appearing as a figurative extension of personhood." Suprapersonal agencies are unthinkable for the individual mind."[135] Again, the corporation, is supra, exceptional, transcendental. Jameson notes that for Michaels, the corporation is not the effect, fantasy or projection of the

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132 Thomas Frank, *Free Markets Killed Capitalism: Ayn Rand, Ronald Reagan, Wal-Mart, Amazon and the 1 Percent's Sick Triumph Over Us All*, Salon (Jun. 29, 2014), http://www.salon.com/2014/06/29/free_markets_killed_capitalism_ayn_rand_ronald_reagan_wal_mart_amazon_and_the_1_percents_sick_triumph_over_us_all/, at 220-21.

133 Jameson, *supra* note 101, at 215.

134 *Id.* at 216.

135 *Id.*

individual, but the reverse; the individual is "a projection back from the collective," an illusion generated by and for the corporate enterprise. We do not create the Matrix, Skynet, or Monsanto—they create us. If the king originally had two bodies, one that represented a society as a whole, or the social body, the overdetermined corporate body has supplanted those bodies figuratively, nominally and politically.

In the 1920s, John Dewey noted that under "fiction theory," which construes corporate personality as a contrivance rather than actual, the corporation has no soul and therefore cannot be "guilty of delict," meaning liable, or perhaps culpable, for causing injury.[136] In 2000, Thomas Frank alleged that "no one has seriously charged a corporation with "soullessness" for many years," but that pronouncement is oddly tone-deaf culturally, both retroactively and proactively.[137] The king's "personality" once served as kind of carapace for the corporate body; now we are left with corporate personality, which is no human personality at all, a state of things that has ramifications across our entire culture. In *The Pale King*, whose title conjures the ruler of a kind of corporate wasteland, David Foster Wallace's characters invoke that same "damn soulless corporation," and one of them also presciently declaims, "I don't think of corporations as citizens. . . . Corporations aren't citizens . . . They don't have souls."[138] Wallace is consistent in invoking this language of depersonalization, having a character warn us that federalist politicians will be "underwritten by an inhuman soulless profit-machine" that will "convince Americans that rebellion against the soulless inhumanity of corporate life will consist in buying products from corporations that do the best job of representing corporate life as empty and soulless."[139]

In the private sector that now barely can be distinguished from the public, Clay Timon, chairman of Landor Associates, the influential branding firm, insists that corporations, as brands, do have souls, and that those souls enable them to generate emotional connections with consumers.[140] If society can suppose that a thing can be infused with life, it is inevitable that that thing will claim a soul. David Allen documents the historical processes through which corporations have attempted (what I would characterize as) the colonization of personhood: "Having secured legal standing as people under the Constitution by the mid 1800s, corporations began looking for other ways to establish their humanness. In the 1900s, corporations began focusing on social welfare issues and public relations to convince people they had a soul."[141] The corporation is the quintessential inhuman thing allegedly imbued with a soul or human personality: a specter haunting the world that was never alive, whose agentless teleology is to convince us it is us.

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136 John Dewby, *The Historic Background of Corporate Legal Personality*, 35 Yale L. J. 655, 668 (1925-1926).

137 Frank, *supra* note 132, at 226.

138 Wallace, *supra* note 40, at 136-37.

139 *Id.* at 149. Wallace seemed to experience some of his own feelings of depression and inadequacy in terms similar to those he used to evoke the degradations of corporate culture: he described himself, for example, as feeling as if he were a fake person who suffered from "imposter syndrome." D. T. Max, Every Love Story is a Ghost Story: A Life of David Foster Wallace (2012).

140 Bakan, *supra* note 101, at 26.

141 David S. Allen, Democracy, Inc.: The Press and Law in the Corporate Rationalization of the Public Sphere 24-25 (2005).

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To Kill a Mockingbird and Legal Ethics: On the Role of Atticus Finch's Attic Rhetoric in Fulfillment of Duties to Client, to Court, to Society, and to Self

Michelle Kundmueller*

ABSTRACT

Atticus Finch, protagonist of Harper Lee's To Kill a Mockingbird *and longtime hero of the American bar, is well known, but he is not well understood. This article unlocks the secret to his status as the most admired of fictional attorneys by demonstrating the role that his rhetoric plays in his exemplary fulfillment of the duties of an attorney to zealously represent clients, to serve as an officer of the court, and to act as a public citizen with a special responsibility for the quality of justice. Always using the simplest accurate wording, focusing on reason over emotion, and speaking in the same manner whether in private or in public, Atticus's rhetoric exemplifies the ancient Roman style known by students of rhetoric as "Attic." Using this style to navigate the potential for conflict among his duties, Atticus reveals the power, the elegance, and the ethical necessity of Attic rhetoric. Connecting Atticus's name to the Attic style of rhetoric for the first time, this article advances several scholarly debates by demonstrating the mutual compatibility of the duties imposed by the Model Rules of Professional Conduct and proffering a powerful tool to attorneys seeking to practice or to teach improved ethical conduct.*

KEYWORDS

Atticus Finch, Harper Lee, Ethics, Professional Conduct, Literature

CONTENTS

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Introduction

The Atticus Finch of *To Kill a Mockingbird* has served as a role model for generations of American attorneys[1] and schoolchildren,[2] but scholarship analyzing this fictional attorney has never focused with sufficient clarity on his use of the most important weapon that a lawyer wields: words. And yet it should be evident that, as an attorney, Atticus's words are an important part of who he is. As renowned scholar of legal writing and speaking, Brian Garner, explains, "There are only two things that lawyers do professionally, and they are to speak persuasively and to write persuasively. That really exhausts the whole gamut of skills that lawyers engage in. Words are our only tools."[3] If Professor Garner is correct that effective rhetoric is synonymous with an attorney's skill and power, then Atticus's use of words should provide a superlative source of insight into the power of his character and thereby explain why so many American attorneys have implicitly adopted him as their patron saint. It is natural that Atticus's rhetoric should be the source of his grip on the imagination (such as it is) of the American attorney.[4]

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1 Attorneys have so dearly loved Atticus Finch that in 2010 the American Bar Association playfully removed him from the running for their list of the twenty-five greatest fictional lawyers. Thane Rosenbaum, *ABA Honors "To Kill a Mockingbird" and Atticus Finch*, A.B.A. J., Aug. 10, 2010, at 30, 30–31. An article in the online journal explained that his fellow fictional attorneys could not bear competition with Atticus's "demigod" status: "Since the moment he was introduced 50 years ago in Harper Lee's novel, *To Kill a Mockingbird*, Atticus Finch has represented both an image lawyers crave and a standard that intimidates them. . . . [He is] a legal deity too lofty to allow comparison to a Denny Crane or a Patty Hewes." Richard Sweren, *Farewell, Atticus,* A.B.A. J., Aug. 10, 2010, http://www.abajournal.com/magazine/article/farewell_atticus. Numerous sources confirm Atticus's power to inspire the love and emulation of attorneys and children who will become attorneys. *See, e.g.,* Stephen D. Easton & Julie A. Oseid, Essay, *"And Bad Mistakes? I've Made a Few": Sharing Mistakes to Mentor New Lawyers,* 77 Alb. L. Rev. 499, 526–28 (2013/14) (describing an "Atticus Finch case" as representation undertaken "not because you think you have a great chance of winning the case, but because it is the right thing to do"); Mary Ellen Maatman, *Justice Formation from Generation to Generation: Atticus Finch and the Stories Lawyers Tell Their Children*, 14 Legal Writing 2017, 208–9 (2008) (describing many ways that Atticus has inspired lawyers and aspiring attorneys); Carrie Menkel-Meadow, *Law and Popular Culture: Can They Do That? Legal Ethics in Popular Culture: of Characters and Acts*, 48 UCLA L. Rev. 1305, 1307, 1310 (referring to the virtual "canonization" of Atticus).

2 With over forty million copies sold, some estimate that as many as 70 percent of American high school students are assigned the novel. Alexandra Alter, *Harper Lee, Author of "To Kill a Mockingbird," Is to Publish a Second Novel,* N.Y. Times, Feb. 3, 2015, at A1; Courtney Crowder, *Marja Mills Addresses Harper Lee Controversy at Literary Event*, Chi. Trib., July 23, 2014, at 6, §4.

3 AmicusCuriae200, *Bryan Garner's Persuasive Oral Argument*, You Tube (Sept. 3, 2010), https://www.youtube.com/watch?v=IJRDKRGo-UE.

4 Notwithstanding the prevailing adulation for Atticus, serious challenges have been raised to the character's position as role model—even before the publication of *Go Set the Watchman*. Some of the most highly noted challenges have accused Atticus of sexism, complicity in society's racism, or both. Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 Ala. L. Rev. 473 (1994); Steven Lubet, *Classics Revisited: Reconstructing Atticus Finch*, 97 Mich. L. Rev. 1339 (1999); Malcolm Gladwell, *The Courthouse Ring: Atticus Finch and the Limits of Southern Liberalism*, New Yorker, Aug. 10, 2009,

The evidence necessary to support this claim—the claim that Atticus's speech is worthy of emulation and therefore should be better understood—lies in the power of his speech as it plays out within the novel. But the character's name gives additional evidence of the importance of Atticus's use of words, and this evidence proves essential to understanding—rather than merely observing and admiring—the full contribution of Atticus to his fictional town and of Harper Lee to the American attorneys who model themselves after Atticus. This article argues that Lee named Atticus Finch, specifically the Atticus Finch of *To Kill a Mockingbird*, after an ancient school of rhetoric known as Attic. Atticus Finch speaks with all the hallmarks of the Attic orator: he never raises his voice above a polite tone; he uses the same tone and vocabulary at home and in the courtroom; and he employs simple, accurate phrases instead of impassioned eloquence. Atticus's practice of Attic rhetoric thus presents an important counterpoint to the perennial American fear of the aggressive, threatening, and sometimes abusive trial lawyer—the lawyer least likely to persuade by reason and most likely to prevail through arousal of some passion, whether it be fear, hatred, or mere selfishness. Nonetheless, there is almost no scholarship on *To Kill a Mockingbird* that so much as mentions Atticus's rhetorical style, very little that considers his oratory from a legal ethics perspective, and none that connects him to the Attic style of oratory.[5]

Atticus's rhetoric—standing in opposition to the passion-arousing style typically associated with the most negative stereotype of the courtroom attorney—connects the optimistic vein running through *To Kill a Mockingbird* with the integrity of the legal profession and the potential for rational deliberation within the American legal system. The importance of this connection lies in teaching attorneys—and indeed Americans more broadly—why we admire Atticus and intuitively model ourselves after him. To the extent that attorneys voluntarily shape

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at 26–32; Deborah Luyster, *Crossing the Bar: The Column of the Legal Education Committee: Lawyering Skills in Law and Literature*, 81 Mich. B. J. 56, 56 (2002); *see also* Menkel-Meadow, *supra* note 1, at 1316, 1333 (questioning Atticus's parenting and arguing that he "is no longer the uncomplicated hero that we once thought when we measure him against current standards of complicity with a wrongfully racist society"). Atticus's detractors elicited a resounding defense of the bar's most beloved hero, and the 2015 publication of *Go Set the Watchman* has since given rise to a fresh round of debate. Davis Margolick, *At the Bar; To Attack a Lawyer in "To Kill a Mockingbird": An Iconclast Takes Aim at a Hero*, N.Y. Times, Feb. 28, 1992, at B7; Claudia Johnson, *Without Tradition and Within Reason: Judge Horton and Atticus Finch in Court*, 45 Ala. L. Rev. 483, 483–87 (1994); Rapping, *supra* note 4. Atticus's character in *Go Set the Watchman* fueled the anti-Atticus camp; his defenders responded by arguing that the new novel's Atticus is a draft of a fictional character whose traits Lee evidently determined to alter to create the Atticus of *To Kill a Mockingbird*. Rapping, *id.* at 862–63; Adam Gopnik, *Sweet Home Alabama: Harper Lee's "Go Set a Watchman,"* New Yorker, July 27, 2015, at 66. I side with the latter camp, setting *Go Set the Watchman* aside as a separate literary work whose characters do not bear on the interpretation of *To Kill a Mockingbird*.

[5] The only exception that the author has been able to find is Brooke Richelle Holland's *Classical Rhetoric in Atticus Finch's Speeches*, 105 Eng. J. 78 (2006). Contrary to my argument, Holland argues that Atticus speaks in the low, middle, and high styles described by Cicero. *Id.* at 81–82. Holland does not diagnose Atticus's exclusive use of the Attic style; much less does she connect this style to Lee's choice of name for Atticus Finch.

themselves in Atticus's image, rules of ethics, professionalism, and civility become, to a very great extent,[6] a matter of course. Attorneys who strive to be like Atticus will fulfill many of their obligations without stopping to think about what they ought *not* to do. Of course, there will always be those who refuse to resolve to do the right thing for the right reason, but this article is written in the belief that many attorneys do intend, as the Model Rules of Professional Conduct explain, to carry a "special responsibility for the nature of justice."[7] For attorneys who embrace this responsibility, understanding (rather than merely intuitively admiring) the logic underpinning Atticus's speech will educate and sharpen the ability to follow his articulate example. If Lee taught attorneys to love Atticus and to wish to be like him, as I believe *To Kill a Mockingbird* shows us that she did, this article seeks to make it a bit plainer how we can imitate him and why it is important for us to do so. And, if Brian Garner is right about the extent of the legal tool kit, nothing could be more important to any upstanding American attorney.

This argument proceeds in three parts. The first part makes the case for why a literary figure should be studied to improve legal ethics and then makes the case for a need in improvement of ethics in the American bar. Even after a century of articulating and rearticulating standards of ethics, professionalism, and civility, legal ethics should turn to literature because the profession continues to struggle with both a perceived decline in ethics and fundamental fault lines that have haunted attorney identity for centuries.

The second part makes the case for Atticus Finch as a salutary literary role model whose specific strengths address both concerns about a decline in general civility and the potential for attorney identity to splinter amidst the sometimes conflicting duties governing an attorney's professional and personal life. Atticus not only carries out the duties imposed by the profession, he does so—without raising his voice—while navigating profound potential for conflict among his duties. As a comparison of his character to the aspirational Preamble of the Model Rules of Professional Conduct demonstrates, Atticus illustrates how the seemingly incompatible expectations placed on an attorney by the traditions of the profession can be fulfilled under difficult circumstances.

The third part connects Atticus's holistic, civil fulfillment of his duties as an attorney to his rhetoric, arguing that analysis and understanding of his rhetorical style reveal both the tools that permit Atticus to successfully fulfill his role as attorney and the underlying beliefs that permit him to do so even under circumstances where it might appear that his duties and interests are in conflict with one another. Lee named Atticus after the ancient, Attic school of rhetoric, so it is not surprising that the characteristics of this school's rhetoric—particularly when compared to more bombastic and passionate styles—unlock the logic behind the character's integrity. Cicero described and critiqued Attic rhetoric at length, describing its simple strengths but also arguing that it lacked the power exhibited in the speech of the greatest orators. Despite his critique, Cicero's descriptions of the clear, rational elegance of Attic rhetoric demonstrate how this style exemplifies the fulfillment of an attorney's simultaneous duties to truth, justice, civility, and his

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6 This is not to claim that all ethics requirements are intuitive; even Atticus Finch might consult the ABA Model Rules of Professional Conduct for guidance on more technical questions. Model Rules of Prof'l Conduct R. 1.5, 5.4 (2013).

7 *Id.* pmbl. ¶ 1.

or her client's interests. Thus, Atticus's rhetorical style points to a resolution of the seeming conflict between an attorney's duties to client and to the court, justice, and personal integrity.

In closing, I focus on the consistency of Atticus's rhetoric across the many aspects of his life—as an attorney, as a citizen, and as a father. In the final analysis, Atticus's Attic rhetoric—as Cicero's discussion of rhetoric will have made clear—proves a key component of more than his skill as an attorney. His rhetorical style is grounded in honesty and respect for the ultimate deliberative capacity of others. Coupled with the courage for which he has long been admired, Atticus's honest yet restrained use of speech (his greatest weapon) contains a microcosm of the restraint that members of the judiciary and bar should exhibit in relationship to the greater whole—the democracy within which they reside.

I. How Atticus Can Help Attorney Ethics

A. Literary Studies in Ethics Education

Attorneys lead their lives amid a forest of duties, not least important among them the duties that guide and control the practice of law itself: the canons, rules, regulations, culture, and expectations that shape the conduct of an attorney. The twentieth century witnessed a great increase in the formality and enforceability of ethical duties governing attorneys, but the extent to which the formal pronouncements, whether enforceable or aspirational, improve attorney behavior is itself a contended issue. Some cheer the articulation of enforceable codes of conduct, arguing that enforcement of detailed rules is the only path to an ethical bar.[8] Others question the efficacy of formal standards, pointing instead to an underlying defect in the dispositions of attorneys who either believe "churlish" behavior appropriate or simply lack the virtue required to make the right decisions.[9] Those who question the sufficiency of rules often call for some degree of culture change, citing possibilities as divergent as altering the adversarial nature of the practice of law, training young attorneys in virtue, or enhancing the shouldering of responsibility by firms and individual attorneys.[10]

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8 Heather M. Kolinsky, *Just Because You Can Doesn't Mean You Should: Reconciling Attorney Conduct in the Context of Defamation with the New Professionalism*, 37 Nova L. Rev. 113, 117–20 (2012); Amelia Craig Cramer, Linda Drake, & Mariam Diggins, *Civility for Arizona Lawyers: Essential, Endangered, Enforceable*, 6 Phoenix L. Rev. 465, 467–68, 503–4 (2013); Eugene R. Gaetke, Expecting Too Much and Too Little of Lawyers, 67 U. Pitt. L. Rev. 693, 694, 727–28, 740–41, 748–49 (2006).

9 Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 Rev. Litig. 177, 190 (1996); Mark Neal Aaronson, *Symposium: Race, Gender, Power, and the Public Interest: Perspective on Professionalism: Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism*, 8 St. Thomas L. Rev. 113, 114–19 (1995).

10 Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of the Ethics and Civility in Litigation*, 67 Fordham L. Rev. 809, 834–35 (1998); Aaronson, *supra* note 9, at 143–45, 153–55; Cramer, Drake, & Diggins, *supra* note 8, at 468–69.

Culture shifts and virtue-enhancing attorney education may initially appear hopelessly unattainable, but advocates point to the potential for firm mentoring and shadowing programs, stress-management training, and expanded law-school and continuing-legal-education curricula.[11] Among the suggestions for how to expand legal education are interdisciplinary studies—such as the study of literature and rhetoric.[12] Law and literature studies are not new, and indeed such scholarship has forayed into many corners of practice.[13] Not surprisingly, more than one scholar has underscored the potential for literature to play a role in narrowing the gap between actual practice and good ethics.[14] Like mentoring programs, the study of literature circumnavigates some of the common complaints against both mandatory and aspirational rules. Perhaps most importantly, studying legal ethics through literature does not establish minimum standards. Rather, it focuses attention on understanding and creating the best resolution to any dilemma. Furthermore, the solution offered comes in the format most familiar to common-law-trained attorneys: embedded in a particular factual scenario and ready to be analyzed, distilled, and critiqued—like any judicial opinion. Moreover, like mentoring, the study of literature requires no formal structure: it is well suited to individual pursuit, informal discussion, law-school classrooms, and continuing legal education through bar programs.

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11 Aaronson, *supra* note 9, at 116, 125; Mark D. Nozette & Robert A. Creamer, *Expecting Too Much and Too Little*, 79 Tul. L. Rev. 1539, 1553–56 (2006); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 Geo. J. Legal Ethics 547, 569–73 (1998); Brenda Smith, *Comment, Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 Dayton L. Rev. 151, 182–84 (1998).

12 Aaronson, *supra* note 9, at 125.

13 Literature may, for example, help legal scholars grapple with complex scientific and medical issues that are accompanied by legal quandaries. David Caudill, *Law and Literature, Literature and Science, and Enhancing the Discourse of Law/Science* Relations, 27 J. Legal Prof. 1, 3 (2003); Jennifer Bard, Thomas Mayo, & Stacy Tovino, *Three Ways of Looking at a Health Law and Literature Class*, 1 Drexel Law Rev. 512 (2009). Analysis of the popular perception of attorneys and the judicial system also lends itself to television and film studies. Naomi Mezey & Mark Niles, *Screening the Law: Ideology and Law in American Popular Culture,* 28 Colum. J.L. & Arts 91 (2005); Steven Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes,* 42 U. Miami L. Rev. 229 (1987); Kimberlianne Podlas, *Cross-Examination: The Great (?) Engine: Article: Impact of Television on Cross-Examination and Juror "Truth,"* 14 Widener L. Rev. 479 (2009); Kimberlianne Podlas, *Guilty on All Accounts: Law and Order's Impact on Public Perception of Law and Order*, 18 Seton Hall J. Sports & Ent. L. 1 (2008); Adam Shniderman, *Ripped from the Headlines: Juror Perceptions in the Law & Order Era,* 38 Law & Psychol. Rev. 97, 97–133 (2014); Diane Klein, *Ally McBeal and Her Sisters: A Quantitative and Qualitative Analysis of Representations of Women Lawyers on Prime-Time Television*, 18 Loy. L.A. Ent. L.J. 259, 259–305 (1998).

14 Philip Kissam, *Disruptions of Literature: Disturbing Images: Literature in a Jurisprudence Course,* 22 Legal Stud. Forum 329, 347–48 (1998); Menkel-Meadow, *supra* note 1, at 1307; Caudill, *supra* note 13, at 2; *but see* Jane Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 Yale L.J. 1059 (1999) (critiquing the internal coherence, utility, and theoretical grounding of law and literature studies).

Even more than mentoring relationships, literature by its very nature translates theory and maxim to concrete application.[15] This is particularly valuable to the common-law lawyer, whose education and professional habits have trained the mind to weave ceaselessly between general rule and particular application. Literature, however, offers something that the casebook cannot: it follows attorney, judge, client, and whoever else may inhabit the story beyond the immediate purview of the legally relevant and into both the broader public arena[16] and the narrower private stories of the characters' personal and inner lives. As literature follows a lawyer into the private sphere, it unearths the interplay between professional and private self,[17] thereby exploring a connection that escapes the rules of professional conduct. Because the fictional attorney's underlying ethical choices are normally expressed in novel form through professional speech, attorney rhetoric—with all its ethical implications—is simultaneously under the glass and ready for examination.[18]

Given these advantages to studying law through fiction, to say nothing of the pleasure thereby afforded, it is not surprising that a literature both deep and wide has developed.[19] Legal scholarship of recent years alone boasts forays into the philosophical Franz Kafka,[20] the perennial favorite Shakespeare,[21] and the fanciful and popular Harry Potter world.[22] *To Kill a Mockingbird* and Atticus

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15 Luyster, *supra* note 4, at 56 (arguing that literature shows how abstraction of a legal rule works in the context of the particulars of human lives). Menkel-Meadow argues that the concrete application that occurs in literature is central to the enthusiasm with which her students respond to studying legal ethics in literature, *supra* note 1, at 1325–26.

16 Literature can assist in the formulation of what "law" is, helping attorneys to explore the "tension between positive law and natural law." Luyster, *supra* note 4, at 56. Because attorneys act at the intersection between law as it actually is and law as it ought to be, the choices of "a lawyer of good character" exhibit the "tension" between "commitment to law and commitment to justice." Menkel-Meadow, *supra* note 1, at 1324. While the resulting, tension-ridden stories can produce "disturbing images of lawyers' ethics," (Kissam, *supra* note 14, at 347), these images provide insights about the impact of law in a society as a whole (Bruce Rockwood, *The Good, the Bad, and the Ironic: Two Views on Law and Literature*, 8 Yale J.L. & Human. 533, 534 (1996) (book review)).

17 Legal scholars have noted that literature provides an opportunity to study the relationship between the public and private lives of attorneys. Menkel-Meadow, *supra* note 1, at 1308–9 (2001); Kristin Huston, Comment, *The Lawyer as Savior: What Literature Says about the Attorney's Role in Redemption*, 73 UMKC L. Rev. 161, 164 (2004). Thomas Morawetz draws the interesting observation that whether a story ultimately shows the practice of law to ennoble or dehumanize an attorney will depend on the author's estimation of the law. Review Essay, *Ethics and Style: The Lessons of Literature for Law*, 45 Stan. L. Rev. 497, 502 (1993).

18 More generally, some argue that literary theory offers legal reasoning a rich resource for understanding how texts mean and how they can legitimately be interpreted. Gary Minda, *Law and Literature at Century's End*, 9 Cardozo Stud. L. & Lit. 245, 245 (1997); Morawetz, *supra* note 17, at 497; Cathren Page, *Not So Very Bad Beginnings: What Fiction Can Teach Lawyers about Beginning a Persuasive Legal Narrative Before a Court*, 86 Miss. L.J. 315 (2017).

19 Menkel-Meadow, *supra* note 1, at 1307–8.

20 Patrick Glen, *Franz Kafka, Lawrence Joseph, and the Possibilities of Jurisprudential Literature*, 21 S. Cal. Interdis. L.J. 47 (2011).

21 Frank Kermode, *Justice and Mercy in Shakespeare*, 33 Hous. L. Rev. 1155 (1996).

22 Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 Stan. L. Rev. 67 (2010); Jeffrey Thomas, *The Power of Stories: Intersections of Law, Literature, and Culture: Harry Potter, Law and Culture: Harry Potter and the Law*, 12 Tex. Wesleyan

Finch, of course, appear with relative frequency, and more often than not the theme relates in some way to legal ethics—given a broad understanding of the subject: Atticus's name is invoked as an example of attorney courage,[23] in support of the importance of pro bono work,[24] and to illustrate the extralegal role that attorneys play in the lives of their families and greater communities.[25] Before delving deeper into why Atticus has been selected as the object of study in this article, the following section sketches the contemporary ethical landscape within which he is analyzed.

B. Enduring Tensions and New Rules in Legal Ethics

Scholarship on the origins of American legal ethics tends to commence with one particular landmark figure, George Sharswood, author of *An Essay on Professional Ethics*.[26] During the nineteenth century, Sharswood and other American legal scholars debated the ethical limitations that ought to guide attorney behavior.[27] During this period, state bar associations made efforts to impose ethics duties through the adoption, first of the Field Code, and later of the 1887 Alabama Code of Ethics, which would serve as the model for new codes in ten additional states.[28] By the twentieth century, the American Bar Association took the lead in the development of three additional promulgations that would be followed across the nation.[29] The 1908 Canons of Ethics was modeled on the Alabama Code, and this was followed by the 1969 Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct.[30]

Since the adoption of the Model Rules of Professional Conduct, legal ethics has seen two additional movements take shape: in addition to the ethics norms found in the professional rules, some jurisdictions have developed professionalism and civility standards.[31] Overlap does exist among the areas of ethics, professionalism,

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L. Rev. 427 (2005); Aaron Schwabach, *Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World*, 11 Roger Williams U. L. Rev. 309 (2006).

23 Caudill, *supra* note 13, at 2.

24 Menkel-Meadow, *supra* note 1, at 1329.

25 Huston, *supra* note 17, at 179.

26 Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 Case W. Res. 381, 382–83, 404–12 (2012) (providing an overview of prominent nineteenth-century Anglo-American statements of legal ethics); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes,* 6 Geo. J. Legal Ethics 241 (1992) (detailing the contribution of Sharswood's work to the substantive content of contemporary rules of legal ethics).

27 Andrews, *supra* note 26, at 384, 412–19; Pearce, *supra* note 26, at 260, 241–45.

28 Andrews, *supra* note 26, at 384, 412–19 (2012); Pearce, *supra* note 26, at 260, 241–45 (1992).

29 Andrews, *supra* note 26, at 419–20 (2012).

30 *Id.* at 419–20, 435–39 (2012) (concluding that the primary contours of the ethical limitations on attorneys has been largely constant despite minor adjustments between the various American statements of legal ethics); *see also* Pearce, *supra* note 26, at 246–47.

31 David A. Grenardo, *Making Civility Mandatory: Moving From Aspired to Required*, 11 Cardozo Pub. L. Pol'y & Ethics J. 239, 245 (2013) (explaining that "civility is also linked to professionalism and ethics"); Thomas E. Richard, *Professionalism: What Rules Do We Play By?,* 30 S.U. L. Rev. 15, 18 (2002) ("Although some argue professionalism and legal ethics are synonymous, they differ significantly" (citations omitted)).

and civility, and sometimes the terms are even used synonymously.[32] Nonetheless, broad distinctions can be discerned. Ethical duties, doubtless the most familiar to practitioners, are considered synonymous with the state rules of professional conduct that regulate attorney conduct.[33] These rules of professional conduct are a "matter of law" and are therefore enforceable.[34] Professionalism norms, in contrast to the rules of professional conduct, result from attempts to "establish lofty standards that attorneys *should* follow."[35] Professionalism does not therefore lend itself to clear codification; rather, it is a realm of conscience in which reasonable minds will differ.[36] Civility, in contrast to the broad reach of professionalism, relates specifically to the "truth seeking process" through the adoption of a "just, dignified, courteous, and efficient manner."[37] At the heart of civility is found the rejection of hostility, combativeness, rude comportment, and degrading behavior.[38] In their place, advocates of civility insist on the role

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[32] Grenardo, *supra* note 31, at 245–46 ("Civility and professionalism are sometimes used interchangeably in the legal profession. Similarly, civility is also sometimes considered 'an element or characteristic of professionalism.' Civility and ethics can overlap as well" (citations omitted)); Richard, *supra* note 31, at 17–19 (arguing that professionalism is inclusive of ethics and civility but that satisfaction of the standards of ethics and civility does not include the standards of professionalism); N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 Cumb. L. Rev. 923, 924–25 (1995/96) (noting reform efforts under the headings of ethics, professionalism, and civility and calling for "broader" definitions and "a more expansive and less compartmentalized discussion" of the standards that ought to guide the practice of law). Disagreement exists over the precise contours of their respective subject areas. Douglas S. Lang, *Professionalism: Core Values: Can Courts Require Civil Conduct?,* 78 Tex. B. J. 718, 718 (2015) (chronicling current Texas and national debate on boundaries and resulting respective governing authority on ethics, professionalism, and civility); *see also* Grenardo, *supra* note 31, at 244–47; Richard, *supra* note 31, at 17–19.

[33] Grenardo, *supra* note 31, at 246.

[34] Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics,* 67 Ark. L. Rev. 571, 620–24 (2014). Hence the rules of ethics, today embodied in the state-specific rules of professional conduct, have been viewed by many as providing only "minimum standards that lawyers must follow." Richard, *supra* note 31, at 18; *see also* Cooper & Humphreys, *supra* note 32, at 929–30 ("These efforts to streamline the professional code of ethics from moral generalizations into more specific guidelines, important as they may be, cannot stand alone. Otherwise they can have the unintended consequence of narrowing the scope of ethical consideration and diminishing the urgency of our remaining ethical mandate").

[35] Richard, *supra* note 31, at 18 (emphasis added); *see also* Lang, *supra* note 32, at 718. In the lofty view of advocates for professionalism, the "attorney who embraces the ideals of professionalism meets or exceeds aspirational ideals established by common sense and common courtesies." Richard, *supra* note 31, at 18; *but see* Gaetke, *supra* note 8, at 699 (noting the lack of agreement over the meaning of "professionalism" and offering diverging definitions).

[36] Richard, *supra* note 31, at 18–19.

[37] Grenardo, *supra* note 31, at 251; *but see* Amy R. Mashburn, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s: Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Val. U. L. Rev. 657, 681 (1994) (arguing that the civility codes embody the "escapism and conservatism of the normative vision" of class hierarchy).

[38] Grenardo, *supra* note 31, at 244–45; Jonathan J. Lerner, *Putting the Civil Back in Civil Litigation*, N.Y. St. B.A. J. 33, 35–36 (2009).

of respect, courtesy, and sometimes even kindness in the daily conduct of the practice of law.[39]

Despite the efforts at improvement illustrated by this history of near-constant standard scrutiny and rule writing, the bar continues to struggle to maintain ethical, professional, and civil standards of behavior.[40] The question of whether attorney behavior has actually deteriorated (or increased in its rate of deterioration) sparks much debate, but it is certainly true that attorneys have a long record of believing that their standards are in decline.[41] Today's increasingly large, mobile, and diverse bar,[42] although emphatically to be celebrated in many respects, has brought with it the end to a relatively homogenous, close-knit bar that shared informal norms with little effort.[43] Lack of implicitly shared informal norms may well account for a

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39 Grenardo, *supra* note 31, at 244–45; *but see* Cramer, Drake, & Diggins, *supra* note 8, at 471 (noting the difficulty of defining "civility"); Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99, 107–9 (2012) (noting the distinctiveness of individual state civility codes while arguing that they are unified by ten core concepts of civility).

40 Kolinsky, *supra* note 8, at 115 (noting the divergence between how attorneys can and should behave); Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 Conn. Pub. Int. L.J. 31, 32–33 (2005) (listing an array of improper behavior, including foul and profane language, "Rambo" tactics, name calling, and belligerent behavior); Hon. Marvin E. Aspen, *Litigation Ethics and Professionalism Symposium: A Response to the Civility Naysayers*, 28 Stetson L. Rev. 253, 253–55 (1998) (listing justices, judges, and attorney surveys observing deterioration in the civility of the bar); Daicoff, *supra* note 11, at 549 (listing as evidence of a decline in professionalism the increase in complaints against attorneys, lowered public opinion of attorneys, and decreased attorney satisfaction with the practice of law); Gee & Garner, *supra* note 9, at 178 (exploring why "courtesy and restraint in personal conduct toward others . . . strike many observers today as almost laughable when one is speaking of the bar"); Aaronson, *supra* note 9, at 114 (confirming recent observation of the systemic lack of civility in the bar).

41 Pearce, *supra* note 26, at 249–50 (dating the debate over the role of ethics in practice to the mid-nineteenth century); Robert Hornstein, *The Role and Value of a Shadow Program in the Law School Curriculum,* 31 Miss. C. L. Rev. 405, 405–11 (2013) (dating the debate over legal education, including professional values, to the 1930s); Gaetke, *supra* note 8, at 694 (arguing that the bar has engaged in 100 years of periodic efforts to improve attorney conduct). Even scholars finding distinctive qualities in the contemporary developments faced by the bar admit that the question of the actual decline in attorney behavior is subject to debate. Daicoff, *supra* note 11, at 547; Sarat, *supra* note 10, at 809–10 (1998); Campbell, *supra* note 39, at 103.

42 Gee & Garner, *supra* note 9, at 181–82 (noting the increased size and mobility of the bar and observing that a "related source of the incivility problem . . . is the downside of what most of us probably view as a salutary civic development: the opening of the profession to all social and economic classes"); Aaronson, *supra* note 9, at 121 (arguing that it has been convincingly demonstrated that "whether under the community reputation based reviews of much of the nineteenth century or the formalized character screening procedures of the last 100 to 115 years, the main impact of character fitness requirements within the American bar has been the exclusion of women, racial and religious minorities, and political dissenters").

