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RESTITUTION CLAIMS FOR WRONGFUL ENSLAVEMENT AND THE DOCTRINE OF THE MASTER'S GOOD FAITH

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ABSTRACT

This essay seeks to explore the deployment of antebellum ideologies of race which justified denial of restitution to Black litigants who were successful in proving that they had been unjustly enslaved. Despite the evidentiary presumption that persons of color of African descent were slaves, there were instances in which Black litigants were able to prove in court that they were not slaves but held as such contrary to law. In cases of unjust enslavement Black litigants should have been entitled not only to their freedom, but also to compensation (restitution) for the value of their compelled labor. This essay will show that the denial of compensation to Black victims in unjust enslavement lawsuits under the doctrine of the so-called 'conventional exemption' was part of an antebellum pattern of excluding Blacks from the equal protection of the law with continuing effects under the contemporary law of restitution.

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I. CONTEMPORARY LEGAL STANDARDS FOR PERSONS WHO WERE FREE, I.E. WHITES V. ENSLAVED PERSONS	

When the evidence, clear and indisputable, was laid before him that I was a free man, and as much entitled to my liberty as he—when, on the day I left, he was informed that I had a wife and children, as dear to me as his own babes to him, he only raved and swore, denouncing the law that tore me from him...He thought of nothing but his loss, and cursed me for having been born free.

--- Solomon Northup,
*Twelve Years A Slave*²

Towards the end of Solomon Northup's autobiographical account of his wrongful enslavement the reader learns that he sought to bring to justice the men who had robbed him of his freedom by selling him into slavery. Although one of the men charged with his kidnapping and sale was allowed to testify—falsely—Northup was not allowed to offer any testimony on his own behalf solely on the ground of his race. Northup's attempt to obtain justice for himself through the legal process available was eventually turned aside without punishment for the offender nor any restitution for his losses due to his twelve years of wrongful enslavement.

Sadly, Northup's experience is emblematic of American slavery and its system of justice which persists, long after the abolition of racial slavery, to deny that any restitution is owed to those who were wrongfully enslaved or their natural heirs, contemporary African Americans. Although we celebrate today the abolition of slavery and proclaim the equality of all persons before the law regardless of race or color, the restitution claims of the wrongfully enslaved receive no fairer hearing before the law than occurred during Northup's lifetime when the institution of slavery was considered legal and racial subordination of persons of African descent was accepted as part of the natural order of civil society. This essay is about examination of the historical premise that there was a time for redress of slavery's harms in the American justice system, but that time has come and gone.

² SOLOMON NORTHUP, *TWELVE YEARS A SLAVE* 183-84 (New York 1970) (1853).

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A. SLAVE LAW'S RACIAL DOUBLE STANDARD

The political interdependence of white democratic institutions and Black slavery has been well-established in historical literature on the subject, as has the reliance of modern capitalism on slavery.³ Americans frequently take pride in the United States as the wealthiest nation on Earth, yet whites hardly ever acknowledge the contribution of Black slavery both to the creation of that wealth and to the opportunities that flow from it. This section of the essay attempts to show the ordinariness of the legal double standard between Blacks and whites in antebellum property claims. This double standard sets the stage for diminished expectations with respect to property claims by Blacks, such that the most that Blacks could typically hope for was their freedom from bondage, but rarely if ever compensation for their exploitation or abuse by whites. By contrast, since whites enjoyed a presumption of freedom, their expectations of compensation in property disputes, even if sometimes disappointed, were routinely validated as a central focus of their legal claims.

The case of *James v. Carper* is exemplary of the double standard.⁴ In that case, a white woman, Mrs. James, brought suit for compensation on a claim of trespass against an inn keeper to whom she had rented her slave Bill. She sued to be personally compensated for the injuries inflicted on Bill when the inn keeper caused Bill to be severely whipped in the belief that Bill had stolen money from one of the inn keeper's guests. At trial the jury was instructed that the employer of an enslaved person had the same right as the owner to inflict punishment on the slave. The only limit on such punishment under Tennessee law at that time was to refrain from taking life or limb, or the infliction of great or unnecessary torture. Nevertheless, the Supreme Court of Tennessee found that the transfer of the right to punish a slave from the owner to a temporary employer could not arise by legal implication in a case that involved allegations of criminal wrongdoing on the part of the slave, as opposed to insubordination toward a superior or wanton misconduct that was not criminal in nature. Such a rule would interfere with the court's own authority to punish the slave. Thus, the court granted Mrs. James, the slave owner, a new trial and a fresh opportunity to prove *her* damages before a jury which could include, according to the court, payment of exemplary damages by the defendant to the slave owner.

By contrast, consider the much more notorious case of *Dred Scott v. Sandford*,⁵ decided by the Supreme Court of the United States in the same year as *James v. Carper*. *Scott* involved a much more complex set of facts, raised matters of national importance, and traversed a much more circuitous path to resolution of its underlying issues.⁶ Generically-speaking, *Scott* should be classified as a freedom

³ See Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 311 (2008).

⁴ *James v. Carper*, 36 Tenn. 397, 4 Sneed 397 (1857). See also *State v. Mann*, 13 N.C. 263, 2 Dev. 263 (1829) (hired slave permitted to batter slave as would the owner).

⁵ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁶ See Christopher Eisgruber, *The Story of Dred Scott v. Sandford: Originalism's Forgotten Past*, in CONSTITUTIONAL LAW STORIES 155, 157-61 (Michael C. Dorf ed., 2d ed. 2009)

suit.⁷ Nevertheless, when Dred Scott and his wife filed suit under Missouri law, they alleged the intentional torts of battery and false imprisonment, which should have entitled them under state law at the time, if successful, to claim money damages.⁸ Such damages would not have been paid by the defendant in the freedom suit, but would have derived from the labor of the plaintiff who was typically hired out to an employer by the court during the pendency of his freedom claim.⁹ On the other hand, if the plaintiff was unsuccessful in proving that he had been wrongfully enslaved, the fund created by his labor would be paid to his master. This procedure ensured that even slave masters who had wrongfully enslaved Blacks would not be required to make restitution to the persons they enslaved. Whereas the worst outcome for a slave master would be loss of a slave, the most that Blacks could typically hope for in such suits was to win their freedom from bondage. Antebellum slave law ensured that even these uncompensated victories were rare and hard to come by. The Scotts, for instance, fought for their freedom in the courts for over eleven years. In the end, Justice Taney, writing for the majority, concluded that the Scotts were not free persons wrongfully enslaved, and that even if they had been free, they could not be citizens and had “no rights that the white man was bound to respect.”¹⁰

If there is a bottom line to be drawn in the comparison between the white as litigant seeking to enforce property rights and the Black as litigant seeking both freedom and restitution under antebellum slave law, it is that the law overwhelmingly favored the white litigant over the Black litigant. In a dispute among whites—the owner, the hirer, the jury, the court—over who could exercise an unfettered right to inflict physical punishment and humiliation on a Black man—in the description of the court, the defendant claimed to be within his rights when he “stripped the slave and bucked him over a wheelbarrow, took out his knife, and threatened to castrate the slave if he did not give up the money”—the Black man who has been battered, beaten, and threatened with emasculation, even as it turns out unjustly or wrongfully,¹¹ has no standing to claim any violation of his rights; only his white owner does.

⁷ See *infra*, note 77 and accompanying text discussing distinction between “freedom suits” and “manumission.”

⁸ Cf. *Gordon v. Duncan*, 3 Mo. 385, 387 (1834)(successful plaintiff in freedom suit entitled to fund created by hiring out his labor services *pendente lite*). See also Andrew Kull, *Restitution in Favor of Former Slaves*, 84 B.U. L. REV. 1277, n. 19 (2004).

⁹ *Id.*

¹⁰ *Scott*, 60 U.S. at 393.

¹¹ *Carper*, 36 Tenn. at 399-400. The court's opinion shows that the slave Bill was wrongfully beaten in a double sense: on the one hand, the court finds that his temporary employer had no right to beat him since that right belong either to the owner or the courts of justice upon his conviction; on the other hand, the court notes that he was factually innocent of the crime as a vagrant white man was caught with the stolen money and convicted of the theft subsequent to Bill's beating.

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B. DEFINING JUST AND UNJUST ENSLAVEMENT THROUGH THE EYES OF THE MASTERS

Perhaps, from a modern perspective, the oddity is not the legality of the racial double standard, but slave law's allowance of freedom suits at all, since Black slaves were generally treated as persons without legal rights and mere objects of property in their master's estate.¹² However, it must be kept in mind that the law of slavery was as instrumental in preserving freedom as it was in perpetuating slavery. It did so through regulation of who may rightfully be enslaved, and articulating the grounds--the pro-slavery ideology--on which others are rightfully free. In a slave society the quality of being free, i.e. a person with legal rights, is perhaps the most valued property of all. But it was still not the only property that mattered. As Andrew Fede points out, "slaves were unique property because they could commit crimes."¹³ Thus, in the primary forum where the law recognized Black slaves as persons rather than property, it was for the purpose of imposing special burdens on them without the ordinary protections of the common law. Indeed, the course of development of the common law bears the marks of slavery's institutional presence, as lawmakers and judges over the course of many years sought to accommodate the preservation of slavery and social hierarchy within an existing legal framework that rhetorically valorized equal and inalienable human rights.

In all the states that permitted Black slavery Blacks were afforded some means of challenging the legality of their enslavement in court, even if required to do so through the intervention of a white advocate.¹⁴ The substantive grounds for claiming wrongful enslavement and the legal process to be followed in making the claim were set by social elites who were themselves typically slave owners. Far from being a threat to the institution of slavery, recognition of the claim of wrongful enslavement acted as a concession to the master's property interest in the enslaved person, and therefore reinforced the legitimacy of slavery generally. The ability of masters to manumit or free their slaves corresponded with their ability to alienate or dispose of ordinary property. Recognition of a cause of action for wrongful enslavement also functioned as a protection against encroachment on the racial and territorial boundaries of slavery that the law established.

The master's power to free his slaves was hardly ever absolute; there were always some restrictions, more or less onerous, based more or less on substantive concerns about the community impact of freedom for racial slaves in a racial democracy. For instance, during the lifetime of an enslaved person the responsibility for his support rested with his owner, but the poor laws made taxpayers responsible

¹² See ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* (1992).

¹³ ANDREW FEDE, *ROADBLOCKS TO FREEDOM: SLAVERY AND MANUMISSION IN THE UNITED STATES SOUTH* iv (2011). More pointedly, Alan Watson writes, "Procedure for slaves' crimes was more summary, penalties were more severe when the offender was a slave, and there were crimes that in effect could only be committed by slaves." See ALAN WATSON, *SLAVE LAW IN THE AMERICAS* 72 (1989).

¹⁴ See THOMAS R. R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* (photo. Reprint 1968) 248 (1858).

for the needy among the free population.¹⁵ Manumission of elderly, incompetent, or handicapped slaves under these circumstances could just as easily reflect a slave owner's unscrupulous calculation of his personal financial interest as any benevolence toward his slaves, or second thoughts about slavery. Manumission by will or testamentary disposition was sometimes ineffective absent legislation, and such legislation could require that Black slaves thus freed leave the jurisdiction within a prescribed period of time or risk re-enslavement.¹⁶ Thus, while manumission per se was not invariably seen as an institutional threat to slavery, the presence of free Blacks in a society based on racial slavery was often viewed as a threat and tightly circumscribed by the law.¹⁷

Whether based on a deed, contract, or testamentary disposition, successful claimants in a manumission suit had to show that their freedom was consistent with their master's wishes or intentions. By contrast, freedom suit claimants such as the Scotts sought to free themselves in opposition to the wishes of their purported owners based either on travel to a free state or territory, or the local law of the slave state.¹⁸ In the late antebellum period, as the nation approached war, the comity that had existed between slave and free states on the issue of emancipation by travel became increasingly tenuous. Justice Taney's decision in *Dred Scott*, quite possibly meant to restore repose on this issue among slave owners, had the effect of inflaming sectional tensions against slavery among free soilers and abolitionists.¹⁹

Based on the foregoing considerations, wrongful or unjust enslavement should be seen as a homeostatic device deployed by slave owners to maintain the legitimacy of "rightful" or just slavery. Through the deployment of a wrongful enslavement claim, persons who would otherwise have no chance to become free were able to gain their freedom. But the freedom thusly obtained was never meant to be a reproach to slave owners as such, and therefore rarely included compensation paid by the alleged slave master to the person wrongly enslaved. This anomaly in the law, created by the exigencies of slavery based on white supremacy meant, however, that even when there were no procedural barriers to court ordered restitution for enslavement, the substantive commitment of antebellum Southern courts was against it. If we then ask the post-emancipation question of when was the proper time to seek reparations for slavery, the resounding response that comes down through ages of resistance to racial oppression is not yet, perhaps never.²⁰

¹⁵ See Benjamin Joseph Klebaner, *American Manumission Laws and the Responsibility for Supporting Slaves*, 63 VA. MAG. HIST. & BIO. 443-53, No. 4 (Oct. 1955).

¹⁶ *Pleasants v. Pleasants*, 6 Va. 319, 2 Cal. 319 (1799).

¹⁷ See A. Leon Higginbotham, Jr. and Greer C. Bosworth, *Rather Than The Free: Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1991).

¹⁸ See, e.g., *Hudgins v. Wrights*, 11 Va. 134 (Va. 1806).

¹⁹ See MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

²⁰ *In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006).

C. *THE PERILS AND SCOPE OF COMPARATIVE EXAMINATION OF SLAVE LAW DEVELOPMENTS/REFORM*

Although this essay relies on a comparative analysis of slave law restitution doctrine in the United States South, focusing on developments in the common law states rather than Louisiana or Spanish-controlled Florida, the work of mapping this legal history has already been done by many others who are likely better trained than the author in historiography.²¹ The primary purpose of re-tracing the maps already drawn by others is to link this history to contemporary debates over racial reconciliation and social justice. As demonstrated by Ariela Gross, conservative and liberal political discourses on race and social justice often incorporate competing histories of slavery in ways that fail to engage the historical premises of conservatives' arguments against redress of slavery's harms.²² Just as Ariela Gross questions whether the time of slavery has passed, I continue to question, as I have previously, whether the time of slavery redress has yet arrived.²³

If the time of slavery's redress has come and gone—Stephen Best and Saidiya Hartman suggest that “[b]y 1787, it was already too late”²⁴—it is necessary either 1) to choose a date when redress was made, naming the elements of that redress, or 2) to choose a date when the possibility of meaningful redress was lost, outlining the reasons for the loss. Best and Hartman choose the second path, concluding that “the incommensurability between grief and grievance, pain and compensation,” by the end of the eighteenth century had become an unbridgeable chasm, and that the most the slaves could reasonably expect was perhaps abolition. Unfortunately, conservative critics of reparations for slavery implicitly hold that the time of slavery's redress has passed, and explicitly name policies such as affirmative action or fair housing laws or abolition itself as elements of redress, but refuse to state any date on which redress occurred. As Ariela Gross points out, conservative histories of slavery are linked to a narrative in which freedom was inevitable, slavery and Jim Crow were transient deviations from the American creed, the Republican party is the champion of civil rights whose true meaning rests on a timeless principle of colorblindness embodied in the federal Constitution, and finally, that American slavery, resembling slavery in the ancient world

²¹ A representative sample of useful historical literature would include: Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799 (2008); Eric Gardner, “*You have no business to whip me*”: *The Freedom Suits of Polly Wash and Lucy Ann Delaney*, 41 AFR.-AM. L. REV. 33, No. 1 (2007); Kull, *supra* note 8; Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009 (1993); Angela Onwuachi-Willig, *The Story of Hudgins v. Wrights*, in RACE LAW STORIES 147 (Moran & Carbado, eds. 2008); FEDE, *supra* note 13.

²² See Ariela Gross, *When Is the Time of Slavery?: The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 284 (2008).

²³ See Robert Westley, *The Accursed Share: Genealogy, Temporality, and the Problem of Value in Black Reparations Discourse*, 92 REPRESENTATIONS 81, 106 (Fall, 2005).

²⁴ See Stephen Best & Saidiya Hartman, *Fugitive Justice*, 92 REPRESENTATIONS 1 (Fall, 2005).

or other parts of the world, was not a racial institution.²⁵ This tableau of commitments permits some conservatives to conclude that “‘no single group’ (i.e. whites) clearly benefitted from slavery, that few whites owned slaves or benefited from slavery, that most blacks did not suffer from slavery, and therefore, that whites as a group do not ‘owe’ blacks anything.”²⁶

In *In re African American Slave Descendants Litigation* the court invokes the narrative device of slavery as a stage transient to inevitable freedom, while refusing to hear the plaintiffs’ arguments on the merits, and dismissing their lawsuit for reparations on procedural grounds.²⁷ In the course of constructing its own narrative of redress for slavery, the court makes plain in dicta its belief that slaveholders who lost their property as a result of the Civil War, Union soldiers who lost their lives in the war, and subsequent generations who suffered social, political and financial losses due to the war, paid the nation’s debt to the slaves.²⁸ In the zero-sum approach of the court, it seems, any loss suffered by white Americans linked to the abolition of slavery, regardless of any consideration of legal or even moral entitlement, represents restitution for slavery.

In the analysis that follows a more rigorous methodology will be applied to the question of restitution for enslaved persons. Despite the perils of analogous reasoning, comparisons can and should be made between the treatment of restitution under slave law for white litigants and Black litigants. Other fruitful points of comparison can be drawn between the so-called Deep South and border states, early colonial slave law and late antebellum slave law, the North and the South, and of course, the traditional comparative law framework of international developments. These are distinctions that the following analysis seeks to observe rather than points to be developed. For present purposes, the argument will outline the grounds for skepticism and critique of conservative histories of slavery, beginning in the next section with the relatively substantial archival foundation for believing that American slavery was almost from its start a racist institution.

II. THE ARCHITECTURE OF SLAVE LAW: DEVELOPMENT, INTERPRETATION, AND REFORM

As with most bodies of law, the development of slave law reflected its cultural precursors. Since the publication of *Slave Law in the Americas*,²⁹ however, it has become a commonplace in the comparative historiography of slavery to observe that the English colonies which later became the slaveholding states of the United States differed from their European counterparts in that the English legal tradition neither had any slave law of its own, nor did it borrow from ancient Roman law sources on the subject as the continental powers did. In the absence of an existing body of law governing slavery under the common law of England, the

²⁵ Gross, *supra* note 22, at 287-303.

²⁶ *Id.*

²⁷ 375 F. Supp. 2d 721, 780 (2005).

²⁸ *Id.*

²⁹ ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989).

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English colonists who took possession of Africans as enslaved persons simply made up their own slave laws as they developed the institution over time.

A. *THE ABSENCE OF SLAVERY FROM THE COMMON LAW TRADITION*

According to Alan Watson, lawmaking in the Western world, especially private law and its sources, developed in the space created by the neglect and indifference of rulers and governments.³⁰ The case of English common law is no exception to this pattern; from its origins until the second half of the nineteenth century, Watson argues, the common law was left to be developed mainly by judges who followed judicial precedent.³¹ Although these judges, unlike Roman jurists, were officially appointed, no ruler actually gave judges the power to make law, which gave rise to the enduring conceit that judges were “finders,” not “makers” of law. Moreover, the discursive practices invoked by the judges describe law as an autonomous field of judgment, self-reliant, and impermeable to other concerns or discourses, such as politics or morality, which are considered external to legal logic. Legal decision making and development conceived of in this way is most often a slow, accretive process in which desuetude does not necessarily lead to repeal or reform.³²

To make good that part of his thesis concerning the operation of legal logic, Watson examines at length the exchange between the majority and the lone dissent in the case of *Commonwealth v. Turner*, where the court held that a Virginia slave master was permitted under the common law to beat his slave “cruelly, immoderately and excessively,” so long as no homicide resulted from the beating.³³ Writing for the court, Judge Dade asserts, “In coming to a decision upon this delicate and important question, the Court has considered it to be its duty to ascertain, not what may be expedient, or morally, or politically right in relation to this matter, but what is the law.”³⁴ Arguing in favor of judicial restraint and the greater authority of the legislature to make law, Judge Dade makes a number of assertions that Watson finds to be either incorrect, surprising, or contrary to the much vaunted judicial value of restraint in its lawmaking capacity. Judge Dade writes,

It is said to be the boast of the common law, that it continually conforms itself to the ever-changing condition of society. But, this conformity keeps on *pari passu* with those changes. Like them it is slow and imperceptible: so that society may easily conform itself to the law. When great changes take place in the social order, a stronger hand, that of the Legislature, must be applied. Thus, when slavery, a wholly new condition, was introduced, the common law could not operate on it. The rules were to be established, either by the positive enactments of the law-making power, or to be deduced from the Codes of other countries, where that condition of man was tolerated.³⁵

³⁰ *Id.* at 1-3.

³¹ *Id.* at 6-16.

³² *Id.*

³³ 26 Va. 678 (1827).

³⁴ *Id.*

³⁵ *Id.* at 680.

As Watson observes, the second source of law mentioned by Judge Dade—legal rules from countries where slavery once existed or now exists—is surprising given that no foreign system is a source of law if it was not accepted as authoritative. Moreover, such legal borrowing by the court would itself constitute lawmaking, especially when the foreign systems had different rules.³⁶

From his initial premise that slavery was a stranger to the common law, Judge Dade moves on to assert that slavery has no connection to the English institution of villenage, and therefore no arguments could be made by analogy to it. But if such an analogy was permitted, Judge Dade argues that it would still not be a crime for a slave master to beat his slave. As a commercial practice with no ties to English custom or law, and introduced into the colony “at the mere will of the buyers and sellers,” Judge Dade concludes, “the condition of the slave was that of uncontrolled and unlimited subjection to the will of the master.”³⁷

Judge Brockenbrough disagrees with the court on the question of slavery’s complete discontinuity with the common law, as well as the implication that the slave’s humanity may be ignored in deference to the master’s property right in the slave. He writes,

It is true, that to the common law, slavery, except in the modified form of villenage, was unknown. But, the relations of superior and inferior, had their rules well established by that law. A master had the power to correct his servant; a parent, his child; and a tutor, his pupil; but the moment either of these persons transcended the bounds of due moderation, he was amenable to the law of the land, and might be prosecuted for the abuse of his authority, for his cruelty and inhumanity. When slaves were introduced, although the power conferred on the master by that relation, was much greater than that conferred by either of the others, yet the common law would easily adapt itself to this new relation... The slave was not only a thing, but a person, and this well-known distinction would extend its protection to the slave as a person, except so far as the application of it conflicted with the enjoyment of the slave as a thing.³⁸

Judge Brockenbrough believed not only that the proper course was to argue by analogy from other branches of the common law, as Alan Watson notes,³⁹ but also that slavery was continuous with other human relationships recognized by the common law. His views clarify that the court’s holding relies on the belief that slavery was anomalous from other human relationships. This disagreement over the fundamental nature of slavery continues until the present day.⁴⁰

³⁶ Watson, *supra* note 29, at 11.

³⁷ *Id.* at 681.

³⁸ *Id.* at 688-89.

³⁹ Watson, *supra* note 29, at 13.

⁴⁰ See Fede, *supra* note 13, at 8 (observing that Jedediah Purdy has coined the terms “the anomaly model” and “the conciliatory model” to describe the difference between those who believe that slavery was fundamentally different from other forms of human relationships and those who believe that slavery lay along a spectrum analogous to other legal bonds) citing *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010). Fede himself argues in favor of the anomaly model.

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B. THE DESULTORY INTRODUCTION OF SLAVERY INTO THE ENGLISH COLONIES THROUGH SOCIAL PRACTICE⁴¹

Although the first African settlers in North America arrived in Jamestown, Virginia in 1619 where their official status within the colony, according to English colonial custom at that time, should have been as indentured servants, their arrival as “cargo” on a Dutch man-of-war seems to indicate that they were probably originally taken by the Dutch as slaves, possibly from Portuguese slave merchants.⁴² In any event, the Dutch captain traded these Africans in exchange for food to the English governor of the Virginia colony, Sir George Yardley, who was also the proprietor of the thousand-acre Flowerdeew Hundred plantation. At the time of the arrival of these Africans, no slavery existed in the English colonies of North America, although the African slave trade had already been flourishing among the Portuguese and the Spanish for over a hundred years, since prior to the start of the sixteenth century. Instead of slavery, the English colonies relied on a system of indentured servitude to supply their needs for labor. Indentured servants were free persons who were either convicts sentenced to labor for a term of years, or the poor who contracted to labor for a term of years in order to pay their passage to the colonies, and sometimes included persons who had been kidnapped. For the next twenty years after the arrival of these African servants, no legal distinction was made between European and African indentured servants.

Statutory recognition of slavery in the English colonies of North America began first in Massachusetts in 1641,⁴³ followed by Connecticut, 1650; Virginia, 1661;⁴⁴ Maryland, New York, and New Jersey, 1664; South Carolina, 1682; Rhode Island and Pennsylvania, 1700; North Carolina, 1715; and Georgia, 1750. Prior to these enactments, there are indications that African slavery had already become part of the architecture of American colonial life, as well as the practice of treating Africans as an order of beings inferior to Europeans, and deserving of harsher treatment under the law than Europeans. For instance, in Virginia in 1630 a white man, Hugh Davis, was sentenced to be publicly whipped “for abusing himself to the dishonor of God and the shame of Christians by defiling his body in lying with

⁴¹ Except where indicated, the historical details included in subsections II (B) and (C) are based on the account given in CHARLES M. CHRISTIAN, *BLACK SAGA: THE AFRICAN AMERICAN EXPERIENCE, A CHRONOLOGY* (1995).

⁴² See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 297-307* (1975) (noting that “probably the first known Negroes to arrive [in Virginia], in 1619, were slaves,” and further explaining the grounds for believing that the Dutch would be the vendors of slaves to English colonies in the West Indies and on the mainland).

⁴³ See WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812*, 67 (1968), citing Max Farrand, ed., *The Laws and Liberties of Massachusetts*, 4 (Cambridge, Mass., 1929). *But cf. id.* at 74-75 (arguing that Maryland passed a statute in 1639 that exempted (presumably Negro) slaves from the rights, liberties, immunities and privileges of the English).

⁴⁴ *Id.* at 81, citing *THE STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA*, 13 vols., I, 539, II, 26 (William Waller Hening, ed., Richmond, N.Y., & Phila., 1809-23).

a Negro,” despite the fact that no legislation would be passed in the Virginia colony prohibiting sexual relations between whites and Blacks until 1662.⁴⁵ It is also telling that in another Virginia case involving three runaway servants in 1640, the two European runaways, in addition to a whipping, were sentenced to serve out their indentures, but the African runaway was sentenced to serve his master for the time of his natural life.⁴⁶ And in 1639 Virginia passed legislation prohibiting Blacks from bearing arms.⁴⁷

Statutory recognition of the commercial practices of colonists who engaged in the traffic in slaves, however, was not equivalent to acceptance of all aspects of the trade as legitimate, much less the legislation of a comprehensive framework for the regulation of slavery and the slave trade. Indeed, the absence of a basis in law for determining who could be held as a slave (or for how long and with what consequences for civil liberties or progeny) led to some surprising reversals at the outset of establishing slave law in the English colonies of North America. For instance, in 1646 Massachusetts ordered the return to Africa at public expense of two enslaved persons who had been kidnapped from the Guinea coast by a colonist named John Smith.⁴⁸ In 1652 Rhode Island passed a statute that purported to limit the period of slavery for both Blacks and whites to no more than ten years, although it seems that this law was never enforced.⁴⁹ In 1655 in Virginia, Elizabeth Key, the daughter of an enslaved woman and an influential planter, sued for and won her freedom on the grounds that 1) her father was a free man, and by common law she inherited her father’s status; 2) she had been baptized as a Christian, asserting that no Christian could be a slave for life; and 3) she had been sold as a slave beyond the nine year period of her indenture.⁵⁰

In his study of this period John Hope Franklin finds that the English colonists came to realize that white servants were unsatisfactory, and African slaves were preferable, for a number of reasons.⁵¹ On the one hand, the supply of white labor was insufficient to the demands of plantation crops such as tobacco, rice, and indigo. Additionally, the terms of service under indenture were a constant source of irritation since they often led to litigation against masters and ship captains for illegal detention. Finally, many indentured servants ran away to unsettled lands, making it difficult and expensive to apprehend them. On the other hand, because of their color, Africans were much easier to apprehend and could be purchased outright which helped to stabilize a master’s labor supply. Moreover, as outsiders to English cultural norms and moral beliefs, it was easier to impose authoritarian and rigid controls on African slaves. And in the end, African slave labor was cheaper, and the supply of Africans was seemingly inexhaustible, in a period when

⁴⁵ *Id.* at 78-80 (proposing that the “negro” in question may not have been female).

⁴⁶ *Id.* at 75.

⁴⁷ *Id.* at 78.

⁴⁸ *Id.* at 69-70.

⁴⁹ *Id.* at 70-71.

⁵⁰ See Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key’s Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799, 800 (2008).

⁵¹ JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 32 (6th ed. 1988).

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economic considerations were vital.⁵² In the end, it seems that the outsider status of Africans, who were both a minority among the colonists and perceived by them to be non-English, non-Christian, non-white, and without kinship ties within the community of settlers, led inexorably toward their oppression and exploitation.⁵³ But whatever the cause and effect relationship between anti-Black prejudice and slavery, the historical record is clear that within the English colonies, legal enactment of slavery followed social practice rather than vice versa.

C. FORMALIZATION OF THE RELATIONSHIP BETWEEN MASTER AND SLAVE THROUGH LEGISLATION

The formal legal reduction of enslaved African persons to mere objects of property with few or no rights was accomplished slowly over the course of years through the passage of many acts of legislation and court decisions. The period beginning near the middle of the seventeenth century through the start of the eighteenth century was an extremely active period for legislation, as European competition in the increasingly profitable slave trade grew. In 1657 Virginia passed a statute authorizing the establishment of a militia to apprehend runaway servants, and another in 1659 reducing import duties on merchants bringing slaves into the colony. In 1660 Virginia made indentured servants who ran away with slaves liable for the loss of any slaves. In that same year, Maryland and Virginia passed laws under which white servants could buy their freedom, but African slaves could not. Additionally, Virginia passed a law limiting taxes on the sale of slaves in which enslaved Africans were referred to as “chattels.”

Possibly in response to the Elizabeth Key’s successful freedom suit, Virginia was the first colony to pass legislation reversing the common law rule that the status of children, whether slave or free, followed the status of their father. In 1662 Virginia enacted legislation providing that children would take on the status of their mother. The so-called doctrine of *partus sequitur ventrem*, literally translated as “that which is brought forth follows the womb,” was derived from Roman civil law, and while probably not an inherently racist mode of reckoning kinship, its invocation in the context of the expanding number of children born in the Virginia colony to enslaved African women and European men provided an inchoate racial definition of slavery. Because the admixture of African heritage was treated legally as an irredeemable deficiency in order to promote European commercial interests, this doctrine permitted white slave masters to increase their property in slaves by enslaving their own children born of enslaved African mothers. By the

⁵² On the economic value of slaves over indentured servants, see also EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM*, 299-308 (1975) (estimating that “the point at which it became more advantageous for Virginians to buy slaves was probably reached by 1660.”).

⁵³ See WINTHROP D. JORDAN, *WHITE OVER BLACK*, 80-82 (describing the symbiosis between anti-Black prejudice and slavery in Maryland and Virginia that dynamically “join[ed] hands to hustle the Negro down the road to complete degradation.” Jordan suggests that this interactive growth, rather than the borrowing of the enslavement practices of other societies, explains the nature of African slavery on these mainland English colonies. See also *id.* at 91-98.

beginning of the eighteenth century, the doctrine of *partus sequitur ventrem* was the law in all the English colonies of North America.

In partial completion of the project of defining African heritage as racial deficiency, Maryland became the first colony in 1664 to pass legislation prohibiting marriage between men of African descent and freeborn English women.⁵⁴ Under the statute, the children of such marriages were to be considered slaves as well. Similar so-called antimiscegenation laws followed in Virginia (1691), Massachusetts (1705), North Carolina (1715), South Carolina (1717), Delaware (1721), and Pennsylvania (1725). The same Maryland statute that prohibited interracial marriages between Black men and white women declared that every Black person currently residing in the colony and any who might enter in the future should be considered slaves *durante vita*.⁵⁵

In 1667 Virginia passed a law declaring that conversion to Christianity did not alter a person's condition of bondage. And two years later Virginia enacted a law that exempted both masters and overseers from felony who killed a slave while administering punishment to the slave.⁵⁶ The legislation of the Carolina colony in 1669 mirrored the path set by Virginia in declaring that "Every Freeman of Carolina shall have absolute power and authority over Negro slaves of what opinion or Religion soever."⁵⁷ In 1671 Maryland, New York and New Jersey also chose to pass an act negating any effect of Christian conversion on slave status.⁵⁸

Virginia further codified Black subordination in 1682 when it passed a law that prohibited the possession of weapons by slaves, restricted slaves from leaving their owner's premises without permission, or attempting force, even in self-defense, against any white person. Under the law, runaway slaves could be killed without penalty if they refused to surrender themselves. As a leader in the codification of slave law, Virginia's law was copied by Maryland, Delaware, and North Carolina. By the end of the seventeenth century, the demand in the colonies for African slaves in the colonies was so great that the colonists were successful in lobbying the British Parliament to revoke the slave trading monopoly of the Royal African Company in 1698.⁵⁹ Thus, it became possible for colonial entrepreneurs to legally enter the slave trading business and supply the needs of the colonies for more slaves.

The slave codes of the New England colonies were somewhat milder than their Southern counterparts. By 1690 Massachusetts, Rhode Island, and Connecticut, for example, had codified the need for slaves to have written permission to leave their owner's premises. No colony in New England denied the right of slave owners to manumit their slaves, although several did impose some restrictions on manumission. In all colonies, an enslaved person who struck a white person was severely punished, and the northern slave laws typically prohibited the sale of alcoholic beverages to slaves, as well as trading with slaves and harboring runaways. But unlike in the South, slaves and free white persons were subject to the same

⁵⁴ *Id.* at 79.

⁵⁵ *Id.* at 81.

⁵⁶ *Id.* at 82.

⁵⁷ *Id.* at 85.

⁵⁸ *Id.* at 92.

⁵⁹ See Morgan, *supra* note 42, at 299 (1975).

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procedures in cases that involved the death penalty, and in Massachusetts and Connecticut, enslaved persons and free whites were governed by the same courts and procedures in all criminal matters. Massachusetts even recognized the right of enslaved persons to own property and to sue their masters if it was taken away.

Virginia slave law, by contrast, could not be more intrusive on the prerogatives of slave owners, more subordinating of enslaved persons, or more racially provocative. In 1691 Virginia passed a law that prohibited any slave owner from freeing enslaved Africans without paying a bond for their transportation out of the colony. And in 1692 Virginia passed additional legislation that imposed banishment from the colony on any free white man or woman who married a Black, a mulatto, or a Native American. The penalty was later changed to six months imprisonment and a fine of ten pounds. Under the same law, slaves were forbidden to keep horses, cattle, or hogs. Finally, slaves charged with a capital offense were to be tried without any jury, and could be convicted on the testimony of two witnesses under oath. Maryland, Delaware, and North Carolina eventually copied the Virginia laws of 1682 and 1692.

In 1702 New York passed a slave code that followed the pattern established in the English colonial slave law of the previous century of infringing on the prerogatives of slave owners in order to enforce criminal sanctions against rebellious enslaved persons. Its code provided that no more than three slaves could assemble without the consent of their owners, and that while slave owners retained broad discretion in punishing their slaves, an enslaved person who struck any free person could be confined for fourteen days and whipped. The slave population in New York city at this time was so numerous that a census showed as many as 43 percent of all whites in the city owned one or two slaves. In 1705 New York prescribed the death penalty for any slaves caught beyond a line forty miles north of Albany. By 1706 New York had likewise adopted legislation enforcing *partus sequitur ventrem* for “all and every, Negro, Indian, Mulatto or Mestee,” and denying slaves the right to testify in any case involving whites.

As part of its law reform efforts in 1705 Virginia collected all of its laws dealing with Blacks under the title, “Act Concerning Servants and Slaves.”⁶⁰ The act purported to define those who could be slaves under Virginia law. Its definition stated that servants “who could not make due proof of their being free in England, or any other Christian country, were to be accounted slaves.” The act included provisions that restricted the movement of Blacks within the colony, prohibited intermarriage, and disqualified Black persons for civil or military office. The act further defined slaves as attached to the soil, so that the heir to a plantation was entitled to purchase the inherited interests of others in the slaves. Under this Virginia law all slaves, including at this time Indian slaves, were considered to be real estate. In the same year, Virginia placed legal restrictions on the purchase of white servants by free Blacks. The statute not only restricted Black ownership of white Christian servants, but also declared automatically free any white Christian servant whose master married a Black. Thus, Virginia law imposed a racial restriction on the property rights of free Blacks in the colony: Blacks could only own other Blacks.⁶¹

⁶⁰ See Jordan, *supra* note 43, at 82.

⁶¹ *Id.* at 94.

In 1712 South Carolina revised its model slave code of 1690 that was mostly borrowed from the 1688 slave code written for the English settlement on Barbados.⁶² Although revised several times thereafter, it remained the basic law of slavery in South Carolina until abolition. Other English colonies used this slave code as a model even as they modified it to suit their needs. In 1755 Georgia adopted the South Carolina slave code, and later Florida adopted the Georgia code. By contrast, the Virginia slave code, whose elements were somewhat different and reflect its ad hoc development over the course of decades, served as the model in the tobacco colonies of Maryland, Delaware, and North Carolina. The model slave code of South Carolina included the following provisions:

Baptism in the Christian faith does not alter the status of a slave.

Slaves are forbidden to leave the owner's property without written permission, unless accompanied by a white person.

Every white person in the community is charged to chastise promptly any slave apprehended without permission to leave the owner's property.

Any person enticing a slave to run away and any slave attempting to leave the province receives the death penalty as punishment.

Any slave absconding or successfully evading capture for twenty days is to be publicly whipped for the first offense, branded with the letter R on the right cheek for the second offense, and lose one ear if absent thirty days for the third offense; and for the fourth offense, a male slave is to be castrated, a female slave is to be whipped, branded on the left cheek with the letter R, and lose her left ear.

Owners refusing to abide by the slave code or inflict specified punishment are to be fined and forfeit ownership of their slave(s).

The slave owner is obliged to pay the sum of four pounds for all fugitives returned to the owner dead or alive by the commander of any patrol company.

Slave houses are to be searched every fortnight for weapons and stolen goods. For theft, the owner must punish the slave by whippings, and for each additional theft, the punishment escalates—loss of one ear, branding and nose slitting, and for the fourth offense, death.

No owner shall be punished if a slave dies under punishment; intentional killing of a slave shall cost the owner a fifty-pound fine.

No slave shall be allowed to work for pay; to plant corn, peas, or rice; to keep hogs, cattle, or horses; to own or operate a boat; to buy or sell; or to wear clothes finer than ordinary "Negro cloth."

In 1740 the following modifications were added to the code:

⁶² For the influence of Barbados on the development of South Carolina slave law, *see id.* at 84-85. *See also* WATSON, *supra* note 13, at 68-76.

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No slave shall be taught to write, work on Sunday, or work more than fifteen hours per day in summer and fourteen hours in winter.

Willful killing of a slave exacts a fine of 700 pounds, and “passion” killing, 350 pounds.

The fine for concealing runaway slaves is one thousand dollars and a prison sentence of up to one year.

A fine of one hundred dollars and six months in prison is imposed for employing any Black or slave as a clerk, anyone selling or giving alcoholic beverages to slave and for teaching a slave to read and write, and death is the penalty for circulating incendiary literature.

Manumissions are forbidden except by deed, and after 1820, only by permission of the legislature.⁶³ (Georgia required legislative approval after 1801.)

All the English colonies of North America denied due process of law to enslaved persons. Indeed, none of the traditional guarantees of English law pertained to slaves, including denial of the writ of *habeas corpus* among the Southern slaveholding states.⁶⁴ Slaves were typically denied access to ordinary courts, and Blacks in general did not enjoy the benefits of jury trial, confrontation of witnesses, or counsel. Frequently in summary adjudications, no court records were kept, which allowed for the use of conclusive presumptions, judgments based on insufficient evidence, and harsh punishments that ranged from whippings to maimings to castrations to executions through hanging, decapitation, dismemberment or burning an enslaved person alive. In Virginia, Maryland, Mississippi, Missouri, Alabama, North Carolina, and Tennessee slaves were barred from testifying against whites. Moreover, none of these restrictive slave laws were ever disallowed or overruled by the British Parliament, as was sometimes the case when a colony attempted to prevent the importation of slaves into its territory.

D. *CONTINUITIES AND DISCONTINUITIES AFTER THE BREAK FROM ENGLAND: SLAVERY, CHOICE OF LAW AND THE NEED FOR COMITY*

While both the British Parliament and monarch remained quiescent on the question of slavery’s legality in the colonies, Lord Mansfield, Chief Justice of King’s Bench, the highest common law court in England, declared slavery to be contrary to the common law of England in the celebrated case of *Somerset v. Stewart*.⁶⁵ The case involved an application for a writ of *habeas corpus* by James Somerset, a Black man alleged to be the runaway slave of Charles Stewart. The writ was aimed at preventing Stewart from confining Somerset aboard a cargo ship on which he would later be transported to Jamaica for sale. After failing in his attempts to persuade the parties to moot the case, the Chief Justice eventually rendered an opinion that as reported included the following statements:

⁶³ See Fede, *supra* note 13, at 97-98.

⁶⁴ Texas and Louisiana are the exceptions. See Fede, *supra* note 13, at 153.

⁶⁵ *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

[T]he only question before us is, whether the cause on the return [to the writ] is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; where-upon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.⁶⁶

William Wiecek has examined the ways in which Lord Mansfield's *Somerset* opinion epitomizes both the features and problems of the judge-made law of slavery.⁶⁷ In comparison to the clear and specific statutes regulating the minutiae of behavior of Blacks and whites under slave law, Professor Wiecek finds judge-made slave law to be indeterminate, ambiguous, equivocal and in the end, uncertain. *Somerset* illustrates these defects. Lord Mansfield purported to address two narrow points of English law: whether a slave owner could forcibly seize a slave and remove him from the kingdom against the slave's will, and whether a slave could avail himself of the writ of *habeas corpus* to prevent his seizure and removal. Nevertheless, in Wiecek's assessment, "*Somerset* burst the confines of Lord Mansfield's judgment."⁶⁸ The decision in both its *ratio decidendi* and its rhetoric fed the burgeoning appetite for anti-slavery law reform in England and in its American colonies. *Somerset* confirmed, if any doubt remained at the end of the eighteenth century, that the relation between commercially and politically interdependent jurisdictions that alternately permit and prohibit slavery must lead eventually to a circumstance where slavery must either be accommodated and accepted everywhere, or repudiated altogether.

The choice of law questions posed by *Somerset* ominously raised not only the legitimacy of slavery anywhere, whether in England or her colonies, but also the possibility that for commercial reasons alone the colonial tail could end up wagging the metropolitan dog.⁶⁹ Rich colonial merchants frequently sought to spend time domiciled in the mother country, and of course, they brought select members of their household slaves with them from the colonies. At the time of Lord Mansfield's decision in *Somerset* there were between fourteen and fifteen thousand slaves residing in the British Isles.⁷⁰ The fear among British slave owners generated by the protean possibilities of *Somerset* included the fear that the high court might set all these slaves free within the scope of a single judicial pro-

⁶⁶ 98 Eng. Rep. at 510.

⁶⁷ William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 87 (1974).

⁶⁸ *Id.* at 108.

⁶⁹ England was economically dependent on her colonies for trade, and many of England's colonists were dependent on slave labor for economic survival, if not upward mobility.

⁷⁰ See Wiecek, *supra* note 67, at 95.

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nouncement. Lord Mansfield acknowledged this fear when he declared in apparent frustration of the parties' unwillingness to settle: "If the parties will have judgment, *fiat justitia, ruat coelum*"⁷¹—let justice be done, though heaven falls!

Heaven did not fall as a result of *Somerset*. Having been decided on the eve of the successful American war of independence, however, it set a critical jurisprudential framework for future judicial decisions among the soon-to-be-established American states over questions of comity and choice of law in determining the status of enslaved persons brought voluntarily from a slave state to a non-slaveholding state, as opposed to those who might have escaped against their masters' will. Since chattel slavery, consistently with *Somerset*, was deemed by American courts to be contrary to both common law and natural right, its toleration in non-slaveholding states or territories was treated as a matter of comity shown toward the foreign positive law or municipal enactments of slave state jurisdictions.⁷²

As Diane Klein has shown, the conception of comity in non-slaveholding state courts leading up to the civil war could, in some instances, be less tolerant than even their post-bellum views.⁷³ This was due in part to the fact that the grant of enforcement of extraterritorial laws by a forum state had always been viewed as subject to an exception based on the public policy of the forum state. Traditionally, comity implied a relation of toleration and enlightened self-interest among separate sovereigns for the official acts of sister states, rather than the recognition of a legal obligation.⁷⁴ Thus, it was always possible that some official act or institution of a foreign jurisdiction might be held to violate the public policy of a forum state in which the act was sought to be enforced or the institution was sought to be recognized as legally binding. As Klein explains,

From the beginning, states reserved to themselves the power to decline enforcement of truly repugnant out-of-state agreements, reminding the world at large that the enforcing court exercised its power in support of the out-of-state or "foreign" contract as a matter of comity only, of something like self-interested and pragmatic friendliness between two states, and not out of any felt or real sense of constitutional or other legal obligation.⁷⁵

Somerset's choice of law legacy, to the common law jurisdictions of America on the issue of the legal effect of voluntary movement of enslaved persons from

⁷¹ *Somerset v. Stewart*, 98 Eng. Rep. at 509.

⁷² See Diane J. Klein, *Paying Eliza: Comity, Contracts, and Critical Race Theory—19th Century Choice of Law Doctrine and the Validation of Antebellum Contracts for the Purchase and Sale of Human Beings*, 20 NAT'L. BLACK L. J. 1 (2007).

⁷³ *Id.* at 12-15, citing *Hone v. Ammons*, 14 Ill. 29 (1852) (refusing to uphold the terms of a contract for sale of an enslaved person on public policy grounds) and *Rodney v. Illinois Central*, 19 Ill. 42 (1857) (refusing to uphold claims for civil damages in the case of a runaway enslaved person on public policy grounds). *But cf. id.* at 16-17, citing *Roundtree v. Baker*, 52 Ill. 241 (1869) (upholding the terms of a contract for sale of an enslaved person after passage of the Thirteenth Amendment abolishing slavery).

⁷⁴ *Id.* at 4-5, explaining the development of comity in relation to contract principles, its application to the antebellum American interstate context, and its traditional public policy exception.

⁷⁵ *Id.*

jurisdictions that did permit human bondage into those that did not, lasted up until the Supreme Court's disastrous *Dred Scott* decision, which in turn set the states divided by the issue of slavery on a path to civil war and eventual formal abolition of slavery.⁷⁶

III. TYPOLOGY OF WRONGFUL ENSLAVEMENT SUITS PRIOR TO ABOLITION

Prior to the abolition of slavery, state slave law statutes and judicial decisions established the parameters of how wrongful enslavement claims might be brought, the elements of successful claims, and the extent of restitution, if any, that was required to be paid by purported masters who were found to have wrongfully enslaved a free person. Unsurprisingly, state slavery law made the prize of freedom exceedingly difficult to obtain through adoption of trial procedures that favored the continuance of slavery on racial grounds, limitation of the causes of action that could form the basis of a wrongful enslavement claim, and minimization of the monetary awards that successful plaintiffs could expect in restitution for their wrongful enslavement.

In both the North and the South lawmakers, while acknowledging the legitimacy of perpetual racial slavery under municipal law, recognized that a person could become wrongfully enslaved in a number of ways: through the kidnap of free Blacks, through manumissions in a master's will that were not subsequently carried out by the executor of the master's estate, through the conversion of a term of service into perpetual service for persons ineligible by law for slavery—typically by means of fraudulent sales to unsuspecting buyers—or through breach of promise to set an enslaved person free upon payment of a sum certain or attaining a specified age. Proof of a free maternal ancestor or proof that one's ancestors were not Black but Indian was deemed sufficient to render a person ineligible for enslavement. After the decision in *Somerset*, voluntary travel to and residence in a free territory or jurisdiction was sometimes also sufficient to render an enslaved person free in the eyes of the law.⁷⁷

Following the decision in *Somerset*, moreover, a division could be made between Northern courts on the one hand, which generally permitted advocates of the wrongfully enslaved to bring *habeas corpus* claims, and Southern courts and legislatures on the other hand—with the exceptions of Louisiana and Texas—which denied advocates of the enslaved access to the common law writs of *habeas corpus* and *de homine replegiando*. Southerners deemed the common law writs to be a threat to the right of property in an enslaved person. In *Daniel v. Guy* the Supreme

⁷⁶ On the facts, Dred Scott was taken by his purported master voluntarily from the state of Missouri where human bondage was legal into territories that prohibited slavery. Both the state supreme court of Missouri and Justice Taney for the majority in the federal case rejected the common law rule that the voluntary removal of Scott to a territory that prohibited slavery voided his enslavement.

⁷⁷ Litigation based on travel to or residence in a free jurisdiction is properly characterized as a “freedom suit,” since it was most often contrary to the will of the master. By contrast, manumission suits are conceptually distinct even if the ultimate issue to be decided was the freedom of the litigants. Manumission expressed the will of the master.

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Court of Arkansas explained why the state legislature denied slaves, as persons belonging to the Negro race were presumed to be, the benefit of *habeas corpus*. Writing for the court, Chief Justice English explained,

The reason for denying slaves the benefit of *habeas corpus*, is manifest. They are property as well as persons, and if they could be discharged from bondage by a judge in vacation or term, the owner might be deprived of property without due course of law, there being no provision for trial by jury, etc., on the hearing of the writ of *habeas corpus*.⁷⁸

The writ of *de homine replegiando* was likewise disfavored by Southern courts, even though as a form of the writ of *replevin* which permits a property owner to recover wrongfully detained property, jury trials for claims asserted under this writ were allowed. The additional feature of both writs that Southern courts and legislatures found troublesome included the possibility that the alleged slave might be set free pending the outcome of the case to the prejudice of the alleged master's interest in the enslaved person's labor. In the Freedom Suit Act of 1795 Virginia abolished access to both of these common law writs for enslaved persons who were not in possession of documents of freedom.⁷⁹ Maryland, however, while it denied *habeas corpus*, granted that courts had jurisdiction to permit writs *de homine replegiando* to enslaved persons.⁸⁰

In contrast to the North, Southern states mandated that manumission suits be filed as common law tort actions. Enslavement was *prima facie* tortious since the common law defense of moderate correction was rejected in the case of slaves in favor of a higher degree of physical dominion.⁸¹ The advocate for the enslaved person in an action at law would either allege assault and battery or false imprisonment—using the archaic form of *trespass vi et armis*. Moreover, the successful plaintiff in an intentional tort suit normally would be entitled to receive compensation, where the measure of recovery would be the amount necessary to restore the plaintiff to the status quo ante, and possibly even punitive damages for wanton misconduct. However, the courts in Virginia, Maryland, and Louisiana either denied successful claimants in wrongful enslavement cases any compensatory damages, or only permitted the payment of nominal damages.⁸²

⁷⁸ See *Daniel v. Guy*, 19 Ark. 121, 132, 1857 WL 545 (1857) (under state statute all persons permitted to file writs of *habeas corpus* except a “negro or mulatto held as a slave”). *Accord Clark v. Gautier*, 8 Fla. 360 (1859); *Weddington v. Sloan*, 54 Ky. 147 (1854); *Field v. Walker*, 17 Ala. 80 (1849); *Thornton v. DeMoss*, 13 Miss. 609 (1846); *Ex. parte Renney v. Mayfield*, 5 Tenn. 165 (1817).

⁷⁹ See *Nicholas v. Burruss*, 31 Va. 289, 298, 1833 WL 2087 (1833).

⁸⁰ See *Johnson v. Medtart*, 4 H. & J. 24, 1815 WL 274 (Md. 1815).

⁸¹ See *James v. Carper*, 36 Tenn. 397, 4 Sneed 397 (1857), *State v. Mann*, 13 N.C. 263, 2 Dev. 263 (1829).

⁸² For the law in Maryland and Virginia, see Kull, *supra* note 8, at 1282-86 citing *Pleasants v. Pleasants*, 6 Va. (2 Call) 319, 356 (1800), *Peter v. Hargrave*, 46 Va. (5 Gratt 12) 12 (1848), *Queen v. Ashton*, 3 H. & McH. 439 (1796), *State v. Van Lear*, 5 Md. 91 (1853), *Franklin v. Waters*, 8 Gill 322, 328 (Md. 1849), and *Jason v. Henderson*, 7 Md. 430, 441-42 (1855); and for the law in Louisiana, see JUDITH KELLEHER SCHAFFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 245 (1994), citing *Delphine v. Guillet*, No. 4249, 11 La. Ann. 424 (1856) and article 177 of the Civil Code of 1825.

Alternatively, the advocate for the enslaved person in Southern courts could waive the tort and claim *indebitatus assumpsit* in an action at equity. This type of suit would be considered an action in restitution for the value of services rendered, as if there had been a labor contract between the enslaved person and his owner. In such an action, the defendant would be permitted to offset the plaintiff's recovery by the value of goods, services, or money already furnished to the plaintiff while enslaved.⁸³

South Carolina and Georgia adopted statutes giving the guardian of wrongful enslavement claimants the right to bring an action of trespass in the nature of ravishment of ward.⁸⁴ The disadvantage for the wrongfully enslaved plaintiff under this form of action was that the plaintiff remained enslaved and at the mercy of his purported master *pendente lite*. By contrast, Missouri adopted an ingenious procedure to mitigate the seeming unfairness of requiring a wrongfully enslaved plaintiff to remain with his purported master until the outcome of the case could be determined. In Missouri the court would order the enslaved person be hired out to a third party during the pendency of his suit for freedom.⁸⁵ If the plaintiff was successful in proving to the court that he was wrongfully enslaved, he would be entitled to the fund created by his employment. If the plaintiff was unsuccessful, the fund created by his employment would be turned over to the defendant. In *Gordon v. Duncan* the court asserts that in cases such as these “nothing for indignity” would be paid to the wrongfully enslaved plaintiff, unless he could show a wanton violation of liberty, thus implying that a purported master was entitled to a presumption of good faith.⁸⁶

The requirement of securing a *guardian ad litem* willing to sue on behalf of persons who claimed to be wrongfully enslaved was based on the precept that slaves as property could neither be sued nor sue another under the civil law.⁸⁷ In South Carolina and Georgia the requirement of a *prochain ami* or “next friend” willing to take on the enslaved person's cause in protracted and expensive legal battles was established by statute. In Tennessee this requirement was established as a matter of common law.⁸⁸ Coupled with common restrictions on the ability of slaves to offer testimony except against other slaves, these procedural hurdles effectively limited the substantive right of enslaved persons to sue for freedom. In many Southern jurisdictions, even free Blacks could not offer testimony against any white person.

In modern terms, the requirement of securing a legal guardian—which in effect amounted to the need for enslaved Blacks to win the sympathies of free

⁸³ See Kull, *supra* note 8, at 1282-86.

⁸⁴ For the South Carolina statute, see 7 *STATUTES AT LARGE OF SOUTH CAROLINA*, 397-98. For the Georgia statute, see Wiecek, “Statutes”, at 265. See also, *Knight v. Hardeman*, 17 Ga. 253, 256-57, 1855 WL 1818 (1855) (for the 1770, 1835, and 1837 acts). See generally, Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 *GOLDEN GATE U. L. REV.* 241-80 (2007).

⁸⁵ See *Gordon v. Duncan*, 3 Mo. 385 (1834). See also *Daniel v. Roper*, 24 Ark. 131, 134 (1863).

⁸⁶ *Id.* at 386.

⁸⁷ See *Catherine Bodine's Will*, 34 Ky. 476, 1836 WL 2089 (1836).

⁸⁸ See *Fede*, *supra* note 13, at 140-41, citing *Doran v. Brazelton*, 32 Tenn. 149, 1852 WL 1834 (1852).

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whites—functioned as a rule of racial standing. Standing refers to the constitutionally-based requirement that plaintiffs allege a personal injury, fairly traceable to the defendant’s allegedly unlawful conduct, and likely to be redressed by the requested relief.⁸⁹ Slaves as chattel property had no right to sue on their own behalf, and thus had no standing to complain of personal injuries done to them by persons presumed in law to be tortfeasors. Another way of characterizing this legal rule is to say that in freedom suits no standing was required of the “next friend” of the slave since he acted as the guardian of an incompetent person. But a deeper point should be observed in connection to this point of law, viz. that when the slave’s injury was fresh, and the tortfeasor was under the jurisdiction of the courts, restitution was often refused to the wrongfully enslaved based on a kind of immunity based on race, characterized as good faith.

The Doctrine of the Master’s Good Faith

In addition to denying what amounts to legal standing to persons claiming to have been wrongfully enslaved, the doctrine of the master’s good faith and the presumption in favor of enslavement for those of servile color offered a kind of immunity to purported owners of slaves from the normal requirement of paying restitution as tortfeasors. Andrew Kull’s research reveals that while there were some cases where a formerly enslaved person was permitted to recover restitution, he also finds that “in jurisdictions where slavery was currently recognized[the South]—as opposed to those in which slavery had previously been abolished[the North]—American courts followed a uniform, anomalous rule.”⁹⁰ One Kentucky court coined the term “conventional exemption” to denominate the rule.⁹¹ The rule was that successful claimants in wrongful enslavements suits would not be permitted to recover the value of their services while wrongfully enslaved if the defendant had acted in “good faith,” that is, believing that the enslaved person was really his slave. Kentucky later codified the rule by statute making liable only the master who acted in “bad faith.”⁹²

Courts in Louisiana, Virginia, and Maryland also denied successful freedom claimants the right to damage judgments in connection with a finding of wrongful enslavement. Andrew Fede traces the Virginia rule to the leading case of *Pleasants v. Pleasants*.⁹³ As Fede points out, “this no damages rule gave a dual benefit to the slaveholder defendants; they did not need to pay damages in tort, as if the form of action were a writ of *habeas corpus*, and they did not have to comply with the pretrial procedures in a *habeas corpus* proceeding, as if the action really were a tort action in trespass.”⁹⁴

And although Georgia and South Carolina did permit wrongfully enslaved persons to recover damages, they also required the plaintiff’s next friend to seek

⁸⁹ See *Cato v. United States*, 70 F.3d 1103, 1109 (9th Cir. 1995).

⁹⁰ See Kull, *supra* note 8, at 1282; see also, *Hickham v. Hickham*, 46 Mo. App. 496 (Ct. App. 1891), *Handy v. Clark*, 9 Del. 16 (1869), and *Kinney v. Cook*, 4 Ill. 231 (1841).

⁹¹ *Aleck v. Tevis*, 34 Ky. 242, 250 (1836).

⁹² See Act of Feb. 12, 1840, ch. 282, §2, 1839 Ky. Acts 173.

⁹³ 6 Va. 193, 1808 WL 578 (1808). See Fede, *supra* note 13, at 350-51.

⁹⁴ *Id.*

damages in the freedom suit rather than establishing freedom first, and then seeking restitution from the tortfeasor defendant afterwards. If the next friend of the wrongfully enslaved person failed to join the damage action in the proceeding to establish freedom, the claim for damages could be denied based on the statute of limitations.⁹⁵ Only the courts in Tennessee permitted serial litigation, first on the issue of freedom, and next on the issue of damages.⁹⁶

When nineteenth century courts refused, on the ground of the master's good faith, to award restitution to plaintiffs of African descent who had been adjudicated to be wrongfully enslaved, the courts thereby refused to do ordinary justice that would have been done had the plaintiffs been white.⁹⁷ Moreover, they did so at a time when none of the procedural obstacles currently advanced against reparations were extant: no problem of standing for the plaintiff (other than *post hoc* discriminatory guardianship rules that demeaned the personhood of the enslaved), no problem of locating a culpable defendant, no problem of complex calculations of benefit or need for tracing distant or dissipated assets, and no problem of statutory time limits.

On the question of the applicability of time limits to slavery-era damage claims, however, in 1869, not more than four years after the end of the civil war and passage of the Thirteenth Amendment abolishing slavery in the United States, the Supreme Court of Georgia sought to demarcate a temporal boundary that continues until the present day. In *Green v. Anderson*,⁹⁸ the court was asked to resolve a dispute between an heir, John Anderson, and the executor of a will, Moses Green. The testator of the will had been the master and owner of John and his mother, Louisa, prior to the civil war when John was still a minor. He bequeathed freedom to them both in his will, and provided that a small amount of his estate be dedicated to their support. Rather than fulfill these terms, Moses Green denied Louisa her pension and denied John his freedom and the funds intended for his education and support, until the civil war came along and settled the question of John Anderson's freedom. Anderson then sued Green to enforce the terms of his former master's will with respect to his mother's pension and his own trust. Chief Justice Brown, writing for the court, held that the bequest was legally made under the laws of Georgia, both at the time of its creation and as of the date of the ensuing litigation, and that John Anderson had standing to enforce the trust created under his master's will as to his own bequest.

Nevertheless, the court found it necessary to disavow in part the suggestion of John Anderson's counsel that as a formerly enslaved person, John had the right to sue in Georgia state courts for *any legacy* given to him while being used as a slave. The court agreed that he could enforce the terms of his master's will that were in his favor, but that was a separate matter from seeking any tort damages for wrongful enslavement, or for wages during the period when he was kept as a slave. The court, therefore, expressed its holding precisely thus: "We hold that a freedman of legal age, may commence proceedings to enforce, in the Courts of

⁹⁵ See *Daniel v. Roper*, 24 Ark. 131, 1863 WL 440 (1863).

⁹⁶ See *Woodfolk v. Sweeper*, 21 Tenn. 88 (1840); *Matilda v. Crenshaw*, 12 Tenn. 249 (1833).

⁹⁷ See *Aleck v. Tevis*, 34 Ky. 242, 248-49 (1836).

⁹⁸ *Green v. Anderson*, 38 Ga. 655 (1869).

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this State, any existing legal or equitable right, created in his favor while he was a slave, that did not then contravene the policy or violate the laws of the State.”⁹⁹

The meaning of “then” in the court’s holding is the temporal boundary referred to above. It refers to the time when slavery was legal, and slaves had no rights in their labor, and no rights in their persons that could be enforced against their masters or any white person. The court is quite conscious of how its procedural ruling is meant to affect substantive rights by interpreting the freedom and legacy of the freedman for him: “By his transition from slavery to freedom, no such right of the owner [to recover damages for injuries received during slavery] transferred to him.” Thus, in the court’s opinion, the statute of limitations which “forever barred and foreclosed” such suits unless already instituted was a mere jurisprudential afterthought.

IV. CONCLUSION

The law created a double standard based upon the claimant’s perceived racial appearance while confirming the master’s unique power, within a system of regulations designed to protect slavery as an institution, to grant or deny privileges to the enslaved, to manumit or to continue to enslave, to inflict cruel and excessive punishments or to be lenient, and to take the slave’s life, limbs, sex, possessions or kin with or without “reason” or consent.

With so much put at stake by the law between the status of free or enslaved, and consequently between Black or white, the notion that in addition to a grant of freedom, damages ought to be paid to those found by courts to have been wrongfully enslaved, does indeed seem to be a “solecism.” Why indeed should the legal double standard end with the presumptions of freedom and enslavement, and not extend as well to the damages to be paid to someone previously, if erroneously, held in slavery? The general contempt heaped on the heads of the enslaved was certainly broad enough to encompass a denial of damages to the wrongfully enslaved. Continuation of the doctrine that no restitution is owed to the enslaved, or their descendants, suggests that less has changed in the contemporary understanding of the wrongfulness of slavery than might be supposed based on abolition alone.

⁹⁹ *Id.* at 662.

Mr. Justice Story Invents American Remittitur: “The Very Limits of the Law”

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ABSTRACT

In the seminal U.S. decision on remittitur in tort cases, Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578) Justice Joseph Story expanded the powers of a judge to set aside a jury damage award, offering the plaintiff a choice between lesser damages set by the judge and a new trial. He did so claiming that English common law supported this procedure. This research finds no support for this claim in the English cases he cited, in two centuries’ worth of English decisions, or in American decisions of the same period. Story’s subsequent decisions did not use his remittitur procedure.

“A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and decide for itself, without reference to the settled course of antecedent principles.”¹

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¹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 350 (1833) (“Who is the Final Judge or Interpreter in Constitutional Controversies”), vol. 1, Bk. III, ch. 4, ¶ 377.

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I. BACKGROUND

This paper concerns the options available to a common-law judge when a jury finds for the plaintiff in a tort suit, and awards damages higher than the judge would have. Some kinds of damage, such as economic, can frequently be computed from the evidence, but others cannot. We focus here on damages not amenable to calculation.

Justice Joseph Story sat on the Supreme Court of the United States and rode circuit for the First Circuit (New England) for over thirty years, from 1812 to 1845. Justice Story was a major influence on both Constitutional interpretation and the development of common law in the United States, through his precedent-setting decisions in the First Circuit, his participation in the Supreme Court (and his partnership there with Chief Justice John Marshall), his strong leadership at Harvard Law School, and his numerous treatises.²

In 1822, Justice Story authored what became this country’s seminal decision on remittitur in tort cases, *Blunt v. Little*.³ Acknowledging that he was “go[ing] to the very limits of the law,” he held that when a judge believed a jury had awarded excessive damages, the judge could offer the winning plaintiff a choice of accepting a reduced damage award at a level the judge set, or a retrial.⁴ I examine here whether the English precedents Story cites support his remittitur procedure.

²See generally, R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985).

³ 3 F.Cas. 760 (C.C.D. Mass. 1822) (No. 1, 578).