43 Pearce, *supra* note 26, at 260, 270–72 (underscoring the assumption of shared norms in informal nineteenth-century American legal ethics and noting the difficulty of maintaining such norms with a larger, more mobile, and more diverse bar).

related change in legal culture: the decline of the "lawyer-statesman" ideal in favor of the promotion of a rather narrowly understood self-interest.[44]

But scholars focused on the longstanding nature of ethics concerns have pointed to more fundamental, centuries-old tensions within the practice of law in the adversarial system, a system that limits—but also requires—advocacy on behalf of litigants.[45] Arising from the very nature of an adversary system, an enduring source of conflict over attorney ethics hovers over the potential for conflict between an attorney's duty of client loyalty and zealous representation and an attorney's duty to the common good.[46] Indeed, this underlying tension in the identity of the attorney as advocate and as officer of the court predates the establishment of the American legal system.[47]

The term "common good," chosen above as a kind of generic placeholder, may be understood to entail any or all of a set of professional and personal duties that can be in competition (or seeming competition) with the interests of a client. They can include, for example, the judiciary, justice, and personal integrity. Indeed, duties owed to the court generally have placed a limit on some duties, like zealous advocacy, owed to the client.[48] Given the tension that lies between these two sets of duties, it is not surprising that zealous advocacy is often blamed for the failure to follow informal norms.[49] Similarly, some scholars point to a more profound tension between an attorney's duties to a client and the attorney's moral well-being, arguing that loyalty to the client either destroys or is perceived to destroy an attorney's ability to follow any preexisting personal moral compass.[50] Yet critique of zealous advocacy and client loyalty is far from unanimous: others argue that ultimately these duties serve the interests of justice[51] and that any unhealthy incentives are

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44 Daicoff, *supra* note 11, at 560–61; *see also* Benjamin V. Madison, III & Larry O. Natt Grant, II, *Methods of Teaching and Forming Professional Identity: The Emperor Has No Clothes, But Does Anyone Really Care? How Law Schools Are Failing to Develop Students' Professional Identity and Practical Judgment*, 27 Regent U. L. Rev. 339, 342 (2014/15) (arguing that contemporary law schools are failing to develop professional ethical identity).

45 Russell G. Pearce, *supra* note 26, at 261–67 (1992); Andrews, *supra* note 26, at 435–37.

46 Gaetke, *supra* note 8, at 695 ("Thoughtful commentators pointedly assert that lawyers tend to act unethically by pursuing their clients' objectives too single-mindedly, without concern for the negative impact of these efforts on other interests, including those of adversaries, third persons, the judicial system, and society"); Pearce, *supra* note 26, at 249–50; Andrews, *supra* note 26, at 435–37.

47 Andrews, *supra* note 26, at 435.

48 *Id.* at 435–38.

49 *Id.; Gaetke, supra* note 8, at 718–720; Allen K. Harris, *The Professionalism Crisis—The "z" Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, 53 S.C. L. Rev. 549, 568–69 (2002*); see also* Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 Fla. St. U.L. Rev. 25 (2011) (arguing that the duty of zealous advocacy encourages attorneys to damage even their client's own interests).

50 Daicoff, *supra* note 11, at 561–63; Andrew L. Reisman, *Comment, An Essay on the Dilemma of "Honest Abe": The Modern Day Professional Responsibility Implications of Abraham Lincoln's Representations of Clients He Believed to Be Culpable*, 72 Neb. L. Rev. 1205, 1226–28 (1993).

51 Pearce, *supra* note 26, at 256–57.

curbed by the importance of reputation within the legal community.[52]

Whatever the root cause of the behavior problems, scholars have united in arguing that failures in attorney comportment threaten the bar's ability to fulfill its social and political function—the facilitation of peaceful, just dispute resolution. Rational deliberation is at the heart of law, and rational deliberation requires the moderate, civil use of language.[53] More than merely manners, attorney behavior bears on the legal system's ability—through the discernment of the judge and often through negotiation between the parties—to find the facts and properly apply the law thereto.[54] When attorneys flout the norms of civil, professional, and ethical decision-making that govern (formally or informally) the practice, they contribute to conflict rather than to the resolution of conflict.[55] Such behavior obscures justice in an individual case and undermines the perception of justice within the judiciary as a whole,[56] arguably discouraging the use of the legal system for the resolution of myriad social problems. In this regard, ethics and civility work hand in hand, for how attorneys speak and write is inextricably bound to how and whether they fulfill their ethical duties—and thereby to the merit of the profession within both the society and the polity.[57]

In the argument that follows, "ethics" will be employed in its broadest sense to include both the enforceable ethics rules and the aspirational norms (sometimes articulated in rules of professionalism and civility, sometimes left implicit and expressed through the opinions and behavior of members of bench and bar) that regulate the practice. The thesis of this article is that the rhetoric of Atticus Finch provides an example that meets our expectations for an ethical attorney. Moreover, because of his particular circumstances, he reveals how the seeming tensions or conflicts among attorney duties can be reconciled through the use of a particular way of employing speech—Attic rhetoric. Also through his Attic rhetoric, his character's performance as an attorney underscores the value of civility to the judiciary and to the ability of the judiciary to play its role within our polity.

Before arguing *how* to become like Atticus, however, I must make the case for *why* one might wish to do so. Part II, therefore, argues that Atticus is indeed an emulation-worthy example of ethical attorney conduct. To be more specific, his example shows that it is possible to overcome the tensions and temptations that may cause lesser attorneys to succumb to uncivil, unethical behavior.

II. Atticus Finch as a Role Model

The preamble of the American Bar Association's Model Rules of Professional Conduct sets forth the three primary identities of an attorney: advocate, officer of the court, and citizen. The preamble then indicates—albeit in germ form—the potential for conflict between duties to client, to court, to society, and also to self—the same conflicts that scholars point to as the source of tension in attorney duties.

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52 Ronald J. Gilson & Robert H. Mnookin, *Disputing through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 512 (1994).
53 Aaronson, *supra* note 9, at 116–18.
54 Harris, *supra* note 49, at 574–78.
55 Cramer, Drake & Diggins, *supra* note 8, at 467.
56 Campbell, *supra* note 39, at 106.
57 Gee & Garner, *supra* note 9, at 188–90.

The preamble thus provides a standard that is both generally accepted and sensitive to the potential for ethical tensions.

According to the preamble an American attorney is and should be "[1] a representative of clients, [2] an officer of the legal system and [3] a public citizen having special responsibility for the quality of justice."[58] The preamble then elaborates on each of these aspects of attorney identity before underscoring the role of conscience and addressing the potential for conflict among duties.[59] In *To Kill a Mockingbird* Atticus, as described by the narrator—his young daughter Scout—fulfills all three aspects of attorney identity. More to the point, he does so under circumstances that require extraordinary rhetorical skill to avoid the potential for conflict among the duties inherent in each aspect of his identity. In so doing, he follows his conscience while providing an excellent role model of ethical, professional, and—most particularly—civil attorney conduct.

A. Representative of Clients

According to the preamble, as a representative of clients, an attorney has two functions: an attorney (1) "zealously asserts a client's position under the rules of the adversary system" and (2) serves as an advisor counseling a client about legal rights and "their practical implications."[60] Atticus is more often shown in the first of these functions, zealously advocating for his client as the court-appointed defense attorney for Tom Robinson—a poor African American man accused of raping a poor white woman.[61] Atticus's zealous advocacy for his client is evident in his comments as he prepares for trial and during Tom's trial. Atticus appears in his role as advisor later and more briefly in the novel when he advises his client after the guilty verdict and through his ruminations after Tom's death.

From the start Atticus evinces the intent to live up to the zealous advocacy standard by doing everything legally permissible for a client who faces dishonest accusers and a stubbornly prejudiced jury.[62] When questioned by his daughter about his determination to defend Tom, Atticus explains that retaining his self-respect required accepting the appointment.[63] Later he tells his brother that he will do his utmost to shake the jury out of their prejudices but that his more realistic hopes are pinned on the appeal.[64] Knowing that a guilty verdict is a near certainty

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58 Model Rules, *supra* note 6, at pmbl. ¶ 1.

59 *Id.* at pmbl.

60 *Id.* at pmbl. ¶ 2.

61 Harper Lee, To Kill a Mockingbird, 100, 117, 223–24, 230–34 (Mass Paperback ed., Grand Central Publishing, 1982) (1960).

62 Elizabeth Keyes remarks that Atticus's example of zealous advocacy motivates "anyone who ever wanted to become a lawyer while reading *To Kill a Mockingbird*." *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 Seton Hall L. Rev. 475, 475 (2015).

63 Lee, *supra* note 61, at 100–101. Jonathan A. Rapping concludes that, while there is nothing to indicate that Atticus sought Tom's case, there is no support for the conclusion that "Atticus was reticent to take on the representation," *supra* note 4, at 855. Implicit in Atticus's explanation to his daughter of his defense of Tom is the fact that Atticus (like other Maycomb attorneys) has defended other African American clients. Lee, *supra* note 61, at 99–100.

64 Lee, *supra* note 61, at 117 ("Before I'm through, I intend to jar the jury a bit—I think we'll have a reasonable chance on appeal, though"). Later, Atticus explains his position

because of the ingrained racism and inflamed passions of his town, Atticus obtains a postponement in the hopes that the town's initial outrage will subside and permit a more rational mindset by the time of trial.[65] Atticus thus asserts the right of his client to the most favorable trial that the rules of the adversary system permit, all the while keeping his sights on the appeal stage—when he knows Tom will be most likely to prevail.[66] This is zealous advocacy.

Atticus maintains this zeal in the face of high personal costs and a distaste for the type of litigation that Tom's defense entails. Much less does this case offer Atticus a particular legal or intellectual appeal to counterbalance its obvious downsides: since his very first case ended with the execution of his clients, he has suffered from a "profound distaste" for criminal law.[67] The postponement that Atticus obtains to protect his client's interest will certainly multiply the financial and emotional costs born by Atticus and his family. In the midst of the Great Depression, Atticus is paid in firewood and nuts by some of his clients.[68] Cash poor already,[69] the financial impact of zealously defending such a popularly hated client must increase with the lengthening of the period before trial.[70] Atticus has a group of core friends who support his resolution, but this defense will likely alienate potential clients.[71] Apart from the financial implications, over the course of the months leading up to trial, his children are taunted at school, and he is faced with the difficult task of explaining to them why their neighbors and fellow citizens call them names and hate their father.[72] He must explain to Scout that "there's been some high talk around town to the effect that I shouldn't do much about defending this man."[73] He instructs her in full knowledge that the day's incident at school will be the first among many: "You might hear some ugly talk about it at school, but do one thing for me if you will: you just hold your head high and keep those fists down."[74] In truth, Atticus and his children also face derision and resistance from citizens on the streets and from within their own family.[75] In the midst of this turmoil, Atticus seems most deeply concerned about the impact on the emotional well-being and moral development of his children.[76] Although he is sensitive to the

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to those outside the family circle when a fellow citizen asks him, "Don't see why you touched it in the first place ... you've got everything to lose from this, Atticus. I mean everything." *Id.* at 195. Atticus retorts, "Link, that boy might go to the chair, but he's not going till the truth's told ... . And you know what the truth is." *Id.*

65 *Id.* at 100–101, 117, 194.

66 *Id.*

67 *Id.* at 5.

68 *Id.* at 26–28.

69 Some of Atticus's clients are rural farmers with no cash because of the Great Depression. Therefore Atticus, like other professionals in town, is also "cash poor." *Id.*

70 His sister, Alexandra, and his friend, Miss Maudie Atkinson, discuss how other professionals who agree with Atticus will not take public steps similar to his for fear of losing the business of those who disagree. *Id.* at 316.

71 *Id*.

72 *Id.* at 99–101.

73 *Id.* at 100.

74 *Id.* at 101.

75 *Id.* at 110, 139, 180, 195.

76 *Id.* at 116–119. Atticus confides his fears about the impact on his children to his brother Jack: "I hope and pray I can get Jem and Scout through it without bitterness, and most

price that his children are paying for Tom's zealous defense, he shows no signs of wavering in his determination.

When Tom's trial commences, Atticus continues to make evident that he is not merely going through the motions of providing legal representation. To identify Atticus's zeal at trial, one must distinguish between volume and effectiveness. Although Atticus retains his calm and courteous manner, his daughter—who has frequently observed him in the courtroom—recognizes the indications of his zeal operating within his characteristic self-control. Two stages of the trial bear particularly clear signs of Atticus's zeal: his cross-examination of the alleged rape victim, Mayella Ewell, and his closing statement.

During his cross-examination of Mayella, Atticus persists (despite his own, more delicate inclinations) in revealing the witness's dishonesty.[77] He questions Mayella thoroughly, effectively, and calmly, although it is equally evident that he finds this particular aspect of the trial nearly sickening.[78] Nonetheless, he persists: "Atticus reached up and took off his glasses, turned his good right eye to the witness, and rained questions on her."[79] By the time he finishes questioning her, Atticus "looked like his stomach hurt."[80] Scout, in her youthful innocence, can only conclude that somehow "Atticus had hit her hard in a way that was not clear to me, but it gave him no pleasure to do so."[81]

During her father's closing arguments, Scout discerns how the gravity of his client's situation has propelled Atticus to appeal, still calmly, but profoundly to the fellow citizens who have prejudged his client: she describes him standing as if "stark naked," his "voice having lost its aridity, its detachment, and he was talking to the jury as if they were folks on the post office corner."[82] The initial impression created by this description of Atticus's courtroom zeal is confirmed when she reports that, after closing and turning away from the jury, Atticus mouths to himself, "In the name of God, believe [Tom]."[83]

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of all, without catching Maycomb's usual disease. Why reasonable people go stark raving mad when anything involving a Negro comes up, is something I don't pretend to understand. . . . I just hope that Jem and Scout come to me for their answers instead of listening to the town. I hope they trust me enough."

77 *Id.* at 242–51.

78 *Id*.

79 *Id.* at 250.

80 *Id.* at 251.

81 *Id.* at 252. Some have argued, on the contrary, that Atticus intentionally disgraces Mayella or that his compassion for her is feigned. Lubet, *supra* note 4, at 1361 (1999); Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 Ala. L. Rev. 511, 524–26 (1994). Others find that Atticus does his duty with distaste and that he treats her with as much compassion as possible consistent with his client's position. Ann Althouse, *Classics Revisited: Reconstructing Atticus Finch? A Response to Professor Lubet*, 97 Mich. L. Rev. 1363, 1365–66 (1999); Randolph N. Stone, *Atticus Finch, in Context*, 97 Mich. L. Rev. 1378, 1378–79 (1999); Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 Ala. L. Rev. 531, 548 (1994). Atticus's personal sympathy for Mayella is supported later in the novel. When insulted and spat upon by Mayella's father (her probable rapist and chronic physical abuser) he remains passive: "If spitting in my face and threatening me saved Mayella Ewell one extra beating, that's something I'll gladly take. He had to take it out on somebody and I'd rather it be me than that houseful of children out there." Lee, *supra* note 61, at 290–93.

82 Lee, *supra* note 61, at 271.

83 *Id.* at 275.

Despite his zeal, the predictable verdict arrives after only a few hours' deliberation.[84] The trial now lost despite Atticus's efforts, the novel shows Atticus as an advisor fulfilling his duty to inform his client of his rights and their practical implications. As he must to preserve his client's rights and autonomy, Atticus advises Tom that his chances will improve on appeal, but he makes no promises.[85] His client's despair must tempt Atticus to promise more, but Atticus counsels his client as his duties require—honestly.[86] Accordingly, before Tom leaves the courtroom, Atticus can provide only qualified hope.[87]

Knowing that the success of his appeal is uncertain, Tom is soon killed while attempting to escape from prison.[88] Atticus, reeling in response to this news, remembers but does not second-guess his decision to provide an honest assessment to his client: "'We had such a good chance,' he said. 'I told him what I thought, but I couldn't in truth say that we had more than a good chance. I guess Tom was tired of white men's chances and preferred to take his own.'"[89] Tom's fate illustrates the high cost of honesty with a despairing client and highlights one reason why fulfilling this duty can be difficult for a well-intentioned attorney who genuinely wishes to protect a client. Despite the outcome in this instance, it is important to remember that Atticus's determination to counsel his client honestly reveals respect for Tom; rather than withhold information from his client (which would effectively treat him as a child), Atticus gave his client information with which to make his own decisions. Another way of stating this: Atticus, having lost after zealously asserting Tom's position under the trial rules, honestly advised Tom of his right to an appeal and its likely practical implications.

B. Officer of the Court

As an officer of the court, conformity to the law is requisite in all facets of an attorney's life: legal, professional, and personal.[90] The preamble indicates that as an officer of the court an attorney ought to "demonstrate respect for the legal system and for those who serve it."[91] Hence, while an attorney may have the duty to challenge "official action," there is simultaneously a duty to "uphold legal process."[92]

Atticus, an attorney whose client will not prevail despite the justice of his defense, is the most sympathetic of attorneys when it comes to the difficulty of fulfilling the function of an officer of the court. His client's cause is just, but his client will lose the trial and very likely his life. What greater temptation exists for overstepping the bounds of the law and of respect for the law? Nonetheless, Atticus expresses the utmost respect for the court and the judge. Yet he does not gloss over the injustice dealt his client. Rather than make either of these opposing mistakes, Atticus's speech—in and out of the courtroom—analytically identifies the source

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84 *Id.* at 281–82.
85 *Id.* at 313–15.
86 *Id.*
87 *Id.* at 282.
88 *Id.* at 314–15.
89 *Id.* at 315.
90 Model Rules, *supra* note 6, at pmbl. ¶ 5.
91 *Id*.
92 *Id*.

and even the dire degree of injustice while affirming the strengths of the judiciary that do deserve respect.

Atticus demonstrates respect for the judge and upholds process in the courtroom through his eminently civil bearing and speech. Unlike the prosecutor—who uses acrimony in an attempt to sway—Atticus proceeds steadily, inflecting little emotion and no acrimony into his voice: "So far, things were utterly dull: nobody had thundered, there were no arguments between opposing counsel, there was no drama."[93] Atticus proceeds through the trial "amiably," using language no more complex or challenging than what Scout hears from him during daily life.[94] Far from working the jury into an emotional turmoil, he behaves as if he were in the midst of a real-estate dispute and uses "his infinite capacity for calming turbulent seas" to "make a rape case as dry as a sermon."[95] His manner is alternately casual, genial, mild, gentle, and detached.[96] Comments from both Scout and the judge indicate that this is how Atticus generally carries himself in court.[97]

Yet Atticus is not complacent. In his closing, he educates the jury about the critical nature of their role in the workings of the justice system. Supporting legal process (both Tom's trial and the jury's more general respect for the judiciary) without flinching in the face of the jury's greatest weakness (the individuals on whose integrity that process must rely) Atticus manages to simultaneously challenge the injustice about to occur and affirm the justice system within which it is about to occur.

"I'm no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up."[98]

Not only does Atticus show marked respect for the trial, the judge, and the witnesses, but when the verdict threatens his children's respect for the legal system he teaches them to understand its flaws without scorning its underlying principles. When they first hear the verdict, Atticus concedes to his son, Jem, that Atticus does not understand how the jury could convict Tom: Atticus admits that "they've done it before and they did it tonight and they'll do it again."[99] Then he reminds his son that the appeal may reach a different result.[100] Days later, discussing the conviction again with his children, Atticus explores the death penalty, rape statutes, circumstantial evidence, and juries, showing his children that—while the law on any particular point may be debatable—the deeper problem is the prejudice that the jury brought with it into the legal system.[101]

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93 Lee, *supra* note 61, at 226.
94 *Id.*
95 *Id.*
96 *Id.* at 234–35, 245, 270.
97 *Id.* at 229, 242–43.
98 *Id.* at 274. Claudia Durst Johnson concludes that Atticus is "grieved" that the jury will not live up to its intended role. Claudia Durst Johnson, To Kill a Mockingbird: Threatening Boundaries 95 (1994).
99 Lee, *supra* note 61, at 285.
100 *Id*.
101 *Id.* at 239–98.

In addition to demonstrating respect for the judiciary and upholding legal process, being an "officer of the court" entails maintaining actual lawful behavior.[102] Atticus's adherence to the law is not generally in question, but there is one scene in which he might be interpreted as failing to live up to this standard in his personal life. Near the conclusion of the novel, Mayella's father, Bob Ewell, attacks and nearly kills Scout and her brother Jem.[103] During the attack they are saved by their reclusive neighbor, Boo Radley.[104] Discussing the incident and the investigation that will follow with Sheriff Tate, Atticus initially insists that he and Sheriff Tate must report what Atticus believes to be the truth—that Jem killed Bob Ewell in self defense.[105] When Sheriff Tate states his intent to report that Bob Ewell fell on his knife, Atticus protests, "Nobody's hushing this up. I don't live that way."[106] As Atticus and Sheriff Tate debate, each man maintains his position.[107] Atticus explains to Sheriff Tate, "I can't live one way in town and another way in my home."[108] Finally, however, Atticus defers.[109] Has Atticus lied, just this once, to save his son from a criminal investigation?

Atticus does not lie to save Jem. He agrees to the proposed deception (on his part a deception by silence) only after Sheriff Tate convinces him that it is Boo Radley—not Jem—who killed Bob Ewell and thus saved his children.[110] Hence, his silence is motivated by the desire to protect his neighbor, not his son. Moreover, to fully convince him, the sheriff must also persuade the still-hesitant Atticus that an investigation would bring acute suffering to Boo Radley. Tate argues as follows:

> "I never heard tell that it's against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what [Boo Radley] did, but maybe you'll say it's my duty to tell the town all about it and not hush it up. Know what'd happen then? All the ladies in Maycomb includin' my wife'd be knocking on his door bringin' angel food cakes. To my way of thinkin', Mr. Finch, taking the one man who's done you and this town a great service an' draggin' him with his shy ways into the limelight—to me, that's a sin. It's a sin and I'm not about to have it on my head."[111]

As the scene draws to a close, Lee has made clear that Atticus consents to silence for the sake of Boo Radley, the man who saved his children. Moreover, Lee has

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102 Model Rules, *supra* note 6, at pmbl. ¶ 5.
103 Lee, *supra* note 61, at 357.
104 *Id.* at 362.
105 *Id.* at 365.
106 *Id*.
107 *Id.* at 365–67.
108 *Id.* at 367.
109 *Id.* at 370.
110 *Id.* at 368–70; Shaffer, *supra* note 81, at 554 (supporting the interpretation that Atticus changes his position to protect Boo Radley rather than to protect his son); *see also* Thomas L. Shaffer, American Legal Ethics: Text, Readings, and Discussion Topics 14–15 (1985) (arguing that Atticus's lie to protect Boo may be a moral mistake but concluding that Atticus's approach to solving this moral dilemma shows him to be a hero because he takes right actions seriously).
111 Lee, *supra* note 61, at 369–70.

made equally clear that Sheriff Tate, the official who will investigate Bob Ewell's death and come to his own conclusion, cannot be shaken by Atticus's preference for honesty. As a practical matter, there is little that Atticus can accomplish, and his comportment as an officer of the court remains at least reasonable in its most questionable moment.

C. Public Citizen Having Special Responsibility for the Quality of Justice, the Role of Conscience, and Resolving Potential Conflict among Duties

An attorney has duties as a public citizen with a special responsibility for the quality of justice: "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of services rendered by the legal profession."[112] As a public citizen a lawyer should also "cultivate knowledge of the law beyond its use for clients."[113] Clearly, Atticus works to improve the law and justice by serving in the state legislature[114] and by defending a client who requires a court appointment for counsel.[115] He fulfills the educational component of his duties by working to prevent his children from adopting the racism of the town and by setting a public example of defense of equal legal rights.[116]

When one asks why Atticus takes on these duties as a public citizen, the following paragraph of the preamble provides a clear answer echoed by the novel: an attorney must be guided by conscience.[117] The zealous defense of Tom costs Atticus a considerable price, not least of which is anxiety for his children and risk to their personal safety as they respond to the slurs, bullying, and stares in the schoolyard and in town.[118] Scout asks her father why he defends Tom despite popular opinion, despite the fact that "most folks seem to think that they're right and you're wrong."[119] Atticus's answer to his daughter twice refers to his conscience as the reason why he must proceed.

> "[I]t's not fair to you and Jem, I know that, but sometimes we have to make the best of things, and the way we conduct ourselves when the chips are down—well, all I can say is, when you and Jem are grown, maybe you'll look back on this with some compassion and some feeling that I didn't let you down. This case, Tom Robinson's case, is something that goes to the essence of a man's conscience—Scout, I couldn't go to church and worship God if I didn't try to help that man."[120]

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112 Model Rules, *supra* note 6, at pmbl. ¶ 6.
113 *Id.*
114 Lee, *supra* note 61, at 7, 100, 154–55, 171, 326.
115 *See supra* Part II.a.
116 Lee, *supra* note 61, at 116–19, 293–98.
117 Model Rules, *supra* note 6, at pmbl. ¶ 6.
118 Lee, *supra* note 61 at 110, 139, 180, 195.
119 *Id.* at 139.
120 *Id*.

> "[B]efore I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience."[121]

As Atticus's situation illustrates and the preamble concedes, "In the nature of law practice . . . conflicting responsibilities are encountered."[122] Or, in Atticus's words, "simply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally."[123] The preamble proceeds to describe what *To Kill a Mockingbird* shows: "Virtually all difficult ethical problems arise from conflicts between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."[124] For Atticus these conflicts are first evident in the tension between his role as zealous advocate for his client and his role as officer of a legal system that he knows will fail that client.

But the potential for conflict among an attorney's duties is even more profound than revealed by the rule's reference to earning a satisfactory living: Atticus struggles to obey his conscience (which demands that he defend Tom zealously) without sacrificing the emotional wellbeing and safety of his children. Hence, without wavering from his decision to zealously defend Tom as his conscience dictates, Atticus suffers at the prospect of the potential damage to his children: he teaches them to deal with the playground bullies and snubbing neighbors,[125] fears that they will contract the disease of racism plaguing their town,[126] and clings to the belief that above all they need a father with integrity to survive the conflict whole.[127]

The tensions among Atticus's duties are most acute, however, when he steps beyond the role of client representative and—as a public citizen—takes personal responsibility for Tom's safety. Warned by Sheriff Tate of the potential for a lynch mob, Atticus sits and reads—apparently unarmed—in front of the jail.[128] To fulfill his duty as a public citizen he puts his life between Tom and citizens bent on lynching.[129] When the anticipated lynch mob comes forward, Atticus coolly faces it, willing and able to confront the would-be murderers with only his ability to use language as a defense.[130]

But then Scout steps into the circle of menacing farmers, followed by Jem and their friend Dill, and Atticus's face shows the "plain fear" that he had not beforehand displayed.[131] Before his voice had remained unchanged; now Scout can see his hands tremble.[132] With their lives hanging in the balance, Atticus exhibits fear; still, he stands commanding and then pleading his disobedient son to take

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121 *Id.* at 140.
122 Model Rules, *supra* note 6, at pmbl. ¶ 9.
123 Lee, *supra* note 61, at 101.
124 Model Rules, *supra* note 6, at pmbl. ¶ 9.
125 Lee, *supra* note 61, at 99–102, 139–40.
126 *Id.* at 116–17, 295.
127 *Id.* at 366–68.
128 *Id.* at 201–02.
129 *Id*.
130 *Id.* at 201–03.
131 *Id.* at 203.
132 *Id.* at 202–03.

Scout home.[133] Despite the terror he has now betrayed, Atticus shows no sign of leaving Tom defenseless for the sake of rescuing the children.[134]

Ultimately, the situation is diffused when Scout manages to strike up a conversation with one of the would-be lynchers.[135] When the men leave, Atticus's relieved body language betrays the turmoil of the moments before: he "had gone to the jail and was leaning against it with his face to the wall."[136] As he gathers himself to head home, Atticus produces "his handkerchief, [gives] his face a going-over and [blows] his nose violently."[137] In a more demonstrative man, these actions might be meaningless. For Atticus, these are the outward indications of a man who has just withstood the greatest trial of his life.

Insofar as Atticus zealously represents his client and remains within legal bounds while demonstrating respect for the law under difficult circumstance (at considerable emotional and financial cost), he is a sound role model. Insofar as he does this while simultaneously speaking the truth about and attempting to repair the injustices within the system, he is that much more worthy a model. But his actions as the representative of his client and an officer of the court do not fully explain the degree of admiration rightly directed to Atticus. His fulfillment of the public-citizen aspect of attorney identity sets him apart from the crowd of potential examples. As a public citizen—not as a client representative or an officer of the court—Atticus risks the lives of his children to improve the quality of justice in Maycomb.

All this, and he never once raises his voice.

III. Cicero's Commentary on Attic—and Therefore Atticus's—Rhetoric

Lee's naming of her hero indicates that one should focus on his rhetoric to understand how he is able to navigate tension so admirably. Attic rhetoric adheres to simple, rational, and restrained techniques, techniques that reveal the honesty and therefore the integrity of the speaker across venues, between audiences, and over time. After exploring Attic oratory more fully, it will be possible to trace its effectiveness for Atticus.

A. Defining Attic Rhetoric

Attic rhetoric is notable for its simplicity, its focus on reason and evidence rather than passion, and its adherence to the same word choice and expression regardless of audience. In sum, Attic rhetoric—named after the Attic Greeks but practiced by a minority of both Ancient Greek and Roman orators—eschews the arousal of the passions, favoring instead concise and controlled communication. David Hume's *Essays* briefly describes Attic rhetoric, providing an introduction of its major features to the modern reader while indicating the most important ancient

133 *Id.* at 203–04.
134 *Id*.
135 *Id.* at 203–06.
136 *Id.* at 206.
137 *Id*.

figure—Cicero—to those seeking to learn more.[138] According to Hume, Attic eloquence in rhetoric is "calm, elegant, and subtle."[139] Attic eloquence "instructed the reason more than affected the passions, and never raised its tone above argument or common discourse."[140]

Hume's description should not be mistaken for praise: he critiques this style for failing to incorporate—when the audience or situation called for it—either the pathetic or the sublime.[141] In contrast to the Attic orators, Hume praises Cicero's and Demosthenes's command over the passions and thus the resolutions of their audiences.[142] Hume himself waxes poetic on the vigor of these ancient orators.

> With what a blaze of eloquence must such a sentence be surrounded to give it grace, or cause it to make any impression on the hearers? And what noble art and sublime talents are requisite to arrive, by just degrees, at a sentiment so bold and excessive: To inflame the audience, so as to make them accompany the speaker in such violent passions, and such elevated conceptions: And to conceal, under a torrent of eloquence, the artifice, by which all this is effectuated![143]

These ancient paragons created "vehemence of thought," in part, by accompanying their passionate appeals with violent gestures, including stomping their feet.[144] Hume argues that Cicero's rhetoric had more command over the "resolution" of his audience because, "on proper occasions," he would invoke the pathetic and the sublime.[145]

Taking a cue from Hume, one finds in Cicero's prolific writings a wealth of elaboration on the features and importance of Attic rhetoric.[146] Cicero wrote on this subject to distinguish and defend his own more passionate and elaborate rhetoric relative to the Attic rhetoric of his day.[147] Calling themselves the Attici,

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138 David Hume, Essays: Moral, Political, and Literary 108 (Liberty Fund ed., Liberty Fund Books 1985) (1777).

139 *Id*.

140 *Id*.

141 *Id*.

142 *Id.* at 99–101, 106.

143 *Id.* at 101.

144 *Id*.

145 *Id.* at 108.

146 Cicero was a Roman philosopher, orator (and sometimes litigator), and politician in the first century B.C. Rex Stem, *Cicero as Orator and Philosopher: The Value of the Pro Murena for Ciceronian Political Thought*, 68 Rev. Pol. 206, 206–8 (2006) (providing a brief sketch of Cicero's multifaceted pursuits); Gesine Manuwald, *The Speeches to the People in Cicero's Oratorical Corpora*, 30 Rhetorica: J. Hist. Rhetoric 153 (2012) (providing an overview of some of Cicero's oratorical involvement in Roman politics). For a more detailed, broader biography, *see* Catherine Steel, *Introduction*, *in* The Cambridge Companion to Cicero 1–6 (Catherine Steel ed., 2013).

147 Cecil W. Wooten, *Cicero and the Quintilian on the Style of Demosthenes*, 15 Rhetorica: J. Hist. Rhetoric 177, 178 (1997); Eric Laughton, *Cicero and the Greek Orators*, 82 Am. J. Philology 27, 29–31 (1961); Erich S. Gruen, *Cicero and Licinius Calvus*, 71 Harv. Stud. Classical Philology 215, 226 (1967); Sean Gurd, *Cicero and Editorial Revision*, 26 Classical Antiquity 49, 59–60 (2007).

Cicero's stylistic critics had adopted a "plain and lucid style with a minimum of rhetorical ornament, a studied neglect of rhythm, and an infrequent use of emotional appeal."[148] Their number included prominent orators of the day, among them Brutus and Calvus.[149] Modeling and naming themselves after great speakers of the Attic period in ancient Greece, the Attici understood the orator to be a type of instructor.[150] Therefore, rather than refining the art of persuasion above all else, they considered themselves focused on logic.[151] Their Greek models included Lysias, Thucydides, and Xenophon.[152]

Cicero responded to the Attici by pointing to the superlative example of Demosthenes—a Greek of the Attic period with whom Cicero's rhetorical style was more consistent.[153] Cicero's recurring use of Demosthenes as a counterexample to the Attic style reveals a complicating factor in the debate between Cicero and the Attici: the term "Attic" refers to both a period of time in a specific place (Attic Greece) and to a specific school of rhetoric.[154] Hence, the passionate and elaborate Demosthenes, for example, was most definitely an Attic Greek but not an Attic orator; by the same logic, the Roman Attici (like Brutus) were Attic orators but not Attic Greeks.[155]

Looking past complications in nomenclature, the debate between Cicero and the Attici produced something most useful to the modern scholar: a reason for Cicero to dwell on the distinctions between Attic rhetoric and his own style (and that of Demosthenes). In sum, Cicero's aggregate portrait of Attic rhetoric has three key features: (1) a spare, simple word choice, (2) a preference for restrained, even-toned, logical argument over elaborate, passionate appeal, and (3) a uniformity in style regardless of topic, audience, or occasion.

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148 Jeffrey Henderson, *Introduction*, *in* Cicero: Brutus, Orator 297, 297–98 (Loeb Ed., Jeffrey Henderson ed., G. L. Hendrickson & H. M. Hubbell trans., 1962) (46 B.C.).

149 Laughton, *supra* note 147, at 29–31 (1961); Gurd, *supra* note 147, at 58–62; Gruen, *supra* note 147, at 226.

150 Henderson, *supra* note 148, at 297–98.

151 *Id*.

152 *Id.*; Wooten, , note 147, at 178; Laughton, *supra* note 147, at 29–31.

153 Henderson, *supra* note 148, at 297–98. There is some disagreement over whether Cicero genuinely modeled his oratory after Demosthenes or perhaps merely found this iconic Attic a useful figure in his debate with the Roman Attici. Wooten, *supra* note 147, at 178, 181 (arguing that Cicero used his portrayal of Demosthenes, which may have been inaccurate, as a vehicle for defending his own techniques); Laughton, *supra* note 147, at 35 (supporting Cicero's genuine admiration of Demosthenes). Cicero wrote of Demosthenes in *Orator*, "Among orators, certainly among Greek orators, it is amazing how one man has pre-eminence over all." Cicero, *Orator in* Cicero: Brutus, Orator 297, ii.6 (Loeb Ed., Jeffrey Hendrickson ed., G. L. Hendrickson & H. M. Hubbell trans., 1962) (46 B.C.).