⁴ *Id.* at 762.

II. JUSTICE STORY ON THE SEVENTH AMENDMENT AND ITS HISTORY

Whether and when a judge may interfere with a jury's damage award depends upon how much deference judges owe to jury determinations. One aspect of such determinations is a jury's determination of the facts. The Seventh Amendment provides in part that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."⁵ Soon after he joined the court, Justice Story heard an appeal from the United States in a common law case in which no legal errors were alleged, but the United States demanded the right to a new trial at the appellate level. In a decision he issued in 1812,⁶ Story observed that this part of the Seventh Amendment was intended to modify Article III, which, as initially enacted, granted the Supreme Court "appellate Jurisdiction" "both as to law and Fact," although, to be sure, "with such Exceptions, and under such Regulations as the Congress shall make."⁷ Practice in several states did authorize new trials on appeal, complete with new presentations of evidence.⁸ Accordingly, a concern that Article III "did not secure the trial of facts by a jury" was discussed with "singular zeal and acuteness."⁹ To address "the apprehensions... of new trials by the appellate courts," the Seventh Amendment prohibited a federal appellate court from convening a new jury to re-examine facts already determined by a lower-court jury.¹⁰ Indeed, the amendment prohibited any reexamination of facts found by a jury, except as "according to the rules of the common law,"¹¹ which Story considered "[b]eyond all question... not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."¹² Under that common law, "the facts once tried by a jury are never re-examined, unless a new trial is granted... for good cause shown; or unless the judgment of such court is reversed by a superior tribunal."¹³ In sum, Story's early understanding, as articulated in *Wonson*, was that under the Seventh Amendment and English common law, jury determinations of fact were binding unless a new trial was granted, or a superior court reversed the judgment of the lower court.

A decade later, Justice Story decided *Blunt v. Little*. He forced a plaintiff, on the defendant's motion, to choose between a retrial and a reduced (remitted) award

⁵ U.S. Const. amend. VII.

⁶ *United States v. Wonson*, 28 F.Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

⁷ U.S. Const. art. III, § 2, para. 2. For more on the history of the Seventh Amendment, see Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1972).

⁸ See, e.g., Act of Mar. 11, 1784, § 6, reprinted in 1 *Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807*, at 146, 149 (providing that, on appeal from the judgment of a justice of the peace in a civil action, "both parties shall be allowed to offer any evidence upon the [appellate] trial at the Common Pleas, in the same manner as if the cause had been originally commenced there").

⁹ *Wonson*, 28 F.Cas. at 750 (citing *The Federalist* Nos. 81, 83 (Alexander Hamilton)).

¹⁰ *Id.*

¹¹ U.S. Const. amend. VII.

¹² *Wonson*, 28 F.Cas. at 750.

¹³ *Id.*

set by the judge. This forced choice combined two distinct English common-law procedural tools to address allegedly excessive verdicts. One of these procedures, as suggested in *Wonson*, was used by losing defendants to request a new trial on grounds of excessive damage awards. The other was used by successful plaintiffs in contract and similar cases to ask the court to reduce a damage award larger than the evidence justified, in order to preserve their victory.¹⁴

III. COMMON LAW PRECEDENT

There is controversy still about whether the English precedents relevant to interpreting the Seventh Amendment are only those that predate 1791, when the Seventh Amendment (and the rest of the Bill of Rights) was adopted, or whether post-1791 English common law decisions are also relevant.¹⁵ Supporting the “only pre-1791” view is the word “preserved” in the text of the Seventh Amendment (although to be sure, referring to the preservation of the right of trial by jury, rather than to “preserving” a common-law prohibition against re-examining facts tried by jury). It can be argued, though, that English common law decisions during the decades immediately after 1791 are also appropriate guides to the content of the English common law. In any event, all three decisions that Story mentioned and relied upon in *Blunt v. Little* are English decisions after 1791, so he evidently considered such decisions pertinent.

A. THE RULES OF THE COMMON LAW, 1504—1791

The drafter of the Seventh Amendment (probably Madison) was right in referring to “the rules of the common law” (emphasis added). As early as the sixteenth century, “The judges sought refuge from the agony of decision – and the perils of undue influence – by umpiring the ancient game strictly according to the rules, and by refusing to meddle with questions of fact.”¹⁶ From 1405¹⁷ to 1622, judges used their power to refuse to enter judgment to variously encourage, cajole, suggest or persuade successful plaintiffs to accept a remittitur.¹⁸ However, in 1622, a radical change occurred in the case of *Hawkins v. Sciet*.¹⁹ Hawkins sued Sciet for calling him bankrupt. The jury found for Hawkins, and awarded £150. The Court reduced this to £50. However, “apres sur grãd advice” [after further discussion], they changed their minds, and restored the original £150 awarded by the jury. The court reasoned that unlike mayhem (where they could see the plaintiff’s

¹⁴ Suja Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 764-69 (2003) (explaining that under English common law, a successful plaintiff could ask the jury’s award be reduced in order to no more than the plaintiff had demanded, because, without such correction, the case could have been overturned).

¹⁵ C.W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 641-43 (1973).

¹⁶ J. BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* Vol. iv, 47 (2003).

¹⁷ *Gervais v. Claxton*, Mich. 7 Hen 4, pl. 15, fal. 31b (K.B., 1405).

¹⁸ R. Helmholz, *Damages in Actions for Slander at Common Law*, 103 L.Q. REV. 624-638 (1987).

¹⁹ 81 Eng. Rep. 1099 (K.B.); Palm 314. Also sub. nom. *Sciet v. Hawkins*, 2 Rolle 243.

wounds), the judges had no special knowledge of the damages, and hence that was to be left to the jury.²⁰

Instead of using the remittitur procedure, courts instead would order a new trial when they found the jury's damage award excessive. The history of the new trial as a remedy is recounted by Lord Mansfield,²¹ as follows:

It is not true that no new trials were granted before 1655, as has been said for Style 466.²²

In *Slade's case*, M. 24 C. 1 (which was in 1648,) in B.R. reported in Style 138,²³ the Court was moved for judgment, formerly stayed upon a certificate, made by Baron Atkyns, "that the verdict passed against his opinion." Bacon, Justice said, "judgments have been arrested in the Common Pleas, upon such certificates." Hales, of counsel with the defendant, prayed that the judgment in that case of *Slade* might be arrested, and that there might be a new trial; "for that it had been done theretofore in like cases." Indeed that case, as there reported, represents Rolle, Justice, to hold "that it ought not to be stayed, though it have been done in the Common Pleas: for that it was too arbitrary for them to do it." And he adds "you may have your attaint against the jury; and there is no other remedy in law for you: but it were good to advise the party to suffer a new trial, for better satisfaction."

In the case of *Wood v. Gunston*, Michaelmas 1655, Banc. Sup. Style 466 (which was an action upon the case, for speaking scandalous words of the plaintiff, and a verdict for the plaintiff, with £1500 damages) the defendant moved for a new trial. And Glynn, Chief Justice, said "it was in the discretion of the Court, in some cases, to grant a new trial: but this must be a judicial and not an arbitrary discretion. And it is frequent in our books, for the Court to take notice of the miscarriages of juries and to grant new trials upon them. And it is for the people's benefit, that it should be so: for a jury may sometimes, by indirect dealings, be moved to side with one party, and not to be indifferent betwixt them; but it cannot be so intended of the Court." And in that case, a new trial was ordered, upon the defendant's paying full costs; the judgment standing as a security to pay what might be recovered upon the next verdict.

The reason why this matter cannot be traced further back, is that the old report books do not give any accounts of determinations made by the Court upon motions.

²⁰ This change is attributed by Helmholz, *supra* note 18, at 637, to a change in how damages were viewed: "while they [judges at Westminster] might know as well as jurors how likely the words spoken were to have caused harm of a general reputational sort, they would have been quite unable to say what actual damages had occurred from their utterance... That sort of question rested within the jury's knowledge." See generally G.T. Washington, *Damages in Contract at Common Law (Part 1)*, 47 L.Q. REV. 345 (1931).

²¹ Bright, *Executor of Hannah Crisp v. Eynon*, (1757) 97 Eng. Rep. 365-69, 1 Burr. 390-98. Further comment on this case can be found in *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY*, JAMES OLDHAM, 157-58 (Vol. 1, 1992). In the extracts from the judgments that follow, the footnoted citations are all internal citations and are reproduced here in footnoted form exactly as they appear in the English Reports to assist the interested researcher.

²² *Wood v. Gunston*, (1655) 82 Eng. Rep. 863, 864, 867; Style 462, 466.

²³ 82 Eng. Rep. 592.

What criteria were to be used to decide whether a new trial should be granted on grounds of excessive damages? The decision in *Beardmore v. Carrington* (1764)²⁴ examined all the available precedents as follows:

...All, or most of the cases of new trials, are where juries have misdemeaned themselves contrary to their oath; in the case in *Stiles* 466,²⁵ the misconduct of the jury was certainly an ingredient, and so it appears from the case in 1 Lev. 97.²⁶ Some books say it was a trial at Bar, and it is highly probable there was some evidence that the jury had been tampered with; and this was certainly the very first case of a new trial, and from that period the Courts have exercised the power of granting new trials in several cases; as when the jury find contrary to the Judge's directions in point of law, when they find directly contrary to the evidence, (that is to say) against evidence all on one side, for if there be evidence on both sides, the Court never interposes in that case; as to granting the first new trial in *Stiles* 466, there is great reason (as was said before) to think it was for misbehaviour in the jury; it was an action for words; so was the case of *Lord Townsend*,²⁷ 2 Mod. 250, for words, and £4000 damages, where the Court refused to grant a new trial; and if a Court could not say that those damages were excessive, they can hardly say that damages are excessive in any case of slander whatever; and this case has never been contradicted or denied to be law. The case of *Ash v. Ash*,²⁸ Comb. 357, was plainly for the misdemeanor of the jury in refusing to answer the Judge when he asked what ground or reason they went upon: to be sure Judges are to advise, but not to control juries; and my Lord Holt and the King's Bench did right, in granting a new trial in that case. In the case of *Wilmot [sic] v. Berkley*,²⁹ Trin. 31 & 32 G. 2, B.R. which was an action for criminal conversation, the jury gave £500 damages against the defendant, and upon affidavits that he was only a clerk in low circumstances, and unable to pay so large a sum, it was moved for a new trial; but the Court refused to grant even a rule to shew cause, because in cases of tort the jury are the only proper judges of the damages. We are now come to the case in 1 Stra. 691, *Chambers v. Robinson*,³⁰ which seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only: we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excesssive. The principle on which it was granted, mentioned in *Strange*, was to give the defendant a chance of another jury: this is a very bad reason; for if it was not, it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots; and therefore we are free to say this case is not law; and that there is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts...

²⁴ 95 Eng. Rep. 790; 2 Wils. (K.B.) 244, 249. See also J. OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES (2006) (quoting a Mansfield manuscript version at p. 71).

²⁵ *Wood v. Gunston*, (1655) 82 Eng. Rep. 863, 864, 867.

²⁶ *Roe v. Hawkes*, (1663) 83 Eng. Rep. 316.

²⁷ *Lord Townsend v. Hughes*, (1667) 86 Eng. Rep. 994 6; 2 Mod. 150.

²⁸ (1695) 90 Eng. Rep. 526.

²⁹ *Wilford v. Berkley*, (1758) 97 Eng. Rep. 472; 1 Burr. 609.

³⁰ (1726) 93 Eng. Rep. 787; 2 *Strange* 691 (12 beq.) (Note that the jury awarded £1000. A second trial was allowed, in which the jury also awarded £1000. A third trial was denied.)

We desire to be understood that this Court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush...³¹

It is interesting that this history does not mention *Clerk v. Udall* (1702);³² in which a second trial was granted for excessive damages. The same damages were given again, and a third trial was denied. It also does not mention *Yate v. Swaine*,³³ in which £250 were given for 26 days of false imprisonment. "... The Court thought the damages excessive, and ordered the inquiry to be set aside..."

A fair summary of the common law on remedies for excessive damages in tort cases in 1764, as enunciated by *Beardmore v. Carrington* would be:

1. The court has the power to grant a new trial for excessive damages.
2. The criterion is "damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against, at first blush."
3. The only remedy under discussion is whether to send a case to a new jury.³⁴

In the period from 1764 to 1791, there were many cases in which a new trial was not granted.³⁵ In *Monroe v. Elliot*,³⁶ the Court of Common Pleas set aside an award of £200 as excessive; a second jury awarded £150. In *Hurry v. Watson*,³⁷ in a case concerning malicious prosecution, the jury awarded £3000. In response to a motion to set aside the damages as excessive, the Court of Common Pleas said it had the power to do so, but recommended that the parties negotiate. They settled for £1500 plus £800 in costs.

³¹ *Beardmore v. Carrington*, 95 Eng. Rep. 790; 2 Wils. (K.B.) 244, 249.

³² *Clerk v. Udall*, (1702) 91 Eng. Rep. 552; 2 Salkeld 649.

³³ (1741) 94 Eng. Rep. 891, 892 (K.B.); Barnes 232. *See also* Case Notes of Sir Soulden Lawrence, 1787—1800, 65 (James Oldham, ed.) (Selden Society 2013) (1787).

³⁴ 95 Eng. Rep. 790; 2 Wils. (K.B.) 244, 249.

³⁵ *Farmer v. Darling*, (1766) 98 Eng. Rep. 27 (K.B.); 4 Burr. 1971.

Benson v. Frederick, (1766) 97 Eng. Rep. 1130 (K.B.); 3 Burr. 1845.

Redshaw v. Brook, (1769) 95 Eng. Rep. 877 (K.B.); 2 Wils. 405.

Perkin v. Proctor, (1769) 95 Eng. Rep. 874 (K.B.); 2 Wils. 382.

Tullidge v. Wade, (1769) 95 Eng. Rep. 909 (K.B.); 3 Wils. 18.

Bruce v. Rawlins, (1770) 95 Eng. Rep. 934 (K.B.); 3 Wils. 61.

Fabrigas v. Mestyn, (1773) 96 Eng. Rep. 549 (K.B.); 2 Black W. 929.

Gilbert v. Burtenshow, (1774) 98 Eng. Rep. 1059 (K.B.); 1 Coup. 230.

Sharpe v. Brice, (1774) 96 Eng. Rep. 557 (K.B.); 2 Black M. 942.

Leith, Bar v. Pope, (1780) 96 Eng. Rep. 777 (K.B.); 2 Black W. 1327.

Ducker v. Wood, (1786) 99 Eng. Rep. 1092 (K.B.); 1 T.R. 277.

Bennett v. Alcott, (1787) 100 Eng. Rep. 90 (K.B.); 2 T.R. 166.

³⁶ Oldham, *supra* note 33, at 4.

³⁷ (1787)TR 27 Geo 3, C.B. (see editor's footnote to the case of *Duberly v. Gunning* 100 Eng. Rep. 1226 (KB. 1792) in the English Reports).

So the position of the common law in 1791 is much the same as it was in 1764: the court has the power to send a case back to a new jury for excessive damages in a non-mayhem tort case, and they are very reluctant to do so.³⁸

B. ENGLISH COMMON LAW AFTER 1791

Nothing dramatic happened in English Common Law on remedies for excessive damages in tort cases during 1791. Rather, the significance of 1791 has to do with American law, for this was the year of ratification of the Bill of Rights, including the Seventh Amendment.

C. ENGLISH COMMON LAW AFTER 1791: THE THREE CASES CITED BY JUSTICE STORY IN *BLUNT V. LITTLE*

The first is the case of *Duberley v. Gunning*, decided in 1792.³⁹ *Duberley* is a case of “criminal conversation,” which means that Mr. Gunning had an affair with Mrs. Duberley. There was an issue at the trial of whether Mr. Duberley had consented or had, by gross negligence or inattention to his wife’s conduct, contributed to what happened. The jury found for Duberley, and awarded him £5000, a huge sum. Gunning appealed both the sufficiency of the evidence and the damages awarded (on the ground that they were excessive). The verdict was upheld by a vote of three to one. On the issue of excessive damages, the victorious plaintiff, Duberley, urged the court to follow the precedent of *Wilford v. Berkeley*,⁴⁰ as follows:

The Court were clear and unanimous, that, although there was no doubt of the power of the Court, to exercise a proper discretion in setting aside verdicts for excessive damages in cases where the *quantum* of the damage really suffered by the plaintiff could be apparent, or they were of such a nature that the Court could properly judge of the degree of the injury, and could see manifestly that the jury had been outrageous in giving such damages as greatly exceeded the injury; yet the case was very different where it depended upon circumstances, which were properly and solely under the cognizance of the jury, and were fit to be submitted to their decision and estimate. And they held the case of criminal conversation with another man’s wife to be of this latter kind. For the injury suffered by the husband, and the estimate of the damages to be assessed, must in their nature depend entirely upon circumstances, which it was strictly and properly the province of the jury to judge of.

Gunning, on the other hand, argued that if the court agreed that the damages were excessive, he was entitled as of right to another trial on damages.

Each Judge gave his own separate opinion. The Lord Chief Justice, Lord Kenyon, found

... under all the circumstances I think the damages were much larger than ought to have been given... My difficulty arises from being unable to fix any standard, by which I can ascertain the excess which, according to my view of this case, I

³⁸ This conclusion is also found by Oldham *supra* note 37, at 59-79 n. 23 in his review of English and American practices on overturning jury damage awards.

³⁹ *Duberley v. Gunning*, (1792) 100 Eng. Rep. 1226; 4 T.R. 651.

⁴⁰ (1758) 97 Eng. Rep. 472 (K.B.); 1 Burr. 609. See also discussion of *Wilford v. Berkeley* at note 29, *supra*.

think the jury have run into. In many cases where the Court have said that the damages were too great, they have had some grounds to proceed upon, by which the excess might fairly be measured. But where there is no such standard, how are the errors of the jury to be rectified?... According to my judgment of this case, I think the damages are a great deal too much: nay, I should have been satisfied even if nominal damages only had been given; but as the jury have formed a different judgment of the evidence, I know not why my judgment should be preferred to theirs upon such a subject.⁴¹

Ashhurst J.'s decision read in part

...whether this Court can set aside the verdict merely for excess of damages, I think before they can do that, they ought to be able to ascertain some rule by which the damages are to be measured, and to which the facts may be applied. Where damages depend in anywise upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for us to interfere. We have no right in such a case to set up our own judgment against that of the jury, to which the constitution has referred the decision of the question of damages. There is another consideration, deserving of great weight, which is, that the court never granted a new trial in such a case as this for excessive damages; and yet many instances have occurred where the damages have been confessedly excessive.⁴²

By contrast, Buller J. dissented on both counts. He would void the verdict, as being contrary to the evidence, and he would void the damages, as being excessive. He writes:

New trials have been granted from the year 1655, at least as appears by a case of that date⁴³ and there one of the grounds was that of excessive damages: and that has been admitted in almost every other case since. In *Beardmore v. Carrington*, C.B.⁴⁴ all the Judges agreed that the Court might grant a new trial for excess of damages. There are besides many old cases which shew that the instance of the exercise of this power in 1655 was not the first. One case is as far back as 7 H. 4, 31 b.⁴⁵ though I think the Court there carried their controlling power too far; for the damages in that case being thought by the Court to be excessive, they said they would stay judgment til the plaintiff agreed to relinquish the excess. In that respect indeed they were wrong; because that was taking upon themselves to determine the exact amount of what the damages ought to have been, which is clearly the province of the jury to decide. The only power which the Courts now claim, is to send the case back to the revision of another jury, when they think that the damages given are enormously disproportionate to the case proved in evidence. We all of us agree that the damages are enormous in this case; and that being admitted, I cannot bring my mind to say that there shall not be a new trial.

All these facts which have been clearly proved show that the plaintiff does not come into Court with a fair case to ask for damages: but they seem to have been

⁴¹ *Duberley*, 97 Eng. Rep. at 1228.

⁴² *Id.* at 1228.

⁴³ *Wood v. Gunston*, (1655) 82 Eng. Rep. 863 (K.B.), 864, 867; Sty. 462, 466.

⁴⁴ (1764) 95 Eng. Rep. 790 (K.B.).

⁴⁵ *Gervais v. Claxton*. Mich. 7 Hen 4, pl. 15, fol. 31b (K.B., 1405); *See* fn 16.

entirely overlooked by the jury; and therefore I think we ought to grant a new trial, that the case may be revised by another jury. Nor can I agree that the granting of this rule will put another jury under any restraint upon the subject of damages: the question will go to them unfettered; they will give what damages they please. It is enough for us to say that *these* damages are excessive.⁴⁶

Note that Buller J. does not say what he would do if the second jury came back with the same or a higher award for damages, but hints that he would have accepted their decision.

Finally, Grose J. writes:

If we were to grant a new trial, I should feel myself greatly at a loss to point out to the jury what line they ought to take. I cannot form to myself any standard, by which to ascertain the exact amount of the damages in these cases. And here I must advert to another difficulty which was pressed by my Lord Chief Justice, namely, that if we set aside a verdict in such a case for excessive damages, we ought also to interfere in like manner, for the sake of consistency, when the damages are too little. But what line have we to go by in declaring the damages to be too much or too little? We have known many of these cases, where very large damages have been given; particularly one of £10,000, against a person in the situation of a servant: if any thing could have warranted the interference prayed for, we may fairly presume it was that, where the damages given were tantamount to a verdict of imprisonment for life;⁴⁷ and yet no new trial was granted. These considerations are enough to make us pause upon the subject. And I think we ought not to interfere for the first time in a case like the present, where the adulterer is a married man, and has taken away his friend's wife. Therefore without saying that no case can exist which could warrant the interference of the Court, I can certainly say in this case that I can see no ground in point of discretion for making this the first instance of such an interference.⁴⁸

Thus the court, by a vote of three to one, rejected the motion for a new trial on excessive damages.

The second post-1791 case to consider is *Chambers v. Caulfield*, decided in 1805,⁴⁹ and again a case for criminal conversation. Most of the decision concerns matters of deeds and trusts, which are not the concern here, but there was also a claim of excessive damages. Concerning the latter, the Lord Chief Justice, Lord Ellenborough, wrote on behalf of all the judges:

If it appeared to us from the amount of the damages given as compared with the facts of the case laid before the jury, that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject, we should have thought it our duty to submit the question to the consideration of a second jury; but this does not, upon a review of the whole evidence, appear in the present instance to have been the case.⁵⁰

⁴⁶ *Id.* at 1228-29.

⁴⁷ This is a reference to debtor's prison, where people who could not pay their debts were held until they did pay them.

⁴⁸ *Id.* at 1229-30.

⁴⁹ 102 Eng. Rep. 1280; 6 East. 244.

⁵⁰ 102 Eng. Rep. 1280,1285.

The third case to consider is that of *Hewlett v. Crutchley*, decided in 1813,⁵¹ an appeal of a case for malicious prosecution. Crutchley had sought criminal charges to be brought against Hewlett, which were found to be baseless. Crutchley had sought the advice of a barrister about the case, but apparently had not told him the full facts. The jury found Crutchley liable, and awarded £2000 in damages. Hewlett appealed on the ground that he was surprised by the testimony of the barrister, and that the damages were excessive.

Lord Mansfield's decision reads in part:

It is extremely difficult to estimate damages; you may take twenty juries, and every one of them will differ, from 2000 down to 200. I always have felt it, that it is extremely difficult to interfere and say when damages are too large. Nevertheless it is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury. There are some damages so large, that it is impossible but that every man must acknowledge they are too large. But in every case where the Courts interfere, they always go into all the circumstances of the Plaintiff and the Defendant, and put themselves in their situation, and enter into all their conduct. In this case the damages are certainly large;...

(after reviewing what happened to Hewlett because of Crutchley's actions) could anyone say that any rational man of character would for £2000 put himself in this situation? If not, the damages are not excessive. As to excessive damages, let this suffice...

Heath J. reports that he is of the same opinion, without commenting on excessive damages.

Finally, Chambre J. writes, "Though the damages are large, and I should have been better satisfied if they had been smaller, I entirely agree that the Court ought not in this case to interfere with the province of a jury; although there are cases in which the Court may properly do that, but this is not one of them."

In this case, dicta suggest only that a court may send the matter to a different jury. There is no suggestion that a judge may sit as that jury and fix the damages at a lesser sum. Both liability and the jury's finding of £2000 were sustained in this case.

A summary of the decisions on excessive damages in these three cases is recorded in Table 1. All eight agree that judges may, in a proper case, set aside a jury damage award for excessiveness and order a new jury trial. However, of the five judges who subjectively find a specific jury's damage decision in a specific case to be excessive, only one, Judge Buller, is prepared to send the case back to another jury for redetermination of the damages. The others agree that the judges have no basis on which to say that their belief that an award is excessive should overcome the jury's finding. And even Judge Buller would not constrain the damages to be found by a second jury.

None of these English common law cases held that a judge may himself sit as a second jury to fix the damages at a lesser sum. The only remedy in the event that a jury award is excessive or is the product of improper motives is a new trial by another jury.

⁵¹ (1813) 128 Eng. Rep. 696 (C.P.); 5 Taunt. 277.

Finally, there is one post-1791 case in which a new trial was granted. Jones was a servant of Sparrow. Jones received a “slight blow” from Sparrow for “impertinent behavior,” violently beat Sparrow, and then sued Sparrow for assault and battery. The jury found for Jones, and awarded him £40. The full decision of Lord Kenyon C.J., for the Court, read as follows: “It must be remembered that although the case of *Duberly v. Gunning* was decided after a very full discussion of the subject, the Court were not unanimous in the determination. But, whether rightly or not decided, that is a case *sui generis* and cannot govern the present.”⁵²

Apparently, although Lord Kenyon did not know why his judgment should be preferred to that of the jury in damages for criminal conversation, he did know why his judgment should be preferred to the jury’s in an altercation between master and servant.

D. AMERICAN COMMON LAW ON EXCESSIVE DAMAGES

The view in America largely followed that in England. In *Tillotson v. Cheetham*,⁵³ issued in 1806 by New York’s highest court of law, the court refused to interfere with a plaintiff’s \$1400 jury award in a slander case. Writing for the court, then-Chief Justice (later Chancellor) Kent held that “[a] case must be very gross, and the recovery enormous, to justify our interposition on a mere question of damages in an action of slander. We have no standard by which we can measure the just amount, and ascertain the excess. It is a matter resting in the sound discretion of the jury.”⁵⁴

Similar decisions were issued in at least three other states before *Blunt v. Little* was decided, and in a fourth state, Massachusetts, shortly afterward. In 1796, Delaware ruled that a tort verdict could not be set aside for a new trial on grounds of excessive damages; there simply was no relief available for excessive damages.⁵⁵ An 1820 South Carolina decision held in a criminal conversation case that all authorities “forbid our granting a new trial upon ground of excessive damages.”⁵⁶ And in 1827, the Pennsylvania Supreme Court stated:

...In contracts, which can be enforced specifically, or where damages are to be given for their non-performance, there is always a measure of damages: in actions affecting the reputation, the person, or the liberty of a man, they must depend, in some measure, on the direction of the jury. If the jury go beyond the standard, the value ascertained by evidence of the thing contracted for, or under its value, the court will set aside the verdict, but in the vindictive class of actions, the damages must be outrageous to justify the interference of the court, — seldom, if ever, for smallness of damages. There is a great difference between damages which can be ascertained, as in *assumpsit, trover, &c.*, where there is a measure, and personal

⁵² Jones v. Sparrow, (1793) 101 Eng. Rep. 144 (K.B.); 5 T.R. 256.

⁵³ 2 Johns. 63 (N.Y. Sup. Ct. 1806).

⁵⁴ *Id.* at 74.

⁵⁵ Fuld v. Thompson, 1 Del. Cas. 393 (Del. Com. Pl. 1796).

⁵⁶ Torre v. Summers, 11 S.C.L. (2 Nott & McC) 267 (S.C. Const. Ct. App. 1820) (approvingly citing *Duberly v. Gunning*, 4 Term 659).

torts, as false imprisonment, slander, malicious prosecution, where damages are matter of opinion...⁵⁷

IV. JUSTICE STORY IN *POPE V. BARRETT* (1816)⁵⁸

The plaintiff entrusted goods to the defendant to sell, and brought suit when the defendant refused to account for the sale and pay the plaintiff. Justice Story, as trial judge riding circuit, found that the plaintiffs were not entitled to compensation for the exchange rate, which had moved against them in the interim. He also found that the jury erred in awarding an extra year's interest to the defendant. To implement this finding, he ordered "...There must be a new trial, unless the plaintiffs will consent to remit the sum allowed for the difference of exchange, and the extra interest. If these sums are remitted, neither law nor justice requires the court to accede to the motion [for a new trial]..."

This decision is entirely consistent with the English cases cited above, since the amounts to be remitted can be calculated by adding the two amounts wrongly awarded plaintiffs by the jury. Thus Justice Story appears to understand and follow the English common law precedents.

V. JUSTICE STORY IN *BLUNT V. LITTLE* (1822)⁵⁹

This is a case of malicious prosecution. Little had brought a case (regarded as frivolous) against Blunt. After bringing his case, Little sought the advice of a lawyer, Mr. Fessenden. One may speculate that Little wanted an after-acquired legal opinion to support his weak case. When Blunt, as Defendant, counter-sued Little for malicious prosecution, the lawyer's testimony was not allowed, as it would not pertain to what Little knew at the time he brought suit against Blunt. The jury found for Blunt on the counter-claim and awarded \$2000 in damages. Little appealed, both on grounds that lawyer Fessenden's testimony should have been allowed, and for excessive damages.

Justice Story heard the appeal. Most of his decision is about the correctness of excluding Fessenden's testimony, which Story upholds, citing *Hewlett v. Crutchley*. With respect to excessive damages, he wrote:

...As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. So far as the contrary doctrine may be supposed to be maintained by *Duberly v. Gunning*, 4 Term R. 651, it has been qualified or overturned in *Chambers v. Caulfield*, 6 East, 244, and *Hewlett v. Crutchley*, 5 Taunt. 277. It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the

⁵⁷ *Sherman v. Kitsmiller*, 17 Serg. & Rowle 45, 50 (Pa. 1827). See also *Reed v. Davis*, 21 Mass. (4 Pick.) 216, 218-19 (1826), in which Massachusetts' Supreme Judicial Court, evenly divided on this issue, refused to grant a new trial on grounds of excessive damages awarded to plaintiffs who had been awarded \$500 after defendants broke into their rented home and evicted them, despite their valid lease. The prevailing justices reasoned that the jury's damages was not excessive. *Id.* at 219.

⁵⁸ 1 Mason 117 (C.C.D. Mass. 1816) (No. 11, 273).

⁵⁹ 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1,578).

person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case. In the present case, there were many aggravated circumstances, and certainly the defendant had no cause of action. It appeared to me at the trial, a strong case for damages; at the same time, I should have been better satisfied, if the damages had been more moderate. I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law. After full reflection, I am of opinion, that it is reasonable, that the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages. If he does, the court ought not to interfere further.

The plaintiff remitted the damages. Motion overruled.⁶⁰

There are several important aspects of this decision. First, it clarifies what Justice Story's decision in *Wonson* meant by the "common law." All three cases to which he refers are post-1791 English cases. Thus to him, the reference to the common law in the Seventh Amendment is the more expansive view.

Second, some of the language that he uses is very similar to that of the decisions he cites. Thus Chambre J. in *Hewlett v. Cruchley* wrote "I should have been better satisfied if they had been smaller," while Judge Story writes "I should have been better satisfied if the damages had been more moderate." Similarly Lord Ellenborough wrote in *Chambers v. Caulfield*, "If it appeared...that the jury must have acted under the influence either of undue motives, or some gross error or misconception on the subject," while Justice Story writes "If it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or injury..." Note that the latter phrase is not in Lord Ellenborough's statement of the common law.

Moving on to the substance of Justice Story's decision, it can perhaps be best understood as a sequence in five steps:

1. The jury's award is excessive.
2. The judge has the authority to vacate it.
3. The judge vacates it.
4. The judge finds the amount that the case should be worth.
5. The judge offers the plaintiff the choice between the amount chosen in step 4, or a new trial.

To what extent do the three cases cited by Justice Story support these steps?

As shown in Table 1, five judges in the three common law post 1791 cases found damages to be excessive. Only one of these judges, Buller J. in *Duberly v. Gunning*, is willing to find it appropriate to overturn the jury's damage award, by sending the case to a new jury, as in step 2. None of these judges, including Buller J., is willing to have judges determine the amount that the case is worth. The only question for them is whether to send the issue of damages to another jury. Thus both step 4, the court's setting the new damage figure, and step 5, giving the plaintiff a choice between the amount named by the judge and a new trial, is beyond what any of the precedent supports.

⁶⁰ *Id.* at 761-62.

The last step is peculiar for another reason. The defendant had moved for a new trial on the ground that the damages were excessive. Given that Justice Story has reached step 3, and has vacated the jury's award of \$2000, one would think that the defendant still retains a Seventh Amendment common law right to have a jury determine the amount of the damages. While it can be argued that the plaintiff, in accepting the remittitur has given up his right to a jury determination, the defendant has not.

It is hard to understand the basis of Justice Story's reading of the three common law cases, and in particular how *Chambers v. Caulfield* and *Hewlett v. Crutchley* "qualified or overturned" *Duberley v. Gunning*. In none of these cases was a second jury required to rehear the issue of damages. None of the judges in *Chambers* and *Hewlett* writes anything negative about the decision in *Duberley*. It is also hard to argue that the \$2000 awarded to Little by the jury is "flagrantly excessive" and "outrageously disproportionate" (in the language of *Leith*), but that \$1500, after Justice Story's demand for \$500 to be remitted, is satisfactory.

Justice Story's reading of the cases he cites, and his decision on excessive damages in *Blunt v. Little*, is inexplicable.

VI. JUSTICE STORY'S TREATISE ON CIVIL PLEADINGS (1829)

Justice Story was the author of many legal treatises. For our purposes, the important one is his *Pleadings in Civil Actions*. There he noted that, in general, a new trial could be ordered if a jury awarded excessive damages, but immediately added, "[i]n cases of tort, however, the Court will not grant a new trial, unless the damages are manifestly outrageous."⁶¹

VII. *THURSTON v. MARTIN* (1830)⁶²

Thurston was born in Newport, Rhode Island, but lived and worked in Georgetown, South Carolina, from October to June. He returned to Newport during the summer months. Martin, tax collector for Newport, had him arrested for not paying taxes in Newport. Thurston successfully sued Martin by action of tres-

⁶¹ JOSEPH STORY, SELECTION OF PLEADINGS IN CIVIL ACTIONS, WITH OCCASIONAL ANNOTATIONS 72[*i*], ¶ 5 (2d ed. 1829). Of the eight decisions Story cited in support of the proposition, six were English, one was from Massachusetts, and one was from New York:

- Wilford v. Berkeley, (1758) 97 Eng. Rep. 472 (K.B.); 1 Burr. 609;
- Huckle v. Money, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils. 160, 205, 252;
- Gilbert v. Burtenshaw, (1774) 98 Eng. Rep. 1059 (K.B.); 1 Cowp. 230;
- Farmer v. Darling, (1766) 98 Eng. Rep. 27 (K.B.); 4 Burr. 1971;
- Tillotson v. Cheetham, 2 Johns. 63, 74 (N.Y. Sup. Ct. 1806);
- Duberley v. Gunning, (1792) 100 Eng. Rep. 1226, 1227-28 (K.B.); 4 T.R. 651, 655;
- Reed v. Davis, 21 Mass. (4 Pick.) 216 (1826);
- Leith v. Pope, 96 Eng. Rep. 777 (K.B.); 2 Black. 1327.

⁶² 23 F. Cas. 1189 (C.C.D.R.I. 1830) (Case No. 14,018).

pass for false imprisonment, and was awarded damages by the jury. Martin appealed, both on grounds that the damages were excessive and that, as a ministerial officer, he was not liable.

Justice Story wrote the opinion on appeal. With respect to excessive liability, he wrote:

... The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied, if the amount had been less. The charge of the court directed the jury, if they found for the plaintiff, not to give vindictive damages; but to give (if the jury thought proper) such a compensation as would indemnify the plaintiff for the necessary expenses incurred in the suit, beyond what he would receive in the shape of costs. The jury were, however, left at liberty to consider all the circumstances of the case, which might, in their opinion, enhance the right to damages, such as the arrest and imprisonment. It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. The court in setting aside a verdict for excessive damages, should clearly see, that they are excessive; that there has been a gross error; that there has been a mistake of the principles, upon which the damages have been estimated; or some improper motives, or feelings, or bias, which has influenced the minds of the jury. If the verdict be not subjected to some such imputations, it is not the practice of the court to disturb the verdict. It is an exercise of sound discretion, which in some degree interferes with the conclusiveness of verdicts, and ought not to be resorted to except in clear cases. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict, as the jury found it. The doctrine of adjudged cases seems to me to support this view of the matter, and it instructs us to be very slow in listening to applications of this sort. Now I cannot say, judicially speaking, that the damages, taking all the circumstances together, are excessive, though they are larger than I should have given.... Under these circumstances, I am not disposed to interfere with the verdict...⁶³

With respect to excessive damages, Justice Story used virtually the same language as he did in *Blunt v. Little*, but did so to reach the opposite conclusion. His decision in *Thurston* does not distinguish the facts in *Blunt v. Little*; indeed, *Thurston* does not even mention *Blunt v. Little*. Thus one might wonder whether his intent was to reject the principle of *Blunt*, without explicitly saying so.

VIII. *WIGGIN V. COFFIN* (1836)⁶⁴

This is an appeal of a case for malicious prosecution. Wiggin successfully sued Coffin for maligning him before a police court in Boston, and was awarded damages. With respect to excessive damages, Justice Story wrote:

It is true that a court of law will not set aside a verdict upon the ground of excessive damages unless in a clear case, where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence, or bias, or have disregarded the law. See *Thurston v. Martin* [Case No. 14,018]. But then in many cases the court is driven to such a conclusion from the actual circumstances in evidence, and the line of defence. If in the present case there was on the part of

⁶³ *Id.* at 1190.

⁶⁴ 3 Story 1; 29 F.Cas. 1157 (C.C.D. Me. 1836) (No. 17,624).

the defendant a want of probable cause; yet if he acted under a mistaken sense of duty, and without any intention of oppression it was, at most, a case for compensatory and not for vindictive damages. It was a case for such compensation in damages as might fairly be allowed not only for the injury done to him, but also for the expenses, which he had incurred in vindicating his character from such an accusation. But as the defendant openly and freely admitted at the trial the entire innocence of the plaintiff, and attempted no justification, it was certainly not a case for vindictive damages. We think, that, under all the circumstances, the damages were excessive. The jury mistook their proper duty, and went far beyond what the facts and the law would justify. There was not even the ground shown, that the defendant was a person of much property. Under such circumstances the question with the court has been, whether the verdict should be set aside absolutely, or to give the plaintiff an election to remit what the court should deem to be a clear excess. If we were satisfied that the case was a clear one, for reasonable damages, we might incline to adopt the latter course, as was done in *Blunt v. Little* [Id. 1,578]. But we are not satisfied that the case upon the evidence was a clear one for any damages. To say the least of the matter, we greatly doubt, and should have been better satisfied with a verdict for the defendant.

A new trial is therefore ordered; but the plaintiff must pay as a consideration of the new trial all the costs of the suit up to the present time. A new trial ordered.

The action was afterwards settled by the parties, and no new trial was had⁶⁵.

Thus the upshot of Wiggin's success before a jury against Coffin is not only that the case is sent back for a new trial, but *also* that Wiggin must pay all costs of the suit up to the present time! The basis for this decision seems to be Justice Story's dissatisfaction with the verdict, not so much with the damages. However, he cites *Blunt* with approval, so his decision in *Thurston* was not a disavowal. His problem with the verdict is puzzling for another reason. Apparently Coffin admitted to having lied in police court in testifying against Wiggin. Justice Story appears to find that this admission exonerates Coffin.

IX. *CUSHMAN V. RYAN* (1840)⁶⁶

This is an appeal of an admiralty case, concerning punishment Cushman, master of a whaling ship, inflicted on Ryan, steward of that ship. The judge found for Ryan, awarding him \$150 plus costs. Cushman appealed.

Story wrote:

...where the damages or amount must necessarily rest in the sound discretion of the court, as it does in salvage causes and causes of damage, the constant policy in the courts of the United States, in the exercise of their appellate jurisdiction, and especially of the supreme court, has been, to discourage appeals upon slight or trivial grounds, and never to reverse the decree, unless there is a plain mistake of law, or a gross excess in the amount of damage awarded. Indeed, under other circumstances, there would be no safety to any parties; and new motives to litigation would be perpetually presented, to stimulate the parties to take the chances of an appeal, in the hope that, in a mere exercise of discretion, the different courts might not arrive exactly at the same amount either of salvage or of damage, although the decree in each case was founded upon the same principles. In the few

⁶⁵ 29 F.Cas. 1157, 1161.

⁶⁶ 1 Story, 91 (C.C.D. Mass. 1840) (No. 3,515); 6 F.Cas. 1070.

cases of appeals of this sort, which have come before me, I have constantly been governed by this consideration; and I have never asked myself the question, whether originally I should have awarded exactly the same sum; but only, whether I could discern a clear and unequivocal mistake or error in the court below, either of law or of fact.

...

The question is not, whether I should have given exactly the same sum in damages; for in such cases there is a large room for the exercise of discretion, as well as for difference of judgment. But that any clear error has been committed, I confess, that I am unable to perceive; and therefore I affirm the decree with costs...⁶⁷

Because this case is an admiralty case, it was heard initially by a judge, not a jury. Yet the same principle appears to apply, that an appeal of a damage verdict when damages are ambiguous, are not to be overturned except in extraordinary circumstances. Note also the addition of language about “gross excess.”

X. *WHIPPLE V. CUMBERLAND MANUFACTURING CO.* (1843)⁶⁸

Mr. Whipple complained that the dam built by Cumberland Manufacturing Company on the Presumpscot River interfered with the flow of water to his (upstream) mill on the same river. The jury found for Whipple, and awarded damages. Cumberland appealed on grounds that the damages were excessive. In response, Justice Story found:

...As to the damages being excessive. We take the general rule, now established, to be, that a verdict will not be set aside in a case of tort for excessive damages, unless the court can clearly see that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. The authorities, cited at the bar, are entirely satisfactory and conclusive on this subject. Indeed, in no case will the court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages; but the court will simply consider, whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all circumstances of the case; and it will be deemed so, unless the verdict is so excessive or outrageous, with reference to those circumstances, as to demonstrate, that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them. There is no pretence of any thing of this sort in the present case; and looking at the nature of the controversy, the number of years, which it had been pending, the unavoidable expenses attending the surveys and employment of agents, as well as the necessary expenses of the employment of counsel beyond what the taxable costs can possibly remunerate, we cannot say, that there is any excess in the damages awarded. They may not be precisely, what we ourselves should have given, sitting on the jury; but we see no reason to say, that they can, in any sense, be treated as excessive, or unreasonable.

While in *Whipple* the damages were economic, there was no rule by which a court could determine them.

⁶⁷ 6 F.Cas. 1070, 1076.

⁶⁸ 29 F.Cas. 934 (C.C.D. Me. 1843) (No. 17,516).

Thus, in *Cushman and Whipple*, Justice Story does not disturb the jury verdict, following *Thurston v. Martin*. This is in contrast to *Blunt v. Little* and *Wiggin v. Coffin*, where he did provide relief on grounds (or ostensibly on grounds) that the jury verdict was excessive. Again, he does not specify what distinguishes these cases from one another.

XI. CONCLUSIONS

The Seventh Amendment was intended to be a restraint on federal appellate judges. However, enforcement of the Seventh Amendment is in the discretion of the very judges it is intended to constrain. If those judges choose to elide it, or to interpret it in ways that effectively nullify it, there is no way to repair the damage under the U.S. Constitutional framework.

Despite his reputation as a constitutional conservative, Justice Story, when he chose, went beyond what appear to be reasonable interpretations of his powers. In *Blunt v. Little*, he cites the three post-1791 English decisions reviewed here: *Duberley v. Gunning* (1792), *Chambers v. Caulfield* (1805), and *Hewlett v. Crutchley* (1813). None of these cases supports the remittitur in which he demanded a reduction in the jury's award to the successful plaintiff, with the alternative of a new trial. Other research shows that this choice is pro forma and largely meaningless; hardly any plaintiff chooses a new trial, and for good reason.⁶⁹

Justice Story's ruling in *Wiggin v. Coffin* is even more dismissive of the jury's findings. Not only did he vacate the jury's verdict of liability and damages, but he required the plaintiff (who won) to pay the defendant's costs if he wished to get the case heard again.

Perhaps Justice Story's reputation of respect for precedent and stare decisis (often based on the quotation that begins this paper) should be re-evaluated on the basis of his actions in deciding cases.

EPILOGUE, 1996

In 1996, the U.S. Supreme Court made two important decisions concerning interpretation of the Seventh Amendment. In the first, *Markman v. Westview*,⁷⁰ the issue was whether the judge should decide the construction of a patent, or whether the Seventh Amendment reserved such a finding to the jury. The Court held:

...The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. Const. Amdt. 7. Since Justice Story's day, *United States v. Wonson*, 1 Gall. 5, 28 F. Cas. 745, 750 (No. 16,750) (CC Mass. 1812), we have understood that "the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657, 79 L. Ed. 1636, 55 S. Ct. 890 (1935). In keeping with our longstanding adherence to this "historical test," Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 640-643 (1973), we ask, first, whether we are dealing with a cause of

⁶⁹ Joseph B. Kadane, *Decision Analysis on Whether to Accept a Remittitur*, 5 REV. L. & ECON. 717 (2009).

⁷⁰ 517 U.S. 370 (1996).

action that either was tried at law at the time of the founding or is at least analogous to one that was, see, e.g. *Tull v. United States*, 481 U.S. 412, 417, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987). If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. See *infra*, at 377-378.*

*Our formulations of the historical test do not deal with the possibility of conflict between actual English common-law practice and American assumptions about what that practice was, or between English and American practices at the relevant time. No such complications arise in this case.⁷¹

Thus, the Supreme Court is taking the narrower view of what English common law is relevant, pointing to rights that existed in 1791.

Before examining the second Supreme Court decision of 1996, we must go back to 1935, and the case of *Dimick v. Schiedt*.⁷² This case ruled that an additur is not constitutional, but in dicta reported the following about remittitur:

...The sole support for the decisions of this court and that of Mr. Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges – a practice which has been condemned as opposed to the principles of the common law by every *reasoned* English decision, both before and after the adoption of the Federal Constitution, which we have been able to find.

In the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur were now before us for the first time, it would be decided otherwise. But, first announced by Mr. Justice Story in 1822, the doctrine has been accepted as the law for more than a hundred years and uniformly applied in the federal courts during that time. And, as it finds some support in the practice of the English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur, which this case does not, the doctrine would not be reconsidered or disturbed at this late day...⁷³

With *Dimick* as background, we come to the case of *Gaspirini v. Center for Humanities*.⁷⁴ For the first time, the Supreme Court explicitly considers the constitutionality of remittitur.

“...The trial judge in the federal system,” we have reaffirmed, “has...discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.” *Byrd*, 356 U.S. at 540. This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner’s refusal to agree to a reduction (remittitur). See *Dimick v. Schiedt*, 293 U.S. 474, 486 – 487, 79 L. Ed. 603, 55 S. Ct. 296 (1935) (recognizing that remittitur withstands Seventh Amendment attack, but rejecting additur as unconstitutional). [footnote omitted]⁷⁵

⁷¹ *Markman*, 517 U.S. 376, 376 n.3

⁷² 293 U.S. 474 (1935).

⁷³ *Id.* at 484.

⁷⁴ 518 U.S. 415 (1996).

⁷⁵ *Id.* at 433.

Being as charitable as possible, suppose one attributes the history of remittiturs in America as having been a case of “conflict between actual English common-law practice and American assumptions about what that practice was,” as the footnote in *Markman* puts it.⁷⁶ Then those who drafted and adopted the Seventh Amendment had every reasonable expectation that they had secured the right not to have remittiturs used against successful plaintiffs. How is continued denial of that right justified by the fact that it persists?

It may be argued on practical grounds that remittiturs avoid the time and expense of a retrial. Perhaps that very burden, on the courts as well as the parties, might restrain judges from imposing new trials in tort cases except when the damage award is “monstrous and enormous indeed,” as provided in the English common law of 1791.

⁷⁶ *Markman*, 376, 376 n.3

Table 1: Summary of Judges' decisions after 1791 in the Common Law Appeals for Excessive Damages from Non-Monetary Injuries

Case:	<i>Duberly v. Gunning</i> (1792)				<i>Chambers v. Caulfield</i> (1805)	<i>Iewlett v. Crutchley</i> (1813)		
Cause:	Criminal Conversation				Criminal Conversation	Malicious Prosecution		
Judge:	Kenyon	Ashurst	Buller	Grose	Lord Ellenborough (for Court)	Mansfield	Heath	Chambre
Does Court have authority to set aside a jury's damage findings in a proper case?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Does this judge find the damages found in this case to be subjectively excessive?	Yes	Yes	Yes	Yes	Not Reached	No	No	Yes
Is this case in which judges may overturn jury's damage findings, i.e. a "proper" case?	No	No	Yes	No	Not reached	Not reached	Not reached	No
Should case be sent to another jury for rehearing on damages?	No	No	Yes	No	No	No	No	No
Should the judges specify a legal upper bound for damages in the case?	Not reached	Not reached	No	Not reached	Not reached	Not reached	Not reached	Not reached

WHAT WE TALK ABOUT WHEN WE TALK ABOUT COURTS:
CONGRESSIONAL WEBSITES AND CHANGING ATTITUDES
TOWARD THE JUDICIARY, 2009-2014

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ABSTRACT

Recent scholarship has claimed that American courts have come under greater political scrutiny and criticism during the twenty first century. This project tests and refines this work by focusing on recent U.S. Congresses to understand better the nature, importance, and origins of lawmaker commentary on the judiciary. In particular, the article examines congressional attitudes toward state and federal courts by evaluating official government websites of all members of the House of Representatives and Senate during the 113th Congress (meeting over 2013-2015) and comparing the results with data previously gathered for Representatives in the 111th (2009-2011) and 112th (2011-2013) Congresses. Among other questions, we explore whether some of our earlier results (suggesting a high level of congressional interest in the judiciary and a shift in partisan attitudes toward courts) persist.

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Is the relationship between the United States Congress and the American judiciary undergoing a change in the early decades of the twenty first century? Our past research and a number of prominent political vectors give us good reasons to reassess the dynamics of court-Congress interactions in the early twenty-first century.¹ These factors include heightened partisanship within government and the electorate, continued politicization of courts by legislators, the success of Senate Republicans in staffing courts and delaying changes to the face of the federal judiciary under the Obama administration, and the continued ideological balancing of the federal judiciary.

In this article, we examine the state of today’s judicial-legislative relations using soundings of congressional websites from the past three Congresses (the 111th, 112th, and 113th). We scrutinize congressional commentary on courts, judges, and judicial decisions over this span (2009-2014) and test a number of hypotheses about interbranch relationships in this distinctive political environment.

Our results lead us to conclude that, at least by one measure, the American legislature’s rhetoric and underlying attitudes about courts appear different than as recently as a decade ago. We have good reasons to believe that congressional perspectives on the judiciary are shifting for parties, leaders, and many rank and file

¹ Bruce G. Peabody & Kyle Morgan, *Hope, Fear and Loathing, and the Post-Sebelius Disequilibrium: Assessing the Relationship Between Parties, Congress, and Courts* 2 BR. J. AM. LEG. STUDIES 27 (2013).

lawmakers. Most notably, the post-Warren Court affinity of liberals and Democrats toward the judiciary² seems more contingent and guarded.³ Conversely, Republican and conservative skepticism (if not outright hostility) toward the judiciary as expressed on lawmaker websites over the past six years now looks tempered, or at least more layered and complex than earlier expressions.

We identify and examine a number of recent political and judicial trends fueling these changes.⁴ These factors include GOP satisfaction with Supreme Court rulings in a number of important areas (such as the Second Amendment, campaign finance, and civil rights) and a sense that the federal courts are “in play” as a potential ideological and institutional ally. We conclude by speculating on the wider significance of our admittedly limited sample.

I. EXISTING SCHOLARSHIP

There is an extensive body of research pertinent to our study, some of which we explicitly draw on and attempt to contribute to through new perspectives and insights. Broadly speaking, we identify three main areas of relevant scholarship.

First, we build on a well-developed line of studies in political science examining congressional-court relationships, work that identifies the signals, mechanisms, and patterns in how legislative and judicial officials interact, communicate, and express preferences to and about one another.⁵ A subset of this work probes the rationale and strategy behind legislative deferrals or cessions of power to the judiciary,⁶ as well as the conditions under which lawmakers are likely to attempt to curb or constrain courts.⁷

A second set of (sometimes overlapping) research is also germane to our pro-

² MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005).

³ Adam Serwer, *Liberal Revolt Grows Over Obama Judges*, MSNBC.COM (Feb. 18, 2014, 10:11 AM), <http://www.msnbc.com/msnbc/liberal-revolt-over-obama-judges-grows>.

⁴ Ryan Grim & Sam Stein, *A New Love Affair: Republicans Rally to Defend Judges*, HUFFINGTON POST (Apr. 5, 2012, 04:01 PM), http://www.huffingtonpost.com/2012/04/05/republicans-judges-supreme-court_n_1406580.html.

⁵ See, e.g., MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* (2011); CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2008); ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997); WALTER F. MURPHY, *CONGRESS AND THE COURT* (1962); J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004).

⁶ GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* (2003); Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.*, 35-73 (1993).

⁷ BAILEY & MALTZMAN, *supra* note 5; Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 *POL. RES. Q.* 353-71; Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 *VANDERBILT L. REV.*, 925 (1965); Keith Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 *INT'L J. CONST. L.*, 446-74 (2003).

ject. “Governance as dialogue” is a relatively new phrase used to encompass scholarship which has roots stretching back over three decades.⁸ Broadly speaking, these studies examine the role of elected and other political officials and organizations in shaping law, especially constitutional law. While only some of this work is specifically focused on Congress,⁹ much of it sheds light on when and how lawmakers comment upon and influence judicial decisions and institutions.¹⁰

Finally, our project has some promising connections with scholarly (as well as popular and “professional”) interest in judicial independence.¹¹ While Article III federal courts and judges are constitutionally and statutorily protected from some forms of legislative power, judicial independence is still susceptible to limitation and redefinition. Just as important, effective judicial power requires some level of institutional “interdependence,” that is, the cooperation and support of other institutions and the public.¹² Through budgets, statutes, rulemaking, the appointments process, and informal mechanisms, like “elite audiences” and “personal reference groups,”¹³ Congress retains considerable power and sway over the judiciary.¹⁴

This article, presenting evidence of complex currents today that have muddied longstanding understandings of how Congress, partisanship, and judicial politics align, contributes to each of the areas of inquiry just delineated. Studying congressional websites helps one better comprehend the evolving nature of judicial-congressional relations, and some of the political engines that drive these changes. Our research also sheds light on how today’s lawmakers view their role in constitutional interpretation and the authority of judges and courts. Finally, this study can provide greater analytic leverage on the question of whether recent political developments represent a threat to our tradition of independent courts, as some have claimed.¹⁵

⁸ LOUIS FISHER, *THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT, AND THE LAW* (1978); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* (1988); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48(3) REV. POL., 401-423 (1986).

⁹ CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds., 2005); Bruce Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001*, 29(1) LAW & SOC. INQUIRY, 127-75 (2004).

¹⁰ See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94(5) CALIF. L. REV., 1323-419 (2006); Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY, 300-14 (2011).

¹¹ MARK C. MILLER, *THE VIEW OF THE COURTS FROM THE HILL* (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 14 (2006); JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012).

¹² *THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC* (Bruce Peabody ed., 2010).

¹³ Larry Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J., 1515, 1580-81 (2010).

¹⁴ GEYH, *supra* note 5; Whittington, *supra* note 7.

¹⁵ A.B.A., *JUSTICE IN JEOPARDY: REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY* (2003); C. Boyden Gray et al., *Panel Discussion: Judicial Independence: Justifications & Modern Criticisms*, Georgetown University Law Center on Fair and

II. PROJECT RATIONALE AND DESIGN

As already indicated, a number of aspects of recent political life give rise to our interest in taking the temperature of today's court-Congress relationships. To begin with, we note burgeoning scholarly evidence, media reporting, and anecdotal accounts of the effects of rising partisanship within Congress on U.S. national politics generally, and its separation of powers specifically. Researchers have found that the two major parties in Congress have become increasingly polarized and homogeneous—perhaps reflecting changes in the electorate as well.¹⁶ These changes reflect trends that have been developing over decades (such as shifting demographics, partisan-gerrymandered districts, changes in party leadership) as well as more short-term effects (like the rise of the Tea Party). Among other consequences, an increasingly polarized legislature is more likely to react to court cases and judicial nominations that have a salient partisan dimension—as identified by leaders, major party statements, important ideological interest groups, or, perhaps, by sharp partisan divisions amongst judges.

We find partial and preliminary support for this observation in Table 1, which lays out the “judicial issues” that have been present in the major party platforms since 2000. While these statements are certainly inexact instruments for capturing attitudes and policy agendas, they are one prominent, public measure of the formal party priorities for a given four year span. Our platform survey from 2000-2012 reveals considerable and apparently growing Republican interest in “judicial issues” and cases (in a wide range of areas from abortion to courts’ use of foreign law) with a much more tempered and cautious set of analogous Democratic references. These results comport with those contending that increasing congressional partisanship has been impelled by changes in Republican leadership and rank and file behavior.¹⁷

Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006) *available at* <http://www.law.georgetown.edu/news/documents/CoJ092806-panel1.pdf>; MILLER, *supra* note 11; Sandra Day O'Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

¹⁶ JOHN H. ALDRICH, *WHY PARTIES?: A SECOND LOOK* (2011); BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICANS IS TEARING US APART* (2008); MARK D. BREWER & JEFFREY M. STONECASH, *DYNAMICS OF AMERICAN POLITICAL PARTIES* (2009); ERIC S. HEBERLIG & BRUCE A. LARSON, *CONGRESSIONAL PARTIES, INSTITUTIONAL AMBITION, AND THE FINANCING OF MAJORITY CONTROL* (2012); MARC HETHERINGTON & JONATHAN WEILER, *AUTHORITARIANISM AND POLARIZATION IN AMERICA* (2009); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006).

¹⁷ THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

Table 1: Party Platforms Highlighting Judicial Issues and Cases, 2000-2012

Year	Democratic Platform	Republican Platform
2000	<ul style="list-style-type: none"> - “right to privacy” and abortion - <i>Olmstead v. L.C.</i> (ADA decision) 	<ul style="list-style-type: none"> - Partial birth abortion - <i>Communications Workers of America v. Beck</i> (union dues) - Exclusionary Rule - <i>Utah v. Evans</i> (census calculations) - Student initiated prayer - “judicial activism”
2004		<ul style="list-style-type: none"> - <i>Elk Grove Unified v. Newdow</i> (Pledge of Allegiance) - <i>Van Orden v. Perry</i> (Ten Commandments in courthouse) - DOMA - Partial birth abortion - Student initiated prayer
2008	<ul style="list-style-type: none"> - <i>Boumediene v. Bush</i> (Habeas corpus) 	<ul style="list-style-type: none"> - judicial immigration decisions making “deportation so difficult” - <i>Kelo v. City of New London</i> (Takings) - <i>Boumediene v. Bush</i> - Death penalty - Abortion - <i>D.C. v. Heller</i> (Second Amendment) - ROTC access
2012	<ul style="list-style-type: none"> - <i>Citizens United v. FEC</i> - using courts to protect immigration rights 	<ul style="list-style-type: none"> - <i>Knox v. Service Employees International Union, Local 1000</i> (union dues) - Gay Marriage/DOMA - <i>Hosanna Tabor v. EEOC</i> (Free exercise religion) - public display of 10 commandments - student prayer - <i>BSA v. Dale</i> (Boy Scouts case) - <i>Wisconsin Right to Life v. Federal Election Commission</i> - <i>Citizens United v. Federal Election Commission</i>. - No regulation of internet speech - <i>DC v. Heller</i> - <i>McDonald v. Chicago</i> - <i>Kelo</i>

Our views about increased partisanship within Congress are closely related to a second phenomenon that underscores the utility of reexamining today’s legislative-judicial dynamics: evidence of increasing (and shifting) politicization of courts by Congress and interest groups. By “politicization” we simply mean a greater willingness of elected officials (of both parties) to place judges, cases, and

other judicial issues at the forefront of policy debates, national political discourse, and campaign rhetoric and fundraising appeals. Scholars such as Steven Teles¹⁸ have traced increased efforts by conservatives over the past three decades to provide an organized counter-movement to liberal success with judicial politics. Researchers like Mark Miller¹⁹ have noted more recent changes that have propelled courts to the front lines of political debates, including the transformation of the House Judiciary Committee from a “Committee of Lawyers” (protective of the judiciary) to the source of many of the highest profile “attacks against the courts.” Part of the “politicization” struggle has been reflected in changes in the Senate’s role in the judicial confirmation process, including the recent and historically extreme “obstruction and delay” of judicial nominees, greater controversy in lower court nominations, and the 2013 Senate decision to dispense with filibusters for lower federal judges (not including the Supreme Court).²⁰

Again, one can find some initial corroboration for this judicial politicization claim by looking at party platforms. Figure 1 suggests a period of balanced bipartisan support for courts from 1948-1972 when both parties mentioned courts positively (if rather cursorily) in party platforms. This was followed by a rising tide of Republican criticism of courts from 1976-1996, characterized by negative reactions to Warren and Burger Court decisions from the right, and, eventually, by organized efforts to challenge judges and legal precedents and populate the judiciary with more conservative jurists. Finally, Figure 1 depicts the contemporary era that is the focus of our article—a span of increasingly mixed and contested reaction to courts, with both parties expressing positive and negative comments about the judiciary and its rulings. Indeed, as we can see, every Republican platform from 2000-2012 mentions the courts in both positive and negative terms.

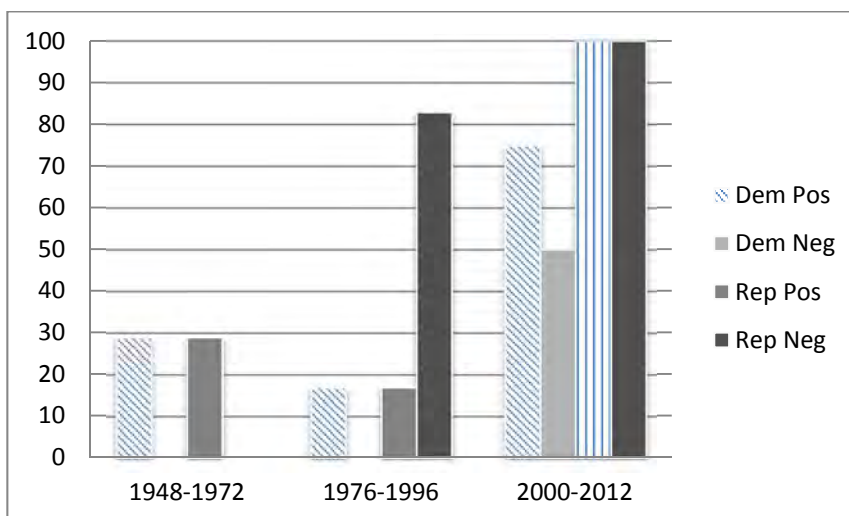
¹⁸ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2010).

¹⁹ MILLER, *supra* note 11, at 134.

²⁰ Sheldon Goldman, Elliot Slotnick, & Sara Schiavoni, *Obama’s First Term Judiciary: Picking Judges in the Minefield of Obstruction*, 97 *JUDICATURE*, 7-47 (2013); Lisa Holmes, “Going Nuclear” *Over Judges: The Causes and Consequences of Filibuster Reform* (2014) Paper presented at the 2014 New England Political Science Association’s Annual Convention.

One might contend that the “filibuster” reform is an effort to remove a level of political influence from the appointment process for lower court judges. But we see the shift in more macroscopic terms: it represents a major revision of the Senate rules governing judicial selection and, at least for the short term, a source of considerable contention in the U.S. Senate. We also note that it is difficult, if not impossible, to disentangle how much nomination slowdown and obstruction can be attributed to concerns about courts as opposed to more general political agendas—such as resistance to the Obama administration.

Figure 1: Percentage of Party Platforms in which Positive and Negative Statements Are Made About Courts



A third and closely related reason for inclining our gaze to today's legislative-judicial politics arises from our recognition that at all levels of the federal judiciary, the partisan divide (that is, the respective number of judges and justices appointed by Democratic and Republican presidents) is narrowing. As Sheldon Goldman, Elliot Slotnick, and Sara Schiavoni report,²¹ from 2011 to 2013 the partisan edge enjoyed by Republicans with respect to lower court (appellate and district court) judicial appointees had declined from 14.4% to 4.8%. Additional appointments during Obama's remaining years in office will reduce that difference further. Together with the close partisan and ideological divide on the Supreme Court, this backdrop provides additional fuel for our thesis that conditions are ripe for some movement in how the national legislature views the judiciary, especially through the lenses of partisanship.

Fourth, we believe that a string of significant judicial decisions handed down over the past decade (including *D.C. v. Heller*,²² *Citizens United v. FEC*,²³ *NFIB v. Sebelius*,²⁴ *United States v. Windsor*,²⁵ and *Shelby County v. Holder*²⁶) make contemporary Congresses an especially fertile medium for scrutinizing the legislature's evolving attitudes towards courts. We are conscious of Alexis de Tocqueville's reminder that most significant political questions become "sooner or later"

²¹ Goldman, Slotnick, & Schiavoni, *supra* note 20.

²² 554 U.S. 570 (2008).

²³ 558 U.S. 310 (2010).

²⁴ 132 S. Ct. 2566 (2012).

²⁵ 133 S. Ct. 2675 (2013).

²⁶ 133 S. Ct. 2612 (2013).

judicial questions,²⁷ and we concede that every term of the Court presents important cases reflecting some of the major political controversies of the era. Nevertheless, we are not the first to contend that some periods of judicial decision making are more important than others.²⁸ We posit that the Supreme Court's recent terms have seen some especially defining issues come onto the judicial docket, including, of course, the historic struggle over the fate of the Obama administration's health care law.²⁹ Again, the list of issues captured in party platforms (in Table 1) supports this claim about the political prominence of contemporary Court cases.

Fifth, and finally, we note increased scholarly and popular attention to the partisan polarization present on the United States Supreme Court specifically. As many commentators have observed, the current Roberts court is arguably unique in the depth and nature of its partisan division, a split that partly reflects cleavages in Congress as well as the electorate. Simply stated, on today's Court "there is no Democratic appointee on the Supreme Court who is more conservative than any Republican appointee."³⁰ This partisan dimension of the Court's work and behavior flavors many of our other observations about the distinctiveness and importance of today's climate of congressional-judicial relations.

Taken together, we think these phenomena set the stage for finding a number of salient changes in congressional attitudes towards courts as we move through the second decade of the twenty first century. In particular, we believe that longstanding Democratic affiliation with the judiciary (and corresponding Republican skepticism of courts) is being reconsidered and recast, with a number of lawmakers coming to at least an implicit judgment that the American judiciary is "up for grabs" as an ideological and institutional ally. We outline our more specific hypotheses in this regard in the pages that follow.

A. *METHODOLOGY*

In order to test and refine the contours of our general thesis, we developed an original data source from the last three U.S. Congresses (111th, 112th, and 113th), a period spanning January 2009 through March 2014. Over this period, we examined comments found on official websites for members of Congress. For the 111th (2009-2011) and 112th (2011-2013) Congresses, we gathered results for the House of Representatives only. For the 113th Congress, we expanded our data collection to include both the House and Senate, although we limited our search parameters to identical periods for each in order to make results for the two chambers as comparable as possible.

Our focus on these three Congresses spans the important developments in judicial-legislative relations we have just identified such as the continued surge in

²⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1: 357-8 (1835) reprinted in FRED R. SHAPIRO, *THE OXFORD DICTIONARY OF LEGAL QUOTATIONS* 241 (1993)

²⁸ LAWRENCE BAUM, *THE SUPREME COURT* 161-83 (2012); ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

²⁹ Bruce Peabody & Peter Woolley, *The Public's Constitutional Thinking and the Fate of Health Insurance Reform: PPACA as a Case Study*, 81 *RES GESTAE FORDHAM L. REV.* 26-40 (2012).

³⁰ Adam Liptak, *The Polarized Court*, *N.Y. TIMES*, May 11, 2014 (Sunday Review).

congressional party polarization (including the formation and rise of the Tea Party as a political force), the narrowing ideological balance on the courts, and the buildup behind and issuing of major court cases.³¹

We recognize there are benefits as well as liabilities in using lawmaker websites to probe what Congress has to say about the judiciary. That said, on the whole, we believe our approach has the advantages of being public, transparent, inclusive, and highly responsive.³² We think member websites represent an especially “low barrier” mechanism for capturing legislative reactions and posturing towards the judiciary. Such communication does not depend upon the cooperation or approval of party leaders, colleagues, or other political entities, nor do they depend upon scarce resources such as media “broadcast time” or publication space.³³ Additionally, the response time for, say, a press release published on a website will be much faster and more immediate than most floor speeches and votes. This immediacy of reaction has the benefit of providing a record of statements that are relatively unfiltered.

These forums are also likely to capture congressional communication with constituents, revealing lawmaker strategies for appealing to voters and other interested groups on judicial issues—especially through David Mayhew’s three forms of reelection activities (advertising, credit claiming, and position taking).³⁴ Related, we believe our approach is useful as a kind of case study of how members use emerging technology to foster a dialogue between the public, courts, and other interested political entities.³⁵

Thus, we believe member website statements are likely to serve as strong conduits for positive as well as negative commentary on the judiciary, transmitting both case-specific statements as well as more general institutional and substantive commentary. Overall, we believe our units of analysis are appropriate and valuable for probing an important dimension of contemporary court-Congress relations, particularly insofar as this dynamic is impacted by the public and attentive interest groups.

Our ensuing analysis draws on the official websites of United States senators and members of the House of Representatives—that is, those personal websites ending in “.gov” in their URLs. On these sites, we examined issue and policy statements, blog entries, as well as press releases. For the 111th Congress, our search was conducted in June 2010 (we scrutinized references to courts and judges from this date to through the preceding May). For the 112th Congress, our survey of House members included both a baseline measure of congressional commentary

³¹ Congress’s Tea Party Caucus was approved in 2010. See Stephanie Condon, *Bachmann’s Tea Party Caucus Approved*, July 19 2010, http://www.cbsnews.com/8301-503544_162-20010958-503544.html.

³² Some members posted reaction to cases on the same day or the day after the decision.

³³ In other words, the member-controlled website is inherently more democratic and inclusive than many other forms of legislator communication, some of which will be, in effect, only accessible to prominent party officials or those with strong media relationships.

³⁴ DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974).

³⁵ See, e.g., Heather K. Evans, Victoria Cordova & Savannah Sipole, *Twitter Style: An Analysis of How House Candidates Used Twitter in Their 2012 Campaigns*, 47(2) PS: POL. SCI. & POL. 454, 454-462 (2014).

in February and March of 2012 (again going back a year prior) as well as a sounding from June 1 to June 31, 2012. This latter measure was intended to capture reaction to major Court cases handed down at the end of the 2011 term, most notably the landmark *NFIB v. Sebelius*.³⁶ Finally for the 113th Congress, we scrutinized member comments from January 3rd, 2013 until February 18th, 2014, giving us a sample stretching from the very beginning of this Congress and going forward for roughly a year.³⁷

In addition to being the most recent legislative term available (and complementing our prior examinations of the 111th and 112th Congresses), scrutinizing the 113th Congress allowed us to examine congressional opinions in the post-*Sebelius* environment. Looking at both the House and the Senate for the same period also facilitated our comparisons of the attitudes of members of the two chambers with respect to courts and judges. Our bicameral data also helps us test how institutional differences (such as the greater electoral responsiveness of the House, and the Senate's closer institutional ties to the judiciary through the appointments process) play out in this context.

Our searches were generally based on the member-specific imbedded "search" function provided on the overwhelming number of House and Senate websites (only absent from two Senate sites and fourteen House sites). When such a search option or search "cell" was missing, we manually sorted through press releases, issue statements, and blog entries over the periods indicated. For all of our searches we examined the terms "court" and "judge" to capture references to courts, judges, and judicial decisions on member-controlled documents and webpages. This approach, while not foolproof or comprehensive, was consistent with our prior research and, was, we believe, reasonably likely to gather a large portion of relevant legislative commentary.

From our list of references to "courts" and "judges" we excluded terms and "hits" not pertinent to our analysis (such as references to foreign courts or, say, "basketball courts"). In order to gauge and code the remaining, germane set of comments, we examined specific wording as well as context. For most of our evaluations we identified a judicial reference as "positive" or "negative" based on its inclusion of a key descriptor matching a set of agreed upon terms. Thus, words and phrases such as "disagree," "disappointed by," "setback," or "gutting" (among many others) prompted us to code legislative evaluations of decisions (and judges) as *negative*, while words or phrases such as, but not limited to, "applauds," "delighted by," "pleased," or "supports," were used to identify *positive* statements.

When such key words were absent, we considered the context of the comment to determine if it could be characterized as positive or negative. For example, if a lawmaker invoked a court case in the midst of a discussion decrying "activist judges," we treated this as a negative judgment, even in the absence of other specific evaluative phrasing.

³⁶ Peabody & Morgan, *supra* note 1.

³⁷ Among other advantages, we believe this period was likely to feature the most salient judicial decisions from the 2012 term of the Supreme Court (October 1st 2012 through October 6th 2013) and the first 17 decisions of the 2013 term (which were handed down prior to the end of our period of study).

Overall, our study included both U.S. state and federal courts and judges (and all levels of the judiciary), commentary on individual cases as well as more extended lines of decisions or jurisprudence and debates about judicial reform. We excluded from our data pool references to courts, judges, or the judiciary where the lawmaker or his or her office was not the actual author of the (evaluative) statement. If a member repeatedly praised or criticized a particular decision or judge, each distinct mention was counted as a respective criticism or praise unless these comments occurred within the same page, web entry, or press release. We included comments about judicial nominees and the nominations process only if these remarks had a clear positive or negative valence and were about sitting judges or the existing state of the judiciary. In other words, we did not count, say, praise of a nominee whom a Senator *believed* would make a sterling judge in the future, or praise of a nominee's non-judicial career. But we did count praise (or condemnation) of a nominee's record as judge. Stated differently, we excluded prospective, contingent, and hypothetical judgments from our analysis.

We did consider any judicial decisions mentioned by lawmakers—and not simply those that happened to be issued over the specific span of our inquiry. Thus, so long as the mention of, say, *Roe v. Wade*³⁸ or *Citizen's United v. FEC*³⁹ was made during our delimited periods of the 111th, 112th, and 113th Congresses, we included the statement and coded it as negative or positive. Among other benefits, this approach helped us to discover which decisions were salient over long periods, and whether they were invoked alongside recurring (or evolving) memes about courts.⁴⁰

B. HYPOTHESES

Given the dynamics of the American political order sketched earlier, we believe there are good reasons to anticipate some flux or movement in contemporary attitudes of members of Congress towards the courts. This broad assumption informs a number of hypotheses we offer here and test with our data.

i. Heightened “Rank and File” Interest in Courts

If our speculations about the increased prominence of courts on today's political landscape are valid, we expect to find widespread congressional interest in the judiciary as a whole—and not just the Supreme Court. Similarly, we expect comments about courts to be made not just by party leaders, but also by “rank and file” members of both the House and Senate, especially where cases or judicial issues can be linked back to district or state specific concerns⁴¹ or to party positions as broadcast by leaders or prominent party statements (such as platforms). Thus, we anticipate finding rank and file interest in the “platform issues” delineated in Table 1 to be especially high.

³⁸ 410 U.S. 113 (1973).

³⁹ 558 U.S. 310 (2010).

⁴⁰ A complete description of our gathering and coding methodology is available upon request.

⁴¹ See PICKERILL, *supra* note 5.

ii. Heightened Specific Interest

In addition to rank and file interest, we anticipate party leaders and members of the Judiciary committees to be even more vocal on judicial issues. The representatives in these sub-groups have a political motivation, substantive expertise, or a specific institutional role that impels them to be cognizant of court decisions and activity. We hypothesize that both of these specific groups will have interests in court issues that are broader than the constituent focus of most other legislators. Leaders, for example, have a particular commitment to mapping judicial decisions and judges alongside party positions, and in providing cues about courts for party followers to heed.

iii. Shifting Partisan Attitudes

As indicated, given our expectations of heightened interest in the courts, we anticipate both Democrats and Republicans will be increasingly active in commenting on the judiciary in recent Congresses. We further presume that the longstanding paradigm of liberal and Democratic affiliation and satisfaction with courts is coming into some reformulation if not outright jeopardy. Consequently, we predict Democrats will offer more critiques of courts and judicial decisions than Republicans—in part due to their frustrated or disappointed expectations.⁴² Given a historic baseline of close ideological affiliation, we think Democrats and liberals will believe they have more to lose when they come to see the judiciary as being “in play,” increasing their skepticism towards the courts.

iv. Chamber Differences

In comparing the House of Representatives and the Senate, we expect to see senators issuing a greater number of statements (on average—that is, per individual legislator), both positive and negative, on courts and their decisions due to a variety of institutional and political factors. While members of the House are representative of narrowly drawn districts and have usually limited national name recognition, senators represent the interests of an entire state and are often viewed as more national figures. Additionally, since the Senate is responsible for the confirmation of Article III judges, we expect them to not only be more involved in commenting on the nomination and appointments process but also to be more attuned to the courts and judicial issues. Senators' greater number and range of constituents and interests, along with other factors, will incline them to offer more comments generally, and more discourse about courts and judges specifically than their House colleagues. Given senators' need to represent an entire state (rather than a partisan district), we expect their court statements to be less ideological, on the whole, than the House. We anticipate local and regional issues will be salient for both chambers, but especially in the House.

⁴² See, generally, James C. Davies, *Towards a Theory of Revolution*, 27 AM. SOC. REV. 5 (1962) for a discussion of a similar theory of rising expectations in the context of revolution.

v. Case vs. Institutional Commentary

If, as we speculate, we are in a climate of greater uncertainty vis à vis the future direction of the courts, we anticipate commentary (both negative and positive) will tend to be focused on individual cases (and judges) rather than broader institutional issues. Our justification for this conjecture is our sense that given the changing partisan membership of the courts as well as the presence of prominent cases fueling bipartisan approval and critique, members of Congress from both parties will see the courts as being “up for grabs” and will therefore be somewhat reluctant to bring more wholesale praise or blame to the judiciary as a whole. As indicated, we believe the “platform” issues and cases highlighted in Table 1 will be among those most frequently targeted for attention.

vi. Presidential Election Years

Recognizing the greater likelihood that the status of courts will become a national issue during a presidential election year, we anticipate seeing more statements about the judiciary in periods leading up to such contests. For our purposes, that means we expect to see more court commentary in the 112th Congress (2012) as opposed to the 113th (2014). On the other hand, we think individual lawmaker attitudes toward the judiciary are secure enough that brief periods of divided or unified government will not be a significant factor in predicting how members of Congress respond to and position themselves via courts.

viii. The Post-*Sebelius* Effect

Finally, we note that the Affordable Care Act (ACA) has been one of the most prominent political issues over the last few years.⁴³ The litigation and discussion leading to *National Federation of Independent Businesses v. Sebelius* absorbed a tremendous amount of political oxygen and energy in the U.S. Nevertheless, we speculate that *Sebelius* is unlikely to have a lingering impact on the overall dynamics we have sketched. In other words, we do not think *Sebelius*, which was read by many as a (partial) victory for the Obama administration and Democratic supporters in Congress, will “reset” congressional attitudes—returning Democrats to instinctive protection of the judiciary and Republicans back to a steady drumbeat of critique. Instead, we believe the case will be just another (important) component in the mix of decisions shaping court-Congress relations.

III. RESULTS

Our results confirm many of our hypotheses and bring others into doubt. Overall our sample reveals substantial and sharply growing congressional interest in the judiciary since 2009 (see Table 2). For example, House commentary (both negative and positive and from all legislators, regardless of party) has grown 282% from the 111th Congress to the 113th (see Figure 2). The rate of growth of positive comments in the House has been slightly steeper than that of negative comments

⁴³ Peabody & Woolley, *supra* note 29, at 26-40.

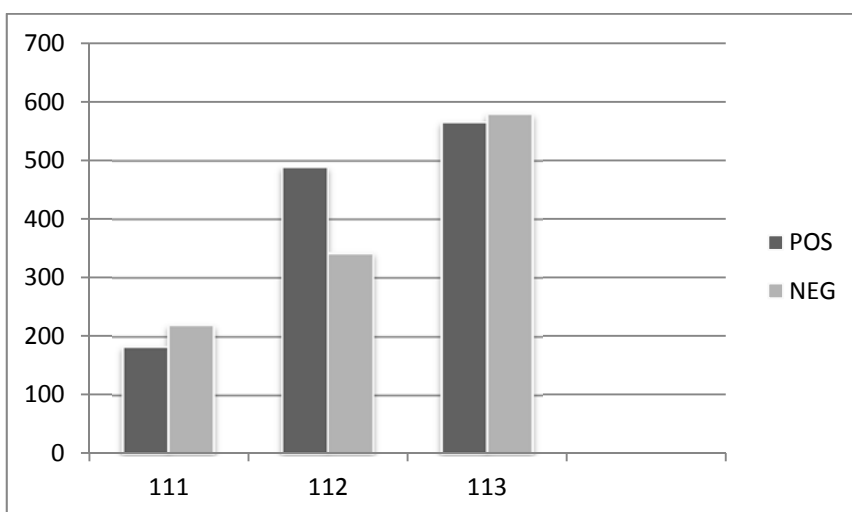
(a 309% increase as opposed to a 264% increase from levels in the 111th Congress to today).⁴⁴

Table 2: Total Number of Positive and Negative Statements Over Three Congresses

	111 th (House)	112 th (House)*	112 th (House)**	113 th (House)	113 th (Senate)
TOTAL POS	183	489	247	566	441
TOTAL NEG	220	342	292	580	232
TOTAL	403	831	539	1,136	673
AVG # COMM	.92	1.87	1.22	2.63	6.7

*Pre-*Sebelius* **Post-*Sebelius*

Figure 2: Growth in House Commentary



Moreover, a qualitative assessment of lawmaker comments confirms a Congress that is increasingly attentive to judicial issues—and often willing to speak about them with considerable detail. A Representative from Texas, for example, shared with his constituents (through a press release) that he “felt compelled to listen to the oral arguments at the Supreme Court building” on *Sebelius v. Hobby Lobby*,⁴⁵ a 2013 Supreme Court term case about whether corporations can deny

⁴⁴ As we discuss later, one might reasonably wonder whether our observed increases are simply a function of greater congressional commentary generally or greater website commentary specifically (as opposed to an actual surge in interest with respect to courts *per se*).

⁴⁵ 134 S. Ct. 1536 (2014).

health coverage related to contraceptives. As the Representative (Louie Gohmert) explained, during oral argument

...I was shocked and grieved to hear a Supreme Court Justice, in essence, ask why not just pay the penalty and then you don't have to violate your religious beliefs. Unbelievable! The power to tax is the power to destroy. If the federal government has the power to force anyone to pay a tax or penalty to observe religious beliefs, then they have the power to make the penalty so high the government can 'prohibit the free exercise' of those firmly held religious beliefs—precisely what the Constitution guarantees it cannot do.⁴⁶

As predicted, members of Congress commented on a range of court cases and issues. While references to the Supreme Court were certainly most prominent, legislators also referenced lower federal court and state court decisions, at times with great attention. For example, a Representative from Oklahoma stated that he was “very frustrated and disappointed to learn today that the Tenth Circuit Court of Appeals ruled against Oklahoma’s appeal in a 2-1 vote on the EPA’s regional haze rule.”⁴⁷ A West Virginia lawmaker praised a federal trial court for ruling that the Environmental Protection Agency (EPA) has “exceeded its statutory authority.”⁴⁸

With respect to the kinds of decisions and issues highlighted by lawmakers, we find considerable, if imperfect, corroboration of our hypotheses. Members of the House and Senate made some explicit efforts to tie their mentions of court cases and judges back to local issues, but these instances were in the minority. One example is Rep. Scott Perry who praised a decision coming out of the U.S. Court of Appeals for the District of Columbia for limiting the power of President Obama to use “the NLRB to impose regulations that local employers tell us will hurt the economy.” Jim Moran, a House member from Virginia lauded *Bostic v. Rainey*,⁴⁹ a District Court decision, ruling that Virginia’s same sex marriage ban was unconstitutional. As Moran concluded, “[t]oday we’ve shown that Virginia really is for lovers.”⁵⁰

On the whole, however, members of Congress focused much more on “national” issues and cases, that is, matters that didn’t have a state or district specific impact. Table 1 (our party platform list of judicial issues) captures the lion’s share of these cases and topics. Thus, consistent with party platform identification of

⁴⁶ See *Gohmert’s Remarks on Obamacare’s Denial of Right to Religious Beliefs*, GOHMERT HOUSE (Mar. 26, 2014), <http://gohmert.house.gov/news/document-single.aspx?DocumentID=374153>.

⁴⁷ See *Lankford Frustrated with Decision on OK Regional Haze Appeal*, LANKFORD HOUSE (Jul. 19, 2013), <http://lankford.house.gov/press-release/lankford-frustrated-decision-ok-regional-haze-appeal>

⁴⁸ See *Rep. Capito Praises Court Ruling on Clean Water Act*, CAPITO HOUSE (24 Oct., 2013), <http://capito.house.gov/press-releases/rep-capito-praises-court-ruling-on-clean-water-act/>.

⁴⁹ 970 F. Supp. 2d 456 (E.D. Va. 2014).

⁵⁰ For another example see *Denham Statement on Latest California High-Speed Rail Ruling*, DENHAM HOUSE (Jan. 29, 2014) <http://denham.house.gov/press-release/denham-statement-latest-california-high-speed-rail-ruling>.

court issues, Republicans frequently commented on abortion (especially *Roe*⁵¹), gay rights cases, religious freedom, *Kelo v. City of New London*⁵² (a “Takings Clause” case), capital punishment, gun rights, free speech on the internet, campaign finance, and health care (along with “non-platform” issues like the lower court recess appointments ruling *Noel Canning v. NLRB*,⁵³ the Foreign Intelligence and Surveillance Act or FISA Court, and litigation related to the EPA). Since, in recent decades, Democratic platforms have contained fewer references to courts than their Republican analogues (see Table 1), it is not surprising that Democratic websites in Congress reference a number of non-platform judicial issues (Voting Rights Act, gay marriage) along with more traditional platform matters such as abortion and campaign finance.

Consistent with our hypotheses, “rank and file” legislators typically deployed their references to the judiciary to pursue “Mayhew” reelection strategies—especially position taking (“the public enunciation of a judgmental statement on anything likely to be of interest to political actors”) and credit claiming (where a lawmaker makes the case that he or she “is personally responsible for causing the government, or some unit thereof” to do something “desirable” for constituents).⁵⁴

Members engaged in position taking in both their reactions to pending cases (the “U.S. Supreme Court announced Tuesday it will hear an important case supported by Congressman Steve Stockman...involving the right of Americans to keep and bear arms”), decided cases (“I am outraged with the Supreme Court’s decision to declare as unconstitutional Section 4 of the Voting Rights Act”), and in staking out more general legal positions (“Our Founding Fathers created [the Second Amendment] to protect citizens from government tyranny...it continues to assure Americans’ rights to defend themselves against the evil people in the world”).⁵⁵ As one Representative said in discussing the Supreme Court’s review of several gay rights cases, “I would like to reaffirm my commitment to the LGBT community.”⁵⁶

Lawmaker comments on courts also served as occasions for what we identify as “wish casting”—a particular form of position taking in which members urged the courts to assume a particular stance.⁵⁷ Thus, a House member from Virginia

⁵¹ 410 U.S. 113 (1973).

⁵² 545 U.S. 469 (2005). (aff’g 705 F.3d 490 (D.C. Cir. 2013).

⁵³ 572 U.S. ____ (2014).

⁵⁴ MAYHEW, *supra* note 34, at 61 (position taking) and 52-3 (credit claiming).

⁵⁵ *Supreme Court Agrees to Hear Gun Case Backed by Stockman*, STOCKMAN HOUSE (Oct. 15, 2013), <http://stockman.house.gov/media-center/press-releases/supreme-court-agrees-to-hear-gun-case-backed-by-stockman>. See also *Stewart Delivers Floor Speech on the 2nd Amendment*, STEWART HOUSE <http://stewart.house.gov/media-center/press-releases/stewart-delivers-floor-speech-on-the-2nd-amendment> (last visited June 26, 2014).

⁵⁶ *Congressman Marc Veasey Expresses Support for LGBT Community as the Supreme Court Hears Oral Arguments on Proposition 8 & the Defense of Marriage Act*, VEASEY HOUSE (Mar. 26, 2013), <http://veasey.house.gov/media-center/press-releases/congressman-marc-veasey-expresses-support-for-lgbt-community-as-the> (last visited Aug. 3, 2014).

⁵⁷ We note that we did not generally include “wish casting” in our results, unless we could identify a positive or negative valence statement with implications for the existing court system or judges. For another example see *Congresswoman Clarke Urges the Supreme*

discussed what was then a pending Supreme Court case from the 2013 term, declaring that

If the Supreme Court invalidates section 5 in its upcoming decision in *Shelby County v. Holder*, it would essentially allow jurisdictions with a history of discrimination to implement any discriminatory voter scheme and to then place the burden on the victims to raise the money to bring a lawsuit.⁵⁸

Democrats and Republicans engaged in wish casting on other issues, like gay rights (“I urge the Court... to uphold the decision of the U.S. Court of Appeals for the Ninth Circuit in *Hollingsworth v. Perry* declaring California’s Proposition 8 to be an impermissible infringement on the equal rights of gay and lesbian persons to marry”)⁵⁹ and health care. Along these lines, Mike Enzi, a senator from Wyoming stated that he “believes the Supreme Court has a chance to right a terrible wrong done by the President Obama’s health care law if it will side with Americans’ Constitutionally-protected right to freely practice their religion” in *Sebelius v. Hobby Lobby*.⁶⁰

Interestingly, members of Congress also used their statements to engage in at least indirect forms of “credit claiming.” Despite the purported remove of the judiciary from lobbying and political influences, numerous lawmakers implied that their sponsorship of amicus briefs helped facilitate a favorable judicial outcome. Thus, Congresswoman Eddie Bernice Johnson stated that she

was proud to join with 211 of my House and Senate colleagues to file an amicus brief, urging the Court to uphold the lower court’s ruling in *U.S. v. Edith Schlain Windsor* that DOMA is unconstitutional. With [today’s Supreme Court] landmark decision, same-sex couples will now have access to more than 1,100 federal laws, programs, and benefits that were traditionally afforded only to opposite-sex couples. Today’s decision moves our country forward as we continue to fight for equal rights for all American citizens.⁶¹

Court to Affirm Women’s Rights, CLARKE HOUSE (Jan. 28, 2014), <http://clarke.house.gov/media-center/press-releases/congresswoman-clarke-urges-the-supreme-court-to-affirm-women-s-rights>.

⁵⁸ *Voting Rights Act Challenge*, SCOTT HOUSE (Feb. 15, 2013),

<http://www.bobbyscott.house.gov/floor-statements/voting-rights-act-challenge/>.

⁵⁹ *Congresswoman Sheila Jackson Lee Urges the U.S. Supreme Court to Extend Equal Protection for all by Declaring the Equality of all Marriages for All Couples*, LEE HOUSE (December 17, 2013),

<http://jacksonlee.house.gov/media-center/press-releases/congresswoman-sheila-jackson-lee-urges-the-us-supreme-court-to-extend-0>.

⁶⁰ *Enzi Sides With Individual Liberty Over Majority Rule in Contraceptive Court Battle*, ENZI SENATE (January 28, 2014)

<http://www.enzi.senate.gov/public/index.cfm/2014/1/enzi-sides-with-individual-liberty-over-majority-rule-in-contraceptive-court-battle>.

⁶¹ *Congresswoman Eddie Bernice Johnson Releases Statement on the United States Supreme Court’s Decision to Strike Down the Defense of Marriage Act*, JOHNSON HOUSE (June 26, 2013), <http://ebjohnson.house.gov/media-center/press-releases/congresswoman-eddie-bernice-johnson-releases-statement-on-the-united>. See also Brief for United States Senators Marco Rubio et al. as Amici Curiae Supporting Respondents, *Town of Greece v. Susan Galloway and Linda Stevens*, 572 U.S. ___ (2013) (No. 12-696), available at [http://www.enzi.senate.gov/uploads/GallowaySCTAmicusBrief\(final\).pdf](http://www.enzi.senate.gov/uploads/GallowaySCTAmicusBrief(final).pdf).

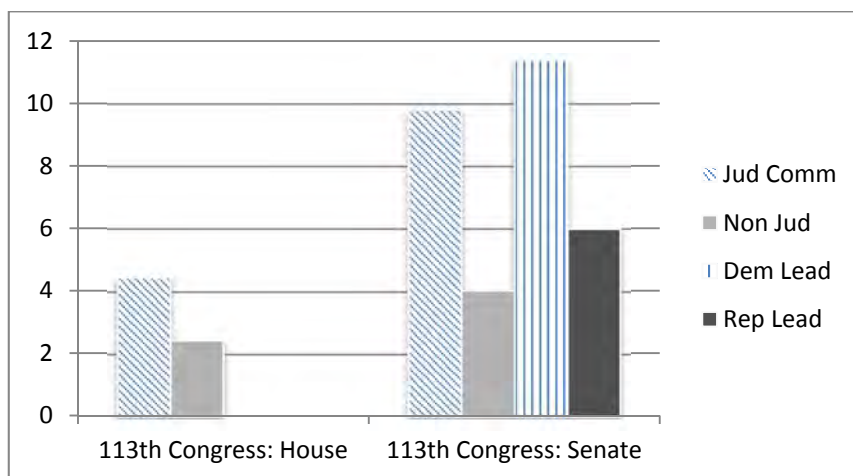
A handful of members of the House and Senate also engaged in a kind of “pulse reading” of their constituents on court issues—typically by encouraging voters to respond to an online poll, such as Rep. Steve Stivers’ request for input on whether “you agree with the Supreme Court’s decision on the Defense of Marriage Act?”⁶²

In addition to arguing that recent Congresses would witness increasing rank and file interest in the judiciary, we hypothesized that two sub-groups would be even more attuned to courts: party leaders and members of the House and Senate Judiciary committees. Thus, with respect to party leaders we expected them to evince greater interest in courts than the general population of lawmakers.

Our results leave this hypothesis in a somewhat uncertain state. In the House, the Democratic leadership was indeed relatively vocal; they made an average of 5.25 comments on the courts compared to an average of 2.59 comments for the rank and file members. The House Republican leadership was, in contrast, rather reticent with respect to the courts, with an average of only 1.6 comments.

When we move over to the Senate we see more consistent evidence for our “Heightened Specific Interest” hypothesis. Democratic leaders were again dramatically more vocal on the courts, with an average of 11.4 comments and, unlike the House, the Republican leadership was also more vocal with an average of 6.0 comments. Both of these results were noticeably greater than the references made by rank and file senators (who averaged only 4.62 comments).⁶³

Figure 3: Average Number of Comments (Positive and Negative) Judiciary Committee, Leaders, and Baseline



At least on their websites, party leaders (from both sides of the aisle) appear to be favorably inclined towards the judiciary—perhaps providing some corroboration.

⁶² *SCOTUS DOMA Decision*, STIVERS HOUSE (June 30, 2014), <https://stivers.house.gov/forms/default.aspx?ID=2625>.

⁶³ See Figure 3.

ration for our “courts in the balance” thesis. Even those leaders who offered criticism of the judiciary did so in rather curtailed or guarded fashion. In 2013, for example, Speaker of the House John Boehner expressed his disappointment with the Court’s Defense of Marriage Act decision, and signaled his solidarity with those who “protest the Supreme Court’s *Roe v. Wade* decision”⁶⁴ but was otherwise silent on court issues. In the Senate the Republican leadership was noticeably more positive, an average of 3.8 positive comments compared to 2.2 negative comments. This trend was somewhat less pronounced for the Senate’s Democratic leadership, who averaged of 5.8 positive comments and 5.6 negative comments.

Part of the revealing context here is to appreciate how far GOP leaders seem to have come from both party positions (as articulated in official platforms) and leadership statements offered just a decade earlier.⁶⁵ In 2004, the Republican Platform decried “activist judges” who “threaten to overturn common sense and tradition” and inhibit “the free exercise of religion in the public square.” The platform statement concluded that the “sound principle of judicial review has turned into an intolerable presumption of judicial supremacy.” Further, in 2005, then House Majority Leader Tom DeLay stated that the federal judiciary had “run amok” and called for disciplining the courts with restrictions on its jurisdiction along with other measures.⁶⁶ While DeLay’s remarks seem to have been outside of the mainstream of his party,⁶⁷ in the same year a Republican-controlled House passed the “Pledge Protection Act” a measure that did not become law, but would have limited the Court’s appellate jurisdiction to hear cases related to the constitutionality of the Pledge.⁶⁸

As predicted by our hypotheses, Judiciary Committee members in the House and Senate have a much greater tendency than their rank and file colleagues to comment on the courts and their decisions.⁶⁹ Corroborating Miller’s observations, the House Judiciary Committee (HJC) seems to be a particularly hot seat for criticisms of courts.⁷⁰ Of the 174 statements made by HJC members about courts and judges in the 113th Congress, almost six in ten of them were negative.

As Figure 3 indicates, Senate Judiciary Committee members (in the 113th) were also much more vocal on courts, than the rest of the Senate, averaging 9.82 comments per member compared to 4.05 for the rest of the Senate. Moreover,

⁶⁴ *Speaker Boehner on the March for Life*, BOEHNER HOUSE (January 22, 2014), <http://www.speaker.gov/press-release/speaker-boehner-march-life>

⁶⁵ THE POLITICS OF JUDICIAL INDEPENDENCE: COURTS, POLITICS, AND THE PUBLIC (Bruce Peabody ed., 2010). This is not to say party-based critique from Republicans has disappeared. Indeed the 2012 Republican Platform warns that “an activist judiciary” poses a threat “perhaps even more dangerous than presidential malfeasance.” But this critique is more cabined than in the past, and occurs in the context of many statements praising judges and other court decisions.

⁶⁶ Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21.

⁶⁷ Charles Babington, *GOP Is Fracturing over Power of Judiciary*, WASH. POST, Apr. 7, 2005 at A04.

⁶⁸ J. Mitchell Pickerill, *Institutional Interdependence and the Separation of Powers*, in THE POLITICS OF JUDICIAL INDEPENDENCE 100, 103 (Bruce Peabody ed., 2010).

⁶⁹ See Figure 3.

⁷⁰ MILLER, *supra* note 11.

members of the Senate Judiciary Committee were evenly split in their praise and criticism (49% and 51% respectively) while the rest of the Senate was much more positively inclined. We suspect this has to do with Judiciary members commenting on a wider range of cases outside of the party mainstream of salient, ideological cases.

At the core of our analysis is a contention that in recent years partisanship has played a key role in impacting the dynamics of congressional attitudes towards courts. We have already seen how changing party platform language (Figure 1) seems to telegraph evidence of significant partisan shifts towards courts. What is the evidence from the “front lines”—from recent member websites themselves?

As Figure 4 reveals, we see a great deal of partisan movement in the House of Representatives from as early as the 111th Congress.⁷¹ Positive comments from Republicans in the House surged in the 112th Congress and then declined to less than half of this high water mark in the 113th (48.8%)—perhaps reflecting hopes and “wish casting” prior to the Court’s handing down of its health care decision *NFIB v. Sebelius*. But, on the whole, the period of 2009-2014 is notable to the extent to which, as hypothesized, Republicans expressed deeply divided attitudes: offering an abundance of positive and negative comments about judges, court decisions, and judicial power.

On the other side, as predicted, we find growing Democratic criticism of courts in the House. While Republican House criticism also increased over the span of our research, it did so more gradually; overall Democratic criticism of the judiciary in the 113th Congress is up 377% from a 111th baseline—in contrast with a 174% increase for Republicans. To the extent we can regard this apparent rising negativism towards the judiciary as a sign of institutional and political anxiety, Democrats, at least in the House, are a fairly jittery lot. Figure 4 also shows the rising interest in courts from the 112th to 113th Congress, and the close balance between negative and positive statements amongst Democrats and Republicans.

Again, digging behind the numbers reveals other dynamics in play with respect to court-Congress relations. While the comments in our sample include a number of “traditional” Republican critiques of judicial decisions, even many of these were tempered. The webpages of Rep. Mark Meadows (R-NC), for example, included many critical references to abortion and gay rights, but they studiously avoided direct reference to court decisions.⁷² Indeed, many GOP lawmakers pointed directly or implicitly to the judiciary as an important ally, especially in struggles with the executive branch. As indicated previously, many Republicans praised the courts in such areas as the U.S. Court of Appeals decision against NLRB recess appointments (and in the Supreme Court’s subsequent granting of certiorari in the case).⁷³ These sympathetic lawmakers expressed hope that the judiciary would support their efforts to limit the power of the Obama administration. As Senator Enzi remarked

⁷¹ We lack comparative data for the Senate.

⁷² For another example see *Thompson on Sanctity of Human Life Sunday, March for Life*, THOMPSON HOUSE (Jan. 22, 2014) <https://thompson.house.gov/thompson-sanctity-human-life-sunday-march-life> (where Rep. Glenn Thompson, R-PA seems to go out of his way to avoid criticizing the Court on abortion).

⁷³ *NLRB v. Canning*, 705 F.3d 490 (D.C. Cir. 2013) (aff’d 572 U.S. __ (2014)).

[w]hen you look at the policies coming out of Washington, the burden of enacting and complying with what Congress or some agency dictates falls on the states. In spite of this fact, the states have few options when directives go bad other than the court system.⁷⁴

In a similar spirit, Rep. Jim Gerlach (R-PA) introduced legislation allowing the House or Senate to launch an “expedited court challenge to executive actions it sees as a violation of the Constitution’s ‘Take Care Clause.’”⁷⁵ In justifying the measure, Gerlach stated that there was “a general sense among our [Republican] conference members...to have the courts look at [areas where the president has exceeded his authority] and reel the [E]xecutive [B]ranch in.” Gerlach further explained that he saw judicial review as a superior option to using the congressional appropriations process to check “controversial executive actions” so as to avoid the president’s veto. “To me, the better way to do this would be to get the question to the Supreme Court as quickly as you can.”⁷⁶

A number of Republicans also supported the “STOP Resolution” (“Stop This Overreaching Presidency”), a measure that would empower members of the House to sue the president in federal court for “violating his presidential duties as outlined in the United States Constitution.”⁷⁷

On the Democratic side, we found considerable traditional praise for courts and civil liberties and civil rights decisions such as *Roe v. Wade* (with numerous commentators marking the 40th and 41st anniversaries of the decision) and the two gay rights decisions from the 2013 term, *U.S. v. Windsor* (finding that married same sex couples could receive federal benefits) and *Hollingsworth v. Perry* (allowing a California court’s invalidation of a same-sex marriage ban to remain in place).

But just as striking, and arguably underwritten with more intense language, were the instances where Democrats objected to court action. Perhaps the most notable ruling in this regard is *Citizens United v. FEC*, the 2010 decision invalidating campaign finance limits on corporations and unions.⁷⁸ Even four years after being issued, the decision remained a lightning rod for Democratic and liberal criticism. Rep. Earl Blumenauer (D-OR) called it a “tragic decision...based on the perverse idea that the court’s out-of-touch majority somehow felt corporations

⁷⁴ *Restore Federalism by Letting States Be a Check Against Overreaching Federal Policies*, ENZI SENATE (Mar. 14, 2014)

http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=a7412b94-f012-47b0-b790-34f4fccbddd0.

⁷⁵ John Gramlich, *Congressional Quarterly: Gerlach Legislation to Rein in President's Use of Executive Power "Appears to Be Gaining Momentum"*, GERLACH HOUSE (Jan. 28, 2014) <http://gerlach.house.gov/news/documentsingle.aspx?DocumentID=367979>.

⁷⁶ *Id.*

⁷⁷ *See, e.g., S.T.O.P. Resolution*, RICE HOUSE, <http://rice.house.gov/stop-act> (last visited June 6, 2014).

⁷⁸ Bernie Sanders, an Independent who caucuses with the Democrats, accused the decision of creating a “political revolution” that would overturn democracy. *See* John Nichols, *Bernie Sanders Raises Battle Cry Against Citizens United: 'I Vote for Democracy!'*, THE NATION (Apr. 11, 2014, 4:48 PM), <http://www.thenation.com/blog/179306/bernie-sanders-versus-rand-paul-ted-cruz-mike-huckabee-and-citizens-united#>.

should enjoy the same constitutional rights as people.”⁷⁹ Blumenauer’s reaction was echoed by many other partisan colleagues who variously called the decision “misguided,” “horrible,” “extraordinarily activist,” and a threat to “the integrity of our election process”—among other objections. The status of *Citizens United* as a partisan flashpoint is underscored by the observation that it was one of only four “judicial issues” mentioned in both the Republican and Democratic platforms from 2000-2012,⁸⁰ the others being habeas corpus protections, abortion, and immigration.

In the 113th Congress, *Shelby County v. Holder* (2013), which invalidated Section 4 of the Voting Rights Act, also received considerable Democratic attention—and condemnation. Representative David Cicilline of Rhode Island called the decision “a significant step backward in our ongoing efforts to protect the voting rights of every American and ensure that all citizens are treated equally under the law.”⁸¹ Congressman Steve Cohen (D-TN), who was especially active in commenting on courts, linked the Voting Rights Act case with *Citizens United*, calling *Shelby* “the second effort by the Supreme Court to destroy democracy as we know it in this county” (he also could not pass up the opportunity to “advertise,” in classic Mayhew fashion, the connection of the case to his “home of Shelby County, Tennessee”).⁸² James Clyburn, the lone Democrat from the South Carolina delegation, stated that he was “deeply disappointed by the Court’s decision [in *Shelby*]*—*the 15th Amendment specifically grants Congress the power to ensure that no American is denied the right to vote, and the Supreme Court is wrong to interfere with that Congressional prerogative.”⁸³

In something akin to a contemporary parallel of early twenty first century moves by Republicans (such as the Pledge Protection Act), a number of Democrats introduced or backed legislation seeking to roll back court decisions as well as court-centered constitutional amendments (the latter primarily aimed at reversing *Citizens United*). Thus Rep. Grace Meng (D-NY) introduced the Corporate Politics Transparency Act (H.R. 2214) which would “require publicly-traded companies to disclose all the money they spend supporting or opposing candidates.”⁸⁴ Others supported a variant measure, the “Disclose Act” which sought to bring greater transparency to what one Democratic Representative called “the wild west

⁷⁹ Earl Blumenauer, *Fixing Our Broken Government: Ending Corporate Personhood*, HUFFINGTON POST (Feb. 28, 2012, 1:00PM) http://www.huffingtonpost.com/rep-earl-blumenauer/fix-our-political-system_b_1307263.html.

⁸⁰ See Table 2.

⁸¹ *Cicilline Statement on Voting Rights Act Decision*, CICILLINE HOUSE (June 25 2013), <https://cicilline.house.gov/press-release/cicilline-statement-voting-rights-act-decision>

⁸² *Cohen Statement on Supreme Court Ruling Regarding Constitutionality of the Voting Rights Act*, COHEN HOUSE (June 25, 2013) <http://cohen.house.gov/press-release/cohen-statement-supreme-court-ruling-regarding-constitutionality-voting-rights-act>

⁸³ *Clyburn Statement On Shelby County v. Holder Decision*, CLYBURN HOUSE (June, 25 2013) <http://clyburn.house.gov/press-release/clyburn-statement-shelby-county-v-holder-decision>.

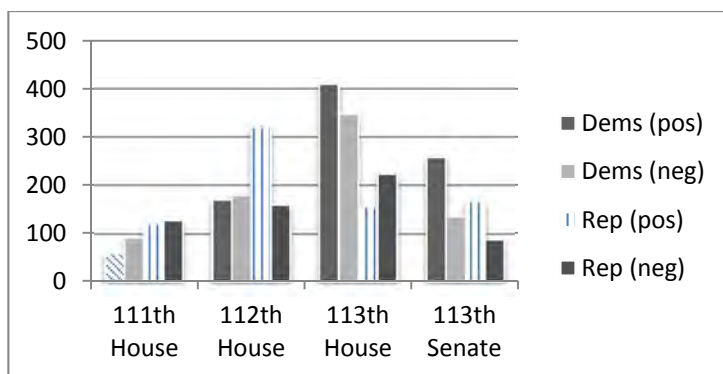
⁸⁴ *Meng Introduces Legislation Requiring Corporations to Disclose Political Spending*, MENG HOUSE (July 11, 2013) <http://meng.house.gov/media-center/press-releases/meng-introduces-legislation-requiring-corporations-to-disclose-political>.

campaign atmosphere created by the Supreme Court.”⁸⁵ Some Democratic members were vaguer in proclaiming variations of the aspiration that “Congress must move quickly” to correct the alleged wrongs perpetrated by the judiciary.

We note one “judicial issue” that crossed party lines involved the National Security Administration (NSA) and the FISA courts. With respect to these topics, many Republicans and Democrats praised a D.C. Circuit Court ruling against the NSA meta-data collection brought to light by Edward Snowden, and supported reforms and greater transparency in the FISA courts.⁸⁶

In addition to finding that many of our hypotheses about congressional partisanship have empirical support, most of our predictions about chamber differences are also corroborated. As Figures 4 and 5 reveal, while the House provided a higher commentary level in the aggregate, on average senators engaged more questions related to the courts, and also provided more of a positive slant to the judiciary than House members—an observation true for senators from both parties. This latter effect may be partly a function of the Senate’s distinctive role in the federal judicial appointments process—this institutional capacity gives senators a greater investment and sense of ownership over those nominees who are actually seated. Indeed, this was reflected in senators’ frequent commentary on judicial nominees, a dimension essentially absent in the House. In a very real sense the federal judiciary is the Senate’s creation, certainly in a way that it is not true for the House of Representatives.

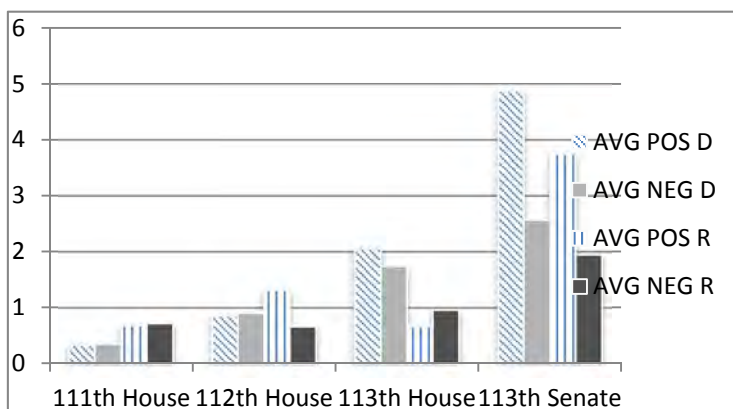
Figure 4: Total Number of Statements on Judiciary and Judges



⁸⁵ *Welch Leads 32 Democrats in Effort to Crack down on Wild West Campaign Atmosphere in Post-Citizens United World*, WELCH HOUSE (March 28, 2012) <http://www.welch.house.gov/press-releases/welch-leads-32-democrats-in-effort-to-crack-down-on-wild-west-campaign-atmosphere-in-post-citizens-united-world/>.

⁸⁶ *Klayman v. Obama*, No. 13-0851 (D.C. Cir. Dec. 16, 2013) (cert. denied, 134 S. Ct. 1795 (2014)).

Figure 5: Average Number of Statements (by Lawmaker)



Qualitatively, senators focused a bit more on national issues than House members and, in general, covered a wider range of topics in their commentary on courts, unsurprising results. We note that the longer terms of senators make them less susceptible to short-term electoral pressures, which is likely to produce a less reactive and perhaps more balanced (and positive) assessment of the judiciary. That said, while noting that while the Senate was more vocal, with an average of just over five comments (nearly doubling House members’ average commentary), substantively the two chambers did not differ dramatically. In other words, the issues that both the House and Senate discussed were quite similar. For example, in the 113th Congress, lawmakers from both chambers spent a great deal of attention on the rulings in *Shelby* (Voting Rights Act) and *Windsor* (the Defense of Marriage Act case). Like their House colleagues, Democratic senators expressed their desire to strengthen the Voting Rights Act post-*Shelby*. In addition, in a parallel of the House, many Democratic senators expressed their support for *Roe v. Wade* (during its 40th and 41st anniversaries), and their continued opposition to *Citizens United*. Overall, senators focused on the same issues as the House, but with a generally greater level of engagement. For example, while members of both the House and Senate mentioned *Shelby*, in the Senate it was much more common to see multiple mentions as well as more consistent efforts by Democrats to reverse the decision. In the House, a single mention of the case was the norm.

The results from our three Congresses also support our supposition that lawmakers would be more likely to emphasize case opposition as opposed to institutional criticism. The overwhelming number of criticisms of Democrats and Republicans from all three Congresses were generated by reactions to prominent cases—mostly handed down by the Supreme Court. Of these, the “platform issues” designated in Table 1 featured prominently, especially when they involved cases touching on abortion, religious freedom, the Takings Clause, the Second Amendment, campaign finance, gay rights, and health care.

There were a handful of interesting exceptions to this overall trend. Rep. Louis Slaughter (D-NY) joined with two interest groups (Common Cause and Alliance for Justice) in accusing Judge Diane Sykes (who sits on the 7th Circuit Court of Appeals) of violating the Code of Conduct for U.S. Judges for appearing at a

fundraiser for the Federalist Society.⁸⁷ Slaughter rebuked both Sykes and Justice Clarence Thomas (who appeared at the same event) and urged Congress to pass an ethics code to cover Supreme Court Justices. As the Congresswoman put it, “Congress must act to ensure the Supreme Court plays by the same ethical rules as all other federal judges.” She also submitted a letter to Chief Justice Roberts urging him to “issue a letter of reprimand for Justice Thomas and to publish an official Court policy on the ethics issue at hand.”⁸⁸ Moreover, a few members of Congress also complained about “activist” judges. This said, for the 2009-2014 period we studied, legislative websites generally steered clear of the calls for institutional reform and court-curbing, measures that were popular in the 108th (2003-2005) and 109th Congresses (2005-2007).

More specifically, the critique of judicial “activism” appears to have ebbed in today’s Senate and House. There were a handful of Republican websites mentioning “activism” and linking this behavior with specific rulings (usually involving gay marriage), but this was not a prominent critique. The Republicans who invoked this charge did not make the same link as recent GOP platforms portraying “activism” as a general (dangerous) judicial behavior.⁸⁹ Democrats used the charge of “activism” even more narrowly, deploying it in the context of a critique of a particular decision, most often *Citizens United*.⁹⁰

We do not find support for our “presidential election year” thesis—that is, our presumption that Congress would be more interested in judicial issues in an election year (2012) than afterwards (2013-2014). In fact, the total commentary on House websites more than doubled from 2012 to 2014 (see Figure 1). A possible explanation for this is that the election year rhetoric occurred before the Supreme Court handed down its “Obama-care” decision, *NFIB v. Sebelius*. But while we have found⁹¹ that *Sebelius* did drive a great deal of commentary immediately

⁸⁷ *Reformers, Senior Lawmaker Charge Justice Thomas and Federal Appellate Judge Diane Sykes With Violating Judicial Ethics*, ALLIANCE FOR JUSTICE (Nov. 2013), <http://www.afj.org/press-room/press-releases/reformers-senior-lawmaker-charge-justice-thomas-and-federal-appellate-judge-diane-sykes-with-violating-judicial-ethics>.

⁸⁸ *Slaughter, Murphy, Blumenthal and Whitehouse Introduce Supreme Court Ethics Bill*, SLAUGHTER HOUSE (Aug. 2, 2013), <http://www.louise.house.gov/press-releases/slaughter-murphy-blumenthal-and-whitehouse-introduce-supreme-court-ethics-bill/>.

⁸⁹ *See Statement from Congressman Luke Messer on Supreme Court Rulings*, MESSER HOUSE (Jun. 27, 2013), <http://messenger.house.gov/media-center/press-releases/statement-from-congressman-luke-messer-on-supreme-court-rulings> (“I am disappointed in yesterday’s Supreme Court ruling. The people should set marriage policy, not activist judges. The debate over marriage will continue, and it is my hope that states will define marriage as the union between one man and one woman”). For a slightly more general critique, see Rep. William Cassidy (R-LA): “Cassidy is also concerned about activist judges who thwart the will of the people by overturning state and federal marriage laws, and he will work to ensure that this issue remains in the jurisdiction of the states. The state constitution of Louisiana states that marriage shall consist only of one man and one woman. This should not be redefined by federal judges.” *Faith and Family Values*, CASSIDY HOUSE, <http://cassidy.house.gov/issues/faith-and-family-values> (last visited June 6, 2014).

⁹⁰ *Citizens United & Campaign Finance*, GRIJALVA HOUSE, <http://grijalva.house.gov/index.cfm?sectionid=95§iontree=4,74,95> (last visited June 26, 2014) (“Rep. Grijalva considers this ruling a power grab by conservative judicial activists unnecessarily overturning more than a century of judicial precedent”).

⁹¹ Peabody & Morgan, *supra* note 1.

after it was issued, the case was not especially impactful on our sample of the 113th Congress in 2014. Our best guess, then, is that with no announced retirements on the Supreme Court, judicial issues were simply not especially prominent during Obama's second term campaign. Perhaps, more to the point, the election year impact on commentary about courts was trumped by specifically congressional electoral concerns, including some important cases handed down after the November 2012 presidential election (such as *Shelby* and *Windsor*), and the longer-term trends which we have identified in this piece (such as the evening partisan balance on the courts).

Indeed, since we have argued that the shifting dynamics of today's congressional-judicial relations are impelled by relatively enduring currents, we speculated that reaction to *NFIB v. Sebelius* itself would be somewhat subdued. As indicated, while the *Sebelius* decision did generate a great deal of attention, extensive Democratic praise, and some Republican critique in the immediate aftermath of the decision, we did not find that the case had a very sharp profile in the commentary in the 113th Congress (in our surveyed period stretching from January 2013-March 2014). Instead in the 113th, we found many more Democratic critiques of, say, *Citizens United* (and *Shelby*) than Republican criticism of *Sebelius*. While many GOP members offered negative glosses on the Patient Protection and Affordable Care Act (PPACA), most of their commentary was on the law as "bad policy" rather than emphasizing the Court's decision or problems with the judiciary as a whole. As Senator Enzi said in a press release, the "Supreme Court decided in June 2012 that the law is constitutional. While it's constitutional, it's still bad policy."⁹² Similarly, Rep. Mac Thornberry (R-TX) Succinctly stated that while "the Supreme Court has ruled the individual mandate is constitutional, I strongly believe that the health care bill was a mistake and that it will adversely affect health care for most of the people in our area and around the country."⁹³ Some GOP lawmakers went out of their way to avoid referring to the Court and its health care decision. On Congressman Kevin Brady's webpage devoted to health care, he discussed Republicans commitment to "repeal bad health care legislation" but made no mention of *Sebelius* or the Court.⁹⁴

⁹² *10 Steps to Transform Health Care*, ENZI SENATE (Jan. 20, 2013) <http://www.enzi.senate.gov/public/index.cfm/10-steps-to-transform-health-care?p=10StepstoTransform-HealthCare>.

⁹³ *Health Care Reform*, THORNBERRY HOUSE (July 17, 2013) <http://thornberry.house.gov/issues/issue/?IssueID=9890#sthash.IVXnG8ak.dpuf>. Compare this with Congressman Bob Latta's (R-OH) statement on the one year anniversary of *Sebelius* where he noted, succinctly, that "the Supreme Court upheld President Obama's health care law and ruled its mandate as a tax." Latta provided no other reference to the Court or the decision, and went on to discuss the "negative impacts of this law" and called for its congressional repeal. See *Latta Statement on One-Year Anniversary of SCOTUS Obamacare Ruling*, LATTA HOUSE (June 28, 2013), <http://latta.house.gov/news/documentsingle.aspx?DocumentID=341118>.

⁹⁴ See *Health Care: The Need for Reform*, BRADY HOUSE <http://kevinbrady.house.gov/index.cfm?sectionid=11§iontree=5,96,11> (last visited June 26, 2014) (an entire webpage devoted to health care without a mention of the Court decision). As another House website stated, "President Obama's healthcare law, while upheld by the U.S. Supreme Court as a constitutional tax, has been consistently rejected by

There are at least three explanations for this “non-*Sebelius* effect.” First, the somewhat ambiguous implications of the case—which upheld the majority of the Affordable Care Act but also imposed important limits on the law’s ability to expand state Medicaid coverage (and weakened the national government’s reliance on the Commerce Clause for constitutional authority)—may have disinclined both Democrats and Republicans from invoking the case with great enthusiasm. Second, and related, the complexity of the case may have made it difficult to invoke and explain the ruling in a way that would obviously resound for partisans and constituents. Third, the subdued reaction to the health care case for the GOP may reflect lawmakers’ sense that the Obama administration is a readier target for rebuke than the judiciary. Attacking the administration and promising to work for repeal of PPACA may be more politically effective given the diffuse institutional support the Court tends to enjoy along with the difficulty of explaining the nuances of the *Sebelius* decision to the electorate.⁹⁵ Of course, the recent Court ruling in *Hobby Lobby v. Sebelius*, and the presence of other cases elsewhere in the American judiciary (such as *Halbig v. Burwell*⁹⁶), is a reminder that litigation over “Obamacare” is ongoing. But to some degree, focus on these new matters reinforces our central view: lawmakers have largely moved on from the Supreme Court’s June 2012 *Sebelius* ruling in favor of new challenges to PPACA.

IV. DISCUSSION

Overall, we believe our results provide support for two wide claims. First, on congressional websites, courts are becoming more prominent, and, second, the partisan dynamics of congressional-judicial relations may well be changing (with more Democratic skepticism and more Republican support evident than in the past). We have seen, for example, that in the 113th Congress, Senate Democrats were essentially evenly divided on courts, with 51% of all comments being positive and 49% negative—a notable result given the longstanding association of courts with the backing of many Democratic issues. On the other side, we have evidence of rising Republican support. More than three in five Senate Republicans in the 113th Congress offered praise for judges and judicial decisions—seemingly a quite different profile than the early 2000s. These and other data fuel our idea that “traditional” partisan views of the courts (as captured by prior scholarship and party statements) are in flux, if not transition.

the court of public opinion.” *OBAMACARE: An Unworkable “Train Wreck”*, LOBIONDO HOUSE <http://lobiondo.house.gov/obamacare-unworkable-train-wreck> (last visited June 26, 2014).

⁹⁵ Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635-64 (1992); James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 343-58 (1998).

⁹⁶ United States Court of Appeals for the District of Columbia Circuit, <http://apps.washingtonpost.com/g/page/national/dc-circuit-court-of-appeals-halbig-v-burwell/1199/>.

What is the broader significance of the developments we have charted in this preliminary way? The question turns, in part, on whether the changes we've observed are enduring, and whether they reflect a deeper seismic shift rather than "mere" (and passing) political rhetoric.

On the first issue, longevity, the evidence from our study suggests a change but not a clear end. The future of congressional relations with the courts is going to depend on a multitude of factors, including the path of presidential appointments, the ideological balance on the Supreme Court specifically, and what enduring social and political issues wrack the body politic and wend their way to judicial dockets.

That said, we offer a few thoughts on the trajectory of court-Congress relations.

Overall, we suspect that our observed "new normal," involving a bipartisan mix of optimism, disappointment, and high levels of interest in the judiciary and its decisions, will continue for a time. We note, however, that what looks like contemporary Democratic skepticism and Republican openness to judicial solutions is, to some degree, a relative phenomenon reflecting changes from a previously stable status quo. Going forward, we suspect both parties will seek cautious and contingent alliances with the judiciary, but will recognize its ideological unreliability.

These beliefs are animated by several points. To begin with, we note that the growth in interest in courts occurred over a span (2009-2014) in which judicial issues did not feature especially prominently in presidential politics. Presumably, a future presidential election in which these matters were more central could generate even greater voter and congressional interest in courts.

With respect to ongoing bipartisan interest in the judiciary, we return to an earlier observation: for the immediate future, at least until the end of President Obama's second term, the partisanship of the judiciary is slated to become even more finely balanced. In this context, there are likely to be more decisions (and jurists) for partisans on both sides of the aisle to praise and rebuke—as well as good reasons for these actors to hope for greater ideological alignment in the future. And unless one party can control both the presidency and the Senate for an extended period, the mix of judges from Republicans and Democrats will provide fodder for continued partisan posturing and fighting for years to come. Having realized so many gains from filling the judiciary with ideologically sympathetic judges in the 1980s and 2000s, we do not think Republicans (or Democrats) will cede this territory anytime soon. In other words, our judicial confirmation battles will continue and with added heat given the climate we have described.⁹⁷

Moreover, the presence of "hyper-partisanship"⁹⁸ in Congress, and with it, the difficulty in overcoming institutional stasis, makes the judiciary an increasingly attractive institution for resolving divisive and intractable policy questions. As Mark Graber puts it in a different context, democratic values may be "better promoted by having some conflicts resolved by justices appointed and confirmed

⁹⁷ Goldman, Slotnick, & Schiavoni, *supra* note 20.

⁹⁸ Reid Wilson, *The Solution to Hyper-partisanship Already Exists and It Doesn't Involve Gerrymandering*, WASH. POST, Oct. 18, 2013.

by elected officials when the practical alternative is not having those conflicts resolved at all.”⁹⁹

This speculation needs to be placed alongside a number of caveats. First, we concede that our data pool is from a relatively compressed period. Several factors we have not considered in any depth may ultimately explain our results better than any broader partisan or institutional trends. For example, it is conceivable that the rhythm and valence of congressional reactions to the courts is primarily attributable to the judiciary’s legitimacy—a question we considered previously.¹⁰⁰ This issue is complex since, for example, today’s Supreme Court still enjoys much higher “favorability” ratings than Congress, while still suffering from a rather low level of public support by historic measures.

This article is only a first step in probing the state of today’s legislative-judicial relations. We can imagine a range of future research projects that would refine and strengthen the observations and claims of this project—and help clarify its wider impact. To begin with, we are interested in extending our data collection and testing our theses over longer time horizons. Such efforts are necessary to establish whether our observations are enduring and part of a wider sea change of evolving lawmaker attitudes. Some of this future work will need to establish reliable “baselines” and contexts for our observed legislative behavior. For example, how can we be sure that increases in congressional references to courts on websites is a function of surging interest in the judiciary, as opposed to a greater willingness to use these forums to publicize reactions and commentary concerning any and all topics?

We also see great value in developing additional hypotheses and statistical tests to sort through a range of individual and institutional factors to explain legislative praise and criticism of courts. Beyond chamber status, party leadership or Judiciary Committee membership, what are the most important political, institutional, and demographic factors accounting for members’ interest in the judiciary and their likelihood to comment in one direction or another? For example, in the House we note a significant level of engagement and criticism coming from members of the Congressional Black Caucus (CBC) in the 113th Congress. Taken as a group, these CBC members averaged 4.55 comments (compared to 2.39 for the rest of the House) and they issued 2.31 negative comments per member (as opposed to 1.20 for other House members). In addition to reflecting opposition to the Voting Rights Act case (*Shelby*), we wonder if the CBC skepticism points to an underlying and deeper disappointment felt by these lawmakers with the recent direction of courts on other civil rights cases involving such issues as affirmative action and redistricting.

In future research we hope to test for statistical significance with respect to many of the independent variables we have already identified (such as party membership and leadership status) as well as others. Does the strength of a member’s ideological orientation affect her likelihood to engage the judiciary on a website? Is there a generational effect for lawmakers—that is, do “older” members of Congress who came of age during the civil rights and civil liberties “revolution” of the 50s and 60s have a different perspective on courts than their younger colleagues?

⁹⁹ Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 73 (1993).

¹⁰⁰ Peabody & Morgan, *supra* note 1.

Are changes in lawmaker commentary about courts best explained by simple member turnover—by the retirement or lost elections of certain incumbents and the entry of new lawmakers especially attuned to judicial issues? We hope to supplement our future statistical tests with qualitative interviews and other examinations of individual-level rationale for engaging judicial topics.

Indeed, as part of future research efforts, we are interested in getting a better read on precisely *why* members of Congress make comments about judges and courts. Among the factors subsequent research should consider is the relationship between lawmaker commentary on courts and public opinion, as well as how interest group mobilization and strategies intersect with patterns in congressional rhetoric toward the judiciary.¹⁰¹ Are members of Congress on the leading edge of changes in how we regard courts, or can we best explain movement in lawmaker attitudes by charting (prior) shifts in the public or influential organized interests?

Finally, and perhaps most important from the perspective of political praxis, other research needs to connect the deployment of legislative commentary on courts with possible threats to judicial independence in such areas as policy, the appointments process, and court budgeting and administration. Is there a relationship between who praises or blames courts (and to what extent) and the state of funding for courts and judges? Can we use our data to predict when (or which) lawmakers are likely to propose “court-curbing” legislation¹⁰²—and the eventual prospects of these bills? While we have generally emphasized the Mayhew “reelection” functions of Congress’s discussions of courts, ultimately, we hope to develop a clearer understanding of when lawmakers’ political words on websites, sometimes bitter, sometimes filled with hope, turn to action.

¹⁰¹ One teasing suggestion of the link between lawmaker commentary on courts and interest groups is found in some of the amicus briefs featured on congressional websites—which demonstrated at least a legal alliance between these political actors.

¹⁰² Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53(4) AM. J. POL. SCI. 971, 971-989 (2009).

WHERE DID ALL THE LAWYERS GO? CHALLENGING PERCEPTIONS OF THE LAWYER AS CIVIC LINCHPIN IN NEW HAVEN: 1830-1890

Leslie Esbrook¹

-But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen. –The Final Prays of the Canon of Ethics²

ABSTRACT

Lawyers have traditionally been portrayed as models for civic representation, epitomized by their role in the founding of the Republic. In recent studies a consensus has formed around the idea that the legal profession lost its civic-mindedness sometime between the nineteenth and beginning of the twentieth centuries. Consequently, the story goes, lawyers have lost a key aspect of the profession that elevated the law to a higher plane compared to other career paths. This paper will explore the history of this shift using New Haven and the greater Connecticut forum for empirical data. The paper will challenge the historical narrative by detailing internal inconsistencies amongst leading scholars, both in terms of time frame of decline and the amount and kind of civic participation envisioned as exemplary. I will show that, at least at the local level in New Haven, the shift of lawyers as history remembers did not occur in a radical, sudden fashion at all; by the end of the century around half of all lawyers continued to fully participate in civic life. Finally, I will track prevalent theories behind the myth of the lawyer's civic decline and superimpose them on the facts relative to New Haven to show that the conflicting results accrued from the data support the absence of causal findings for the current theories in vogue. In sum, the shift of the role of lawyers in public service in New Haven is much more gradual than once surmised, suggesting the change was not a top-down deluge to a new world of corporate law but rather a trickle out of public service into many other fields that valued legal expertise.