154 Cicero, De Optimo Genere Oratorum IV.7-15 (Loeb ed., Jeffrey Henderson ed., H. M Hubbell trans., 1949) (90 B.C.).

155 *Id.* Pointing to Attic orators who did not use what the Roman Attici called an Attic style (like Demosthenes), Cicero argued that the Attici had inappropriately co-opted the title for their specific method. While still insisting that Demosthenes could only be classed as Attic because of his period and origin, Cicero also often refers to the plain, simple style as Attic. This adds an unavoidable layer of complexity to understanding Cicero's descriptions of the various styles of rhetoric.

1. Simple, Accurate Word Choice

In his *Tusculan Disputations* and in *De Optimo Genere Oratorum,* Cicero described Attic rhetoric as spare, simple—eschewing anything grand or ornate.[156] By comparison to his own oratory prowess, Cicero considered Attic orators to "prefer their own poverty stricken bareness to rich luxuriance."[157] Lysias, for example, used great simplicity and therefore "seems excessively meager."[158] Unlike Demosthenes, it is unclear whether Lysias could speak "with great passion" even when a situation called for it.[159] The Attici admired Lysias's choice of words as the "perfect model," but Cicero heard instead "old fashioned plainness."[160] The Attic style thus makes "intelligence consist in fastidiousness of taste in oratory and take[s] no pleasure in anything lofty and magnificent."[161]

Notwithstanding its rejection of anything grand and ornate, however, there is "refinement" in the "plain" Attic style.[162] Cicero concedes, for example, that Lysias can justly be admired for his "correctness and purity of diction."[163] Although "meager" or "lean," Lysias's speech also wields a kind of "muscular strength."[164] The Attic orator thus achieves a limited degree of success: "Those who have attained only to this may be considered sound and spare as far as that goes, but may be compared to athletes who are fit to promenade in the gymnasium, but not to seek the prize at Olympia."[165] Moreover, through their relatively simple use of words, Attic orators avoided the potential pitfalls associated with using grand style and ornate speech poorly—Attic orators do not risk "inappropriate, harsh, and far-fetched" effect.[166] In other words, better to be a solid Attic speaker than to attempt without the requisite skill to be Cicero or Demosthenes.

Nonetheless, Cicero's critique of the minimalism of Attic speech is firm. Continuing the athletic analogy, he argues that the "prize-winners, though free from all diseases, are not content with mere good health, but seek strength, muscles, blood, and even as it were an attractive tan."[167] More than a matter of taste, Cicero embraces a richer approach to language as the more effective and therefore more practical method of persuasion.[168] In terms of the application of his conclusions to

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156 Cicero, Tusculan Disputations II.i.2–4 (Loeb Ed., Jeffrey Henderson ed., J. E. King trans., 1945) (45 B.C.); Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.7–8.

157 Cicero, Tusculan Disputations, *supra* note 156, at II.i.2–4.

158 Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.7–8.

159 *Id*.

160 Laughton, *supra* note 147 at 30.

161 Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.12.

162 *Id*.

163 Laughton, *supra* note 147, at 31. Cicero appears to have formed a similarly qualified positive opinion of one of the leading Roman Attici, Calvus: according to Cicero, Calvus's choice of style limited his power to reach all except the most learned of audiences, but Cicero gave him credit for learning and discrimination. Gruen, *supra* note 147, at 226.

164 Laughton, *supra* note 147, at 31.

165 Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.12.

166 *Id.* at III.7–8.

167 *Id.* at III.8.

168 Andrew M. Riggsby, *Pliny on Cicero and Oratory: Self Fashioning in the Public Eye,* 116 Am. J. Philology 123, 128 (1995); Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.7–8.

contemporary speech, it is important to note that Cicero's opinions are premised on the "middlebrow" needs of a speaker in a republican context.[169] According to Cicero's observations of political life, Attic reserve simply does not generate sufficient power in a democracy; instead, adroit technique must be employed because "republican government plays itself out in a popular theatre designed for broad effects and capable of, at best, middlebrow artistry."[170]

2. Logical Argument, Not Passionate Appeal

Cicero's *Orator* and *Brutus* reveal a second purported deficiency in Attic rhetoric: a lack of passionate appeal. Rather than appealing directly to the passions, Attic rhetoric is refined and scrupulous.[171] Speaking in a restrained tone,[172] an Attic orator has no need for strong lungs.[173] Avoiding rhythm altogether, instead the Attic orator's speech has "something agreeable about it and show[s] a not unpleasant carelessness on the part of a man who is paying more attention to thought than to words."[174] Words flow in a manner that is "loose but not rambling; so that it may seem to move freely but not to wander without restraint."[175] At times the result may be "rough and unpolished," but the good Attic speaker remains "precise and discriminating."[176] In essence, the Attic orator appeals to the reason without distracting the audience from the content of a speech.

Cicero admitted that the restrained Attic style had its own charm. Indeed, because of its simplicity, even those who cannot employ it effectively will have the impression that they can imitate the Attic style with success.[177] Imitation of the precision, clarity, and resulting simplicity in this method, however, proves far more difficult than apparent.[178] While all embellishment—in tone, gesture, and organization—is avoided in Attic presentation, there remains an elusive charm—an "elegance and neatness"—that is like the beauty of a woman who is more attractive without ornament.[179] To this extent the charm of Attic speech may be considered contrived—just insofar as the Attic speaker commands elegance with the knowledge of the spare beauty that results from the avoidance of ploy.

In contrast to the precision and restraint of the Attic orator, Cicero argues that the best orators vary their voices to move their audiences: "The perfect orator ... will use certain tones according as he wishes to seem himself to be moved and to sway the minds of his audience."[180] Commanding his voice with greater skill, the best orator varies his voice to better convey the feeling of his speech, striving to "speak intensely with a vehement tone, and gently with a lowered voice, and to show

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169 Robert Hariman, *Political Style in Cicero's Letters to Atticus,* 7 Rhetocia: J. Hist. Rhetoric 145, 149–50 (1989).
170 *Id*.
171 Cicero, *Orator*, *supra* note 153, at viii.28.
172 *Id.* at xxiv.82.
173 *Id.* at xxvi.85.
174 *Id.* at xxiii.77.
175 *Id*.
176 *Id.* at viii.28.
177 *Id.* at xxiii.76.
178 *Id*.
179 *Id.* at xxiv.79.
180 *Id.* at xviii.55.

dignity in a deep voice, and wretchedness by a plaintiff tone."[181] Cicero further elaborates, explaining that "the superior orator will therefore vary and modulate his voice; now raising and now lowering it, he will run through the whole scale of tones."[182] Indeed, Cicero once boasted to a friend that he could "boom away," joking that his friend might have heard the "reverberations" in another town.[183] Similarly, Cicero's gestures show no restraint; he admits that "we are wont to use it so piteously that we have even held a babe in our arms during the peroration, and in another plea for a noble defendant we told him to stand up, and raising his small son we filled the forum with wailing and lamentation."[184]

Compared to this visceral appeal lauded by Cicero, the Attic orator's "style lacks the vigor and sting necessary for oratorical efforts in public life."[185] He accuses the Attic orators of conversing with scholars, preferring to soothe minds than to arouse passions.[186] They instruct rather than captivate.[187] Describing the approach of philosophers and Attic speakers together, he claims that their speech is "gentle and academic; it has no equipment of words or phrases that catch the popular fancy . . . there is no anger in it, no hatred, no ferocity, no pathos, no shrewdness; it might be called a chaste, pure and modest virgin."[188] Put another way, the Attic speaker uses a refined but conversational approach.[189]

The divergence between the two styles in their focus on reason versus passion is particularly prominent in *Brutus*, in which Cicero portrays a conversation between himself and two Attici friends. One of his interlocutors, Brutus, confirms the strong Attic identification of sound thought with good rhetoric, claiming that "no one can be a good speaker who is not a sound thinker."[190] As Brutus sees it, "whoever devotes himself to true eloquence, devotes himself to sound thinking."[191] By contrast, Cicero's comments reveal that it is not clarity or power of thought that he values most highly. According to Cicero the "proper and legitimate functions of the orator" are "to digress from the business in hand for embellishment, to delight his listeners, to move them, to amplify his theme, to use pathos."[192] Indeed, directly comparing the two approaches, Cicero finds inflaming the passions far more important: "One may conclude, that of the two chief qualities which the orator must possess, accurate argument looking to proof and impressive appeal to the emotions of the listener, the orator who inflames the court accomplishes far more than the one who merely instructs it."[193] Numerous passages in *Brutus* evaluate famous

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181 *Id.* at xviii.56–57.
182 *Id.* at xviii.59.
183 Hariman, *supra* note 169, at 150.
184 Cicero, *Orator*, *supra* note 153, at xxxviii.131.
185 *Id.* at xix.62–63.
186 *Id.* at xix.63.
187 *Id*.
188 *Id.* at xix.64.
189 *Id*.
190 Cicero, *Brutus*, *in* Cicero: Brutus, Orator 1, vi.23 (Loeb Ed., Jeffrey Hendrickson ed., G. L. Hendrickson & H. M. Hubbell trans., 1962) (46 B.C.).
191 *Id*.
192 *Id.* at xxi.82.
193 *Id.* at xxiii.89. A similar contention is repeated near the end of the *Brutus*, when Cicero argues that "the one supreme characteristic of the orator" is to "sway his feelings in whatever direction the situation demanded." *Id.* at xciii.322. Note that Cicero refers to swaying feelings and not to engaging the judge's reason.

Roman Attic orators and reinforce Cicero's preference for emotional appeal over logic and reason: he critiques their ability to persuade while offering qualified praise of the bare, lucid, straight, calm, restrained, and scholarly virtues of Attic speakers.[194]

Through skillful employment of voice and word choice, the best orators persuade by commanding the passions of their audience.[195] Indeed, the passion-oriented aspect of Cicero's approach directs more than the use of the voice: it permits the orator—with a good end in mind, to be sure—to abandon truth for the sake of persuasion.[196] Where the Attic orator focuses on using evidence and logic to win over the audience's reason, the Ciceronian approach employs the combined force of elaborate organization, distracting gesture and varied voice, intermixed with emotional ploys to the end of persuading the listener's passions. This distinction in method—and the distinction in mindset that creates this distinction in method—reveals why Cicero judged the Attic orator less powerful.

3. Unvaried Rhetoric, Regardless of Audience or Occasion

In his descriptions and praise of the best oratory, Cicero argues that optimal persuasion requires adjustment for topic, audience, and occasion.[197] As discussed above, the Attic orator has a narrow repertoire: there is little or no variation in tone, gesture, organization, word choice, or other device. This is important within a single speech—where Attic rhetoric will seem plain in comparison to the dramatic highs and lows of a Cicero. But the Attic adherence to simple and straightforward presentation also creates a necessary uniformity in all speeches, making it impossible for the speaker to adjust argument and style to changing audiences, topics, and times. In other words, with uniformly simple word choice and a logical, passion-eschewing focus, the Attic orator necessarily lacks the quality that Cicero thinks most important for a great orator.

Cicero elaborates on this quality of the best orators throughout the *Orator*. As he understands it, the orator's judgment must be shaped by the judgment of the audience: "The eloquence of orators has always been controlled by the good sense of the audience, since all who desire to win approval have regard to the goodwill of their auditors, and shape and adapt themselves completely according to this and to their opinion and approval."[198] Hence, in contrast to the unvarying presentation of the Attic orator, Cicero argues that the best orators will exercise judgment to determine which words and delivery will be most effective in a particular context and on a particular topic.[199] In his opinion, this requires "rare judgment and great endowment," showing the wisdom of the superior orator.[200] This approach rests on the observation that the orator's potential to persuade is bound by the beliefs and

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194 *Id.* at lxxxv.262, lxxx.276–279, ixxxii.283–84.

195 Michael Frost, *Ethos, Pathos & Legal Audience,* Dick. L. Rev. 85, 94–98 (1994).

196 Gary Remer, *The Classical Orator as Political Representative: Cicero and the Modern Concept of Representation*, 72 J. Pol. 1063, 1072 (2010).

197 Frost, *supra* note 195, at 92, 98–99.

198 Cicero, *Orator*, *supra* note 153, at viii.24.

199 Daniel J. Kapust & Michelle A. Schwarze, *The Rhetoric of Sincerity: Cicero and Smith on Propriety and Political Context*, 110 Am. Pol. Sci. R. 100, 103 (2016).

200 Cicero, *Orator*, *supra* note 153, at xxi.70.

values of the audience; hence, he concludes that the speaker—to be effective—must make appeals bound by the community's beliefs.[201]

As a practical matter, this approach dictates that the orator shift style "in any way which the case requires."[202] The best approach alters depending on both the speaker's and the audience's condition, rank, position, and age.[203] The topic itself will also require tailoring, so the orator "can discuss commonplace matters simply, lofty subjects impressively, and topics ranging between in a tempered style."[204] Nothing less than "wisdom" guides the great orator to adapt to occasion and audience so that a "rich subject will not be treated meagerly, nor a grand subject in a paltry way, nor *vice versa*, but the speech will be proper and adequate to the subject."[205]

These are not tactics that the Attic orator is willing to embrace. They defy the very definition of Attic rhetoric. As Cicero views it, the Attic orator's insistence on simple, accurate language and rational discourse undermines the orator's very purpose—persuasion. Without either the ability or the willingness to use the most powerful weapons of persuasion, Attic orators opt instead for a reserve that dooms them to make futile—if accurate, reasonable, and honest—appeals to their audiences.

B. The Attic Rhetoric of Atticus Finch

Throughout *To Kill a Mockingbird*, Lee presents her Attic orator—Atticus Finch—speaking in the same tone and employing the same unembellished but precise phrases and logical arguments regardless of the context and audience. In other words, the story's narrator, Scout, describes her father as a thoroughly Attic orator without ever making the reference openly. Scholarly literature on Atticus Finch has not yet connected his name to the school of rhetoric that he employs, and consideration of the character's name—to date—has focused on either the word's Greek origin and Roman use or on a potential connection with a Roman known as Atticus (discussed below). One might expect that Lee, whose novel surely elicited its share of public interest, might have spoken publicly to her unusual choice of name. Therefore, before detailing the textual evidence for the connection between Atticus and Attic rhetoric, I briefly examine the scant—and ultimately inconclusive—clues left by Lee.

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201 Remer, *supra* note 196, at 1072.

202 Cicero, *Orator*, *supra* note 153, at xxi.70.

203 *Id.* at xxi.71.

204 *Id.* at xxviii.100–101.

205 *Id.* at xxxv.123–xxxv.124. Cicero expresses the same opinion in several of his works; Cicero, De Optimo Genere Oratorum, *supra* note 154, at III.8–IV.10 (praising Demosthenes because he could speak with passion or calmly and critiquing the Attic Lysias because he could not speak passionately); Cicero, De Partitone Oratoria v.15 (Loeb ed., H. Rackham trans., 1942) (54 B.C.) ("the prudent and cautious speaker is controlled by the reception given by his audience—what it rejects has to be modified").

1. Lee's Extra-Textual Indications

Analysis of Lee's intent invariably runs into a serious obstacle: She shunned public view, and she seems to have left as little external evidence about her book as possible.[206] She never approved of a biography,[207] her attorney had her will sealed from public view,[208] and indeed she never conducted any public interviews after the mid-1960s.[209] Her very rare public comments after the last public interview did not directly relate to her first famous novel: in recent years she denounced the last biography published before she died[210] and then endorsed publication of *Go Set the Watchman* in the year before her death.[211] Of course, her reticence to come into public view only raised the stakes: efforts have been made to capture her life and the connections between her life and her characters. Because she never chose to participate, however, these efforts amounted to extensive excavation with little result—if result is measured in terms of clear illumination of her novel and its conscious influences.[212]

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206 Garrison Keillor, *Good Scout: A Biography of Harper Lee, a Writer Comfortable with Her Accomplishment*, N.Y. Times Book Rev., June 11, 2006, at F11 (book review) ("[S]he didn't enjoy the limelight. So she backed away from celebrity, declined to be interviewed or to be honorifically degreed and simply lived her life"); Julia M. Klein, "*The Mockingbird Next Door" by Marja Mills,* Bos. Globe (July 12, 2014), https://www.bostonglobe.com/arts/books/2014/07/12/review-the-mockingbird-next-door-life-with-harper-lee-marja-mills/EwniyOr6IgcXVH0rXkPp4O/story.html (book review) (Lee "shunned reporters and biographers, and encouraged her close associates not to talk to outsiders").

207 The author of the last biography published in Lee's lifetime, Marja Mills, claimed to have Lee's approval, but Lee publicly released a letter with the following blanket statement: "Rest assured, as long as I am alive any book purporting to be with my cooperation is a falsehood." Steven Levingston, *Harper Lee: New Portrait is a "Falsehood,"* Washington Post, July 16, 2014, at C01; Julie Bosman, *Author of Memoir About Harper Lee Insists She Had Lee's Cooperation*, N.Y. Times, Apr. 30, 2011, at C3; Dwight Garner, *To Kill A Friendship*, N.Y. Times, July 18, 2014, at C19.

208 Jennifer Crossley Howard, *Judge Seals Harper Lee's Will from Public's Scrutiny*, N.Y. Times, Mar. 5, 2016, at A11. When reporters from the *New York Times* succeeded in having the will unsealed, Alabama papers reported that the will, signed a week before her death, placed the bulk of her fortune in a trust shielded from public view. Editorial, *Harper Lee's Unwanted Attention*, Anniston Star (Ala.), Feb. 28, 2018, at editorials. No public announcements have been made regarding the disposition of any personal papers that Lee may have saved.

209 Bosman, *supra* note 207 (reporting that, as of 2011, Lee had not given a public interview in forty-five years).

210 Howard, *supra* note 208.

211 Alexandra Alter & Serge F. Kovaleski, *In Statement, Harper Lee Backs New Novel*, N.Y. Times, Feb. 5, 2015, at A13; Alexandra Alter & Serge F. Kovaleski, *After Harper Lee Novel Surfaces, Plots Arise*, N.Y. Times, Feb. 8, 2015, at A1.

212 For example, the first and the best known biography, Charles J. Shields's *Mockingbird: A Portrait of Harper Lee*, paints a thorough backdrop of her life (through the date of its completion), but—lacking access to Lee or her papers (if they exist)—he cannot convincingly do more than guess about the connections between the author's life events and her novel's content. Charles J. Shields, Mockingbird: A Portrait of Harper Lee (2007); *see also* Meghan O'Rourke, *One-Hit Wonder: The Life Story of the Woman Who Wrote One of America's Most Beloved Novels*, Washington Post, July 23, 2006, at

In one obscure interview, given in 1962 to the *Birmingham Post Herald*, Lee dropped her most direct statement indicating an inspiration for Atticus.[213] In an awkwardly written, partially quoted and partially paraphrased statement, she indicated that the inspiration for her character's name was "the Greek known by that name – 'wise, learned and humane man.'"[214] This most likely refers to a Roman who lived in Greece, Titus Pomponius Atticus, a close friend of Cicero. [215] Most of our knowledge of this historical Atticus comes from letters that he and Cicero exchanged (nearly all surviving letters in their voluminous correspondence are Cicero's) and a brief biography by Roman historian Cornelius Nepos.[216] Little is known about how Lee learned about Atticus: she may well have encountered him independently in her own reading. On the other hand, while the universities she attended have not released details, she may have been introduced to Cicero, Atticus, or some other author who referred to one of them through her undergraduate studies at the University of Alabama, her year of law school, or a summer literature program that she attended at Oxford University.[217]

Among those who have attempted to explain the origin of Atticus's name, there seem to be two opinions. Some vaguely tie the name to its ancient origins, connecting the character to the republican principles either of Attic Greece or of Rome.[218] Others, inspired by Lee's 1962 interview comment, point to Cicero's friend, the Roman named Titus Pomponius Atticus.[219] Titus Atticus, a boyhood friend of Cicero, studied law alongside Cicero but never practiced.[220] Instead, he choose to live in Greece—in Attica—and pursue literary and business affairs in a life of relative retirement compared to the political turmoil of Rome.[221] Thus, while

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BW15 ("In the absence of reliable data from which to forge a coherent narrative, Shields follows his research down many a cul de sac and pads out trivial details"). Marja Mill's *The Mockingbird Next Door*, the most famous of the biographies, was renounced by Lee herself, effectively removing it from candidacy as a trustworthy source. *See supra* note 207. Most recently, Joseph Crespino has released *Atticus Finch: The Biography*, a detailed portrait of Lee's father that purports to tell the fuller story of Atticus Finch, but—once again—while many interesting facts have been unearthed, conclusive evidence remains beyond our grasp because we simply do not know the intent with which Lee translated life to novel. Joseph Crespino, Atticus Finch: The Biography (2018).

213 Ramona Allison, "*Mockingbird" Author is Alabama's "Woman of Year,"* Birmingham Post-Herald, Jan. 3, 1962, at 12.

214 *Id*.

215 *Pomponius Atticus, Titus*, Oxford Classical Dictionary (4th ed. 2012).

216 *Id*.

217 Shields, *supra* note 212, at 83–111. I contacted officials at the University of Alabama and Oxford to request details about the programs pursued by Lee. Neither institution was able to provide any information.

218 Maureen E. Markey, *Natural Law, Positive Law, And Conflicting Social Norms in Harper Lee's To Kill A Mockingbird,* 32 N.C. Cent. L. Rev. 162, 170–71 (2010); William J. Chriss, *The Noble Lawyer Paradigm*, 75 Tex. B. J. 50, 52–53 (2012).

219 Calvin Woodard, *Listening to the Mockingbird*, 45 Ala. L. Rev. 563, 573–74 (1994); Shields, *supra* note 212, at 114; Crespino, *supra* note 212, at xiv.

220 Steel, *supra* note 146, at 10–13; Harry L. Levy, *Cicero the Lawyer as Seen in His Correspondence*, 52 Classical World 147, 150 (1959); Mary Bradford Peaks, *Cicero and American Lawyers*, 22 Classical J. 563, 570 (1927).

221 Steel, *supra* note 146, at 10–13. One enticing fact about Titus Atticus's potential role as a source for Atticus Finch is that Titus's slaves, even his footmen, were literate. *Id.* at 12.

the Atticus of history does not undermine Lee's respect for the figure, his biography hardly provides a full explanation of his connection to Atticus Finch.

Some see in Lee's father, Amasa Coleman Lee, a model for the character of Atticus. Shortly after the publication of *To Kill a Mockingbird*, Lee noted that she wrote Atticus as she thought of her father, as someone "who has genuine humility and a natural dignity. He has absolutely no ego drive, and so he is one of the most beloved men in this part of the state."[222] The identification of Lee's father as a possible source for Atticus Finch also rests on similarities between Atticus and Amasa, including the fact that both were lawyers in Alabama, both had defended African American clients accused of felonies, and both men effectively served as single parents to precocious children.[223] Most recently, Joseph Crespino's *Atticus Finch: A Biography* retells the story of Atticus Finch by starting with the story of Amasa.[224] In his retelling, Crespino focuses on points of similarity between Amasa and Atticus while gliding quietly past significant points of difference.[225]

In sum, both Amasa Coleman Lee and Titus Pomponius Atticus appear to claim rightful status as partial sources from which Lee created the Atticus Finch of *To Kill a Mockingbird*. Nonetheless, neither provides so neat a fit that those seeking to understand the literary character ought to cease seeking for additional insight. Indeed, the oft repeated references to her father and the ancient Roman provide very little insight into the inner workings of Atticus: this may be why—Crespino's biography aside—these links often garner very little attention in literary and legal (as opposed to historical) analyses of *To Kill a Mockingbird*. The schoolchild who reads *To Kill a Mockingbird* knows that Lee portrays Atticus as a man she loves and respects. Adding the information that he was modeled on a noble Roman and Lee's father supports this conclusion, but it does not enrich it. Much less does it help schoolchildren and lawyers understand what steps to take to integrate Atticus's admirable qualities into their own lives and professional pursuits.

2. Lee's Atticus Finch

Looking to the book she left to the public—rather than prying into the life she clearly tried to shield from public view—one finds a more important connection between character and real-world inspiration. With the features of Attic rhetoric in mind, one has the power to unlock Atticus's ability to wield the most important tool of the lawyer with the utmost power, integrity, and respect for others. Atticus Finch uses Attic rhetoric to represent and counsel his client, to serve as a respectful but challenging officer of the court, and—with the lives of three children in the balance—to defend one man's right to trial in the face of a lynch mob. Through Atticus, Lee demonstrates that Attic rhetoric is more than useful: it is necessary in the moments when attorney duties are in tension with each other. Through Attic

Calpurnia, Atticus's housekeeper and nanny, estimates that only about four individuals in her African American congregation can read; Calpurnia and her grown son, Zeebo, account for half this number. Lee, *supra* note 61 at 165–66.

222 Talmage Boston, *Who Was Atticus Finch?*, 73 Tex. B. J. 484, 484–487 (2010).

223 *Id*.

224 Crespino, *supra* note 212, at xvii.

225 The first chapter, where Crespino covers Amasa's early career, is a good example of this quality. *Id.* at 3–30.

rhetoric an attorney uses his most fundamental tool to navigate ethical duties to client, to court, and to justice—and thus also to his own conscience. Through Attic rhetoric an attorney has a path to wholeness.

Lee underscores the Attic qualities of Atticus's speech throughout the novel, but the character's Attic qualities become most apparent when one compares how his accurate, rational approach pervades his speech regardless of topic, audience, and occasion. Whether with his children or in court, he uses his legal vocabulary, but in both contexts he refrains from embellishment, distraction, and drama. His tone is conversational and level in both contexts, and no listener could doubt that logic and accuracy bear more of his attention than delivery. A man who thus speaks accurately, simply, calmly, and rationally as father and defense attorney can hardly help but qualify as an Attic orator. Cicero would doubtless disagree, but *To Kill a Mockingbird* shows that Atticus's rhetorical style is key to his ability to remain simultaneously true to himself and to his ethical duties.

Atticus's lawyerly word choice when speaking to his children may at first seem to defy categorization as Attic. For example, when he refuses to spit-shake with his daughter after they reach a compromise, he tells her, "We'll consider it sealed without the usual formality." [226] Similarly, when he asks her not to tell her teacher about their plan to read together at night, his answer when Scout asks for an explanation seems unduly complex. Atticus explains, "I'm afraid our activities would be received with considerable disapprobation by the more learned authorities." [227] Indeed, Scout explains that Atticus often speaks to his children in the same "last will and testament diction" that he uses as an attorney.[228] In perhaps the most extreme example, when seven-year-old Scout asks what rape is, he gives her the precise legal definition: "carnal knowledge of a female by force without her consent."[229]

Atticus speaks to his children using his professional language, but can this style be described as simple, accurate, and rational? Although it may not immediately be evident, the answer to this question is "yes" because Atticus explains the world to his children in the simplest possible *accurate* terms. When Atticus explains the world to his children, he does not evade or lie even in the face of the most difficult questions. Because he thereby refuses to sacrifice accuracy to youth, the result is word choice that is advanced relative to the age of his audience. But the result is also a sometimes startling degree of honesty. As he explains to his brother Jack, "When a child asks you something, answer him, for goodness' sake ... . Children are children, but they can spot an evasion quicker than adults and evasion simply muddles 'em."[230] Accordingly, Atticus explains the logic and failings of family, neighbors, town, trials, and the law to Jem and Scout as they question him over the course of the book.

Because he speaks to his children as if they were adults, Atticus is able to honestly explain the realities of life in their racist town, the dictates of his conscience, and the complexities of the law to his children with only the complexity that reality

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226 Lee, *supra* note 61, at 42.

227 *Id*.

228 *Id.* For example, Atticus tricks his son, Jem, into confessing disobedience using "the oldest lawyer's trick on record." *Id.* at 66.

229 *Id.* at 181.

230 *Id*. at 116.

requires. He never diverts their youthful attention or sacrifices honesty to innocence. Hence, Atticus's lawyerly speech with his children supports his categorization as an Attic orator because his speech bears the hallmark adherence to the simplest accurate style regardless of audience, topic, and context. As Scout explains to her neighbor, Miss Maudie, Atticus's behavior is the same in private and public: "Atticus don't ever do anything to Jem and me in the house that he don't do in the yard."[231] Miss Maudie immediately agrees with Scout's observation, explaining that "Atticus Finch is the same in his house as he is on the public street."[232]

Once Atticus steps into the courtroom his simple accuracy and focus on logic—which can be difficult to grasp in the context of conversation with a child—becomes apparent. As a litigator, Atticus is the model of simplicity, restraint, precision, and logical appeal. As detailed in II.B., he refuses to thunder, employing the language and tone of his daily life.[233] He approaches the rape trial at the center of the novel, the focal point of personal and political turmoil and injustice, with as much restraint as any real estate transaction.[234] No more in court than at home has Scout ever heard Atticus raise his voice. Scout reports of herself and Jem, "We acquired no traumas from watching our father win or lose. . . . I never heard Atticus raise his voice in my life, except to a deaf witness."[235] The judge confirms Scout's account, explaining to one overwrought witness that "we've done business in this court for years and years, and Mr. Finch is always courteous to everybody. . . . he's trying to be polite. That's just his way."[236]

By the end of the trial, Scout has shown us a concise, sometimes detached, reasonable man handling what he has earlier told his daughter will be the most trying case of his life. In his closing argument, he remains—as he has been throughout—moderate, logical, and straightforward.

> Atticus was speaking easily, with the kind of detachment that he used when he dictated a letter. He walked slowly up and down in front of the jury, and the jury seemed attentive: their heads were up and they followed Atticus's route with what seemed to be appreciation. I guess it was because Atticus wasn't a thunderer.[237]

Atticus Finch is an Attic orator through and through. In the moment when his address to the jury becomes the most impassioned (if one can even use that word), it simply becomes more like his private tone: "'Gentlemen,' he said. Jem and I again looked at each other: Atticus might have said, 'Scout.'"[238] In his conversational address to the jury, Atticus consistently conveys a prioritization of thought over delivery.

Atticus's simple, direct, and even-toned speech is also logical, precise, and wise. If ever Atticus reveals the elegance and spare beauty of the Attic approach, it

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231 *Id.* at 61.
232 *Id*.
233 *Id.* at 226.
234 *Id*.
235 *Id.* at 229.
236 *Id.* at 242.
237 *Id.* at 270.
238 *Id.* at 271.

is in his closing statement when he patiently instructs the jury on the necessity of equality in the courtroom. Knowing full well the bigotry of the jury, he nonetheless looks these fellow citizens in the eye and addresses them as rational human beings—as peers who can reason their way through the logical explanation that he sets before them in black and white.[239]

> We know all men are not created equal in the sense that some people would have us believe—some people are smarter than others, some people have more opportunity because they're born with it, some men make more money than others, some ladies bake better cakes than others—some people are born gifted beyond the normal scope of most men.
>
> But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.[240]

Of course, Atticus's honest logic loses the trial at the heart of *To Kill a Mockingbird*: the jury convicts innocent Tom Robinson. Atticus pins his hopes on the rationality of the appeals process, but should he have employed the full spectrum of rhetorical skills that Hume and Cicero praise to save his client? Or, to describe the choice in concrete terms, should he have played on the jury's passions to convince them, using every tone and embellishment that Cicero could muster, that Mayella was a "loose woman" and then shed pathetic tears over Tom's children? Perhaps if he had thundered a bit (surely a man of his education and training could have intimidated and frightened a girl who had never seen the inside of school), Mayella might have broken. Or maybe he could have convinced the already-racist jury that Tom was too cowardly to have committed the crime. And Tom might have walked.

This difficult question is at the heart of the tension between an attorney's simultaneous duties of zealous advocacy and as an officer of the court and as a citizen with responsibility for the quality of justice. No less, this question strikes at the heart of democratic deliberation and the potential for reason to prevail over passion. It also touches on the potential for an attorney to maintain integrity and honesty while serving the client's best interests. Faced with a situation like that of Atticus, attorneys can make the legal system better by appealing to reason and trusting the rational capacity of their fellow citizens. Or they can make it worse by stirring vicious passions, feeding on human bias, and failing to maintain honesty with the court and all present. What Atticus told the jurors in his plea to their reason—that the integrity of the system depends on those who make it up—is no

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239 *Id*.

240 *Id.* at 273–74.

less true for attorneys than for jurors.[241] When Atticus adheres to appeals to reason, he takes a necessary but insufficient step—a prerequisite step—to a jury's ability to listen to reason rather than passion. Atticus's Attic appeal is not sufficient for the not-guilty verdict dictated by reason, but—like his presence at the jail in the face of the lynch mob—it is a necessary preliminary step before a rational deliberation process can occur.

Lee confirms this interpretation by revealing the conversion of the one juror won over by Atticus Finch.[242] As Atticus explains, the only juror to argue for acquittal was a member of the Cunningham family and a relative to Walter Cunningham—the would-be lyncher who at Scout's prompting led the mob to abandon their intention and head for home.[243] The Cunningham juror, standing alone, had argued for acquittal for hours.[244] By drawing a connection between these two Cunninghams, Lee suggests a relationship between Atticus's ability to persuade the leader of the dissolution of the lynch mob and Atticus's persuasion of the one juror who attempted to bring the jury to a not-guilty verdict.

Atticus loses the trial, but—because he is the same man in and out of court, before his children and before the town and jury—he wins the mind of one juror, one citizen, and one neighbor to his side of the issue. Atticus's integrity, an integrity incompatible with the passionate, ever-changing persuasion of the Ciceronian orator, changes one citizen and thereby makes Maycomb that much closer to a just society. Nonetheless, as advocates, as officers of the court, and as citizens, we are left asking whether this is enough. The answer that each individual gives to this question dictates their rhetorical choices and the extent to which they find the courage not only to admire but also to emulate the Attic rhetoric of Atticus Finch.

This interpretation is further confirmed by consideration of Lee's own literary choices in the style of *To Kill a Mockingbird*. This novel adopts so restrained—so Attic—a style of rhetoric that one might be tempted to dismiss it as an important contribution to justice. But, like Atticus, Lee used this rhetorical style to win slow, long-term gains. In her case, generations of schoolchildren have been persuaded to adopt one pivotal idea: that all humans ought to be equal before the law. Lee forwarded this moderate (but essential) proposition without raising her literary voice, without invective, and in rational language equally well suited to children and adults. The moderation of her rhetoric ought not to blind us to the inestimable importance of winning the minds of future voting citizens to beliefs foundational to basic rights (and therefore to even greater strides). Indeed, the moderate nature of her rhetoric, far from being a sign of weakness, ought to be understood for the powerful tool that she showed it to be: Lee won over and continues to win over her fellow citizen without polarizing, preserving the potential for friendship and community—prerequisites for rational discourse and future persuasion between citizens. Not least of all, her hero—Atticus Finch—has inspired generations of lawyers to be better advocates, officers of the court, and citizens.

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241 *Id.* at 274–75.
242 *Id.* at 297–98.
243 *Id*.
244 *Id*.

Conclusion

Finding the origin of Atticus's name does more than solve the mystery of the hero's unusual title. Atticus Finch's Attic rhetoric is key to understanding how he so inspiringly fulfills an attorney's ethical obligations while retaining his own self-respect. It provides the logic underpinning Lee's many descriptions of Atticus's words and demeanor so that Atticus's position as a model attorney can be more justly reevaluated. As an attorney, Atticus is "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." His Attic example demonstrates the mutual compatibility of these constituent elements of an attorney's identity. Similarly, Atticus's speech allows him to harmonize the duties of honesty and integrity that coexist with the duties of zealous advocacy for his client. As an individual, the integrity dictated by his Attic approach to speech enables him to navigate treacherous times without sacrificing his conscience to practical expediency. Atticus's speech shows us how all this is possible. Never overwhelming the intellect of his listener with passionate appeal, reasoning honestly and equally with all, and humbly offering his client (and his children and neighbors) the benefit of his razor-sharp intelligence, Atticus's Attic rhetoric is the answer to many seeming quandaries about the ethical boundaries of the lawyer's life.