¹ J.D. Candidate, Yale Law 2015. Many thanks and appreciation for help on this article go out to the library staff at the Lillian Goldman Law Library at Yale Law School, the archivists at the Whitney Library of the New Haven Museum, the law unit at the Connecticut State Library, Professor Lawrence Fox, George W. and Sadella D. Crawford Visiting Lecturer in Law, Yale Law School, and Professor Robert C. Ellickson, Walter E. Meyer Professor of Property and Urban Law, Yale Law School.

² LAWRENCE J. FOX, A CENTURY OF LEGAL ETHICS 169 (2009).

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INTRODUCTION

The story told is a familiar one: lawyers founded our nation, built up our legal and legislative codes, and attained countless measures of high office. Then, the era of industrialization and manufacturing overtook the profession, harnessing the skills of the bar to the ambitions of corporations, big business, and greed.³ In-house counsel, the rise of the firm, and contract creation became the bread and butter model for the legal profession.⁴ By 1900 lawyers in the urban centers of the East by and large had shed their profession's ethos of public service.⁵ Thus the prolonged saga of the disappearance of the lawyer-statesman reached an apex, turning the great statesmen such as Thomas Jefferson, Alexander Hamilton, James Madison, and John Adams into mythical characters of a different time.⁶ To this day, the profession struggles to define itself introspectively and reaches centuries backwards in time in hopes of finding a character-portrait of the selfless lawyer to resurrect.⁷

³ See HEINZ EULAU & JOHN D. SPRAGUE, *LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE* 12 (1964); L. RAY PATTERSON & ELLIOTT E. CHEATHAM, *THE PROFESSION OF LAW* 10, 398 (1971) (declaring that the U.S. system was created as a legal polity in direct opposition to King George's violation of legal rights, and noting that lawyers occupied a large share of the initial federal government positions); JULIUS STONE, *LEGAL EDUCATION AND PUBLIC RESPONSIBILITY*, 15-19 (1959).

⁴ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW: THIRD EDITION* 329, 484 (2005) (noting the growth of administrative law and business regulation and recognizing the post-Civil War lawyer-statesman ideal morphed into that of the corporation lawyer).

⁵ See Edwin F. Sweet, *Municipal Government and Its Demands on Good Citizenship*, 9 *YALE L.J.* 73, 81 (1899).

⁶ See RON CHERNOW, *ALEXANDER HAMILTON* 160 (2005); NORMAN GROSSMAN, *AMERICA'S LAWYER-PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE* ii (2009); *America's Founding Fathers: Delegates to the Constitutional Convention*, THE CHARTERS OF FREEDOM: U.S. NAT'L ARCHIVES, http://www.archives.gov/exhibits/charters/constitution_founding_fathers.html (last visited Apr. 15, 2013). Interestingly, the reification of the lawyers during the constitutional period may not itself be consistent with historical truths, underscoring the dangers of blindly following legal mythology. ORIE L. PHILLIPS & PHILBRICK MCCOY, *CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS DISCIPLINE AND DISBARMENT 188-89* (1952) (remarking that in the colonial days of America "to be a lawyer was to incur social opprobrium... for example, in Connecticut, they were included in discriminatory legislation in company with drunkards and keepers of brothels"). See also Thomas Thacher, *Yale in Its Relation to Law: An Address Delivered at the Bi-Centennial Celebration at New Haven* 5 (Oct. 21, 1901) ("In those days [the 1700s]... the law presented little attraction compared with the later times").

⁷ Quintin Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing, and Its Future Prospects*, FACULTY SCHOLARSHIP SERIES (2008), available at

http://digitalcommons.law.yale.edu/fss_papers/1888 (analyzing from the modern day examples of the legal profession in Connecticut, what changes the field has undergone, and how to sustain the profession in a manner consistent with its goals of societal improvement); *The Lost Lawyer & the Lawyer-Statesman Ideal-AALS 2014-New York, NY, Call for Papers*, LEGAL SCHOLARSHIP BLOG: A SERVICE FROM THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, UNIVERSITY OF GEORGIA SCHOOL OF LAW, UNIVERSITY OF PITTSBURGH

In New Haven, one man demonstrates this story of the nineteenth century's shift in the legal profession: Mr. George H. Watrous. A New Haven surname of repute, the Watrous family left its mark on the city courts, on Yale, and on the city's public utility management systems.⁸ George H. Watrous married into another powerhouse family, the Duttons, consolidating the family's good fortune and influence.⁹ Born into a well-off family already steeped in the world of law (his father was a judge),¹⁰ Watrous graduated from Yale in 1853. He joined the firm Dutton & Watrous for a time, continued practice on his own after the firm disbanded, and in the 1860s branched into government affairs. He represented New Haven in the General Assembly, served as Corporation Counsel for the City of New Haven, and "at various times...was elected to municipal offices in that city."¹¹ In the mid-1870s he advanced to president of the New York, New Haven and Hartford Railroad Company and held the position nearly until his death, in 1889.¹² In his years at the bar, mirrored onto the years of the lawyer-statesman's decline, Watrous shifted from solo practitioner with public service responsibilities to the corporate world, leaving behind legal advocacy in the service of government and individual client service entirely.

Watrous's diverse pursuits chart the rise of privatization to the detriment of community values in law.¹³ Lawyers, praised in their own community for the civic service ideals attributed to them, lost their way both with regards to physical presence in the community sphere and internal ethical commitments to justice.¹⁴ Although Watrous shifted from a life of public service in the law to the life of a businessman and did not make the leap directly into a corporation's law department, his move to the corporate world exemplifies the broader trend of corporate lure. Many historians who speak disparagingly of the lawyer-statesman's demise equate

SCHOOL OF LAW, AND UNIVERSITY OF WASHINGTON SCHOOL OF LAW (Mar. 26, 2013), <http://legalscholarshipblog.com/?p=10711>.

⁸ The Watrous family owned the New Haven Water Company, New Haven Gas Light Company, the first trolley companies, and have the lake that provides freshwater to New Haven named in their honor. See OBITUARY SKETCH OF GEORGE DUTTON WATROUS, 127 CONNECTICUT REPORTS 735-6, available at <http://www.cslib.org/memorials/watrousgd.htm> (last updated July 24, 2012).

⁹ *Id.*, at 592-95. George H. Watrous's wife, Harriet J. Dutton, was the daughter of Henry Dutton, Governor of Connecticut and Judge of the Supreme Court of Connecticut. See HON. HENRY DUTTON, 33 CONNECTICUT REPORTS III, available at <http://www.cslib.org/memorials/duttonhret.htm> (last updated Oct. 3, 2012).

¹⁰ OBITUARY SKETCH OF GEORGE H. WATROUS, *supra* note 8.

¹¹ DWIGHT LOOMIS & J. GILBERT CALHOUN, THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT 400 (1895); GEORGE H. WATROUS, CITY OF NEW HAVEN COURT OF COMMON COUNCIL OPINIONS GIVEN BY THE LAW DEPT. 27-30 (1875).

¹² OBITUARY SKETCH OF GEORGE H. WATROUS, *supra* note 8, at 592.

¹³ Joining the firm in the 1850s may be a bit of an anomaly, as firms did not start to grow until a few decades later, but his representation at the firm confirms his classification as a first-mover in the legal profession's developing trends. See GEOFFREY C. HAZARD, JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY (2004).

¹⁴ See generally ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993) (arguing that the legal profession has over time become disjointed from its originally morally fulfilling meaning and lacks an underlying philosophical motivational factor to sustain itself).

any position in a corporation to that of “trade” rather than “profession.” The level of position occupied in the corporation is immaterial, for the virtuous skills of the lawyer were not required.¹⁵ Yet is this portrait of the legal profession accurate? Did the practice and ethos of the legal profession undergo a discernible shift at a discrete moment in time?

This essay will explore the history of the role of lawyers in the nineteenth century and empirically test the most prominent theories using data from New Haven and greater Connecticut. First, I will introduce the current theories on the role of lawyers in American society. Literature in the field stretches the civic ideal in many directions, with no dominant portrait of what the civic-minded lawyer looked like. Some valued lawyers’ internal ethical civic-mindedness to their practice as an abstract commitment; others valued the physical embodiment of civics through participation in judicial positions or in legislative and executive seats. Similar competing theories abound on the time period of the lawyer’s purported shift away from the public sector;¹⁶ they broadly look to the end of the nineteenth century as a pivot point but vary in detail. I will present data on the greater New Haven region in search of trends.

I find that lawyers do not experience a radical shift from their commitments to government service as the common myths suggest. Fluctuations in levels of service are frequent since the mid-nineteenth century at least and, most importantly, lawyers at no time in the period hold a commanding sway over substantial civic positions. Rather, they dabble in government in discrete periods.¹⁷ While historians disagree over what a shift from public service means and when it occurred, my data suggest that the decline of the lawyer-statesman is more myth than reality. Despite these findings, there still may be reasons we want to support the legal myth of the lawyer-statesman’s decline. While historical accuracy is objectively quite important,, myths serve a valuable purpose in the profession’s self-identity and reawaken memories of qualities of a bygone age. The concluding remarks explore difficult questions of how to reconcile the legal profession’s normative requirements with the realities of contemporary practice.

This study aims to take a first systematic look at the lawyer in municipal government. It leaves many questions unanswered and subsidiary trails open for exploration;¹⁸ it is my hope that further research in New Haven or similar cities

¹⁵ *Infra* Part I-B (orations eschewing the corporation’s hold on lawyers).

¹⁶ This is an important distinction - during the early period of the nineteenth century most lawyers held sole-practitioner private practices whilst serving in public government. The change seen in latter years relates to the absence of the public government service in conjunction with the maintenance of some form of private practice.

¹⁷ There may also be indications that towards the later part of the century representation in government concentrated on judicial positions and civic-minded fraternal organizations that displaced or supplanted traditional government services. *See infra* Part III-E.

¹⁸ Future studies might examine more closely the trend of non-consecutive civic service over the course of the nineteenth century. As my work has indicated, the “ideal” of civic service participation, the lawyer-citizen, the lawyer-statesman, and its various other iterations remains vague and indefinite. An attempt to understand the motivations behind non-consecutive civic service positions and the give and take between solicitation for these positions and requests for vacancies to be filled by competent lawyers who happened to be on hand would contribute a lot to the field of legal history. While this study looks at the

will sharpen this body of knowledge and elucidate further debate. To date, such data-driven work in the field of legal socio-identity has not been undertaken separate from broader studies of political actors and groups. This study will begin to fill a gap in the field of legal history.¹⁹

I. HISTORIOGRAPHY OF THE LAWYER-STATESMAN: AN APPRAISAL

A. *THE IMPRECISE ROOTS OF DECLINE AND CONCEPTION OF THE IDEAL*

On a blustery June day in 1898 a select group of men sat, eagerly awaiting the Honorable Charles Andrews, ex-Chief Judge of the New York Court of Appeals, to deliver Yale Law School's seventy-fourth Commencement Address.²⁰ Andrews started where many orators will, with the lawyers of the revolutionary period's noble fight for civil liberties. From there, he focused more directly on the exigencies of all men steeped in the tradition of the law, bellowing that "[the] preservation of social order in America will depend largely upon the influence which shall be exerted by the members of the legal profession..."²¹ He spoke of lawyers drafting legislation, defending the weak, and shaping government policy, all means to re-appropriate their civic image that he claimed had become subservient to opportunistic grabs for corporate power and greed.²² He ended beseeching the youngmen of Yale Law School to remember that "it is never more important than now that the lofty spirit, the patriotic purpose and sense of public duty which animated [the early generation of lawyers] should be the controlling forces in guiding the conduct of the members of our profession."²³

In 1898, then, a crisis had already taken hold. Two years later Bourke Cockran in his Commencement Address harped on the same main theme, signaling the year 1900 to be a turning point, whereafter "the lawyer may play a part or disgrace himself in our civic life."²⁴ The lawyer's inquisitive nature was well-suited to public service. He could either help or hurt the government, but ties to the latter were,

nineteenth century shift, even less empirical work has been done on the twentieth century. New Haven in particular experienced large demographic shifts while maintaining a relatively steady total population-the lawyer in local government and his family background would be an equally fascinating follow-up study. For information on the twentieth century demographic shifts, see Norman I. Fainstein & Susan S. Fainstein, *New Haven: The Limits of the Local State*, in *RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT* 28 (Susan S. Fainstein et al. eds., 1986).

¹⁹ See, e.g., ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (2d ed. 2005). For a similar empirics-driven study of the recent stratification of the bar in Chicago offering good examples of surveys and means of presenting data, see JOHN P. HEINZ AND EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (2d ed. 1994).

²⁰ CHARLES ANDREWS, *AMERICAN JURISPRUDENCE: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE SEVENTY-FOURTH ANNIVERSARY OF YALE LAW SCHOOL, ON JUNE 27, 1898*, (2010).

²¹ *Id.* at 28.

²² *Id.* at 3.

²³ *Id.* at 30.

²⁴ Bourke Cockran, *Address at Yale Law School Commencement*, *New Haven Evening Register*, 3 (June 26, 1900).

for Cockran, inseverable. For these judges and learned men, the mark of the centennial symbolically characterized a change from dawn to dusk in the legal profession's relationship to government.

In his aptly named treatise on the issue entitled *The Lost Lawyer*, Anthony Kronman characterized the problem as one of value-loss.²⁵ He argued for a return to the belief that an outstanding lawyer possesses technical and practical skill; that whereas in the early nineteenth century lawyers wished to see themselves as men devoted to the public good while remaining humbly aware of the limitations placed on men of character by virtue of humankind and politics, this value has since disappeared in favor of a unilateral, technical skill more akin to paper pushing than to client advocacy.²⁶ This relic of a former era, the lawyer-statesman, devoted himself to deliberating how best to achieve the public good, and found spiritual and moral value in those deliberations so that his own practice stayed internally satisfying.²⁷ Kronman's statesman was not defined by his role in civic society; he remained a lawyer rather than legislator, but his expressed commitment to serving the public good in his practice internalized the statesman ideal. According to Kronman, this model disappeared in the late nineteenth century, but retained its appeal until the 1960s when even the implicit recognition of his virtues crumbled under the weight of newer theories like the scientist scholar.²⁸ Kronman's lawyer-statesman, in accordance with the YLS orators' statesman, met his end in the late nineteenth century.

Other historians place the death of the lawyer-statesman both much earlier and later than the turn of the century. Gordon, another leading legal historian, dated the end of the revolutionary, foundation of government period to 1860²⁹ with specialization and the shift away to public interest work performed outside the bounds of government really taking place from 1900 onwards,³⁰ although he considered that the influence of the remnants of an ethos of civic service continued to be discernible from 1900-1975.³¹ He, too, readily conceded that lawyers are quick to hark back to a time of perceived devotion to public service, perpetuating a "rhetoric of decline" that in no way has been proven in fact as a concerted, contemplated move away from civic-mindedness.³²

²⁵ KRONMAN, *supra* note 14.

²⁶ *Id.* at 2, 16.

²⁷ *Id.* at 54, 99.

²⁸ *Id.* at 16, 20, 316. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); KARL N LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1966).

²⁹ ROBERT W. GORDON, *The Independence of Lawyers*, FACULTY SCHOLARSHIP SERIES 60 (1998), available at http://digitalcommons.law.yale.edu/fss_papers/1361.

³⁰ ROBERT W. GORDON, *The Citizen-Lawyer-A Brief Informal History of a Myth with Some Basis in Reality*, [hereinafter Gordon, *The Citizen-Lawyer*] 50 WM. & MARY L. REV. 1169, 1196-1200 (2009) (claiming that the new citizen-lawyer works in the field of public interest as a "cause" lawyer for groups like the ACLU or NAACP, or works on "legalist projects" as part of pro bono practice); Gordon, *The Independence of Lawyers*, *supra* note 29, at 6.

³¹ *Id.*

³² *Id.* at 49-50. Gordon cynically goes on to suggest that a "speaker's lofty conception of professional ideals conceals a narrow or unattractive factional interest." *Id.* For more cyni-

Another advocate of an earlier-in-time theory was Robert Dahl, a leading political scientist local to New Haven, who briefly touched on the role of lawyers in government in his studies of mayoral candidates and city officeholders. He concluded that by the 1840s the lawyer had already phased himself out of a prime position in local government, along with the rest of the “professional or patrician” class.³³ His research showed the rise of the businessman, followed by the immigrant or “ex-plebe,” as the main stakeholders in New Haven city governance.³⁴

Looking back to Yale Law School commencement orations, examples of the fear related to the perceived shift in the profession support the idea that a fundamental shift in the profession’s civic responsibilities occurred in the early 1800s, rather than later. In his 1880 speech, the Honorable E.J. Phelps attacked lawyers who serve the law as a “trade” rather than a “profession,” and ended with another heartfelt entreaty: “[w]rite these words in letters of gold. An ambition to serve one’s country is a high and noble one and should be encouraged!”³⁵ The Honorable Dorman B. Eaton, a mere two years later, cast a disapproving gaze back to the year 1846, when judges started to become elected by popular vote rather than appointed with no partisan affiliation but purely based on merit, explaining that since that time the law wavered between two competing theories. The law was either for the service of the public, to uphold ideals of justice and rights for the underrepresented, or for the service of private individuals, to aid them in advancing their businesses and profit margin. He had nothing positive to say about the private side: “[i]f the study and practice of the law are like shoe-making, fiddling and beer-brewing, mere private matters concerning which only those in the business have a claim to be heard, then let us at once treat ... the lawyer as a tradesman, and not as an officer.”³⁶ Those living through moments of change attached specific dates such as 1846 or 1900 to pinpoint perceived shifts; those looking back on the trajectory of the profession spoke in bounded sets of years, choosing a precise rounded end date only to cabin off a longer period. Either way, because of the visceral character of the shift in the ethos of the legal profession no one in the field agreed on a defining the start of the decline. In short, the legal community has been struggling for an extended period of time over the ideal of the profession and its aspirations to embody a more public-minded image and spirit.

There are two hurdles in this story. First, there was a lack of understanding precisely what the identity shift meant. Orators spoke in variations of “government good, companies bad” language lacking any finer nuance. Kronman and Gordon had conceptions of the lawyer-statesman working in some capacity outside the

cism of the citizen lawyer lacking compelling evidence, see the theory that for many lawyers public life was used as a means to advance business and professional interests, in Gordon, *The Citizen-Lawyer* at 1187, advocating the theory that for many lawyers public life was used as a means to advance business and professional interests. Unfortunately, I cannot find records enough to suggest the mindset of nineteenth century lawyers fits or contests this image.

³³DAHL, *supra* note 19, at 12-13.

³⁴*Id.*

³⁵ E.J. PHELPS, ADDRESS TO THE GRADUATING CLASS AT YALE COMMENCEMENT, NEW HAVEN DAILY PALLADIUM 2, (July 1, 1880).

³⁶ Dorman B. Eaton, An Address to the Graduating Class of the Yale Law School: The Public Relations and Duties of the Legal Profession 18 (June 27, 1882).

firm or private practice, i.e. taking on pro bono-type cases in his private practice.³⁷ Dahl's lawyer-statesman only concerned himself with elected official positions, mostly those at the highest rungs of the municipality or state. Additionally, conflicting historiographical theories that do not fit the myth of the lawyer-statesman's decline, either asserting that lawyers never were as prevalent in politics as most believe or that lawyers had always been a driving force in politics even post-corporatization, give further proof of the absence of a dominant narrative framework to explain the development of the legal profession.³⁸

The second hurdle is the time frame's lack of clarity. Early-mid 1800s, early-mid 1900s, 1860s, 1880s, and 1890s were all proposed as turning points. In some respects it is impossible to accord a fixed point to this shift; my research will show that if anything the shift happened much more slowly than the urgency of public speeches and philosophical lamentations would suggest.³⁹ The extreme range of dates also suggests how independent competing theories in this field stand. Their failure to engage with one another and challenge existing notions requires a necessary second look at what is really occurring in the nineteenth century. For the purpose of this study, I will examine the lawyer-statesman as government office holder, the view taken by Dahl. I will bound the time frame in which a purported "shift" occurred by Dahl's 1840 earlier-in-time mark to the YLS judge orators' 1900 moment of truth and broadly ask if any substantial decline occurred in this period.

*B. THE LAWYER-STATESMAN IN TRIPARTITE SERVICE OF GOVERNMENT:
RE-EVALUATING THE DEFINITIONS OF PUBLIC SERVICE*

Part A's discussion of the competing historical theories of legal history's shift to private concerns underlines another important distinction: the meaning of statesman, citizen lawyer, public-mindedness, and the other terms used in debate. Kronman's lawyer-statesman concerns a theoretical ideal for how the lawyer comports himself in his legal practice;⁴⁰ Gordon's citizen lawyer at times also remains wedded to private practice infused with an ethos of public good.⁴¹ That ideal is

³⁷ Gordon, *The Independence of Lawyers*, *supra* note 29, at 60.

³⁸ See QUINTIN JOHNSTONE & DAN HOPSON, JR., AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND 30 (1967) (claiming that until 1967 a high number of legislators had always been bar members); MARK C. MILLER, THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS 57 (1995) (noting similarly a constant prevalence of lawyer-legislators in the United States). *But see* WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890-1930, 40 (1977) (arguing that the commercialization interpretation of the changing role of lawyers in the 1890s "romanticizes the pre-1890 bar's professionalism and disinterestedness... more than the historical record supports."). *See also infra* Part II-B (addressing theories related to non-judicial government service in particular).

³⁹ *Infra* Part II-C. *See also* Gordon, *The Independence of Lawyers*, *supra* note 29, at 17 (acknowledging the study of legal ethnographic history as a very speculative, fuzzy topic, on which few studies and primary materials exist and on which those materials that do exist treat only the metropolitan elite of the bar).

⁴⁰ KRONMAN, *supra* note 14.

⁴¹ ROBERT W. GORDON, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, [hereinafter Gordon, *The Role of Lawyers*] 11 THEORETICAL INQ. L. 441, 453-

near-impossible to chart or research absent private glimpses into the minds of lawyers. Even the type of office that lawyers were meant to hold is a disputed question. Surely, lawyers fill the ranks of the judiciary. Yet more importantly, was the lawyer-statesman ideal intended to serve in legislative and executive branches of government?⁴²

Contemporary and historical sources take widely divergent views on the ideal envisioned for a civic-minded lawyer, even when agreeing on the basic point that service in government is representative of the statesman. The lack of consensus indicates the absence of agreed parameters with which to frame this concept, the lack of understanding for the contours of the ideal that has been lost, and the need for a collection of ideas and initial attempts to harmonize existing literature. Most contemporary sources treat the ideal quite broadly, glossing over the particular branches of service or types of positions more suited to the lawyer-statesman.

One recurring theme in contemporary literature is the idea of lawyer as revolutionary founder of government. Gordon elaborated this ideal lawyer-revolutionary, leading movements for political liberalization and founding constitutional regimes as part and parcel of the profession. This vision expands the scope of the lawyer from an expert of the law to a creator of law to the next radical step-standard-bearer and destroyer of the *ancien régime*.⁴³ Such a view of civic lawyer as founder of a new world order certainly dovetailed with the founders of the first law school's mission statement. The school, in Litchfield, Connecticut, churned out nearly 1,000 lawyers at a time when the whole of Connecticut had no more than 100 lawyers to its name; one out of ten Litchfield graduates went into federal government.⁴⁴ The government had vacancies and could find no better place to fill its ranks than the graduates of an institution passing down common law precedents evoking stability, tradition, and respect for institutional values.⁴⁵

55 (2010). Cicero, for example, deemed the earliest humanist lawyer of Europe, will epitomize this type of lawyer.

⁴² Casting a wide net, I will look for examples in any type of service for the legislative or executive branches, part-time positions inclusive.

⁴³ Gordon, *supra* note 41, at 460 (citing the work of lawyers in the U.S., French, Indian, Pakistani, and South African constitutional regime changes as examples). See also DAVID BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* (1994) (cataloguing the role of lawyers in the French Revolutionary Period and the increasingly central roles they assumed in the day-to-day management of the uprising); W. Wesley Pue, *Introduction*, in *THE PROMISE AND PERILS OF LAW: LAWYERS IN CANADIAN HISTORY 1-16* (Constance Backhouse & W. Wesley Pue, eds., 2009) (framing the study of the lawyers in the Canadian context with a view to the profession's understanding of itself amongst the background of other common law nations and their foundings).

⁴⁴ MARIAN C. MCKENNA, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 78-80* (1986); Andrew M. Siegel, "To Learn and Make Respectable Hereafter:" *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978 (1998). For more detailed information, see LOOMIS & CALHOUN, *supra* note 11, at 187, which lists certain important graduates of the Litchfield Law School from a diverse background including but not limited to John C. Calhoun (U.S. Vice President), Marcus Morton (Governor of Massachusetts), Levi Woodbury (Governor of New Hampshire), William Ellsworth and Roger Sherman Baldwin (Governors of Connecticut), and William C. Dawson (U.S. Senator-Georgia).

⁴⁵ John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School*, in *HISTORY OF THE YALE LAW SCHOOL 23* (Anthony T. Kronman ed., 2004). See

The view was also shared by Max Weber, who argued that the main accomplishment of lawyers was the construction of a new world order modeled on a culture of secular rationality.⁴⁶ Yet the fact that lawyers served as revolutionary founders of government does not automatically imply that their profession would remain in long-term government service once the nation stood on more solid footing. It may simply be, as Gordon himself notes, a product of the inevitability of lawyers taking on government roles by virtue of the need to fill a void of qualified representatives.⁴⁷ The contributions of lawyers to revolutionary fervor is a matter for another work; for our purposes, it is enough to say that acceptance of the revolutionary lawyer-statesman model does not inform us about the post-revolutionary civic order and the lawyer's place therein.

Another model locates the fulfillment of civic service ideals in the provision of legal services to the poor and ethical and sound advice to a specific and tailored client base.⁴⁸ If aid to the poorer client base fulfills a role of equal representation and service to groups in need of public services, on extrapolation a case could be made that lawyers are qualified for and should be encouraged to enter legislative or constituent-based roles in government. Neither Gordon, nor his contemporaries, made such a leap. Gordon, in his introduction of the citizen-lawyer, swept broadly to catch all possible incarnations: "What makes them citizen lawyers... is that they... devote time and effort to public ends and values: the service of the Republic, their communities, the ideal of the rule of law, and reforms to enhance the law's efficiency, fairness, and accessibility."⁴⁹ The definition of the lawyer-citizen from these sources spreads wide rather than deep.

Lack of consensus on the substantive components of a lawyer's civic-mindedness are echoed in historical sources, most notably those very oration speeches in which lawyers who have achieved the ultimate status of statesman convey their interpretive sense of the value. Examination of the YLS oration speeches made from 1880-1905 referring to public service reveals different levels of support for the lawyer-statesman as executive or legislative officeholder. Of course, these speeches themselves were not without lofty, patriotic wording that suggested a role of lawyers outside the limited scope of client advocacy.⁵⁰ While no overarching consensus through time or word may be extrapolated, we do find a more specified vision of civic service imagined for the public lawyer.

Some of the leading figures of the time fully supported both legislative and executive public service. Judge Chamberlain spoke proudly of the fact that the

also Gordon, *The Independence of Lawyers*, *supra* note 29, at 18 (arguing that federal vacancies are one of the key reasons lawyers give to justify their position in upper political posts and as policy advisors, both in and out of government).

⁴⁶Gordon, *The Role of Lawyers*, *supra* note 41, at 461.

⁴⁷ Gordon, *The Citizen-Lawyer*, *supra* note 30, at 1184.

⁴⁸ *Id.* at 1178.

⁴⁹ *Id.* at 1169.

⁵⁰ See, e.g., Andrews, *supra* note 20, at 30 (quoting Edmund Burke to defend the lawyer as a man of many hats and the broad, general qualities of the study of law as virtuous to instruct young men in the art of a "lofty spirit, patriotic purpose and sense of public duty.") Burke was an Irishman and prominent member of the Whig party known for his support of the American revolutionaries and opposition to the French Revolution. See F.P. LOCK, EDMUND BURKE VOL. 2: 1784-97 (2006).

national Congress had, until that point, never failed to consist of a majority of lawyers.⁵¹ He vociferously expressed the opinion that law taught at Yale is best used in service of government.⁵² His post-Civil War plea was ripe with suggestion of lawyers as rebuilders of society, and he gave the lawyer a place in both the foundation of the republic and the continuation of the republic via extended service in government.⁵³ Thacher, in his speech entitled “Yale in Legislation,” also advocated for lawyers in non-judicial government positions.⁵⁴ In 1934 Justice Harlan F. Stone defined civic service as service “in the halls of legislatures or in the executive or administrative posts,” all the way down to “matters of sanitation and public health, public undertakings involving engineering knowledge and skill.”⁵⁵ Public undertakings would include civic commissions passing framework statutory regulations for public utilities, and also lawyer’s defense in service of poorer clients. Stone’s conception of public service he deemed the tradition most “cherished” by lawyers, a strong indication that by 1934 the revered service of the bar in its heyday encompassed a vision larger than simply community ethics in private practice or service in the judiciary.⁵⁶ Throughout the period of decline in question and far beyond, there are examples to suggest lawyers’ favored place in executive and legislative roles.

Others took a middle ground, finding the law helpful as a tool in legislative service but not so in the executive branch. Elihu Root in his 1904 YLS graduation address championed this position: “the study and exposition of existing laws, of course, tends to qualify men to be makers of law. And to a lesser degree to administer the law.”⁵⁷ This position spoke for those contemporaries who saw lawyers’ natural place as revolutionary foundation-layers, and those who saw lawyers as representatives of a certain populace whose voices may not be heard in constituent representation.⁵⁸ The middle ground weds legal training with its natural match of law creation legislatively, but, notably, does not simultaneously disfavor lawyers in the executive.

⁵¹ Daniel H. Chamberlain, Governor, S.C., Oration Before the Yale Law School at its Fifty-First Anniversary: on Some of the Relations and Present Duties of the Legal Professional to our Public Life and Affairs 8 (June 30, 1875) (specifying the number of lawyers to be a “high majority”).

⁵² *Id.* at 30.

⁵³ *Id.* at 33 (claiming the law finds its highest use in upholding and advancing the government of law).

⁵⁴ Thacher, *supra* note 6, at 10. (“Th[is] topic....calls to mind a host of sons of Yale who, as Senators, Representatives in Congress, Governors and State legislators, have wrought well, and done honor to their Alma Mater.”).

⁵⁵ Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 3 (1934).

⁵⁶ *Id.* at 2.

⁵⁷ Elihu Root, *Some Duties of American Lawyers to American Law*, 14 YALE L.J. 58, 65 (1904). He continues, “The lawyer’s habit of speaking and of thinking on his legs is useful in a legislative body... it is much easier and more natural for the lawyer, with his varied experience and his habit of transplanting himself frequently from one set of interests and ideas to another, to meet the different requirements of public office, than it is for any other member of the community.... The profession of law, therefore affords the most promising route to high office, not merely upon the bench but in the legislative and executive branches of government.”

⁵⁸ See *supra* Part I-B.

Still others took a more hesitant stance towards lawyers in government, particularly lawyers who served in the judiciary and crossed over to the electoral partisan side of politics. For example, the Honorable Judge Eaton in 1882 lamented the osmosis from judge to political office and vice versa, calling instead for the judiciary and legal profession to remain “unbiased in the estimation of the people.”⁵⁹ Burke Cockran’s 1900 speech clarified his particular vision of the lawyer’s civic duty as specific to the judiciary, affirming the ultimate lawyer statesman as one who “takes parts in the exercise of that great judicial statesmanship... independent of [the] legislative or executive.”⁶⁰ His vision included the lawyer as client advocate, challenging in court questions that affected the citizen’s place in the State and the administration of State agencies, but beyond the use of the law in its most known form he intentionally separated the judiciary from other branches.⁶¹ For Cockran, then, civic-mindedness entailed either those values entrenched in good client advocacy, or the occupation of judge point blank.⁶² Judge Daniel Lord readily conceded that legislative and executive functions had been subjected to an aura of perceived appropriation by members of the bar and disliked it, bluntly stating, “it is by no means evident that [the bar’s] professional studies and habits, without many additions, qualify them to be either politicians or statesman.”⁶³ Similarly, studies of ethics and the law in the mid-1900s found the public to share common perceptions of the lawyers’ ill-fitted talents for government service; as one lawyer said, people “seldom think of the lawyer as an essential part of our scheme of things.”⁶⁴ Another practitioner offered reasons from the layman’s perspective to keep government free from lawyers- lawyers used their brilliantly cunning skills to warp objectives to their personal ends. In short, a distrust of lawyers from outside the profession fed the view of many that lawyers should not serve in government.⁶⁵ Indeed, early in the century Louis Brandeis himself seemed on the fence about the role of lawyers in government given their perceived shift to the

⁵⁹ Eaton, *supra* note 36, at 28.

⁶⁰ Cockran, *supra* note 24, at 3.

⁶¹ *Id.* at 2.

⁶² By the early 1900s the lawyer’s place in civic society was even being compared and found wanting to that of members of the medical profession, according to remarks made by Columbia Law Professor Adolf A. Berle, Jr. To the extent that one considers the medical profession’s tradition of public service to be in its service to needy clients, this analog vision of the lawyer’s role would again focus just on the actual practice of law and its reach to a broader sphere of need-based clients. See Gordon, *The Independence of Lawyers*, *supra* note 29, at 4 (referring to Professor Adolf A. Berle, Jr.).

⁶³ Daniel Lord, Oration Before the Phi Beta Kappa Society at Yale College: On the Extra Professional Influence of the Pulpit and the Bar 9 (July 30, 1851). Lord’s envisioned difference between a politician and statesman remains unclear, although he seems not to have a favorable sentiment for either. Further in his speech he remarks, “On the...bar...society depends, and ever must greatly depend for the establishment, protection, and defence of its internal principles, its social order and its national advancement.” *Id.* at 10. Lord’s conception of lawyers in the civic tradition would relegate them to their private profession, and have the civic-ness remain part of their internal ethics and value-based services.

⁶⁴ PHILLIPS & MCCOY, *supra* note 6, at 195.

⁶⁵ *Id.* at 196. (“The people of this nation must never become prey to the brilliant professional who warps the law to his own ends or to the purposes of those whom he serves.”).

dark side of corporate, business interests. He worried that personal and business motives would interfere with impartial civic-minded use of government power.⁶⁶

Yet Brandeis' view still ultimately assumed a place in the legislature and policy realm for lawyers even in 1914, and enough other orators shared his sentiments.⁶⁷ Interestingly, the recurring theme of public service in the Yale Law School Commencement remarks from the period of 1880-1910 suggests the idea received much traction, debate, and importance as a central feature of the practice of law.⁶⁸ Further non-oration based indicators give stronger evidence to the vision of the lawyers' civic service role envisioned a place in legislative and executive functions. First, in the history of Yale Law School, the decision to wed the school with the four year college was intended to give a legal education broader than the confines of the common law and, in so doing, prepare students for public service and other intellectual pursuits.⁶⁹ A broad legal education would inform students more in the fields of history and principles that framed the law in conjunction with doctrine to make students not just lawyers, but "intelligent and influential American citizens."⁷⁰ The very first graduates of the school confirm the inculcation of the value of public service within the closed law school community; ten became governors, three cabinet officers, thirty-one representatives in Congress, with Senators spanning five states.⁷¹ Harlan Stone in his address on the public influence of the bar re-emphasized this primary function of legal education when he proclaimed, "there is grave danger...if [lawyer's education] be directed wholly to private ends without thought of the social consequences, and we may well pause to consider whether the professional school has done well to neglect the inculcation of some knowledge of the social responsibility which rests upon a public profession."⁷²

⁶⁶ Louis Brandeis, *The Opportunity in the Law*, in BUSINESS-A PROFESSION 329, 337-39 (1933). In a 1914 speech, he scathingly commented that lawyers "not only failed to take part in constructive legislation... but they have often advocated, as lawyers, legislative measures which as citizens they could not approve, and have endeavored to justify themselves by a false analogy."

⁶⁷ Stone, *supra* note 55, at 6, nicely characterizes Brandeis' view of the traditional lawyer as one who serves as "policy intelligentsia... both within and without the context of advising clients," offering a space for the lawyer in a civic role in his interpretation. *See also* Gordon, *The Independence of Lawyers*, *supra* note 29 (characterizing Woodrow Wilson's remarks to the ABA with similar visions for the place of the lawyer as a policy advocate both in and out of government : "[E]very question of public policy seemed sooner or later to become a question of law, upon which trained lawyers must be consulted" (quoting Woodrow Wilson, *The Lawyer and the Community*, in 21 THE PAPERS OF WOODROW WILSON, 66-67 (A. Link ed., 1976))). *But see* in the same article a quote from the FEDERALIST NO. 35 at 221 (A. Hamilton), arguing as a precondition to the lawyer's policy advocacy his independence from dominant factions of civil society, suggesting a more independent, indirect measure of advocacy distanced from direct participation in politics.

⁶⁸ *See, e.g.*, List of Speeches Delivered at Yale Law School, 1850-1950 (on file with the Yale Law Rare Books Collection).

⁶⁹ FREDERICK C. HICKS, HISTORY OF THE YALE LAW SCHOOL TO 1915 135 (2001).

⁷⁰ Thacher, *supra* note 6, at 9.

⁷¹ HICKS, *supra* note 69, at 136.

⁷² Stone, *supra* note 55, at 14.

Second, the founding of the first law schools independent of broader educational prerogatives stemmed from visions of constructing a safe haven for those Federalists swept from power in the Revolution of 1800.⁷³ Litchfield Law School would be a place where these elites who shared a particular political ideology could concentrate their power, form bonds of friendship, and maintain a place for themselves in the new American higher education.⁷⁴ Jefferson's University of Virginia would then be founded as a bastion for Republicanism, and so it became that institutions of law from the outset were centrally tied to preserving political power.⁷⁵ More specifically, these institutions sought to preserve legislative and executive power. In sum, enough evidence suggests that the civic role conceived within the profession for the lawyer was one intrinsically tied to ethics in client service, proactive roles in the judiciary, and service in legislative and, to a lesser extent, executive branches. All of these roles acted in tandem to create a meta-level idea of public service supported both by practitioners and the manner in which legal education developed as a placeholder of broader societal interests.

C. THE LAWYER-STATESMAN IN ALTERNATIVE CIVIC SERVICE POSITIONS

What about the vision of civic service exemplified by work for third-party groups, notably the church, charitable organizations, or private philanthropic foundations?

Little suggests that the idea of civic service attributable to the profession of law meant to encompass these organizations. Aside from the value of participation in such community groups independent of trade, no records mention the skills of lawyers as inherently useful in service of philanthropic engagements. Two of the speeches concerning public duties of the law touched on religion. The first, in 1851, spoke of the bar and pulpit as dual standard bearers for a society's growth and progress.⁷⁶ Intimating the social value of both organizations, however, did not stretch so far as to impute an intersection of employment to either sector.⁷⁷ The second speech, given in 1880, expounded on the values of Christianity which infused the tradition of the common law as those moral, noble ideals that gave the law an almost sacrosanct character.⁷⁸ Here, service to a house or worship is not asked of the lawyer; rather, Phelps suggests that by practicing the law in its intended manner the lawyer embodies Christian principles that are to be commended. If civic virtue borders on the notion of service to a variety of groups in a particular society, the lawyer in his basic practice both literally and figuratively lives out a form of civic virtue in all transactions he undertakes.

⁷³ Siegel, *supra* note 44, at 5.

⁷⁴ *Id.*

⁷⁵ Jay Feinman & Wythe Holt, Book Review, 7 J. LEGAL PROF. 233 (1982) (reviewing DENNIS R. NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION (1980) (noting that Nolan's book is lacking in depth on the matter of the formation of the American legal profession specifically because it has failed to address the profession's consideration of its place in politics and the phenomenon of law school cum political training ground)).

⁷⁶ Lord, *supra* note, at 9.

⁷⁷ *Id.*

⁷⁸ Phelps, *supra* note 35, at 2.

As for the secular third-party organizations, charitable organization membership as recorded in City records reveals an overwhelming if not total usurpation of the field by women.⁷⁹ Records on these groups are sparse; those that do exist date back only to the mid-1870s and give little insight into the development or patterns of change in organizational structure from the earlier periods of the nineteenth century.⁸⁰ Private philanthropic foundations face a similar fate of spotty records and formation in the latter half of the nineteenth century. One possible avenue may be the growth of fraternal organizations, which performed roles similar to those of the all-female charity groups as well as roles traditionally part of the private sector such as issuance of life insurance.⁸¹ Membership on civic boards under the executive branch such as beautification commissions and committees on street lamps and paving, would certainly have been included in the ideal of public service generally understood at the time. These organizations fit into a quasi-third party category of civic participation, service to the government for a specified duration and appointment. On the other hand, these positions could easily fall under the scope of part-time executive actions.⁸² No primary records suggest these positions on various topics valuable to public utility were envisioned to fit within the bounds of the lawyer's public service ideal.

II. AN EMPIRICAL LOOK AT LAWYERS IN GREATER NEW HAVEN

Collectively, then, despite the contested opinions on the legal diaspora from civic service to private interests, a generalized understanding of the phenomenon bounded the shift from the 1840s-1900 and defined the shift as a disappearance from roles in government (judiciary, legislative, or executive).⁸³ The internal conflict of the lawyer imbued with a sense of civic duty in his private practice has also

⁷⁹ See, e.g., MEMBERSHIP LIST FOR ORPHAN AID SOCIETY: NEW HAVEN (1874) (on file with the Whitney Library at the New Haven Museum).

⁸⁰ *Id.* See also Floyd M. Shumway & Richard Hegel, *New Haven in 1884*, 30 J. NEW HAVEN COL. HIST. SOC'Y 40-49 (Winter 1984) (listing private charities to include the "Home for Aged and Destitute Women," "the Young Women's Christian Association," and "the Ladies' Seamen's Friend Society").

⁸¹ See *infra* Part III-E (discussing the possibility of fraternal organization membership replacing other traditionally civic duties with less time commitment). Records on fraternal organization membership may not be publically available, see Shumway & Hegel, *supra* note 75, at 49 (noting that "this was perhaps the peak period for secret fraternal organizations..."). For a similar study on fraternal organizations generally, see Mary Ann Clawson, *Fraternal Orders and Class Formation in the Nineteenth-Century United States*, 27 COMP. STUD. SOC. & HIST. 672 (1985).

⁸² From New Haven records, it is clear that membership on these committees greatly overlapped with councilmen and assemblymen position holders, groups that are a focus of this study. See, e.g., PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY 348 (1860) (including committees such as Finance, Streets, Numbering Streets, Police, Nuisances, Water, Printing, Licenses, and Sewerage).

⁸³ We might label this the "Gordon-Dahl" myth, because between those two historians we are given the date range and the conception of lawyer-statesman as government officeholder in all three branches of government. However, this handy label remains unsatisfactory because it pigeonholes Gordon's diverse works and theories on the lawyer-

been noted, although for purposes of an empirical look this aspect of civic-ness will be excluded. From this broad framework, I can begin to analyze these claims in a controlled setting.

A. WHY NEW HAVEN: A BEACON OF HOPE FOR LEGAL AFFAIRS

We first must ask of the reasons to use New Haven as a test study. What are the unique features of the city or broad similarities of the city to its compatriots that make it suitable if not desirable as the focus of this research?

First, New Haven has already been the subject of several significant political and demographic studies. These studies provide statistics compiled using census data to track changes in the city's political make-up that serve as useful tools for theorizing reasons for noticed change, or lack thereof, of the role of lawyers in government.⁸⁴ Second, New Haven is known for its repositories of original source data and town records that stand unrivaled by many other colonial cities.⁸⁵ For my purposes, this meant full lists dating back to 1830 on all practicing lawyers in the city and all members of city government.⁸⁶ Third, New Haven and, more broadly, the state of Connecticut are the forerunners in legal education and training. The first established law school in the country sat in Litchfield, Connecticut, and Yale Law School came shortly thereafter.⁸⁷ Many of the initial graduates of these schools were natives of Connecticut who settled in the state to practice law.⁸⁸ In fact, one might expect the prevalence of lawyers in government positions to be higher than average in other comparably sized cities precisely because the state began to formally train lawyers early on. On the other hand, the proliferation of lawyers would, *mutatis mutandis*, in statistical measurements create the appearance of fewer lawyers as a percentage entering the field of service. Litchfield's success, though, ultimately may simply show the innovation of lawyers in the state of Connecticut, rather than an anomalous output. The school

statesman, as well as his dates of the decline, into a package much simpler than the one to which he himself advocates. It also encompasses the machinations and observations of many of the judges and practitioners of the nineteenth century who were much more willing to attribute the lawyer-statesman ideal to specific governmental roles and who are not noted in the name of the myth. As an agglomeration of the broadest features of many scholars' theories in order to capture to the extent possible empirical shifts given available data, the hypothesis I am challenging defies a neat label.

⁸⁴ See DAHL, *supra* note 19; ROLLIN G. OSTERWEIS, THREE CENTURIES OF NEW HAVEN, 1638-1938 (1953). These studies treat lawyers in politics peripherally.

⁸⁵ Sources date back to the Colonial Period. See, e.g., NEW HAVEN TOWN RECORDS (Franklin B. Dexter ed., 1919) (dating indexed records back to 1649); RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, 1638-1649 (Charles J. Hoadly ed., 1857) (indexing records kept by the first colonists of New Haven).

⁸⁶ See, e.g., *Town and City Directory*, CONNECTICUT HERALD (Jan. 5, 1830) (on file with the Whitney Library at the New Haven Museum).

⁸⁷ Siegel, *supra* note 44, at 1.

⁸⁸ *Id.* See also BIOGRAPHY OF THE GRADUATES OF YALE LAW SCHOOL: 1824-99 (1907) (recording the birthplace and town of current residence circa 1907 of Yale Law graduates).

closed its doors in 1833, approximately the starting date of my current study.⁸⁹ Fourth, New Haven's size provided a manageable set of data to contrast and compare; the number of practicing lawyers in the city by 1890 reached 154,⁹⁰ enough lawyers to even out any outlying trends but not so many as to make cross-referencing lawyers to government positions excruciatingly tedious. Fifth, Yale Law School's place in New Haven provides a source for the framework of the theoretical place of lawyers taken from speeches made directly to Yale graduates, many of whom would practice in New Haven or the greater Connecticut area.⁹¹ In the 1800s, the law school's ties to New Haven were great and transmission of ideas from the bar to the classroom and vice versa was natural and organic. Nothing better demonstrated this than the housing of the Law school's library in the New Haven Courthouse from 1873 onwards, providing a large enough space for the library to grow and for the public use by New Haven lawyers who previously trekked to Hartford to use the public law library.⁹² Sixth, as citizens of a titan of industry and beneficiary of the merger of the New York New Haven Railroad in 1872, New Havenites embraced corporate law and the rise of railroad law early on, fueling the prevailing theory that the rise of private firms stunted the lawyer's interest in statesmanship.⁹³

On the other hand, the rise of business practices, like the relatively high proportion of legal services in the state, may be evidence of the unique, non-representative quality of the town and state at the time.⁹⁴ Early onset and strength of both trends of development of law schools and corporate law might in the end have evened themselves out. The state's unique moniker of the Constitution State may have contributed to a statewide collective narrative that favored the development of the lawyer-statesman; conversely, it could be argued that all New England states hold fast to a utopian view of the founding and appropriate the lawyer-statesman ideal into their own statewide discourse.⁹⁵ Still, for all the possible pitfalls of using New Haven as a test case, the wealth of evidentiary materials available and countervailing biases in favor of lawyers in government and rise of big business present useful and necessary tools for a preliminary study and suggest that a sharp and dramatic shift might be more apparent in New Haven than in cities with less extreme manifestations of these trends.

⁸⁹ See *Langbein*, *supra* note 45, at 29. Langbein proposes four reasons for Litchfield's untimely demise: its proprietorship format, its "archaic pedagogy," the lack of philanthropy, and its isolation. *Id.* at 30.

⁹⁰ NEW HAVEN CITY YEARBOOK 577-79 (1890).

⁹¹ See *supra* note 68 (listing all of the relevant addresses given at the commencement ceremonies of Yale Law School roughly from 1880-1900); *supra* note 88 (cataloguing the most current address of Yale Law School graduates through 1907).

⁹² FREDERICK C. HICKS, YALE LAW SCHOOL: 1869-1894 INCLUDING THE COUNTY COURT HOUSE PERIOD 51-3 (1937).

⁹³ See PHILIP C. BLAKESLEE, A BRIEF HISTORY LINES WEST OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (1953).

⁹⁴ ROBERT F. CAVANAUGH, FROM THE COLONIES TO TODAY: OVER THREE CENTURIES OF LAW AND LAWYERS IN NEW HAVEN (2007) (stating the Civil War brought boom times to Connecticut industry, but as New Haven's economy grew so too did its number of lawyers).

⁹⁵ *About Connecticut*, THE OFFICIAL WEBSITE OF THE STATE OF CONNECTICUT, <http://www.ct.gov> (last visited Apr. 15, 2013).

B. EXPLANATION OF THE STUDY'S METHODOLOGICAL APPROACH

To test the veracity of theories surmising lawyers' declining civic capital, I compiled data both at the state and local levels. At the state level, I looked at the positions of Governor and Lieutenant Governor over the period of roughly 1830-1909. At the local level, I used decennial data sets of practicing lawyers in New Haven in 1830, 40, and so forth, up to 1890, and cross-referenced these names with the names listed in City Yearbooks for the positions of Alderman, Councilman, and Mayor to see trends in the number of those positions held by lawyers over time.⁹⁶ For the period from 1850-1860 I examined data yearly, so as not to miss more fine grain changes based solely on the decennial figures.⁹⁷ 1830 was the first year in which newspaper records of practicing lawyers are on file with the New Haven Historical Society.⁹⁸ 1890 is the first year that the population of lawyers reaches over 150; from then on cross-referencing becomes significantly more difficult and there is much less fluctuation in population or bar membership between 1890-1900.⁹⁹ I also used the law lists to track lawyers' average client population, change in bar membership decennially based on family name, and, for the first half of the nineteenth century, looked at each lawyer individually to get a sense of what exactly civic participation from the demand side entailed. My last set of data came from biographies of the Yale Law School graduates, where I tallied for civic service participation as broadly defined in Part 1-B.¹⁰⁰

⁹⁶ See *Address of the Mayor and Annual Reports*, CITY OF NEW HAVEN 76 (1862); NEW HAVEN CITY DIRECTORY 163 (1841); NEW HAVEN CITY DIRECTORY 333 (1850); NEW HAVEN CITY DIRECTORY 389 (1861); NEW HAVEN CITY YEARBOOK 6-7 (1871); NEW HAVEN CITY DIRECTORY 410 (1872); NEW HAVEN CITY YEARBOOK (1880); NEW HAVEN CITY YEARBOOK 577-79 (1890); NEW HAVEN CITY YEARBOOK (1901); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1840); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1850); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1860); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY 87-89 (1871); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1880); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1890); PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY (1900); *Town and City Directory*, CONNECTICUT HERALD (Jan. 5, 1830).

⁹⁷ See NEW HAVEN CITY YEARBOOK 89 (1852); NEW HAVEN CITY YEARBOOK 76 (1853); NEW HAVEN CITY YEARBOOK 6-7 (1854); NEW HAVEN CITY DIRECTORY 7-8 (1855); NEW HAVEN CITY DIRECTORY 76 (1856); NEW HAVEN CITY DIRECTORY 111 (1857); NEW HAVEN CITY DIRECTORY 115 (1858); NEW HAVEN CITY DIRECTORY 120 (1859).

⁹⁸ *Town and City Directory*, *supra* note 96.

⁹⁹ For these reasons I declined to extend the study out to the rounded close of century marker; I am confident that adding the final column of 1890-1900 would not have changed the findings by any calculable degree.

¹⁰⁰ The City Directory in 1840 listed Ammi Harrison, a woman, under practicing attorneys. PRICE AND LEE'S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY 111 (1840). She is also listed in a charitable organization as Mrs. Ammi Harrison and never appears again in the City Directory, see *supra* note 79. This indicates there may be certain oversights in the lawyers listing. Also, lawyers who left New Haven to hold state or federal civic positions are not included in the census count of active lawyers and this may skew the numbers slightly.

C. FINDINGS

My findings significantly challenge two prevailing theories of legal history: 1) that prior to the mid-1800s government was predominantly shaped by the influence of lawyers and 2) that towards the end of the 1800s this dynamic suddenly reversed course when lawyers took a mass exodus from civic office.

Appendix A provides the data set used for Table 1, which lists the percentages of lawyers as governors and lieutenant governors of Connecticut from 1827-1909.¹⁰¹ An analysis of those findings is re-packaged in Table 1, below:

Table 1: Governors and Lieutenant Governors of Connecticut in Law, 1827-1909¹⁰²

Total Governors	36	Total Lieutenant Governors	31
In Law:	22	In Law:	12
		No info:	8
Total:	61%		52%
1827-1858	87.5%		90%
1866-1881	57%		33%
1883-1909	38.4%		16.6%

There is no correlation between state electoral officeholders and party affiliation. Democrats, Whigs, Americans, and Republicans all contributed lawyer candidates over the course of the century. If the vision of the law school breeding political elites initially stemmed from Federalists hoping to form a bastion against the tides of Republicanism, the theory of law as beneficial to civil service migrated

¹⁰¹ The term “mogp” found in Appendix 1 stands for “many other government positions,” a term used to indicate a Governor or Lieutenant Governor’s ongoing career of public service.

¹⁰² *Governors of Connecticut*, CONN. STATE LIBR., <http://www.cslib.org/gov/> (last visited Apr 15, 2013). Governors and Lieutenant Governors with no records available were discounted from total percentages. “In Law” refers to lawyers either qualified through apprenticeship or law school as stated in CONNECTICUT STATE LIBRARY records. Neither position was full time. See CONN. GEN. STAT. § 3-2 (1965) (Statute changed to require Governorship be a full-time position); Brian Lockhart, *Is the Lt. Governor’s Position a Waste of Taxpayer Dollars?*, POLITICAL CAPITOL: CT NEWS (Apr. 23, 2010), <http://blog.ctnews.com/political-capitol/2010/04/23/is-the-lt-governors-position-a-waste-of-taxpayer-dollars> (recounting the part-time nature of the lieutenant governor position even as it currently exists). Total percent of lieutenant governors does not include those without information found. Number of lieutenant governors does not repeat those lieutenant governors who later became governors.

to all political camps not long after the first law schools' foundings. This helps even the field of potential candidates for lawyers in civic positions; were the ideal of civic-lawyer unique to one political party, trends in lawyers' civic participation would vary according to strength of party and add additional factors to offset any recorded changes. The list of gubernatorial candidates affirms that this factor is trivial, as do bipartisan convocations drawn from the Yale Law School commencement orations.¹⁰³

Second, as suggested by the acronym "mogp," referring to governors' roles in "many other government positions," lawyers played their hand in politics during non-consecutive terms in non-hierarchical positions, dabbling in politics on the side.¹⁰⁴ Although years in public service are not recorded in either Appendix A or Table 1, biographical histories used to construct these tables confirms the transitory nature of the gubernatorial candidates' public service record.¹⁰⁵ Rhetorically the great-lawyer statesman took on airs of fixing government, suffusing public office with experienced men of higher reasoning, and embodying a strong commitment to service that implied a certain level of time and effort. However, subsequent findings dispute the myth's conceptually heightened devotion to public service by proof of the staggered time of entrance into service, the part-time nature of the work, and the non-hierarchical route to the top.¹⁰⁶ The notion that in the golden days of the early nineteenth century lawyers commitment to civic service took on a pervasive, intense quality to be revered and harkened back to in times of despair lost a small piece of its force thanks to the findings of Table 1.

Third, while the proportion of lawyers in the governor and lieutenant governor positions did decline from the periods of 1827-1866 and again from 1866-1883, the small sampling size magnifies the change in percentages but still reveals that from the period of 1883-1909, fully thirty-eight percent of Governors of Connecticut had studied the law. This is by no means indicative of an absence of lawyers in the civil service, at least at the high official State level. The Lieutenant Governor's drop in lawyers from ninety percent to sixteen-percent suggests that in lower positions of government, lawyers did exhibit less of a presence as the century wore on to an extent not noticed in positions traditionally associated with a certain level of prestige and power, such as the State Governorship. While both positions were part time, the Governorship by its very nature and scope of duties encompassed greater responsibilities than the Lieutenant position.¹⁰⁷ We might expect that the greater private commitments of lawyers in the late nineteenth century would entice lawyers wanting to remain in public service to occupy the less time-consuming positions such as lieutenant governor. Table 1, however, proves this not to be the case.

¹⁰³ See *supra* Part I-B.

¹⁰⁴ See Appendix 2 (suggesting much more clearly the hodgepodge nature of Yale Law School graduates' public service).

¹⁰⁵ *Id.*

¹⁰⁶ Many of the "mogp" positions noted in App. A came before and after the governorship and did not track a steadied rise in experience and level of responsibility on the way to attaining the top position of state office.

¹⁰⁷ See generally CONN. GEN. STAT. § 3 (2013) (describing the Governorship and Lieutenant Governorship responsibilities).

The ideal of the lawyer-statesman continued to be a rallying cry for a non-trivial amount of lawyers even by the end of the century; a statue of Richard Hubbard, Governor of Connecticut in 1877 at the Capitol Building bears the inscription: "Lawyer, Orator, Statesman."¹⁰⁸ Moreover, the most precipitous decline in lawyers at the position of governor and lieutenant governor occurred around the year 1860; this, however, is inconsistent with similar shifts at the local level. Table 2 charts the comparative shifts in the population of lawyers serving as mayor of New Haven:

Table 2: Mayors of New Haven in Law, 1827-1908¹⁰⁹

Total Mayors	33
In Law:	12
No Info:	1
Total:	37.5%
1827-1860	57%
1863-1881	0%
1883-1908	40%

By this measure, a complete absence of lawyers starting in 1860 then buoys back to a forty percent rate of lawyers serving as mayor at the turn of the century. Again one must take into account the small sample size. This data still counters the very claim Dahl makes with the same data that the professional and patrician classes, including lawyers, were excluded from public office post-1860 with the rise of the business and later his coined "ex-plebe" classes.¹¹⁰ A comparably middling rate of lawyers serving as mayor from 1827-1860 and again from 1883-1908 contests prevailing notions of lawyers absence from civic duties in the latter time period; numerically, both the governorship and the mayoral position of New Haven hovered at around forty percent legally trained office holders at the turn of the century. Less than the figures during the period of 1827-1860, a forty percent showing gives little reason to posit a crisis in the legal community with regard to civic values or an absence of lawyers from their traditionally viewed place as public officeholders.

¹⁰⁸ *Richard D. Hubbard*, CONN. STATE CAPITAL TOURS, <http://www.cga.ct.gov/capitoltoours/photohtmpages/StatuaryPhoto6.htm> (last visited April 15, 2013).

¹⁰⁹ See DAHL, *supra* note 19, at 12 (providing a full chart listing all the Mayors of New Haven, their political parties, and years in office). Appendix A's format is based off of this chart.

¹¹⁰ *Id.* at 13.

Where Did All the Lawyers Go?

A look at the total number of lawyers as local aldermen and councilmen produces an even shallower case for the linear downfall of the lawyer-statesman.

Table 3: Lawyers as New Haven Councilmen and Aldermen, 1840-1890¹¹¹

Year	Aldermen	Aldermen-Lawyers	Councilmen	Councilmen-Lawyers
1841	4	1	20	0
1851	4	1	20	0
1860	6	1	24	2
1870	14	1	28	4
1880	24	3	36	5
1890	24	2	36	0

Roughly speaking, the numbers for aldermen and councilmen with legal training in New Haven produce no trend changes over the course of 1841-1890. Very few aldermen and councilmen were lawyers in the early 1800s, and just as few served in those positions by the end of the century. One might suspect a shift out of these lesser local government positions over the course of the century, at least to a degree more noticeable than in the mayoral or governor ranks, but instead we see a pattern of limited civic engagement in these executive branch oversight positions and no change in the diversity of zoned district from which the representatives are drawn.¹¹² In any one year, lawyers were not the prime movers and shakers in local government.¹¹³ A fine grain look at the period from 1853-1860 confirms these findings and quells claims that the decennial cut of data does not accurately account for trends that may appear in non-rounded years:

¹¹¹ See *supra* notes 97 for City Directories used to compile data. Note that City Yearbooks listing Councilmen and Aldermen by name for 1830 and 1840 were not found, thus explaining why 1841 begins Table 3.

¹¹² See *infra* Part III-D for the proposal that an increase in immigrant population, settling in the outer districts, was one hypothesized reason for a shift of lawyers out of the public service. The few lawyers who did serve as aldermen or councilmen throughout the 1800s came from all districts; records do not show any noticeable group concentrated in the Districts 1-4. See *supra* note 87.

¹¹³ The record of zero lawyer councilmen in 1890 looks like a steep drop off. More data points would be really helpful here, but for my purposes the consistency of the minimal impact of lawyers throughout the century is most relevant.

Table 4: A Fine Grain Look at Lawyers as New Haven Councilmen and Aldermen, 1853-60¹¹⁴

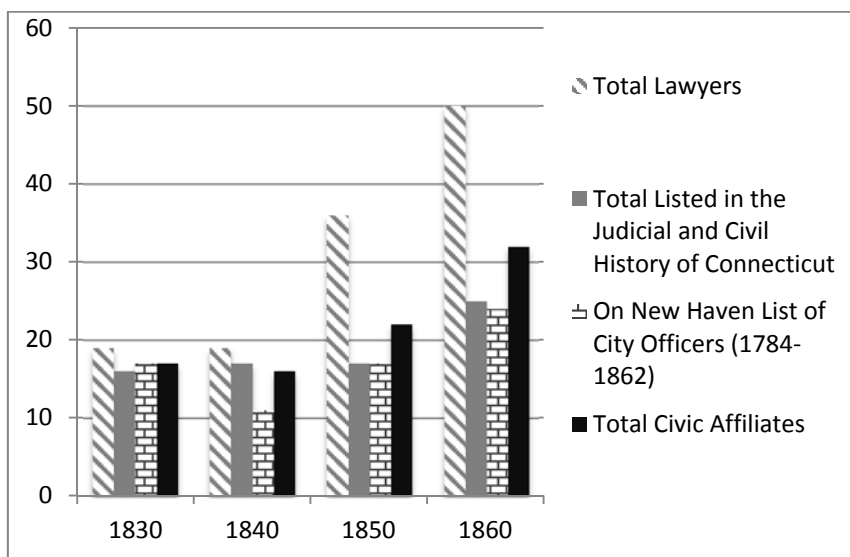
Year	Aldermen-Lawyers	Councilmen-Lawyers
1853	0/4	2/20
1854	0/4	1/20
1855	1/4	0/20
1856	1/4	0/20
1857	0/6	0/24
1858	0/6	1/24
1859	1/6	1/24
1860	1/6	2/24

As shown in Table 4, the number of lawyers serving as aldermen and councilmen from year to year was at a consistent plateau hovering around zero, with one or two lawyers entering the positions periodically. A decline in lawyer-statesmen in these offices could not occur without a surplus of lawyers to begin with.

What happens when we consider the place of the lawyer-statesman from the supply side, rather than from the demand side of available government positions? In this case, we can look individually at all practicing lawyers in New Haven and consider their roles in the community. I cast the net wide to include affiliations of statesmen that include legislative, executive, and judicial positions. If lawyers in the early 1800s were not dominating legislative or executive branches, and if by the end of the century their relative participation in these roles remained non-trivial or at least did not precipitously decline as history would have us believe, from the supply side how common was it for lawyers to have a track record of public service?

¹¹⁴ For sources used to compile data, see *supra* note 97. I begin with 1853 because those records were easiest to acquire. There is no particular need to see the whole decade as seven years consecutively is enough to show a yearly rate of progression.

Chart 1: New Haven Lawyers in All Civic Positions¹¹⁵



This chart seems to confirm some of the more traditional views of the decline of the lawyer statesman. It looks as though, by as early as 1850, stratification starts to form between the rising number of lawyers and the growth in what are termed “civic affiliates.”¹¹⁶ Although not listed on the chart, the growth of the population of lawyers in the county¹¹⁷ rose by almost seventy percent in a decade, and we

¹¹⁵ NEW HAVEN CITY DIRECTORY 163 (1841). (includes every lawyer cross-listed in the City Yearbook as a Justice of the Peace. Non-registered lawyers are equally noted to serve in the position of Justice of the Peace; for the purposes of calculating lawyers in civic positions this position was not included.) The number of lawyers and their government positions are cross-referenced for the year in which they are labeled and all previous decennial years. I run the risk of having not accounted for certain practicing lawyers who later held government positions, and there is reason to suspect for many this would be so. Chart 1 only measures lawyers in civic positions until 1860. By 1870 the explosion of lawyers makes it difficult to continue cross-referencing with any accuracy. In addition, the city records for holding of government office are synthesized only up to 1862. The term civic affiliate represents the total number of lawyers listed in both the Judicial History, LOOMIS & CALHOUN, *supra* note 11, and the New Haven list of city officers, *supra* note 96, which includes the positions of councilman, alderman, city clerk, mayor, sheriff, and collector of taxes. None of the lawyers filled the latter two positions. See LIST OF CITY OFFICER FROM THE ORGANIZATION OF THE CITY GOVERNMENT, FEBRUARY 10TH 1784, TO 1862, INCLUSIVE, PRICE AND LEE’S NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY 75-91 (1862).

¹¹⁶ A term I use here to refer to lawyers holding position in any judicial, legislative, or executive branch local government position.

¹¹⁷ These studies only take into account the city of New Haven. For the difference between the town and city population count, see PRICE AND LEE’S, NEW HAVEN (NEW HAVEN COUNTY, CONN.) CITY DIRECTORY 7 (1861).

might expect to see the divergence between the number of lawyers and civic affiliates widen in the next ten year span.¹¹⁸ We might also expect a gap to form between civic-affiliate lawyers and their non-civic affiliate counterparts from the period of 1850-1860 based on the growth of corporations or firms, but firms do not begin to take root in New Haven until the 1870s.¹¹⁹ From 1830-1860, the number of civic affiliates does increase, but not at nearly the same rate of growth as the general population of lawyers. As a matter of proportions, though, it is important to note that even by 1860 the decline that manifests still grants over half the lawyers the title of civic affiliate, a proportion that again differs from the hyperbolized notions of civic truancy.

Two points are of interest to hypothesize reasons for such an early divergence. First, there remains a question of historical accuracy. As the blackened line on the far right shows, the definition of civic affiliate will change the total number of lawyer-statesmen, because each source lists lawyers by different criteria. The *Judicial History of Connecticut* includes biographies published on a pro rata basis and in many cases does not include certain local positions that otherwise would be considered civic affiliates.¹²⁰ The *New Haven List of City Officers* includes only some of the local government positions, but still encompasses a different subset of lawyer-statesmen than recorded in the *Judicial History*.¹²¹ Furthermore, other lawyer-statesmen may have existed at the time but their civic duties were unrecorded in either of the two sources. Second, the names of the New Haven lawyer-statesmen from 1830-1860 are the bulwarks of the city, family names that constantly reappear in the city's historical accounts including Hillhouse, Boardman, Baldwin, Ingersoll, Townsend, and Osborne.¹²² Their histories closely mirror those of Yale Law School grads¹²³ in terms of brevity of time in government and affiliations with other charities outside of government.¹²⁴ Mostly singular officeholders, town councilman for one term and then again eight to ten years later, they play in government but, by and large, the name civic affiliate attests more to a time of experimentation with public service than with a serious commitment to use legal training in the service of sustained public leadership or reform.¹²⁵

To examine the supply side in the latter half of the century, samples from the graduates of Yale Law School give somewhat puzzling results.

¹¹⁸ See CAVANAUGH, *supra* note 94, at 15.

¹¹⁹ *Infra* Tbl. 7.

¹²⁰ LOOMIS & CALHOUN, *supra* note 11.

¹²¹ See LIST OF CITY OFFICER FROM THE ORGANIZATION OF THE CITY GOVERNMENT, *supra* note 115.

¹²² Additional names prominently featured in New Haven directories include Stoddard, Kimberly, and Blackman. See NEW HAVEN CITY DIRECTORY 111 (1850); NEW HAVEN CITY DIRECTORY 333 (1861).

¹²³ See *infra* App. 2.

¹²⁴ See LOOMIS & CALHOUN, *supra* note 11, at 197-530.

¹²⁵ *Id.*

Table 5: YLS Graduates in the Civil Service, 1860-1892¹²⁶

Year	Graduates Listed	In Civic Positions	Percent
1860-62	22	7	32%
1870-72	25	15	60%
1880	33	16	48.5%
1890	42	14	38%
1891	54	24	44%

The results suggest again that the percentage of lawyer-statesmen fluctuates but never drops below a non-trivial amount of the graduate population. It also suggests no sudden decline in lawyer-statesmen from any of the decades of the latter half of the century. Although several entries were sparse, particularly those of graduates who had moved West or South and had left little more than a mailing address, work in local archives or non-New England town records might eventually supplement this preliminary chart and reveal more lawyer-statesmen.¹²⁷ The data used for Table 5¹²⁸ shows both the fickle and diverse nature of the lawyer-statesman civic duties. Graduates served a term in the House here, were appointed as a member of a local school board there, and many had judicial positions and other non-legislative/executive positions such as City Auditor or Treasurer. A finer grain cut is given for the years of 1890-1891. The upward trend of service from 1890 to 1891 helps to call attention to the slight fluctuations year to year but ultimately supports a decennial study, which shows the general trend consistently hovers around a 40-60% commitment to public service. Interestingly, the 1890 and 1891 biographical records of graduates' service were gathered in the early 1900s post-graduation, calling into question even those more cautious historical accounts that acknowledge a sea change in lawyer-statesmen developing as late as the early

¹²⁶ Data acquired from BIOGRAPHY OF YLS GRADUATES, *supra* note 88. CIVIC Position is defined for these purposes loosely, including appointed positions such as membership on Boards of Education, City Clerk, and District Attorney Positions. For specific position listings, see Appendix 2. 1891 individual biographies are not included in Appendix 2 but are on file with the author. The early 1860s and 1870s are bundled to reflect a comparable sample size to one year's class in the 1880s and 90s wherein more biographies are recorded. Information in this biography was recorded in a private publication for pay so that entries were not checked for accuracy and may be embellished or overstated. Certain lawyers by the late 1800s may still have been trained on an apprentice basis. It is an interesting matter for another study whether a legal education via apprenticeship or via college influenced decisions to commit one's faculties to the lawyer-statesman role.

¹²⁷ *See*, for example, entries for graduates such as Charles P. Bohan or Joseph P. Brennan who moved out of the Connecticut area and have listed solely last recorded address, BIOGRAPHY OF THE GRADUATES OF YALE LAW SCHOOL, *supra* note 88, at 627.

¹²⁸ *See infra* App. B (detailing the names and occupations of all YLS graduates in public service for the years in question).

1900s.¹²⁹ Both 1890 and 1891 have some of the first recorded foreign students,¹³⁰ who appear to come to the law school explicitly to receive training for future government positions. While the lawyer-statesman complex relevant to this research centers only on the American lawyer, the increase in foreign students around this time lends credence to the claim that the law as a skill used and valued in civic service remained highly respected by American and non-American lawyer alike in 1890.

Generally speaking, such a decline in the civic service appears more as a very gradual shift, neither from a precipice nor a peak but from a middling position begun in the 1800s that involved individual lawyer-statesmen's forays into government sporadically, rather than as conductors of political machines. This evidence is more strongly supported at the local level, which one might have considered to be the more visible level of lawyer-statesman than the state level, where lawyers examining their place in the community would have less reason to cry wolf based on impressions of legal isolationism. With the trend of lawyer-statesman less linear than claimed, the next question examines prevailing theories for the shift and possible alternative explanations.

III. PRESSURE POINTS: THEORIES OF LAWYER-STATESMAN RATE FLUCTUATION

Several common theories abound that explain the current notion of the lawyer-statesman's timely demise. These theories are a partial explanation for the gradual shift; to the extent that they do not map particularly well with New Haven, they support the non-traditional results found in the city and leave room for further analysis of contributing factors to the lawyer-statesman rate fluctuation observed.

A. SUPPLY AND DEMAND: THE EFFECTS OF NORMAL POPULATION GROWTH

First, normal population growth is commonly cited as a reason for the declining number of lawyer-statesmen. This theory posits that the number of lawyers grew at a steady rate for marginally expanding civic positions, resulting in a proportional drop in the number of lawyers in civic service positions.¹³¹ Concurrently, the idea that growth of the lawyer population in particular expanded to fill a rising need for legal services might explain a higher demand for time spent devoted to private practice, as would a migration of a section of lawyers to the academic market. To the last point, the first full time faculty of the Yale Law School was retained in 1881,¹³² challenging the notion of professorships substituting in any significant

¹²⁹ See *supra* Part I-B.

¹³⁰ BIOGRAPHY OF THE GRADUATES OF YALE LAW SCHOOL, *supra* note 88, at 592, 637.

¹³¹ See, e.g., DAHL, *supra* note 19, at 16, 31 (noting for both periods of patrician and entrepreneur rule in New Haven a lack of numbers caused an "acute political vulnerability"). *Id.* at 31.

¹³² Thacher, *supra* note 6, at 8.

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manner civic service participation.¹³³ Table 6 gives an overview of lawyers compared to general population growth in New Haven:

Table 6: The Population In Respect Of New Haven Lawyers¹³⁴

Year	Population	Number of Lawyers	Percent of Lawyers in Population	Lawyer to Citizen Ratio	Marginal Change in Lawyers' Services Decennially
1830	10,180	19	.187	536	X
1840	12,960	19	.147	682	5
1850	20,345	36	.177	565	-1.2
1860	35,535	50	.141	711	1.0
1870	50,840	72	.142	706	-.03
1880	62,882	125	.199	503	-1.7
1890	86,045	135	.157	637	.6

As the population of New Haven grew steadily, so too did the supply of lawyers, presumably to meet increasing demand.¹³⁵ Given the expansion of government concurrent with the growth of population, the burgeoning citizenry of New Haven cannot in itself account for any proposed shift in lawyer's roles. This is especially true given our broad parameters for what constituted civic participation. There is a slight gap in the number of lawyers per citizen in 1860 compared to the preceding decennial, but such a jump in citizens served per lawyer also appeared

¹³³ One might consider teaching to be a form of civic participation, although there is no indication the bar conceived of the role as a service to the community at large.

¹³⁴ Data acquired from sources listed in *supra* notes 96, 97. The last column calculates the marginal rate of change between the number of lawyers registered and the number of clients per lawyer decennially. Populations are taken of the city proper and not the town. Firms listed in the 1880 and 1890 City Directories are included in the total count of lawyers by the number of partner names listed (maximum three per firm). This calculation holds true for subsequent tables, see *infra* Table 7. Lawyer to citizen ratio presents the number of citizens served by one lawyer in New Haven.

¹³⁵ One wants to compare these figures with the number of cases at the New Haven bar to see if litigation increased accordingly. These records are unavailable over the entire span of the nineteenth century. See Nancy M. Shader, *Guide to the Records of the Judicial Department: State Archives Record Group No. 3*, OFFICE OF THE PUBLIC RECORDS ADMINISTRATOR AND STATE ARCHIVES 33-34 (2001).

from 1830-1840 and no corresponding decline in the number of lawyer-statesmen occurred in the first period. Broadly speaking, the population of lawyers tracked the growth of the population of the general citizenry closely, offering a stable supply/demand curve for civic service opportunities.

B. THE RISE OF THE FIRM AND CORPORATE LAW

What about the development of firms and corporate practices in the late 1800s? Table 7 tracks the rise of firms and partnerships in New Haven.

Table 7: Growth of Firms, Partnerships, and Advertisements¹³⁶

Year	Number of Firms/Partnerships	As % of Lawyer Population	Number of Ads
1870	0	0	0
1880	4	8	9
1890	6	12.6	8

The ascendancy of firms from 1870-90 inclusive does give some evidence of the growth of more formal, incorporated business law practices. A shift of partnerships and firms from zero to twelve percent in the span of twenty years is significant and partially explains, at least from the supply side, common notions of the lawyer-statesman's disappearance. Unlike the sole practitioner model of private practice, the law firm or corporate law models offered more steady clients, greater accounts due to economies of scale, a higher marginal level of work product to sell at higher rates, and, in sum, the possibility of much greater profit margins.¹³⁷ The advertisements column projects the business image of the legal community and transposes well on the same time period of the rise of firms. Most of the advertisements found in the City Directory come from the firm and partnership population. We cannot be sure that the membership of these partnerships did not itself encompass a portion of the lawyer-statesman population; nor does the growth of firms correspond in time with the dips perceived in the New Haven lawyer-statesman community in 1860.¹³⁸ As most state and municipal positions were part-time throughout the nineteenth century, and prior to the rise of corporate law most government officeholders still maintained their sole-practitioner business concurrently, one wonders if the time commitments for firm work significantly altered the availability of lawyers for work in public service.¹³⁹ The correlation between growth of firms and decline of statesmen may also be questioned

¹³⁶ Data taken from New Haven City Directories, *See supra* notes 96, 97.

¹³⁷ *See* Henry Hansmann, Reinier Kraakman, & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1388-95 (2006). (advancing reasons for the structural advantages to organizing a law firm as or as part of a business entity); HOBSON, *supra* note 38, at 63 (asserting that less service in state legislatures was common knowledge given the fact that profits producible in private practice widely surpassed any possible salary in government).

¹³⁸ *See supra* Tbls. 2, 3.

¹³⁹ *See supra* note 102.

on the grounds of firm membership; most of the partnerships listed are names of families that practiced law in New Haven since the early days of the century. Though conjecture, a possible thought is that these older families' initial devotion to the statesman ideal may have carried over to later generations regardless of their private practice structure. At most, these numbers support the commonly held theories that the New Haven data set challenges.

C. BEYOND THE HORIZON: A SHIFT TO FEDERAL GOVERNMENT

Other reasons given for the shift in the role of lawyers are similarly puzzling given the data from greater New Haven. Perhaps, if the lawyer-statesman ideal continued to hold sway, the nexus of power at the federal level tempted lawyers to devote their energies in the public service outside the local realm.¹⁴⁰ We certainly know that the Pendleton Act and subsequent flip-flopping presidencies from 1880-1900 provided for a great rise in federal civil service positions,¹⁴¹ although records on those lawyers of New Haven in particular who ascended to the federal service do not exist. However, two of the previous charts directly contradict this hypothesis—the governor's chart, showing the most precipitous drop in lawyer-statesman at the state (non-local) level, and the councilman/alderman chart, revealing that lawyers' presence in local affairs in the first half of the century was neither ubiquitous nor standard. If lawyers tended not to begin civic work at the local level, and noticeably left higher-level government positions in the second half of the century, a shift to federal service is not a satisfactory explanation.

D. CHANGE IN THE SOCIAL FABRIC: A BOOMING POPULATION OF IMMIGRANTS

A noticeable fear pervaded the bar at the time of the lawyer-statesman's sorrowful demise, namely, a fear of the immigrant. Such a fear led to the creation of more stringent requirements for bar admission and the formalizing of bar associations to take a more proactive oversight of the profession.¹⁴² New Haven's population shift towards high percentages of immigrants followed this trend; by 1900

¹⁴⁰ See Robert W. Gordon, *The American Legal Profession 1870-2000*, THE CAMBRIDGE HISTORY OF LAW IN AMERICA, 73, 96 (2008). (describing Eastern corporate lawyers who "dominated high foreign policy posts in the first half of the twentieth century"). See also HOBSON, *supra* note 38, at 64 (asserting that lawyers would only enter politics at the national sphere due to the limelight of attention and giving the example of Elihu Root, who only entered federal politics at the explicit request of President McKinley who sought a competent and qualified person to fill the position). For our purposes, local is defined as municipal and state government positions, given evidence presented in Part II-C which showed even more rapidly declining trends of service at the state level than at the municipal level.

¹⁴¹ Pendleton Civil Service Reform Act of 1883, ch. 27, 22 Stat. 403. See Ari Hogenbloom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301 (1959).

¹⁴² See, e.g., CAVANAUGH, *supra* note 94, at 21; HENRY S. DRINKER, THE ANNALS OF AMERICAN ACADEMY: ETHICAL STANDARDS AND PROFESSIONAL CONDUCT, 37, (1955).

one-third of the city's dramatic population increase was attributed to immigrants.¹⁴³ Traditional legal historians might surmise that the rise of the immigrant class brought an influx of immigrants to the bar that may not have been steeped in such a strong tradition of supporting public service and civic-mindedness.

While it may be undisputed that immigrants from the period of 1870-1900 took a more active role in executive and legislative branches of local government throughout the United States,¹⁴⁴ evidence of their representation in the legal profession does not inverse relative to their foreign-born status. The lack of a sharp cut-off of lawyers in local government reinforces the more muddled picture of a gradual shift sprinkled with great yearly fluctuations of the lawyer's civic role. New Haven's first immigrant mayor, the Irishman Charles Driscoll, was himself a lawyer, undercutting the notion that immigrants at the bar valued the statesman side of their practice any less than their landed counterparts.¹⁴⁵ To the latter point, though, Table 8 shows a trend of family stability in the bar that challenges any theories propounded on the basis of an inherent difference in the mindset of newly minted immigrant lawyers:

Table 8: Inbred Nature of the Law: Family Stability Decennially, 1830-1890¹⁴⁶

Year	Total Lawyers	Repeat Last Names	Decennial Name Repetition
1830	19	X	X
1840	19	8	42 %
1850	36	9	25 %
1860	50	29	58 %
1870	7	40	56 %
1880	125	66	53 %
1890	135	83	61 %

By the late 1800s, not only was the New Haven bar majority inbred to a select group of families, this inbred nature continued to increase. The numbers should be even greater given that some family names skip a decennial count but reappear two decades later, and that some family names are twice-recorded at their first yearly appearance and were not taken into account.¹⁴⁷ The only ten-year period for

¹⁴³ Cass Gilbert & Frederick Law Olmsted, REPORT OF THE NEW HAVEN CIVIC IMPROVEMENT COMMISSION 15 (Dec. 1910).

¹⁴⁴ JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900, 6 (1984).

¹⁴⁵ *Cornelius T. Driscoll*, PUBLIC ART ARCHIVE, <http://www.publicartarchive.org/node/41572> (last visited April 15, 2013).

¹⁴⁶ Data acquired from City Directories, see *supra* note 96. Repeated names of individual and repeated family names are included indiscriminately in order to Show the overlap of families in total.

¹⁴⁷ For example, the names Thomas Bennett, Huggins, two Ingersolls, two Pecks, and two Stoddards appear in 1850, two Fowlers and two Platts appear in 1870. See *supra* note 96.

which a significant drop in the percent of names from ten years prior is recorded is the period from 1840-1850. Yet between these ten years no change in the number of lawyer-statesmen at the New Haven bar was similarly recorded. Generally, New Haven's bar appears increasingly closed off to new applicants, one reason why perhaps the purported annihilation of lawyer-statesmen never came to pass. The level of service embodied by the law families in the 1840s and 50s steadied with future generations and stabilized the percentage of lawyer-statesmen. If new entrants to the bar from largely immigrant classes or non-elite natives began their careers around 1860 without priming civic affiliation, but slowly developed this penchant by the time Driscoll became mayor, the dips in service noted around 1860 could be accounted for. More probably, though, other exogenous factors would account for this shift, including the obvious interlude of the Civil War that entangled many lawyers and other professionals in extraordinary military engagements.¹⁴⁸ The relatively inbred nature of the bar of New Haven supports the steady trend of lawyer-statesmen observed and is strong correlative evidence of the prominence of community standing to uphold the supremacy of civic-minded lawyers. Once a lawyer-statesman, always a lawyer-statesman.

E. THE GROWTH OF FRATERNAL ORGANIZATIONS

Though charitable or private organization membership was never lauded as a part of the lawyer-statesman ideal, it is evident that lawyers by the late nineteenth century took a prominent role in newly developed fraternal organizations and clubs.¹⁴⁹ Whether or not this participation represented a substitute for traditional civic service in the minds of lawyers, or reflected broader societal pressures for a certain elite social class to join such groups, remains unclear.¹⁵⁰ The growth of the fraternal organizations in the latter half of the nineteenth century as part of a broader trend for all males, immigrants and non-immigrants alike,¹⁵¹ contests the notion that work done in connection with these organizations manifested similar

¹⁴⁸ YLS graduates listing is skewed at this time period precisely for this reason.

¹⁴⁹ See the 1891 records of YLS graduates, including membership in the Knights Templar, Odd Fellows, Society of the Sons of Revolution, Americus Club of Reading, Juvenile Improvement Clubs, Knife and Fork Club, Men's Club of First Congregational Church, Greek fraternities, American Forester's Association, and Historical Societies, *BIOGRAPHY OF THE GRADUATES OF THE YALE LAW SCHOOL*, *supra* note 88, at 626-31. *See also* Cornelius T. Driscoll, *supra* note 145 (documenting Driscoll as a founder of the Knights of Columbus in 1882).

¹⁵⁰ Most fraternal organizations were organized on ethnic lines, but the explosion in number of said organizations meant that nearly all groups from all social classes had an organization in which to take part. This controls for any factors that would skew the population of lawyers joining fraternal organizations in a manner inconsistent with the overall population of lawyers. *See* John Bodnar, *Ethnic Fraternal Benefit Associations: Their Historical Development, Character, and Significance*, in *RECORDS OF ETHNIC FRATERNAL BENEFIT ASSOCIATIONS IN THE UNITED STATES: ESSAYS AND INVENTORIES 5-14* (Susan H. Shreve & Rudolph J. Vecoli eds. 1981), *available at* http://hsp.org/sites/default/files/legacy_files/migrated/bodnarbenassocreadingact1.pdf; Pamela Marie Paxton, *For the Common Good? American Civic Life and the Golden Age of Fraternity*, 82 *SOCIAL FORCES* 1651, (2004) (book review).

¹⁵¹ *See* Shumway & Hegel, *supra* note 80, at 49.

qualities and effects as the work performed in public service roles. If qualities unique to the law served as a call to duty for the lawyer to undertake civic positions, it could not be the case that lawyers' entrance into fraternal organizations at similar rates as businessmen and other professionals substituted on an even plane. Henry Drinker, in his work on legal ethics, emphasizes this fundamental difference between the lawyer and the businessman: "that [young men in training of law] have not given way before to the aggressively competitive spirit which has characterized our industrial development is due to the inherent conditions which differentiate the law, as a profession, from a mere business...."¹⁵²

The search for causal connections between observed fluctuations in lawyer-statesmanship advances similarly unsatisfactory results. Traditionally conceived reasons for the fall of the lawyer-statesman such as population growth, influx of new socioeconomic immigrant classes to the bar, and mushrooming of corporate law either offer only partial explanations or are not supported by factual evidence. On the one hand, the absence of strong causal factors supports the findings of non-linear fluctuations in lawyer-statesmen trends; on the other hand, it suggests that the gradual decline in lawyer-statesmen percentages as generally found in comparative studies of the local bar, Yale graduates, and state level offices results from myriad forces that are very difficult to untangle conclusively.

IV. CONCLUDING REMARKS: THE DANGERS AND REWARDS OF LEGAL MYTHOLOGY

If the over-invoked tale of George Watrous does not properly model the transition of lawyers from the state to the firm, neither do tales of the opposite extreme. In the latter camp one finds the story of Simeon Baldwin, revered in New Haven and Connecticut for his active public service throughout the latter half of the nineteenth century.¹⁵³ His devotion to public service, from membership on the Common Council of New Haven to the Public Parks Commission to Governor of Connecticut and candidate for U.S. Senate, exemplified a commitment above and beyond the lawyer-statesman ideal.¹⁵⁴ As my research from the greater New Haven area suggests, the story of lawyers relations with the public sector is a muddled, non-linear, empirically frustrating one that defies expectations and does not conform to any one particular exogenous change in the latter nineteenth century's demographic that may have otherwise provided helpful explanation.

At the state level, trends in gubernatorial candidates most closely track prevailing notions of the lawyer-statesman's decline. Even there, though, rates at the end of the century remained above the threshold of paucity suggested in the modern day literature. At the local level, lawyers never had a supreme place in political affairs even in the first half of the nineteenth century. Their participation compared to the overall number of high posts in local government was spotty; to the extent they did participate they did so in a temporary fashion. By the 1900s only a gradual shift in lawyers' participation rates is recorded; local records indicate around forty

¹⁵² DRINKER, *supra* note 142, at 37.

¹⁵³ SIMEON E. BALDWIN, *LIFE AND LETTERS OF SIMEON BALDWIN* (1919). A professorship at Yale Law School is endowed in his name to this day, see *Peter H. Schuck*, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/PSchuck.htm> (last visited April 12, 2013).

¹⁵⁴ HICKS, *supra* note 69, at 268.

percent of lawyers continued to hold government office even after the turn of the century. The shift which occurs does so gradually; it is nearly impossible to pin the shift to a certain period of dates consistent amongst all levels of government. Rather than a top-down shift influenced by a particular exogenous event, the rates of lawyer-statesmen appear as a bottom-up trickle that could not have been as perceptibly worrisome as historians suggest. Orations of the time confirm that the lawyer-statesman ideal remained coveted and praised without being overtly pleaded for because it had not been “lost,” as we now so believe. Discourse internal to the legal profession, regardless of the numbers, never swayed from defending the ideal of civic participation, as vague as the concept remained. The ideal as mythologized has always been an incentive to enter the profession.

After examining the empirical trends, the real question remains: why do we care if we change how we think about the history of the legal profession? The myth we have currently beckons us as lawyers to strive for more. We remember fondly the golden days of law’s easy symbiosis with government service and the moral and social benefits received by both the lawyers and the community. In cultivating such an image, we dignify the role of the law for what it once was and still could be, and we strive individually to work towards embodying a professional character similar to that which we find wanting in our current society. In these ways the current myth serves as more than just historical accounting. Fittingly, in the 1870s when the “municipal structure accommodated everyone but satisfied no one,” the “political conscience” had been molded by the ideal of pure, honest statesman acting to serve the public good, referring to that which was good for the entire public rather than merely factional interests.¹⁵⁵ If we take that pairing to a more extreme hypothetical, the myth of the statesman independent of legal status served to ground the citizenry’s faith in local government at a time when chaos otherwise would have ensued. The use of the popular myth to buttress a fragile, unstable structure here becomes an asset. The inconsistencies of the myth historians overlook to reach the picture of industrial progress and development commonly associated with the late nineteenth-century.¹⁵⁶ In many ways, then, we might convince ourselves that having a myth of the lawyer-statesman to strive towards is more beneficial than anything. If historical accuracy is not the most important quality, the multiple forms of the myth itself serve to strengthen whichever lawyers’ particular interests are at play: whether the downfall came in the mid-1800s or the early 1900s, the initial causation takes a backseat to the larger discomfort with the loss of the lawyer-statesman. The value of the myth in helping our current society question the path of the legal profession for the aim of improving the lawyer’s well-being, productivity, and role in the community, outweighs any lack of coherence in the narrative or inconsistencies of particulars.

Still, for all the good that the myth of the lawyer-statesman has done for the legal profession’s self-imposed existential crisis, a more accurate accounting of the lawyer’s place is useful and desirable. It is good to know what really happened—if, for example, there was a strong divergence in patterns between state and local government service. Even if the profession chooses to put forth a more glorified account in speeches and opening remarks, legal historians can debate amongst themselves the finer points of what appears to be a non-homogenous story of the

¹⁵⁵ TEAFORD, *supra* note 144, at 27.

¹⁵⁶ *Id.*

relationship between the law and civic society. Piercing the myth may also relieve some of the stress attached with our current crisis; it is comforting to know that we as lawyers maintain healthy levels of public service participation and that levels of participation were never as drastically in decline as we once thought. The causation of fluctuating rates of civic service also presents new questions. If exogenous factors played less of a role in the explicit and pivotal “decline,” the legal profession then appears more resilient, more resistant to change in its core conception than previously hypothesized, and more rooted in a linear historical trajectory. We do not need to recapture something that was lost; we merely need to continue in a tradition and legacy of service that has wavered, perhaps, but never fallen. Such a narrative is much more positive and generous. Maybe the best advantage to re-conceptualizing the current myth of the lawyer-statesman is just that: lowering mythical expectations for who the lawyer needs to be, and affirming our current history’s continuation of standards consistent with the golden days of our most revered professional ancestors.

Appendix A

Table 9: The Governors and Lieutenant Governors of Connecticut, 1827-1909¹⁵⁷

Party	Elected	Governor	Occupation	Lieutenant Governor	Occupation
Dem Rep	1827	Gideon Tomlinson	Lawyer, mogp	John Samuel Peters	Lawyer, mogp
Nat Rep	1831	John Samuel Peters	Lawyer, mogp	Thaddeus Betts	Lawyer, U.S. Senator, CT Senator
Dem	1833	Henry Edwards	Lawyer	Ebenezer Stoddard	Lawyer, mogp
Whig	1834	Samuel Foot	Lawyer, mogp	Thaddeus Betts	Lawyer, mogps
Dem	1835	Henry Edwards	Lawyer, mogp	Ebenezer Stoddard	Lawyer, mogp
Whig	1838	William W Ellsworth	Lawyer, mogp	Charles Hawley	Lawyer, mogp

¹⁵⁷ *Biographical Directory of Federal Judges, 1789-Present*, FED. JUD. CTR., <http://www.fjc.gov/public/home.nsf/hisj> (last visited Feb. 27, 2013); *Biographical Directory of the United States Congress: 1774-Present*, U.S. CONG., <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Mar 1, 2013); *Brief Descriptions of Connecticut State Agencies: Governor*, CONN. STATE LIBR. <http://www.cslib.org/agencies/governor.htm> (last updated Jan. 25, 2011); *Brief Descriptions of Connecticut State Agencies: Lieutenant Governor*, CONN. STATE LIBR. <http://www.cslib.org/agencies/lieutenantgovernor.htm> (last updated Jan. 25, 2011).

Where Did All the Lawyers Go?

Dem	1842	Chaucey Cleveland	Lawyer, mogp	William Holabird	Lawyer
Whig	1844	Roger S Baldwin	Lawyer, CT Senator, U.S. Senator	Reuben Booth	Lawyer
Dem	1846	Isaac Toucey	Lawyer	Noyes Billings	Lawyer
Whig	1847	Clark Bissell	Lawyer	Charles McCurdy	Lawyer
Whig	1849	Joseph Trumbull	Lawyer	Thomas Backus	No info, CT Senator
Dem	1850	Thomas Seymour	Lawyer, mogp	Charles Pond	Lawyer
Dem	1853	Charles Pond	Lawyer	Vacant	
Whig	854	Henry Dutton	Lawyer, mogp	Alexander Holley	Manufacturer
American	1855	William Minor	Lawyer, mogp	William Field	No info
Rep	1857	Alexander Holley	Manufacturer	Alfred Burnham	Lawyer, mogp
Rep	1858	William Buckingham	Mercantilist	Benjamin Douglas, Roger Averill	Manufacturer, Lawyer
Rep	1866	Joseph Hawley	Lawyer, U.S. Senator	Oliver Winchester	Manufacturer
Rep	1867	James English	Business	Ephraim Hyde	Business
Dem	1869	Marshall Jewell	Tanner	Francis Wayland	Lawyer
Rep	1870	James English	Business	Julius Hotchkiss	Farmer
Dem	1871	Marshall Jewell	Tanner	Morris Tyler	No info
Rep	1873	Charles Ingersoll	Lawyer, mogp	George Sill	Lawyer
Dem	1877	Richard Hubbard	Lawyer	Francis Loomis	No info
Dem	1879	Charles Andrews	Lawyer, mogp	David Gallup	No info
Rep	1881	Hobart Bigelow	Manufacturer	William H Bulkeley	Business

Dem	1883	Thomas Waller	Lawyer, mogp	George Sumner	Lawyer
Rep	1885	Henry Harrison	Lawyer, CT Senator, New London Mayor	Lorrin Cooke	Farmer
Rep	1887	Phineas Lounsbury	Business	James Howard	Manufacturer
Rep	1889	Morgan Bulkeley	Business	Samuel Merwin	Banker
Dem	1893	Luzon Morris	Lawyer	Ernest Cady	No info
Rep	1895	Owen Coffin	Business	Lorrin Cooke	Farmer
Rep	1897	Lorrin Cooke	Farmer	James Dewell	No info
Rep	1899	George Lounsbury	Business	Lyman Mills	No info
Rep	1901	George McLean	Lawyer	Edwin Keeler	Banker
Rep	1903	Abiram Chamberlain	Engineer	Henry Roberts	Lawyer
Rep	1905	Henry Roberts	Lawyer	Rollin Woodruff	Manufacturer
Rep	1907	Rollin Woodruff	Manufacturer	Everett Lake	Manufacturer
Rep	1909	George Lilley	Mercantilist	Frank Weeks	Business

Appendix B

Table 10: Descriptive Chart of YLS Grads in Civil Service, 1860-1892¹⁵⁸

Year/Name	Legislative/Executive	Community Organization	Judicial
1860-62			
H. Lynde Harrison	CT Senator, Speaker of CT House, Republic State Central Committee	New Haven Colony Historical Society.	Judge of City Court, Clerk
Thomas Merry	Legislature of San Francisco		
Charles Fowler	Lower House of CT General Assembly		
A. Stanley Ulrich	Financing and Examining Committees.	Board of School Control, American Aid Association	
Washington Wilcox	Lower House of CT General Assembly, Upper House, U.S. Congressman	Public Service and Utilities Commission	State's Atty
William Downes			Clerk
George Fay	Senator to General Assembly of CT		
1870-72			
Charles Bush	Lower House of General Assembly		Judiciary Committee in CT House
Gideon Welch	State Senator, CT House	School Committee, Tree Warden, Register of Births	Judge, Probate Court, Town Court, Borough Court, Common Court of Pleas, Clerk
Earliss Arvine	State Commission for Promotion of Uniformity of Legislation		
Conrad Bacon		Postmaster	Clerk, CT House and Senate

¹⁵⁸ BIOGRAPHY OF YLS GRADUATES, *supra* note 88.

Michael Downes			Clerk
Cornelius Driscoll	New Haven Alderman, General Assembly, Mayor New Haven		Court of Common Council, Corp. Counsel of New Haven
Aaron Gardenier	NY Assemblyman		Dist. Atty.
Patrick Kiernan	Councilman	“Executive officer in civil benevolent asso- ciations,” Secretary of New Haven Li- brary	
Adolph Asher			Clerk of City Court
Henry Newton	General Assemblyman	State Board of Health	Chairman of House Judiciary Commit- tee, Referee in Bankruptcy
Henry Hall	“Took active interest in local affairs”		Borough Atty
Henry Baldwin	Governor of NY, Con- gressman, Delegate to Presidential Convention		
William Starkey	“Prominent in Political Life”	Customs Collector	Clerk of City Court
William Swift	Mayor of Ishpeming, State Senator	City Recorder	
William Wright	General Assemblyman, Alderman	Finance Committee	Commissioner of U.S. District Court for New Haven
1880			
William Beecher			Judge of Probate
Aaron Browning			Clerk of Bills, City Atty, Referee in Bankruptcy
Jesse Case			Justice of the Peace
William Childs	U.S. Commissioner		
Edwin Goodell		Board of Education	Town Atty, Montclair, NJ

Where Did All the Lawyers Go?

Hadlai Hull	Lower House Assemblyman		State's Atty
Bernard Keating		City Auditor	City Clerk
William Kellogg			Justice of Police Court
William Law	New Haven Alderman, CT Assemblyman	City Auditor	
Robert Lowe			Judge of Probate
Charles Northrop	Delegate to Constitutional Convention 1901.	Board of School Visitors, Town Treasurer	Town Clerk, Justice of Peace
Miner Norton	"Takes active part in City, County, State and National Campaigns"	U.S. Appraiser	Director of law of the city
James Pigott	CT General Assemblyman, U.S. Congressman, Delegate to Democratic National Convention		City Clerk
Edwin A Randolph	Common Council of Richmond, Alderman, Virginia Commissioner.		
William Sanborn	VT State Representative		
James Walsh	Alderman, Acting Mayor, U.S. Commissioner		Judge of City Court
1890			
James Bree	New Haven Councilman, CT Senator, Representative	Auditor of Accounts, Director of St Francis Orphan Asylum	
Warren Bristol			Asst. City Atty and Corp Counsel
Edwin Bugbee	Candidate for General Assembly	City Auditor	Atty at Police Court
George Fowler		Town Treasurer, School Board of Michigan	Town Clerk
Walter Frear	Governor of Hawaii, Chairman of Hawaii Code Commission and Legislation Commission		Second Circuit Judge

Frank Hinckley	Lower house of General Assembly, member of Constitutional Convention 1902.		
L. Edwin Jacobs	New Haven Common Council, Alderman		Corp Counsel, Justice of Peace
Philip Pond		Deputy Coroner, CT State Board of Mediation.	Clerk of Court of Common Pleas
Jeremiah Toomey	Lower house of General Assembly		City Atty
Winthrop Turney	Civil Service Commissioner	Trustee of Public Library of Long Island, Exec Committee of Civilian's Municipal League.	
Leonard Waldron	"Entered service in govt"		
Charles Duffy	Mayor, Circleville OH		
Robert Morris	President of Republican County Committee of NY.		

COLD (COMFORT?) FOOD: THE SIGNIFICANCE OF LAST
MEAL RITUALS IN THE UNITED STATES

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ABSTRACT

Last meals are a resilient ritual accompanying executions in the United States. Yet states vary considerably in the ways they administer last meals. This paper explores the recent decision in Texas to abolish the tradition altogether. It seeks to understand, through consultation of historical and contemporary sources, what the ritual signifies. We then go on to analyze execution procedures in all 35 of the states that allowed executions in 2010, and show that last meal allowances are paradoxically at their most expansive in states traditionally associated with high rates of capital punishment (Texas now being the exception to that rule.) We conclude with a discussion of the implications of last meal policies, their connections to state cultures, and the role that the last meal ritual continues to play in contemporary execution procedures.

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INTRODUCTION

There is no shortage of controversy surrounding capital punishment in America. From innocence to lethal injection, from remorse to retribution, the issue is as complex and painful as any modern policy issue can be. About the same time that Troy Davis – a man whose innocence was proclaimed by supporters from his trial witnesses to the Dalai Lama – was executed in Georgia in the fall of 2011, the execution of a Texas man convicted of a brutal hate crime sparked its own brand of controversy. Lawrence Russell Brewer’s case, however, seems to have gained notoriety more because of the change in Texas policy it provoked than because of Brewer’s crime or eventual punishment.

Brewer had been convicted in the late 1990’s and sentenced to die by lethal injection for dragging James Byrd, 49, to his death in Jasper, Texas.⁴ With his execution looming, Brewer requested a final meal of two chicken fried steaks, a triple meat bacon cheeseburger, a cheese omelet, fried okra, fajitas, a pint of ice cream, a pound of barbecue with white bread, a pizza, and three root beers.⁵ With an extravagant meal in front of him (although it is not clear that he was served his entire request), Brewer didn’t eat a bite. When Texas State Democratic Senator John Whitmire learned of the request (and Brewer’s failure to eat his final meal), he wrote a letter to the Texas Criminal Justice Division requesting that it immediately end the last meal practice and warning that if it did not, he would introduce legislation to end the practice in the next session. “It is extremely inappropriate,” Whitmire wrote, “to give a person sentenced to death such a privilege.”⁶

In this article we review the meaning and substance of the last meal ritual through a consideration of legal and empirical evidence. In Section I we raise the question of what Texas ‘lost’ when it discarded the last meal tradition. We examine the manner in which the decision was taken, the process used, and the reasons given by those involved. We end with a consideration of the possible impact on those most directly affected – condemned inmates and their jailers.

In Section II we review evidence on the cultural roles that last meals play, and have played, in execution rituals. A brief historical review reveals many forms last meals have taken, and their remarkable endurance through different epochs. Next, we review the use of last meals as a means of sending a political message – both by condemned inmates and other commentators. Last, we consider the rarefied interactions that the occasions of last meals produce between condemned inmates and their jailors – from the somber to the light-hearted, the disengaged to the compassionate.

In Section III we examine the different rules that exist in states regulating the content of last meals. We review the details of these policies, and then divide states into groups based on whether they permit greater or lesser choice among inmates

⁴ See 3 Whites Indicted in Dragging Death of Black Man in Texas, CNN.COM (July 6, 1998 11:07 pm), <http://edition.cnn.com/US/9807/06/dragging.death.02/>

⁵ See TEXAS ENDS ‘LAST MEALS’ FOR DEATH ROW INMATES, LA TIMES Blog (Sept. 23, 2011, 2:03 pm), <http://latimesblogs.latimes.com/nationnow/2011/09/texas-ends-death-row-inmates-final-meals.html>.

⁶ See Manny Fernandez, *Texas Death Row Kitchen Cooks Its ‘Last Meal’*, N.Y. TIMES, Sept. 23, 1991, at A17, available at http://www.nytimes.com/2011/09/23/us/texas-death-row-kitchen-cooks-its-last-last-meal.html?_r=0.

in what they might request for their final meal. We then use some statistical comparisons to show that states which execute the most people are also those with the fewest restrictions on what might be provided in a last meal. Further, our findings also suggest a strong relationship between fundamentalist Protestant religious populations in states and their willingness to honor elaborate meal requests. We suggest some possible interpretations of these findings, which suggest that those with the strongest attachment to the death penalty may also be those most invested in the panoply of ritual which surrounds executions themselves.

In Section IV we elucidate four major themes present throughout contemporary discussions of the last meal: that it is cruel, that it is offered out of guilt, that it is a gesture of mercy, and that it is a vestige of a bygone era. Our discussion suggests these descriptions may all be fair at times, but that above all the ritual itself has the intrinsic property of recognizing the humanity, if not the dignity, of the condemned inmate, and that as such it should be protected through statutory codification.

I. THE CONTEMPORARY POLICY CONTEXT IN TEXAS

The really surprising thing about the abolition of the last meal privilege in Texas is how easy it was. It took only one individual – Texas State Senator John Whitmire, representative for parts of the city of Houston and Harris County, and Chair of Texas’ Senate Criminal Justice Committee – to write to the Texas Department of Criminal Justice (TDCJ) to express his moral outrage at Lawrence Brewer’s last meal.⁷ “He never gave his victim an opportunity for a last meal,” Senator Whitmire explained, “It’s wrong to treat a vicious murderer in this fashion. Let him eat the same meal on the chow line as the others.”⁸ TDCJ Executive Director Brad Livingston agreed and the matter was settled.

Casually breaking with a Texas tradition that extended back 87 years, the Criminal Justice Division immediately and summarily ended its practice of offering Texas death row prisoners the opportunity to request a special last meal.⁹ Prisoners scheduled to be executed are now served the same meal offered to all other prisoners.

With a history that goes back centuries, how could a single state legislator successfully demand the end of this tradition? What does a final meal ritual reveal about the larger, legal processes implicated by the death penalty, and what insight might it offer into the personal relationships between the prisoners and those who guard them? Is there something about a sentence of death that calls for ritual courtesies, or are such courtesies weak and meaningless in the face of an execution?

Regrettably, Livingston’s deliberative process is not yet a matter of public record. It is not difficult to imagine how it would have proceeded in an ideal world, however. Livingston’s decision ought to have required him to answer at least three fundamental questions. First, what is being abolished? The last meal is a complex and long-lived ritual and one should know what is being given up in advance of

⁷ See TEXAS ENDS ‘LAST MEALS’ FOR DEATH ROW INMATES, *supra* note 5.

⁸ See Manny Fernandez, *supra* note 6.

⁹ See Allan Turner, Last-Meal Requests off Death Row Menu, mySA Blog (Sept. 23, 2011, 1:36 am), http://www.mysanantonio.com/news/local_news/article/Last-meal-tradition-for-death-row-inmates-2184368.php.

any decision. Second, how can it be abolished? Policy changes can happen in many ways. One should at least know the options. Third, what does it mean to abolish it? Policy-makers regularly reflect on the wisdom of basing their decisions on evidence. It would clearly be desirable to know the consequences of a decision before it is made. Much less than the questions of high principle that the abolition of the last meal invoke, the need to address at least these basic issues may be presumed to be broadly accepted by all involved in the debate.

First, the last meal is a ritual stretching back across centuries of United States history and before. Its resilience is due perhaps to the fact that the execution, unlike the death penalty, is not usually a matter of extensive debate. The execution is an administrative matter. It is the process by which a living person is put to their death. It is governed by “execution protocols” which describe the procedure to varying degrees of exhaustion, including the precise combinations of lethal chemicals, their manner of application, and the determination of the fact of death. They lay out the chain of events that will accompany the administration of the lethal dose including the visit by the family, the proffering of spiritual counsel, and, of course, the last meal.

Although mundane and prosaic, these documents represent the accumulated experience and tradition of centuries of execution practice in the United States. Adapted as they are for modern purposes, they nevertheless bear the hallmarks of the history of the manner and means of inflicting capital punishment in America. They are cold, but they reveal the fundamental elements of the American execution. Amid tight security, the condemned meet family, eat their final meal and go to their swift and certain deaths with spiritual and legal counsel at their side until almost the final moments.

There has long been interest in the tradition of the prisoner’s last meal. Some of the interest has been historical and academic, while some has been more sensational and voyeuristic. Swedish filmmakers Mats Bigert and Lars Bergström’s project, *Last Supper*, carefully traces the origins of offering a ceremonial final meal to prisoners set to die.¹⁰ The blog “Dead Man Eating” includes an archived list that dates back to early 2002, focused on what prisoners nationwide request to eat before their sentence is carried out.¹¹ Former Texas jailhouse cook Brian Price’s book, *Meals to Die For*, includes descriptions of over 200 meals he has prepared for condemned inmates awaiting their execution.¹² Notably, Price has offered to cook all Texas inmates’ last meals for free. As he explained in an interview with CNN reporters, “We should not get rid of the last meal.... Justice is going to be served when this person is executed, but can we not show our softer side? Our

¹⁰ Bigert & Bergström (Producers), 2005. *The Last Supper* [Documentary] Stockholm, Sweden: Studio Bigert & Bergström.

¹¹ See generally <http://deadmaneating.blogspot.com>.

¹² BRIAN D. PRICE, *MEALS TO DIE FOR* (2005).

compassionate side?”¹³ However, Texas Department of Criminal Justice spokesperson Michelle Lyons told the Los Angeles Times that Price’s offer is “kind,” but “it’s not the cost, but rather than concept we’re moving away from.”¹⁴

It becomes clear, then, that the American way of execution is ridden not only with legal technicalities but also with ceremonies and rituals which are vestigial representations of a process that was once transected with spiritual concerns. Execution customs – even, arguably, the presence of defense counsel, to whom one can after all confess with impunity – represent the vanishing traces of a once vibrant spiritual culture associated with death and execution.

Today’s last meals may seem a poor relation to those ornate and carefully considered rituals of the past, but parallels remain. Louisiana State Prison Warden Burl Cain reports that he has shared in the last meals of several of the inmates put to death under his jurisdiction and that he tries to keep the mood of the occasion ‘upbeat.’¹⁵ Robert Johnson, a sociologist who has studied the men who work on death row directly, describes the meal as a focal point that guards will use to distract the condemned from their fate.¹⁶ The last meal continues to serve as a place to manage the condemned and broker their co-operation in the execution process. But in the midst of the tight security of death row, they certainly are not operationally required.

The abolition of the last meal in Texas demonstrates a feeling that the state has no understanding of (or at least respect for) the last meal’s ostensible meaning and functions. What those meanings and functions are, and what it means to be a society that no longer has use for them, are the questions that every decision-maker in Livingston’s position must contemplate.

Second, the decision to abolish the last meal, if it is to be made, falls generally under the auspices of the bureaucrats and professionals responsible for the execution protocol itself. As Livingston was reminded by Senator Whitmire, however, those bureaucrats may not themselves be able to operate in a political vacuum. Whitmire has presided over criminal justice for the Texas State Senate for some years, and has clashed with TDCJ on numerous occasions. In 2006 Whitmire received a direct, personal threat from a death row inmate who had successfully obtained a cell phone, after which contraband became his signature issue.¹⁷ TDCJ went on to be humiliated by a series of revelations about the ease of transporting goods in and out of its prisons.¹⁸ Such is Whitmire’s lack of regard for TDCJ that

¹³ See Lateef Mungin, Former death row chef offers to cook free meals for the condemned, CNN JUSTICE, Oct. 2, 2011, at <http://www.cnn.com/2011/10/02/justice/texas-last-meal/index.html>.

¹⁴ See Mark Memmott, Texas Turns Down Cook’s Offer of Free ‘Last Meals’, NPR.com (Sept. 27, 2011), <http://www.npr.org/blogs/thetwo-way/2011/09/27/140838771/texas-turns-down-cooks-offer-of-free-last-meals>.

¹⁵ Warden Describes Inmates’ Last Hours, ABCNEWS.COM (May 4), http://abcnews.go.com/2020/story?id=124095&page=1_

¹⁶ Robert Johnson, *Death Work: A Study of the Modern Execution Process* (1998).

¹⁷ Death Row Killer Threatens Texas Senator Via Cellphone, USA Today (Oct. 21, 2008, 9:06am), http://usatoday30.usatoday.com/news/nation/2008-10-21-inmate-senator-threats_N.htm.

¹⁸ Texas Prisons Can’t Stop Cell Phones at Cell Walls, CBS DFW. (Jun. 13, 2011, 9:20pm), <http://dfw.cbslocal.com/2011/06/13/texas-prisons-can-t-stop-cell-phones-from-reaching->

he has called repeatedly for the entire department to be moved from its present location in Huntsville – also the location of Texas’ death row – to the state capital, Austin.

Livingston’s decision to abolish the last meal was made necessary, in effect, by the combination of the actions of Senator Whitmire, on the one hand, and Lawrence Brewer on the other. On Sept 22, 2011, Whitmire wrote directly to Brewer that “I have yielded to TDCJ judgment in the past, but now enough is enough.”¹⁹ The practice should be discontinued immediately, he went on, “or I am prepared to do so by statute next session.” Meanwhile, Brewer’s ordering and subsequent rejection of a vast feast prior to his execution made a mockery of any symbolic value the last meal might be said to hold. In the circumstances, it is hard to imagine any other response option by Livingston. Was he to side with the unrepentant racist who was laughing in his face, or with the politician with the mandate – and apparently the intention – to implement popular will? Amid this rattling of sabres, Livingston’s decision cannot have been difficult. Given the obvious constraints on Livingston’s actions, the question here is whether states wish to construct execution protocols which are based on the judgments of professionals acting freely to facilitate the operation of their units, or to arrive at them at the conclusion of a morality play.

Third, the consequences of the abolition of the last meal will be felt most keenly not by those debating it so hotly but rather by those implicated directly in the process of the execution itself. For all their antiseptic bureaucracy, executions remain somber moments in prisons. Condemned prisoners now average over twelve years between sentencing and execution nationwide. In that time they may come to be known, and often liked, in the prisons which are their homes. Executions and the protocols by which they are carried out are most binding, and most onerous, on the condemned and those who must supervise and care for him in his final hours.

Executions are conducted in a secret world inhabited by a select few people and the research on what the last meal means to them has yet to be done. Certainly, all is not well in that world. Robert Johnson reports that the mood prior to an execution, particularly of the condemned, is one of despondency and fear, notwithstanding the apparent best efforts of professionals such as Warden Cain. The final meal is far from the idealized moment of sharing or forgiveness that ancient customs may have signified. But for those present – staff and condemned alike – it may still be some kind of fitting but hollow consolation. It is hard to imagine why else Brian Price, the erstwhile chef for Texas’ death row, offered in the wake of the abolition to continue to cook final meals at his own expense. TDCJ’s response to Price, that it was “not the cost but rather the concept that we’re moving away from,” indicates that the types of consequences it contemplated in making its decision may not have had anything to do with the concerns of the people involved in the execution process.²⁰ If true, then this might be regrettable – not because

cell-walls: “In 2010 791 cell phones were taken away from Texas prisoners. From January through May of this year about 316 phones have been confiscated.”

¹⁹ Letter from Sen. John Whitmire to Brad Livingston (Sept. 22, 2011), *Texas Letter on Prisoner Meals*, available at <http://www.scribd.com/doc/65940295/Texas-letter-on-prisoner-meals> (last visited Aug. 6, 2014).

²⁰ See Mark Memmott, *Texas Turns*, *supra* note 14.

Price's concerns should outweigh anyone else's, but because it might indicate that TDCJ has made the mistake of considering this reform in a vacuum. If there is anything that should be remembered about the last meal it is that it is a story about history, culture, politics and people. Whether Livingston was right or wrong, the question of whether he could or should have made a different decision is not just a matter of "concept," but of judging whether an act committed at a moment of high passion, ending old traditions, and changing the last moments of the hundreds who remain on death row as well as the professional lives of those charged with caring for them, was taken with due diligence.

II. CONTEXT AND PERSPECTIVE

Because of the religious, historical, and cultural complexity of the last meal before execution, it is not surprising that a good deal has been written about it in scholarly articles, cinema, popular and social media. One of the most comprehensive of these academic approaches to the subject was written by Linda Meyer. Discussed together with the examination of prisoners' last words, the author describes last meals and last words as a final attempt to be human and to prevent the capital punishment process from becoming an extermination.²¹ Yet, the rituals introduce an element of the unpredictable and unmanaged and human. Even in this atmosphere of near total control, the process of execution requires these last remnants of the human.²² Indeed, this piece, among others, helps explore the most pressing questions about the last meal – regardless of its abolition or the procedures for providing it: whether it humanizes a barbaric process or whether it adds to the macabre traditions surrounding execution.²³

When my co-authors and I first became interested in this project, we were first struck by the broad, pop-culture interest in the last meal. A prisoner's last meal is almost always described in news stories about an execution. But little did we know then about projects such as the "Last Meals Project" created by Jonathon Kambouris. It focuses on the last meals of some of the most notorious prisoners, including Ted Bundy and Timothy McVeigh, and it includes (reproduced) photographs of the meals the prisoners requested. Those meal requests ranged from a bag of assorted Jolly Ranchers to a request for justice, equality, and world peace. It has had thousands of visitors since its inception.²⁴

²¹ Linda Ross Meyer, *The Meaning of Death: Last Words, Last Meals*, 2 (2008) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480686, last visited Aug. 6, 2014).

²² *Id.* at 2.

²³ *Id.* at 3.

²⁴ Even beyond the context of actual executions, considering a last meal has become a sort of get-to-know you game. A few years ago, an article ran in Time Magazine relaying the questions asked by Melanie Dunea, in her book called "My Last Supper." Dunea asked celebrities what they would order for their last meal. The project drew responses from Gordon Ramsay, Mario Batali and Jacques Pépin who claimed they would choose: a classic roast beef dinner; a ten course meal including molto dishes of pasta, seafood and vegetables both raw and cooked; and a hot dog. Joel Stein, *You Eat What You Are*, TIME, Oct. 2007, at 51 (citing, MELANIE DUNEA, MY LAST SUPPER: 50 GREAT CHEFS AND THEIR FINAL MEALS (2007)).

But what we ultimately became more interested in was what the last meal meant (or didn't mean), what it represented (or didn't). Beyond a popular fascination with the topic that might extend from sensationalism into art, this article, rather, seeks to investigate what prisoners' actual last meals (or refusals thereof) might signify – and what we might learn from them.

A. *ORIGINS OF AND SUPPORT FOR THE TRADITION OF THE LAST MEAL*

Although most believe the ritual originates with the last meal of Jesus Christ, according to Max Bigert, co-producer of the Swedish documentary *Last Supper*, the tradition “can be traced back to pre-Christian times, to the fear of ghosts. In Ancient Greece you had to feed the person who was going to be executed, so that they could cross the River Styx into the underworld, and not come back as a hungry ghost.”²⁵ The Last Supper of Christ, contemplated and examined by artists, historians, and religious figures for centuries, is one of the most sacred events for members of the Christian faith.²⁶ Of course, that supper was not only tied to the traditional Jewish Passover meal but formed the basis for the Sacrament of Communion; laden with symbolism, it was at its most basic a supper in the shadow of arrest and execution with people to whom Jesus of Nazareth felt especially close.

Over the years, new traditions surrounding a last meal emerged, sometimes even incorporating a final Communion. In Germany, during the eighteenth century the so-called Hangman's Meal would be attended by jurists, clergy, local dignitaries and often the executioner himself. The food served at such occasions was grand: Nuremburg established the municipal tradition of providing every condemned man with an entire roasted goose. A series of scripted exchanges would ensue in which the condemned would be directed to seek forgiveness in the next life and would be offered bitter lemons to signify their fate. The entire meal comprised a grand symbolic gesture implying complicity between condemned and condemner, forgiveness and acceptance in the breaking of bread and the bittersweet satisfaction of earthly desires.²⁷ History records that then, as today, appetites were fickle.²⁸

²⁵ A. Britten, Five questions for...Mats Bigert [Interview], *Metro*, 23 Jan. 2007, reproduced at <http://artemundi.org/ebulletin/bulletin2007-02.htm> (last visited Jun. 6 2012; unavailable Aug 6, 2014, original on file with authors).

²⁶ Terri J. Gordon, *Debt, Guilt, and Hungry Ghosts: A Foucauldian Perspective on Bigert's and Bergstrom's Last Supper*, 6 *Cabinet Magazine* Online, <http://cabinetmagazine.org/events/lastsuppergordon.php> (last visited Aug. 1, 2014).

²⁷ Scholars have noted the irony of such a tradition, especially compared to a biblical context. “Covenant meals in the Old Testament, for example, make plain that ritual meals offered to an enemy must come with an obligation of protection, and sitting down to a meal with an enemy who intends no such protection may be the deepest kind of betrayal.” Meyer, *supra* note 21, at 21.

²⁸ In Frankfurt am Main, Susanna Margarethe Brandt, 25, was sentenced to death for killing her infant daughter. On the day of her execution, she was ordered to feast with six of the local officials and judges through the ritual known as the “Hangman's Meal.” On the menu, there were three pounds of fried sausages, ten pounds of beef, six pounds of baked carp, twelve pounds of larded roast veal, soup, cabbage, bread, a sweet and eight and a half measures of 1748 wine. She reportedly managed nothing more than a glass of water. Brian

In eighteenth century London, some prisoners were allowed to hold a celebration with outside guests on the eve of their execution. On the next day, the procession would stop at a pub for the condemned's customary "great bowl of ale to drink at their pleasure, as their last refreshment in life."²⁹ Later, in America, the Puritans of Massachusetts once held grand feasts for the condemned, believing it emulated the Last Supper of Christ, representing a communal atonement for the community and the prisoner.³⁰

Across cultures then, even in the context of the realities of a forthcoming execution, the last meal emerges as a tradition verging on a celebration – or at the very least of comfort – of the one facing his imminent death. Many see a value in that, even as they protest the legality or morality of the execution itself. Put one way by Celia Shapiro, an artist who has compiled photographs of last meals, "The process of composing the pictures became a profound meditation on violence and how the state metes out justice and retribution. The meal is life given to the body, the execution is life taken from the body."³¹

Of course, reasons for publication of details related to the last meal may be somewhat different from the reasons justifying the last meal itself. But both, oddly, seem to be about connection, explains Treadwell, featured on the Dead Man Eating blog, "I honestly think everybody loves food, and it gives people a way to connect with this segment of the population they normally have nothing in common with," Treadwell said. "They can say, 'Hey, I've never killed anybody with a hammer, but I love fried chicken.'"³² Trite, perhaps, but that explanation is borne out in other discussion of the reasons we seem to crave details about prisoners' last meals.³³

B. LAST MEALS AS POLITICAL STATEMENTS: WHAT THEY MAY (AND MAY NOT) MEAN

There are political implications, too, of Last Meals: in the requests and in their portrayals. Amnesty International began a campaign in February 2013 that showed the last meals of five innocent prisoners who were executed and later

Cunningham, *Last Meals*, LAPHAM'S QUARTERLY, Wed. July 23 2014, <http://www.laphamsquarterly.org/essays/last-meals.php?page=all> (last visited Aug. 6, 2014).

²⁹ BRIAN P. BLOCK & JOHN HOSTETTLER, HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN 34 (1997).

³⁰ Meyer, *supra* note 21.

³¹ Celia A. Shapiro, Last Supper, <http://www.celiaashapiro.com/posts/view/168> (last visited, Aug 1, 2014).

³² Carlos Campos, *Prisoners' Last Meals Satisfy Appetite For Curious Facts*, DEAD MAN EATINGWEBLOG (Dec. 1, 2003), http://deadmaneating.blogspot.com/2003/12/dme_02.html (last visited Aug. 6 2014).

³³ Daniel Nasaw, *Last Meal: What's the Point of This Death Row Ritual?*, BBC NEWS MAG. (Sept. 26, 2011), <http://www.bbc.co.uk/news/magazine-15040658> (last visited Aug. 6 2014). ("What men and women request for their last meal reflects how they lived their lives and how they choose to face their deaths, and offers Americans a poignant human connection to the people they have decided should die for their crimes, scholars and legal analysts say.")

exonerated of their crimes in the United States.³⁴ The campaign won the Gold Outdoor Lion at the Cannes International Festival 2013.

Prisoners know that their requests are described in news reports surrounding impending (or completed) executions and sometimes use that opportunity to make a final statement. While one death row inmate ordered a single olive (symbolizing world peace) for his final meal, James Smith ordered a plate of dirt. Smith, however, settled on yogurt since dirt was not on the approved list.³⁵ Robert Madden “asked that final meal be provided to a homeless person.”³⁶ Counting on journalists to report his outrage when prison staff could not accommodate him, Thomas Grasso’s final words were, “I did not get my SpaghettiOs, I got spaghetti. I want the press to know this.”³⁷ In at least two cases, food has been connected to prisoners’ attempts to avoid the execution completely.³⁸

Even when unintentional, a prisoner’s requested last meal may reveal information crucial to a larger political or legal issue, such as his competency to be executed. Before the United States Supreme Court decision finding the execution of the severely mentally disabled to be unconstitutional,³⁹ many are haunted by the case of Ricky Ray Rector, who ate his final meal, but “saved” pecan pie “for later.”⁴⁰

A prisoner’s failure to request a last meal – or to eat the meal previously ordered – may be the area most likely to produce controversy or speculation. This may or not be fair. There may be biological reasons for declining and psychological reasons for partaking. Explains Meyer, “At a certain rational level, declination of the last meal makes sense since – unless there is a late, unexpected pardon – there is no biological need for energy. At other levels, declination of the last meal makes little sense since the person voluntarily foregoes a final sensory experience over which they have some degree of control.”⁴¹ Or a prisoner may simply be too terrified to take a bite of food.⁴² Many accounts of those preparing meals for or

³⁴ *Amnesty and the Last Meal*, THE INSPIRATION ROOM (July 2, 2013), <http://theinspirationroom.com/daily/2013/amnesty-and-the-last-meal/> (last visited Aug. 6 2014).

³⁵ Sam Howe Verhovek, *Word for Word/ Last Meals; For the Condemned in Texas, Cheeseburgers Without Mercy*, N.Y. TIMES (Jan. 4, 1998).

³⁶ Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 L. & SOC. INQUIRY 701, 714-15 (2007).

³⁷ R. K. Elder, *Last Words of the Executed*, 205 (2010).

³⁸ Julie Greene, *Last Supper*, PROTEUS 49 (2007) (“[I]n the early part of the twentieth-century in Washington State, a condemned man tried to eat so much as to be too fat to fall through the trapdoor when he was hanged. Around this time, a convict named Donald Schneider also attempted to gorge himself so he wouldn’t fit into the electric chair. Neither succeeded.”)

³⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁰ See <http://www.famouslastmeals.com/2010/09/ricky-ray-rector.html> (last visited Aug. 6 2014).

⁴¹ Meyer, *supra* note 21 at 15-16.

⁴² “[M]eal remains ambiguous until the prisoner acts. Did he refuse or ridicule the meal? Did he order it, but was not sufficiently at peace to eat it? Did he eat and enjoy it? Did he invite the guards to join him? Was his family allowed to eat with him? Did he thank the cook?” Meyer, *supra* note 21, at 22.

sharing time with a prisoner before his execution explain that appetites have long left many men facing death.⁴³

There may be some difference between declining to order a final meal and ordering a final meal and refusing to eat it. Leonel Torres Herrera and Gary Graham, like others before them, were Texas prisoners who famously protested their innocence in hard-fought legal challenges. In protest, each failed to order a last meal. Explains Linda Meyer, “these denials impress upon us the seriousness of their protestations of innocence. Their refusal to acquiesce in the ritual of the last meal is itself a protest and a refusal to ‘make peace.’ Yet, if no such ritual existed, these men could not ‘refuse’ it in so meaningful a way.”⁴⁴

Outside observers are forever trying to make meaning out of a prisoner’s last words or actions.⁴⁵ What becomes clear, though, after review of last meals requests, prisoners who declined last meals, and prisoners who ordered a last meal but did not eat, is that our understanding of their meaning is extremely limited.

C. LAST MEALS OFTEN REVEAL SOMETHING SPECIAL AND TENDER ABOUT A PRISONER- OR THE ONES GUARDING HIM

A meaningful final meal is not limited to people in prison. Many who know or suspect death is impending seek out meaningful rituals and traditions with loved ones—some of which include food. The traditional last meal request, however, often reveals what is on the heart or mind of someone who has taken life – and for that reason – for reasons of curiosity, of mystery, that fact has become newsworthy. What we found in this project, however, was less about the meal requests as a collection of favorite tastes, but more about meaning and memory. As one article related, “[w]hen it comes to our deepest desires, it turns out that food isn’t just about taste. It’s tied right into memory and the longing for the sensations of when we felt happiest or most loved.”⁴⁶

And if our civilian belief that our choices of a last meal may reveal our deepest desires or core personality traits, how much more so may the last meal reveal about a person with limited opportunities for expression? Prisoners, for example, may request the Eucharist for a final meal⁴⁷ – or even whimsical, symbolic food. A man once asked for a traditional Chinese meal whose recipe calls for a one hundred year old egg; he promised he wouldn’t eat it “a minute early.”⁴⁸

⁴³ Rev. Carroll Pickett and Carlton Stowers. *Within These Walls: Memoirs of a Death House Chaplain*. 2002. See also Power Ekroth, *LAST SUPPER TEXTS*, Studio Bigert & Bergstrom (Jan. 6, 2010).

⁴⁴ Meyer, *supra* note 21 at 51.

⁴⁵ In New York City, there is an invitation-only supper club called Studiofeast. Every year they host a dinner based on the best responses to the question, “You’re about to die, what’s your last meal?” The group takes requests from all over and compiles the top 10 or 20 ingredients and creates a menu for dinner. The project was centered on the idea that what a person chooses to eat in their final moments reveals a little about who that person is. *I AM WHAT I EAT: THE LAST MEAL*, Studiofeast, available at Vimeo, <http://studiofeast.com/our-story/> (last visited Aug. 6 2014).

⁴⁶ Stein, *supra* note 24, at 51, 52.

⁴⁷ Meyer, *supra* note 21, at 49.

⁴⁸ *Id.* at 50.