Cicero and Hume dismissed the Attic orator's logic as relatively weak, recommending instead reliance on the orator's ability to play skillfully on the passions of the audience. But Atticus reveals that Attic orators are necessary if the judiciary is to function as intended: as a rational dispute-resolution process. Atticus thereby serves as a role model for those attorneys who wish to pursue the common good with honesty and integrity. Even-toned Atticus thus provides a healthy counterpoint to the profession's fears of ethical incoherence. His Attic rhetoric offers us a path to issue-focused, rational, and respectful dialogue between adversaries.

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(Mis)judging Ordinary Meaning?: Corpus Linguistics, the Frequency Fallacy, and the Extension-Abstraction Distinction in "Ordinary Meaning" Textualism

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ABSTRACT

Rarely is a new yardstick of legal meaning created. But over the past decade, corpus linguistics has begun to be utilized as a new tool to measure ordinary meaning in statutory interpretation and original public meaning in constitutional interpretation. The legal application of corpus linguistics posits that an examination of every use of a term in a wide variety of documents can yield a more complete, impartial understanding of a word than can dictionaries, intuition, or an unsystematic survey of sources. Corpora could supplement, or even supplant, dictionaries and native-speaker intuition in legal analyses. For originalism in particular, legal corpus linguistics promises to offer what would be a more scientific methodology for a point of view which, until now, has lacked one.

However, corpus linguistics, as applied to legal problems, falls prey to a fatal methodological criticism – the frequency fallacy. The criticism states that in a corpus, an unusual meaning can have many corpus entries while a perfectly ordinary meaning can be completely absent from the corpus. That is, frequency is not a good measure of meaning. Since legal corpus linguistics relies on frequency, the corpus cannot inform legal meaning.

This article parries this otherwise fatal critique. It argues that while the frequency fallacy is self-evidently true, the fallacy is not inherent to the corpus, but rather is an artifact of misinterpreting the corpus by treating it like a dictionary. This defense consists of a number of steps. The first step distinguishes between two different methods of discerning ordinary meaning: extension and abstraction. As illustrated by Yates v. United States and United States v. Marshall, extension entails extending the statutory term to varying facts, while abstraction keeps the facts constant and abstracts out key qualities to find an appropriate term. Critically, this article argues that abstraction offers a way to avoid the frequency fallacy. Second, to use abstraction properly, one must analyze not only the presence of the legal term in question but also its absence; that is, one must determine the presence or absence of other terms to describe a similar factual scenario to distinguish between artifacts of language and facts about the world.

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This article concludes by arguing that this method has a beneficial emergent quality. Not only does this answer make legal corpus analysis methodologically sound, but it also paves the way for the first tool to approximate how an ordinary person would read the law, thus potentially furthering the rule of law.

KEYWORDS

Corpus Linguistics, Originalism, Statutory Interpretation, Legal Interpretation, Yates, Marshall, Interpretative Methods

CONTENTS

Introduction

Article I, Section 1 of the Constitution vests all federal legislative power in Congress, while Article I, Section 7 sets forth the process for effectuating this power through passage of legislation by both houses and either presidential approval or veto override. Article III, Section 2 delegates the application—and, thus, the interpretation— of these laws to concrete "cases" and "controversies" to the judiciary.

The judiciary is needed because the law is indeterminate.[1] Ideally, the legislation passed by Congress and signed by the President would be perfectly determinate: each transgression or transaction, every dispute or deed could be easily and consistently placed, or not placed, in a legal category. However, while this holds true in "easy" cases, a minority of cases, perhaps inevitably, will be legally indeterminate, and defy legal categorization: it will be unclear whether activity X falls within legal category Y. This is because events are not themselves so clear-cut, or because of the limits of human perception,[2] or because of the inherent limits of language in general,[3] or a combination of these factors. Regardless, the business of the judiciary is these so-called "hard cases," and judges and lawyers are called on to resolve that uncertainty.

A substantial subset of these "hard cases" relates to the interpretation of legal texts, as opposed to the uncertain boundaries of legal concepts, custom, or precedent. At present, the legal system has determined that the answers to these controversies should be, at least in part, linguistic in nature.[4] And reasonably so. The ordinary meaning principle relies on solid normative footing. Ordinary meaning is supposed to project respect for the population of people who must adhere to the law, as they

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1 Many problems of legal interpretation arise from a gap between the structure of our language faculty on the one hand and the goals of a language-based rule of law on the other. This tension is an inevitable consequence of the human condition. Indeed, this problem can trace its roots to Aristotle. In Nicomachean Ethics, Aristotle [(384 BCE), book 5, chapter 10], put it this way (for discussion, *see* Frederick Schauer Profiles, Probabilities, and Stereotypes 42–48 (2009)):

> [E]very law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms. Where it is necessary to speak in general terms but impossible to do so correctly, the legislator lays down that which holds good for the majority of cases, being quite aware that it does not hold good for all. The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject matter, being necessarily involved in the very conditions of human action.

2 This alludes to the debate between "metaphysical" and "epistemic" vagueness. Generally, *see*,Vagueness and Law: Philosophical and Legal Perspectives (Geert Keil & Ralf Poscher eds., 2016).

3 *See* Scott J. Shapiro, Legality 251 (2011) (because written communication is finite, imprecise, contextual, and ambiguous, "it is impossible for finite beings to guide conduct in ways that resolve every conceivable question.").

4 This is not an inevitable conclusion, as evinced by that linguistic considerations were not always the judiciary's primary adjudicative tool. In recent decades, however, statutory interpretation, much "like Cinderella, once consigned to the scullery, has become the belle of the ball." Prof. William Eskridge, *Showcase Panel IV: Textualism and Statutory Interpretation 11-16-2013,* Federalist Society 2013 Conference, https://www.youtube.com/watch?v=-0iFXMGwkwY&t=1405s.

are most likely to understand the words of the law as ordinarily construed. Thus, a key component of the meaning we ascribe to law concerns its "communicative content."[5] Most everyone—not just textualists anymore—agrees that "[t]here are excellent reasons for the primacy of the ordinary meaning rule."[6]

The law's baseline principle is to interpret such indeterminate texts, if they are not deemed terms of art,[7] in accordance with their "ordinary meaning." That is, courts "consider the answer [to indeterminate legal questions] to be one determined by general principles of language usage that apply equally outside the law."[8] When statutes present missing or ambiguous terms, interpreters generally attempt to determine the "plain" or "ordinary meaning." Similarly, with open-textured constitutional terms, originalists attempt to determine the original public meaning of a phrase when the Constitution was written and ratified.

Since discovering the ordinary meaning is far from simple, the interpretive enterprise has developed a multitude of canons, doctrines, decisions, and theories concerning the appropriate way to uncover the meaning of the text, as well as a number of tools, such as dictionaries, to attempt to make the interpretive enterprise more objective.

One new tool for statutory and constitutional interpreters is corpus linguistics. Despite an intimidating Latin name, corpus linguistics is conceptually and operationally straightforward: corpus linguistics is the study of language (linguistics) by analyzing samples of natural, real-world language in large bodies of text (corpus).[9] The idea is to more empirically examine a corpus of "real-world" texts showing how words were "actually used in written or spoken English" during a particular time period.[10]

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5 Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479 (2013).

6 William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 35 (2016).

7 On occasion, disagreement within a sharply divided Court plays out over whether a term is being used in a specialized sense or in accordance with ordinary meaning. *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478 (1990) (five Justice majority holding that "child support" in the Aid to Families With Dependent Children (AFDC) statute is restricted to that term's specialized use in the Child Support program under the Social Security Act, while four-Justice minority argues that "child support" in the AFDC statute has a broader, common use meaning). *See also Bruesewitz v. Wyeth*, 562 U.S. 223 (2011) at 234-235 and *Bruesewitz* at 257-258 (Sotomayor, J., dissenting). At other times, a unanimous Court has interpreted what might appear to be a term of art by its ordinary meaning. *See* Wall v. Kholi, 562 U.S. 545 (2011) (meaning of "collateral review" in habeas corpus statute analyzed by separate examination of the ordinary dictionary meanings of "collateral" and "review"). In other cases, the Court may view a term's ordinary meaning, technical meaning, and statutory context as all pointing to a single interpretation. *E.g.,* Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560 (2012).

8 Brian Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation (2015).

9 A more academic definition of corpus linguistics is the "study of language function and use by means of an electronic collection of naturally occurring language called a corpus." Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 Colum. Sci. & Tech. L. Rev. 156, 190 (2011).

10 State v. Rasabout, 356 P.3d 1258, 1275(Utah 2015) (Lee, J., concurring in part and concurring in the judgment).

In recent years legal theorists have started analyzing the best way to incorporate these empirical techniques into statutory and constitutional interpretation.[11] Courts have also started utilizing these techniques in statutory interpretation.[12] On the surface, corpus linguistics seems to be a promising tool to determine the ordinary meaning of unclear phrases in statutes and the Constitution, and a clearly better tool than the alternatives, namely, personal judgment, dictionaries, or "law-office history." If corpus linguistics can indeed be dispositive in matters of interpretation, then it is the rare game-changer indeed. In the words of Georgetown Law Professor Larry Solum, corpus linguistics has the potential to "revolutionize" constitutional interpretation.[13]

However, as both its proponents and opponents note, corpus linguistics suffers from a fatal methodological flaw—the "frequency fallacy." Current corpus analyses have assumed the effectiveness of corpus linguistics is self-evident: the more frequent the appearance, the more "ordinary" a term would be used. But this reliance on frequency data can be misleading. A term might appear frequently (or infrequently) for reasons other than that it is an ordinary (or extraordinary) use of the term. If so, then corpus data teach us nothing whether a given meaning of a term is ordinary or not. Hence, the frequency fallacy is a fatal flaw.

This paper attempts to answer this difficulty by arguing that there is nothing inherent in legal corpus linguistics that gives rise to the frequency fallacy; rather, it is the automatic (and perhaps unconscious) importation of an approach to ordinary meaning that is suited to the world of the dictionary, not the world of the corpus.

This defense requires two-steps. The first step is to make a distinction between two ways of determining ordinary meaning. As illustrated by the debate between the concurrence and dissent in *Yates v. United States* and *United States v. Marshall*, there exists a distinction between two methods of determining ordinary meaning; what can be called "extension" and "abstraction." "Extension" takes the legal term as fixed, and then examines various factual situations to see whether or not such a term is applicable. "Abstraction," on the other hand, begins with understanding the nature of the facts themselves, thereafter abstracting these facts to find the best of many possible terms.

"Extension" is the method of the dictionary. After all, the "technology" of the dictionary is conducive only to an extension method: one cannot define a series of facts but rather can define a legal term. However, applying the dictionary-suited

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[11] Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L.J. 788, 795 (2018), (proposing importation of empirical, computer-aided linguistic methods into legal interpretation); James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 Yale L.J. Forum 21, 27-29 (2016) (describing the development of some of these efforts); *see also* the forum on legal corpus linguistics in 2017 B.Y.U. L. Rev. 1359 (2018).

[12] Justice Thomas Lee of the Utah Supreme Court has drafted multiple concurring opinions employing corpus linguistics in statutory interpretation: *Rasabout*, 356 P.3d at 1275-82 (Lee, J., concurring in part and concurring in the judgment); In the Matter of the Adoption of Baby E.Z., 266 P.3d 702, 723-31 (Utah 2011) (Lee, J., concurring in part and concurring in the judgment). In 2016 the Michigan Supreme Court issued a majority opinion utilizing the set of techniques. *People v. Harris*, 885 N.W.2d 832, 838-42 (Mich. 2016).

[13] Amanda Kae Fronk, *What Can You Do with a Few Hundred Billion Words?*, [online] B.Y.U. Magazine (2019). Available at: https://magazine.byu.edu/article/big-lang-at-byu/.

method in a corpus world leads directly to the frequency fallacy. Thus, rather than seeing the corpus as a "super-dictionary" of sorts, one needs instead to apply the different method more suited to the corpus world: that of abstraction. Doing so is the first step in avoiding the frequency fallacy.

The second step is avoiding what is called dependent variable selection, a more generalized version of what Solan & Gales call "double dissociation." In brief, one must analyze not only the presence of the legal term in question but also its absence; that is, to determine the presence or absence of other terms to describe a similar factual scenario. Though this is conceptually straightforward, it is harder to implement in practice.

This article will proceed as follows. Part I outlines the reasons why and how corpus linguistics has been introduced to legal interpretation, and introduces a few key cases that have undergone corpus analysis and which will be revisited throughout the piece. Part II outlines the frequency fallacy and shows how it undermines the analyses of the aforementioned cases. Part III answers these criticisms by outlining a mathematically sound corpus methodology, and illustrates how this method sometimes changes and sometimes supports the analyses from Part I.

In Part IV, this article concludes with a normative, not merely technical, endorsement of the abstraction method. Extension is what legal interpreters are used to, as it is the only method enabled by the technology of the dictionary, but it is not necessarily the best method if discerned from first principles. After all, most citizens (and potential law-breakers), to the extent they are aware of the law (an empirically questionable assumption, but one that undergirds the theory of ordinary meaning nonetheless) would try not to discern the prototypical meaning of the legal term in general via extension, but would rather try to determine whether that term applies to the particular factual circumstances in which the citizen finds herself—that is, citizens interact with the law via abstraction. Thus, not only can abstraction answer the local questions surrounding corpus linguistics, it offers a broader benefit to statutory and constitutional interpretation, as it can turn corpus linguistics into a tool that can open the previously inaccessible *ne plus ultra* of interpretation: an objective assessment of the pathways of how an ordinary person fuses law and life.

I. The Rise of Legal Corpus Linguistics

This section will describe why, then how, corpus linguistics was introduced into legal interpretation. It then outlines the two key assumptions the legal corpus enterprise makes that will be discussed in Parts II and III.

A. Non-Legal Corpus Linguistics

Corpus linguistics is the study of language (linguistics) through analyzing samples of natural, real-world language in large bodies of text (corpus).[14] In the linguistics

[14] Examples of general corpora include Brigham Young University's Corpus of Historical American English (COHA), Corpus of Global Web-based English (GloWbE), and Corpus of Contemporary American English (COCA), the last of which is probably the best-known, publicly available reference corpus and comprises 520 million words from 1990 to 2015, balanced over five registers.

context, corpus linguistics was created to oppose generative (or "armchair") linguistics, which deemed native speaker intuition the best method to find linguistic insights.[15] Instead, corpus linguistics argued that observing words as they are used in practice—in their natural habitat, so to speak— can provide richer linguistic insights than can the ruminations of one person alone. Linguists create the natural habitat of language by building a corpus, or a systematic[16] collection of naturally occurring texts (of both written and spoken language), such as novels, essays, poems, news articles, in in electronically searchable databases, [17] so that scholars can analyze the actual frequency, context, and collocation of particular words or phrases.[18]

B. Legal Corpus Linguistics

Similar to its development in linguistics in general, in the legal context of determining the ordinary meaning of an ambiguous word or phrase in a statute or the Constitution, corpus linguistics has arisen to oppose the parallel of generative linguistics in the law—subjective methods as native speaker intuition or the bias-riddled use of dictionaries. Instead, corpus linguistics aims to offers the non-subjective data of many instances of the use of a word or phrase in the database's collected texts as the basis of a more transparent, falsifiable, empirical, and rigorous methodology.

1. How Did We Get Here?: Contributory Trends

a. The Formalist Turn

The first causal factor is the formalist turn in statutory and constitutional interpretation over the past two generations.[19] For most of the 20th century, approaches that emphasized legislative intent and statutory purpose dominated statutory interpretation. Such schools of interpretation, while (arguably) not ignoring the text, based their interpretations on broader purposes and normative values.[20] One articulation of such a purposivist view comes from one of the seminal

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15 Vincent B. Y. Ooi, Computer Corpus Lexicography (1998).

16 "Systematic" means that the structure and contents of the corpus follows certain extralinguistic principles on the basis of which the texts included were chosen.

17 Although "corpus" can refer to any systematic text collection, it is commonly used in a narrower sense today, and is often only used to refer to systematic text collections that have been computerized.

18 Douglas Biber*, Corpus-Based and Corpus-Driven Analyses of Language Variation and Use*, *in* The Oxford Handbook of Linguistic Analysis 193, 193-94 (Bernd Heine & Heiko Narrog eds., 2d ed. 2015).

19 The vanguard of the textualist forces include such works as Office of Legal Policy, Dep't of Justice, Using and Misusing Legislative History (1989); Antonin Scalia, A Matter Of Interpretation: Federal Courts and the Law (1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

20 As Brian Slocum has written, "It is difficult to conceive of a realistic methodology of interpretation in which it would *not* be influential." Slocum, *supra* note 8. Even Professors Henry Hart Jr. and Albert M. Sacks, who advocated a purposivist approach

cases in Administrative Law, *Citizens to Preserve Overton Park v. Volpe*: "The legislative history…is ambiguous…because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent."[21]

However, beginning in the 1980s, textualism (or "plain meaning textualism") has been ascendant, such that, today, Ordinary meaning is, among jurists, the ruling interpretive norm: the current interpretive enterprise aims to understand statutes in accordance with their ordinary meaning. Hewing close to the ordinary meaning has deep roots in American jurisprudence,[22] has undergone a tremendous revival in the past two generations,[23] and now enjoys near-ubiquity.[24] The Supreme Court has anchored its interpretation around a term's "ordinary meaning"[25] (or designed by

to interpretation, maintained that in interpreting the words of the statute so as to carry out the purpose a court should not give the words "a meaning they will not bear." Slocum notes that some, including Harvard Dean John Manning, doubt whether legal process devotees considered themselves bound by the meaning of the textual language. Manning argues that they considered themselves free to interpret the relevant provision more narrowly or more broadly than the language would warrant. See John F. Manning, *Justice Ginsburg and the New Legal Process*, 127 Harv. L. Rev. 455 (2013).

21 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 n.29 (1971).

22 Justice Oliver Wendell Holmes Jr. said that the primary task for the statutory interpreter is to determine "what [the statutory] words would mean in the mouth of an ordinary speaker of English, using them in the circumstances in which they were used." Like the "reasonable person" in the law of torts, the "normal speaker" is "simply another instance of the externality of law." Oliver Wendell Holmes Jr, *The Theory of Legal Interpretation,* 12 Harv. L. Rev. 417, 417-18 (1899). For similar statements by earlier giants of American law*, see, e.g*., Gibbons v. Ogden*,* 22 U.S. 1, 71 (1824) (Marshall, C.J.); James Kent, Commentaries on American Law 432 (1826); Joseph Story, Commentaries on the Constitution of the United States 157-58 (1833).

23 The vanguard of the textualist forces include such works as Office of Legal Policy, Dep't of Justice, Using and Misusing Legislative History 1989); Antonin Scalia, A Matter of Interpretation *supra* note 19; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 Harv. J.L. & Pub. Pol'y 59, 65 (1988).

24 Testifying to the ubiquity of the primacy of the text, Justice Kagan said, "[W]e're all textualists now." Elena Kagan*, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, https://www.youtube.com/watch?v=dpEtszFT0Tg at 8:25

25 *See, e.g.,* Carpenter v. U.S., 138 S. Ct. 2206 (2018); Wisconsin Central Ltd. v. U.S., 138 S. Ct. 2067 (2018); Lucia v. S.E.C., 138 S. Ct. 2044 (2018); Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752 (2018); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018); Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018); Artis v. District of Columbia, 138 S. Ct. 594 (2018); Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017); Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017); Manuel v. City of Joliet, 137 S. Ct. 911 (2017); N.L.R.B. v. SW General, Inc*.,* 137 S. Ct. 929 (2017); Life Technologies Corp. v. Promega Corp., 137 S. Ct. 734 (2017); Fry v. Napoleon Community Schools, 137 S. Ct. 743 (2017); Lightfoot v. Cendant Mortg. Corp., 137 S. Ct. 553 (2017); Voisine v. U.S., 136 S. Ct. 2272 (2016); Cuozzo Speed Technologies, LLC v. Lee, 136 S. Ct. 2131 (2016); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117 (2016)*;* Clark v. Rameker, 573 U.S. 122, 127 (2014) ("[W]e give the term its ordinary meaning."); Bond v. U.S., 572 U.S. 844, 861, (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term … ."); Mohamad v. Palestinian Auth., 566 U.S. 449, 454 (2012) ("Because the [Act] does not define the term 'individual,' we look first to the word's ordinary

such synonyms as the "everyday meaning" or the "commonsense" reading[26]). Lower courts have agreed that ordinary meaning is foundational in interpreting statutes, making it the foundation for the application of the judiciary's other interpretive tools, as well as the boundaries of interpretive acceptability.[27] Administrators and executive branch officials—who perform the lion's share of statutory interpretation in this country—also start with and focus on a text's ordinary meaning.[28] Even those who criticize the normative value of the ordinary meaning rule agree that it is descriptively ubiquitous and forms the "standard picture" of statutory interpretation.[29]

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meaning"; as such, ("individual," as used in the Torture Victim Protection Act, does not include an organization); *Taniguchi v. Kan Pacific Saipan*, 566 U.S. 560, 568, 2004 (2012) (judging the relevant statutory term by how "the word is *ordinarily* understood in that sense") (emphasis in original); *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*, 559 U.S. 175, 182 (2010) ("We … give [the relevant] terms their ordinary meanings."); Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*,* 548 U.S. 291 (2006); Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material."); Barnhart v. Thomas, 540 U.S. 20 (2003); Asgrow Seed Co v. Winterboer, 513 US 179, 187 (1995) ('When terms used in a statute are undefined, we give them their ordinary meaning'); West Virginian Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991); U.S. v. Providence Journal Co*.,* 485 U.S. 693, 700–01 (1988).

[26] Moncrieffe v. Holder, 569 U.S. 184, 206, (2013) ("commonsense" understanding); Mohamad v. Palestinian Auth., 566 U.S. 449, 504, (2012) ("everyday parlance"); Carctchuri-Rosendo v. Holder, 560 U.S. 563, 574–75 (2010) ("commonsense conception" and "everyday" understanding); Boyle v. U.S., 556 U.S. 938, 946 (2009), U.S. v. Santos, 553 U.S. 507, 513 (2008) ("Ordinary definitions"); Gonzales v. Carhart, 550 U.S. 124, 152 (2007) ("Usual meaning"); Watson v. U.S., 552 U.S. 74, 76 (2007) ("Natural meaning"); S.D. Warren Co. v. Maine Bd. of Env. Protection, 547 U.S. 370, 376, 378, 382 (2006) ("Common meaning", "Ordinary sense" and "Everyday sense"); Lopez v. Gonzales, 549 U.S. 47, 53 (2006) ("Everyday understanding"); Rousey v. Jacoway, 544 U.S. 320, 320 & 326 (2005) ("Dictionary understanding) and "Common understanding") National Cable & Telecomms. Assoc. v. Brand X Internet Services, 545 U.S. 967, 970, 986, 989, 990 (2005) ("Common usage" and "Plain term"); Leocal v. Ashcroft, 543 U.S. 1, 8 (2004) ("Plain text"); Bedroc Limited, LLC v. U.S., 541 U.S. 176, 184 (2004) ("Ordinary and popular sense"); Equal Employment Comm. v. Met. Ed. Enterprises, 519 U.S. 202, 207 (1997) ("Ordinary", "contemporary", and "common meaning").

[27] For a sampling examples of ordinary meaning as the anchor for statutory interpretation, *see, e.g.*, *Adoptive Couple v. Baby Girl,* 570 U.S. 637, 645–50, (2013); *Levin v. United States,* 568 U.S. 503, 513–15, (2013); *Mohamad v. Palestinian Auth.,* 566 U.S. 449, 454–55, (2012); *Bilski v. Kappos,* 561 U.S. 593, 601–05 (2010); *Massachusetts v. EPA,* 549 U.S. 497, 528–32 (2007); *Moskal v. United States*, 498 U. S. 103, 108 (1996); *Richards v. United States,* 369 U.S. 1, 9 (1962). For illustrative state cases, *see, e.g., Apple, Inc. v. Superior Court*, 292 P.3d 883, 885 (Cal. 2013); *Cassel v. Superior Court,* 244 P.3d 1080, 1087-88 (Cal. 2011); *People v. Albillar,* 244 P.3d 1062, 1067–69 (Cal. 2010); *Williams v. State,* 121 So.3d 524, 529–34 (Fla. 2013); *Hampton v. State,* 103 So. 3d 98, 110–13 (Fla. 2012); *Smitter v. Thornapple Township,* 833 N.W.2d 875, 880–83 (Mich. 2013); *Barr v. City of Sinton,* 295 S.W.3d 287, 297–99 (Tex. 2009).

[28] *See* Christopher J. Walker, *Inside Agency Statutory Interpretation,* 67 Stan. L. Rev. 999, 1030-31 (2015) (reporting that federal agencies interpreting statutes focus on the "ordinary meaning" of the words enacted into law).

[29] Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 Oxford Studies in Philosophy of Law 39, 48 (Leslie Green & Brian Leiter eds., 2011) (describing

A similar formalist turn has occurred in constitutional interpretation. While living constitutionalism theories once held hegemonic sway, in recent years, originalism has become increasingly important in both the academy and the courts. Many judges and scholars consider the Constitution's original meaning relevant to constitutional questions.[30] Even interpreters who decline to adhere rigidly to originalist and textualist modes of analysis nonetheless often utilize the text at least as a starting point for questions of constitutional interpretation.[31]

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the "Standard Picture"). *See also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1106 (2017) at 1086 (speaking of the "Standard Picture," or the "view that we can explain our legal norms by pointing to the ordinary communicative content of our legal texts," in other words "an instrument's meaning as a matter of language"). *See* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235 (2015), at 1255-63, 1272 (exploring a range of possible meanings of communicative or "conversational" meaning, including "semantic" or "literal" meaning, "contextual" meaning embraced by "shared presuppositions of speakers and listeners," "intended meaning," and others, and asserting that there accordingly is "no single, linguistic fact of the matter concerning what statutory or constitutional provisions mean"); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 Const. Comment. 193, 194-95 (2015) (identifying possible notions of meaning, including authorial intention, public meaning, moral reading, and others).

30 *See, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (suggesting that the Court should "take a fresh look at [its] regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment"); *NLRB v. Canning*, 573 U.S. 513, 526-28, (2014) (Breyer, J.) (turning to early dictionaries and the records of the Constitutional Convention at the very start of his analysis of the Recess Appointments Clause before finding ambiguity); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J.) (engaging in historical analysis to uncover the meaning of the Second Amendment); *see also* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 946-48 (2017) (Thomas, J., concurring) (referencing "the probable original meaning of the [Appointments] Clause and this Court's precedents" in an analysis of whether the National Labor Relations Board's general counsel is a principal "Officer of the United States" (internal quotation omitted)); *Hearings on Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 1, 3-5 (2017) (statement of Lawrence B. Solum), https://www.judiciary.senate.gov/imo/media/doc/03-23-17%20Solum%20Testimony.pdf (describing now-Justice Gorsuch's adherence to originalism and describing originalism's place in the mainstream of constitutional interpretive philosophy as well as originalism's relevance for interpreters from a wide spectrum of political backgrounds); *cf.* Buckley v. Valeo, 424 U.S. 1, 128-31 (1976) (per curiam) (analyzing the drafting history of the Appointments Clause to support the Court's conclusion that the phrase "Officers of the United States" "embrace[s] all appointed officials exercising responsibility under the public laws of the Nation").

31 *See, e.g., Heller*, 554 U.S. at 636-37 (Stevens, J., dissenting) (addressing "the text of the [Second] Amendment, its history," and Supreme Court precedent in analyzing whether the Second Amendment "protects the right to possess and use guns for nonmilitary purposes like hunting and personal self-defense"); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 7–8 (2005) ("[E]mphasis matters when judges face difficult questions of statutory or constitutional interpretation. All judges use similar basic tools to help them accomplish the task. They read the text's

Corpus linguistics in constitutional interpretation is nearly exclusively due to the rise of originalism, which, until now, has lacked a methodology, which originalists hope corpus linguistics can provide.[32]

b. Deficiencies in Interpretative Tools

In the wake of the formalist turn, corpus linguistics emerged as an alternate interpretative tool in a self-conscious effort to overcome the shortcomings of the tools currently used in statutory and constitutional interpretation.

In statutory interpretation, judges typically use two methods in determining the ordinary meaning of a term – native speaker intuition and dictionaries – both of which are flawed.[33] Each method has its own flaws, and the two methods share flaws.

Intuition is subjective ipso facto, and thus is problematic from a rule-of-law perspective, which seeks objectivity in judgement. Next, linguistic intuition or *sprachgefühl* is riddled with biases and distortive heuristics; in the vivid words of a linguist that summarizes nearly every relevant cognitive bias: "each of us has only a partial knowledge of the language, we have prejudices and preferences, our memory is weak, our imagination is powerful (so we can conceive of possible contexts for the most implausible utterances), and we tend to notice unusual words or structures but often overlook ordinary ones."[34]

Though purportedly neutral, dictionaries suffer from serious flaws as well.[35] Dictionaries parse language in words; humans understand (and construct) language in clusters, phrases, or sentences. Their inconsideration of broader linguistic context makes dictionaries a clumsy tool for understanding language. Further, as

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language along with related language in other parts of the document … . But the fact that most judges agree that these basic elements— language, history, tradition, precedent, purpose, and consequence—are useful does not mean they agree about just where and how to use them. Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. These differences of emphasis matter…").

32 *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Pa. L. Rev. 261 (2019) at 283 (describing the "shortcomings of existing methodologies" for determining the Constitution's communicative content)

33 Judge Posner criticizes their use in *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (summarizing literature critical of judicial reliance on dictionaries to ascertain ordinary meaning, focusing on the gap between the context-sensitive use of words, and the acontextual nature of dictionary definitions), as does Associate Chief Justice Lee of the Supreme Court of Utah in *State v. Rasabout*, 356 P.3d 1258, 1272–73(Utah, 2015) (Lee, J., concurring).

34 Ramesh Krishnamurthy, *Collocation: From "Silly Ass" to Lexical Sets*, *in* Words In Context: A Tribute To John Sinclair On His Retirement 32–33 (Chris Heffer et al. eds., 2000).

35 Arguably dictionaries are worse because they give the veneer of neutrality – *see MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994). For a superb review of the extensive literature that highlights the shortcomings of dictionaries, *see* James Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 Wm. & Mary L. Rev. 483 (2013).

"museums" of word meanings,[36] dictionaries can provide a list of possible senses, but do not indicate which of the possible senses is the most ordinary.[37]

Both intuition and dictionaries are insufficiently subtle for the fine line-drawing exercises required in hard cases, may be affected by motivated reasoning[38] and other cognitive biases,[39] and are not falsifiable or defeasible in a Popperian sense.[40]

The tools of constitutional interpretation face these, and other, problems. Intuition is useless, as it cannot account for "linguistic drift" over hundreds of years. Founding-era dictionaries, moreover, were generally the work of one individual,[41] tended to plagiarize each other,[42] and relied on famous, often dated, examples of English usage (from Shakespeare or the King James Bible). Further, there are no Constitution-era American dictionaries.[43]

In response to these shortcomings, corpus linguistics aims to offer an interpretive tool that is transparent, falsifiable, and objective. Corpus linguistics addresses the pitfalls of intuitions by providing an objective external dataset against which to check, and test, our subjective hunches and which is immune to the biases of perception and recall inherent in human reasoning.

In addition, corpus linguistics aims to addresses the shortfalls of dictionaries by providing concordance-line context not only for single words, but of a number of words together. For instance, below this paper will re-analyze the case of

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36 *See, e.g.,* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) (referring to dictionaries as "museum[s] of words"); *see also* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1375–76 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible.").

37 *See* Lee & Mouritsen, *supra* note 11, at 808 ("[t]he dictionaries typically cited by our courts … make no claims about relative frequency of listed senses of a given word.").

38 *State v. Rasabout*, 356 P.3d 1258, 1274 (Utah, 2015), ("Instead of acknowledging and rejecting contrary senses of a statutory term, judges tend to ignore them—identifying only the sense of a word they deem ordinary without acknowledging any others.") (Lee, Associate C.J., concurring in part and concurring in the judgment); *see also*, *e.g*., Kovach v. Zurich Am. Ins. Co*.,* 587 F.3d 323, 346 (6th Cir. 2009) (McKeague, J., dissenting) (criticizing the majority for ignoring other definitions in basing its presentation of the "ordinary meaning" of "accidental" on one definition without regard to others); Konop v. Hawaiian Airlines, Inc*.,* 302 F.3d 868, 878 (9th Cir. 2002) (ignoring broader definitions in favor of a narrow definition as "ordinary meaning" of "intercept"); *United States v. Warner Bros. Well Drillin*g, 899 F.2d 15 (Table), (6th Cir. 1990) at 2-3 (citing only one definition of "operator" in determining the ordinary meaning, even though opposing definitions existed).

39 Lawrence Solan et al., *False Consensus Bias in Contract Interpretation*, 108 Colum. L. Rev. 1268 (2008).

40 Karl Popper, The Logic of Scientific Discovery (1959).

41 *See* Lee & Phillips, *supra* note 32, at 28

42 Lee & Phillips, *id*. at 27.

43 Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. Rev. 1621, 1642 (2017) ("Johnson's dictionary reports English usage in Great Britain from a period that ended thirty-two years before the drafting of the United States Constitution in 1787.")

Muscarello v. United States by collocating "car," "carry," and "gun"—an impossible task without an electronic computer search. Thus does electronic search enable corpus analysis to address the subtle line-drawing distinctions required in statutory and constitutional analysis.

In addition, unlike dictionary museums, corpora provide frequency data indicating which use is most common. The combination of frequency data and the objectivity of data in general is hoped to mitigate the cherry-picking endemic to dictionaries.

Further, corpus linguistics offers a method that is falsifiable by virtue of being transparent: one can review another's corpus analysis (as this paper does below). Indeed, corpus analysis enables the litigants or conversants to share a set of common facts. Justice Scalia touted a common set of relevant adjudicatory facts as one benefit of originalism; the same applies equally to corpus linguistics.[44]

Finally, corpus analysis hopes to answer the concerns over historical time-appropriateness. A corpus search can be easily narrowed to a particular time period. While this is of obvious use in constitutional analysis, where the meanings of terms between 1787-1791 is paramount, it is also valuable in statutory analysis.[45]

In sum, not only does it hope to solve the problems raised by intuition and dictionaries, but corpus analysis promises benefits—specifically, collocation and historical search—that are impossible to achieve without it.

c. The Age of "Big Data"

Though exogenous to the law, another critically important cause of corpus ascendancy is advancements in electronic search. So-called "shoebox" corpora have existed for decades, but could not quickly and reliably provide context for legal interpretive inquiries, and would have arguably been inferior to a more subjective, generative approach.[46] However, with a computer, data is indexed and electronically searchable, so that in a few clicks, one can now achieve what would have taken years—or would have been simply impossible—for an individual to do beforehand.

With these broad trends in mind, this note will look in more detail at criticisms of current interpretative tools that corpus linguistics is intended to surpass.

2. Examples of Legal Corpus Linguistics

To further these aims to reduce interpretive inaccuracy, corpus linguistics has been introduced into legal interpretation. We provide a brief overview of the cases below both to outline the history as well as to offer examples of corpus linguistics in practice.