Cold (Comfort?) Food

Even a refusal of a meal may be telling: one author tells of a prisoner refusing his final meal “so that he could spend more time with his visitors, since he would have had to be taken out of the visiting yard to eat it.”⁴⁹ And notably, there are also touching stories of last “meals” revealing prisoners’ empathy – even for those carrying out an execution. Recalling a last meal request to Lewis Lawes, the abolitionist warden of Sing Sing, an article in the *New York Times* recounted: “Once, when a condemned man named Patrick Murphy pleaded for a strictly prohibited last drink of spirits, Lawes broke the rules to deliver a medicinal dose of bourbon. Murphy accepted it gratefully and then offered it back to the stricken Lawes, saying, ‘You need the shot more than I do, warden.’”⁵⁰

Conversely, the meal is also a way for prison employees to show their compassion to the condemned. Over the decades spent on death row, guards frequently build relationships with prisoners—and this is sometimes revealed through the last meal tradition.⁵¹ That is not to say all wardens or guards join in this tradition or that they all support it. Expense and punishment, after all -- regardless of one’s opinion about a last meal -- are two core concerns of prison administration.⁵²

In at least one case, involvement in preparation of the last meal has changed a prison chef’s views on death row prisoners. Brian Price, a Texas cook who prepared hundreds of last meals before Texas discontinued the practice of offering a special one, recalls, “I think that through their meals, they were seeking a small bit of comfort and courtesy. Food can take you back to a better time in your life, and it gave me comfort to give these dying men and women some comfort in their last hours.”⁵³

⁴⁹ Katya Lezin, *FINDING LIFE ON DEATH ROW: PROFILES OF SIX INMATES* 184 (1999).

⁵⁰ RALPH BLUMENTHAL, *A MAN WHO KNEW ABOUT THE ELECTRIC CHAIR*, N.Y. TIMES, Nov. 6, 2011 5:02 pm, <http://cityroom.blogs.nytimes.com/2011/11/06/a-man-who-knew-about-the-electric-chair/> (last visited Aug. 1, 2014).

⁵¹ JOHN D. BESSLER, *KISS OF DEATH: AMERICA’S LOVE AFFAIR WITH THE DEATH PENALTY* (2003) (citing Jim Willett, *89 Executions. I was the Warden*, STAR TRIB. (Minneapolis), May 20, 2001, at A25. “Sometimes I wonder whether people really understand what goes on down here and the effect it has on us,” Jim Willett asks himself, “I wondered most about the mothers who saw their sons being put to death,” he says. “Some would just wail out crying. It’s a sound you’ll never hear any place else, an awful sound that sticks with you.”).

⁵² Others beyond the prison walls may be concerned with the expense of a special last meal, but our research shows that in most prison systems, there is either a cap on the dollar amount that may be spent in preparation of a prisoner’s final meal or that the ingredients must already be stocked in the prison kitchen (see *infra* Section III generally.) We also note that not all prison administrators use food as a way to connect with the inmates under their supervision: “...Maricopa County (Arizona) Sheriff Joe Arpaio famously cut caloric intake for nearly 9,000 jail inmates from 3,000 to 2,500 calories per day. Arpaio justified the caloric reduction on health-related and budgetary grounds. ‘Do you hear me?’ he was quoted as telling inmates. ‘You’re too fat. I’m taking away your food because I’m trying to help you. I’m on a diet myself. You eat too much fat.’ Arguing that he was saving the county about \$300,000 a year in food costs, Arpaio boasted: ‘I got meal costs down to 40 cents a day per inmate. It costs \$1.15 to feed the department dogs.’” Avi Brisman, *Fair Food?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 G. J. ON POV. L. & POL’Y 49, 67 (2008).

⁵³ Brian Price, *The Last Supper*, LEGAL AFFAIRS, (Mar./Apr. 2004),

Coming to understand that these men and women – whatever they may have done – were human seeking comfort amidst crisis has led Price to offer to prepare last meals at no cost to Texas prisons. As with many other personal encounters with men and women facing death, his experiences have even changed his views on capital punishment: “I used to be a strong believer in the death penalty – thinking that what goes around should come around. But my experience cooking for the condemned forced me to weigh my values and look at the death penalty from both sides of the fence.”⁵⁴

III. GETTING THE RITUALS RIGHT: WHY DO STATES MAKE THE DECISIONS THEY DO ABOUT LAST MEALS?

Last meals are served within the administrative contexts of state Departments of Corrections, many of which regulate the contents of the meals themselves. As such, while such meals are frequently interpreted for what they say about the condemned men and women who consumed them, they may also reflect something about the states they come from. Our analysis in this section explores some of the differences that exist between states in the restrictions they impose.

Executions are highly ordered procedures where everything, including the timing and contents of the last meal, is prescribed. A comparison of these execution procedures reveals just how much states vary in what they permit inmates to be provided.⁵⁵ Some, like Texas after the Whitmire affair, provide nothing special. Most provide at least some special consideration, though this comes by degrees.⁵⁶

To better understand why states make the decisions they do about constraining the contents and lavishness of last meals, we examined available information on last meal policies and rules for all states that used capital punishment in 2010. Our analysis first catalogued the variety of restrictions states placed on meals, and then examined how those restrictions were related to a variety of other state characteristics including characteristics of their correctional systems, punitivity in state penal cultures, and the extent of their use of capital punishment.

A. APPETITE SUPPRESSANTS: A DESCRIPTION OF THE RESTRICTIONS STATES IMPOSE ON LAST MEALS

Thirty-five states had capital punishment as an available sentencing option in 2010, though Illinois was at the time undergoing a period of moratorium. We sought information on the rules and regulations surrounding the provision of last

http://www.legalaffairs.org/issues/March-April-2004/feature_price_marapr04.msp (last visited Aug. 6 2014). (“The last meal is an ancient tradition, which some say predates the death of Christ. I always thought of the LMs I prepared as a version of the Last Supper, when Christ knew that he would die the next day.”).

⁵⁴ *Id.*

⁵⁵ See e.g., Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002).

⁵⁶ See Fig. 1, below.

meals in each of these states. Our preferred sources were so-called ‘execution protocols’ – documents drawn up typically by prison administrators which describe in great detail the precise procedures to be followed in executions.⁵⁷ A total of twenty such protocols (or part-protocols) were collected, from which information regarding the restrictions placed on the contents of last meals could be extracted from nine.

We then set about gathering information on the remaining states by scouring state DOC websites, statute law, news sources, and other research articles in this area.⁵⁸ We sought descriptions of last meal regulations in each state that could be traced directly back either to official documents produced describing last meal procedures, or to individuals with direct knowledge of such policies and procedures. In this manner, we were able to compile a dataset containing authoritative information on the regulations governing last meal provisions in all 35 states of interest.

Two of the 35 states – Kansas and New Hampshire – had no execution protocols or regulations in place in 2010.⁵⁹ Neither state had executed an inmate since *Gregg*.⁶⁰ In the case of New Hampshire no execution had taken place since 1939.⁶¹ As a result, neither state had faced the need to actually draw up procedures for an execution. In all of the remaining 33 states procedures for executions and last meals had, to a greater or lesser extent, been stipulated. We organized all thirty-three states in our dataset into four categories according to the extent of the explicit constraints that were placed upon the decisions of the prison officials who prepared them. The status for each state is shown in Figure 1.⁶²

⁵⁷ For example, Idaho’s protocol can be found online, *available at* <http://www.idoc.idaho.gov/content/policy/708>. The rules surrounding the last meal are mentioned on page 19.

⁵⁸ Denno, *supra* note 55.

⁵⁹ The absence of any protocols in either Kansas or New Hampshire was confirmed in email communications with relevant Department of Corrections officials in each state, on file with the authors.

⁶⁰ *See Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶¹ New Hampshire executed Howard Long in 1939. The sentencing to death of Michael Addison in 2008 has led to discussions of the development of a new protocol, however. *See* Death Penalty Information Center at <http://www.deathpenaltyinfo.org/new-hampshire-1> (last visited Aug. 5, 2014).

⁶² A complete listing of sources for this material is available on request from the authors.

certain limitations on what could be bought.⁶⁷ In California, a meal could be purchased from a local restaurant though a spending limit of \$50 was imposed.⁶⁸ In Florida the limit was \$40,⁶⁹ in Georgia it was \$20,⁷⁰ and in Oklahoma it was \$15.⁷¹

In Montana, no spending limit was imposed, but it was specified – as it was in several other states in this category – that the meal must be purchased locally to the prison.⁷² The local purchase rule serves, at the very least, to formalize a more or less real fear that last meal requests might generate excessive costs. Georgia, for example, will provide local lobster if requested, but the state “will not fly it in from Maine.”⁷³ Although still permitting prison officials to provide the inmate with something above and beyond what they could usually expect as prison fare, therefore, these states explicitly prescribed the breadth of discretion those officials had as they set about fulfilling the inmate’s request.

A further ten states had drafted policies of a yet-more-restrictive form, requiring that any last meals prepared for prisoners must be crafted only from ingredients that are already available on prison premises.⁷⁴ In Pennsylvania the inmate is presented with a menu in eight categories from which they are invited to choose: protein items, starches, soups, grains, side dishes (such as coleslaw or apple sauce), dessert, drinks (of which they might pick two), and relishes.⁷⁵ In Virginia and Idaho, inmates are constrained to choose from among the items in the regular prison menu, the Idaho regulations also noting that “The offender may retain consumable commissary items as approved by the IMSI warden until completion of the last meal.”⁷⁶ Texas fell into this category in 2010, and as Brian Price’s book on the preparation of meals for condemned inmates in that state reports, this constraint required him to become creative in his attempts to fulfill inmate requests.⁷⁷

⁶⁷ See Figure 1. These states include California, Florida, Georgia, Montana and Oklahoma.

⁶⁸ California Text of Regulations, Subchapter 4, Article 7.5, 3349.3.4(b)(5), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/4_LI_7-28-10.pdf (last visited Jan.14, 2014).

⁶⁹ Florida Department of Corrections, Death Row Fact Sheet, available at <http://www.dc.state.fl.us/oth/deathrow/index.html>.

⁷⁰ Jennifer G. Hickey, *Dining in with Capital Punishment*, 17 INSIGHT ON THE NEWS, 24 (2001).

⁷¹ R. Peterson *Life on Death Row – Execution Day*, McAlester News (2011) available at <http://mcalesternews.com/local/x756276814/Life-on-Death-Row-Execution-Day> (last visited Jan. 13, 2014).

⁷² Montana Department of Corrections, Montana State Prison Execution Technical Manual, 51.

⁷³ Greene, *supra* note 38, at 48.

⁷⁴ These states are Alabama, Colorado, Idaho, Nebraska, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming.

⁷⁵ Greene, *supra* note 38, at figure 2.

⁷⁶ Regarding Virginia, see A. Stewart, *Execution Day: What’s Scheduled to Happen* (2009) formerly available at http://www2.insidenova.com/news/2009/jul/12/execution_day_whats_scheduled_to_happen but no longer available when last visited (Aug. 5, 2014). Copy on file with authors available on request. Idaho Department of Correction, Execution Procedures, 19.

⁷⁷ BRIAN D. PRICE, MEALS TO DIE FOR (2005).

Price reports ingredients were frequently not available, and substitutions were frequently necessary. The use of hamburger meat in the place of steak appears to have been particularly common.⁷⁸

Finally, last meal policies in three states stipulated that the inmate would be served the same meal as other inmates prior to execution and that no special meal would be provided.⁷⁹ In two of these, Oregon and Connecticut, although the regulations clearly stipulated that “The inmate shall be served the same food as other inmates at the normal meal time,” the prison warden was granted discretion to overrule this general principle.⁸⁰ In the other state, Maryland, no such discretion was granted.⁸¹ In 2011, as a result of the Whitmire affair, Texas joined this category.

Notwithstanding variation in the restrictiveness of last meal provisions, the authority of correctional officials to make ultimate determinations about the form the last meal would take was clear throughout all the documents reviewed. In Ohio, for example, the rules stipulate that the execution “Team Leader” shall “ask the prisoner to identify his or her special meal request,” which should then be served “at a time to be determined by the Managing Officer.”⁸² In Arizona, the duty falls to the prison Warden, who should request that the inmate complete the “Last Meal Request, Form 710-5,” and return it “no later than 14 days prior to the execution” to give time for the request to be considered.⁸³ In Montana and California, the responsibility of soliciting the inmate’s request fell to food services staff, though California warns the inmate “The Associate Warden and the Food Manager will review your request to determine if the request can be accommodated.”⁸⁴ In Oregon, the affirmative duty to solicit the inmate’s request was absent altogether, the regulations stating instead that “At the discretion of the Superintendent, the inmate may be permitted a last meal of the inmate’s choosing.”⁸⁵

⁷⁸ *Id.*

⁷⁹ Maryland, Oregon and Connecticut.

⁸⁰ The wording is from Connecticut Department of Correction Directive 6.15, Administration of Capital Punishment, page 5. In Oregon, the language reads “The inmate will be served the same food as other inmates assigned to the facility,” and the prison official with discretion is the ‘Superintendent.’ Oregon Bulletin, 2011, Department of Corrections Administrative Order DOC 9-2011, Capital Punishment (Death by Lethal Injection), *available at* Oregon Secretary of State Archives Division, http://arcweb.sos.state.or.us/pages/rules/bulletin/0711_bulletin/0711_ch291_bulletin.html (last visited 13 Jan. 2014).

⁸¹ Greene, *supra* note 73, at 47.

⁸² State of Ohio Department of Rehabilitation and Correction (2011), rule ORC 2949.22; 2949.25, page 8.

⁸³ Arizona Department of Corrections Department Order 710, Execution Procedures, page 4.

⁸⁴ California Lethal Injection Regulations, Thirty Day Notification, item 12. *See also* Subchapter 4, Article 7.5, 3349.3.4 (b) (5) “The Team Administrator shall... Along with the Food Manager, interview the inmate to ascertain what request, if any, the inmate may have for a last meal.” Montana Department of Corrections, Montana State Prison Execution Technical Manual 20.

⁸⁵ Oregon Bulletin, 2011, Department of Corrections Administrative Order DOC 9-2011, Capital Punishment (Death by Lethal Injection) *available at* Oregon Secretary of State Archives Division,

Reflecting the importance of the last meal as a ritualistic practice, the last meal isn't actually the last thing the inmate eats in at least three states. In Ohio and Indiana, the meal is eaten the day prior to the execution – no less than “thirty-six (36) to forty-eight (48) hours before the execution” in Indiana, where it is to be “consumed in one sitting.”⁸⁶ In Idaho, the meal is served “at approximately 1900 hours the day prior to the execution,” while the following day “five (5) hours prior to the execution, the offender shall be offered a light snack.”⁸⁷ While states differ in the leeway they offer in the preparation of the meal, their level of commitment to the ritual itself can also be gauged from their determination to preserve it even in situations where its literal status as a ‘last meal’ no longer exists.⁸⁸

The geographical patterns shown in Figure 1 may at first glance be unexpected. The most restrictive, highly regulated last meal policies are clustered in the Western half of the country, with the exception of a small number of South-Western states. The states of the Deep South, meanwhile, where capital punishment itself is most concentrated, vary in their restrictiveness, with several forming part of a cluster of states with unrestricted last meal policies extending far north into the Mid-West. Rather than correlating neatly with the prevalence of other punitive policies such as capital punishment and mass incarceration, therefore, last meal policies evince a different pattern. To clarify this picture further, we examined statistically the relationship between last meal policies and a variety of measures of differences in state correctional systems, punitive penal culture, and their usage of capital punishment.

B. ECONOMICS, PUNITIVITY OR RITUALISM? EXPLAINING THE CHOICES STATES MAKE

There are many things that might explain the choices that states make in how they structure their last meal policies. Based on our review of existing literature and theory in the area, we examined three: economic and security considerations, punitive penal culture, and ‘retributive ritualism’ associated with the use of capital punishment.

i. Economics and Security

Last meal policy decisions might be made on the basis of the need to preserve security and efficiency in state correctional systems. Policy decisions about last meal provisions are made most directly by correctional administrators themselves with the result that execution protocols are likely to answer to operational needs. Decisions against allowing external food to be brought into the prison may be

http://arcweb.sos.state.or.us/pages/rules/bulletin/0711_bulletin/0711_ch291_bulletin.html (last visited Jan.13 2014).

⁸⁶ Email communication with Indiana Department of Corrections. The Ohio protocol also specifies the meal should be served the day prior to the execution: State of Ohio Department of Rehabilitation and Correction (2011), rule ORC 2949.22; 2949.25, page 8.

⁸⁷ Idaho Department of Correction, Execution Procedures 19, 33.

⁸⁸ See Denno, *supra* note 55, at 123, where questions are raised about the possibility that meals may interfere with injection procedures where the inmate has insufficient time to digest its contents.

made on the basis of security concerns over contraband. California's protocol explicitly notes that the meal must be inspected for contraband prior to being served.⁸⁹ Equally, honoring lavish requests may be seen as wasteful. Rules in Georgia state that in the event of a stay of execution the inmate will not have the right to an additional "last meal" should they later find themselves strapped to the gurney for a second time.⁹⁰ Accordingly, we collected data on the incarceration rate in each state, the sizes of correctional budgets and the amounts spent by states per inmate, in order to try and capture the operating conditions of correctional systems across the county, and assess whether those conditions were related to last meal policies. We expected last meal policies to be least restrictive where incarceration rates were low, correctional budgets were high, and spending-per-inmate was high.⁹¹

ii. Punitive Penal Culture

Alternatively, decisions about last meal provisions may be made on the basis of a wider desire to punish inmates and deprive them of comfort. Whitmire's letter, which noted Brewer did not provide the "privilege" of a last meal to his victim, may be an example of this sentiment.⁹² Sociologists of punishment have argued that criminal justice policy has, for a generation or more, become progressively more preoccupied with inflicting punishment, deprivation and austerity upon inmates.⁹³ Research has shown relationships between trends toward punitive correctional policy decisions and the size of states' minority populations, the conservatism of state electorates and the prevalence of fundamentalist religious beliefs in the general population.⁹⁴ We collated data on each of these dimensions and examined them for any relationship to last meal policies. We expected last meal policies

⁸⁹ CALIFORNIA TEXT OF REGULATIONS, SUBCHAPTER 4, ARTICLE 7.5, 3349.3.4(B)(5), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/4_LI_7-28-10.pdf.

⁹⁰ Greene, *supra* note 73.

⁹¹ Correctional population and incarceration rate data obtained from Bureau of Justice Statistics (2010) *Prisoners in 2009*, Appendix Table 1 (available at <http://bjs.gov/content/pub/pdf/p09.pdf>, Mar. 18, 2013). Correctional spending data obtained from Bureau of Justice Statistics (2012) *Justice Expenditure and Employment Extracts, 2009 – Preliminary*, Table 3 (available at <http://bjs.gov/index.cfm?ty=pbdetail&iid=4335>, Mar. 18, 2013). Spending per inmate data calculated by the authors from the previous two sources.

⁹² Whitmire, *supra* note 19.

⁹³ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, (2001).

⁹⁴ See, e.g., Thomas D. Stucky, Karen Heimer, & Joseph B. Lang *Partisan Politics, Electoral Competition and Imprisonment: An Analysis Of States Over Time*, 43 CRIMINOLOGY 211-47 (2005); D. Jacobs & J. T. Carmichael, *The Politics of Punishment Across Time and Space: A Pooled Time-Series Analysis of Imprisonment Rates*, 80(1) SOCIAL FORCES 61 (2001).

to be least restrictive where African-American populations were high, the proportion of Republican voters low, and the prevalence of fundamentalist religious beliefs was low.⁹⁵

iii. Retributive Ritualism and the Use of Capital Punishment

Finally, last meal policy decisions may be the result of a distinctive, contrary trend in the area of capital punishment whereby states that execute the most are also those with the most invested in the ritual panoply of executions. Linda Ross Meyer has suggested that regular use of capital punishment is associated with greater commitment to the curious rituals that surround it including last meals and last words, commenting that “Without the symbolic accoutrements of death, execution becomes merely extermination.”⁹⁶ Noting that Texas is yet the only state that chooses to publish the last words of condemned on its website,⁹⁷ she writes:

The ultimate justification for the death penalty, retribution, requires that these executions have their ritual element, the uncontrolled possibility for rebellion or pity, in order to have also the possibility of retributive meaning. States that resist the tradition of last words tend to be states with less experience in killing.⁹⁸

If Meyer is right and the regular use of capital punishment is also associated with a more full knowledge of and commitment to its ritualistic accoutrements, it is also possible that states which use the penalty the most will also prove the least restrictive in their provision of last meals.⁹⁹ Accordingly, we collected data on the number of executions and the population of state death rows to test this hypothesis. Notwithstanding our more general hypothesis about punitivity, therefore, we expected last meal policies to be *least* restrictive where the use of the death penalty was *most* common.¹⁰⁰

C. ANALYSIS AND RESULTS

Because our sample of thirty-three states is relatively small for statistical purposes, we divided them into just two categories: those which restrict the preparation of last meals to prison kitchens, and those which permit the purchasing of meals from outside the prison. To our minds, this is a key distinction that divides states that (literally) ‘go the extra mile’ to obtain and prepare last meals from those

⁹⁵ Percent African-American data obtained from the Bureau of the Census, 2010 census (available at www.census.gov, Mar. 18, 2013). Percent Republican data is the percent of the popular vote in the 2008 Presidential Election favoring John McCain, obtained from the Federal Election Commission (2009) *Federal Elections 2008* (available at <http://www.fec.gov/pubrec/fe2008/federalections2008.pdf>, Mar. 18, 2013). Data on percent evangelical obtained from the Pew Forum on Religion and Public Life (2008), *U.S. Religious Landscapes Survey*, Appendix 1, p. 100 (available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>, Mar. 18, 2013).

⁹⁶ Meyer, *supra* note 21.

⁹⁷ See http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html.

⁹⁸ *Id.*

⁹⁹ Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 702-704 (2007).

¹⁰⁰ Data on death sentences and executions obtained from DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/> (last visited Mar. 18, 2013).

that limit themselves to what can be prepared and served internally. Accordingly, the comparisons that follow juxtapose data on correctional operations, punitive penal culture and the use of capital punishment for the thirteen states that restrict meals to in-house preparation ('restrictive' states) and the twenty that allow inmates to order food from other sources ('non-restrictive' states).

Table 1: Comparing restrictive and non-restrictive states on correctional operations and punitive culture.

	Variable	Restrictive states (n=13)	Non-restrictive states (n=20)	Non-restrictive states are....	T-test for difference of means
Correc-tional operations	Incarceration rate (per 100,000)	411	502	Higher	2.031 *
	Corrections budget (\$bn)	\$1.499	\$1.898	Higher	0.431
	Spending per inmate	\$64,230	\$42,323	Lower	-3.076 ***
Punitive penal culture	% African-American	9.56%	15.04%	Higher	1.507
	% Republican	50.16%	50.60%	Higher	0.139
	% Fundamental-ist	23.92%	33.40%	Higher	2.150 **

* $p < 0.1$, ** $p < 0.05$, *** $p < 0.01$; Degrees of freedom = 31.

Table 1 compares restrictive and non-restrictive states on characteristics of their correctional operations and factors associated with punitive penal culture. The column on the right hand side of Table 1 illustrates whether the differences between restrictive and non-restrictive states are large enough to be considered statistically significant – that is, unlikely to be due to simple chance. The findings suggest that among all the differences between the states we observed, certain ones are particularly worthy of attention. Specifically, states with the least restrictive last meal policies have higher incarceration rates, spend less per inmate, and have larger fundamentalist populations.

In short, our results suggest the opposite of what we hypothesized. We expected the states which placed the fewest restrictions on last meal policies would be those which incarcerated the fewest and spent the most on housing their inmates. Instead, we found they tended to have higher incarceration rates and to spend less on each inmate. Equally, we expected last meal policies to be least restrictive where state populations were the least fundamentalist. Instead, we found that states with the least restrictive policies tended to have higher number of fundamentalist Christians. That states with the largest prison populations, the least spending per inmate, and the most fundamentalist populations should also be those that are the most 'generous' to those they condemn to die is at odds with our expectations of the influence that correctional operations and punitive penal cultures have. Clearly, if last meal policies are a product of correctional operations or punitive penal cultures, then the relationship is more complicated than we had expected.

Tables 2a & b: Comparing restrictive and non-restrictive states on their capital punishment records.

<i>Table 2a: Number of executions</i>	Restrictive states	Non-restrictive states	
Under 12 executions	14	6	20
Over 13 executions	3	10	13
	17	16	33

$X^2 = 6.9453$ ***
(1 d.f.)

<i>Table 2b: Death row population</i>	Restrictive states	Non-restrictive states	
Death row population 34 or under	14	6	20
Death row population over 35	3	10	13
	17	16	33

$X^2 = 6.9453$ ***
(1 d.f.)

Next, restrictive and non-restrictive states were compared on their capital punishment records. Because state execution records vary so dramatically, with some states carrying out many more executions and housing much larger death rows than others, the states in the sample were divided into categories based on whether they had carried out more than 12 executions since 1976 and whether they had a death row population of over 34 individuals. These were the median values among states in 2010, and by dividing states up in this way it was possible to eliminate the disproportionate influence that states such as Texas and California have on statistical analyses by virtue of their massive capital punishment operations.

The results of the analysis show that states with non-restrictive last meal policies do indeed conduct more executions and have larger death rows than those with restrictive policies. This may seem surprising, since it contradicts the general assumption that penal culture will be more ‘punitive’ where executions are more common. This apparent ‘generosity’ in the form of relatively unrestrictive last meal rights in states which also kill the most inmates is in keeping with Meyer’s ‘retributive ritualism’ hypothesis, however, which implies states which execute the most will also be the most invested in execution rituals such as the provision of last meals. This strong, statistically significant relationship supports Meyer’s contention that states that make the greatest use of capital punishment are also the most likely to institutionalize ritualistic aspects of executions.

D. DEATH REALLY IS DIFFERENT

The results of the foregoing analysis are fascinating for sociologists because they represent an exception of sorts to the power of punitive penal culture in states. States that execute the most also imprison the most, inflict the longest sentences, and maintain correctional systems designed to inflict austerity. And yet our analysis shows that those states which execute the most are also the most likely to provide an expansive entitlement to a last meal at the moment of a condemned inmate's death, allowing them the greatest freedom in what they choose to eat. Even in systems which house many more people and spend almost a third less on housing each inmate, condemned men and women are extended the broadest choices of foods at the times of their deaths.

Meyer's general argument that attachment to last meals reflects the latent importance of rituals to accomplishing the retributive meaning of capital punishment is compelling, but our results also point to a more explicitly spiritual reason behind these more expansive entitlements in certain states. Large populations of fundamentalist Protestants are present not only in the Southern states but also as far west as Arkansas and Oklahoma (both 53%) and as far north as Indiana (34%).¹⁰¹ Moreover, recent research into fundamentalist Protestant opinions on the death penalty has shown a complex relationship whereby fundamentalists tend to support capital punishment generally, but are also more likely to be compassionate to sinners and to believe in the possibility of forgiveness.¹⁰² Little wonder, perhaps, that states with the largest fundamentalist populations are also those that are least likely to place constraints on the last meal ritual, given its longstanding role as an occasion of reconciliation and peacemaking.

Of course, this 'snapshot' of state policies in 2010 renders us unable to examine the evolution of such policies over time or to speculate very deeply about what 'latent' trends the patterns we observe reveal. The development and institutionalization of capital punishment 'rituals' may well be an historical process borne out of tradition and custom. As such, rituals such as last meals may have evolved in ways that visibly confirm, or add nuance to, Meyer's argument that a kind of latent retributive ritualism is at work. More work of an historical nature would undoubtedly elaborate on her insights. Nevertheless, the tokenistic acknowledgment of the need for last meals in states that rarely resort to execution may indeed be symptomatic of an approach which relegates execution rituals, like executions themselves, into a position of 'de facto abolition.'

¹⁰¹ Fundamentalist Protestantism has a variety of definitions. In our data, gathered by the Pew Forum on Religion and Public Life, fundamentalists are described as a religious tradition composed of denominations which "share certain religious beliefs (such as the conviction that personal acceptance of Jesus Christ is the only way to salvation), practices (such as an emphasis on bringing other people to the faith) and origins (including separatist movements against established religious institutions)." Other related terms include 'born-again' or 'evangelical' Christians. Pew Forum on Religion and Public Life *U.S. Religious Landscapes Survey* 13 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (last visited Aug. 6 2014).

¹⁰² J.D. Unnever & F.T. Cullen, *Christian Fundamentalism and Support for Capital Punishment*, 43 J. RESEARCH IN CRIME & DELINQUENCY 169-97 (2006).

IV: ANALYSIS AND CONCLUSION

A. DO MERCY AND CRUELTY SHARE THE SAME DINNER TABLE OR IS BLIND TRADITION THE MAIN COURSE?

The circumstance of a last meal, then, begs Hamlet's old question of whether we must be "cruel only to be kind."¹⁰³ Is the last meal part of a tough love approach to the procedures surrounding the modern day death penalty? Is it cruelty disguised as a gift? Maybe it's just a last sentiment of kindness from the State, the guards, and the wardens, or perhaps no one really knows and it is merely continued as blind tradition sustained not by thoughtful understanding, but only by a vestigial sense of obligation. Regardless of whether this ritual is considered as a form of cruelty, of mercy, or as a relic, it is only by seeking an answer to the question of why we continue to provide last meals that we can understand what exactly the state of Texas has abolished; why the last meal is important; and where it came from to begin with.

i. Cruelty

Is the last meal purely a tool wielded by the State for knowledge, voyeuristic pleasure, or perhaps communal punishment? Once an individual is ensnared in the penitentiary system, it has been argued; they become models for the internalization of the law, individuals of constant scrutiny, and are subjected to never ending surveillance.¹⁰⁴ Is the last meal, this so-called last opportunity for a prisoner to control his or her own human behavior, really just one last chance for the State and the public at large to scrutinize them, judge them, or probe them?

Gordon compares the last meal to Shylock's treatment in Shakespeare's *Merchant of Venice*, explaining that "the last meal comes at great cost. The price of the last supper for the prisoner is a radical loss of personhood and privacy, a weird reduction of the individual for posterity to his/her last meal."¹⁰⁵ Many last meals requested by the condemned are composed of foods that recall an inmate's pre-prison life—a childhood favorite or their mother's home cooking—and from this, an intimate detail about him or her is revealed, subsequently broadcasted to the public without regard to his or her privacy or human dignity.¹⁰⁶

The allegation that last meals are 'cruel' speaks to larger issues regarding the perversity of affording the condemned inmate any kindness whatsoever. The question is really whether an act of any sustaining kindness can have any meaning or reality in the context of a system where every component continually turns toward the moment of the recipient's death. Of course, those who reside on death row may be sustained by such kindnesses, so in human terms an interpretation of the last meal as inherently 'cruel' may be questionable: the simple spectacle of states with high execution rates which afford the greatest liberty in this last rite is perhaps instructive as to the very great importance of such acts in the final moments of an inmate's life. Nevertheless, the question of cruelty may arise again in the context

¹⁰³ WILLIAM SHAKESPEARE, *HAMLET*, Act 3, Scene 4, Page 8.

¹⁰⁴ Gordon, *supra* note 26, at 9.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *See e.g.*, Stein, *supra* note 24.

of actions taken to remove the entitlement to a special meal during an inmate's final hours. May a state, having elected to kill a man, reduce that act into a simple performance of euthanasia, devoid of all emotion or humanity?¹⁰⁷ Whether as a structured act of degradation or a withdrawal of a treasured privilege, there is plenty of evidence to suggest last meals are acts of implicit cruelty.

In light of this continuing debate over this ritual's cruelty, or kindness, the history behind the last meal shows evidence of an extremely grim past. One of the most disturbing examples emanates from the witch trials that swept across the county and the world in the nineteenth century. Once a woman was convicted of practicing witchcraft she was normally sentenced to burn at the stake. However, before her execution, she would be served a considerable amount of alcohol. Unfortunately, this drink was not to calm the condemned woman's nerves, but rather, it was generally thought that the alcohol would make her burn more rapidly.¹⁰⁸

While the example above is almost a blatant cruelty, is the last meal just a mechanism or an attempt to make the execution of a human seem gentler? It has been argued that the last meal merely emphasizes the 'softer side' of society—"just before they break your neck."¹⁰⁹

ii. Guilt

Perhaps, as suggested by one analyst, we feed the condemned not because of their own wrongs but rather because we ourselves are guilty as well.¹¹⁰ We use the last meal not as a gift, therefore, but rather as a tool to repress our own guilt spurred from participating in a state sanctioned killing.¹¹¹ Conversely, to suppress or cast doubt on our own guilt, we provide these last meals to the condemned in order to move the spotlight from ourselves and onto someone else who we've deemed more deserving of it. Additionally, it's quite possible that the wardens and death row personnel use the last meal to help them cope with and overcome their reluctance to kill or the potential guilt which might stem from that killing – for being a part of an execution team is, psychologically, a difficult task.¹¹² As the findings in Section Three show, the Southern States of the United States seem to have more generous protocols concerning the last meal, but should we take the notion of 'generosity' at face value? While the size of the meals provided to prisoners and the variety of food allowed might seem large, is it all just for the prisoners; or rather, as previously mentioned, is it to help with the coping of prison officials? If so, should we really consider the meal as a 'kind' gesture when the desired consequence is not to calm the nerves of the condemned but rather the nerves of the living?

¹⁰⁷ For the euthanasia analogy, see Meyer, *supra* note 21.

¹⁰⁸ Bigert & Bergström, *supra* note 10.

¹⁰⁹ *Id.*

¹¹⁰ See Stein, *supra* note 24.

¹¹¹ *Id.*

¹¹² Cynthia F. Adcock, *The Collateral Anti-Therapeutic Effects of the Death Penalty*, 11 FLA. COASTAL L. REV. 294, 314 (2009) (quoting Robert Jay Lifton, co-author of ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS (2002)).

At least in America, there has been a progression towards a dehumanized capital punishment; we've attempted to make this system painless, those who work for it passive, and the inmate pacified.¹¹³ Is the last meal just another attempt to make the process easier? Lawrence Hayes, a former death row inmate, spoke about the last meal in a recent interview and stated (concerning a modern and historical analysis of the ritual)

Last meals are a gimmick to make people feel better about execution....When I first thought about the issue, I thought, 'Ok, this is an act of humanity, of benevolence.' But when I started studying it, I realized it was created to ease the conscience of the executioner.¹¹⁴

Hayes, when asked if he would have accepted a last meal if still on death row, simply replied "no." To him, it was a contradictory and ambivalent gesture – using a meaningful and good thing, like the comfort of food and family, to make a bad thing, like execution, "not so bad."¹¹⁵ So arguably correctional officials, society, and its executioners use the last meal to force the condemned to accept their fate. By partaking in this ritual, the prisoner, by eating or being forced to order the meal, accepts the execution that they surely know awaits them.¹¹⁶ In fact, many of the convicted, whose guilt was called into question after their execution, chose not to eat the meal served to them.¹¹⁷ These perspectives, while sometimes seen as centered on forgiveness, mercy, or kindness, are not to help the condemned but rather, are based on the need or fascination of someone else – namely the personnel in charge, the State, or the public.

iii. Mercy

Last, perhaps the meal is offered out of kindness, generosity, and mercy. While the State considers these offenders to be morally irrelevant, unpredictable and incapable of any sort of change, it still offers this gesture in the offender's last moments of life.¹¹⁸ In keeping in line with Meyer's notion of 'retributive ritualism,' the states with large execution rates just might be those that are the most invested in the last meal ritual and the meanings behind it.¹¹⁹ From our statistical findings, it can be inferred that states with the greatest experience in executions may have developed a more profound appreciation for the difference between executions and exterminations.

While in prison, an individual loses all forms of control. Prisoners must adapt to prison food, meal times, wake up times, bed times, where they can go, who they

¹¹³ Meyer, *supra* note 21.

¹¹⁴ Interview with THE HUFFINGTON POST on Aug., 8, 2012, available at http://www.huffingtonpost.com/2012/08/21/last-meals-on-death-row_n_1814369.html (last visited Aug. 6 2014).

¹¹⁵ *Id.*

¹¹⁶ Bigert & Bergström, *supra* note 10.

¹¹⁷ *Id.*

¹¹⁸ LaChance, *supra* note 34, at 702-03, 711.

¹¹⁹ Meyer, *supra* note 21.

can talk to, and anything in between.¹²⁰ The lives of an American inmate are controlled by every second – these men and women are powerless in almost every regard to how they live their lives.¹²¹ To most Americans or individuals worldwide, food is central to religious beliefs, political power, economic security, and the like; once it's drastically minimized or controlled, a person's core beliefs can emphasize the powerlessness experienced while in prison.¹²² There is a unique loss of control over one's body, privacy, dietary habits, and autonomy and the last meal serves to return that one last choice, one last ounce of power, back to the prisoner.¹²³ This last choice might be the only thing left for a prisoner, "[j]ustice may not always be served because the innocent can be proved guilty and the guilty can be proved innocent. Choosing the last meal is a significant ritual because the accuracy and validity of this choice is the only answer one can ultimately accept."¹²⁴ So, while for many death row inmates it might be hard to accept the hand of cards they've been dealt, one thing that is acceptable is the final choice they were able to make for themselves. For it is inevitable that everyone will experience death, and food can bring calmness to the experience for all involved.

The last meal, while it can give a calming effect to an individual can also be a way for prisoners to assert one final time their political and religious beliefs – one final way for them to express, without a correctional system limitation, how they feel.¹²⁵ Perhaps it is this unawareness of what lies beyond death that attracts the voyeuristic fascination with the last meal and sparks the imagination and intrigue of popular culture.

iv. Blind Tradition

a. Historical Significance

Death, its finality, and our mortality terrify yet intrigue us. Because of this intrigue, this morbid fascination with after-life, we have, over time, created rituals and traditions concerning the dead and the condemned. In particular, last suppers have been in existence not only since our generation and the ones before, but more notably since the time of Jesus Christ and before. It has even been said that "the tradition of the last supper is traced to the belief in the eternal human soul, a soul that will be able to continue life in one way or another after the body is being dispersed." For even the people of the pre-Christian eras had rituals concerning the last meals of inmates or prisoners. Not only does the Christ's last supper resemble the tradition which we hold true to today but the Ancient Greeks also participated in similar offerings.¹²⁶ One would feed a last meal to prisoners so that they could pass over the River Styx into the Underworld—for if not fed, the executed might return to the living as a hungry ghost.¹²⁷

¹²⁰ Rachel Marie-Cane Williams, *Entering the Circle: The Praxis of Arts in Corrections*, 31 J. ARTS MGMT. L. & SOC'Y 293, 299 (2002).

¹²¹ See Brisman, *supra* note 51.

¹²² *Id.* at 51.

¹²³ *Id.* at 50-51.

¹²⁴ LAST MEALS PROJECT, available at www.lastmealsproject.com/pages.html.

¹²⁵ See LaChance, *supra* note 34, at 714-15 (2007).

¹²⁶ *Id.*

¹²⁷ *Id.*

As such, therefore, the last meal is a rite that locates present-day executions in a vast arc linking not only acts of criminal punishment but also noble acts of selfless sacrifice, defeat in battle, and even suicide. The conundrum occurs when one realizes that after decades of being treated mercilessly, a prisoner is given one last small concession: a last meal. In other words, why would (before this recent Lawrence Brewer debacle) a Governor like Rick Perry, who brags about being the governor with the most executions in modern times (275 as of April 27, 2014), show any sign of mercy towards the very end of a cruel process?¹²⁸ Do we even know why we still give this seemingly sacred rite? Even if one could make the argument that these men and women do not *deserve* a last meal – a last choice – they’ve nevertheless grown to expect it. It’s a tradition that almost everyone has heard of, a ritual of cultural significance allowing popular culture to express its imagination. However, by a State revoking it, the Correctional system has successfully constrained and curtailed this once religious, cultural, and historical ritual into nothingness.

b. Texas

What was it about Lawrence Brewer’s last meal request that sparked this exaggerated, swift, and destructive decision? Was it the fact that he ordered enough food to feed all of death row or rather, once served, he didn’t eat a bite of it? While it is unclear as to whether Mr. Brewer was given his exact request (it seems unlikely given the frequency with which the prison kitchen in Texas is known to alter requests based on what is available)¹²⁹; it is a factual surety that once served, Mr. Brewer refused the feast altogether. Of the 35 of the states which executed prisoners in 2010 just two northeastern states (Connecticut and Maryland) provided no special last meal. By joining this category, Texas is now a stark deviation to the findings provided in Section Three – namely that deep-south states are more generous in providing last meals to prisoners.

Perhaps the oddity is that most states prescribe last meal protocols via their respective Department of Corrections or through the Warden, however, in Texas, the extinction of the last meal came not from DOC or a Warden but rather from an elected legislator. A legislator isn’t politically invisible to the public as a commission or correction staff is; could it be that when politically accountable individuals partake in decisions concerning death row inmates the findings might very well be drastically different? Should this be a topic that legislators and governors consider, and if it is, would our findings look different?

Regardless of Texas’ reasoning behind disallowing a last meal to current death row inmates, Mr. Brewer’s request and actions, and the consequences resulting from it, will surely affect future prisoners. There are many prisoners, unlike Lawrence Brewer, who upon their final hours of life, kept their requests simple, selfless, or as close to non-existent as one can get. Inmates have been reported to

¹²⁸ Rick Perry on Death Penalty and ‘Ultimate Justice’ in Texas: ‘I’ve Never Struggled With That,’ HUFFINGTON POST ONLINE, http://www.huffingtonpost.com/2011/09/07/rick-perry-death-penalty-gop-debate_n_953214.html (last visited Aug. 6 2014).

¹²⁹ Price, *supra* note 12.

merely order a cup of coffee,¹³⁰ a bag of jolly ranchers,¹³¹ oatmeal and milk,¹³² fresh squeezed orange juice,¹³³ or just justice, equality, and world peace.¹³⁴

B. IF THE PHILOSOPHY IS KINDNESS, THE KEY IS CODIFICATION

If the philosophy that we are holding true to is kindness, or even some sort of blind tradition, then it seems logical to suggest that there should be some standard that we hold this tradition to. Currently, there is neither a recognized Constitutional right to a last meal, nor is there a nationally uniform administrative policy. While the standard, and the procedures that accompany the last meal range greatly from state to state, they are nonetheless important not only to the condemned but also to the wardens, families, religious advisors, and prison personnel involved in the executions.

To place this long marveled tradition on sturdy legs, it is the recommendation of these authors that states codify the right to a last meal. The scenario that took place in Texas is the perfect example to show just how easy it is to ban a practice that is not codified. Had Texas created a statute which gave prisoners a last meal, the entire legislature would have had to vote to remove it – not just one senator who became angry after receiving news of Lawrence Brewer’s behavior.

Obviously, another best case scenario would be for the United States to proclaim that the last meal is a constitutional right – disallowing states like Texas to ban it altogether. Although even with this scenario, the standards and contours of that right would still be largely in the hands of the States.

However, considering the other side of this codification coin, would involving the legislatures of the states do more harm than good? As we have seen in Texas, once the politically involved become an integral part of the decision making process concerning the last meal, the protocols or lack thereof could change drastically with little or no oversight.

There are others, though, who believe the last meal has been imbued with more meaning than is appropriate.¹³⁵ Why bicker about SpaghettiOs or pecan pie when life is at stake? In the shadow of an execution, does this tradition actually matter? We acknowledge the truth of greater needs amidst the machinery of death,

¹³⁰ 9 LAST MEALS PROJECT, www.lastmealsproject.com. This was the last meal request of Aileen Carol Wuornos. She was executed in the State of Florida at 9:47 A.M. on October 9, 2002.

¹³¹ *Id.* at 10. An assorted bag of Jolly Ranchers was the last request of Gerald Lee Mitchell who was executed on October 22, 2001 by the State of Texas.

¹³² *Id.* at 3. Stanley “Tookie” Williams requested just oatmeal and a cup of milk before being executed on December 13, 2005 in California.

¹³³ *Id.* at 6. Nothing extravagant was requested by John R. Thompson when he asked for a cup of fresh squeezed orange juice on July 8, 1987 when he was executed by the State of Texas.

¹³⁴ *Id.* at 13. The most unselfish of all requests (which now cannot be made under the last meal rite) was by Odell Barnes Jr. who requested, simply and selflessly, “justice, equality, world peace.” He was executed on March 1, 2000 by the State of Texas.

¹³⁵ “If the last meal process has been abused, then maybe it warrants changing, but there are a lot more serious abuses that have gone on in terms of lack of due process in Texas. Inmates would much prefer a last lawyer to a last meal.” Richard Dieter, DPIC (www.dpic.org); *see also* Fernandez, *supra* note 4, at A17.

Cold (Comfort?) Food

but also have learned of the comfort offered by this tradition amidst the emotional pain for all involved. Put another way, “[k]illing people is a morally messy business. Whether we allow a man carte blanche with junk food menus ... or we simply serve him that day’s fried chicken ... the act is, in essence, the same.”¹³⁶ For us, however, exploring this strand of the tapestry has revealed even more about the needless difficulty and arbitrary choices accompanying legal executions in the United States.

¹³⁶ Tony Karon, *Why We’re Fascinated by Death Row Cuisine*, TIME (Aug. 10, 2000); see also Earl F. Martin, *Masking the Evil of Capital Punishment*, 10 VA. J. SOC. POL’Y & L. 179, 213 (2002) (“[T]here are other more subtle means by which the American public hides the evil of capital punishment from itself in an effort to salve its collective conscience. Specifically, through the bureaucratization of executions, the inclusion of lawyers and medical doctors within the system, and the employment of religious themes and activities in connection with the sanction, society manages to push the evil that is inherent in capital punishment either out of view or, at least, to a place of minor significance, in weighting the pros and cons of the sanction.”).

THE SIXTH AMENDMENT TWILIGHT ZONE: FIRST-TIER
REVIEW AND THE RIGHT TO COUNSEL

Briggs J. Matheson*

ABSTRACT

Despite fifty years of doctrinal evolution, the precise boundaries of the Sixth Amendment right to counsel remain as murky as ever. Innovative state laws of criminal procedure have placed new pressures on the U.S. Supreme Court's right-to-counsel jurisprudence, and raise new questions about whether and when criminal defendants are entitled to the assistance of counsel. In addition, the Court's retroactivity precedents and its procedure for summarily granting a petition for certiorari, vacating the lower court opinion, and remanding the case for further proceedings below (the "GVR" procedure), suggest further tension among the Court's right-to-counsel decisions. This paper explores the frontier of the Court's right-to-counsel jurisprudence in light of these procedural quandaries.

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INTRODUCTION

For half a century it has been a bedrock principle of constitutional criminal procedure that indigent criminal defendants are entitled to the assistance of an attorney to prepare and present their claims.¹ At the same time, the Supreme Court has made clear over the last fifty years that the right to counsel does not apply at every stage of a criminal proceeding. Since its landmark decision in *Gideon v. Wainwright*,² the Supreme Court has drawn a number of “categorical”³ lines establishing when defendants are (or are not) entitled to the assistance of counsel.⁴ Thus, on the same day that *Gideon* was decided, the Court declared that the right to counsel applies to a defendant’s “first appeal, granted as a matter of right” under State law.⁵ And in subsequent decisions the Court has made clear that the right to counsel generally does not apply to subsequent discretionary appeals⁶ or to collateral proceedings.⁷

Still, despite fifty years of doctrinal evolution, the boundaries of the right to counsel remain unclear. This confusion stems in part from the Court’s decision in *Halbert v. Michigan*⁸, in which the Court articulated a potentially expansive view of the scope of the right to counsel. In holding that a plea-convicted defendant was entitled to the assistance of an attorney to prepare an application for leave to appeal, the Court spoke in broad terms about the underlying right. Justice Ginsburg, writing for the Court, explained that a defendant is generally entitled to the assistance of counsel when two conditions are satisfied: (1) the defendant is seeking “first-tier review” of the “merits” of his claims; and (2) that defendant is “ill-equipped to represent [himself].”⁹ This somewhat ambiguous language marked a departure from the Court’s earlier bright-line rules regarding the scope of the right to counsel, and raises questions as to what proceedings constitute “first-tier” appellate review.¹⁰

Consequently, innovative state laws of criminal procedure have placed new

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¹ U.S. CONST. amend. VI; *id.* amend. XIV.

² 372 U.S. 335 (1963).

³ *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (plurality opinion).

⁴ *See* Part I.A, *infra*.

⁵ *Douglas v. California*, 372 U.S. 353, 356 (1963).

⁶ *See* *Ross v. Moffit*, 417 U.S. 600 (1974).

⁷ *See* *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

⁸ 545 U.S. 605 (2005).

⁹ *Id.* at 611-12, 617.

¹⁰ *See* Part I.B, *infra*. This paper examines the scope of the right to counsel with respect to appellate and post-conviction review of a defendant’s criminal conviction. It therefore does not address the Court’s right-to-counsel jurisprudence concerning other “critical stages” of criminal proceedings, such as “arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.” *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012) (citing cases); *see also* *Montejo v. Louisiana*, 556 U. S. 778, 786 (2009); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

pressures on the Court's right-to-counsel jurisprudence, prompting the Court to reconsider longstanding precedents governing the right-to-counsel's applicability. Likewise, the Court's decisions in seemingly unrelated doctrinal areas raise new questions about whether certain criminal defendants are entitled to the assistance of counsel at certain stages of their criminal proceedings. These new cracks in the Court's seemingly concrete right-to-counsel jurisprudence call into question the Court's commitment to its bright-line, categorical approach, and its willingness to follow *Halbert's* logic concerning "first-tier" review.

The Court's recent decisions in *Martinez v. Ryan*¹¹ and *Greene v. Fisher*¹² highlight the uncertainty surrounding the Court's right-to-counsel jurisprudence going forward. In *Martinez*, the Court faced the question whether the right to the effective assistance of counsel applies to a state prisoner's first postconviction appeal, when that postconviction proceeding constitutes his first and only opportunity to raise an ineffectiveness-of-trial-counsel claim (an "initial-review collateral proceeding"¹³). In short, the Court had to decide whether a postconviction proceeding could count as "first-tier" review under *Halbert*, notwithstanding the Court's bright line rule that the right to counsel does not reach collateral proceedings.¹⁴ Although the Court acknowledged that this question was "a constitutional one," it avoided answering it entirely, and merely concluded that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."¹⁵ However, while the Court largely sidestepped the thorny issue of the right-to-counsel's applicability to "initial-review collateral proceedings," it did not steer completely clear of its right-to-counsel implications.¹⁶

At first glance, the *Greene* decision appears to have little to do with the Court's right-to-counsel jurisprudence. *Greene* settled a thorny debate over the proper retroactivity cutoff for prisoners seeking habeas relief under the Anti-Terrorism and Effective Death Penalty Act (AEDPA).¹⁷ Specifically, the Court held in *Greene* that a state prisoner seeking federal habeas relief may not rely on intervening Supreme Court case law that is announced *after* the last state-court decision on the merits of his claims, even if the intervening precedent was announced *before* that prisoner's conviction became final.¹⁸ But *Greene's* significance extends far beyond the technical details of federal habeas law. Upon closer examination, *Greene* raises two broader questions: (1) what judicial process remains available for a defendant whose case is pending on direct review when the Supreme Court announces a change in the governing law; and (2) when might that defendant be entitled to the assistance of counsel?

Although these questions were not squarely presented to or addressed by the Court in *Greene*, some answers may be found in the convergence of three distinct

¹¹ *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

¹² *Greene v. Fisher*, 132 S. Ct. 38 (2011).

¹³ *Martinez*, 132 S. Ct. at 1315.

¹⁴ *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

¹⁵ *Martinez*, 132 S. Ct. at 1315.

¹⁶ *See infra* Part II.

¹⁷ 28 U.S.C. § 2254 (2011).

¹⁸ *Greene v. Fisher*, 132 S. Ct. 38, 44-45 (2011).

but related doctrines: (1) the Court's retroactivity precedents; (2) the Court's procedure for summarily granting a petition for certiorari, vacating the lower court opinion, and remanding the case for further proceedings below (the "GVR" procedure); and (3) the right-to-counsel. Taken together, these three doctrinal threads suggest additional tension between the Court's prior bright-line right-to-counsel decisions and *Halbert's* concern about "first-tier" review. More specifically, the interplay of these three doctrines suggests that a defendant whose case is pending on direct review may be entitled to the assistance of counsel to seek certiorari to the U.S. Supreme Court when the Court announces a change in the governing law before his case becomes final. Under these limited circumstances, certiorari review by the Supreme Court may constitute the "first-tier" review by an appellate court under the now-governing law.

The following paper examines the as-yet-unexplored¹⁹ frontier of the Court's right to counsel jurisprudence in light of these recent doctrinal developments. Part I briefly traces the Court's right-to-counsel jurisprudence. Part II examines the right-to-counsel issue presented—and subsequently avoided—in *Martinez*. Part III introduces the ways in which the *Greene* decision also calls into question the Court's right to counsel jurisprudence by examining the relationship between the Court's retroactivity, GVR, and right-to-counsel precedents. Part IV concludes.

I. THE COURT'S RIGHT-TO-COUNSEL JURISPRUDENCE

A. THE EVOLUTION OF THE RIGHT TO COUNSEL

Before exploring the obscure boundaries of the right to counsel, it is important first to note the doctrine's firmer foundations. Prior to the Court's holding in *Gideon*, the notion that criminal defendants generally were entitled to the assistance of counsel was far from obvious. In *Powell v. Alabama*²⁰ the Court acknowledged that, at least in certain circumstances, the "necessity of counsel" could be "so vital and imperative that the failure of the trial court to make an effective appointment of counsel . . . [could be] a denial of due process within the meaning of the Fourteenth Amendment."²¹ In that case, five young, African-American youths were tried for raping two white women—then a capital offense.²² Noting the defendants' indigency and inability to defend themselves, the Court nonetheless de-

¹⁹ Greene briefly mentioned this line of argument in his brief to the U.S. Supreme Court. See Brief for Petitioner Eric Greene at 36-37, 40-43, *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637) (noting the potential "practical and constitutional" problems that would arise should the Court affirm the Third Circuit's holding). However, this argument attracted almost no response from the Commonwealth of Pennsylvania. See Brief for Respondents Jon Fisher et al. at 43 *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637) (citing Greene's argument without responding substantively). Nor did the Court find this line of argumentation worth mentioning in its opinion. See *Greene v. Fisher*, 132 S. Ct. 38 (2011). This paper fills the gap and provides a more thorough treatment of the issues involved in this contention.

²⁰ *Powell v. Alabama*, 287 U.S. 45 (1932).

²¹ *Id.* at 71.

²² *Id.* at 57.

clined to articulate a broad right of criminal defendants to the assistance of counsel. Instead, the Court reasoned that

All that it is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law To hold otherwise would be to ignore the fundamental postulate, already adverted to, that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.²³

Thus, the *Powell* Court's narrow conception of the right to counsel turned entirely on contextual factors specific to each individual case.

Just a decade after *Powell*, in *Betts v. Brady* the Court revisited the question "whether due process of law demands that in every criminal case, whatever the circumstances, a state must furnish counsel to an indigent defendant."²⁴ *Betts* had been indicted for robbery in Maryland state court. He informed the judge that he was financially unable to retain counsel, and requested that the court appoint an attorney to represent him.²⁵ The trial judge refused, noting the County's policy to provide indigent defendants with the assistance of counsel only in cases involving murder and rape.²⁶ *Betts* was subsequently tried, convicted, and sentenced to eight years in prison.²⁷

At the Supreme Court, *Betts* argued that the trial court's refusal to appoint counsel constituted a deprivation of liberty without due process of law under the Fourteenth Amendment.²⁸ According to *Betts*, due process required that "in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the state."²⁹ The Court disagreed, explaining "we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."³⁰ However, the Court indicated that there could be special circumstances in which a state's failure to appoint counsel *might* violate due process. Explaining that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right," the Court concluded that "want of counsel in a particular case may result in a conviction lacking in such fundamental fairness."³¹

Twenty years later, the Court concluded in *Gideon v. Wainwright* "that *Betts v. Brady* should be overruled," and that the right to counsel is fundamental and

²³ *Id.* at 71-72 (internal quotation marks and citation omitted).

²⁴ *Betts v. Brady*, 316 U.S. 455, 464 (1942).

²⁵ *Id.* at 457.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 461-62.

²⁹ *Id.* at 462.

³⁰ *Id.* at 471.

³¹ *Id.* at 473.

binding on the States by virtue of the Sixth and Fourteenth Amendments.³² The Court characterized its decision in *Gideon* as “restor[ing] constitutional principles established to achieve a fair system of justice.”³³ And significantly, the Court’s opinion in *Gideon* emphasized the practical realities of adversarial criminal trials, and the “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”³⁴ Governments, the Court underscored, “spend vast sums of money to establish machinery to try defendants,” making it nearly impossible for indigent defendants to “stand[] equal before the law” without the assistance of state-appointed counsel.³⁵

Despite this sea-changing decision and lofty language, the Court has made clear in the half-century since *Gideon* was decided that the right to counsel is one of limited applicability. Since *Gideon*, the Court has articulated a number of “categorical holdings as to what the Constitution requires with respect to a particular stage of a criminal proceeding.”³⁶ In *Douglas v. California*,³⁷ decided the same day as *Gideon*, the Court held that indigent defendants are entitled to the assistance of counsel on their “first appeal, granted as a matter of right” under State law.³⁸ Although states are not compelled to provide “[a]bsolute equality,” the Court reasoned that “where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”³⁹

Mirroring much of the logic in *Gideon* itself, the *Douglas* Court explained that in appellate proceedings, “without a champion” to advocate for the indigent defendant’s claims, “only the barren record speaks for the indigent.”⁴⁰ The Court also drew on its earlier opinion in *Griffin v. Illinois*, which held that an Illinois rule conditioning appellate review on the provision of a trial transcript violated the Fourteenth Amendment, since it made no exception for indigent defendants.⁴¹ The *Douglas* Court emphasized that, like the transcript requirement in *Griffin*, the failure to provide counsel for a defendant’s first appeal as of right essentially constituted “discrimination against the indigent.”⁴² Thus, while States are not obligated

³² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³³ *Id.* at 344.

³⁴ *Id.*

³⁵ *Id.* The Court subsequently held that the “appellate-level right to counsel” articulated in *Douglas* “comprehends the right to effective assistance of counsel” as well. See *Evitts v. Lucey*, 469 U.S. 387, 392 (1985).

³⁶ *Murray v. Giarratano*, 492 U.S. 1, 12 (1989) (plurality opinion).

³⁷ *Douglas v. California*, 372 U.S. 353 (1963).

³⁸ *Id.* at 356.

³⁹ *Id.* at 357.

⁴⁰ *Id.* See also *Swenson v. Bosler*, 386 U.S. 258, 259 (1967) (per curiam) (“The assistance of appellate counsel in preparing and submitting a brief to the appellate court which defines the legal principles upon which the claims of error are based and which designates and interprets the relevant portions of the trial transcript may well be of substantial benefit to the defendant. This advantage may not be denied to a criminal defendant, solely because of his indigency, on the only appeal which the State affords him as a matter of right.”)

⁴¹ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

⁴² *Douglas*, 372 U.S. at 355.

to provide criminal defendants an appeal,⁴³ if a State chooses to do so it cannot force an indigent defendant to “run th[e] gantlet [sic]” of the initial appellate process without providing assistance of counsel.⁴⁴

Less than a decade later, the Court considered in *Ross v. Moffit* whether the right to counsel, as articulated in *Douglas*, “should be extended to require counsel for discretionary state appeals and for applications for review in th[e] [U.S. Supreme] Court.”⁴⁵ In answering this question, the Court revisited the constitutional principles underlying its earlier right-to-counsel precedents. The Court began by noting that “[t]he precise rationale for [the holding in *Douglas*] ha[d] never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.”⁴⁶ The Court reasoned that locating the right to counsel in the Due Process Clause would produce different results than locating the right in the Equal Protection Clause, since “[d]ue process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated,” and “[e]qual protection . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”⁴⁷

Starting with due process, the Court conceded that its prior right-to-counsel decisions concerned whether certain state practices were “consistent with the requirements of fair procedure guaranteed by the Due Process Clause,” and were therefore based on a due process rationale.⁴⁸ Nevertheless, the Court went on to hold that the Due Process Clause does not require states to provide the assistance of counsel to defendants seeking discretionary review by state supreme courts.⁴⁹ In reaching this conclusion, the Court emphasized the differences between a first appeal as of right—like the one at issue in *Douglas*—and a purely discretionary appeal. First, the Court pointed out that unlike an appellate court reviewing a defendant’s claims in the first instance, a decision by a state supreme court or the U.S. Supreme Court to accept an appeal “depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review”⁵⁰:

The critical issue in [such courts] . . . is not whether there has been “a correct adjudication of guilt” in every individual case, but rather whether “the subject matter of the appeal has significant public interest,” whether “the cause involves legal principles of major significance to the jurisprudence of the State,” or

43 See *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (“The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions.” (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894))).

44 *Douglas*, 372 U.S. at 357. See also *Griffin*, 351 U.S. at 24 (“[W]hen a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such . . . review”) (Frankfurter, J., concurring).

45 *Ross v. Moffit*, 417 U.S. 600, 602-03 (1974).

46 *Id.* at 608-09.

47 *Id.* at 609.

48 *Id.* at 610.

49 *Id.*

50 *Id.* at 617.

whether the decision below is in probable conflict with a decision of the Supreme Court.⁵¹

Furthermore, the Court emphasized, a defendant seeking discretionary appellate review has typically already had “the opportunity to have counsel prepare an initial brief” in his first appeal as of right.⁵² Consequently, “[o]nce a defendant’s claims of error are organized and presented in a lawyerlike fashion” in the first-tier appeal, there is little need for further assistance of counsel.⁵³ Such materials, the Court reasoned, provide any subsequent appellate tribunal with an “adequate basis for its decision to grant or deny review.”⁵⁴

With respect to equal protection, the *Ross* Court dismissed the petitioner’s claim, reasoning that the Fourteenth Amendment “does not require absolute equality,” but merely requires “that indigents have an adequate opportunity to present their claims fairly within the adversary system.”⁵⁵ Although the Court acknowledged that “[l]anguage invoking equal protection notions is prominent both in *Douglas* and in other cases treating the rights of indigents on appeal,”⁵⁶ it rejected the idea that the right-to-counsel should be based on the Equal Protection Clause. Then-Justice Rehnquist, writing for the Court, emphasized the “limits” of “equal protection analysis” in this area, and cautioned against interpreting the right-to-counsel in equal protection terms.⁵⁷

Ross represented a significant step in the Court’s evolving treatment of the right-to-counsel. In place of *Douglas*’s vague part-due-process-part-equal-protection analysis, the Court drew an explicit line in the sand beyond which the right to counsel could not reach, and made clear that the right to counsel is more firmly rooted in the Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause.⁵⁸ Furthermore, in stark contrast to Justice Douglas’ lofty idealism in his *Douglas* opinion, Justice Rehnquist emphasizes that the right to counsel exists “only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.”⁵⁹

Following the *Ross* Court’s lead, the Court continued to draw bright lines restricting the scope of the right-to-counsel’s applicability in other contexts. First, in *Pennsylvania v. Finley*,⁶⁰ the Court held that that state prisoners do not have the

⁵¹ *Id.* at 615 (citations omitted).

⁵² *Id.* at 616. As the Court already noted in *Swensen v. Bosler*, 386 U.S. 258, 259 (1967), the same is not true of a defendant’s first appeal granted as a matter of right. See *supra* note 40.

⁵³ *Ross*, 417 U.S. at 615.

⁵⁴ *Id.*

⁵⁵ *Id.* at 612 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973); *Griffin v. Illinois*, 351 U.S. 12, 23 (1956)).

⁵⁶ *Id.* at 611.

⁵⁷ *Id.* at 611-12.

⁵⁸ Indeed, subsequent right-to-counsel litigation following *Ross* reflected this turn away from equal protection. Cf. *Evitts v. Lucey*, 469 U.S. 387, 390-91 (1985) (noting the parties’ stipulation that there was no equal protection issue in a case concerning effective assistance of initial appellate counsel, since counsel was retained not appointed).

⁵⁹ *Ross*, 417 U.S. at 616.

⁶⁰ *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

right to the assistance of counsel “when mounting collateral attacks upon their convictions.”⁶¹ According to the *Finley* Court, “the right to appointed counsel extends to the first appeal of right, and no further.”⁶² And, “since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, *a fortiori*, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.”⁶³ Drawing on *Ross*, the Court noted that a “defendant’s access to the trial record and the appellate briefs and opinions provided sufficient tools for the *pro se* litigant to gain meaningful access to courts that possess a discretionary power of review.”⁶⁴

Two years later, in *Murray v. Giarratano*, the Court reaffirmed *Finley*, holding that “the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases.”⁶⁵ The plurality opinion in *Giarratano* shed significant light on the Court’s treatment of the right to counsel since *Gideon*. Chief Justice Rehnquist made clear in that opinion that “[o]ur cases involving the right to counsel . . . have been categorical as to what the Constitution requires with respect to a particular stage of a criminal proceeding.”⁶⁶ This bright-line approach, he wrote, was first adopted in *Gideon*, which established a “categorical rule requiring appointed counsel for indigent felony defendants,” as opposed to the contextual, case-by-case analysis under *Betts*.⁶⁷

Even the dissenters in *Giarratano*, while disagreeing with the plurality’s holding, largely endorsed this “categorical” methodology. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, outlined the Court’s previous right-to-counsel decisions, including *Ross* and *Finley*, and described them as “applications of the Fourteenth Amendment’s guarantees to particular situations.”⁶⁸ To be sure, Justice Stevens went on to explain why, in his view, the Fourteenth Amendment required appointment of counsel for collateral proceedings in capital cases citing, in part, the “unique nature of the death penalty.”⁶⁹ But this should not obscure the methodological agreement among the justices that the applicability of the right to counsel depends on the “nature of the proceedings.”⁷⁰

B. HALBERT V. MICHIGAN

The Court’s more recent decision in *Halbert v. Michigan*⁷¹ took the idea that the right-to-counsel’s applicability turns on the “nature of the proceedings” one step further. In doing so, the Court arguably deviated from the Court’s traditional

⁶¹ *Id.* at 555.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 557.

⁶⁵ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion).

⁶⁶ *Id.* at 12.

⁶⁷ *Id.*

⁶⁸ *Id.* at 19 (Stevens, J., dissenting).

⁶⁹ *Id.* at 22.

⁷⁰ *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987).

⁷¹ *Halbert v. Michigan*, 545 U.S. 605 (2005).

bright-line approach, thereby raising questions regarding the scope of the right-to-counsel's applicability going forward. In *Halbert* the Court considered Michigan's appellate procedure for plea-based convictions, which requires a "defendant convicted by plea who seeks review in the Michigan Court of Appeals [to first] file an application for leave to appeal."⁷² The Court of Appeals may then "grant or deny the application; enter a final decision; [or] grant other relief."⁷³ If the court grants the application, "the case proceeds as an appeal of right."⁷⁴ Halbert had requested the appointment of counsel to assist him in drafting his leave to appeal, but the Michigan courts denied his request.⁷⁵

At the U.S. Supreme Court, Halbert contended that Michigan was required under the Fourteenth Amendment to provide counsel to assist indigent plea-convicted defendants preparing their applications for leave to appeal. According to Halbert, Michigan's system "ranks as a first-tier appellate proceeding requiring appointment of counsel under *Douglas v. California*."⁷⁶ In contrast, the State argued that its procedure for plea-convicted appeals more resembled a discretionary appeal, like that in *Ross v. Moffit*.⁷⁷ The case, therefore, appeared to be perfectly teed up for the Court to decide using its by-now-well-established "categorical" approach: whether Halbert was entitled to the assistance of counsel depended on whether he fell on the *Douglas* side of the bright line rule or the *Ross* side.

Ultimately, the Court agreed with Halbert, concluding that Michigan's appellate procedure is "properly ranked with *Douglas* rather than *Ross*."⁷⁸ Justice Ginsburg, writing for the Court, explained that "[t]wo aspects of the Michigan Court of Appeals' process following plea-based convictions" compelled the outcome in *Halbert*. First, the Court found it significant that the Michigan appellate court's determination of a plea-convicted defendant's application constituted the "first-tier" appellate review of "the merits of the [applicant's] claims."⁷⁹ In making this point, the Court rejected the State's analogy to *Ross* and emphasized the fact that the discretionary appeals at issue in *Ross* did not involve "error correct[ing]" appellate review:

[D]eterminations by [State] Supreme Court[s] turn[] on considerations other than the commission of error by a lower court, *e.g.*, the involvement of a matter of significant public interest. . . . By contrast, the Michigan Court of Appeals, because it is an error-correction instance, is guided in responding to leave to appeal applications by *the merits of the particular defendant's claims*, not by the general importance of the questions presented.⁸⁰

The second aspect of the Michigan system that motivated the Court's decision

⁷² *Id.* at 612 (citing Mich. Ct. Rule 7.205 (2005)).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 609.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 610.

⁷⁹ *Id.* at 617. See also *id.* at 611 (discussing the significance of the "first-tier review" of a defendant-appellant's claims).

⁸⁰ *Id.* at 618-19 (emphasis added).

was the fact that “indigent defendants pursuing first-tier review in the Court of Appeals are generally ill equipped to represent themselves.”⁸¹ Michigan’s system thereby created an impermissible distinction between indigent defendants and those able to pay for the assistance of an attorney. Thus, the Court concluded, Michigan’s procedure for plea-convicted defendants triggered both the due process and equal protection concerns underlying the right to counsel.

In several respects *Halbert* represents a departure from the Court’s previous right-to-counsel decisions. Although the Court’s analysis largely tracks the categorical lines drawn in *Douglas* and *Ross*, it does so with considerable flexibility. For one thing, Justice Ginsburg resurrects the equal protection rationale underlying the right-to-counsel⁸²—a basis that the *Ross* Court had all but written off. Indeed, throughout the *Halbert* opinion, Justice Ginsburg emphasizes indigent defendants’ numerous “handicap[s]” within the adversarial system,⁸³ and highlights the importance of “equal justice” for all defendants, irrespective of wealth.⁸⁴ In doing so, Justice Ginsburg may have signaled a renewed receptiveness to equal protection-based arguments when it comes to right-to-counsel claims.

More fundamentally, however, Justice Ginsburg emphasizes that cases involving “barriers encountered by persons unable to pay their own way”—especially those encountered on appeal—“cannot be resolved by resort to easy slogans or pigeonhole analysis.”⁸⁵ And, in keeping with this seeming discomfort with overly rigid, rule-based analysis, Justice Ginsburg articulates a more standard-like approach to determine the applicability of the right to counsel. According to the *Halbert* Court, the appellate level right to counsel now turns on (1) whether a particular appellate proceeding qualifies as a “first-tier” review⁸⁶ “on the merits” of an appellant’s claims; and (2) an indigent defendant’s ability to represent himself in that proceeding.⁸⁷

This two-pronged test begs the question: what constitutes “first-tier” review potentially triggering the right-to-counsel’s applicability?

II. *MARTINEZ V. RYAN* AND THE RIGHT TO COUNSEL IN INITIAL-REVIEW COLLATERAL PROCEEDINGS

The Court appeared to be poised to answer this question recently in *Martinez*

⁸¹ *Id.* at 617.

⁸² *See, e.g., id.* at 610 (“we hold that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals” (emphasis added)); *id.* (“Our decisions in point reflect both equal protection and due process concerns.” (internal quotation marks omitted)).

⁸³ *See id.* at 620-21 (noting that many indigent defendants are illiterate and may suffer from learning disabilities or other mental handicaps).

⁸⁴ *Id.* at 610 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)).

⁸⁵ *Id.* (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996)).

⁸⁶ *Halbert* is the first case in which the Court adopted the term “first-tier” review to describe the right-to-counsel’s applicability.

⁸⁷ *See supra* notes 80-82 and accompanying text.

v. *Ryan*, a case involving the implications of a state rule of criminal procedure requiring convicted defendants to raise ineffective-assistance-of-counsel claims only in state postconviction procedures (and not on direct review).⁸⁸ At the time the case was briefed and argued, it appeared the Court would resolve the question of whether the right to counsel applies to a state prisoner's initial postconviction appeal, when that postconviction proceeding constitutes his first and only opportunity to raise his ineffective-assistance-of-trial-counsel claim.⁸⁹

Luis Mariano Martinez was convicted in Arizona state court of sexual conduct with a person under the age of fifteen.⁹⁰ Following his conviction, Martinez sought to allege an ineffective-assistance-of-trial-counsel claim. However, Arizona law "requires claims of ineffective assistance at trial to be reserved for state collateral proceedings,"⁹¹ making such proceedings "the first point at which an ineffective assistance of counsel claim may be presented for review."⁹² Unbeknownst to Martinez, while his direct appeal was still pending, his state-appointed postconviction counsel initiated an Arizona collateral proceeding, but failed to raise the ineffectiveness claim.⁹³ The state court dismissed this initial action for

⁸⁸ *Martinez v. Ryan*, 132 S. Ct. 1309, 1314 (2012).

⁸⁹ Indeed, the court below framed the issue in *Martinez* in this manner, as did both the petitioner and the respondent in their briefs on the merits to the U.S. Supreme Court. See *Martinez v. Schriro*, 623 F.3d 731, 740 (9th Cir. 2010) cert. granted, 131 S. Ct. 2960 (2011) and *rev'd and remanded sub nom.* *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) ("The more difficult question, however, is whether collateral review might constitute the "first tier" of review for a petitioner's ineffective-assistance-of-trial-counsel claim, and thus be sufficient to give rise to a right to counsel."); Brief for Petitioner at i, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (No. 10-1001) (framing the question presented as the following: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim), available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-1001_petitioner.authcheckdam.pdf; Brief for Respondent at i, 132 S. Ct. 1309 (2012) (No. 10-1001) (framing the question presented as the following: "In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), this Court held that the right to counsel does not apply to state collateral proceedings and, thus, there is no right to the effective assistance of collateral-review counsel. As a matter of state law, Arizona provides criminal defendants with counsel to challenge their convictions and sentences in state collateral proceedings following the conclusion of direct appeal. Does this state procedure create a federal constitutional right to the effective assistance of collateral-review counsel?"), available at http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/10-1001_respondent.authcheckdam.pdf.

⁹⁰ *Martinez*, 132 S. Ct. at 1313.

⁹¹ *Id.* at 1314.

⁹² *Schriro*, 623 F.3d at 739 (citing *State v. Spreitz*, 39 P.3d 525, 527 (2002); *Lambright v. Stewart*, 241 F.3d 1201, 1203-04 (9th Cir. 2001), cert. denied, 534 U.S. 1118 (2002)).

⁹³ *Martinez*, 132 S. Ct. at 1314. Indeed, Martinez's first postconviction counsel filed a statement "asserting that she could find no colorable claims at all." *Id.* See also Brief for Petitioner, *supra* note 89, at 6.

postconviction relief.⁹⁴

A year and a half later, Martinez secured new postconviction counsel and filed a new petition for state postconviction relief, this time alleging his ineffectiveness of trial counsel claim.⁹⁵ The Arizona Superior Court dismissed this second petition on the grounds that Martinez had failed to raise the ineffectiveness claim in his *first* petition for state collateral review, and had thereby waived the claim.⁹⁶ The Arizona Court of Appeals affirmed and the Arizona Supreme Court declined review.⁹⁷

Having exhausted his state remedies, Martinez then filed a federal habeas petition, alleging that the doctrine of procedural default should not bar his claim.⁹⁸ While acknowledging that the Arizona courts' denial of his claim under a "well-established state procedural" normally would preclude federal review of his claim,⁹⁹ Martinez argued that "he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions."¹⁰⁰ Nevertheless, the district court dismissed Martinez's petition as procedurally defaulted.¹⁰¹

The Ninth Circuit affirmed, and reasoned that "[t]he ineffectiveness of appellate counsel . . . is a relevant and cognizable consideration in this appeal only if Martinez possessed a federal constitutional right to the assistance of counsel in the relevant proceeding for collateral review."¹⁰² According to that court, Martinez possessed no such right. After reviewing the Court's right-to-counsel precedents, the Ninth Circuit found it determinative that "[t]he Supreme Court has never recognized a federal constitutional right to the assistance of counsel in collateral review proceedings."¹⁰³ Moreover, the court explained, "[e]ven if collateral review presents the first tier of review for Martinez's ineffective assistance of counsel claim, we conclude that Martinez's action is not analogous to a direct appeal or the *first* opportunity for him to obtain review of his conviction."¹⁰⁴

Martinez then petitioned for and the United States Supreme Court granted certiorari.¹⁰⁵ Before the Court, Martinez argued that, because Arizona requires criminal defendants to raise ineffectiveness claims *only* in postconviction proceedings, a state prisoner's first collateral appearance constitutes the "first-tier" appellate review of such claims.¹⁰⁶ Martinez pointed out that the question of the right-to-counsel's applicability to such "first-tier" collateral proceedings remained an

⁹⁴ *Martinez*, 132 S. Ct. at 1314.

⁹⁵ *Id.*

⁹⁶ *Id.* See Ariz. R. Crim. Proc. 32.2(a)(3).

⁹⁷ *Martinez*, 132 S. Ct. at 1314.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *Wainwright v. Sykes*, 433 U.S. 72, 84–85, 90–91 (1977)).

¹⁰⁰ *Id.* at 1314–15.

¹⁰¹ *Id.* at 1315.

¹⁰² *Martinez v. Schriro*, 623 F.3d 731, 736 (9th Cir. 2010).

¹⁰³ *Id.* at 736 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

¹⁰⁴ *Id.* at 740.

¹⁰⁵ *Martinez v. Ryan*, 131 S. Ct. 2960 (June 6, 2011) (No. 10-1001) (granting certiorari).

¹⁰⁶ Brief for Petitioner, *supra* note 89, at 11-12 (citing *Halbert v. Michigan*, 545 U.S. 605 (2005)).

open one.¹⁰⁷ In *Coleman v. Thompson*,¹⁰⁸ the Court acknowledged the general rule established by *Pennsylvania v. Finley* that “there is no right to counsel in state collateral proceedings.”¹⁰⁹ However, the *Coleman* Court then suggested that there might be an exception to that rule when “state collateral review is the first place a prisoner can present a challenge to his conviction.”¹¹⁰ According to Martinez, the standard set forth in *Halbert* regarding “first-tier” review supported finding such an exception in his case.¹¹¹

Arizona, for its part, argued that the Court established a “categorical[.]” rule in *Finley* that the right to counsel does not apply in collateral proceedings.¹¹² *Halbert*, the State argued, did not change the Court’s right-to-counsel analysis, and should not give rise to an exception from *Finley* in this case. According to Arizona, the appellate procedure at issue in *Halbert* triggered the right to counsel because it represented “the first and perhaps only review of the defendant’s convictions and sentences.”¹¹³ But Martinez, the State argued, already received appellate review of his conviction on direct review, and therefore his postconviction proceeding did not rank as “first-tier” review under *Halbert*.¹¹⁴ What is more, Arizona argued, recognizing a right-to-counsel in initial review collateral proceedings would produce adverse consequences for states governments. Specifically, recognizing a right to first-tier postconviction counsel would create an “infinite continuum” of litigation in which prisoners could continuously file subsequent petitions for collateral review alleging the ineffective assistance of their *previous* postconviction counsel.¹¹⁵

In its *Martinez* opinion, the Court began by acknowledging that *Coleman* “left open . . . a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial.”¹¹⁶ But just as quickly as the Court recognized this open question, it decided to avoid the issue altogether. Justice Kennedy, writing for the Court, explained that “[t]his is not the case . . . to resolve whether that exception exists as a constitutional matter,” since the case could instead be decided on what he termed “equitable” grounds.¹¹⁷

The *Martinez* Court therefore elected to modify a different part of *Coleman v. Thompson*, creating a “narrow exception” to the procedural default doctrine for

¹⁰⁷ *Id.* at 16 (citing *Coleman v. Thompson*, 501 U.S. 722 (1992)).

¹⁰⁸ *Coleman v. Thompson*, 501 U.S. 722 (1991).

¹⁰⁹ *Id.* at 755.

¹¹⁰ *Id.*

¹¹¹ See Brief for Petitioner, *supra* note 89, at 22-28.

¹¹² See Brief for Respondent, *supra* note 89, at 5.

¹¹³ *Id.* at 6 (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 30-31; see also *Bonin v. Vasquez* (Bonin I), 999 F.2d 425 (9th Cir. 1993) (first identifying the “infinite continuum” problem). The Supreme Court expressed similar reservations at oral argument. See Transcript of Oral Argument at 32:18-33:5, *Martinez v. Ryan*, 131 S. Ct. 2960 (No. 10-1001).

¹¹⁶ *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012).

¹¹⁷ *Id.* at 1318.

state prisoners who find themselves in Martinez's situation. Justice Kennedy began by noting the general procedural default rule that "a federal court will not review the merits of claims, including constitutional claims that a state court declined to hear because the prisoner failed to abide by a state procedural rule."¹¹⁸ However, he wrote, the doctrine of procedural default is "not without exceptions."¹¹⁹ Most notably, "[a] prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law."¹²⁰ In *Coleman*, however, the Court had held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'"¹²¹ The *Martinez* Court felt it necessary to "modify th[is] unqualified statement," holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."¹²²

According to Justice Kennedy, there is "a key difference between initial-review collateral proceedings and other kinds of collateral proceedings. When an attorney errs in an initial-review collateral proceeding, it is likely that no state court at any level will hear the prisoner's claim."¹²³ This, Justice Kennedy wrote, was particularly troubling in light of the fact that States could "deliberately choos[e] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed."¹²⁴ Therefore, he reasoned, this carve-out from the traditional procedural default rules "reflect[s] an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default."¹²⁵

Having established the basis for this new procedural default exception, Justice Kennedy then explained its scope:

[W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.¹²⁶

¹¹⁸ *Id.* at 1316 (citing *Coleman v. Thompson*, 501 U.S. 722, 747-48 (1992)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (citing *Coleman*, 501 U.S. at 753).

¹²² *Ryan*, 132 S. Ct. at 1315.

¹²³ *Id.* at 1316.

¹²⁴ *Id.* at 1318.

¹²⁵ *Id.*

¹²⁶ *Id.* The Court subsequently extended this holding to cases in which a State does not necessarily *require* a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a

Justice Kennedy also emphasized that this holding is limited to ineffective-assistance-of-counsel claims.¹²⁷

In a vigorous dissent, Justice Scalia, joined by Justice Thomas, criticized the *Martinez* majority for its supposedly narrow, equitable remedy. According to Justice Scalia, the procedural default exception crafted by the majority is actually much broader than the Court suggests. In his view, “[t]here is not a dime’s worth of difference in principle between [Martinez’s case] and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised.”¹²⁸ As an example, he notes that “claims of ‘newly discovered’ prosecutorial misconduct” are often raised in initial collateral proceedings.¹²⁹ With respect to the majority’s avoidance of the constitutional issue, Justice Scalia suggested that the Court’s “equitable” approach was simply a means to provide Martinez with some remedy, since his constitutional argument was “quite clearly foreclosed by our precedent.”¹³⁰ Citing the Court’s “longstanding jurisprudence holding that there is no constitutional right to counsel in state collateral review,”¹³¹ Justice Scalia explained that he would have reached the constitutional question presented, and denied Martinez’s claim.

Despite (or perhaps because of) the Court’s unwillingness to engage the right-to-counsel issue, *Martinez* adds to the confusion surrounding the right-to-counsel doctrine’s scope. Remarkably, one of the rationales the Court offers in support of its “equitable” approach seemed to endorse Martinez’s constitutional argument. The Court noted that “[w]here, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.”¹³² And this is so, the Court explained:

because the state habeas court “looks to the merits of the clai[m]” of ineffective assistance, no other court has addressed the claim, and “defendants pursuing first-tier review . . . are generally ill equipped to represent themselves” because they do not have a brief from counsel or an opinion of the court addressing their claim of error. *Halbert v. Michigan*, 545 U.S. 605, 617 (2005); see *Douglas*, 372 U.S., at 357–358.¹³³

Thus, the Court invokes *Halbert*’s two-pronged test to support its procedural default exception. Ironically, this is the very logic the Court would likely have had

collateral proceeding, but nonetheless makes it “‘virtually impossible’ for an ineffective assistance claim to be presented on direct review.” *Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013).

¹²⁷ *Id.* at 1317-18.

¹²⁸ *Id.* at 1321 (Scalia, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 1326 (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and *Murray v. Giarratano*, 492 U.S. 1 (1989)).

¹³¹ *Id.* at 1321.

¹³² *Id.* at 1317.

¹³³ *Id.* (quoting *Halbert v. Michigan*, 545 U.S. 605, 617 (2005)).

to rely on had it decided *Martinez* on constitutional grounds.¹³⁴

The *Martinez* decision also produces considerable confusion with respect to the relationship between the right to counsel and the standard for determining ineffective assistance of counsel under *Strickland v. Washington*.¹³⁵ As noted earlier, the Court held in *Martinez* that both “uncounseled failure to raise ineffective assistance of trial counsel”¹³⁶ and ineffectively counseled failure to raise ineffective assistance of trial counsel may qualify as cause excusing procedural default.¹³⁷ In the latter situation, a defendant must show that his appointed counsel in an initial-review collateral proceeding was ineffective under *Strickland*—i.e. that appointed counsel’s performance fell below an objective standard of reasonableness and that this error prejudiced the defendant’s case.¹³⁸ But the Court has made clear that a defendant is entitled to the effective assistance of counsel only where he has the right to counsel in the first place.¹³⁹ Thus, the *Martinez* Court’s use of *Strickland* arguably puts the cart before the horse: a defendant who receives ineffective assistance of counsel in an initial-review collateral proceeding concerning an ineffective-assistance-of-trial-counsel claim can avoid procedural default, but that defendant was never constitutionally entitled to the effective assistance of postconviction counsel in the first place.

Consequently, it is hard to predict how the Court might eventually come down on the constitutional question in *Martinez*. On the one hand, a majority of the Court appears to be comfortable with the *Halbert* two-pronged test for determining the right-to-counsel’s applicability. In particular, the *Martinez* Court’s reliance on *Halbert* to support its procedural default exception¹⁴⁰ may signal the Court’s disagreement with the Ninth Circuit’s narrow interpretation of *Halbert*, according to which the right-to-counsel only applies to a defendant’s first opportunity to challenge his conviction in general.¹⁴¹ Thus, the *Martinez* Court’s invocation of *Halbert* suggests that under certain circumstances, some criminal proceedings other than the typical first direct appeal as of right may qualify as “first-

¹³⁴ The Court’s subsequent decision in *Trevino v. Thaler* extending the application of *Martinez* similarly acknowledged the equivalence between a prisoner’s direct appeal and an initial-review collateral proceeding, and invokes the distinctly “constitutional” logic underlying the right to counsel. 133 S. Ct. at 1918. Justice Breyer, reviewing *Martinez*, observed that “where the State . . . channels initial review of [an ineffective-assistance-of-trial-counsel] claim into collateral proceedings, a lawyer’s failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings, could . . . deprive a defendant of any review of that claim at all.” *Id.*

¹³⁵ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³⁶ *Ryan*, 132 S. Ct. at 1327 (Scalia, J., dissenting).

¹³⁷ See *supra* note 126 and accompanying text.

¹³⁸ See *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³⁹ See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 725 (1991) (“Because there is no constitutional right to an attorney in state postconviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.” (citation omitted)); *Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that where there is no constitutional right to counsel there can be no deprivation of effective assistance of counsel).

¹⁴⁰ See *supra* notes 132-33 and accompanying text.

¹⁴¹ See *supra* note 104b and accompanying text.

tier” review triggering the right to counsel.

At the same time Justice Scalia’s dissent makes clear that both he and Justice Thomas would *not* extend the right-to-counsel to any collateral proceedings, even in cases like *Martinez*’s where the state requires defendants to preserve certain claims for postconviction review. And at least one commentator, remarking on the oral arguments in *Martinez*, concluded that “there seemed to be virtually no support among the Justices for any general rule supporting the right of defendants to counsel in collateral post-conviction proceedings for *all* claims that they were unable to raise at trial.”¹⁴² What is more, every Circuit Court to have addressed this specific issue has held that the Supreme Court’s ruling in *Finley* precludes application of the right to counsel on collateral review, even if the collateral proceeding is the first place a prisoner can raise his claims.¹⁴³ Ultimately, the Court’s disposition of this issue will depend on its commitment to its categorical holding in *Finley* that the right-to-counsel does not apply on collateral review.¹⁴⁴ While *Halbert*’s two-pronged test gives the Court some flexibility, for the moment it is not clear that it is enough to re-shape the right-to-counsel doctrine on collateral review. Indeed, the mere fact that the majority avoided this question altogether may indicate that a majority of the Justices would not alter the *Finley* rule.

III. *GREENE V. FISHER* AND THE RIGHT TO COUNSEL IN THE “TWILIGHT ZONE”

Initial-review collateral proceedings are not the only proceedings raising questions about *Halbert*’s reach. As the Court’s recent decision in *Greene v. Fisher* illustrates, the question of what counts as “first-tier” review may arise in other procedural contexts as well. On the face of it, *Greene*—a case concerning retroactivity law for purposes of federal habeas review—seems to have little to do with *Halbert* and the Court’s right-to-counsel jurisprudence. But *Greene*’s ostensibly limited holding may have significant downstream effects for a certain category of criminal defendants. Most important for purposes of this paper, *Greene* raises questions concerning what counts as “first-tier” review while a defendant’s

¹⁴² Steve Vladeck, *Argument Recap: An Arizona-specific right to collateral postconviction counsel?*, SCOTUSBLOG (Oct. 5, 2011), <http://www.scotusblog.com/?p=129072> (emphasis in original).

¹⁴³ See, e.g., *Martinez v. Schriro*, 623 F.3d 731 (9th Cir. 2010); *Muniz v. Suthers*, 209 Fed. App’x 763 (10th Cir. 2006) (unpublished opinion); *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) (holding that applying the right-to-counsel in an initial-review collateral proceeding “is directly contrary to the explicit holding of *Finley* that no constitutional right to counsel exists in collateral review”); *Qusinberry v. Taylor*, 162 F.3d 273 (4th Cir. 1998) (reaffirming *Mackall*). See also *People v. Ligon*, 239 Ill.2d 94 (2010) (neither *Halbert* prong applicable); *State v. Lopez*, 156 N.H. 193 (2007) (holding that *Halbert* does not apply to state collateral review because under New Hampshire law a defendant still has a direct review option); Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel*, 60 HASTINGS L.J. 541, 586 nn.373-76 (citing cases in which federal courts dismiss a claim of right to counsel on collateral review without noting the open question in *Coleman*).

¹⁴⁴ *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

case is still pending on *direct* review.¹⁴⁵

A. *BACKGROUND: GREENE V. FISHER AND THE RETROACTIVITY “TWILIGHT ZONE”*

In December 1993, Eric Greene and four co-conspirators robbed a small grocery store in northern Philadelphia.¹⁴⁶ The store’s owner was shot and killed during the commission of the crime.¹⁴⁷ By early 1995, all five co-conspirators were apprehended and Greene was charged with, *inter alia*, second-degree murder, robbery, and conspiracy.¹⁴⁸ Although Greene himself did not confess to the robbery, two of his co-conspirators provided statements to the police that implicated Greene in the crime.¹⁴⁹

The Commonwealth then sought to try all five co-defendants in a joint trial, prompting Greene to file a severance motion, arguing “that the confessions of his non-testifying codefendants should not be introduced at his trial.”¹⁵⁰ To support his motion, Greene cited *Bruton v. United States*,¹⁵¹ which held that the Confrontation Clause¹⁵² forbids the prosecution from introducing a statement or confession by a non-testifying co-defendant that implicates the defendant in the crime. The trial court denied Greene’s severance motion, but agreed to require the Commonwealth to redact any statements in the confessions that incriminated him.¹⁵³ The redacted confessions “replaced names with words like ‘this guy,’ ‘someone,’ and ‘other guys,’ or with the word ‘blank,’ or simply omitted the names without substitution.”¹⁵⁴

Greene’s trial moved forward and the jury convicted him of second-degree murder, three counts of robbery, and one count of conspiracy, and sentenced him to life imprisonment.¹⁵⁵ Greene immediately appealed to the Pennsylvania Superior Court—the Commonwealth’s intermediate appellate court—where he renewed his Confrontation Clause claim based on *Bruton*.¹⁵⁶ In December 1997, the superior court affirmed Greene’s conviction, “holding that the redaction had cured any problem under *Bruton*.”¹⁵⁷

Greene then timely filed a petition for allowance of appeal to the Pennsylvania Supreme Court, again raising his Confrontation Clause claim under *Bruton*.¹⁵⁸

¹⁴⁵ For full disclosure, the author participated as a law student on the team of attorneys representing Eric Greene before the Supreme Court.

¹⁴⁶ *Greene v. Fisher*, 132 S. Ct. 38, 42 (2011).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Bruton v. United States*, 391 U.S. 123, 132-33 (1968).

¹⁵² U.S. CONST. amend VI.

¹⁵³ *Greene*, 132 S. Ct. at 42.

¹⁵⁴ *Id.*

¹⁵⁵ *Greene v. Palakovich*, 606 F.3d at 90.

¹⁵⁶ *Greene*, 132 S. Ct. at 42-43.

¹⁵⁷ *Id.* at 43.

¹⁵⁸ *Id.*

While his petition was still pending, the U.S. Supreme Court decided *Gray v. Maryland*.¹⁵⁹ In *Gray*, the Court considered a Confrontation Clause claim based on *Bruton* that—like Greene’s claim—challenged the admission of a codefendant’s confession that had been redacted by replacing the defendant’s name with blanks and other words signaling obvious deletions.¹⁶⁰ The Court held that redacted “confession[s] . . . which substitute[] blanks and the word ‘delete’ for the [defendant’s] proper name” violate the Confrontation Clause, and therefore “fall[] within the class of statements to which *Bruton*’s protections apply.”¹⁶¹

The Pennsylvania Supreme Court granted Greene’s petition for allowance of appeal, limited to the question of whether the trial court’s admission of the redacted confessions violated Greene’s Sixth Amendment rights.¹⁶² However, “[a]fter the parties submitted briefs . . . the Pennsylvania Supreme Court dismissed the appeal as improvidently granted.”¹⁶³ Because the Court’s decision to dismiss the case was unaccompanied by any written opinion, it is not clear why that court felt the allowance for appeal should not have been granted.

Up until this point in his proceedings, Greene had been represented by a court-appointed attorney.¹⁶⁴ However, once the Pennsylvania Supreme Court dismissed Greene’s appeal, his “appointed attorney mailed him a letter advising him that his representation was at an end.”¹⁶⁵ Greene’s conviction became final¹⁶⁶ ninety days after the Pennsylvania Supreme Court dismissed his appeal.¹⁶⁷

Following the dismissal by the Pennsylvania Supreme Court, Greene unsuccessfully sought state postconviction relief based on Pennsylvania’s Post Conviction Relief Act (“PCRA”).¹⁶⁸ Greene then filed a pro se federal habeas petition in

¹⁵⁹ *Gray v. Maryland*, 523 U.S. 185 (1998).

¹⁶⁰ *Id.* at 188.

¹⁶¹ *Id.* at 197.

¹⁶² *Greene*, 132 S. Ct. at 43.

¹⁶³ *Id.*

¹⁶⁴ See Brief for Petitioner Eric Greene, *supra* note 19, at 6. See also Pa. R. Crim. P. 122, Comment (2000) (“[Appointed] counsel retains his or her appointment . . . through the Supreme Court of Pennsylvania.”).

¹⁶⁵ Brief for Petitioner Eric Greene, *supra* note 19, at 6.

¹⁶⁶ The U.S. Supreme Court has made clear that a criminal defendant’s conviction becomes “final” on the date that (1) the Court denies certiorari, or (2) the period for filing a timely petition for certiorari expires. See *Griffith v. Kentucky*, 479 U.S. 314, 333 (1987) (“By ‘final,’ we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” (citing *United States v. Johnson*, 457 U.S. 537, 542, n.8 (1982))); see also *Clay v. United States*, 537 U.S. 522, 525 (2003) (holding that “finality” for purposes of AEDPA §2255(f) means the conclusion of direct review (cert. denied) or expiration of time to seek certiorari in the U.S. Supreme Court).

¹⁶⁷ *Greene v. Palakovich*, 606 F.3d 85, 91 (3d Cir. 2010).

¹⁶⁸ 42 Pa. Cons. Stat. Ann. §§ 9541-46 (West 2011). Greene did not – indeed, could not – raise his Confrontation Clause claim in his PCRA petition, as it had already been “previously litigated” on direct review and was therefore procedurally barred on state collateral review. *Id.* § 9543(a)(3); see also *Palakovich*, 606 F.3d at 91 (noting that “the severance claim had been finally litigated and could not afford him collateral relief”).

the Eastern District of Pennsylvania, again alleging violation of his Sixth Amendment rights.¹⁶⁹ Under section 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may grant relief only if the state-court adjudication of the petitioner's claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."¹⁷⁰ Although the district court acknowledged that the Supreme Court's intervening decision in *Gray v. Maryland* "bolster[ed] the merits" of Greene's claim¹⁷¹ (the redactions at issue in Greene's case were almost identical to those involved in *Gray*) the court nonetheless denied Greene's petition. According to the district court, Greene could not rely on *Gray*, since that decision was announced *after* the Pennsylvania Superior Court's ruling on the merits of Greene's Confrontation Clause claim.¹⁷² Thus, the district court explained, the rule announced in *Gray* did not constitute "clearly established Federal law" at the time of the last state-court adjudication of Greene's claim.¹⁷³ The district court did, however, note that reasonable jurists could disagree as to *Gray*'s applicability in this case, and granted Greene a certificate of appealability.¹⁷⁴

A divided panel of the Third Circuit affirmed.¹⁷⁵ The majority held that because the *Gray* decision postdated the "last reasoned state-court decision"¹⁷⁶ on the merits of Greene's Confrontation Clause claim (i.e. the Pennsylvania Superior Court's denial of the claim), it was not "clearly established Federal law" for purposes of section 2254(d)(1). Thus, the Pennsylvania Superior Court's decision could not have been "contrary to" or an "unreasonable application of" Federal law that did not exist at the time of that decision.¹⁷⁷ According to the majority, the law at the time of the last state-court adjudication on the merits of Greene's claim was *Bruton*, not *Gray*, and therefore Greene was not entitled to federal habeas relief.¹⁷⁸

Judge Ambro dissented, writing that he "disagree[d] with [the majority's] determination of the controlling date for 'clearly established Federal law' under 28

¹⁶⁹ 482 F. Supp. 2d 624 (E.D. Pa. 2007).

¹⁷⁰ 28 U.S.C. § 2254(d)(1) (West 2011).

¹⁷¹ 482 F. Supp. 2d at 630.

¹⁷² *Id.* at 629-30.

¹⁷³ *Id.*

¹⁷⁴ *Id.*; see also 28 U.S.C. § 2253(c)(1)(A). As a result of the court granting Greene a certificate of appealability, Greene was able to secure appointed counsel. See 28 U.S.C. § 2254(h) ("[T]he court may appoint counsel for an applicant who is or becomes financially unable to afford counsel Appointment of counsel under this section shall be governed by section 3006A of title 18."); 18 U.S.C.A. § 3006A (requiring district courts to create a "a plan for furnishing representation for any person financially unable to obtain adequate representation" and establishing rules for appointing counsel).

¹⁷⁵ *Greene v. Palakovich*, 606 F.3d 85 (3d Cir. 2010).

¹⁷⁶ *Id.* at 95 n.7. According to the Third Circuit, the "last reasoned state-court decision" in Greene's case was the Pennsylvania Superior Court's ruling denying Greene's Confrontation Clause claim under *Bruton*. See *supra* notes 19-20 and accompanying text.

¹⁷⁷ *Palakovich*, 606 F.3d at 98 ("Reading the language plainly, 'clearly established' contemplates that the law or precedent *existed* at the time of the state court's substantive resolution of the petitioner's claim.").

¹⁷⁸ *Id.* at 99.

U.S.C. § 2254(d)(1).”¹⁷⁹ He reasoned that the relevant cutoff date for determining what constitutes “clearly established Federal law” under section 2254 was not the “last reasoned state-court decision,” but rather the date on which the petitioner’s conviction became final.¹⁸⁰ Because *Gray* predated the date on which Greene’s conviction became final (i.e. the expiration of time for filing a petition for certiorari on direct review), Greene was entitled to the benefit of that intervening decision and, consequently, habeas relief.¹⁸¹

With the assistance of the Stanford Supreme Court Litigation Clinic, Greene filed and the Supreme Court granted a petition for certiorari to resolve the question of *Gray*’s applicability.¹⁸² Greene argued that the relevant temporal cutoff for “clearly established Federal law” under section 2254 was finality: the date on which the Supreme Court denied certiorari or the date on which the period for filing a cert petition expired.¹⁸³ According to Greene, the Court’s own retroactivity precedents dictated this reading of section 2254. First, in *Griffith v. Kentucky*,¹⁸⁴ the Court explained that the “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.”¹⁸⁵ Just two years later, in *Teague v. Lane*,¹⁸⁶ the Court reaffirmed *Griffith* and held that a new decision from the Supreme Court does not apply to criminal defendants whose cases have already reached finality and are now pending on collateral review, unless the decision constitutes a “watershed rule[] of criminal procedure.”¹⁸⁷ Thus, Greene argued, *Griffith* and *Teague* set the relevant cutoff point at finality for determining what decisional law applies on direct and collateral review, respectively. Under *Griffith/Teague*, the argument went, so long as a new decision from the Supreme Court predated finality, a defendant whose case is pending on direct review may seek relief based on the intervening law.

According to Greene, AEDPA did nothing to change this existing retroactivity framework.¹⁸⁸ Because State Supreme Court decisions are discretionary,¹⁸⁹ Greene argued, the Pennsylvania Supreme Court’s decision to deny discretionary review did not constitute an “adjudication on the merits” as envisioned by section 2254.¹⁹⁰ Consequently,

¹⁷⁹ *Id.* at 107 (Ambro, J., dissenting).

¹⁸⁰ *Id.* at 107-09.

¹⁸¹ *Id.*

¹⁸² *Greene v. Fisher*, 131 S. Ct. 1813 (Apr. 4, 2011).

¹⁸³ Brief for Petitioner Eric Greene, *supra* note 19, at 10-12.

¹⁸⁴ *Griffith v. Kentucky*, 479 U.S. 314, 333 (1987).

¹⁸⁵ *Id.* at 322.

¹⁸⁶ *Teague v. Lane*, 489 U.S. 288 (1989).

¹⁸⁷ *Id.* at 306-08, 311.

¹⁸⁸ Brief for Petitioner Eric Greene, *supra* note 19, at 17 (noting that the Court typically presumes that Congress did not alter prior law established by Supreme Court precedent absent some indication of Congress’ “specific intent” to do so).

¹⁸⁹ See *infra* notes 163-65 and accompanying text.

¹⁹⁰ The parties conceded this point, recognizing that the relevant “decision” for purposes of § 2254 was the Pennsylvania Superior Court decision denying Greene’s Confrontation Clause claim based on *Bruton*. See *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011) (“The Third Circuit held, and the parties do not dispute, that the last state-court adjudication on the

[c]hanging the retroactivity cutoff from finality to the date of the last state-court decision on the merits . . . would create a “twilight zone”¹⁹¹ during direct review. State prisoners’ ability to seek federal habeas relief based on decisions announced after state intermediate court decisions would depend on the happenstance of whether state supreme courts decide to grant discretionary review in their cases and issue decisions on the merits.¹⁹²

The Third Circuit’s rule, Greene argued, would essentially close the door to federal habeas court for all “twilight zone” defendants seeking the benefit of intervening case law that postdates the last state court decision, despite the fact that their cases were not yet final.

The Respondent Commonwealth of Pennsylvania largely echoed the Third Circuit’s opinion in its merits brief to the Supreme Court, arguing that the plain text of section 2254 required a retroactivity cutoff pegged to the last state-court adjudication on the merits.¹⁹³ The Commonwealth noted that setting any retroactivity cutoff date necessarily produces arbitrary results—even setting the relevant cutoff date for “clearly established Federal law” at finality would mean that state prisoners’ ability to seek federal habeas relief would depend on the speed with which their case moved through the state system.¹⁹⁴ Furthermore, the Commonwealth argued, federal habeas courts should not disturb state court judgments that were based on good law at the time they were announced.¹⁹⁵ Indeed, the Commonwealth noted, one of Congress’ key objectives when it enacted AEDPA was to promote principles of comity and deference to state-court judgments.¹⁹⁶ And a state court cannot be expected to apply federal law that did not exist at the time that court adjudicates a claim.

merits of Greene’s Confrontation Clause claim occurred on direct appeal to the Pennsylvania Superior Court.”); Transcript of Oral Argument at 7:10-21, *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637). Greene did advance an alternative argument in his merits brief that suggested the “state-court decision” to which § 2254 refers could be interpreted to include state supreme court denials of discretionary review. *See* Brief for Petitioner Eric Greene, *supra* note 19, at 44-49. However, Greene made no mention of this alternative argument at oral argument, nor did the Court address it in its decision. *See generally* *Greene v. Fisher*, 132 S. Ct. 38 (2011).

¹⁹¹ Judge Ambro first coined the term “twilight zone” in his dissent from the Third Circuit’s decision in Greene’s case. *See* *Greene v. Palakovich*, 606 F.3d 85, 107 (3d Cir. 2010) (Ambro, J., dissenting). I use the term in this paper to refer to the period of time between the last state-court adjudication on the merits of a defendant’s claims, and the time at which that defendant’s conviction becomes final. *See supra* note 29 (discussing the definition of “finality”). Thus, as it is used throughout this paper, the term “twilight zone” defendant” is meant to describe a criminal defendant who, like Eric Greene himself, wishes to seek the benefit of an intervening Supreme Court decision that is announced after the last state-court adjudication of his claim, but before finality.

¹⁹² Brief for Petitioner Eric Greene, *supra* note 19, at 12-13.

¹⁹³ Brief for Respondents Jon Fisher et al., *supra* note 19, at 9-11.

¹⁹⁴ *Id.* at 40. Justice Breyer echoed this point at oral argument, noting that any bright-line retroactivity cutoff is “obviously always going to be somewhat unfair and somewhat arbitrary.” *See* Transcript of Oral Argument at 24:15-21, *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637).

¹⁹⁵ Brief for Respondents Jon Fisher et al., *supra* note 19, at 10-11.

¹⁹⁶ *Id.* at 9-10.

The Supreme Court agreed with the Commonwealth and, in a unanimous opinion—the first of the October 2011 term—affirmed the Third Circuit’s decision.¹⁹⁷ Justice Scalia, writing for the Court, drew on the Court’s decision just six months earlier in *Cullen v. Pinholster*,¹⁹⁸ which held that federal habeas “review . . . is limited to the record that was before the state court that adjudicated the claim on the merits.”¹⁹⁹ Justice Scalia rejected Greene’s argument that the universe of applicable law need not be limited in the same way as the factual record, explaining that AEDPA “requires federal courts to ‘focu[s] on what a state court knew and did,’ and to measure state-court decisions ‘against this Court’s precedents *as of the time the state court renders its decision.*’”²⁰⁰ As it is used in section 2254(d)(1), “clearly established Federal law” means the law that existed at the time of the last state-court adjudication on the merits. Consequently, Greene could not obtain habeas relief based on *Gray*.²⁰¹

B. Greene’s Broader Implications: Retroactivity, GVRs, and the Right to Counsel

At first glance, *Greene* appears to be little more than a simple fix to a highly technical aspect of federal habeas law. Indeed, the fact that the Court decided *Greene* in a unanimous, six-and-a-half page opinion less than a month after oral argument²⁰² suggests that even the Justices thought that their decision was of little significance beyond the specific question presented.²⁰³ But for defendants caught in the “twilight zone,” the consequences of *Greene* are potentially enormous—not just because of *Greene*’s effect on federal habeas law, but also because of its potential effects on the Court’s jurisprudence in other areas. In particular, the Court’s holding in *Greene* may trigger the applicability of the right to counsel under the *Halbert* Court’s two-pronged test.

In order to understand how *Greene* could have such far-reaching effects, it is important first to make out the different doctrinal components to this claim. As noted earlier, *Greene*’s broader effects are the product of three interrelated doctrines: (1) retroactivity law, (2) the GVR, and (3) the Court’s *Halbert* decision. Briefly stated, the argument proceeds in three steps:

First, the Court’s retroactivity precedents—and, arguably, the Constitution—dictate that intervening Supreme Court case law apply to all criminal defendants whose cases are still pending on direct review (i.e., they have not become final).²⁰⁴

¹⁹⁷ *Greene v. Fisher*, 132 S. Ct. 38 (2011).

¹⁹⁸ *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

¹⁹⁹ *Id.* at 1398.

²⁰⁰ *Greene*, 132 S. Ct. at 44 (quoting *Pinholster*, 131 S. Ct. at 1399).

²⁰¹ *Id.*

²⁰² Oral argument took place on October 11, 2011. See Transcript of Oral Argument, *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637). The *Greene* opinion was announced on November 8, 2011. *Greene v. Fisher*, 132 S. Ct. 38 (2011).

²⁰³ Several Courts of Appeal have since applied *Greene*’s technical retroactivity principle to determine the governing law at the time of a petitioner’s “last reasoned state court adjudication on the merits.” *Thompson v. Runnels*, 705 F.3d 1089, 1096 (9th Cir. 2013); see also, e.g., *Miller v. Stovall*, No. 12-2171, slip op. (6th Cir. 2014).

²⁰⁴ See, e.g., *Griffith v. Kentucky*, 479 U.S. 314 (1987). See *infra* Part III.B.1.

After *Greene*, however, a defendant caught in the “twilight zone,” cannot seek federal habeas relief based on any intervening law that postdates the last state-court adjudication of his claims, despite the fact that the intervening decision was announced before his case became final.²⁰⁵ Furthermore, like Eric Greene himself, such defendants are often procedurally barred from raising claims based on intervening case law in state postconviction proceedings.²⁰⁶

Where, then, is a “twilight zone” defendant to turn to seek relief based on the intervening law? The answer may be found in the second step of the argument, which concerns an obscure practice that has evolved in the U.S. Supreme Court over the last century: the “GVR.” This procedurally simple (if doctrinally vague) practice is designed to deal with precisely the issue faced by defendants in the “twilight zone.” More accurately, the GVR is “the Court’s procedure for *granting* certiorari, *vacating* the decision below without finding error, and *remanding* the case for further consideration by the lower court” (hence “GVR”).²⁰⁷ Although the precise contours of the GVR are not well-defined,²⁰⁸ the Court has explained that it is appropriate to GVR²⁰⁹ a case when an intervening Supreme Court decision makes it “reasonabl[y] probab[le]” that the lower court did not have an opportunity to review the case under the now-governing law, and that further review in light of the intervening law may affect the outcome of the case.²¹⁰

The third and final step of the argument is *Halbert*’s two-pronged test: a criminal defendant may be entitled to the assistance of counsel when (1) the defendant is seeking the “first-tier” review of his claims “on the merits”; and (2) the defendant-appellant is “ill-equipped to represent [himself].”²¹¹ A “twilight zone” defendant whose only opportunity to receive appellate review on the merits of his claims via a cert petition request for a GVR arguably satisfies these two conditions: such a petition would constitute the “first-tier” appellate review of his claims, and an indigent defendant is unquestionably ill-equipped to seek a GVR without the

²⁰⁵ See *supra* Part III.A.

²⁰⁶ For example, Greene noted in his brief to the Supreme Court that “[m]any of the states that have [systems of postconviction review] preclude prisoners from pressing claims that they have previously litigated. And states may enforce these bars on relitigation even when intervening decisions would bolster those claims.” See Brief for Petitioner Eric Greene, *supra* note 19, at 39-40 (citing Ala. R. Crim. P. 32(a) (2) (“A petitioner will not be given relief under this rule based upon any ground . . . which was raised or addressed at trial”); *Thomas v. State*, 298 S.W.3d 610, 615 (Tenn. Crim. App. 2009) (noting that the bar on previously litigated claims applies even when an intervening U.S. Supreme Court decision creates a “change in the method of analysis on the issue”). What is more, states are not obligated to provide collateral review in the first place. See *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

²⁰⁷ Aaron-Andrew P. Bruhl, *The Supreme Court’s Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009).

²⁰⁸ See *infra* Part III.B.2.

²⁰⁹ The term “GVR” is commonly used by the Justices and by commentators as both a noun—referring to the actual procedure for summarily granting, vacating, and remanding a petition—and as a verb. See, e.g., Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 166 (1996) (“We have GVR’d in light of a wide range of developments . . .”).

²¹⁰ *Id.* at 167.

²¹¹ *Id.* at 617. See *infra*.

assistance of counsel. Indeed, many of the principles underlying the Court's right-to-counsel jurisprudence support the contention that a "twilight zone" defendant seeking a GVR is entitled to the assistance of an attorney.²¹²

With this general framework in mind, the following subparts briefly examine the details of the first two doctrinal components: retroactivity law and the GVR.

i. The Supreme Court's Retroactivity Jurisprudence

Understanding *Greene*'s broader consequences first requires a closer look at the Court's modern retroactivity jurisprudence, which took form in the later twentieth century. Prior to 1982, the Court had adopted a case-by-case approach for determining the retroactive effect of new rules of constitutional criminal procedure.²¹³ In *Linkletter v. Walker*, the Court held that "the Constitution neither prohibits nor requires retrospective effect" of a new rule of criminal procedure, and that a rule's retroactivity depended on "weigh[ing] the merits and demerits in each case."²¹⁴ The Court then clarified in *Stoval v. Denno* that the retroactivity or non-retroactivity of new rules of criminal procedure should be determined by weighing three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."²¹⁵

Starting in 1982, however, the Court began to chart a new course. In *United States v. Johnson*²¹⁶ the Court reviewed its prior retroactivity precedents and concluded that "[r]etroactivity must be rethought."²¹⁷ The *Johnson* Court determined that retroactivity analysis for "nonfinal convictions" should be different than for convictions that are final when a new rule of criminal procedure issues from the Supreme Court.²¹⁸ However, *Johnson* did not establish a broad rule mandating retroactive application of all new rules of criminal procedure to defendants whose cases were still pending on direct review. Rather, the *Johnson* Court distinguished past precedents and held that, subject to certain exceptions, "a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered."²¹⁹ The Court emphasized that this holding left the Court's prior retroactivity precedents "undisturbed."²²⁰

Still, *Johnson*'s limited holding constituted the first step in a dramatic transformation of the Court's approach to the retroactive application of new rules of criminal procedure. And in 1987, the principles underlying *Johnson* received full

²¹² See *infra* Part III.B.3.

²¹³ *Linkletter v. Walker*, 381 U.S. 618 (1961).

²¹⁴ *Id.* at 629.

²¹⁵ *Stoval v. Denno*, 388 U.S. 293, 297 (1967).

²¹⁶ *United States v. Johnson*, 457 U.S. 537 (1982).

²¹⁷ *Id.* at 548 (quoting *Desist v. United States*, 394 U.S. 244, 258, (1969) (Harlan, J., dissenting)).

²¹⁸ *Id.* at 554-55.

²¹⁹ *Id.* at 562.

²²⁰ *Id.*

expression in *Griffith v. Kentucky*.²²¹ In *Griffith*, the Court abandoned its earlier contextual, multi-factor approach to retroactivity. In its place, the Court articulated a bright-line rule that Supreme Court decisions creating new rules of criminal procedure apply retroactively to all nonfinal criminal cases still pending on direct review.²²² Justice Blackmun, writing for the Court, drew heavily on Justice Harlan's dissent in *Desist v. United States*²²³ to emphasize that "similarly situated defendants," so long as their convictions are not yet final, must be treated the same.²²⁴ Accordingly, Justice Blackmun wrote, the Court could no longer "tolerate[]" the practice of selectively applying new rules to some defendants but not to others.²²⁵

Significantly, the Court framed its holding in *Griffith* in distinctly constitutional terms. Justice Blackmun explained that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."²²⁶ Moreover, he noted that "[a]s a practical matter . . . we cannot hear each case pending on direct review and apply the new rule. But we fulfill our *judicial responsibility* by instructing the lower courts to apply the new rule retroactively to cases not yet final."²²⁷ Although the Court did not explicitly ground the rule announced in *Griffith* in a specific constitutional provision, the implication was clear: criminal defendants are constitutionally entitled to the benefit of new rules of criminal procedure that are announced while their cases are pending on direct review.

To be sure, prior to the development of this modern retroactivity jurisprudence, the Court resisted the idea that the Constitution spoke to the retroactive or nonretroactive application of Supreme Court decisions.²²⁸ But at least since its decision in *Griffith*, the Court has often framed its modern rule of retroactivity for defendants on direct review as constitutionally derived. Most notably, in *Teague v. Lane* the Court reaffirmed *Griffith*,²²⁹ and concluded that new rules of criminal procedure generally do *not* apply to state prisoners whose convictions have become final and who are now seeking collateral relief.²³⁰ In his *Teague* concurrence, Justice White noted that he had dissented from the Court's holding in *Griffith*, but

²²¹ *Griffith v. Kentucky*, 479 U.S. 314 (1987).

²²² *Id.* at 322-23.

²²³ *Desist v. United States*, 394 U.S. 244 (1969).

²²⁴ *Griffith*, 479 U.S. at 323.

²²⁵ *Id.*

²²⁶ *Id.* at 322.

²²⁷ *Id.* at 323 (emphasis added). See also *United States v. Johnson*, 457 U.S. 537 (1982) (describing the principle of treating similarly situated defendants the same as a "basic judicial tradition" (quoting *Desist v. United States*, 394 U.S. 244 (1969) (Harlan, J., dissenting))).

²²⁸ See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 629 (1961); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1073 n.110 (1997) (citing *Northern Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 258 (1932)).

²²⁹ See *Danforth v. Minnesota*, 552 U.S. 264, 274 (2008) ("In *Teague*, Justice O'Connor reaffirmed *Griffith*'s rejection of the *Linkletter* standard for determining the "retroactive" applicability of new rules to state convictions that were not yet final . . .").

²³⁰ *Teague v. Lane*, 489 U.S. 288 (1989). See *supra* notes 47-50 and accompanying text.

nonetheless characterized the *Griffith* decision as having “constitutional underpinnings.”²³¹ Thus, Justice White noted, Congress likely lacked the authority to alter the Court’s retroactivity precedents “dealing with direct review.”²³²

Similarly, in *Harper v. Virginia Dept. of Taxation* the Court explained its holding in *Griffith*, describing that case as a “ban against selective application of new rules.”²³³ In *Harper*, the Court considered the retroactive application of *Davis v. Michigan Dept. of Treasury*,²³⁴ a civil tax case, and concluded that *Griffith*’s rule of presumptive retroactive application of new Supreme Court decisions should govern in civil cases as well.²³⁵ In doing so, the Court again drew on “the ‘basic norms of constitutional adjudication’ that animated [its] view of retroactivity in the criminal context [to] prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.”²³⁶ Justice Thomas, writing for the Court, noted that the rule announced in *Griffith* rested on “the nature of judicial review,” which “strips us of the quintessentially ‘legislat[ive]’ prerogative to make rules of law retroactive or prospective as we see fit.”²³⁷ Accordingly, Justice Thomas reasoned, “the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.”²³⁸ What is more, he explained that “[t]he Supremacy Clause does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law.”²³⁹

Justice Scalia’s concurrence in *Harper* lends further support to the claim that the Constitution requires retroactive application of new rules of criminal procedure to defendants whose cases are not yet final. Quoting Justice White’s characterization of *Griffith* as having “constitutional underpinnings,”²⁴⁰ Justice Scalia attempted to identify the “basic norms of constitutional adjudication” on which the *Griffith* retroactivity rule rests. Courts, Justice Scalia explained, have no authority

²³¹ *Teague*, 489 U.S. at 317 (White, J., concurring).

²³² *Id.* Justice White did note, however, that Congress had authority to modify retroactivity rules as they pertain to habeas corpus, which, according to the Court in *Greene*, is precisely what Congress did when it enacted AEDPA in 1996. *See Greene v. Fisher*, 132 S. Ct. 38, 44 (2011).

²³³ *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993).

²³⁴ *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989).

²³⁵ *Harper*, 509 U.S. at 96-97.

²³⁶ *Id.* at 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)).

²³⁷ *Id.* at 95 (alteration in original).

²³⁸ *Id.* at 97 (quoting *American Trucking Ass’n. v. Scheiner*, 483 U.S. 167, 214 (1987) (Stevens, J., dissenting)).

²³⁹ U.S. CONST., Art. VI, cl. 2. However, States are free to fashion their own rules of retroactivity for state prisoners on *collateral* review (i.e. those whose convictions have become final). *See Danforth v. Minnesota*, 552 U.S. 264, 275 (2008) (“Neither *Linkletter* nor *Teague* explicitly or implicitly constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas.”); *id.* at 278 (noting that *Teague*’s general principle of nonretroactivity on collateral review was an interpretation of the then-governing federal habeas statute).

²⁴⁰ *Harper*, 509 U.S. at 104 (Scalia, J., concurring) (quoting *Teague v. Lane* 489 U.S. 288 317 (1989) (White, J., concurring)).

to engage in the practice of making purely prospective law.²⁴¹ Rather, “the province and duty of the judicial department to say what the law *is*”—not what the law *shall be*.”²⁴² To Scalia, the duty of Article III courts stands in contrast to the power of the legislative branch:

Fully retroactive decisionmaking was considered a principal distinction between the judicial and the legislative power: “[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.”²⁴³

Thus, according to Justice Scalia, the *structure* of the Constitution requires courts to give retroactive application to new decisions announced by the Supreme Court. New decisions are not “new” in the sense that they “make” new law. Instead, new decisions merely reflect the Court’s understanding of what the law *is*, and therefore courts are obligated to apply those new interpretations to cases pending on direct review.²⁴⁴

Of course, the constitutional foundation of the Court’s retroactivity jurisprudence has yet to be fully articulated by a majority of the Court. And, because “[t]he Constitution does not define retroactivity[,] the parameters of any constitutional limitations are therefore inherently ambiguous.”²⁴⁵ Still, at least since its decision in *Griffith*, the Court has been clear that “basic norms of constitutional adjudication” mandate retroactive application of new rules to nonfinal criminal cases. Consequently, a defendant who finds himself in the “twilight zone” when the Supreme Court announces a new, potentially outcome-determining decision, is arguably constitutionally entitled to some form of judicial process to obtain the benefit of the intervening decision.

ii. The GVR

Given that prefinality Supreme Court caselaw applies to all criminal defendants whose cases are still pending on direct review, what judicial process remains available to defendants in the “twilight zone” after *Greene*? Remarkably, the *Greene* Court provided an answer to this question, suggesting that Greene had “missed” an “opportunit[y]” when he failed to file a petition for certiorari on direct review.²⁴⁶ At oral argument, both Chief Justice Roberts and Justice Breyer sug-

²⁴¹ *Id.* at 105.

²⁴² *Id.* at 107 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added)).

²⁴³ *Id.* (quoting THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91, (1868)).

²⁴⁴ See *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (noting that courts have only the power to say “what the law is . . . not the power to change it”) (citation and internal quotation marks omitted).

²⁴⁵ Fisch, *supra* note 228 at 1078-79.

²⁴⁶ *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011).

gested that Greene should have petitioned the Court for certiorari on direct review.²⁴⁷ Justice Scalia was more direct in his opinion for the Court, noting that “[a]fter the Pennsylvania Supreme Court dismissed his appeal, [Greene] did not file a petition for writ of certiorari from this Court, which would almost certainly have produced a remand in light of the intervening *Gray* decision.”²⁴⁸ The practice to which Justice Scalia refers in this passage is the “GVR”: the Court’s longstanding procedure for granting petitions for certiorari, vacating the lower court opinion, and remanding the case for further proceedings in light of intervening changes in the law.²⁴⁹

The origins of the GVR are somewhat ambiguous, though the “prevailing view of both courts and commentators is that the modern GVR derived from early- to mid-twentieth century decisions by the Court to vacate and remand various cases in light of intervening state statutes or state supreme court decisions.”²⁵⁰ At its inception, this practice was rooted in federalism concerns and provided deference to state courts when intervening changes in the law called into question their prior judgments.²⁵¹ Though not yet termed “GVR,”

[b]y 1945, the Supreme Court could confidently state that it was its ‘customary procedure . . . to vacate the judgment of the state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances.’”²⁵²

Starting around the 1950s, the contours of this practice began to evolve into what is now known as the modern GVR practice. Around this time, the number of GVRs began to steadily increase.²⁵³ This increase was partly the result of the Court’s increased willingness to use the GVR not just out of federalism concerns, but as an “equitable tool” to allow lower courts—including lower federal courts—

²⁴⁷ See Transcript of Oral Argument at 4:17-6:21, *Greene v. Fisher*, 132 S. Ct. 38 (2011) (No. 10-637).

²⁴⁸ *Greene*, 132 S. Ct. at 45.

²⁴⁹ See, e.g., J. Mitchell Armbruster, *Deciding Not to Decide: The Supreme Court’s Expanding Use of the “GVR” Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387, 1387-88 (1998) (describing the basic elements of the GVR); Bruhl, *supra* note 207 at 717 (defining a GVR as “a summary disposition that, without purporting to find any error, returns the case to the court below for further consideration in light of some matter”).

²⁵⁰ Shaun P. Martin, *Gaming the GVR*, 36 ARIZ. ST. L.J. 551, 553 (2004); see also Sena Ku, *The Supreme Court’s GVR Power: Drawing A Line Between Deference and Control*, 102 NW. U. L. REV. 383, 387 (2008) (suggesting that the Court first exercised its GVR power in the late 1920s).

²⁵¹ See *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 179 (1996) (Scalia, J., dissenting) (citing *Missouri ex rel. Wabash Ry. Co. v. Pub. Serv. Comm’n*, 273 U.S. 126 (1927)).

²⁵² Martin, *supra* note 250, at 553-54 (quoting *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945)).

²⁵³ *Id.* at 557 (“During the 1960s . . . the Supreme Court’s use of the GVR multiplied exponentially, and . . . has remained fairly steady (and at historic highs) since the 1970s.”).

to reassess cases in light of intervening changes in the law.²⁵⁴ By the 1960s it was common practice for the Court to summarily grant, vacate, and remand cases in light of intervening U.S. Supreme Court decisions.²⁵⁵ Since then, the Court has expanded the GVR practice further, GVR'ing cases in response to intervening “federal statutes . . . agency regulations, proposed changes in state agency policies, changes in position by the Solicitor General or a state attorney or solicitor general, changed factual circumstances, new local federal appellate procedures, ongoing district court proceedings, and the introduction of new contentions on appeal.”²⁵⁶ As one commentator suggests, the Court’s liberal use of the GVR over the last half-century suggests that today’s Justices are “content to GVR based upon a broad range of intervening events that includes virtually anything that might be deemed relevant to the proper disposition of the suit.”²⁵⁷

The form and content of the GVR has changed significantly over the last fifty years as well. While early summary vacate and remand orders were issued sometime after the certiorari petition was granted, the Court now regularly issues a GVR at the same time that it grants the petition.²⁵⁸ Starting in the latter half of the twentieth century the Court also began using what is now the standard, boilerplate language for a GVR: “Petition for writ of certiorari granted. Judgment vacated, and case remanded to [the appropriate lower court] for further consideration in light of [a specific intervening event].”²⁵⁹ Although there is a “great deal of fluctuation from year to year” in terms of the number of GVRs issued,²⁶⁰ it is clear that the GVR practice has become a significant portion of the Court’s docket.²⁶¹ This is hardly surprising given the dramatic growth of the Court’s plenary docket over the last century—indeed, the Court itself has acknowledged that it increasingly relies on the GVR to manage its increased caseload.²⁶²

Yet, even as the GVR has become increasingly popular as a means of clearing the Court’s busy docket,²⁶³ the doctrinal underpinnings of this practice have re-

²⁵⁴ Ku, *supra* note 250, at 388-89.

²⁵⁵ See, e.g., *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (noting that it “has been our practice . . . where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the state court for reconsideration”). For a more modern example, see, e.g., *O’Leary v. Mack*, 522 U.S. 801 (1997) (GVR’ing for reconsideration in light of *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

²⁵⁶ Martin, *supra* note 250, at 559-60; see also *Youngblood v. W. Virginia*, 547 U.S. 867, 871 (2006) (Scalia, J., dissenting) (criticizing the majority’s decision to GVR a case where “[t]here has been no intervening change in law that might bear upon the judgment”); see also Bruhl, *supra* note 207, at 719 (noting the Court’s use of “nonstandard” GVRs in circumstances not involving an intervening Supreme Court decision such as a confession of error by the U.S. Solicitor General).

²⁵⁷ Martin, *supra* note 250, at 562.

²⁵⁸ *Id.*

²⁵⁹ *Id.* (citing *McGrath v. Chia*, 538 U.S. 902, 902 (2003)) (alterations in original).

²⁶⁰ Bruhl, *supra* note 207, at 723.

²⁶¹ Martin, *supra* note 250, at 562-63.

²⁶² See *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

²⁶³ See *id.* at 167 (“[A] GVR order conserves the scarce resources of this Court.”).

mained somewhat ambiguous. Because most GVR orders consist of only two sentences of boilerplate language,²⁶⁴ “our ability to critically examine the contemporary GVR practice, and even to fully understand it, is seriously hampered by a lack of information.”²⁶⁵ Although the Court has described its authority to issue GVRs as a “broad” statutory power granted under 28 U.S.C. § 2106,²⁶⁶ “it has not recognized any formal limitation to this power.”²⁶⁷ Moreover, “no statute or constitutional provision expressly limits—much less addresses—the GVR power.”²⁶⁸ Consequently, one commentator notes, “[t]radition . . . plays perhaps the most significant role in . . . defining GVR use.”²⁶⁹

By drawing on tradition and the few written opinions in which the Court has discussed its GVR power in some depth, the contours of this unique “exercise of [the Court’s] discretionary certiorari jurisdiction”²⁷⁰ become somewhat more discernable. While the Court has in recent years been willing to GVR even those cases that do not involve any intervening change in the relevant law,²⁷¹ most of the Court’s contemporary GVR orders are issued due to an intervening Supreme Court decision, federal statute, or agency interpretation.²⁷² Notably, the Court has articulated a reasonably clear rule for determining when to issue a GVR in this “standard”²⁷³ situation. In *Lawrence v. Chater* the Court explained that

[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.²⁷⁴

Thus, the key question in the Court’s GVR analysis is whether the lower court’s decision is “cast in doubt by a factor arising after [it was] rendered.”²⁷⁵ Where a reasonable doubt exists, “a GVR order guarantees to the petitioner full and fair

²⁶⁴ See *supra* note 123 and accompanying text.

²⁶⁵ Bruhl, *supra* note 207, at 716.

²⁶⁶ *Id.* Section 2106 provides that “[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106 (West 2011).

²⁶⁷ Ku, *supra* note 250, at 390.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996).

²⁷¹ See, e.g., *Youngblood v. W. Virginia*, 547 U.S. 867 (2006).

²⁷² Bruhl, *supra* note 207, at 728 (“In the vast majority of the cases, the relevant event was a Supreme Court decision.”).

²⁷³ *Id.* at 719 (defining “nonstandard” GVRs as those involving something other than an intervening change in the law, such as a confession of error by the Solicitor General).

²⁷⁴ *Lawrence*, 516 U.S. at 167.