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44 Scalia, *supra* note 19.

45 *See* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 B.Y.U. L. Rev. 1311 (2017), for an analysis of the 1931 case, *McBoyle v. United States*. Such an analysis would be impossible to do comprehensively without corpora.

46 Early field anthropologists and lexicographers used to collect individual words on slips of paper, documenting their origin, date of acquisition, meaning, and, occasionally, the context in which they were used.

a. Muscarello v. United States

The first use of computerized linguistic analysis in a Supreme Court opinion is Justice Breyer's majority opinion in *Muscarello v. United States*.[47] In *Muscarello*, the Court debated whether the act of transporting a handgun locked in a glove compartment during a drug deal falls within a statute calling for a five-year mandatory prison term for a person who "uses or carries a firearm…during and in relation to…a drug trafficking crime."[48] Justice Breyer, writing for the Court, performed a proto-corpus analysis, searching a computerized database of newspaper and magazine articles that contained sentences using "carry," "vehicle," and "weapon." Breyer found "that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, i.e., the carrying of guns in a car,"[49] and therefore applied the five-year minimum to Frank Muscarello. *Muscarello* has been a polarizing case even after being decided: it has been alternately praised as "one of the great textualist moments of our period"[50] and derided as more "a food fight… than a serious argument among distinguished jurists."[51] Nonetheless, despite what one might think of the outcome, *Muscarello* was the first Supreme Court case to explicitly employ computerized search.

b. "Commerce"

Professor Randy Barnett's computer-driven study of the original meaning of the Commerce Clause is likely the first example of inchoate corpus analysis in Constitutional interpretation.[52] This analysis was prompted by the Supreme Court's revitalization of judicially enforceable limits on Congress' Commerce Clause power in *United States v. Lopez*.[53] Justice Thomas, in concurrence, lamented that the Court's expansive reading of the Commerce Clause had "drifted far from [its] original understanding," which he took to consist only of "selling, buying, and bartering, as well as transporting for these purposes."[54] In response to critiques that "commerce" was broader than Justice Thomas claimed,[55] Barnett conducted a proto-linguistic analysis, examining every use of "commerce" in the Pennsylvania Gazette from 1728-1800. He found that the word appeared 1594 times and that, in all but thirty-one instances, the term meant "trade or exchange," per Justice Thomas. Barnett took this "overwhelming consistency" of usage as powerful evidence of

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47 Indeed, in the intellectual history of legal corpus linguistics, Mouritsen's original article on *Muscarello* sparked the entire field of inquiry.

48 Muscarello v. United States, 524 U.S. 125, 126 (1998) (quoting 18 U.S.C. § 924(c)(1)(A) (2012)).

49 *See id.* at 129.

50 Henderson v. State, 715 N.E.2d 833, 835 n.3 (Ind. 1999).

51 Lawrence M. Solan, *The New Textualist's New Text*, 38 Loy. L.A. L. Rev. 2027, 2053 (2005).

52 Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 856-57 (2003) (doing this with the Pennsylvania Gazette).

53 *See* United States v. Lopez, 514 U.S. 549, 566 (1995).

54 *See id.* at 585 (Thomas, J., concurring).

55 *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 Iowa L. Rev. 1, 6 (1999).

the term's original public meaning: "[T]his survey clearly establishes that . . . the normal, conventional, and commonplace public meaning of commerce…was 'trade and exchange,' as well as transportation for this purpose. On the strength of this data…I no longer believe that the term 'commerce' was even ambiguous."[56] It should be noted that other scholars, such as Jack Balkin, did not agree with Barnett's unambiguous conclusion.[57]

c. State v. Rasabout

The first use of corpus linguistics (and specifically COCA) in a judicial opinion was *State v. Rasabout*, a 2015 judicial opinion by Justice Thomas Rex Lee of the Utah Supreme Court.[58] The Court had to determine whether the phrase "discharge of a firearm" constituted firing one bullet only or included firing one sequence of several bullets. The defendant, Andy Rasabout, had fired twelve shots during a drive-by shooting. The defendant was convicted of violating a Utah statute that made it a crime to "discharge any kind of dangerous weapon or firearm…without written permission, within 600 feet of a house, dwelling, or other building."[59] A jury convicted him of twelve separate offenses; however, the trial court merged them into one count. The Utah Supreme Court reversed.

In a concurring opinion, Justice Lee searched COCA to locate all the instances where the word "discharge" appeared within five words of either "firearm," "firearms," "gun," or "weapon." His search returned eighty-six instances, the overwhelming majority of which suggested that "discharge of a firearm" refers to the firing of a single bullet. In fact, he found only one instance that unambiguously supported Rasabout's argument.[60] Therefore, Justice Lee concluded that "discharge of a firearm" ordinarily means firing only one shot, and therefore Rasabout should be convicted of twelve separate counts.

d. People v. Harris

In the spring of 2016, the Michigan Supreme Court became the first state supreme court to use the COCA in a *majority* opinion when it decided *People v. Harris*.[61] The question in *Harris* was whether police officers who had testified falsely in a disciplinary hearing had provided "information" in that hearing. A Michigan law, the Disclosures by Law Enforcement Officers Act (DLEOA), immunized information testified to in such contexts from use in a subsequent criminal prosecution. The purpose of the law was to enable the state to compel the testimony of law enforcement officers in disciplinary proceedings without violating their constitutional right to refrain from providing self-incriminating testimony that can be used against them in a criminal case.

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56 Barnett, *New Evidence*, *supra* note 52, at 862.

57 Jack M. Balkin, *Commerce*, 109 Mich. L. Rev, 1, 51 (2010). *But see* Barnett's reply in Randy E. Barnett, *Jack Balkin's Interaction Theory of Commerce,* 2012 U. Ill. L. Rev. 623 (2012).

58 State v. Rasabout, 356 P.3d 1258 (Utah, 2015).

59 *Id.* at 1259.

60 *Id.* at 1261.

61 People v. Harris, 885 N.W.2d 832 (Mich. 2016).

Three officers were present at a traffic stop; one of them assaulted the driver without adequate cause while the others watched. The officers testified falsely in their disciplinary hearings, not knowing that someone had made a video recording of the entire incident. The officers were subsequently prosecuted for obstruction of justice.

All seven justices on the court were comfortable using COCA to ascertain the ordinary meaning of information. However, they divided four to three on the outcome of the case. The disagreement among the justices arose from deciding which corpus analysis should be conducted. The majority correctly pointed out that information can be used with modifiers such as false and inaccurate to denote false statements. It held that the word information can be used to describe both truthful and false statements, making the officers' false testimony inadmissible.[62] But as the dissenting justices pointed out, a COCA search revealed that without modification, information is generally used to denote accurate information, rejecting the majority's conclusion that the presence of veracity adjectives in both directions indicates that the unmodified form of the noun can be understood equally both ways.[63]

e. "Officers of the United States"

After these cases and a number of influential law review articles, corpus linguistics has been applied in the academy to a number of burning Constitutional questions. This application has been enabled by the development of a new corpus. Until recently, no eighteenth century American English corpus existed. But in late 2017, Brigham Young University Law School launched a beta version of the Corpus of Founding Era American English ("COFEA"), which currently contains approximately 150 million words.[64]

Corpus analysis has been applied in amicus briefs in *Lucia v. SEC*, where the Court ruled that administrative law judges (ALJs) within the Securities and Exchange Commission (SEC) are "Officers of the United States" within the meaning of the Appointments Clause.[65] The Constitution provides that the President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."[66] Nevertheless, "Congress may by Law vest the Appointment of such inferior Officers…in the President alone, in the Courts of Law, or in the Heads of Department." Thus, an "Officer of the United States" may be appointed by any of three entities: the President (with or without Senate confirmation), the courts, or a department head. However, administrative law judges are not appointed by the President, courts of law, or department heads. Rather, they are hired following a merit-selection process that is administered by the Office of Personnel Management.

In a concurring opinion, Justice Thomas cited the conclusions (though not analysis) of Professor Jennifer Mascott, who used a corpus-like approach.[67]

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62 *Id.* at 839 (majority opinion).

63 *Id*. at 850 n.14 (Markman, J., concurring & dissenting).

64 Lee & Phillips, *supra* note 32, at 31.

65 U.S. Const., Appointments Clause, art. II, § 2; Commissions Clause, art. II, § 3; Impeachment Clause, art. II, § 4 .

66 U.S. Const., art. II, § 2.

67 Jennifer L. Mascott, *Who are "Officers of the United States"?,* 70 Stan. L. Rev. 443 (2018).

Amici used corpus linguistics to suggest that original public meaning of "officer" encompasses any government official with responsibility for an ongoing governmental duty. An amicus brief filed by "scholars of corpus linguistics" note that the phrase "Officer(s) of the United States" appears in COFEA just 109 times between 1787 and 1799, with just over a third of those being direct quotations of the Constitution, and argue that this "reveals that the term applied to not just high ranking government officials, but also customs officials, loan officers, and law enforcement officials carrying out warrants," and, thus, would include ALJs. In this case, corpus linguistics was used to argue that the current civil-service task of appointing ALJs is constitutionally problematic.

f. "Emoluments"

With three federal law suits filed against President Trump since his surprise election victory, one Constitutional clause—the Foreign Emoluments Clause—has gained particular attention from academics, the media, and the public.[68] Specifically, there have been a number of lawsuits filed against the President, that he violated the "emoluments" clauses of the Constitution.[69] The Foreign Emoluments Clause prohibits members of the government from receiving "any present, Emolument, Office, or Title, of any kind whatever" from foreign states or leaders without the consent of the United States Congress. Likewise, the Constitution states that the President shall "receive for his Services, a Compensation," and that "he shall not receive [within the period for which he was elected] any other Emolument from the United States, or any of them."[70]

The plaintiffs argue that there are two meanings of emolument in use in the late 1700s: first, a broad, general sense that covers any profit, benefit, advantage, or gain one obtains, whether tangible or not, from any source; second, the legally-authorized compensation or monetizable benefits from public office, employment, or service. If the broad, general sense is the operative one in the Constitution, the President has violated the Constitution through foreign and domestic governments paying the hotel bills of their officials for stays at a Trump Hotel, among other ways. But if the Constitution uses the narrow sense of emoluments, then the President has not violated these constitutional clauses since no one has claimed that he is in the official employ or an officer of a foreign state.

A recent paper uses a corpus analysis to argue that "when the recipient is an officer, the narrower sense of emolument is the one overwhelmingly used."[71]

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68 U.S. Const. art. I, § 9, cl. 8.

69 *See, e.g.,* Peter Overby, *Lawsuit Against Trump Starts Battle to Define 'Emolument'*, NPR, Morning Edition, Sept. 11, 2017, available at http://www.npr.org/2017/09/11/550058339/lawsuit-against-trump-starts-the-battle-to-define-emolument?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social (interviewing Georgetown Law Professor John Mikhail about his recent article on the Founding-era meaning of the word emolument, with Professor Mikhail confessing that "prior to maybe December of 2016, I had not given much thought to the word emolument").

70 U.S. Const. art. II, § 1, cl. 7.

71 James C. Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S Constitution: A Corpus Linguistic Analysis of American English*, 1760-1799, 59 S. Tex. L. Rev. 181 (2018).

For this reason, it argues that the Congressional and Presidential Emoluments Clauses would have most likely been understood to contain a narrow, office or public-employment sense of emolument, and thus likely does not apply to President Trump.

g. "Bear Arms"

Likely the most contentious issue regarding specific words in the Bill of Rights, the Second Amendment's protection of "the right of the people to keep and bear arms" has been hotly contested. Only two weeks after COFEA became available, Prof. Dennis Baron, one of the signatories to the linguists' amicus brief in *District of Columbia v. Heller*, published an op-ed in the Washington *Post* with a corpus analysis of "keep and bear arms." Of "about 1,500 separate occurrences of 'bear arms' in the 17th and 18th centuries," Baron wrote, "only a handful don't refer to war, soldiering or organized, armed action." Based on that fact, Baron said that the two corpora "confirm that the natural meaning of 'bear arms' in the framers' day was military."[72] The implication of this analysis is that the Court's *Heller* decision was mistaken, and there is no individual right to own guns. In a similar analysis, Professors Alison LaCroix and Jason Merchant used Google Books to search for the phase "bear arms" in sources published between 1760-1795.[73] They found that in of the sample size, "bear arms" was used in its collective sense, whereas in 18.2% of the sample, the phase was used in an individual sense, concluding that the most frequent – and therefore most ordinary – meaning was that of a military context.

II. The Frequency Fallacy

Corpus linguistics,[74] however, has not been without its critics. This next part outlines and elucidates the largest methodological problem: that of reliance on frequency. This Part proceeds as follows. It first, briefly posits that corpus linguistics relies on frequencies to determine ordinariness. Next, it explains why such a reliance is problematic. Last, it highlights how a faulty reliance on frequency data undermines nearly every corpus analysis to date.

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[72] Dennis Baron, *Antonin Scalia Was Wrong about the Meaning of 'Bear Arms'*, Wash. Post, May 22, 2018. For an alternate analysis of COHA data, *see* Joel William Hood, *The Plain and Ordinary Second Amendment:* Heller *and Heuristics*, at 13-19, Social Science Research Network, posted April 17, 2014, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425366. Lawyer-linguist Neal Goldfarb has provided the most comprehensive corpus analysis of "bear arms" on his blog, LAWnLinguistics, https://lawnlinguistics.com/corpora-and-the-second-amendment/, 8 Aug. 2018.

[73] Alison L. LaCroix, *Historical Semantics and the Meaning of the Second Amendment*, The Panorama (Aug. 3, 2018) http://Thepanorama.shear.org/Wp-Content/Uploads/2016/12/PanoHeader1206.Png, 3 Aug. 2018, thepanorama.shear.org/2018/08/03/historical-semantics-and-the-meaning-of-the-second-amendment/.

[74] When this article refers to "corpus linguistics" it thus refers to the application of corpus linguistics to the law, rather than to corpus linguistics in general, which does not suffer from these same problems as it deals with different questions.

A. The Implicit Methodology: Common Means Ordinary

Legal corpus linguistics (LCL) has never explicitly stated its methodology by which it determines ordinary meaning. However, by method of induction, one can clearly see a straightforward methodology emerge. In short, it is that the most frequent usage is the ordinary usage. This methodology underpins the uses of LCL mentioned in the previous section. For instance, "Commerce" should mean "trade or exchange" rather than intercourse, "discharge," in *Rasabout*, should mean a single shot rather than multiple shots, and "bear arms" should refer only to the collective, military sense rather than to the individual sense because, in each case, the former dominates the latter in terms of frequency. In summary, it can be called the "Frequency Hypothesis": "where an ambiguous term retains two plausible meanings, the ordinary meaning of the term (and the one that ought to control) is the more frequently used meaning of the term."[75]

B. The Current Critique: A Frequentist Methodology Ignores Lurking Variables

Though it might seem appealing on the surface, the Frequency Hypothesis collapses into a "Frequency Fallacy." As both corpus supporters and opponents have noted, frequency is not a good indicator of ordinary meaning, as frequency in a corpus might be determined by variables other than the underlying probability of ordinariness.

Though the proponents do not put it in these terms, it's fairly straightforward to state that the frequency fallacy is a specific instance of a broader bedrock principle in statistics, that of the lurking variable. A lurking variable is "a potential confounding variable that has not been measured and not discussed in the interpretation of an experiment or observational study."[76] A lurking variable creates the (false) appearance of causation between two variables. For instance, there is the strong association between the number of firefighters who respond to a fire and the amount of damage done by the fire. One shouldn't conclude that the firefighters may be responsible for the damage: the lurking variable is the size and seriousness of the fire. More serious fires require more firefighters and also result in more damage.[77]

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[75] Ethan J. Herenstein, Essay, *The Faulty Frequency Hypothesis: Difficulties in Operationalizing Ordinary Meaning Through Corpus Linguistics* 70 Stan. L. Rev. 112, 113 (2017).

[76] Christopher Clapham & James Nicholson, The Concise Oxford Dictionary of Mathematics (5th ed. 2014). 2

[77] Examples of lurking variables—and their close cousins, confounding variables—abound. There is a strong correlation between ice cream sales and drowning deaths per month, but it would be a mistake to infer a causal relationship (i.e., ice cream causes drowning) because of the presence of an important confounding variable which causes both ice cream sales and an increase in drowning deaths: summertime. Brian L. Joiner,. *Lurking Variables: Some Examples*, 35 Am. Stat. 227, 233 (1981). Similarly, a government study collected data on the death rates in nearly 6,000 hospitals in the United States should have taken into account the lurking variable — severity of illness. David S. Moore & George P. McCabe, Introduction to the Practice of Statistics (2003). In World War II, bombing accuracy increased with the amount of enemy fighter opposition. The missing variable correlated with both accuracy and fighter opposition

Similarly, in corpus linguistics, a word usage might be more frequent than another for reasons that have nothing to do with ordinariness. Generalizing, neither the presence nor the absence of corpus entries indicates ordinariness. This is because common appearances might not relate to the ordinariness of the word at all, but rather might relate to either a) the prevalence of the underlying phenomenon or b) its newsworthiness.

For this reason, the presence of evidence does not indicate that just because something is less frequent it is less ordinary. When a term appears frequently in a corpus, one cannot infer that other terms are extraordinary uses, or when a term that does not appear in a corpus, or appears very infrequently, one cannot infer it is an extraordinary usage, because corpus frequency is influenced by factors other than ordinariness, such as the prevalence or newsworthiness of the underlying phenomenon that the term denotes. As Solan & Gales and Lee & Mouritsen have noted, a term might be absent because the underlying concept is rare, not because the usage is unusual.

Solan & Gales write about the "blue pitta," a bird found in Asia but not North America, but that name doesn't appear in any corpus of American English. Nonetheless, "it is no less a bird, and we are no less comfortable calling it a bird just because it does not appear in corpora of American English."[78] That is, to paraphrase Justice Scalia, if you would say that the blue pitta is not a bird at a "cocktail party," people would "look at you funny."[79] Solan & Gales conclude that "a particular meaning may be absent from a corpus concerns facts about the world, rather than facts about or knowledge of language," and that the absence of frequency does not indicate an extraordinary meaning, again showing that frequency is not correlated with ordinariness. Absence of evidence is neither absence nor evidence.

There must have been a cocktail party of ornithologists-textualists, as Justice Thomas Lee notes the frequency fallacy as the "dodo" problem – that is, just because the dodo would not appear in the corpus as frequently as other birds does not mean it is any less a bird:

> A dodo, after all, is an obsolete bird. But it is still a bird. And a person who happened to discover a remaining dodo on a remote island would certainly be understood to be in possession of a bird. Such a person would be covered, for example, by the terms of a rental agreement prohibiting tenants to keep "dogs, cats, birds, or other pets" in their apartments. If you are found in possession of a caged dodo, you are not likely to escape the wrath of the landlord by insisting that a dodo is an obsolete sort of a bird.[80]

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was cloud cover: if clouds obscured the target, the fighters usually did not come up and the aiming errors were ordinarily very large. Frederick C. Mosteller & John W. Tukey, Data Analysis and Regression 318 (1977). Other examples include the fact that countries that trade more fight more (as they are closer); crime rates correlate with restaurant patronage (since the same pleasant weather draws more people outside); height and salaries are related where gender is the hidden variable; storks are a fantastic predictor for the number of babies being born in areas of Oslo; the hidden variable was the number of chimneys in the area, as storks like nesting there. Some correlations are completely spurious and lack any explanatory variables, lurking or otherwise. For a humorous list, see: http://www.tylervigen.com/spurious-correlations.

78 Solan & Gales, *supra* note 45, at 1315.

79 Johnson v. United States, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting).

80 Lee & Mouritsen, *supra* note 11, at 21.

Whether the blue pitta or the dodo, the frequency fallacy can cause corpus linguistics to "go to the birds," since corpus data may reflect the fact that a given sense of a certain term is a more factually common iteration of that term in the real world, but not an ordinary or extraordinary use of the term.

C. How the Frequency Fallacy Undermines Corpus Analyses of Legal Cases

The unreliability of frequency is not simply an abstruse point of interest but undermines each corpus analysis that relies on it—that is, every corpus analysis shown above. Here, we will review these analyses and show how they rely on the flawed frequency fallacy.[81]

1. Muscarello v. United States

The analysis in *Muscarello* fails due to the frequency problem. First, Justice Breyer's analysis fails even the flawed frequency test. Starting with Justice Ginsburg's dissent, Breyer's opinion has been legitimately criticized for its bizarre data analysis. In response to the majority's survey of newspaper and magazine articles, Ginsburg wrote, "The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning 'perhaps more than one-third' of the time. One is left to wonder what meaning showed up some two-thirds of the time."[82] Re-analyzing the case using corpora, both Stephen Mouritsen[83] and Neal Goldfarb[84] have criticized the Court's opinion, noting that in corpora searches, when people talk about people carrying objects, more often than not the people carrying them have them on their person outside of a vehicle.

However, while the *Muscarello* opinion is indeed flawed, the criticisms of the decision fall prey to the failed frequency fallacy. The fact that carrying guns on one's person is more frequent that carrying guns in a car does not indicate anything about the ordinariness of either term but indicates only that people have more occasion to talk about people carrying objects outside of vehicles than inside them. This could be because people spend much more time outside of vehicles than they do in them, or because there aren't that many occasions on which we talk about the things we passively have with us in our cars. Regardless, insofar as frequency does not indicate ordinariness, that carrying a gun on one's person is more frequent indicates only that it is spoken about more frequently, not that the use of any term is more ordinary or not.

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81 It is important to note that the "just-so" stories offering conjecture of why one term might appear more frequently than another are offered only for illustrative purposes; the frequency fallacy is mathematical, and applies regardless of these imaginary vignettes. See Stephen Jay Gould, "The return of hopeful monsters." *Natural history* 86.6 (1977): 22–30.

82 *Id*. at 143.

83 Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 B.Y.U. L. Rev. 1915 (2010). *See also* a more tempered critique in Lee & Mouritsen, *supra* note 11, at 803–04.

84 Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 B.Y.U. L. Rev. 1359 (2018).

2. "Commerce"

In his analysis of the Commerce Clause, Barnett explicitly relied on the Frequency Hypothesis, writing that "[w]ere the term 'commerce' to have had a readily understood broad meaning, one would expect it to have made its appearance in this typical newspaper."[85] In other words, Barnett argues that the more frequently a particular usage of commerce is encountered, the more ordinary that usage is.

This assumptive argument fails by the frequency fallacy. Just because "commerce" more frequently meant trade and transportation in the newspaper corpus does not mean that using "commerce" to indicate manufacturing or production would have been odd or extraordinary, since there could be a number of reasons that the writers at the Pennsylvania Gazette wrote about trade more often than production. Pennsylvania was the center of colonial-era commerce. The writers would have had more exposure to commerce and commerce-related stories, and thus, as today, would write about what was convenient, not necessarily what was important. The publishers likely pushed for commercial stores since their readership and advertisers were primarily based in Philadelphia. Further, it's unclear whether the farmers in rural Pennsylvania could, or would, have read the Gazette if offered, making stories relating to production far less relevant to the paper. Perhaps exchange was more newsworthy than production given not only the ocean winds but the political winds; the American Revolution was started, in large measure, for reasons related to taxes, and thus trade had far stronger political valence than production. All these would be reasons why "commerce" would appear much more as describing trade rather than manufacturing or production without any claims about the ordinariness of the underlying terms.

Regardless, these "just-so" are merely illustrative of the broader, mathematical point: Barnett's reliance on frequency alone as an indicator of ordinariness cannot be defended.[86]

3. State v. Rasabout

Justice Lee's concurring opinion in *Rasabout* also fails because of the frequency fallacy. Justice Lee assumed that because "discharge" was more frequently used to refer to a single gunshot than to the emptying of the entire magazine, the term "discharge" would be understood as referring to a single gunshot. However, that a term is more frequent does not mean that it is more ordinary: it might be more frequent simply be because it's more common to fire a single shot than it is to empty an entire cartridge.[87] Thus, frequency alone is not sufficient to determine ordinariness.

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85 Barnett, *supra* note 52, at 857.

86 Even on its own terms, frequency analysis has no principled threshold. It is unclear whether 95-5 is the same as 62-38. This following section offers a way to calculate whether a meaning is ordinary and whether more than one meaning may be ordinary.

87 This relates to Benford's law. *See* http://www.oxfordreference.com/view/10.1093/acref/9780199679188.001.0001/acref-9780199679188-e-1819#.

4. "Officers of the United States"

Similarly, the *Lucia* amici commit the frequency fallacy: the presence of frequency does not indicate the presence of ordinariness. There is a very simple reason why the term "officer" might more frequently refer to any government official than to the highest government officials: there are far more ordinary government officials than high government officials, so even if both can be called "officer," by sheer force of numbers "officer" will more likely refer to ordinary officials than to higher officials. Another reason could be that higher officials could normally be called "officers," but had other, more specific and descriptive terms (such as "Postmaster General") to use as reference.

5. "Emoluments"

Simply because "emoluments" more frequently referred to the narrow, public-office sense than to the broad remuneration sense does not mean that the former is more ordinary or the latter is extraordinary. It is also easy to see why the term "emoluments" might have more commonly referred to the narrow sense, of being in the employ of a foreign government, for while it is more common to accept gifts than it is to be granted a foreign title, an American public servant in foreign employ is far more sensational, and therefore newsworthy. Further, there are many other terms, such as "gifts," that could more easily refer to the broader term than "emoluments," so it could be that "emoluments" was a perfectly ordinary term for payments, even though it wasn't used; it's just that gifts were not talked about much.

6. "Bear Arms"

The same frequency fallacy afflicts Baron's and LaCroix and Merchant's analyses of the Second Amendment. Again, one cannot infer anything from frequency other than frequency itself. There could be many reasons why the military use of "bear arms" occurred far more frequently than the individual, self-defense use that do not at all indicate that the former sense was the ordinary one, or the latter sense the extraordinary one. For instance, there would have been more opportunity and motive to write about military uses than individual ones. Reporters have incentive to write about war, both because sensationalism sells papers, but also because war is a catastrophic event (in both original senses—as causing much destruction and being an event of major significance). The same opportunity or motive does not apply to individual uses of guns. As to opportunity, given that individual carry of guns was near-ubiquitous, reporters would not write about something that was so obvious and accepted, unless they were conducting a sociological study or promulgating a regulation on the status quo.[88] Again, these speculative "just-so" stories are merely illustrative; it is mathematically true that one cannot derive ordinariness from frequency, and thus Baron cannot derive the ordinariness of "bear arms" from the relative frequency of its uses.

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[88] *See* Joyce Lee Malcolm, To Keep And Bear Arms: The Origins Of An Anglo-American Right (1994).

In sum, it is entirely possible that in its most empirically frequent use, "bear arms" was not synonymous to "carry arms." But that does not matter for linguistic or legal interpretation. Rather, the question is: is "bear arms" a sufficiently ordinary way to describe individual gun possession?

D. Conclusion: A Challenge to the Corpus Enterprise

In sum, as both proponents and opponents of corpus linguistics have noted, the assumption that frequency correlates with ordinariness is flawed.[89] Thus, neither frequency nor absence is a sufficient basis from which to draw conclusions: simply because a word appears more frequently in a corpus does not mean that it is more prototypical or ordinary—nor does the absence of a word mean that it is extraordinary. Thus, the entire premise of corpus linguistics—that objective corpus data can provide interpretative insights—is threatened. If the inputs of frequency do not lead to the outputs of ordinariness—or if corpus linguistics cannot offer a methodology that leads from data to ordinariness—then corpus linguistics does not fulfill its mandate of being more objective or reliable. If anything, it might do more harm than good, since a corpus analysis might give a false sense of security to solidify conviction about the rightness of an incorrect interpretation.

Corpus commentators have noted the frequency fallacy, but until now have been stumped. The frequency fallacy cuts to the heart of corpus linguistics in the law, and requires a response if corpus linguistics is to proceed.

III. Solving the Frequency Fallacy

The previous section showed that the frequency fallacy— that is, the mistaken assumption that how common a word is indicates how ordinary it is—fatally undermines specific corpus analyses and foundationally challenges the current practice of corpus linguistics in the law. Those that have noted these deficiencies and thus dismissed corpus linguistics as an interpretive tool.[90]

However, while agreeing on the diagnosis, this paper does not agree on the prognosis. Rather, a deeper understanding of the mechanics of the frequency fallacy can illuminate an answer that can salvage legal corpus linguistics.

This answer consists of two steps. The first is based on the argument that the frequency fallacy is caused by a particular method of discerning ordinary meaning, imported from the world of the dictionary but unsuited to the world of the corpus. To that end, this section will first clarify the distinction between the extension of a term and the linguistic abstraction of a fact pattern by using *Yates v. United States* and *United States v. Marshall* as illustrations. While this distinction exists in statutory interpretation in general, it is largely moot in the world of dictionaries, which, as will be explained below, are technologies that are amenable only to the extension method. This distinction, however, will be crucial with regards to

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[89] The frequency fallacy is compounded in corpora searches by the related issue of Zipf's problem.http://www.oxfordreference.com/view/10.1093/acref/9780199679188.001.0001/acref-9780199679188-e-2264#.

[90] *See* Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. Rev. 1503 (2017); Herenstein, *supra* note 75.

corpus linguistics, as taking an abstractions approach is the first step in solving the frequency fallacy.

The next section describes the second step necessary to avoid the frequency fallacy. Within a given factual setting, one must seek instances in the corpora not only of the presence of the term of interest, but also of situations where the term could have been used but wasn't. Otherwise, one commits the statistical error of selecting on the dependent variable.

Together, these two steps can answer the frequency fallacy. The last part of the section illustrates this by revisiting the cases outlined in the prior two sections, and showing how this two-step solution can make the analyses of these cases more mathematically sound—often with surprising results.

A. Two Methods of Discerning Ordinary Meaning: Extension and Abstraction

This section will highlight a distinction between two methods of determining ordinary meaning, a distinction which is always present but has often been moot, as the technology of dictionaries is amenable only to one of these methods. However, as the next section will argue, applying that method to the world of the corpus is what leads to the frequency fallacy.

In general, the schematic of a legal interpretive problem (specifically that of judging ordinary meaning) can be described as follows: there is a statutory or constitutional term A and an interpreter is trying to discern whether factual situation B is included in A's ambit. For instance, does "carry a firearm" apply to a gun in the glove compartment? "Commerce" to manufacturing? "Bear arms" to personal ownership of an AK-47?

Conceptually speaking, we can determine whether word A ordinarily includes element B in two ways. The first starts with the word: to identify word A, determine what its membership condition is, and then discovers whether B fits it, and thus is a member of A. The second is to start with the facts: to identify element B, determine its salient features, conceive of the sets of things that can describe those features, then see whether A can comfortably be included as one of those sets.

Thus, what we call "ordinary meaning" can comprise one of two different processes: the first we can call extension (for extending the meaning of term A to factual situation B); the second we can call abstraction (for abstracting the salient features of token B to type A).

An extensions approach asks: can we fairly apply the statutory term to the facts? It thus determines whether the fact pattern is an ordinary instance of the term by these steps:

1. Define the statutory term/hold the legislative (or linguistic) facts constant
2. Determine a membership condition
3. Determine whether the factual case fulfills this condition. If it does, the statute applies to this case.

Conversely, an abstractions approach asks: can the fact pattern be fairly abstracted as the statutory term? To determine whether the term an ordinary label for the fact pattern, it follows these steps:

1. Determine the salient features of the facts/hold the adjudicatory/evidentiary facts constant
2. Conceptualize what terms could, or best, describe these facts
3. Determine whether we ordinarily conceive of those facts with the statutory term. If yes, then the case falls under the statute.

B. The Extension: Abstraction in Practice

Yates v. United States

To a skeptic's ear, this might seem like a meaningless distinction. Indeed, these approaches will often approximate each other, as they should. We would hope that regardless of the beginning point—law or facts—the endpoint would be the same. However, in hard cases, this distinction can be clarifying, even—depending on which side you adopt—dispositive.

This distinction was dispositive, for instance, in *Yates v. United States*.[91] In that case, a federal agent caught Captain Yates fishing undersized red grouper in violation of a federal conservation statute. After the officer departed, Yates ordered a crew member to throw the fish overboard. For this, Yates was charged with violating the Sarbanes-Oxley Act of 2002, the law passed in the wake of the Enron accounting scandal, which states that anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation may be fined or imprisoned for up to 20 years.[92] Yates moved for acquittal, pointing to the statute's origin, and arguing that the statute's reference to "tangible object" subsumes objects used to store information, such as computer hard drives, not fish. The trial court denied Yates' motion, convicting him of violating the statute. The 11th Circuit affirmed.

The Court reversed, deciding for Yates. In so doing, *Yates* offered a battle royal between two of the court's textualists, Justice Alito and Justice Kagan, one that clearly illuminates the extension-abstraction distinction.

In concurrence, Justice Alito, relying on *ejusdem generis* rule of construction, opined that Sarbanes-Oxley's "tangible object" does not cover Captain Yates dumping red grouper:

the term 'tangible object' should refer to something similar to records or documents. A fish does not spring to mind—nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. All are "objects" that are "tangible." But who wouldn't raise an eyebrow if a neighbor, when asked to identify something similar to a "record" or "document," said "crocodile"?[93]

Justice Kagan, on the other hand, disagreed, arguing in dissent that Captain Yates should be liable for destruction of evidence under Sarbanes-Oxley, since a fish is a "tangible object":

So if the concurrence wishes to ask its neighbor a question, I'd recommend a more pertinent one: Do you think a fish (or, if the concurrence prefers, a crocodile)

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91 Yates v. United States, 574 U.S. 528 (2015), 135 S. Ct. 1074, 1082 (2015).
92 18 U.S.C. §1519.
93 Justice Alito at 135 S. Ct. 1088.

is a "tangible object"? As to that query, "who wouldn't raise an eyebrow" if the neighbor said "no"?

In this case, the extensions-abstractions approach is dispositive: both Justices Alito and Kagan arrive at their conclusions because they take one side of the extension-abstraction divide. That is, both of them take a textualist approach, but it is this previously unmentioned distinction that guides their textualism to a certain conclusion. Justice Alito takes the position he does because he adopts an extensions approach: he determines the membership conditions of "tangible object" (that is, that it should refer to something similar to records or documents) and then determines that these conditions do not apply to the facts (because fish are not financial records, they are not "tangible objects" as intended by the statute). Alito explicitly thinks of (and then rejects) the extension or application of the meaning of "tangible object" to many different factual scenarios; that is, he holds the meaning of the statutory term constant, and tries to apply it to certain facts.

Justice Kagan, on the other hand, takes an abstraction approach. She first begins with the facts in question, determining, by citing Dr. Seuss, that an ordinary way to define these facts are the statutory terms "tangible" and "objects."

Indeed, not only does the extension-abstraction distinction explain the *Yates* decision, but it saves the case from an otherwise devastating critique by Prof. Victoria Nourse.[94] Ordinary meaning textualism is supposed to increase objectivity and predictability. But if Justices Alito and Kagan can disagree about the ordinary meaning, then the ordinary meaning neither increases objectivity or predictability, but is rather subjective preference by another name.

The extension-abstraction distinction, however, answers Nourse's question. It shows that the Justices disagree not because they are acting capriciously, but because, while they both adopt the text as dispositive, they take two different approaches to ordinary meaning: Alito with extension, and Kagan with abstraction. This distinction shows that the disagreement in *Yates* is not due to the internal inconsistency of ordinary meaning textualism, but rather because divergent approaches to analyzing the text lead to divergent answers.[95]

In addition to defending textualism against an otherwise compelling indictment, the extension-abstraction distinction is nicely illustrated in Yates.

United States v. Marshall

Another case that illustrates the extension-abstraction distinction is *United States v. Marshall*.[96] A federal statute set a five year mandatory sentence for anyone who sells more than one gram of a "mixture . . . containing a detectable amount" of LSD.[97] Since LSD weighs almost nothing, it must be consumed (and therefore sold) with a carrier, most commonly blotting paper. The question before the court,

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94 *See* Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 Fla. L. Rev. 1409 (2017).

95 It should be noted that another answer to Nourse's question is whether the Sarbanes-Oxley Act focused on financial evidence or on evidence in general.

96 United States v. Marshall, 908 F.2d 1312 (7th Cir. 1990), aff'd sub nom. Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991).

97 21 U.S.C. § 841(b) (1994).

therefore, was whether blotter paper is a "mixture or substance containing" LSD. As the court wrote:

> That phrase cannot include all "carriers". One gram of crystalline LSD in a heavy glass bottle is still only one gram of "statutory LSD". So is a gram of LSD being "carried" in a Boeing 747. How much mingling of the drug with something else is essential to form a "mixture or substance"?[98]

Marshall is a case well-known to law students because it is an excellent illustration of the clash between textualism and purposivism. Judge Easterbrook, writing a textualist opinion for the majority, applies the statute in this case because he thinks the LSD a legitimate form of "mixture." Judge Posner, writing a purposivist dissent, thinks that such a conclusion is "loony,"[99] "crazy,"[100] "irrational,"[101] making makes no more sense than "basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it," and therefore proposes to rewrite the statute.

But *Marshall* could also be viewed through a purely textual lens as a dispute between extension and abstraction. Judge Easterbrook takes a top-down, definitional, and extensional approach: he has a rough definition of the "substance" and "mixture" and then applies these definitions to various hypothetical factual situations to elucidate the concepts, finding that blotter paper is indeed a mixture: "LSD is applied to paper in a solvent; after the solvent evaporates, a tiny quantity of LSD remains. Because the fibers absorb the alcohol, the LSD solidifies inside the paper rather than on it. You cannot pick a grain of LSD off the surface of the paper. Ordinary parlance calls the paper containing tiny crystals of LSD a mixture."[102]

Judge Posner, on the other hand, takes a bottom-up abstraction approach, figuring out how else to categorize or classify the blotter paper-LSD compound, classifying it instead as a vehicle: "The blotter paper, etc. are better viewed, I now think, as carriers, like the package in which a kilo of cocaine comes wrapped or the bottle in which a fifth of liquor is sold."[103]

There are a number of other cases where this distinction applies. For now, we will part with the illustrations and move to the next step: to show how the extension-abstraction distinction can save legal corpus linguistics.

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98 *Marshall* at 1317.

99 *Id.* at 1332. ("[I]t would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it.")

100 *Id.* at 1333.

101 *Id.* at 1334.

102 *Id.* at 1317.

103 Id. at 1335.

C. A New Diagnosis: Applying the Dictionary's Extensions Method in a Corpus World

The application-extensions distinction explains the frequency fallacy; it is the use of the extensions method that leads to the frequency fallacy.

It is understandable that the extensions approach is used often, as that is what is currently used in the vast majority of opinions, since the technology of the dictionary enables it. Though the extension-abstraction distinction holds true in statutory interpretation in general, it is generally moot, since the vast majority of opinions follow the ordinary extensions approach. This is because the interpretive technology available – namely, the dictionary – cannot handle an ordinary abstractions approach. Extensions make sense in an age of dictionaries. Dictionaries cannot abstract the optimal term from descriptions of facts (that is a very difficult problem, something only human intuition can now do).

Because of the dominance of the dictionary, an extensions approach is seen in the vast majority of cases. As Justice Ginsburg replied to Stephen Colbert's question as to whether a hot dog is a sandwich, "tell me what the definition of a sandwich is, and I'll tell you whether a hot dog is a sandwich."[104] Though lighthearted, the Court's approach has been to start with a term (often defining the term with a dictionary) and seeing whether that definition applies to the factual situation. Given the primacy of the dictionary, mostly for lack of an alternative method, the extensions approach has remained dominant in opinions. For this reason, it is natural that people should transfer the familiar approach to the world of corpus linguistics.

An extensions approach can never be used in corpus linguistics, however, since an extensions approach in a corpus analysis inevitably leads to the frequency fallacy. This is because to determine the membership criteria of a term in a corpus – that is, to see whether a term can be applied to various factual situations – one necessarily needs to compare the corpus frequency of the different scenarios. This describes both the frequency fallacy *and* the extensions approach. That is, the extensions approach uses the frequency hypothesis as its methodology.

Each of the examples above tries to "define" a term, as it were—whether the term is "commerce," "carry," "discharge," etc.—by referring to the corpus as a dictionary of sorts, the assumption being that the most popular term is the best definition. In so doing, these examples roll the otherwise distinct three steps of defining the term, establishing membership criteria, and applying those criteria to certain facts (outlined in the beginning of this section) into one step. Indeed, they do so in reverse order: the facts (i.e. appearances in the corpora) determine the membership criteria and ultimately the definition of the legal term. For instance, because military-related terms are the most prevalent when the term "bear arms" is used, "bear arms" means something related to trade. And so on for the other examples.

By defining a term by the majority usage, you automatically shaft the minority uses, which could otherwise be perfectly normal uses of the term. Thus, the frequency fallacy is caused by importing the method of the dictionary.

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[104] Debra Cassens Weiss., *Is a Hot Dog a Sandwich? Ginsburg Considers Colbert Question.* ABA Journal Online, retrieved from http://www.abajournal.com/news/article/is_a_hot_dog_a_sandwich_ginsburg_considers_colbert_question/.

D. The Solution: Using an Abstractions Approach in Corpus Analyses

If the cause of the frequency fallacy is the extensions approach, an abstractions approach can avoid the frequency problem, with the proper precautions.

An abstractions approach, per the three steps mentioned earlier in this Part, asks the question Justice Kagan asked in *Yates*: how *else* would this situation be described? And unlike *Yates*, which relies on intuition alone to answer this question, the corpus provides a tool for the answer, and would proceed as follows: it would look at instances of how often the facts appear in the corpus, see what relevant terms are ordinarily used to describe these facts, and determine if the legal term is one of those terms.

For instance, (more illustrations are forthcoming in the next section) if one were determining whether a dodo was indeed a bird, one would search the corpus for instances of "dodo" (rather than instances of "bird"). Thereupon, one would see that, indeed, there is no better term than "bird" to describe the dodo (indeed, because there is no other term). Thus, "bird" is a perfectly ordinary way to describe a dodo.

1. Searching for Alternatives

Another example highlights an important methodological point: one must search not only for the legal term in question, but also for other terms that could potentially describe these facts. This parallels what Solan & Gales call "double dissociation": demonstrating "that the circumstances described by the infrequently used term are present in the corpus but spoken about differently."[105]

For instance, in determining whether a blue pitta was indeed a bird, one would search the corpus for "blue pitta." There being no instances where "blue pitta" appears, one concludes that the corpus cannot speak to the question one way or the other. This is different from the earlier, extensions approach, which would say that since "bird" did not include any instances of "blue pitta," a blue pitta is not a "bird."

That, indeed, was the approach Lee & Mouritsen took in their analysis of *Taniguchi*: since there was no instance of the term "interpreter" referring to a written interpreter, "interpreter" must refer only to an oral interpreter.[106] That may be the correct conclusion, but the analysis alone does not support the conclusion. Rather, one must show that judicial interpreters are described using different language when discussed. Otherwise, much like the blue pitta, it could be that the term is absent from the corpus (perhaps because it is quite rare) and therefore one cannot conclude anything from the absence of evidence at all.

2. Ordinariness by relative frequencies

The question arises: what is the numerical threshold for ordinariness? Double dissociation is helpful not only for discerning between absence of evidence and

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[105] Solan & Gales, *supra* note 45, at 143. This is not dissimilar from the concept of dependent variable selection.

[106] Lee & Mouritsen, *supra* note 11, at 848.

evidence of absence, but also in determining ordinariness via relative frequencies. That is, relative to the factual situation, what is the frequency of the legal term used versus other terms?

If the legal term is used relative to other terms to describe similar factual situations in the overwhelming majority, then one can comfortably say that it is an ordinary use.[107] This is the case in the dodo example – "bird" is used the vast majority of the time to describe dodos. Similarly, as we will see below, in the *Rasabout* case, "empty" (not "discharge") is the majority term used to describe shooting multiple shots (or emptying an entire cartridge), so one can comfortably conclude that "empty" is the ordinary way to describe shooting multiple shots.

Things become trickier when there is no clear majority term, or where there is a plurality term. For instance, what if there are two competing terms that have, say, are each used 40% of the time? Or if there is one term used 60% and another used 40%?

This is a difficult estimation on a number of levels. First, as will be described below, these numbers often have weak statistical power. A rule of thumb that this paper will propose is that mathematical calculations are *ipso facto* invalid if they are conducted by lawyers. For instance, none of the corpus analyses conducted by lawyers only[108] have mentioned that when one draws conclusions from data, one needs to employ the rule of statistics. One such rule is that small sample sizes are often misleading. A good rule of thumb in this regard is that if a single person (without an army of research assistants) can count all the instances of a term in a corpus, then the sample size is likely too small.[109] Indeed, uses of corpus linguistics in linguistics have at least thousands of records, if not more.

For this reason, while it would be tempting to say that the 60% term is ordinary term and 40% is not (or is at least less ordinary), one cannot conclude as such given the (likely) too-small sample size.

Second, there is a threshold question of the meaning of "ordinary meaning." Gales & Solan make a helpful distinction between two concepts of what makes meaning "ordinary":

> Ordinary Meaning 1 ("OM1"): The ordinary meaning of a term is a description of the circumstances in which the term is most likely to be used.
>
> Ordinary Meaning 2 ("OM2"): The ordinary meaning of a term is a description of the circumstances in which members of a relevant speech community would express comfort in using the term to describe the circumstances. More than one meaning may be ordinary for a term under this theory.[110]

One could say that this is the difference between *the* ordinary meaning (OM1) and *an* ordinary meaning (OM2).[111]

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[107] Determining that something is *not* ordinary is more difficult, as we will note below.

[108] The exception that proves the rule is the work of Stefan Gries.

[109] This rule is defeasible if the effect size is sufficiently large.

[110] Solan & Gales, *supra* note 45, at 1342-1343.

[111] Justice Scalia appears to endorse OM1 in a number of famous cases. For instance, in *Smith v. United States*, 508 U.S. 223, 242 (1993), Justice Scalia stated that "[t]he Court

The question regarding pluralities or narrow majorities becomes a lot easier if one takes an OM2 approach; that is, one is not trying to say that a certain meaning is extraordinary (which is harder to do, given the sample size problems) but rather that there is more than one ordinary way to describe this factual situation, a proposition that doesn't require sharp confidence intervals.

If one, though, does indeed have sufficient sample size, then one can look at the relative ratios. If a legal term is being analyzed, then it likely arises in what H.L.A. Hart called a "peripheral" case. Indeed, the statutory interpretation questions that reach the courts, especially higher levels of the court, are often "hard" problems. If so, then there exists a "core" case—or at least a case that is more clear-cut. One then would compare the ratio within the peripheral case to the ratio within the core case. For instance, below we analyze the phrase "carry" in *Muscarello*, finding that it is a minority usage, perhaps 30% to 50%. The absolute value of the ratios themselves would suffice for OM2, but from the relative ratios we can infer that if 30% is sufficient for the "core" (or, rather, undisputed) case of carrying weapons, then 30% would also sufficient to establish "carry" in a car as ordinary, even according to OM1.

One might ask—doesn't this method replicate the frequency fallacy? The answer is, it depends. If the concern surrounding the frequency fallacy was that other lurking, and linguistically unimportant, variables (such as popularity) might influence the relative frequencies between two terms, then this approach does not implicate this problem, as keeping the facts constant mitigates much of the problem of minority or rarer instances being swallowed by majority instances, since one is looking only at minority instances (for example, the dodo). Therefore, it does not matter whether there is another, more numerous use of the legal term (such as sparrows).

One can ask a further question, though: within even the minority instance, can there not be a lurking variable that determines whether a certain descriptor is used more often than another? The answer is, yes—that variable is the ordinariness of the term, by definition. This is nearly (though not quite) a tautology: the ordinary term is the term used most comfortably to describe a certain set of facts. If people use the term (such as "bird") to describe a series of facts (like dodo), it shows that they use that term comfortably, and thus it is ordinary.

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does not appear to grasp the distinction between how a word *can be used* and how it *ordinarily* is used." In *Chisom v. Roemer*, 501 U.S. 380, 410 (1991), Justice Scalia wrote that the Court's job "is not to scavenge the world of English usage to discover whether there is any possible meaning." "[O]ur job," he says "is to determine … the ordinary meaning." Justice Scalia, in these cases, seems to adopt an approach that endorses only *one* ordinary meaning. OM2 is endorsed, apparently, by Justice Scalia's "acid test" quoted above. Further, Professors Hart and Sacks state that one of the purposes of the dictionary is to "answer […] hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible." As Mouritsen notes, it is this same concept of what is "linguistically permissible" that seems to actuate the reasoning in *Muscarello*. The Court states only that "one *can*, as a matter of ordinary English, 'carry firearms' in a wagon." This "linguistically permissible" characterization of ordinary meaning also explains the majority's satisfaction with finding "carry" in a car instantiated in only one-third of the sentences in its database search.

However, if one is an epistemological skeptic, and believes that there is no way to recreate what Chomsky calls "competence" from "performance,"[112] given that ordinary meaning is "competence" (i.e. what a native speaker would comfortably use to describe a set of facts), then, indeed, this approach falls prey to the frequency fallacy, since every reliance on frequency is *ipso facto* a fallacy.

3. Revisiting Cases

With the abstractions method in mind, this paper will now return to the cases mentioned above, and execute a corpus analysis on each without the frequency fallacy.

a. Muscarello v. United States

The prior corpus analyses of *Muscarello* looked for cases of guns in cars where "carry" appeared, instead of looking for all the terms describing conveying a gun in a car. Correct analyses must show that they described conveying a gun in a car with other terms, since otherwise these could be these were the only examples of carrying a gun in a car, and "carry" a common term despite its low frequency.

We performed such a search. The first search determined how often "carry" described a gun in a car. The next search looked for alternate terms for describing transporting a gun in a car. After so doing, we find the following percentages:

Muscarello	Gun in car
"Carry"	33.3%
Largest other term	50% (keep)

These data support the contention of Solan & Gales that *Muscarello* turns on the meaning of "ordinary."[113] That is, the data support both sides. Given that Justice Breyer took an "OM2" approach, it would seem that "carry" described conveying a gun in a car a third of the time would have sufficed to count as ordinary. Justice Ginsburg, in her "OM1" approach, based on the data here could plausibly claim that "carry" is not *the* ordinary term to describe these facts.[114] The second column of data is drawn from a prior analysis of *Muscarello*, and shows that, contingent upon a larger sample size for the first column, "carry" a gun in a car would not pass muster for OM1.

b. "Commerce"

To resolve the Barnett-Balkin Commerce Clause controversy, the following analyses would need to be performed: Balkin would need to find the instances of the concept of intercourse and show that "commerce" is, if not the majority term,

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[112] Noam Chomsky, Aspects of the Theory of Syntax (1965) ("We thus make a fundamental distinction between competence (the speaker-hearer's knowledge of his language) and performance (the actual use of language in concrete situations).").

[113] Solan & Gales *supra* note 45, at 134.

[114] Though the small sample size precludes us from making such a confident conclusion.

then at least a substantial minority term (such that, if someone in the 18th century were describing cultural interchange, contemporaries would not "look at [them] funny"). Barnett needs to show the opposite: that there were, indeed, other ways of describing cultural exchange, and that "commerce" is a minority usage to describe that factual pattern. The same applies to manufacturing or production. Since it is complex and nuanced, this paper will not attempt such an analysis.

c. State v. Rasabout

Lee's *Rasabout* decision searched only for "discharge" rather for other terms for emptying a magazine; he needed to show that they discussed emptying a magazine with other terms, since otherwise it could be that discussions of emptying a magazine were rare indeed and "discharge" a perfectly normal term. For that reason, Justice Lee should have showed that COCA contains examples of emptying a gun with other terms. Solan & Gales did this exact search, the results of which are below, and support Justice Lee's argument that using the term "discharge" for unloading a full magazine is an unusual use of the term. This effect size is sufficiently large such that the small sample size should not matter.

Rasabout	Shooting full magazine
Discharge	3%
Largest other term	84% ("empty")

d. "Bear Arms"

We repeat the analysis for the final, and most contentious, issue: the meaning of "bear arms" in the Second Amendment. Searching for cases of individual use of arms (defense and hunting), we find that "bear arms" is certainly the ordinary way to describe the individual use of arms.[115]

Bear arms	Individual defense	Military use
Bear arms	72.7%	51.4%
Other	24.9% ("carry arms")	43.2% ("take up arms")

Given the importance and sensationalism of war, the military context appeared far, far more often than individual use of weapons. This is compounded by the fact that much of COFEA consists of letters written by American leaders during the revolution, which unsurprisingly discuss the war.

Though it is not necessary to establish a parallel standard of proof, we repeated the analysis with the military use of the term "bear arms," finding that even in this "core" case, military exercises are described as "bear[ing] arms" just over 50% of the time, significantly less than the percentage of times individual use is described by "bear[ing] arms."

[115] Note that our sample size is small – there were only 11 corpus entries this author could find – but the effect size is large.

From these preliminary analyses, it would seem that Prof. Baron is wrong and that Justice Scalia in *Heller* was right. Stronger, though, than these quantitative results is a qualitative insight from the corpus, that the novelty of the Second Amendment was not the right to"bear arms" but "the right of the *people*." That is, in England only the nobility were allowed to bear arms. In America, every citizen, not just the propertied classes, were free men, permitted to bear arms.[116]

We see, then, that, contrary to corpus linguistics' detractors, the frequency fallacy problems with corpus linguistics are not endemic to quantifying interpretation per se, but caused by a specific error caused by importing a method from dictionaries into the world of the corpus.

IV. Reflections: Implications for Statutory Interpretation

With the solution to the frequency fallacy in mind, this section will discuss the potential risks and rewards of using corpus linguistics in this fashion. First, the complexity of calculations and the near-certainty of statistical error leads one to assume that corpus linguistics should be used as a qualitative example bank rather than a quantitative tool; and to the extent numbers are involved, they should be directional in nature. Second, though it leads to the frequency fallacy, this author predicts that the extension approach will remain dominant until the technological interface is fixed. Last, this paper concludes by arguing that the abstractions approach furthers the rule of law in a way that other tools could never do by replicating how ordinary citizens fuse law and reality.

A. How to Use a Corpus: Qualitative, Not Quantitative

There are generally two ways to use a corpus, one qualitative, the other quantitative. The qualitative (and, in the opinion of this author, the more powerful) tool is to look at the concordance lines for context. In this view, the corpus is like a very large and responsive example bank, which can give a qualitative flavor to the difference between terms. The quantitative view would be to encode and then tally these examples to form numeric purposes as shown below. But lost in the tumult is the fact that the qualitative use of corpora is— or should be—uncontroversial, and that much of the benefits of the corpus can be gained using the tools qualitatively. Nonetheless, we shall expound on the quantitative elements, since they are most ripe for abuse and, when combined with qualitative tools, can be potentially revolutionary.

One of the main critiques of corpus linguistics is that it aims to take the judgment out of judging. That is, judging is not scientific. It is a human endeavor, not the "mechanical jurisprudence" criticized by Roscoe Pound. Indeed, some corpus analysts have offered full-fledged "black box" statistical analysis. These are incorrect both in the method (judges and lawyers will never be able to interpret

[116] For fans of counterfactuals, if the Framers would have wanted to limit the Second Amendment to collective military exercises, they could have used the phrase to "take" arms, which exclusively referred to collective military use of arms.

much less produce these analyses) but also in its assumptions, of corpus linguistics, or any extra-legal data for that matter, as dispositive.

However, that is not the approach of this paper, which attempts to capture the benefits of objective quantitative data while retaining the nature of judgment in interpretation. In this view, corpus linguistics makes judging no more mechanical than does Westlaw. It does this in a few ways. First, it makes corpus work intentionally accessible, providing a system that is simpler than a Westlaw or Lexis search, so that interpreters can learn it (or have their clerks or research assistants learn it). Second, corpus analyses should not purport to be dispositive. No data scientist worth her salt would ever see the above analysis as anything but directional. It doesn't address the dismal sample size or any variation or standard errors. This isn't a scientific analysis but a qualitative guide to avoid errors in statistical thought. Third, there is also a fair amount of art in the data interpretation and allocation process. After all, the crux of the analysis is determining what the cognate phrases are that can serve as alternates to the statutory term. For this reason, others can conceivably criticize the approach above for not being formalist enough.

It also is worth stating a point that has not been stated, definitely enough but even at all, which is that the best uses of corpus linguistics are qualitative. The richness than an interpreter can extract from concordance lines is far superior to even the quantitative approaches listed above.

Doing so will avoid the danger of creating a false sense of data security. Bad data is worse than no data. This is because data give a decision-maker a sense of security that the decision is the correct one. Bad data give a decision-maker a real sense of security to arrive at a false conclusion. If even the leading practitioners can err in, say, committing the frequency fallacy, then the method ought to be more thoroughly beta-tested before used in the grave responsibility of redistributing resources or infringing on individual freedom.

B. The Tenacity of Extension

Even though the extension approach to corpus linguistics leads to the frequency fallacy, it will be difficult to finally extricate. To understand why, we must first understand why the extension methodology has enjoyed ubiquity to begin with.

The reason this extension methodology was imported was not intentional, but rather accidental: it is the vestige of technological design. First, the linguistic approach to corpus use came not from an intentional adoption of corpus methodology by lawyers also trained as corpus linguists, but rather by the indirect, subtle, yet ultimately far more effective method of the user design of the corpus technology. It is far easier to use a corpus to compare frequencies of facts while holding the term constant than it is to search for alternate terms given the same facts. This is because that is precisely what the corpus was designed to do: corpus linguists, in contrast to generative linguists, are interested in how language varies in the world, and how language is actually used; that is, they are interested in seeing the relative frequencies among different factual scenarios for a *single* term. That is how a corpus is laid out: search a term, see the variation in fact. While this is an interesting linguistics question, it would lead to misleading law, as described above. Thus, importing the corpus, lock, stock, and barrel, to the law led to this natural (mis)use of the corpus.

Second, the methodology imported from law is either that of the dictionary or, more likely, that of Westlaw or "Lexis on steroids."[117] When faced with a computer interface, lawyers do what they are habituated to do: put the term in the search box, see what comes up, analyze, repeat. This, however, leads to the frequency fallacy via dependent variable selection, as shown above.

The best fix, therefore, is to change the technology to re-align the design with the proper analysis. In the interim, the above will show how to do a proper corpus analysis given the existing technology.

Another reason why people might stick with the extension approach is that it operates under the assumption that all the evidence is there, whereas this approach contains far more uncertainty to minimize. The problem with the extension approach is that it is akin to a man looking for his keys under a streetlamp, not necessarily because they are there, but just because that where there is light. Just because a methodology does not give certainty is no reason to use the wrong methodology. Hopefully, in the adversarial system in court, or the discussion among researchers, the truth will eventually emerge.

C. The Peril of "Gerrymandering" a Word

Despite the potential benefits of corpus linguistics, its form – focusing on discerning the meaning of a single word – requires a doubly-focused lens: first, to focus on the text to the exclusion of other sources of meaning that even textualists would accept (such as structure and history in constitutional interpretation, and the whole act canon and statutory history, which is distinct from legislative history, in statutory interpretation); second, to focus only on a single word rather than the vast sweep of the text, what Professor Nourse colorfully calls "gerrymandering" the text.[118] In certain cases, such as *Rasabout, Yates,* and *Marshall*, such gerrymandering would be called for, since the case does indeed rest on a single word.

However, the "commerce" clause debate should serve as a warning that not all cases should rest on the meaning of a single term. It is clear, at least to this author, that "commerce" has a broad meaning.[119] First, structurally, a narrow theory of commerce makes nonsense of the rest of the clause: "[t]he Congress shall have the power. . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[120] Congress undoubtedly had power to regulate non-economic affairs with the Indian Tribes and with foreign nations;

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[117] Ben Zimmer, *The Corpus in the Court: 'Like Lexis on Steroids'*, The Atlantic, Mar. 4, 2011, https://www.theatlantic.com/national/archive/2011/03/the-corpus-in-the-court-like-lexis-on-steroids/72054/.

[118] *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 Ala. L. Rev. 667-685 (2019).

[119] This, however, does not justify unlimited federal power. On the contrary; Washington is limited to issues that are genuinely interstate, not simply national. This would prescribe a smaller role for the government than currently exists. As Balkin writes, "the real point of these distinctions was to narrowly define what commerce was "among the several states" and therefore subject to federal regulation." Balkin, *supra* note 57, at 50. For this reason, Akhil Amar has remarked that we should really call the Commerce Clause the "with-and-among clause. Akhil Reed Amar, America's Constitution: A Biography 108 (2005)

[120] U.S. Const., Art. I, § 8.

reading the clause as excluding that is nonsensical. Second, historically, a broad meaning of "commerce" is liquidated by precedent set by President Washington, who signed a number of "Nonintercourse" Acts relating to the Indians.[121] Third, under the Articles of Confederation, Congress had the power of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[122] No contemporaneous observer would assume that the Constitution gave Congress *less* power than did the Articles, a fact embodied by "Resolution VI." From these varied arguments, it is clear that Congress' "commerce" power includes both "trade" and "affairs."

This "commerce" analysis shows that even though Barnett might have the better reading of the particular word "commerce," that word is not alone dispositive.[123] It is sufficiently that "commerce" might *plausibly* mean intercourse – a contention that the corpus supports.

In conclusion, in some cases it is proper to take a magnifying glass to a single word; it is less inappropriate gerrymandering than it is a council gathered around a map or scientists focusing on a specimen. In other cases, singling out a word is indeed improper gerrymandering. Corpus uses must make sure to distinguish between the two cases, and use the corpus as dispositive only when determining that the word itself is dispositive.

D. The Ultimate Potential of Corpus Linguistics

Last, corpus linguistics has the potential to do something no tool has ever done before. First, we must understand the norms by which interpretative tools are measured, and which interpretation aims to further.

One norm—along with democratic legitimacy and governance—is the rule of law. Following Lon Fuller's definition, a legal system does not uphold the rule of law if it lacks rules, does not make its rules public, drafts its rules obscurely, engages in retroactive legislation, enacts contradictory rules, enacts rules that are impossible to satisfy, constantly changes its rules, or does not apply the rules. Put positively, Fuller outlines eight principles for legal standards, that they be general, promulgated, clear, prospective, consistent, satisfiable, stable, and applied.

For those concerned about the Rule of Law—that is, for those for whom the Rule of Law is their meta-interpretive theory— an interpretive methodology is proper to the extent it furthers the Rule of Law. Specifically, a methodology that yields laws with three characteristics—that are publicly understandable, give predictable results, and are fairly and neutrally applied—furthers the Rule of

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121 In addition, the Bureau of Indian *Affairs*.

122 Articles of Confederation, art. IX, ¶ 4.

123 A similar analysis could be done for *Muscarello*, in which the Whole Act canon is dispositive. See 18 U.S.C. §921(a)(3), which includes "destructive device" in the definition of "firearm," and then proceeds in §921(a)(4)(A) to provide examples of a "destructive device" that include "bomb," "grenade," "rocket," "missile," and "mine." It is unlikely that, however deep one's pockets, one can carry such statute-defined "firearms" on one's person.

Law and therefore is to be preferred.[124] The rule-of-law principle of fair notice is deeply rooted in American jurisprudence.[125] An example of a rule of law appeal is Justice Scalia's criticism of legislative intent: "It was said of the tyrant Nero that he used to have his edicts posted high up on the pillars, so that they would be more difficult to read, thus entrapping some into inadvertent violation."[126] An interpretive methodology, Scalia argues, that determines the meaning of laws on the basis of anything other than ordinary meaning would violate the rule of law by not giving fair notice or being publicly accessible, and thus is not a proper interpretive methodology.[127]

In its ideal form, ordinary meaning should further the rule of law[128] by helping create a system where laws are publicly understandable, yield predictable results, and are fairly and neutrally applied.[129] As to public understanding: ideally, ordinary meaning and public understanding of the law should be equivalent, as ordinary meaning is motivated by interpreting the law as the people would interpret it.[130] As

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124 Only three elements of the Rule of Law are "in play," or variable, in a given instance of statutory interpretation. The others are fixed, either by the very act of interpretation or by convention. Some Rule of Law principles are presupposed by the very act of interpreting statutes; namely, that rules exist (otherwise there would be no "statutory" in "statutory interpretation") and are public (otherwise one couldn't interpret the laws), satisfiable (otherwise there would be no point or purpose in interpreting the laws), and stable (the interpretive act will not be rendered futile by the act changing by the time it is interpreted). Canons of statutory construction assume consistency (both of laws and of words—for example, the rule requiring construction of statutes *in pari materia* to be interpreted as though they were one law. *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, (1991) (Scalia, J., dissenting). This leaves only public understanding, predictability, and fair and neutral application.

125 Chief Justice John Marshall first articulated this in *United States v. Wiltberger*, 18 U.S. (1 Wheat.) 76 (1820).

126 Antonin Scalia, A Matter of Interpretation 97 (1997).

127 Similarly, Justice Holmes writes that notice is a requirement of justice: "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

128 On the importance of neutrality and consistency in the application of law, see Tom R. Tyler, Why People Obey the Law (1990, 2d ed. 2006); Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice,* 123 Yale L.J. Forum 525 (2014).

129 Lon L. Fuller, The Morality of Law (1964); Friedrich Hayek, The Constitution of Liberty 205-16 (1960); *see also* H.L.A. Hart, Essays in Jurisprudence and Philosophy 347 (1983); Colleen Murphy, *Lon Fuller and the Morality of the Rule of Law,* 24 L. & Phil. 239 (2005).

130 Empirical evidence for the best way to align judicial interpretation with public meaning forthcoming from the author. A separate empirical study as to the best way for law to provide notice forthcoming as well. *See generally* The Oxford Handbook of Language and Law 13–26 (Lawrence M. Solan & Peter M. Tiersma, eds., 2012); Brian G. Slocum, Ordinary Meaning ch. 1 (2017); Peter M. Tiersma, Legal Language (1999); Victoria F. Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers,* 99 Geo. L.J. 1119, 1172-75 (2011); Amy Widman, *The Rostrum Principle: Why the Boundaries of the Public*

to predictability: although ordinary meaning does not perfectly generate predictable answers to legal questions,[131] it is, to paraphrase Churchill, the worst form of interpretation except for all the other forms that have been tried from time to time, as it "yield[s] greater predictability than any other single methodology," such as methodologies that consider only legislative intent, statutory purpose, or utilitarian welfare-maximization.[132] As to fairness and neutrality of application: ideally, the ordinary meaning rule should, ideally, de-bias judges by focusing on the external statutory meaning rather than their internal assessments of the worth of the litigants.

By providing objective rigor around the abstraction method, corpus linguistics can fulfill the normative promise of ordinary meaning textualism.

Corpus linguistics is the first tool that is amenable to the abstraction approach. This approach can further the ideals of the rule of law by giving notice of the law to the citizenry. It tries to get in the head not of the legislator, but of the subject. A sniper deciding whether to shoot, a banker whether to trade, the butcher, brewer, or baker deciding whether to fire an employee, does not, as lawyers would, open Westlaw to find the relevant statutory language, then Webster's Second to discern the term's proper meaning. Rather, their expertise is not in the language, but in the facts; they start with the facts, and, to the extent they are aware of the statutory language, they decide whether one can conceive of the facts with that term. In other words, they use the abstraction, not extension, approach. The sniper asks, "Is the person walking down the street a bystander?", not "what are the prototypical examples of the word "bystander"?" For the abstraction approach, it is not what the statute means, but whether it applies, that matters.

The true potential of the corpus, therefore, is in offering a tool that furthers the rule of law. The dictionary faces rule of law concerns, as the sniper does not consult Webster's second. Rather, she refers back to how that word is used in ordinary language—precisely what the corpus captures. As described above, citizens think in the abstraction, not extension, modes. The legal tools we have, such as dictionaries, indices, and Westlaw, lead us to the extension, language-based approach rather than the abstraction fact-based approach; one cannot replicate the applied induction humans do to understand language in a dictionary.

Until now, these were the only tools that could give consistency or objectivity to what language means. And as such they were worth the trade-off. The corpus, however, is perhaps the first legal tool that can achieve the rule-of-law *ne plus ultra*, to have the legal interpreter understand the factual situation as the citizen would,

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Forum Matter to Statutory Interpretation, 65 Fla. L. Rev. 1447, 1447-50 (2013); Note, *Textualism as Fair Notice,* Harv. L. Rev. 542 (2009).

131 Compare the majority and dissenting opinions in *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001), for an engaged debate on what meaning was "ordinary" for a 1926 statute. Compare also the majority and dissenting opinions *in Taniguchi v. Kan Pacific Saipan, Ltd.,* 566 U.S. 560 (2012); *Lindh v. Murphy,* 521 U.S. 320 (1997); *Senne v. Village of Palatine, Illinois,* 695 F.3d 597, 609 (7th Cir. 2012).

132 Eskridge, *supra* note 6, at 36. Empirical evidence for Churchillian textualism – the primacy of text over any other methodology, or combinations of methodologies – is needed. Some preliminary evidence is provided by Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation,* 2 J. Legal Analysis 257 (2010).

and thus determine what "words would mean in the mouth of an ordinary speaker of English, using them in the circumstances in which they were used."[133]

[133] Oliver Wendell Holmes Jr,, *The Theory of Legal Interpretation,* 12 Harv. L. Rev. 417, 417-18 (1899). For similar statements by earlier giants of American law, *see, e.g., Gibbons v. Ogden,* 22 U.S. 1, 71 (1824) (Marshall, C.J.); James Kent, Commentaries on American Law 432 (1826); Joseph Story, Commentaries on the Constitution of the United States 157-58 (1833).

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"Felix Cohen Was the Blackstone of Federal Indian Law:" Taking the Comparison Seriously

Adrien Habermacher*

ABSTRACT

This paper explores the many facets of Rennard Strickland's comparison between Sir William Blackstone, author of the 1765-69 Commentaries on the Laws of England, and Felix Cohen, architect of the 1942 Handbook of Federal Indian Law. It consists of a side by side analysis of both authors' master works, political and educational projects, as well as general contribution to jurisprudence. It reveals that despite the stark differences between Blackstone's work on the English common law from his professorship at Oxford in the late eighteenth century, and Cohen's endeavors on the US federal law concerning Native Americans as a civil servant at the turn of the 1940s, there are remarkable similarities in the enterprises of legal scholarship the two jurists took on, the larger political projects they promoted, and their role in the development of legal thought. The idea that "Felix Cohen was the Blackstone of Federal Indian Law" has stylistic appeal and could have been little more than a gracious way to celebrate Cohen. An in-depth comparative examination of legal history and jurisprudence however corroborates and amplifies the soundness of the comparison.

KEYWORDS

Legal History, Jurisprudence, Comparative Law, Native American Law, Legal Education

CONTENTS

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Introduction

Rennard Strickland has referred to Felix Cohen as "the Blackstone of Federal Indian Law,"[1] for his work on the *Handbook of Federal Indian Law*.[2] The analogy has been received positively by other experts of Native American Law, and used again over the years.[3] Cohen and Blackstone did not know each other, for they lived at different times, on different continents. Moreover, while they both spent some time teaching law, their overall careers had little in common. Sir William Blackstone published his *Commentaries on the Laws of England* in eighteenth century England during his tenure as Vinerian Professor at Oxford;[4] Felix Cohen was at the forefront of legal realism in American jurisprudence in the 1930s and contributed to the 1942 *Handbook* as a civil servant within the Department of Justice and then the Department of the Interior. Despite these striking differences at the outset, both Blackstone and Cohen achieved the unprecedented task of presenting the law of a field left to centuries of scattered accumulation through distinct and specialized sources in a comprehensive and logically organized fashion.

The comparison could soundly rest on this similar achievement alone and be fully justified. However, Strickland and others did not say "Cohen's *Handbook* is the Blackstone's *Commentaries* of Federal Indian Law"; the comparison is not between the two publications, or rather it is not just between the two publications, but between the two scholars. Although the instances where such comparison appears unmistakably focus on the comprehensive and organized character of the two works, the phrasing suggest that, beyond a stylistic praise of Cohen, the careful reader will consider comparing the two jurists in the total body of their work. Let us take this invitation seriously.

Looking at the work of Blackstone and Cohen, numerous elements lead me to think that there is more to be said and considered than the mere resemblance of the publications. This intuition gave birth to the present paper and should be the guiding thread in what follows. With this paper, I aim to explore and analyze the soundness and the depth of the comparison in its many potential meanings. This is why I will enlarge the breadth of inquiry at each step of the assessment so as to best appreciate the extent to which a comparison is tenable.

First of all, I will turn to the core of the comparison, i.e. the parallel between the *Commentaries* and the *Handbook*. I will distinguish here between on the one hand, the nature and characteristics of the works, and on the other hand, their reception and their impact on the jurisprudence. In this first section, I will test the following assumptions: (i) the structures of Cohen's *Handbook* and Blackstone's *Commentaries* share a similar rationale of comprehensive organization of the legal

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1 Rennard Strickland, *Indian Law and the Miner's Canary: The Signs of Poison Gas*, 39 Clev. St. L. Rev. 483, 483 (1991). We can note that Strickland was the main editor for a 1982 reedition of the Handbook initially published in 1941, *see* Handbook (1982), *infra* note 28.

2 Felix S. Cohen, U.S. Dep't of the Interior, Handbook of Federal Indian Law (1941) [Hereinafter Handbook (1941)].

3 *See, e.g.* Steven Paul McSloy, *'The Miner's Canary': A Bird's Eye View of American Indian Law and Its Future*, 37 New Engl. L. Rev. 733 (2003).

4 William Blackstone, Commentaries on the Laws of England in Four Books (1765-69), [Hereinafter Commentaries].

norms in the field, (ii) these features allowed the publications to become a primary source for lawyers and judges, and (iii) both works contributed to or led a renewal of legal thinking in the field they addressed.

We cannot assess the comparison between the two figures if we limit our inquiry to these two publications. This is why I will then focus on the authors' broader projects for legal education embedded in the *Commentaries* and the *Handbook*. For this analysis, I will examine whether (iv) both Blackstone and Cohen entertained comparable underlying grand projects; and whether (v) their respective projects met similar outcomes.

Lastly, I will assess the comparison between Blackstone and Cohen in terms of the two jurists' position in the history of legal thought. I will use their views on a central concept of legal philosophy that is property to illustrate their place in the history of jurisprudence. This third section will test the following assumption: vi) their respective views were similarly situated within the legal philosophy of their time.

I want to underscore at the outset that using the terminology of "Indian" in reference to what pertains to the Indigenous Peoples of North America is deeply problematic, and should not be perpetuated.[5] American legal actors have only recently started shifting away from the "Indian law" vocabulary to adopt "American Indian law", or even the most respectful "Native American law" rhetoric. The flawed terminology however remains embedded in the laws and institutions (e.g. the Bureau of Indian Affairs).[6] I make best efforts to use the modern and more respectful terminology in the following pages. However, as the article's title readily illustrates, it is impossible to expunge this outdated vocabulary when relying on historical works and analyzing the authors' ideas as they expressed them. I therefore go back and forth between mentions to "Federal Indian Law" and "Native American Law", depending on the context, to refer to the same field of law. I invite the readers to take the presence of this outdated vocabulary here as a reminder that settlers in North America have only recently started to recognize the need to correct the colonial framework based on the European explorers' initial ignorance that a continent laid between their homeland and Asia.

I. Comparing the Handbook to the Commentaries as Two Masterpieces

Blackstone and Cohen both authored publications of great importance in their own field: the former wrote the *Commentaries on the Laws of England* (1765-69) and the latter the *Handbook on Federal Indian Law* (1941). It is undoubtedly what sparked the comparison, since Cohen's *Handbook* was perceived as an achievement

5 For a discussion of the problematic nature of the "Indian" vocabulary, the (lesser) troubles with other options, *see, e.g.* H Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law 60 n.1 (2014).

6 *Compare* the Canadian practice of using the "Indigenous" terminology in the applied name of official departments (e.g. Indigenous Services Canada, https://www.canada.ca/en/indigenous-services-canada.html (last visited Sept. 17, 2019) despite the continued prevalence of the "Indian" terminology in legislation, (e.g. Indian Act, R.S.C. 1985, c I-5 (Can.)).

in the field of Native American Law similar to what Blackstone had done in the second half of the eighteenth century with the common law of England. Our inquiry into the tenability of the comparison therefore logically starts with an assessment of the similarity between the two *magna opera*.

A. The Nature and Characteristics of the Work: Historical Analysis, Agreeable Style, and Organization of a Mass of Rules into a System of Legal Principles

A key characteristic of both masterpieces is the importance they give to history. Both insist on providing historical context to the principles they expound. Blackstone for instance rooted each principle of the common law that he presents as governing a certain area of English law in a history of customs and practice. This feature makes the *Commentaries* a significant contribution to English legal history; despite the historical shortcomings that modern knowledge can identify, it constitutes a largely reliable source especially from the end of the thirteenth century onwards.[7] Cohen affirmed that appreciating the historical context was necessary to properly understand the law in his field as in others.[8] This belief guided his work throughout the *Handbook*, for example when he used the history of long-term agricultural leases to shed light on the meaning of a statute affecting the validity of tribal leases made outside of a treaty framework.[9] Moreover, knowing the laws that were in force at an earlier point in time is crucial when assessing the present day legal situation in Native American law since the field is replete with legal rights that are still enforceable even though the legislation on which they rely has long been repealed.[10]

Another characteristic of both the *Commentaries* and the *Handbook* is their distinctive style of writing: they are easy to read. Blackstone's clear and elegant style made the study immensely easier than the previously dominant treatise, *Coke on Littleton*.[11] Whereas Coke's style had supposedly brought Joseph Story to tears, and led Oliver Wendell Holmes, Snr., to study medicine instead of law,[12] Blackstone gathered praise for the ease with which even laymen could read and understand his writing.[13] The best example of this would be the first pages of Book II telling the story of how property came about. As we will see in greater details below, Blackstone's presents a narrative of the different stages that have led to the present day notion of property, much like Rousseau took his readers through the different stages of human society developments to explain the civil state of men

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7 S.D. Holdsworth, The Historians of Anglo-American Law 54-60 (Columbia University Press 1998) (1928) (affirming that Blackstone is "*clearly wrong*" in his account of the Anglo-Saxon period but "*generally sound and valuable*" from the reign of Edward I (i.e. 1272-1307) onwards.)

8 Handbook (1941), *supra* note 3, at xviii.

9 *Id.* at 326-27.

10 *Id.* at xiv.

11 B.H. McPherson, The Reception of English Law Abroad 487 (2007).

12 *Id.* at 485.

13 Even Bentham, who fiercely opposed Blackstone's legal and political philosophy at the time, acknowledged this quality, *see* L.H. Dunoyer, Blackstone et Pothier 70 (1927).

(*l'état civil*).[14] The *Handbook* is equally easy to read. The apparent organization with titles and sub-titles makes the overall work uncomplicated to apprehend; in addition, the fact that the many details and comments are relegated to the thousands of footnotes makes the reading straightforward. Even if a number of persons contributed to the actual writings presented in the *Handbook*, the architect Cohen must have supervised the general style of the document.

The true nature of Blackstone's and Cohen's works however seems to lie somewhere other than the historical exposition of the law in an elegant style. The exposition of rules from the past and the present connected only by relation to a single subject matter, that is to say a thematic chronology, is of a lesser value than the systematic analysis and presentation of the "common standards, principles, concepts, modes of analysis that run through [the] massive body of statutes and decisions."[15] When compared with the more modest and/or less successful attempts that had been made previously to lay a structure for the complex set of legal rules and principles in English common law or in Native American law, the importance of Blackstone's and Cohen's respective works stands out. It is by making sense of the mass of rules and showing the interconnectedness among them, the articulations binding them together and governing their developments and their operation, that both Blackstone and Cohen each created a subject, to which scholarship and analysis could then on be applied.

In a 1979 publication that represents a major contribution in the understanding of the history of legal ideas, Kennedy stated that "Blackstone's work is the only systematic attempt that has been made to present a theory of the whole common law system."[16] Milson, soon after, exposed an extensive review of the works published in the decades preceding Blackstone's own achievements and showed that several authors had attempted to present the common law in a systematic way; most of them focused on a particular area like Finch in the early seventeenth century and Wood a century later, and Hale is one of the very few who attempted to do the same for the whole of the common law. Watson also took issue with Kennedy's statement and successfully demonstrated that Blackstone's arrangement fits into a genealogy of common law lawyers, in particular Hale, who tried to expose the common law in a rational arrangement even if they did not gain the recognition Blackstone achieved.[17] Hale never succeeded in his enterprise, and is credited with the following explanation: "[t]he particulars are thereof so many, and the connections of things so various therein that as I shall beforehand confess that I cannot reduce it to an exact logical method… ."[18] From Watson's and Milson's respective historical accounts, it is clear that Blackstone was not the only jurist in England thinking about the common law as whole and the difficulties of presenting it systematically.[19] Nevertheless, Kennedy's statement remains exact in that

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14 *See generally* Jean-Jacques Rousseau, Discours sur L'Origine et Les Fondements de L'Inégalité parmi Les Hommes (1754).

15 Handbook (1941), *supra* note 3, at xiv.

16 Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205, 209 (1979).

17 Alan Watson, *The Structure of Blackstone's Commentaries*, 97 Yale L.J. 795 (1988); *see also* S.F.C. Milsom, Studies in the History of the Common Law (1985).

18 Quoted in Milsom, *supra* note 17, at 204.

19 Watson, *supra* note 17; Milsom, *supra* note 17. Moreover, we should not forget

Blackstone was the only one who presented an exposition of the common law in general as a rational system. Blackstone's *Commentaries* are not a juxtaposition of legal maxims, rules and remedies found in the common law, but rather a justified organization of the general principles of the common law;[20] unlike Hale's work it satisfactorily came to terms with the many particulars and the various connections of things, and unlike Finch's and Wood's, it covers all the areas of the common law. These inquiries into the genealogy of Blackstone's own arrangement have a historical significance; Watson's narrative convincingly argues that Blackstone's choice for the ordering of his work is a combination of the Justinian *Corpus Iuris Civilis* as presented in Gothofredus's edition and of Hale's own attempts.[21]

Cohen similarly succeeded in organizing Federal Indian law in a systematic fashion. There had been previous attempts to reach the same outcome, and none was quite as successful as the *Handbook.* Some had tried to help lawyers interested in the field with documents presenting the law, but never all of the law. Cohen acknowledges the existence of Mansfield's 1897 *Digest*.[22] This earlier publication had some influence as it was cited authoritatively in a number of Supreme Court decisions before the publication of the *Handbook*.[23] It fell short, however, of a comprehensive presentation of Federal Indian Law since it merely reproduced the statutes applying to Indian country. Although it must have been useful to have an overview of the decisions of the legislative branch, Federal Indian law could not be captured by Mansfield's *Digest* because of the prominent common law character of this area of law. In 1901, Murchison published a *Digest of Decisions Relating to Indian Affairs*,[24] prepared at the request of the Commissioner of Indian Affairs with funds allocated by Congress, "with a view to gathering together in compact form a complete line of decisions by courts […] and the Executive Departments on the many and varied questions*"* that now form the field of Native American Law.[25] The first and only volume was completed as a digest of court decisions, but the second volume that had been planned to present the decisions of executive departments was apparently never completed.[26] Murchison's intentions expressed above reveal that although comprehensiveness was the goal of the enterprise, rational and systematic arrangement did not seem to be core concern. It aimed at being a compilation rather than a logical exposition. This 1901 *Digest* had however little to no impact in the field as it is mentioned nowhere in the secondary literature addressing the history of Native American Law; even more telling maybe is the fact that it is not even acknowledged by Cohen in the *Handbook*. The reason for the insignificance of the 1901 *Digest* most certainly lies in the failure to provide a comprehensive presentation since the second volume was never completed. The *Handbook* succeeded where

comparable works undertaken in the field of equity, such as Henry Ballow, A Treatise of Equity (1737) (focused on equity but also covering rules "at law").

20 Dunoyer, *supra* note 13, at 71-72.

21 Watson, *supra* note 17.

22 W.W. Mansfield, A Digest of the Statutes of Indian Territory: Embracing All Laws of a General and Permanent Character in Force at the Close of the Session of the United States Congress on March 4th, 1897 (1897).

23 *See, e.g.* Stephens et al. v. Cherokee Nation. 174 U.S. 445 (1899).

24 K.S. Murchison, Digest of Decisions Relating to Indian Affairs (1901).

25 *Id.* at 3.

26 L.F. Schmeckebier, Government Publications and Their Use 251-52 (1936).

the digests had failed: comprehensiveness and systematization. While the claim to be encyclopedic is rejected in the introduction,[27] it was nevertheless "a thorough and comprehensive treatise that attended to virtually every nook and cranny of the field."[28] Neither Mansfield's 1897 *Digest* or Murchison's 1901 *Digest* attempted to give a structure to the volume of laws relating to Indian Affairs; they merely presented an accumulation of rules, where Cohen later offered a system of laws in the *Handbook*. The *Handbook* truly constituted the first treatise on the subject.[29]

In sum, the *Commentaries* and the *Handbook* share the key characteristics that they are most famous for: a rational, systematic and comprehensive exposition of the law of the field. In both publications this structure and the content that is presented in firmly backed by historical explanations.

B. Reception and Jurisprudential Impact: Leading Sources of Law with Transformative Effect on Future Legal Scholarship

The succinct and logical exposition of the English common law that Blackstone achieved with the *Commentaries* soon became indispensable for students and lawyers, in England and even more so in America. Thanks to its organization and its completeness, the *Commentaries* made it possible for students and lawyers alike to gain an understanding of English law in a convenient way. Instead of digging into a mass of yearly reports and detailed abridgments on specific areas of law, they could consult Blackstone's four books and be presented with a limited set of principles explaining the functioning of the legal rules. Travelers and settlers found this to be especially useful. Whether the popular image of frontier attorneys riding circuits on horseback with the four volumes of the *Commentaries* in their saddlebag[30] comes from actual events or not, it is very telling: the *Commentaries* were handy. The *Commentaries* were first published in America in 1771,[31] decades before the creation of any institutionalized training for lawyers. Reading treatises was then the main way of studying law, whether alone or directed by a practicing lawyers as an apprentice. There is no doubt that this is why the *Commentaries* was put in the hands of all the prospective lawyers in America for at least one century, and remained on all the readings lists provided by instructors in law long after there had been local adaptation of their content (usually both the original and the adapted version, such as Kent's *Commentaries*, were assigned).[32]

It is the combined effect of its internal features and the consequence of being an essential element in every lawyer's education that made Blackstone's *Commentaries* an indispensable source for legal practitioners. Barnes calculated that over 10,000 American cases cited the *Commentaries* between 1787 and

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27 Handbook (1941), *supra* note 2, intro., at xiii.

28 Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law, at viii (Rennard Strickland ed., 1982) [Hereinafter Handbook (1982)].

29 Handbook (1941), *supra* note 2, intro., at xiv.

30 McPherson, *supra* note 11, at 488 n.107 (citing Barnes, Friedman).

31 Bell's first American edition of the *Commentaries* was published in Philadelphia in 1771, see McPherson, *supra* note 11, at 486-87.

32 *See id.* at 486-88; and generally W.H. Bryson, Essays on Legal Education in Nineteenth Century Virginia *(*1998).

1915.[33] It seems that it is in the United States, more than in any other country including Blackstone's homeland, that his authority reached its highest degree.[34] Because of the increasingly wide gap between the law described by Blackstone and the legal reality in America as well as in England, Blackstone lost most of his legal authority after the 19th century. Nevertheless, to this day, Blackstone remains a reference for legal history in common law jurisdictions; for example the *Commentaries* were used as an authority in 2008 to attest to the existence of a principle of law by the U.K. House of Lords in *R.(Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*.[35] They are most often used to evidence the historical meaning of legal principles and terms of arts. For instance in *Washington v. Glucksberg*, Chief Justice Rehnquist cited the *Commentaries* as authority to demonstrate that suicide and assisted suicide had been prohibited by the common law for 700 years.[36] More recently, in *Hobby Lobby*, Justice Alito for the majority and Justice Ginsburg in her dissent both used the *Commentaries* to support their respective view of whether, historically, corporations could further religious ends.[37]

A similar phenomenon, on a much smaller scale, given the nature of Native American law, occurred with Cohen's *Handbook*. Supreme Court Justice Felix Frankfurter noted in 1956 that "Cohen's prestige as a scholar, the massive research effort that went into compiling the work, and the brilliant synthesis of case law and historical precedents reflected throughout the text enshrined the Handbook as the principal scholarly resource for lawyers and judges in the field of Indian law."[38] Empirical findings support Frankfurter's claim: the *Handbook* was referred to in at least 67 Supreme Court decisions and 687 briefs filed to the Supreme Court as of 14 May 2018 (all editions, except 1958 revision).[39] As a point of comparison, one can look at the empirical study undertaken by Fletcher in 2013, finding that from 1959 to 2013, the Supreme Court addressed 145 Native American law cases, and there have only been 40 citations to Native American law-centered law review articles.[40] Out of the 67 cases where I found a reference to the *Handbook,* 49 were decided within the date range of Fletcher's empirical study. Keeping in mind that a number

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33 McPherson, *supra* note 11, at 488 n.108 (citing Barnes).

34 *Id*. at 489.

35 R. (Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs (No.2), [2008] A.C. (H.L.) 61 [43, 70, 87, 124, 151].

36 Washington v. Glucksberg, 521 U.S. 702 (1997).

37 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770 n.23 (2014); *id.* at 2796 (Ginsburg, J., dissenting).

38 D.H. Getches et al., Cases and Materials on Federal Indian Law 197 (2011) (citing F. Frankfurter, Of Law and Men (1956)).

39 29 Supreme Court cases cited to the original 1941 edition, 31 cited to the 1982 edition, and 7 to the 2005 and subsequent editions; a similar search on Court of Appeals across the nation showed 353 results, with the top circuits being 9th Circuit (136), 10th Circuit (80), and 8th Circuit (50). I excluded citations to the 1958 edition given that it constituted a revision on ideological grounds rather than an update of Cohen's work, as will be explored below, see *infra* note 96 and accompanying text; however, note that cases may cite the 1958 revision and another edition to support the same or different points. Moreover, due to the methodology as well as inconsistency of citing practices over time, the figures presented here should be considered as indications rather than exact reporting.

40 Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 Calif. L. Rev. Circ. 1 (2013).

of variables make the comparison imperfect,[41] I believe that it nevertheless gives an idea of the authority enjoyed by the *Handbook* among legal sources in the field. The *Handbook* alone seems to have been relied upon more than all of the academic scholarship in the field together.

Whereas Blackstone's *Commentaries* succeeded because they were the best source (most convenient, most complete and easiest to read), the *Handbook* reached the same outcome partly because it was the only source. Fletcher affirmed that the *Handbook* remained the principal, and sometimes single source on the field from its publication until the 1990s, even as updates were irregular.[42] There was no Coke, no Kent, no Story to produce competing works in Native American law. It is difficult to evaluate how much of this is due to internal qualities of the *Handbook* (it being convenient, comprehensive and rational enough to thwart any similar attempt) or the nature of the field of Native American law (which remains a discipline with only a limited number of dedicated scholars and practitioners). This is not to undermine the value of the *Handbook,* which was also convenient, complete and easy to read; had there been competitors, there is no doubt that Cohen's work would have been a fierce champion, but the fact is that there were none for a long time. It is only in the 1980s that a number of alternatives started to emerge:[43] Canby's *American Indian Law in a Nutshell* in 1981,[44] Pevar's *Rights of Indians and Tribes* in 1983,[45] and the Conference Of Western Attorneys General's *American Indian Law Deskbook* in 1993.[46] Moreover, in 2013 the American Law Institute launched a project of restatement of American Indian Law, and asked Fletcher to supervise it.[47]

Finally, both Blackstone's *Commentaries* and Cohen's *Handbook* became key sources of law in their respective field in a large part due to the characteristics that I have highlighted previously. Maybe unsurprisingly, the same causes produced similar effects. Let us now turn to a more qualitative inquiry in the reception of the *Commentaries* and the *Handbook*; we need to assess whether the said characteristics, and the reliance on the new material they sparked, contributed to renewed legal thinking in the field, or at least made some measurable impact.

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41 For instance, the number of scholarship citations reported by Fletcher is the *total number of citations in opinions* (e.g. if there are two citations in a same opinion, then the reported number will be two), whereas I am reporting the *total number of cases* in which the *Handbook* is cited, regardless of the number of citations in the opinions for the case. Moreover, not all the cases I am reporting in my own findings may belong in the 145 Native American law cases determined by Fletcher since I have not engaged in the qualitative sorting process that Fletcher went through to determine whether the cases included in my figures are primarily Native American law cases.

42 Fletcher, *supra* note 40, at 5 ("*From the time it was first distributed in 1940 until the 1990s, the Handbook of Federal Indian Law dominated the field, despite irregular updates, because it was the only place to turn for a basic and comprehensive grounding in every aspect of American Indian law.*").

43 *Id.* at 5 n.26.

44 The most recent edition is W.C. Canby, Jr., American Indian Law in a Nutshell (6th ed. 2015).

45 The most recent edition is S.L. Pevar, The Rights of Indians and Tribes (4th ed. 2012).

46 The most recent edition is Conference of Western Attorneys General, American Indian Law Deskbook (2019 ed. 2019).

47 This project is still in progress: American Law Institute, The Law of American Indians, https://www.ali.org/projects/show/law-american-indians/.

The presentation of the content of the laws of England into comprehensive categories is evidence that Blackstone meant to show the scientific character of his discipline; not only are the objects of study capable of being examined in a rational way, the very method displayed is of a scientific nature. The systematic presentation of legal rules, although it had already been thought of by the Romans, seems to mirror the efforts of biology to classify living species by means of taxonomy. Modern taxonomy was founded upon Linnaeus's works published from 1735, and in particular, the tenth edition published in 1758. This paradigmatic revolution and the debate it triggered in the scientific community happened only a few years before the publication of the *Commentaries* in 1765.[48] The scientific character of the study of the common law, and its proximity with established sciences, could therefore justify the inclusion of common law studies in the universities as a discipline worthy of study in its own right. Moreover, the novel distinction drawn between substance and procedure, rights and actions, and embedded in the very structure of the books was additional evidence for Blackstone's attempt to show that the common law could be subject to scientific inquiry.

Milsom notes that after Blackstone, a "new kind of legal literature"[49] appeared; conveyancers such as Cruise (*Essay on Fines* (1783); *Digest on the Laws of England Respecting Real Property* (1804)) and Sander *(Essay on the Nature of Uses and Trust* (1791))[50] began to write in a scholarly and almost speculative vein rather than primarily for the practical purposes of their business. They no longer focused on describing the procedures to follow in order to achieve certain outcomes in their practice, but started to reflect upon the articulation of the principles and their meaning. For instance, "fee simple" became an object worthy of scientific discussion rather than the possible result of a lawyer's handiwork.[51] Blackstone's ability to express himself in a way particularly adapted to the idea he wanted to transmit and understandable by all was recognized even by his most fervent critic, Jeremy Bentham.[52] As Blackstone was addressing laymen and law students, and adapting his language to this audience unfamiliar with the technical terms of lawyers, he led lawyers to reflect upon the purpose of phrases that had been used for centuries, giving them for the first time a sense that these phrases and maxims were worthy of scientific discussion.[53] Blackstone changed the way lawyers were thinking about the law, from a set of actions to a system of principles. This allowed in turn the emergence of text-books dedicated to presenting the substantive rules in an area of law with fewer references to the procedure by which they were enforced

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48 Harriet Ritvo, *La Résistance au Système: La Grande-Bretagne, Buffon et l'Eclipse Linnéenne*, *in* L'Héritage de Buffon, 219 (Marie-Odile Bernez ed., 2009) (arguing that Linnaeus's Systema Naturae (1758) provoked mixed reactions in the English scientific community; this demonstrates in turn that the ideas of the Swedish botanist were received and debated in England in the years leading to the birth of the *Commentaries*).

49 Milsom, *supra* note 17, at 205.

50 Other examples include Charles Fearne, Essay on the Learning of Contingent Remainders (1772), Richard Preston, Elementary Treatise by Way of Essay on the Quality of Estates (1791), *see* S.F.C. Milsom, The Nature of Blackstone's Achievement 9 (1981).

51 Milsom, *supra* note 50, at 9.

52 Dunoyer, *supra* note 13, at 70.

53 Milsom, *supra* note 17, at 205.

in the nineteenth-century.[54] In the nineteenth-century also, the English common law relating to contracts became consolidated into a comprehensive and rational theory of contracts including formation, discharge and performance with relevant remedies for breaches.[55] This theoretical achievement owed much to Blackstone's attempt to prompt scientific discussion about the common law maxims. In mapping the law and providing a general overview of it, as well as trying to make sense of established rules and structures for laymen, Blackstone started the processes that led about a century later to this radical reconsideration of the rules and forms of actions related to contracts.[56] Furthermore, Kennedy credits Blackstone with pivotal developments for what he terms the "liberal mode of American legal thought" arguing that the *Commentaries* "set out together, for the first time in English, all the themes that […] characterize attempts to legitimate the status quo through doctrinal exegesis."[57]

Much as Blackstone's *Commentaries* transformed the approach of lawyers to their own discipline, showing them the way to think about articulated principles rather than describing procedure, Cohen's *Handbook* transformed the "vast hodge-podge of treatises, statutes, judicial and administrative rulings, and unrecorded practice"[58] into a field for scholarship and academic analysis. Felix S. Cohen was the first true scholar of Indian Law,[59] and the academic community that has dedicated itself to the field over the past decades is his offspring. He transformed the way lawyers interested in the field saw their discipline; for the first time Indian law was a system articulated around a set of principles rather than a mass of rules with no internal rationale. This is a major shift in legal thinking. Native American law scholars sometimes spoke about the influence of the *Handbook* on their own thinking. What Getches called "without question, the single most influential passage ever written by an Indian law scholar"[60] is a passage of the 1941 edition of the *Handbook*. In this passage, Cohen introduced "the most basic principle of all Indian law,"[61] explaining that all judicial decisions on tribal powers had adhered to three fundamental principles.[62] Cohen's claim reproduced by Getches has political

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54 *Id.* at 200.

55 *See* Warren Swain, The Law of Contract 1670–1870 172–200 (2015) (exposing the evolution of the literature of contracts in England throughout the nineteenth century); P. Legrand & G. Samuel, Introduction au Common Law (2008).

56 James Gordley, The Philosophical Origins of Modern Contract Doctrine 134 (1991); and generally Milsom, *supra* note 50, at 9.

57 Kennedy, *supra* note 16, at 211.

58 D.T. Mitchell, Architect of Justice - Felix S. Cohen and the Founding of American Legal Pluralism 171 (2007) (quoting F. Frankfurter).

59 Fletcher, *supra* note 40, at 2.

60 Getches et al., *supra* note 38, at 198.

61 Handbook (1941), *supra* note 2, at 122 (this principle is the following: "*those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*").

62 Handbook (1941), *supra* note 2, at 123 (the three underlying principles are: "*(1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal*

implications which will be analyzed in detail later, but it truly is an articulation of "all Indian law" around one basic principle, subject to sub-division in three fundamental principles. If this is truly the core of Cohen's *Handbook's* influence, which we have no reason to doubt, then Cohen has undoubtedly given birth to new legal thinking in the field of Native American law. The internal characteristics of the *Handbook* highlighted above (succinctness, comprehensiveness and systematized structure) were certainly instrumental in the achievement of this novel jurisprudence of Native American law.

This first section of the inquiry has argued that the *Commentaries* and the *Handbook* both share a number of characteristics; they both present comprehensive and rationalized expositions of the law of the field in an accessible style and with a strong historical approach. These features undoubtedly allowed the two publications to become the most used and relied upon source of legal knowledge in their field for a significant time. As primary sources for lawyers' practice and training, and thanks to their characteristics and nature, they influenced legal thinking in a new way; the presentation of the law as a system of principles rather than a mass of rules transformed the field into a discipline fit for scholarship.

II. The Commentaries and the Handbook as Vehicles for Their Authors' Broader Pedagogic and Political Projects

Blackstone and Cohen did much more than map the law of the field and provide students and professionals with a succinct, comprehensive and accessible source for legal knowledge; they advocated for a certain vision of social relations and a political view of the role of law and legal knowledge. In this second section, I will first analyze the nature of Blackstone's and Cohen's respective project as it is expressed through the *Commentaries* and the *Handbook*; then I will compare and contrast the extent to which both scholars succeeded in making their political and pedagogical views prevail.

A. The Nature of the Projects: Proposals for the Role of Law and Legal Education in Social Relations

Blackstone prepared the *Commentaries* as he was giving lectures at Oxford on the common law of England. He inserted as an introduction to the four volumes the lecture he gave in 1758 to mark his appointment to the Vinerian professorship. At the time it was delivered, the *Commentaries* had not yet been published, and Blackstone refers only once to work he had already undertaken for them when he mentions the outline of the course he will be giving. The lecture is therefore not about the work he has undertaken before nor about how he will be using it in his teachings. I would argue instead that by inserting in print the lecture on the study of the law at the very opening of his major work the author reveals the nature of his project, namely to use his position at Oxford to change the way English law is

sovereignty of the tribe, i.e., its powers of self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.").

studied in order to give it the place it deserves as a discipline worthy of teaching and learning in its own right.

The lecture first of all addresses at length the many reasons why Englishmen of all social status should have some knowledge of the common law.[63] Unsurprisingly Blackstone recommends that the nobility become versed in the common law. Proper knowledge of the laws in force in England is required to fulfil their dual functions as legislators and judges of last resort in the House of Lords (at the time cases where heard before the entire chamber rather than a dedicated committee). The gentlemen who owned enough property to be called as jurors or pursue a political career in the House of Commons would equally need foundational legal knowledge to accomplish their duties. These arguments seemed all the more compelling to Blackstone as he blamed the defects in the English laws on the frivolous amendments brought by Parliament to long-standing common law rules, and such failings would be prevented if legislators were not "utterly ignorant" of the rules they are called on to modify.[64] However, and this is perhaps most noteworthy, Blackstone also argues for Englishmen who owned less than the previous two categories to learn about property rights and the transmission of such property through wills to ensure that their intentions regarding whatever they owned would be enforced by the courts.

Blackstone then attempts to demonstrate that the study of the common law is superior and more useful than that of the canon law or civil law (two already-established university disciplines). The Vinerian professor reminds his audience that the design of the civil law, as codified under Emperor Justinian, was for the "despotic monarchy of Rome and Byzantine," in contrast with the common law so well-adapted to "[perpetuate] the free constitution of Britain."[65] Blackstone limits the relevance of learning the canon law or the civil law to the clergy and those destined to serve in the courts of equity. He thoroughly casts these legal traditions as foreign to England, and advocates instead for the study of local laws rooted in the "immemorial customs" of Britain, affirming that "[i]t is incumbent upon every man to be acquainted with [...] the obligations which it lays him under" (as opposed to those applicable elsewhere).[66]

Lastly, Blackstone develops the reasons why the science of the common law should be taught in the universities rather than learnt through apprenticeship with practicing lawyers. Blackstone argues that unlike with the inns of court, students will find companions and teachers to assists with their learning in the universities. Moreover, according to him the science of common law "employs in its theories the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart; [...] is universal in its use and extent, accommodated to each individual, yet comprehending the whole community", and is therefore is therefore "properly and regularly academical."[67] The scientific status of the field of study is grounded in the use of objective methods to examine an object affecting the entire society. Universities are deemed to be the best home for the teaching of sciences since that is where they can flourish and benefit from the proximity of other sciences for their own developments.

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63 1 Commentaries, *supra* note 4, at 5-12.
64 *Id.* at 9.
65 *Id.* at 5.
66 *Id.* at 6.
67 *Id.* at 27.

This overreaching pedagogic project was also deeply political. In establishing it as a respectable science to be taught and studied in the university, Blackstone legitimized the common law as it was. Grounded in historical continuity, the status quo of the common law was to be preferred to radical changes, such as those of the philosophers of the Enlightenment movement in Continental Europe in the same era, or even the codification proposals advocated by Bentham. Blackstone defended the perpetuation of a system of private property inherited from feudal England over the more egalitarian ideas that flourished elsewhere in the eighteenth century. It took the form of a justifying legal rules and principles as grounded in the customs of the English people, as a natural emanation of their character over time. According to Kennedy, this constituted an "attempt to naturalize purely social phenomena"; moreover, it framed as a freedom-inspired rational order something that Kennedy saw as servitude and chaos.[68] Accordingly, one can see Blackstone's work as an embrace and praise for an unjust social order. We are therefore see that a striking paradox in Blackstone's project: the wish to empower and enlighten the English people with applicable legal knowledge through a radically novel academic endeavor, which by the same token sustains a truly conservative approach to social and legal relations.

Turning now to the project underlying Cohen's *Handbook*, as with Blackstone, the introductory sections are extremely instructive. Three substantive sections come before the *Handbook* itself: Secretary of the Interior Ickes's Foreword, Solicitor Margold's Introduction, and Assistant Solicitor Cohen's Author's acknowledgment. Despite the different signatures, Cohen drafted all three of them.[69] This justifies reading them together, as three aspects of the same ideas, in order to best comprehend the project embodied in the *Handbook*. Moreover, the fact that Cohen and the preparation of the *Handbook* were moved to the Interior after starting within the Department of Justice shows that there was political will and eagerness in the Interior's administration to see the completion of the *Handbook* on shared premises. The Department of Justice put an initial end to Cohen's work because they wanted a guide on how to win Native American law cases, and especially the many land claims pending at the time. The Interior made sure Cohen could resume his work because they shared his view that the end result should help protect Native American tribes' rights (for the government to fulfill its duty "as guardian of the Indians" and for the Native Americans to defend themselves) and be useful to all potential parties in Native American law cases.[70]

Two elements of historical context should be recalled to facilitate comprehension of the pedagogic and political aspects of Cohen's project. First, the *Handbook* was published after several decades of federal policy aimed at putting an end to tribalism. The allotment era that had started with the General Allotment Act of 1887 had demonstrated that Congress could sweep away tribal powers affirmed by treaties or by a long line of Supreme Court decisions, even against the principles of tribal sovereignty that could be derived from the Marshall trilogy.[71] Second, the global context of the late 1930s and early 1940s was demonstrating on an unimaginable scale the vulnerability of minorities, racial, religious or political,

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68 Kennedy, *supra* note 16, at 211.
69 Mitchell, *supra* note 58, at 171.
70 *See id.* at 166-70.
71 Getches et al., *supra* note 38, at 198.

when faced with a hostile government. The Introduction acknowledged the topical character of the European and East-Asian events and their relevance to the work in progress: Cohen's Introduction opens with a quotation by Ickes, who affirms that the subject of "how governments treat minorities […] never was a more burning subject than in […] December 1939".[72] These two features of the period during which the *Handbook* was prepared should not be forgotten when examining the meaning of its author's ambitions.

Moreover, Cohen's previous works as a legal scholar already demonstrated his political commitment to certain ideals. As will appear later, Cohen championed legal realism in American jurisprudence, for instance with his 1935 *Transcendental Nonsense and the Functional Approach.*[73] In opposition to the legal process school of thought, he rejected the idea that legal processes and principles could be neutral and allow for a fair competition of unbalanced group interests. Instead, he believed that the state had a central role to play in protecting minorities from competing interests.

Cohen's pedagogic project was very different from Blackstone, and was not focused on creating an academic discipline to study and teach Native American law. The primary pedagogic aim pursued by the *Handbook* was to give Native Americans "useful weapons in the continual struggle that every minority must wage to maintain its liberties" and providing those who dealt with them "the understanding that may prevent oppression."[74] At the same time it should allow "the Indian people to take an active and responsible part in the solution of their problems," and help the Federal government in fulfilling its obligation to "protect and safeguard the rights of our oldest national minority."[75] Cohen moreover believed that "confusion and ignorance in the field of law are allies of despotism."[76] The *Handbook* therefore was an attempt to empower the Native Americans with means to know and protect their rights, and let the general public know about them so that they do not infringe upon them. The publication being comprehensive, rationally organized and easy to read, it was appropriately equipped to fulfill such a role. Cohen's pedagogical project was primarily concerned with empowering a minority to give them the tools to be actors in the creation of the laws they were to be governed by; this is a sharp contrast with Blackstone's attempt to educate a majority in the knowledge of laws. Despite the lack of resemblance between Blackstone's and Cohen's context and subject, the dissimilarity of their respective pedagogic projects reveals different political approaches.

The *Handbook* was also a piece of political advocacy. Unlike Blackstone's *Commentaries,* it did not purport to legitimize the state of the law as it was at the end of the allotment era and defend natural evolutions of the laws in the field. To the contrary, it relied on legal analysis to advance progressive social policies and constituted "one of the more voluminous lawyers' briefs ever produced for the revival of tribal sovereignty—the overarching goal of the Indian Reorganization

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72 Handbook (1941), *supra* note 2, intro., at vi.

73 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

74 Handbook (1941), *supra* note 2, foreword, at v.

75 *Id.* at v-vi.

76 *Id.*, author's acknowledgment, at xviii.

Act."[77] Felix Cohen was instrumental in the drafting and enacting of the Indian Reorganization Act (IRA, referred to in the *Handbook* as the Wheeler-Howard bill) which was sponsored by Commissioner of Indian Affairs Collier and signed into law by President Roosevelt in 1934. It primarily meant to put an end to the allotment policies and thus preserve communal tribal land bases, as well as encouraging tribes to (re-)institute self-government. The *Handbook* "represents a vigorous defense of tribal sovereignty and, like the Indian Reorganization Act itself, promoted the revival of American Indian tribalism within the context of federal power over Indian tribes";[78] it can be seen as an extension of the IRA pursuing the same policies, supported by the same actors. It contributed to the recast of the federal-tribal relationship initiated by the IRA. While Congress expressly recognized the survival of tribal inherent powers in the IRA after "the destructive forces of the allotment era reforms,"[79] the *Handbook* was a comprehensive exposition of them, of their practice and their theory.

The existence of this political project in the design of the *Handbook* is maybe best illustrated by what its opponents did to it later on. In the 1950s, the Eisenhower administration decided to follow a policy antagonistic to the one embodied in the IRA and the 1942 *Handbook*: it started ending federal responsibility over the tribes, thus subjecting them to state laws and abolishing their sovereignty by the same token as the provision of federal services.[80] All of a sudden, the existence of a document published under the supervision of the Department of the Interior presenting a very different view on the topic proved "embarrassing."[81] A simple solution was found: "rewrite Cohen's book and discredit the original under the guise of a revision."[82] The authors of the 1958 edition of the *Handbook* themselves acknowledged in the introduction that their purpose was "of foreclosing, if possible, further uncritical use of the earlier edition by judges, lawyers and laymen."[83] The 1958 edition had one constant theme: stressing the plenary character of federal powers over Native Americans and understate the idea of tribal sovereignty.[84] In sum, "where Cohen sees the tribes as sovereign peoples, entitled to self-government and responsible for their own destinies, the 1958 edition tends to see them as thorns in the side of the American system of

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77 Getches et al., *supra* note 38, at 197.

78 *Id.* at 197-98.

79 *Id.*

80 This policy has been called "termination," see e.g. Kenneth R. Philp, *Termination: A Legacy of the Indian New Deal* 14(2) Western Hist. Q. 165 (1983).

81 Felix S. Cohen, Felix S. Cohen's Handbook of Federal Indian Law 3 (R.L. Bennett & F.M. Hart eds., 1971) [Hereinafter Handbook (1971)] (this is a facsimile reprint of Cohen's original edition of the Handbook initiated by the Native American law scholars of the University of New Mexico as an attempt to counter the administration propaganda embodied in the 1958 edition of the Handbook).

82 *Id*.

83 Office of the Solicitor, U.S. Dep't of the Interior, Federal Indian Law 1 (1958) (citation for this publication sometimes indicates Felix S Cohen as the author; perpetuating this habit would be misleading given the profound departure from Cohen's presentation of Federal Indian Law that it features, and would provide undue legitimacy to the revisionism it constitutes).

84 Handbook (1971), *supra* note 81, at 4; Handbook (1982), *supra* note 28.

government."[85] The profoundly ideological revision of 1958 shows by contrast the powerful political messages of Cohen's original work.

To conclude this section, it is now clear that both Blackstone and Cohen furthered broader pedagogic and political projects with their most famous publications. They both published vehicles for a grand project with a pedagogical and a political facet, organically intertwined. Despite some commonalities, like the aim to ease access to legal knowledge, their respective projects were extremely different. Nevertheless, neither the *Commentaries* nor the *Handbook* were written solely to provide a single source of legal knowledge in their field; on the contrary, they both contributed to advancing the political endeavor of their author.

B. The Extent of Their Achievements: Blackstone's Quasi-Triumph and Cohen's Fluctuating Fortune

The extent of Blackstone's achievements is summarized by Twining in a terse phrase: Blackstone "left a legacy of ideas rather than institutions."[86] It is not before the middle of the 20th century that law really became a subject for academic teaching and study in England; that is almost two centuries for Blackstone's pedagogical project to become reality. However, in the meantime, universities began to train lawyers in America: the forerunner was College of William and Mary in Virginia from the very first years of the nineteenth century,[87] mirrored by a few others in the following decades, until the final victory of law-schools over competing settings for lawyer's training in the aftermath of the American Civil War and under the influence of Langdell's model. Generations of American lawyers started their studies in law with Blackstone's *Commentaries*;[88] it took only about a century after their first publication for Blackstone's proposal for legal education to be widely accepted in America. It took a shorter time for American scholarship on common law to emerge, as Kent, Story and Tucker took on truly academic work on the law of their land.[89] Blackstone's pedagogical project was succeeding in America when it was still ignored in England. Regarding the political aspect of Blackstone's grand project, things look a bit different. The English common law was not subjected to comprehensive codification, as Blackstone feared and as Bentham hoped, but overall left to its organic growth with increasing legislative intervention starting in the end of the nineteenth century. Blackstone's *Commentaries* were instrumental in preserving this state of things, since they "became the old Gothic castle of the

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85 *Id.* (citing Philip S. Deloria).

86 W. Twining, Blackstone's Tower: The English Law School 24 (1994).

87 George Tucker, professor of law at William and Mary, published his own edition of Blackstone's *Commentaries* adapted for his students with annotations regarding the laws in Virginia and in the United States, in 1803. *See* McPherson, *supra* note 11, at 487-88.

88 *See, e.g.* Angela Fernandez & Markus Dubber, Law Books in Action: Essays on the Anglo-American Legal Treatise 23 (2012).

89 *See, e.g.* McPherson's demonstration that Story and Kent undertook works of the nature and scale of Blackstone's own at the beginning of the nineteenth century, McPherson, *supra* note 11, at 489*;* and Hoeflich's reference to Tucker as one of the "American Blackstones", M. Hoeflich, *American Blackstones*, *in* Blackstone and his Commentaries – Biography, Law, History (W. Prest ed., 2009).

Common law" for eighteenth and nineteenth century English lawyers to inhabit.[90] As an identifiable source of knowledge on the common law, the *Commentaries* diverted the need to enact a single source of law, i.e. a code. This holds true to an even greater extent in America: during its formative years after the War of Independence, in a truly Anglophobe period, the new Republic contemplated the French example (Napoleon's *Code Civil des Français* was enacted in 1804) and Bentham's proposals before rejecting them.[91] The fact that the *Commentaries* were already firmly adopted by American lawyers must have been instrumental in preventing the success of codification efforts in this country as well. Lastly, Kennedy starts his history of American legal thought with Blackstone, and emphasizes the unity that has remained from Blackstone's first articulation of principles justifying the legal status quo to the present dominant legal thinking.[92] This further demonstrates that Blackstone's political project was successful overall in England, and even more so in America.

Cohen's success may be contrasted. The mention above of the publication of the 1958 version of the *Handbook* should not mislead us in thinking that Cohen failed in achieving the political project embodied in his *Handbook*. The termination policies of the 1950s were a setback for those sharing Cohen's views. They unquestionably show that Cohen's grand project was not unanimously embraced, and that its opponents took control of federal policies regarding Native Americans in the decade following the *Handbook's* publication. This must be why Cohen assessed his own achievements as "at best a move between giant failure and microscopic success" in 1953 correspondence with Frankfurter.[93] However, in 1971, scholars at the University of New Mexico published a facsimile of the 1942 edition of Cohen's *Handbook* in order to prevent the 1958 edition from winning the political war over the approach to Native American affairs. These scholars, Bennett and Hart in particular, were direct heirs to Cohen's work since they were among the first law professors to dedicate themselves to Native American Law. In the 1968 Indian Civil Rights Act, Congress mandated an updating of the work; the project was undertaken by Native American law scholars under the leadership of Strickland, outside of the supervision of government administrations, and was completed in 1982.[94] It followed the spirit of Cohen's tribal sovereignty approach, and brought significant new materials to the *Handbook*. It was updated in 2005 and 2012, again by scholars not affiliated with the federal government.[95] Although the 1958 edition "is almost universally reviled to this day"[96] and is often referred to as

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90 Fernandez & Dubber, *supra* note 88, at 27.

91 McPherson, *supra* note 11, at 473.

92 *See generally* Kennedy, *supra* note 16.

93 Mitchell, *supra* note 58, at 271 (quoting Cohen).

94 Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. Rev. 153, 158-59 (1996).

95 Fletcher, *supra* note 40, at 5 n.25.

96 *Id.* at 5 n.25; since the 1958 revision of the Handbook came out, 21 Supreme Court decisions cited it, but only two such decisions are subsequent to the publication of the 1982 edition: Nevada v. Hicks, 533 U.S. 353 (2001), and California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The pattern appears even more clearly with regards to Courts of Appeals: whereas there were 33 cases from Courts of Appeals citing to the 1958 revisions (including 20 from the 9th Circuit, and 10 from the 8th Circuit) between 1958 and 1986, there has not been a single one since 1986 (as of 14 May 2018). *Compare* these results *with* citations of other editions of the Handbook, *supra* note 39.

a "vulgate version,"[97] the struggle between the 1958 editions on one side, and the original 1941 edition accompanied with the 'loyal' recent updates on the other side remains an illustration of competing approaches to policies and legal analysis of Native American law issues. For instance, Justice Scalia writing for the majority in *Nevada v. Hicks* in 2001 cited the 1958 edition to support the anti-tribal sovereignty claim that "an Indian reservation is considered part of the territory of the State."[98] On the other hand, Justice Souter cited the 1982 edition in his dissent as an authority for a more sovereignty-friendly argument about the inapplicability of the Bill of Rights and the Fourteenth Amendment to Native American tribes since "Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations on states do not apply to tribes."[99] Cohen's ideas seem to be prominent among the academic community dedicated to Native American law, but to be embraced only by a minority of Supreme Court Justices. Supreme Court decisions as to which cases to hear and how to decide them remain overall unfavorable to tribal interests.[100] Cohen's grand project has not prevailed, but it remains at the center of the current political debate over Federal Indian law and policies.

In sum, the fate of Blackstone's and Cohen's respective grand projects indicates that the former achieved a quasi-triumph over time whereas the latter has thus far known fluctuating fortune. Blackstone's *Commentaries* succeeded in establishing his grand project in America over the course of a few decades, and entrench his political proposals for the law in the English consensus very quickly. Cohen's political project has gained momentum at some times and has encountered setbacks at others. The significant differences in this section between Blackstone and Cohen demonstrates that broadening the scope of analysis beyond the initially perceivable common traits provides a more accurate understanding of the acuity of the Blackstone-Cohen comparison. The analysis should however not stop at the first distinction between the two scholars and their achievements; to the contrary, the findings here justify pursuing the analysis further, and broadening again the scope of our inquiry.

III. Comparing the Two Scholars' Philosophy of Property as an Example of Their Role in the Intellectual History of Law

In this section I analyze Blackstone's and Cohen's respective positions in the intellectual history of jurisprudence. Both contributed to the development of jurisprudence in their

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97 S*ee, e.g*. Bennett & Hart, *supra* note 81, at 4.

98 Nevada v. Hicks, 533 U.S. 353, 362 (citing Federal Indian Law (1958) Handbook, *supra* note 83).

99 *Id.* at 384 (Souter, J., concurring) (citing Handbook (1982), *supra* note 28).

100 *See, e.g.* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009); Alexander Tallchief Skibine, *The Supreme Court's Last 30 years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 Colum. J. Race & L. 277 (2018). Skibine also notes that Justice Kagan (in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016)) and Justice Breyer (in *United States v. Lara*, 541 U.S. 193, 200 (2004)) have both written opinions "in line with the paradigm articulated by Felix Cohen", *id.* at 334-35.

own time by taking an active role in thinking, teaching and writing on issues pertaining to legal philosophy. Their shared commitment to academia is illustrated by their respective careers and publications. William Blackstone joined Oxford University at age 15 in 1738, commenced a doctorate of civil law in 1750 and soon after decided to dedicate himself to academic endeavors. He unsuccessfully applied for the chair of Regius Professor of Civil Law; after this initial failure, he was appointed in 1758 to the first chair of English law as Vinerian Professor. It is only after the publication of his *Commentaries* that Blackstone would return to the Bar.[101] The *Commentaries* are the result of his work as university professor of English law at Oxford. Cohen's elaboration of the *Handbook* in his capacity within the government administration should not mislead us into thinking that he did not, as Blackstone, primarily belong to the academy. Strickland rightly recalls that "Felix S. Cohen [remained] a son of the academy no matter where he happened to be":[102] Morris R. Cohen, Felix's father was celebrated as a great American academic, with contributions in fields ranging from logic and metaphysics to legal and social philosophy.[103] Like father, like son as Morris and Felix Cohen co-authored together *Readings in Jurisprudence and Legal Philosophy* in 1951,[104] and Felix Cohen demonstrated his own taste for academia as a visiting professor at the Yale Law School and City College.[105] Blackstone's and Cohen's background demonstrates the relevance of this broader inquiry in the philosophical foundations of their work.

I have confined the analysis of Blackstone's and Cohen's position in the intellectual history of law to one subject: property. A comparative assessment of one major concept of their legal thinking should give enough indications as to the validity of the comparison, and it would be impossible here to assess Blackstone's or Cohen's situation comprehensively. I have focused the analysis on the notion of property because it was a key topic in both Blackstone's and Cohen's epochs of jurisprudence, and because it also unifies the two authors. First, Blackstone's *Commentaries* were published at a time of fruitful thinking by a number of European philosophers on the concept of property; it is in the era that Locke's[106] and Rousseau's[107] seminal works addressing the origins, operation and meaning of property. Then, Cohen's academic works were undertaken from the late 1920s to the early 1950s, a period during which different views on property were central in the exchanges on legal theory since this theme was central in defining the world's order between capitalism and communism. Furthermore, substantial sections of property law taught today in American law schools derive from the peculiarities of English common law articulated by Blackstone in the Second Book of his *Commentaries*.[108]

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101 *See* the brief biography of Blackstone in the introduction of C.E. Harman, Critical Commentaries on Blackstone vii-ix (2002).

102 Strickland & Valencia-Weber, *supra* note 94, at 156.

103 *Obituary: Morris Raphael Cohen*, N. Y. Times, Jan. 31, 1947, at 22, http://nyti.ms/1AkDUe9; Sidney Ratner, *Tribute to Professor Cohen*, N. Y. Times, Feb. 1, 1947, at 14, http://nyti.ms/1AkIYiz.

104 M.R. Cohen & F.S. Cohen, Readings in Jurisprudence and Legal Philosophy (1951).

105 *Felix Cohen Dead; Aided US Indians*; *Ex-Associate Solicitor of the Interior Department Was Champion of Tribes' Rights*, N. Y. Times, Oct. 20, 1953, at 29, http://nyti.ms/1AlxV8O.

106 *See, e.g.* John Locke, Two Treatises of Government (1689).

107 S*ee, e.g.* Jean-Jacques Rousseau, Du Contrat Social (1764).

108 Harman , *supra* note 101, at 107.

In American law schools, "property was what Indian Law was about or primarily about before the Second World War*,"*[109] and property law courses have long been avenues for law teachers with an interest in Native American issues to integrate them into the curriculum, at the very beginning of the twentieth century as well as in recent decades.[110] Lastly, the foundational case for Native American law deals primarily with issues of property: *Johnson v. M'Intosh* in 1823.[111] We can therefore see a bridge of sorts between Blackstone and Cohen in this domain.

An alternative approach could have been to look at constitutional theory. Constitutional issues in jurisprudence were also prominent in Blackstone's era and constitutional law courses have also been a part of the American law school curriculum where teachers could introduce students to Native American law issues.[112] However, the differences between the parliamentary monarchy of the United Kingdom supported by an unwritten Constitution and the federal republican form of government in the United States embodied in a written Constitution are sufficiently great as to make any comparison of the two jurists this aspect of legal philosophy nearly impossible. Before assessing each author's position in the history of legal thought, and in their respective times' legal thinking, it is necessary to explore their own views on property.

Blackstone believed that there are laws of nature among men as among things. With regard to property, the scope of natural law is however restricted to a single principle that all things are the general property of all mankind, exclusive of other beings,[113] since the Creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and every other living thing that moves upon the earth." Blackstone writes that this is the "only true and solid foundation of man's dominion over external things."[114] In the beginning, as per the law of nature formulated by God himself and as recorded in the book of Genesis, all men thus enjoyed common ownership over all things present on Earth. In the early days of mankind, while men were in a state of "primeval simplicity,"[115] this general notion of property was sufficient as there were plenty of things for the then few human beings to enjoy for their current needs and they had no need of individual titles for their activities did not require anything beyond this communion of goods. As men "took from the public stock for [their] own use such things as [their] immediate necessities required,"[116] and abandoned them back when these necessities ceased, they actually only enjoyed the goods as theirs when they were in their possession; they individually enjoyed an usufructuary property in them, while the whole of mankind always retained the general ownership of all external things. Thus, *"*the right of possession continued the same time only that the act of possession lasted."[117]

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109 Strickland & Valencia-Weber, *supra* note 94, at 157.

110 *See id.* at 157-58; and James M. Grijalva, *Compared When - Teaching Indian Law in the Standard Curriculum*, 82 N.D. L. Rev. 697, 698 (2006).

111 21 U.S. 543 (1823); *see also infra* note 125 and accompanying text.

112 Strickland & Valencia-Weber, *supra* note 94, at 158.

113 2 Commentaries 3.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

Profound changes such as the adoption of a sedentary lifestyle and the start of agriculture then gave rise among early humans to a need for a more permanent entitlement to the things on which they had applied their labor. For instance, men would not invest time and craft in building habitations if another man could obtain a title to the habitation as soon as the builder walked out of his home. Likewise, as men began to breed animals to avoid the uncertainties of hunting, and also began to till the soil, they wanted to ensure that nobody but the breeder and the farmer could enjoy the fruits of such "industry, art, and labour."[118] From there rose the idea that "bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein."[119] In the introduction dedicated to *the nature of laws in general*, Blackstone had already evoked the end of the migratory lifestyle as a cause leading to the establishment of property and civil government.[120] In the Second Book, the author explains how the new needs of mankind made it necessary to 'invent' a more permanent and individualized form of ownership than the one supplied by the natural law. According to Blackstone, "[n]ecessity begat property; and in order to insure that property, recourse was had to civil society,"[121] and the concomitants such as states, government and laws.

After the invention of property by men, Blackstone shows that the notion developed in many ways in different times and places. For example, some communities accepted that men could grant ownership in their property to strangers by writing a will in their favor, thus disposing of their property as they wished after their death, while others could not tolerate transmission of goods in this form since possession and ownership ceased to exist when a man dies.[122] In the varieties of legal rules regarding transmission of property across human communities, the common principle remained that "occupancy is the thing by which the title was in fact originally gained."[123] This is the civil foundation of property. The permanent right of property is a civil right and not a natural right since natural property is general in character, and it represents a political establishment;[124] the diversity of rules in this regard is clear evidence to support this theoretical understanding of property.

Let us pause briefly here to note the intellectual genealogy connecting the foundations of US property law and Native American law to Blackstone's explanation of property. In 1823, Chief Justice Marshall of the U.S. Supreme Court decided the case *Johnson v. M'Intosh*[125] very much in line with Blackstone's views of property. Although Chief Justice Marshall does not explicitly mention Blackstone (generally speaking, references to authorities of any nature are extremely rare in

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118 *Id.* at 7.
119 *Id.* at 5.
120 1 Commentaries intro. § II, 47-49.
121 2 Commentaries 8.
122 *Id.* at 12-13.
123 *Id.* at 8.
124 *Id.* at 11.
125 21 U.S. 543 (1823) (Chief Justice Marshall does not explicitly mention Blackstone, and this is no surprise given how rare references to authorities of any nature are Chief Justice Marshall's opinions; nonetheless, his reasons echo the arguments submitted by Winder and Murray, M'Intosh's attorneys, who themselves cited the first pages of 2 Commentaries).

Marshall's opinions), his reasons echo the arguments submitted by Winder and Murray, M'Intosh's attorneys, who themselves mentioned the first pages of the Second Book of Blackstone's *Commentaries*. In spite of the rich developments in both property law and Native American law in the past 200 years since this decision, the case remains a landmark of the Marshall era and is very often examined in the very first year of law school across America.

Blackstone's view of property is most often characterized by scholars as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[126] Schoor and Kreitner suggest that it was Cohen himself, a prolific writer on the history and philosophy of property,[127] who crystalized and gave broad currency to this perception of Blackstone's perspective.[128] However, Schoor reminds us that a careful reader of the *Commentaries* will discover numerous explications, delimitations and qualifications for "less-than-absolute property rights."[129] Cohen's 1954 *Dialogue on Private Property* attributes to Blackstone a philosophy of property deprived of the complex arrangement of rules that he had described as the law of England throughout the Second Book of the *Commentaries.*[130]

What is then Cohen's philosophy of property and why does he misuse Blackstone in that respect? In *Dialogue on Private Property*,[131] Cohen presents a comprehensive and pedagogical explanation of his own understanding of property. He defines it as "the exclusions that individuals can impose or withdraw with state backing against the rest of society," in relation to their enjoyment of a thing.[132] He distinguishes this approach from Blackstone's, summarizing it as focused on the "sole and despotic dominion," as the latter could not apply to anything in reality given that there always are limitations on one's ability to enjoy a thing,[133] and thus is unable to account for the operations of law in "concrete, real-world problems."[134] As things constantly interact with others, one could not possibly exert a "sole and despotic dominion" over a something without making it impossible for others to enjoy an equally broad right to their own things. Cohen paints Blackstone's definition as absolute in order to highlight the nuances of his own and the matter of degree:[135] everything lies in the extent to which one can enjoy his things. To define such limits, Cohen looks at what judges and other state authorities

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126 David B. Schoor, *How Blackstone became a Blackstonian* 10 Theoretical Inquiries L. 103, 104 (2009) (the original quote is to 2 Commentaries 1).

127 F.S. Cohen, *Dialogue on Private Property* (Yale Law Sch. Faculty Scholarship Series, Paper No. 4360, 1954).

128 Schoor, *supra* note 126, at 124 ("my intuition is that 'sole and despotic dominion' was popularized through the good offices of Felix Cohen"); *see also* Roy Kreinter, *On the Use and Abuse of Blackstone – A Comment on Professor Schoor*, 10 Theoretical Inquiries L. (1 Forum) (2009).

129 Schoor, *supra* note 126, at 107. See e.g. 2 Commentaries 38-39 (exposing the right of all to hunt "ravenous beasts of prey" on another's turf).

130 Cohen, *supra* note 127.

131 *Id.*

132 *Id.* at 378.

133 *Id.* at 362-63.

134 *Id.* at 378.

135 *Id.* at 379.

would actually do to protect one's property rights.[136] It is in respect that Cohen's philosophy of property truly belongs to legal realism: "what judges do is more important than what they say" and property relationships are defined and shaped as "*a resultant of court activity*" "whether or not the court calls them property."[137] In determining property relationships, Cohen (who had undoubtedly read Holmes) knew that courts would be faced with conflicting groups' interests. Moreover, his long involvement with Native American law issues, taught him that "divergences of values [were] common when groups with different traditions and experiences came in contact."[138] Cohen firmly believed that the government has an affirmative obligation to protect the social and economic rights of groups and individuals,[139] and presented this democratic ideal in his Foreword to the *Handbook*.[140] There lay the solution to the problem of conflicting group interests: various groups should be able to express their collective right to be different, and these voices have to be included and protected. Cohen embraced and advocated legal pluralism as the best way to protect individuals from oppression and promote social integration.[141] The consequence of Cohen's legal pluralism for the operation of property would be the reconciliation of other groups' interests in the enforcement by the state of property rights.

Property laws presented by Blackstone, and his principled articulation of them, accommodated a myriad of stakeholders' interests instead of celebrating the owner's "sole and despotic dominion" over the things that he owned. In this respect, we can see that there is much similitude with Cohen's beliefs. Despite all the apparent differences between Blackstone and Cohen, there seems, once again, to be a sense of unity. The similarities between Blackstone's and Cohen's views on property are further highlighted by an underlying view of social relations. Kennedy demonstrated that Blackstone's *Commentaries* operate to legitimate and perpetuate the status quo.[142] With regards to property, the rules that Blackstone enunciated as law resulted from the imposition of power by the strong on the weak in the power struggles of feudal England. However unfair the processes that led to them, Blackstone entrenched the outcomes and reaffirmed their legal force for the future. The last pages of Cohen's *Dialogue* offer a striking parallel: Cohen stresses that the functional operation of property principles, stemming from the fundamental rule of first occupancy, perpetuates the governing group's own power over time.[143]

Blackstone's understanding of property revealed above was not ground-breaking. It was an elaboration on natural law presenting no major inconsistency

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136 *Id.* at 379-80.

137 *Id.*; Cohen himself calls his definition "*realistic"*, *see id.* at 378; *See also* Schoor, *supra* note 126, at 124 n.138.

138 Handbook (1941), *supra* note 2, at 147.

139 Mitchell, *supra* note 58, at 174.

140 *Id.* at 172.

141 *See generally id.* at 172-77.

142 *See generally* Kennedy, *supra* note 16.

143 *See* Cohen, *supra* note 127, at 386-87 ("the rule of first occupancy […] preserves the status quo. [It] maintains or strengthens the power of the possessing group. […] Our examination of the situation in terms of power indicates that the rule of first occupancy may appeal very much to a law-giver who is interested only in strengthening the power of his government or its ruling class.").

with Locke's own philosophy of property,[144] and fits in a genealogy tracing back to Pufendorf and Grotius. What is important for the intellectual history of law regarding Blackstone's philosophy of property is its inclusion in the *Commentaries.* The way Blackstone narrates the birth of civil property is an instance of scientific, philosophical, discussion of a legal notion in a rational fashion. The legal principles, just like the concept of property, are therefore, a proper object for a logical examination. Moreover, while the term 'property' may be used in daily life, it has a precise meaning in law and Blackstone undertakes to not only investigate its historical developments but also to explain its meaning. His writing style, similar to Rousseau's, is a way to make this study available to all of those who are not familiar with legal jargon. The clarity of his language and narrative style certainly make for easier reading for students than the technical and confused abridgments then available. It is with explanations such as those for the concept of property that Blackstone "changed the way in which people think."[145] Blackstone participated in the shift from a period of "legal creation" (the invention of new forms of actions over centuries of cumulative English legal developments) to a "period of literary creation in which legal results were reduced to coherent substantive systems*."*[146] Blackstone's efforts in pedagogy to explain the law to non-jurists was instrumental in leading jurists to transform the law into a substantive system rather than a compilation of procedures.[147] Blackstone for the first time expressed what became self-evident subsequently:[148] the categories of problems encountered in life by members of society are reflected in categories of legal solutions. These categories are the "elementary legal ideas*,"* and are "elementary precisely because, in a sense, they classify life."[149] Introducing this idea to lawyers' thinking is what Milsom calls the true nature of Blackstone's achievement.[150] Blackstone's decisive role in introducing in legal thinking what is now considered as obvious unquestionably demonstrates Blackstone's key role in the intellectual history of law.

In *The Path of the Law*,[151] Holmes challenged "the description of law as a body of natural and neutral rules."[152] Acceptance or rejection of this idea dominated American jurisprudence in the first decades of the twentieth century. This disillusion with law seemed to leave only two future alternatives: giving the state the power to govern diverse groups in the name of general public good, necessarily in accordance with one's own biased sense of justice, or deferring to groups at the risk of lapsing into moral relativism or, worse, nihilism.[153] The struggle between the two alternatives envisioned after Holmes, the question of legal pluralism, has stayed alive long into the twentieth century, with legal realism as an incarnation of the latter option.[154] Before articulating the principles for legal pluralism, Cohen gave

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144 Blackstone himself acknowledges Locke's influence on his own works, *see, e.g.* 1 Commentaries, 125-26; *See generally* Locke, *supra* note 106.

145 Milsom, *supra* note 17, at 9.

146 *Id.* at 11.

147 *Id.* at 12.

148 *Id.* at 11.

149 *Id.* at 6-7.

150 *See generally* Milsom, *supra* note 17.

151 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

152 Mitchell, *supra* note 58, at 271.

153 *Id.*

154 *See, e.g.* Carrington's fear in the mid-1980s that Legal Realists, or rather their heirs

its credentials to legal realism in a period when legal thinking was dominated by the process theorists who asserted the existence of "neutral processes in which different groups supposedly interact, compete, and trade ends"[155] as an answer's to Holmes's dilemma. In 1935, Cohen provided the most satisfactory alternative to legal process for those who believed that law could not escape embracing substantive norms[156] so far with his *Transcendental Nonsense and the Functional Approach.*[157] This work was received and has "remained a classic example of the legal realists' critique of conceptualism."[158] This publication was critical in earning Cohen what Frankfurter referred to as his prestige as a scholar[159] years prior to the preparation of the *Handbook*. Cohen's articulation of legal realism in *Transcendental Nonsense and the Functional Approach*, and then of legal pluralism as presented in particular for the Native Americans in the *Handbook*, allowed the movement to develop and gain momentum in the 1960s,[160] and later give birth to critical legal studies and its own offsprings such as critical race theory and critical feminism. Cohen was, with Llewellyn,[161] the architect of legal realism. As such, he occupies a pivotal role in the development of American legal theory in the twentieth century.

Hence, we have seen that not only do Blackstone and Cohen both articulate comprehensive and rationalized visions of property; they also understand this notion with surprising points of likeness. Neither Blackstone nor Cohen became the great jurists we consider them to be to this day thanks to their analysis of property; nonetheless, analyzing their respective stance on this concept helps understand the pivotal role they played in the intellectual history of law. Property is one of the few concepts which has shaped the history of jurisprudence, and the above analysis revealed that Blackstone and Cohen both played an original role in its intellectual developments. Blackstone greatly contributed to making it a subject of rational examination for lawyers, and Cohen articulated legal pluralism in the understanding of property; their respective achievements in this field echo the momentous role for the development of legal writing and legal sources.

Conclusion

Comparing the most influential scholars in a given field to Blackstone is common practice. For instance, the United States Supreme Court referred to Col W. Winthrop as "the Blackstone of Military Law."[162] Native American Law is no different, as

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that were then only emerging as the Critical Legal Studies movement, would bring nihilism into legal education and corrupt the spirit of prospective lawyers: Paul D. Carrington, *Of Law and the River*, 34 J. Legal Education 222.

155 Mitchell, *supra* note 58, at 272 (citing Dalh).

156 *Id.*

157 Cohen, *supra* note 73.

158 Mitchell, *supra* note 58, at 271.

159 *See* Getches et al., *supra* note 38.

160 *See, e.g.* the jurisprudential changes brought about by the Warren Court.

161 *See, e.*g. Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 Colum. L. Rev. 431 (1930).

162 Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) (*citing Reid v. Covert*, 354 U.S. 1, 19, n.38 (1957)); *See* W. Winthrop, Military Law (1886); J.E. Kastenberg, The Blackstone of Military Law: Colonel William Winthrop (2009).

we have seen with the comparison between Cohen and Blackstone popularized by Strickland. We can however now affirm that such a comparison is not some stylistic device set by the genre of academic writing in the case of Cohen—the comparison is sound, accurate and profound.

Testing the six initial assumptions I described in the introduction by using the three different lenses employed to conduct this inquiry has been illuminating. The assumptions based on deference to Native American law scholars' comparison of Cohen to Blackstone were overwhelmingly confirmed. Cohen was indeed the Blackstone of Federal Indian Law, and the *Handbook*, the *Commentaries* of Federal Indian Law; Cohen was the first scholar of Native American law, and the *Handbook* was the first piece of scholarship in the field, in the same way as Blackstone was the first scholar of English common law. In presenting a political vision for the discipline, Cohen also contributed to the thinking in the field much as Blackstone had done two centuries earlier. Lastly, Cohen played a key role in the development of American jurisprudence, mirroring to a great extent Blackstone's fundamental role in making the common law a substantive field fit for academic analysis.

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