²⁷⁵ *Beer v. United States*, 131 S. Ct. 2865, 2865 (2011) (quoting *Webster v. Cooper*, 131 S. Ct. 456 (2009)).

consideration of his rights in light of all pertinent considerations.”²⁷⁶

But what, exactly, does GVR’ing a particular case mean in the eyes of the Supreme Court? The Court’s decision to grant a petition, vacate the lower opinion, and remand for further proceedings in light of some change in the law does not constitute an outright reversal of the lower court’s opinion.²⁷⁷ Rather, as one commentator puts it, “the Supreme Court issues a GVR when it ‘decides not to decide.’”²⁷⁸ The Court itself describes the GVR not as a mechanism for summarily reversing incorrect lower court decisions, but as a tool to “promote[] fairness and respect[] the dignity of the [lower courts] by enabling [them] to consider potentially relevant decisions and arguments that were not previously before [them].”²⁷⁹

In truth, a GVR probably carries greater weight than the Supreme Court is willing to explicitly acknowledge. Although not all GVRs constitute a reversal, many “reconsideration order[s], if not tantamount to reversal, do[] indicate a strong leaning in that direction.”²⁸⁰ Of course, “[b]y purporting to give lower courts greater autonomy and direct involvement in constructing the holdings of GVR’d cases, the GVR gives lower courts a semblance (or, some might say, pretense) of control.”²⁸¹ But at least one study has shown that lower courts almost always reverse or at least modify their original holding when a case returns to them via a GVR.²⁸² At least in practice, therefore, a GVR represents a decision by the Supreme Court to allow—indeed, encourage—further judicial scrutiny of a petitioner’s claims.

As noted at the outset of this subsection, the Court made clear in *Greene* that it felt Eric Greene had missed an opportunity to request and receive a GVR following the dismissal of his appeal by the Pennsylvania Supreme Court.²⁸³ Indeed, the Court “almost certainly” would have GVR’d Greene’s case for reconsideration in light of *Gray v. Maryland*—a “standard” GVR scenario. But this casual remark by the Court misses a crucial dynamic created by the Court’s own retroactivity jurisprudence. As discussed earlier, under *Griffith v. Kentucky*, “twilight zone” defendants are *constitutionally entitled* to the benefit of any intervening Supreme Court decision that is announced before their convictions become final.²⁸⁴ Thus, had Greene filed a petition for certiorari requesting a GVR following the Pennsylvania Supreme Court’s dismissal of his claims, the U.S. Supreme Court arguably

²⁷⁶ *Stutson v. United States*, 516 U.S. 193, 197 (1996).

²⁷⁷ See *Lawrence*, 516 U.S. at 168 (“[T]he GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review.”); see also *Ku*, *supra* note 250 at 408 (“[T]he Court, by GVR’ing, does not directly change the holding by reversing or affirming the lower court.”).

²⁷⁸ *Armbruster*, *supra* note 249, at 1389.

²⁷⁹ *Stutson*, 516 U.S. at 197.

²⁸⁰ Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 841-42 (1983).

²⁸¹ *Ku*, *supra* note 250, at 409.

²⁸² See Arthur D. Hellman, “*Granted, Vacated, and Remanded*”—*Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE 389, 393 (1984).

²⁸³ See *supra* notes 246-46 and accompanying text.

²⁸⁴ See *supra* Part III.B.1.

would have been *obligated* to GVR his case so that he could seek the benefit of *Gray v. Maryland*.

The problem with this contention is that, for at least the last half-century, the Supreme Court has viewed the GVR as a purely *discretionary* exercise of its certiorari jurisdiction.²⁸⁵ Of course, before *Greene*, denying a “twilight zone” defendant’s petition for certiorari and request for a GVR may not have been all that problematic—prior to that decision, there was at least a *possibility* that a state prisoner could seek federal habeas relief in order to seek the benefit of a prefinality Supreme Court decision announced after the last state-court decision on his claims. Not so after *Greene*. Today, a state criminal defendant who finds himself in Eric Greene’s circumstances has only one option: a petition for certiorari to the U.S. Supreme Court. The possibility of a GVR now represents the one and only chance that defendant may have to obtain the benefit of a new rule of criminal procedure to which he is constitutionally entitled. To deny such a request for a GVR would thereby subvert *Griffith* and the constitutional principles underlying the Court’s retroactivity jurisprudence.

That the Supreme Court may be compelled to issue a GVR under certain circumstances is hardly a new proposition. As one commentator notes, “the historical progenitors of contemporary GVRs viewed such a result as a *mandatory* feature of the federal system rather than merely a discretionary or prudential result.”²⁸⁶ In *Gulf, Colorado & Santa Fe Railway Co. v. Dennis*, for example, the Court held that an intervening State Supreme Court decision compelled the U.S. Supreme Court to vacate and reverse the lower court’s decision, even though the lower court judgment was correct at the time it was announced.²⁸⁷ The general principle that intervening changes in the law require some form of remedy dates back to well before the precursors to the GVR first emerged. In *Dennis*, the Court drew on Chief Justice Marshall’s statement in *United States v. Schooner Peggy* that

[i]t is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.²⁸⁸

The combined effect of *Greene* and the Court’s retroactivity precedents suggests a possible return to this principle, at least for “twilight zone” defendants seeking GVRs.

iii. Putting It All Together: The “Twilight Zone” Defendant’s Right to the Assistance of Counsel to Request a GVR from the U.S. Supreme Court

To illustrate *Greene*’s broader effect on the Court’s right-to-counsel jurisprudence, consider a hypothetical state criminal defendant who today finds himself in the exact same procedural quandary that Eric Greene faced over a decade ago.

²⁸⁵ Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 168 (1996) (noting that the Court’s decision whether to issue a GVR “depends . . . on the equities of the case”).

²⁸⁶ Martin, *supra* note 250, at 554.

²⁸⁷ Gulf, C. & S.F.R. Co. v. Dennis, 224 U.S. 503, 506-07 (1912).

²⁸⁸ United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

Like Greene, this hypothetical “twilight zone” defendant has exhausted his state remedies, but his conviction has not yet become final when a new Supreme Court decision—one that potentially would entitle him to relief—is announced. In light of *Greene*, this hypothetical defendant is left with only one option to seek relief based on the intervening law: filing a petition for certiorari to the U.S. Supreme Court and requesting a GVR for further reconsideration in light of the now-governing precedent.²⁸⁹ The Supreme Court’s consideration of this hypothetical petition and its decision whether to GVR the case now arguably represents the first and only appellate review of the defendant’s claims under the governing law.

Consequently, the “twilight zone” defendant’s request for a GVR arguably triggers the applicability of the right to counsel under *Halbert*. *Halbert*’s first prong—that the appellate review constitutes the “first-tier” consideration of the merits of the defendant’s claims—is satisfied. As the Court made clear in *Douglas*, the right to counsel attaches to the “first appeal, granted as a matter of right.”²⁹⁰ Central to the Court’s conception of such an appeal is the ability to have one’s “claims . . . be[] presented by a lawyer and passed upon by an appellate court.”²⁹¹ Even if a “twilight zone” defendant was previously able to present his claims to a state appellate court, he has yet to have a tribunal pass on his claims under the now-governing law. And as the Court noted in *Ross*, “[t]he Fourteenth Amendment . . . requires . . . that indigents have an adequate opportunity to present their claims fairly within the adversary system.”²⁹² Merely presenting one’s claims under no-longer-good law is neither a “fair[]” nor “adequate opportunity.”

Furthermore, while the Court has consistently characterized its certiorari jurisdiction and the GVR as purely “discretionary,”²⁹³ the Court’s GVR determination satisfies the *Halbert* Court’s description of a “first-tier” appeal in a number of ways. First, as noted earlier, the *Halbert* Court found it “of critical importance” that “the tribunal to which [a defendant-appellant] addresses [his] application . . . sits as an error-correction instance.”²⁹⁴ This, the *Halbert* Court noted, helps to distinguish “first-tier” appellate review from second- or third-tier review.²⁹⁵ Despite the Court’s frequent declarations that it is not an “error-correcting” appellate

²⁸⁹ Of course, this hypothetical defendant could simply seek plenary review; but because the GVR requires the court to grant the petition anyway, simply vacating and remanding the case is the more likely option given the Court’s heavy plenary docket. See *supra* note 262 and accompanying text. As discussed earlier, state postconviction remedies are not a viable option for the “twilight zone” defendant. See *supra* note 206.

²⁹⁰ *Douglas v. California*, 372 U.S. 353, 356 (1963) (emphasis added). See also *Ross v. Moffitt*, 417 U.S. 600, 617 (1974) (“The right to seek certiorari in this Court . . . exists by virtue of federal statute.”); 28 U.S.C. § 1254 (2011).

²⁹¹ *Douglas*, 372 U.S. at 356.

²⁹² *Ross*, 417 U.S. at 612.

²⁹³ *Id.* at 616-17; *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 168 (1996).

²⁹⁴ *Halbert v. Michigan*, 545 U.S. 605, 607 (2005). See *supra* notes 80-81 and accompanying text.

²⁹⁵ A number of Circuit Courts have taken note of *Halbert*’s emphasis on error-correction to determine whether an appellate procedure constitutes a “first-tier” appeal. See, e.g., *Harrington v. Gilles*, 456 F.3d 118 (3d Cir. 2006); *Hardway v. Robinson*, 655 F.3d 445 (6th Cir. 2011).

body,²⁹⁶ the GVR is error-correction in the purest sense. Unlike the Court's plenary docket, the Court's GVR analysis does not turn on "factors other than the perceived correctness of the judgment [it is] asked to review."²⁹⁷ Typically, the Court GVRs a case "when the Justices have found enough similarity between the case before it and the intervening decision to indicate, as a prima facie matter, that the judgment below *is in error*, but that because of other aspects of the case, the Court is not prepared to reverse outright."²⁹⁸

What is more, a GVR corrects errors directly concerning the merits of the petitioner's claims. Of course, officially, the Court claims that it "express[es] no views on the merits of the case" when it GVRs a petition.²⁹⁹ But this is, at best, only half-true. Determining whether to grant a GVR *inevitably* involves some consideration of the merits in light of the new governing law. Several Justices have, at times, acknowledged this fact: in *Board of Trustees v. Sweeney*, for example, Justice Stevens, joined by Justices Brennan, Stewart, and Marshall, dissented from the Court's decision to GVR the case, noting that "[w]henver this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits."³⁰⁰ Similarly, in *Henry v. City of Rock Hill*, the Court explained that the decision to GVR a case depended on whether it appeared from the petition that an intervening decision was "sufficiently analogous and, perhaps, decisive to compel re-examination of the case."³⁰¹

Thus, as with Michigan's appellate procedure in *Halbert*,³⁰² the Court's consideration of a "twilight zone" defendant's request for a GVR "is properly ranked with *Douglas* rather than *Ross*."³⁰³ Because the Court's determination of whether to GVR a case constitutes error-correction, the considerations typically motivating discretionary appeals—such as whether the case involves significant legal principles—are not implicated. Moreover, unlike a defendant "seeking to pursue a second-tier discretionary appeal,"³⁰⁴ a "twilight zone" defendant seeking a GVR for reconsideration in light of intervening case law does not have the benefit of prior

²⁹⁶ See, e.g., *Ross*, 417 U.S. at 615; Hon. William J. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231 (1983) (noting that the Supreme Court does not sit in error correction); Hellman, *supra* note 280 at 799 ("[T]he consensus of Congress, the bar, and the judiciary that review for error should play, at best, a minor part in the Court's work . . .").

²⁹⁷ *Ross*, 417 U.S. at 617.

²⁹⁸ Hellman, *supra* note 280, at 839 (emphasis added).

²⁹⁹ *First Nat'l City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971).

³⁰⁰ *Bd. of Trustees of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25-26 (1978).

³⁰¹ *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964); see also *id.* at 776 (noting that the Court GVRs a case when it is "not certain that the case was free from all obstacles to reversal on an intervening precedent").

³⁰² *Halbert v. Michigan*, 545 U.S. 605, 611 (2005) (quoting *Douglas v. California*, 372 U.S. 353, 356 (1963)).

³⁰³ *Id.* at 610.

³⁰⁴ *Id.* at 611.

appellate briefing.³⁰⁵ Even if a “twilight zone” defendant obtained the assistance of appellate counsel at an earlier stage, the intervening change in the law likely negates much of the usefulness of any prior legal assistance. Most importantly, prior briefing based on outdated and incorrect case law would not supply an “adequate basis”³⁰⁶ for the Court to make its GVR determination.

With respect to *Halbert*’s second prong, indigent “twilight zone” defendants are unquestionably “ill equipped to represent themselves.”³⁰⁷ The GVR represents one of the most obscure areas of Supreme Court practice.³⁰⁸ Because “[t]he standards for when and how changes in law can be taken advantage of through GVRs currently take the form of obscure unwritten rules of Supreme Court history and practice,” even the most experienced appellate litigators may be unfamiliar with the details of this procedure.³⁰⁹ Consequently, for those “twilight zone” defendants who are unable to afford paid counsel, a petition for certiorari requesting a GVR would represent a “‘meaningless ritual,’ while others in better economic circumstances [would] have a ‘meaningful appeal.’”³¹⁰

Like *Martinez*, then, *Greene* calls into question the Court’s commitment to its more “categorical” right-to-counsel precedents. Of course, *Greene* creates no tension with the Court’s holding in *Finley* that the right-to-counsel does not apply to collateral proceedings³¹¹; “twilight zone” defendants are, by definition, still in the direct review stage of their proceedings. But *Greene* does raise the question whether *Halbert* provides sufficient doctrinal flexibility to qualify the Court’s unambiguous holding in *Ross* that the right to counsel is inapplicable to discretionary appeals.³¹²

Arguably, a “twilight zone” defendant seeking a GVR from the Supreme Court may have a stronger argument under *Halbert* for the right-to-counsel’s applicability than a defendant in Louis Martinez’s situation. For one thing, it is not clear that the Court’s GVR consideration fits within the *Ross* Court’s definition of a discretionary appeal in the first place.³¹³ But even assuming that it does, *Halbert*, by its terms, applies only in the context of direct review: the Court was concerned in that case that Michigan’s procedure for plea-convicted appeals constituted “the first, and likely the only, *direct* review the defendant’s conviction and sentence will receive.”³¹⁴ And for “twilight zone” defendants, a petition for certiorari and request for a GVR represents the “first” and “only[] direct review” such defendants will receive under the governing law to which they are constitutionally entitled

³⁰⁵ See *Ross v. Moffit*, 417 U.S. 600, 615-16 (1974) (noting that the petitioner had already “received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf” in his first appeal as of right).

³⁰⁶ *Id.* at 615.

³⁰⁷ *Halbert*, 545 U.S. at 606.

³⁰⁸ See, e.g., *Ku*, *supra* note 250, at 383 (describing the GVR as an “established but obscure” procedure).

³⁰⁹ Bruhl, *supra* note 207, at 748.

³¹⁰ *Ross*, 417 U.S. at 612 (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)).

³¹¹ *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

³¹² *Id.* at 602-03.

³¹³ See *supra* notes 284-85 and accompanying text.

³¹⁴ *Halbert*, 545 U.S. at 619 (emphasis added).

under *Griffith v. Kentucky*. Furthermore, the Court has made clear that criminal procedures dealing with the direct review process present greater due process concerns than those governing collateral appeals.³¹⁵ Accordingly, due process may demand greater doctrinal flexibility with respect to fundamental rights when comes to “first-tier” direct review.

Of course, going forward, the Court could simply walk back *Halbert*’s expansive language, and repudiate the whole notion that “first-tier” review necessarily triggers the right to counsel in the first place. Indeed, as noted earlier, the Ninth Circuit suggested as much when it dismissed Louis Martinez’s petition on the grounds that he “had already received direct review of his convictions, and had already received the assistance of counsel in connection with that first appeal.”³¹⁶ Such an approach, if it ever were adopted by the Supreme Court, would mean that “twilight zone” defendants have no right to counsel to seek GVRs so long as they have already received the assistance of counsel in their first appeal (notwithstanding the intervening change in the law).

But such an outcome would be unsatisfying for at least two reasons. First, it would represent a dramatic shift in the Court’s understanding of the right secured by the Sixth and Fourteenth Amendments. Interpreting the right to encompass only a right to the assistance of an attorney to appeal one’s conviction in general would be wholly inconsistent with the Court’s consistent framing of the right as attaching to a defendant’s opportunity to present his *claims*.³¹⁷ And the Court made clear in *Halbert* that a “first-tier” review is a defendant’s first opportunity to have an appellate court review “the merits of the appellant’s claims.”³¹⁸ What counts, then, is not whether a defendant has already received the assistance of counsel to appeal his conviction, broadly construed, but whether he is seeking an adequate opportunity to present his claims for the first time. Second, as noted earlier, the seven-Justice majority in *Martinez* appeared to be perfectly comfortable with *Halbert*’s expansive language, even relying on it outside of the right-to-counsel context to fashion an “equitable” remedy in that case.³¹⁹ *Halbert*’s two-pronged test, therefore, seems to be here to stay.

Beyond these doctrinal prognostications, however, it should be noted that there are a host of practical difficulties that counsel against applying the right to counsel to “twilight zone” defendants. For one thing, public defender offices across the country are already stretched thin.³²⁰ This is especially true with respect

³¹⁵ See *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (noting that States are accorded greater due process flexibility with respect to their collateral review procedures than those governing direct review (citing *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987))).

³¹⁶ *Martinez v. Schriro*, 623 F.3d at 740.

³¹⁷ See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (noting that States have a duty “to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process”).

³¹⁸ *Halbert v. Michigan*, 545 U.S. 605, 618 (2005).

³¹⁹ See *supra* notes 133-34 and accompanying text.

³²⁰ See, e.g., Nathan Koppel, *Public Defenders Stretched Thin by State Cuts*, WALL STREET JOURNAL, Apr. 14, 2011, <http://online.wsj.com/article/SB10001424052748704530204576232812464584064.html>.

to appellate defenders.³²¹ Although federal public defender offices tend to be less resource-constrained than their state and local counterparts,³²² any expansion of the right-to-counsel's applicability would necessitate a corresponding increase in public defender resources to keep up with the added caseload. And any change in the law that places increased pressure on public defender offices' budgets is likely to be unpopular among courts, policymakers, and administrators.³²³ Thus, from the government's perspective, it may simply be easier and more economical to avoid any expansion of the right to counsel.

Moreover, it is not clear which government would be responsible for supplying the necessary resources to appoint counsel when "twilight zone" defendants wish to request a GVR. The Court noted in *Ross v. Moffit* that the right to seek certiorari in the U.S. Supreme Court is granted by Federal statute.³²⁴ Consequently, the Court concluded, "[t]he suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority."³²⁵ The *Ross* Court went on to suggest that "[i]t would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek certiorari here to review state judgments of conviction."³²⁶ But, the Court noted, "this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file . . . petitions for certiorari in this Court."³²⁷ Thus, while it appears as though the federal government would be responsible for supplying counsel to "twilight zone" defendants seeking GVRs, the Court has consistently and deliberately avoiding doing so.

CONCLUSION

As the foregoing indicates, whether *Halbert* represents a paradigmatic shift

³²¹ See, e.g., See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 682 (2007) (noting the "scare public resources" available for appellate defenders).

³²² See, e.g., Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 685 n.11 (2010) (noting that "the federal courts deal with a small percentage of criminal prosecutions" and that "[m]ost federal public defenders have reasonable caseloads and provide their clients with good representation").

³²³ See, e.g., James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1, 3 (2006) (noting that Congress' "tight funding" of the federal courts places pressure on "discretionary" expenses, including salaries for federal public defenders); cf. Scott R. Jennette, *Forfeiture of Attorneys' Fees Under RICO: An Affront to a Defendant's Right to Counsel and to a Fair Trial*, 12 U. DAYTON L. REV. 553, 555 n.15 (1987) (noting concerns among critics of certain amendments to the RICO statute that federal public defender budgets are inadequate to handle large criminal RICO cases).

³²⁴ *Ross v. Moffit*, 417 U.S. 600, 617 (1974); 28 U.S.C. § 1254 (2011).

³²⁵ *Ross*, 417 U.S. at 617.

³²⁶ *Id.*

³²⁷ *Id.* (citing *Drumm v. California*, 373 U.S. 947 (1963); *Mooney v. New York*, 373 U.S. 947 (1963); *Oppenheimer v. California*, 374 U.S. 819 (1963)).

in the Court's right-to-counsel jurisprudence, or merely a stylistic anomaly, remains to be seen. While Justice Ginsburg's opinion in that case echoes *Gideon's* "restor[ation]" of "constitutional principles established to achieve a fair system of justice," it is still too early to tell whether the Court today is willing to continue down that path.³²⁸ Despite the lack of any firm answers regarding *Halbert's* reach in the Court's *Martinez* and *Greene* decisions, these cases nonetheless shed light on the Court's evolving approach to this fundamental constitutional right. At the very least, *Martinez* seems to represent a struggle within the Court to reconcile the doctrinal inconsistencies within its right-to-counsel precedents. Although certain members of the Court appear comfortable with categorical, bright-line rules, others appear to be troubled by such inflexibility, particularly in light of *Halbert's* overarching concern with the fundamental fairness of criminal proceedings. Given the frequency with which the question of the right-to-counsel's applicability in initial-review collateral proceedings has come up over the years,³²⁹ it is safe to assume that this issue will be before the Court again in due time.

If *Martinez* (and *Trevino*) represents the Court's growing pains in its right-to-counsel jurisprudence, *Greene* represents just one of many possible new avenues for a robust *Halbert*-based right-to-counsel jurisprudence. Indeed, there are numerous possibilities for criminal proceedings to fit under a broad definition of "first-tier" review. For example, consider a different variation of "twilight zone" defendants: prisoners whose convictions have become final and who seek collateral relief in federal habeas court. Under the Court's holding in *Teague v. Lane*,³³⁰ such prisoners may not seek the benefit of new Supreme Court decisions announced after their convictions have become final—termed "new rules" under *Teague*³³¹—unless one of two possible exceptions apply: (1) if the new rule places the "kind[] of primary, private individual conduct" for which the prisoner was convicted "beyond the power of the criminal law-making authority to proscribe"³³²; or (2) if the new rule announces a "watershed rule[] of criminal procedure."³³³ The Court has never found either of these exceptions to apply. But if it did, a prisoner would then be permitted under *Teague* to seek collateral review of claims based on the new rule. Such review would arguably constitute the "first-tier" review of the merits of such claims, thereby triggering *Halbert*.

This last scenario is, admittedly, an unlikely one. But, like *Greene* and *Martinez*, it nonetheless underscores the potentially significant implications of the Court's decision in *Halbert*. These examples suggest that should the Court adopt a robust interpretation of "first-tier" review, the right to counsel may have broader application than the Court has previously recognized.

³²⁸ *Id.* at 344.

³²⁹ See cases cited *supra* note 143.

³³⁰ *Teague v. Lane*, 489 U.S. 288 (1989).

³³¹ *Id.* 489 U.S. at 310.

³³² *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667 (1971)).

³³³ *Id.*

THE MANY TEXTS OF THE LAW

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ABSTRACT

This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, as well as for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources – some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources – are largely responsible for this situation.

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Perhaps one of the most well-known passages from H.L.A. Hart's landmark work on jurisprudence, *THE CONCEPT OF LAW*, is his example of a rule at the entrance to a park: *No vehicles in the park*.¹ He then explores the ambiguity of that rule: *does it forbid roller skates, bicycles, toy automobiles, airplanes*, and the consequence of that ambiguity for law and its meaning. Hart ends by insisting that for most rules, which are expressed in language that is inherently ambiguous, there is a core of unambiguous meaning surrounded by a penumbra of ambiguity. He goes further to say that when judges and lawyers address the penumbra they do so by reference to social and cultural values.

For us, there is a far more important question. First, Hart's example examines law from the perspective of the jurist, not that of the lay person. But even as a jurist, he does not pay attention to how jurists are taught the law vis-à-vis the text of the law, and whether that has any potential implications in the way they understand and apply the law, and on how judges' work is understood by the lay person.

Here we continue where Hart stopped. We investigate what it means for the legal professional to learn the law by reading excerpts of cases spoon-fed to make learning easier. We wonder whether such an artifice which pretends to bring the student to the original source encourages an already budding instinct for the apocryphal, rather than the original source. We understand, of course, that the evolution of the casebook has followed the evolution of law, and the notion that law encompasses more than appellate cases. But we believe it was never contemplated that students and future judges would learn less about law (including appellate cases in their original form), rather than more, by editing cases and adding other materials.

Second, we analyze the current cultural climate and how it affects the common person's understanding of the law, even though Hart completely shies away from that study. In fact, for Hart, and those who came before, like Austin, Wittgenstein, and even Holmes, and after, like Fuller, the test of a legal system was always jurist-oriented. Jurisprudes seem to have missed entirely how the very focus of the legal system, the common person, might become less confident of her legal system as ambiguity, or the recognition and acceptance of ambiguity, rises. And, in turn, it is our view, or fear, that the legal system must become both less reliable and less integral, as the common person loses faith, or worse, in an ambiguous legal system.

What we have noticed, in our current media-centric and polarized society, is that the way law, in Hart's sense, is delivered to the public creates increasing ambiguity such that any public-centric measure of law loses almost all its sense and content. If law, to be law, must be known or knowable, to the public, law today is "known" in a plethora of ways, many of them mutually inconsistent. And we wonder whether that qualifies as law at all, if law has no core identity itself.

In many ways, one of the points of this article is that we have moved far away

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¹ H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958). The example is reprised in modified form in H.L.A. HART, *THE CONCEPT OF LAW* 125-27 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994).

from the common man's sense of legal certainty² that Jeremy Bentham favored when he demanded that law be clear and concise enough to be posted at the entrance to every railway station.³ It is that same sense of certainty that French codification sought by reducing inconsistent, haphazard, judicial decisions to a short and concise legal code. And, finally, it is that same sense that New York's Justice Field sought when attempting an American codification.⁴

This paper contends that even as jurists invoke the official canonic version of the legal text, it is in danger of being replaced for the jurist, and for the lay person, if it has not been substituted already, by some apocryphal, inauthentic or casual text. We argue that in addition to the approximate nature of legal knowledge, the overuse of overedited and perverted casebooks, as well as the distribution of legal information among imperfect sources – some official but partial, others inauthentic but highly accessible, and a few reliable but highly unaffordable commercial sources – are largely responsible for this situation.

I. THE IMPERFECT NATURE OF LEGAL KNOWLEDGE ENCOURAGES AMBIGUITY ABOUT THE RULE OF LAW

From an abstract point of view, law represents the product of “many different wills and imaginations, interests and visions.”⁵ At this basic level, society is perceived as the association of humans whose assumed eternal hostility to one another requires that order and freedom be maintained by government with the help of a specific linguistic tool called law. Governments use laws, man-made rules, because such institutional behavior satisfies a specific social and political desire or value, that of a society governed by legal language, by law. This postulate does not represent a universal or even an a-historic value. It has always been connected to the liberal state as we know it since the Glorious Revolution of 1688,⁶ which established the victory of the English Parliament over the King, or the victory of “impersonal rules” over the King’s whimsical desires, expressed as subjective language, i.e., “because I say so”. In other words, our liberal society is intrinsically connected to prescriptive and normative rules, which bear on everybody’s conduct by stating what their subjects “may do, ought to do, or ought not to do.”⁷ On a different plane, but reflecting what might be assumed to be a natural human instinct, both the Decalogue and Hammurabi's Code predate the Glorious Revolution by several millennia.

Roberto M. Unger’s definition of the role of the laws in our society appears

² “[Either] I greatly overrate or [Bentham] greatly underrates the task not only [of digesting] our Statutes into a concise and clear system, but [of reducing] our unwritten to a text law.” (Madison’s answer to Bentham’s offer to codify the American law and make it clear for all judges to apply) William D. Bader, *Meditations on the Original: James Madison, Framers with Common Law Intentions - Ramifications in the Contemporary Supreme Court*, 20 VT. L. REV. 5, 7 (1995).

³ JOHN DINWIDDY, BENTHAM (1989).

⁴ See generally, CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1969).

⁵ ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME 65 (1996).

⁶ For more on the Glorious Revolution, see, e.g., Larry Kramer. *Putting the Politics Back* 100 COLUM. L. REV. 215 (2000).

⁷ ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 69 (1975).

both poetic and idealistic but also deeply ambiguous:

[Laws] place limits on the pursuit of private ends, thereby ensuring that natural egoism will not turn into a free-for-all in which everyone and everything is endangered. They also facilitate mutual collaboration. The two tasks are connected because a peaceful social order in which we know what to expect from others is a condition for the accomplishment of any of our goals. More specifically, it is the job of the laws to guarantee the supreme good of social life, order and freedom.⁸

Whether idealistic or not, Unger seems correct in his perception of what the subjects of the law expect from it: to provide order. Thus, rather than ask Hart's open-ended question, "What is law?"⁹ this paper asks "What makes a text law?" For Hart, law was the same phenomenon that Hans Kelsen had articulated earlier – rules emanating from places of authority.¹⁰ Hart developed this positivist approach. He expanded the meaning of law beyond that of knowledge whose source was statutes, cases, international law, customs, etc., to emphasize that legal concepts embraced social theory and philosophic inquiry, too.¹¹ Hart halted his inquiry there, though. He did not negate the existence of imperfect legal knowledge, or legal "rumor" or "garble,"¹² as Leslie Green describes the general, although perhaps mistaken, understanding of Hart's work.

Hart mentioned that for the ordinary person law is something vague. He found evidence of approximate legal knowledge when he explained its limits.

Few Englishmen are unaware that there is a law forbidding murder, or requiring the payment of income tax, or specifying what must be done to make a valid will. *Virtually everyone* except the child or foreigner coming across the English word 'law' for the first time could easily multiply such examples, and most people could do more. They *could describe, at least in outline*, how to find out whether something is the law in England; they know that there are experts to consult and courts with a final authoritative voice on all such questions.¹³

Notwithstanding its approximate nature, Hart explained, legal knowledge is sufficient to ensure law's preeminent normative role. Hart did not ponder the textualization of legal rules. Perhaps based on his continental experience where legal information has a different distribution than in the United States, he assumed that the public would access and interact with the official text of the law or, more likely, consult an expert. That interaction ensured his fellow citizens' ability to explain or to "cite" and describe "at least in outline" the law. This limited legal knowledge nevertheless enabled the normative function of law to continue unobstructed, and the desired social order to voluntarily and democratically be maintained. The unbroken flow of the legal outline from the legislature to the judge to the lay person assured a common understanding of law, an understanding so undebated, that Hart did not think to address the possibility of its absence.

⁸ *Id.*

⁹ See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed., 2012).

¹⁰ See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961).

¹¹ Leslie Green, *Introduction in H.L.A. HART, THE CONCEPT OF LAW* xv (3d ed., 2012).

¹² *Id.*

¹³ See HART, *supra* note 9, at 2 (emphasis added).

Despite Hart's focus on the fact that "general [legal] rules, standards, and principles" which represented "the main instrument of social control"¹⁴ and not on the gap between their enactment, publication, and application, his precise observations about legal knowledge and its normative implications facilitated subsequent analysis into the moment of law's actuation and the cognitive and practical gap it creates. This essay continues Hart's analysis and deepens his inquiry into our interaction with the sources of law, which is what Hart calls the "deliberate, datable acts,"¹⁵ whether it comes from a legislative, judiciary or executive body. It points out that Hart seemed to have assumed legal knowledge was generated by a subject's (almost invariably a judge's) interaction with the official text of the law, which could incorporate social observations or even philosophical inquiry. However, this essay goes further and contests Hart's assumption about the totality of ways we interact with the law. Usually, as seen here, because of the nature of legal information and the way it is disseminated, law is realized through an interaction with something other than the "official" or the canonic legal text and it incorporates pre-existing cultural knowledge or "legal gossip." From this perspective, Hart's penumbra is not a mere technicality, but is as central to law as its core text. This becomes more important, as we argue below, in that the penumbra has recently expanded beyond all imagined limits, and threatens to continue to do so, at the same rapid rate, and perhaps even more rapidly, for the foreseeable future.

Far from a heresy, this argument resonates with Dworkin's work, which has described law as "an interpretive concept like courtesy."¹⁶ While it is hard to gauge a person's legal knowledge, there are tools to investigate the nature of legal knowledge. For instance, Dworkin described the work of the members of the judiciary as interpretive theories which "are grounded" in their

convictions about the 'point' – the justifying purpose or goal or principle – of legal practice as a whole, and these convictions will inevitably be different, at least in detail, from those of other judges. Nevertheless a variety of forces tempers these differences and conspires toward convergence.¹⁷

If legal knowledge were to be as perfect as mathematical knowledge, for instance, there would be no need to work on tempering difference and ensuring convergence – the method of inquiry would discard mathematical deviation. To the contrary, as Dworkin explained, legal knowledge uses specific tools to produce its ultimate normative goals: (1) the doctrine of "stare decisis" and the judge's presumed role to follow legal precedent; (2) the "inevitable conservatism of formal legal education"¹⁸ and (3) the conservatism of the process of selecting lawyers for judicial and administrative office.¹⁹ Dworkin did not opine about another tool which is inherent to all human constructs, including law, and legal knowledge: cultural convergence. To the extent that there are cultural values which distinguish American culture among other cultures, culture acts as a corrective which tempers

¹⁴ *Id.* at 124.

¹⁵ *Id.* at 44.

¹⁶ RONALD DWORKIN, *LAW'S EMPIRE* 87 (1986).

¹⁷ *Id.* at 87-88.

¹⁸ *Id.*

¹⁹ *Id.*

legal differences and, for instance in the form of moral norms, becomes incorporated in our theory of a legal system and the mandates which establish it.²⁰ On the other hand, international legal convergence, a popular subject in international law assures some tempering of legal differences on the international level.²¹

While none of the scholars briefly discussed above qualified their understanding of legal knowledge as “imperfect,” they did so incidentally, by relying on non-legal texts to find the meaning of law. The question remains though whether our legal knowledge, our understanding of our legal system, has to be imperfect, and whether deciphering the meaning of law requires incorporating our cultural values and general knowledge. Does it have to start, at least for the lay person, with our approximate readings of apocryphal unofficial legal texts? Because if it does, it would more surely end with that type of source too. Is there something in the nature of legal knowledge that makes it easier for the public to access and use cultural legal manifestations rather than the canonic text of the law? The next paragraphs suggest that both the rigid hierarchy of official or canonical legal knowledge mirrored by obtusely written texts shape the approximate nature of legal knowledge.

Unger described legal knowledge as highly structural and used the concepts of theory and practice or social practice to illustrate this.²² But, if we are to believe that “individuals and individual interests are the primary elements of social life, and because they are locked in a perpetual struggle with one another, [and] social order [is] established by acts of will and protected against the ravages of self-interest,”²³ then it makes more sense to describe legal knowledge using the concepts of theory and prudence, defined by Unger as “the knowledge of particulars or reasoning about particular choices.”²⁴ We would amend Unger’s definition to say that prudence in its dialectical connection with legal theory is political reasoning applied to specific historical moments to reach social order. What differentiates legal knowledge from other knowledge systems is its object. For instance, legal theory and prudence incorporate the most distinctive and general political values of a governmental entity and translate them into legal norms or text. Those values are further practically applied to historical moments as statutes and case law.

From its inception, the United States has always been the result of a dual political commitment to a democratic republic and to a market system intrinsically

²⁰ See, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM. AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (2d ed. 2003). For additional reading, see JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

²¹ See articles on convergence, in such areas as TRIPS, especially IP. E.g., J. Janewa Osei-tutu, *Value Divergence in Global Intellectual Property Law*, 87 *IND. L.J.* 1639, 1647 (2012) (the article explains how value divergence is consistent with the TRIPS Agreement and how it can gradually lead to the convergence of intellectual property interests) CARLOS M. CORREA, *INTELLECTUAL PROPERTY RIGHTS, THE WTO AND DEVELOPING COUNTRIES: THE TRIPS AGREEMENT AND POLICY OPTIONS 3-4* (2000). Thomas K. Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 *CHI. J. INT’L L.* 433, 490 (2012) (This Article examines the recent phenomenon of the convergence of competition law regimes across the globe).

²² ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 9 (1986).

²³ UNGER, *supra* note 7, at 75.

²⁴ *Id.* at 254.

connected to it, as if one could not have existed without the other. This social and political structure relied on a “legally defined institutional structure that went along with it.”²⁵ As Unger pointed out, there is a clear agreement between the political commitment and the legal theory explaining, exposing, and making it happen. Like all legal systems, ours too incorporates the general principles associated with the embraced political commitment. Within the umbrella of its own “rule of law” then, it puts them to work. Incorporating Unger’s explanation, our legal knowledge mirrors the United States legal system which can be described as the marriage between a specific type of legal theory, our expanded view of Unger’s prudence²⁶ and their practical application through specific statutes, cases, rules, and regulations.

Legal theory contains the most abstract rendition of our political commitment, under the name of “the rule of law,” while prudence represents the linguistic application of that theoretical ideal to a set of historical particular circumstances or “reasoning about particular choices.”²⁷ Unger’s hierarchy is unclear – whether a duopoly or triumvirate. However, it makes sense to add another clear element to his theory and prudence and distinguish prudence from practice. Thus, legal knowledge is dominated by a triumvirate – theory, prudence, practice – as they are necessary to govern our market-based social hierarchy, always described as our liberal society.

While theory, our rule of law, favors normative rules, its practical application to particular circumstances favors its descriptive side, because most commands need explanatory details in order to be obeyed. The rule of law continually adapts itself to a new historical epoch through prudence and its various applications and incorporating various degrees of normativity by means of detail and specificity. Interestingly, the rule of law and its bare linguistic rendition constitute the back bone of everybody’s general legal education and cultural legal background. At the opposite end of the spectrum, its detailed statutory or case law application remains only vaguely known and approximated by the majority of the public, and of course, is only formally taught in law schools;²⁸ occasionally, and surprisingly, it is misunderstood by judges themselves.²⁹

II. JURISTS’ COMPLACENCE ABOUT LAW’S AMBIGUITY

If legal knowledge is inherently imperfect because of its highly hierarchical structure which encourages retention of the main constitutional principles (the rule

²⁵ UNGER, *supra* note 22, at 5.

²⁶ See *id.* and text accompanying notes 5 to 7 *supra*.

²⁷ UNGER, *supra* note 7, at 254.

²⁸ See generally, DUNCAN KENNEDY, *LEGAL REASONING: COLLECTED ESSAYS* (2008).

²⁹ See e.g. Alan C. Weinstein, *The Ohio Supreme Court’s Perverse Stance on Development Impact Fees and What to Do About It*, 60 CLEV. ST. L. REV. 655, 679 (2012) (describing the decision of the Ohio Supreme Court in *Drees Co. v. Hamilton Twp.*, 970 N.E.2d 916 (Ohio 2012) as “deeply distressing” : “the court failed even to acknowledge, let alone distinguish: (1) its own ruling upholding impact fees twelve years before in *Homebuilders Association of Dayton* and the *Miami Valley v. City of Beavercreek*, and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the Court relied in part” *Id.* (internal citations omitted).

of law translating our market-driven democracy) and approximation of the descriptive applications of our rule of law, we should examine whether its linguistic nature also plays a role in amplifying that problem.

Legal knowledge starts with the reading of the language of a legal text, whether canonic or, more often, some cultural approximation. Referring to legal theory and knowledge as language may be infuriating to some, but as Rousseau diplomatically put it – “When Archimedes ran naked through the streets of Syracuse to announce his findings, what he said was no less true because of the way it was communicated.”³⁰ Law is legal knowledge which translates social, economic and political values into language which follows linguistic rules and which is further textualized in the process of reading or actuating it. This paper postulates that legal language, especially detailed, meticulous legal knowledge, generates an inherently approximate understanding.

Language shapes knowledge but because language is molded in various degrees by the cultural values of a society, and culture molds specialized knowledge, American language is molded by American culture, and to the extent language seduces us into specific patterns of thinking, American culture and its values seduce our thinking.³¹

Our language has remained the same and keeps seducing us into asking the same questions. As long as there continues to be a verb ‘to be’ that looks as if it functions in the same way as ‘to eat’ and ‘to drink,’ as long as we still have the adjectives ‘identical,’ ‘true,’ ‘false,’ ‘possible,’ as long as we continue to talk of a river of time, of an expanse of space, etc. etc., people will keep stumbling over the same puzzling difficulties and find themselves staring at something which no explanation seems capable of clearing up. And what’s more, this satisfies a longing for the transcendent, because in so far as people think they can see the ‘limits of human understanding,’ they believe of course that they can see beyond these.³²

Of course, not all language is molded equally by cultural values, and various cultural values mold various types of language differently. For instance, law does not use the language of the ghetto or of some marginal subcultures. Law uses mainstream language, and its lack of flexibility impacts legal knowledge. This linguistic ossification translates into an ossification of imagination, or in law, it forces us to stay on one informational path and to try to solve the same problems in the manner generations before us saw and tried to solve them.

For instance, if within the last few decades, using *stare decisis* rather than statutory language -42 U.S.C. 1973- has been the way to solve Section 5 Voting Rights Act litigation, it seems reasonable to assume that this mode will be continued for a reasonable time into the future by the United States Supreme Court. This observation further translates into compounding approximate knowledge. To further exemplify this point, on the U.S. Department of Justice’s web site, if you search for Section 5 Voting Rights Act, your first hit is an editorializing paragraph of the latest U.S. Supreme Court decision:

³⁰ UNGER, *supra* note 7, at 192. For the original quote, see Jean Jacques Rousseau, *Lettres Ecrites de la Montagne*, 3 OEUVRES COMPLETES 686 (B. Gagnebin & M. Raymond eds., 1964).

³¹ See LUDWIG WITGENSTEIN, *CULTURE AND VALUE* 15e (Peter Winch trans., 1980).

³² *Id.*

On June 25, 2013, the United States Supreme Court held that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Rights Act to determine which jurisdictions are subject to the preclearance requirement of Section 5 of the Voting Rights Act, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).³³

The link to the statutory language appears further below in the page, almost as if an afterthought.³⁴

Linguistic ossification and ossified imagination have a potentially positive effect; by remaining the same over a longer period of time, language could and sometimes does foster common understanding. In law, especially, this result is highly desirable. It can be said that the only period of societal calm that persists for long is when interested parties and the population at large see in legal language the same thing, or understand it as saying the same thing. Put another way, the more flawless the communication between our social, economic and political values and their legal articulation, the easier it is to preserve social order.

However, as seen here, it is easier to maintain a flawless communication between the textual rendition of our rule of law – the Constitution -- and our social and political commitment than between the various statutory applications of our rule of law, and our interpretation of those legal texts. Again, that may be because the Constitutional text is rather vague, has a religious flavor,³⁵ and encourages a religious type of understanding. If religious understanding requires one to go beyond the letter of the text, the same result surely occurs when faced with the much more detailed statutes which abound in arid, hard to grasp, descriptive language. It seems that no matter the degree of legal detail, nothing is obvious when it comes to law (*No vehicles in the park*). Nothing seems to be comprehensively described within statutory language, for instance. Or, as Wittgenstein noted, maybe all “assertions about reality, assertions which have different degrees of assurance”³⁶ may appear obvious, and easy to grasp, but somehow, the most obvious assertions “may become the hardest of all to understand.”³⁷

While slow to change, as Wittgenstein observed, language is nevertheless open to interpretation. Common law language is even more so open. As Hart noticed, law in the form of legal language incorporates cultural influences, whether social observations or philosophical inquiries. To the extent that pre-existing cultural interpretations mold our legal understanding, we can talk about a cultural corrective of the multitude of possible legal readings. Think about how a statute needs to be read together with its judicial applications, which then needs to be divided into its binding and not-binding part (the law student's classical distinction between holding and dicta), which in fact will be applied more or less as a matter of faith until something happens and a contradiction between the legal language assumed as binding and a specific situation will need to be resolved anew. That

³³ *Section 5 of the Voting Rights Act*, JUSTICE.GOV,

http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Apr. 12, 2014).

³⁴ *Subchapter I-A: Enforcement of Voting Rights*, JUSTICE.GOV, http://www.justice.gov/crt/about/vot/42usc/subch_ia2.php#anchor_1973c (last visited Apr. 12, 2014).

³⁵ See, generally, Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV., 909 (1995).

³⁶ LUDWIG WITTGENSTEIN, ON CERTAINTY 66 (Denis Paul & G.E.M Anscombe trans., G.E.M Anscombe & G.H von Wright eds., 1969).

³⁷ WITTGENSTEIN, *supra* note 31, at 17e.

will involve the specific language at issue quoted and questioned and the cycle will continue!

All these brief linguistic observations suggest that language affects our understanding and legal language affects our legal knowledge. That linguistic phenomenon seems to have only one desired effect, that of preserving the approximate nature of legal knowledge.

Concluding the findings of this first part of the paper, we saw that legal philosophers such as Hart noticed our imperfect legal knowledge. Additionally, the structure of our legal system promotes perhaps so many legal applications of our rule of law that it becomes impossible to know much of them other than by their main ideas and title, much like we refer to *Section 5 Voting Rights Act litigation*, but we do not really know what those cases contain.³⁸ Continuously detailing normative texts forces the reader to use interpretive cultural tools to decipher it. This further preserves the imperfect and approximate nature of legal knowledge. Furthermore, legal language is not something which people recite aloud with their eyes closed while holding hands, or whose words people sing and dance to, or post on their FACEBOOK account for further social engagement, or even ponder about their meaning. Even the most renowned jurists of the land approximate legal language from its very inception and then its application is further inexactly publicized.

III. RANDOM EXAMPLES ABOUT LAW'S AMBIGUITY FOR JURISTS AND CITIZENRY

As explained above, our rule of law, legal theory, favors normative rules. Its practical application to particular circumstances favors its positivist or descriptive side. If the rule of law and its bare linguistic rendition constitute the back bone of everybody's general legal education and cultural legal background, at the opposite spectrum, its detailed statutory or case law application remains only vaguely known and approximated by the majority of the public. Furthermore, it is only taught formally in law schools.³⁹

³⁸ § 1973: Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2) [42 USCS § 1973b(f) (2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973.

³⁹ See generally, KENNEDY, *supra* note 28.

From a textual perspective, the United States Constitution represents the embodiment of our rule of law. It gives legal meaning to our geo-political commitment to a democratic market economy. The Federal Constitution has been further amended in order to give legal meaning to new social and economic circumstances. For instance, the Fifteenth Amendment became part of the Federal Constitution in 1870 in order to render illegal the exercise of property rights over human beings and avoid further social disruption. The history of the latter half of the 19th century was briefly summarized and legally translated into two constitutional amendments, including the Fifteenth Amendment, whose two paragraphs read as follows:

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

This Constitutional language is confined within the dual political commitment to a market democracy, by describing the democratic need to vote. While still abstract and impersonal, the language of this amendment also uses some specific descriptors such as “on account of race, color, or previous condition of servitude,” in an attempt to make it both inclusive and contemporarily relevant within the perimeters of the liberal political theory of that time. Reality proved that “[d]espite the clear wording of the Fifteenth Amendment,”⁴⁰ it remained easily avoided in practice, as African Americans remained effectively disenfranchised. Both Congress and the U.S. Supreme Court refused to do anything in a game of “After you, my dear Alphonse,” which seemed “amusing to everybody, except the Negro.”⁴¹ It took a century to attempt to apply it to the practice of everyday life of the former Confederacy, through statutory provisions and the subsequent cases interpreting them.

This highly structured legal system has a somehow equally well structured cognitive counterpart. Americans are reasonably well aware of the Federal Constitution, its Bill of Rights, and some of the subsequent Amendments. This could be the result of the fact that our entire culture is suffused with our Constitutional principles, with the embodiment of our rule of law. Also, it could be caused by the fact that the Constitutional text is brief and vague, almost religious,⁴² which makes it easy to grasp and comprehend. Whether because of its simplicity or its short length, when one retains the gist of an article, the gist often coincides with the entire text. Indeed, as many observed already, legal knowledge is most inexact when it comes to detailed statutes.⁴³ However, no one has been able to generalize from there and summarize that legal confusion becomes the product of detailed textualization. The more detailed and arid the text of the law, the more sense it makes to incorporate pre-existent cultural knowledge in the process of reading it, if only to make it more useful, that is, to have a scope that seems useful in more

⁴⁰ CHARLES L. ZELDEN, *THE SUPREME COURT AND ELECTIONS: INTO THE POLITICAL THICKET* 11 (2010).

⁴¹ RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 142 (2004).

⁴² See Kennedy, *supra* note 35.

⁴³ See HART, *supra* note 9.

than one minor instance. Even more likely is that one will avoid the official text altogether and read some apocryphal, inexact, but more clear and comprehensible textual version, which is also more easily accessible technologically. Think only about the ease of access by performing a Google search for “section 5 voting rights” whose first hit is a governmental web site belonging to the Department of Justice, which starts by editing the statutory language and then by offering a section called “voting news.”⁴⁴

What constitutes a clear apocryphal version varies. For instance, in the 19th century, cultural manifestations of constitutional amendments included newspaper editorials, comments, and articles, as well as speeches and letters by political celebrities of the day. There is no evidence that *The New York Times* reproduced and published the text of the Fifteenth Amendment until every citizen could recite it. But there is proof that *The Times* published many reactions to this legal text. On April 11, 1870, for instance, it published an emotional, poetic, metaphor-laden letter Frederick Douglas wrote earlier on April 5, which had the advantage of summarizing the gist of the Amendment upon which Americans and, for the first time, African-Americans could and should vote:

The revolution wrought in our condition by the Fifteenth Amendment of the Constitution of the United States, is almost startling, even to me. I view it with something like amazement. It is truly vast and wonderful, and when we think through what labors, tears, treasures and precious blood it has come, we may well contemplate it with solemn joy. Henceforth, we live in a new world, breath a new atmosphere, have a new earth beneath and a new sky above us. Our new condition brings with it that which should make us thoughtful as well as joyful. It sweeps the future of our ancient shortcomings, and flings us as a race upon our own responsibility. Equal before the Lord, equal in the ballot-box and in the jury-box, the glory or shame of our future condition is to lie upon ourselves⁴⁵.

Interestingly, despite its clear meaning,⁴⁶ there is a huge gap between the text of the Fifteenth Amendment and its application in the former Confederate states.⁴⁷ The difference of interpretation could be seen as the result of the divergent cultural values between the North and the South as well as between the white and black communities of the former Confederate states. The cultural convergence element, briefly explained earlier, requires a long period of time in which cultural values are able to become common and voluntarily absorbed, promoted and thus obeyed. As shown here, it took a century to start the cultural dialogue of their moral importance and incorporate them into a detailed legal text.⁴⁸

Within the structure of our legal system, the gap between the wording of the Fifteenth Amendment and its application was solved in the same textual manner as the earlier Constitutional gap between the ideas of a market democracy and of human beings as the object of property: through more legal text. Suffice it to mention that before the adoption of the Fifteenth Amendment, judges readily applied

⁴⁴ *Voting*, JUSTICE.GOV, www.justice.gov/crt/about/vot/ (result obtained Apr. 12, 2014).

⁴⁵ Frederick Douglas, *Frederick Douglass on the Fifteenth Amendment*, N.Y. TIMES, Apr. 11, 1870 at 1.

⁴⁶ ZELDEN, *supra* note 40.

⁴⁷ *Id.* at 11-35.

⁴⁸ See now 42 U.S.C. 1973 (originally Pub. L. 89-110, title I, § 2, Aug. 6, 1965).

the positive law known as the Fugitive Slave Acts of 1793 and 1850,⁴⁹ which stipulated federal involvement in slave-catching in Northern states, while expressing moral qualms about the evil nature of slavery.⁵⁰ One infamous instance is *Prigg v. Pennsylvania*,⁵¹ where Justice Story held that the federal Fugitive Slave Act precluded a Pennsylvania state law that prohibited blacks from being taken out of Pennsylvania into slavery, and overturned the conviction of Edward Prigg – a slave catcher who kidnapped the black woman Margaret Morgan to bring her back into slavery – as a result. Even more dramatically, the Supreme Court reached its decision in *Dredd Scott v. Sandford*,⁵² by holding that slaves were not citizens within the meaning of the Constitution and therefore were not entitled to the rights that belong to citizens,⁵³ to only reverse itself years later, in the *Slaughter-House Cases*,⁵⁴ on the same constitutional grounds – fortunately much changed since 1842.

In 1965, following the principles of our rule of law and in the wake of the deadly events at the Edmund Pettus Bridge in Selma, Alabama, the federal Congress finally passed specific legislation which applied both legal theory and prudence to rectify the wrongs created by our American slavery past.⁵⁵ With that specific act of legislation, the datable act of 1965, Congress hoped that there would be no further dilemmas in understanding and applying the right to vote laws. If the Fifteenth Amendment gave voice to democratic political principles, the Voting Rights Act of 1965 applied those principles. The language of the Act incorporated the political wisdom of the day, political reasoning or prudence,⁵⁶ and applied it to the reality of the American South.⁵⁷ Each subsequent amendment and case law interpretation meant a new application of those hard-won moral and democratic principles to a particular historical moment, which created their own approximate and imperfect cognitive dissonance between the text of the law and its actuation.

The Voting Rights Act 1965 specifically and permanently outlawed:

election procedures denying or abridging the “right of any citizen of the U.S. to vote on account of race or color;”

⁴⁹ Act of February 12, 1793, 1 Stat. 302 (1793) (providing for removal of alleged slaves “upon proof to the satisfaction of such [federal] judge or [state] magistrates”); Act of September 18, 1850, 9 Stat. 462 (1850) (expanding federal involvement in capture of fugitive slaves, including providing for appointment of special federal commissioners to hear fugitive rendition proceedings and issue certificates of removal; also establishing penalties for interfering with capture of runaways).

⁵⁰ For an in-depth discussion about the morality of upholding the Fugitive Slave Act, see, e.g., ROBERT M. COVER, *JUSTICE ACCUSED* (1975) and Ronald Dworkin, *The Law of the Slave-Catchers (Book Review)*, *TIMES LITERARY SUPPLEMENT*, Dec. 5, 1975, at 1437.

⁵¹ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

⁵² *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁵³ J. Randy Sawyer, *The Last Line of Defense: A Comparative Analysis of United States Supreme Court and New Jersey Supreme Court Approaches to Racial Bias in the Imposition of the Death Penalty*, 7 *SETON HALL CONST. L.J.* 663, 721 (1997).

⁵⁴ 83 U.S. 36, 73, 21 L. Ed. 394 (1872).

⁵⁵ For more details, see generally, ZELDEN, *supra* note 40.

⁵⁶ See *supra* notes 32 et seq. and accompanying text.

⁵⁷ ZELDEN, *supra* note 40, at 36, 50.

literacy and moral requirements and other such test or device that denied or abridged voting rights of racial minorities.

In addition, the Act contained some temporary provisions which needed periodic Congressional intervention in the form of extensions. Among them, Section 5 requires “preclearance of all changes in voting laws or procedures in certain states and political subdivisions.”⁵⁸ Since then, Section 5 has been renewed four times, most recently in 2006. Its latest renewal, like the preceding one, is supposed to last 25 years and, like its preceding extension, is already heavily litigated, as well as, apparently, manipulated,⁵⁹ and caricatured.⁶⁰

Though exceedingly detailed, Section 5 remains a harbinger of ambiguity as it continues its course through the judiciary system. Some of its preceding extensions, for example, caused the United States Supreme Court Justices to “make up” statutory language under the guise of interpreting and “applying” the statute.⁶¹ Some may argue that it sounds worse than it is.⁶² Moreover, just last year, for instance, the Department of Justice invoked Section 5 to stop Republican-backed voter-identification laws in Texas and South Carolina from going into effect. But was it the spirit or the letter of the law DOJ invoked? Does it make any difference if the DOJ invoked the gist of the law? If we look at the issues raised in *Shelby County v. Holder*,⁶³ during oral argument⁶⁴ one is at a loss to answer these questions. Furthermore, while this case was pending, most of us followed its course through blogs or even comedians’ monologues⁶⁵ or online news outlets.⁶⁶ All these outlets, official or not, are easily accessible through the Internet, but only the apocryphal ones are easy to understand perhaps because the language they use is more culturally relevant to the reader than the arid canonic text of the law.

The litigation raised by the application of Section 5 of the 1965 Act demonstrates that legal approximation persists irrespective of the level of detail of the legal text. Through the decades following its passage, the language of the Voting Rights Act has been approximated and guessed, and misquoted by all courts including the Supreme Court of the land,⁶⁷ which indicates that our understanding or the Act is imperfect, and neither lay subjects nor legal professionals can agree

⁵⁸ Daniel McCool, *Meaningful Votes*, in *THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT 3-35* (Daniel McCool ed., 5th ed. 2012).

⁵⁹ Steven Yaccino & Lizette Alvarez, *New G.O.P. Bid to Limit Voting in Swing States*, N.Y. TIMES, Mar. 29, 2014.

⁶⁰ Marquel, *New G.O.P. Bid to Limit Voting Swing States. Black Districts to Vote at Local Zoos*, THEPOTHOLEVIEW.COM, Mar. 29, 2014.

⁶¹ See discussion below.

⁶² *Id.*

⁶³ *Shelby Cnty. v. Holder*, 570 U.S. ____ (2013)

⁶⁴ Available at

http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

⁶⁵ Bill Maher, *Maybe The Voting Rights Act Is Not Helping Minorities*, available at http://www.realclearpolitics.com/video/2013/03/02/bill_maher_maybe_the_voting_rights_act_is_not_helping_minorities.html.

⁶⁶ Paul M. Barrett, *The Unintended Consequences of the Voting Rights Act*, BUSINESSWEEK.COM (Mar. 4, 2013), <http://www.businessweek.com/articles/2013-03-04/unintended-consequences-of-the-voting-rights-act>.

⁶⁷ See discussion below.

on anything other than a limited temporary meaning.

The following are but two examples representing Voting Rights Act cases which reached the United States Supreme Court: *Beer v. United States*,⁶⁸ and *Reno v. Bossier Parish School Board*.⁶⁹ In *Beer*, the U.S. Supreme Court held that applying Section 5, the DOJ had to determine within the preclearance context whether the proposed change would have a discriminatory effect on the minority voting rights effect defined as “retrogression.”⁷⁰

By prohibiting the enforcement of a voting-procedure change until it has been demonstrated to the United States Department of Justice or to a three-judge federal court that the change does not have a discriminatory effect, Congress desired to prevent States from “undo(ing) or defeat(ing) the rights recently won” by Negroes. H.R.Rep.No.91-397, p. 8, U.S. Code Cong. & Admin. News 1970, p. 3284. Section 5 was intended “to insure that (the gains thus far achieved in minority political participation) shall not be destroyed through new (discriminatory) procedures and techniques.” S.Rep.No.94-295, p. 19, U.S. Code Cong. & Admin. News 1975, p. 785.

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard (under s 5) can only be fully satisfied by determining on the basis of the facts found by the Attorney General (or the District Court) to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is Augmented, diminished, or not affected by the change affecting voting...” H.R.Rep.No.94-196, p. 60 [...] In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise (emphasis added).⁷¹

As shown above, “retrogression” is a conclusion the Justices used to define an undesired effect under Section 5. Retrogression was meant to describe the effect prohibited by Section 5, which were changes that place minority voters in a worse position than under the status quo ante.⁷²

But using that term the Court did not rely on the statutory language. By using a term that was not part of the statutory language, the Court indicated that their legal understanding, their legal knowledge was imperfect. As Justice Thurgood Marshall noted in his dissent,⁷³ the term “retrogression” came from a passage in an extraneous document, a House Report, that the Court identified in its opinion. Legislative history, of course, is not an integral part of a statute.

In justifying its convoluted construction of § 5, however, the Court never deals with the fact that, by its plain language, § 5 does no more than adopt, or arguably

⁶⁸ *Beer v. United States*, 425 U.S. 130 (1976).

⁶⁹ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

⁷⁰ *Beer*, 425 U.S. at 141.

⁷¹ *Id.* at 140-41.

⁷² Peyton McCrary, *The Constitutional Foundations of the “Preclearance” Process: How Section 5 of the Voting Rights Act Was Enforced, 1965-2005* in McCool ed., *supra* note 58, at 44-45.

⁷³ *Beer*, 425 U.S. at 146.

expand,^{FN5} the constitutional standard. Since it has never been held, or even suggested, that the constitutional standard requires an inquiry into whether a redistricting plan is “ameliorative” or “retrogressive,” A fortiori there is no basis for so reading § 5. While the Court attempts to provide a basis by relying on the asserted purpose of § 5 to preserve present Negro voting strength ... it is wholly unsuccessful. What superficial credibility the argument musters is achieved by ignoring not only the statutory language, but also at least three other purposes behind § 5.⁷⁴

Reno v. Bossier Parish School Board,⁷⁵ rather than rectifying the earlier approximate legal meaning, incorporated it. Rather than focus on the statutory language of Section 5, its canonic language, the Court again ignored it. This seems a clear indication that legal knowledge cannot emanate solely from the official text of the law, and fictional tools, such as “stare decisis” are best suited to ensure its normative function of promoting the rule of law. Justice Scalia, who wrote the majority opinion in *Bossier*, and who, ironically, is probably the Court's most committed opponent of the relevance of statutory history,⁷⁶ incorporated the previous Court construct of “retrogression” in *Bossier's* statutory application of Section 5, and further diluted the statutory knowledge by expanding this term of art to define the statutory “purpose” as well as its “effect.”⁷⁷

These examples demonstrate that statutes, which are detailed applications of our rule of law, embodied by our Constitution, cannot and do not generate exact legal knowledge. To the contrary, their descriptive, arid content encourages approximate knowledge which needs to be supplemented with other sources in addition to the statutory language itself. This reality reminds one of Hart's observations that legal differences are inherent and jurists use specific tools to ensure legal coherence viewed as necessary for law's normativity.⁷⁸ *Stare decisis* works as a corrective tool.

Justice Benjamin Cardozo quoting William Galbraith Miller's *The Data of Jurisprudence*⁷⁹ described the importance of *stare decisis* more than a century ago, in this way:

If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.⁸⁰

Cardozo's Sisyphus-type of hunt for consistency in the face of approximate legal knowledge and ambiguity is perhaps best matched by that of Justice Antonin

⁷⁴ *Beer v. United States*, 425 U.S. 130, 149-50 (1976).

⁷⁵ *Reno v. Bossier Parish Sch. Bd*, 528 U.S. 320 (2000).

⁷⁶ More on Scalia's inconsistent statutory interpretation, see, e.g., *Ransom v. FIA Card Services, N.A.* 131 S.Ct. 716, 731 et seq. (2011) (Scalia's dissent); also, Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185 (2011).

⁷⁷ *Bossier*, 528 U.S. at 341.

⁷⁸ See HART, *supra* note 9.

⁷⁹ WILLIAM GALBRAITH MILLER, *THE DATA OF JURISPRUDENCE* (1903).

⁸⁰ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33-34 (1921).

Scalia, whose attempts to ensure consistency are remarkable:

[O]ne of the most substantial... competing values [in adjudication], which often contradicts the search for perfection, is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated.⁸¹

More philosophically than factually possible, Justice Scalia professes to use statutory language to a fault.⁸² In practice, though, he uses whatever tools fit the decision he has in mind – in our Voting Rights Act example, Scalia used legislative history ignoring the statutory language.⁸³

Others are more honest and realize that professing one thing and doing another does not change reality. For instance, scholars have noted the unreliable character of *stare decisis* since 1930, when Jerome Frank published his findings that a court could decide one way or the opposite and make its reasoning appear equally flawless.⁸⁴ The Critical Legal Studies movement founded itself upon a similar point.⁸⁵

If legal knowledge is inherently imperfect because of its highly hierarchical structure which encourages retention of the main constitutional principles (the rule of law translating our market-driven democracy) and approximation of the descriptive applications of our rule of law, we also saw that its linguistic nature also plays a role in this legal ambiguity. To continue our investigation then the next step should be an introspective analysis of our legal education.

IV. HAVE HEAVILY EDITED CASEBOOKS INTRODUCED THE TASTE FOR THE APOCRYPHAL AND PARTIAL

American law schools are renowned for their Socratic method which makes students learn as they espouse their ignorance. The birth of this method dates back to 1870, the year when Christopher Columbus Langdell became Harvard's Dane Professor:

The day came for its first trial. The class gathered in the old amphitheater of Dane Hall – the one lecture room of the School – and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes! The lecturer opened his.

“Mr Fox, will you state the facts in the case of *Payne v. Cave*?”

Mr. Fox did his best with the facts of the case.

⁸¹ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV., 1175, 1178 (1989).

⁸² Antonin Scalia, *Common-law Courts in a Civil-Law System: The Role of United States Federal Court in Interpreting the Constitutions and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31 (1997).

⁸³ William D. Popkin, *An Internal Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV., 1133, 1143 (1992).

⁸⁴ JEROME FRANK, *LAW AND THE MODERN MIND* 72 (1930).

⁸⁵ See, e.g., UNGER, *supra* note 22; Michael H. Davis, *Death of a Salesman's Doctrine: A Critical Look at Trademark Use*, 19 GA. L. REV. 233, 279 (1985); Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415 (2000).

“Mr. Rawle, will you give the plaintiff’s argument?”

Mr Rawle gave what he could of the plaintiff’s argument.

“Mr. Adams, do you agree with that?”

And the case-system of teaching law had begun....⁸⁶

From the perspective of this article, what is remarkable about Langdell’s method, as then Harvard President Eliot remarked, was his reliance on the authentic version of the law (an accurate version of a decision). Professor Langdell taught law by asking his students to go to the original sources. And indeed, *Payne v. Cave*, the case that started the Harvard educational revolution was reproduced in the case book in its entirety.⁸⁷ Langdell did not ask his students to approximate the law or recite definitions and rules: “When and by what statute were lands made alienable in England after the conquest?”⁸⁸ nor “What is the difference between an action of trespass and an action of trespass upon the case?”⁸⁹ Langdell believed and taught his students that learning law was possible by reading and analyzing the original sources⁹⁰ which were both available – printed in the case book, and available to a limited extent in the library – and understandable, thus permitting the deconstruction of the text and its reconstruction through analysis.

Langdell’s original Socratic method relied on case-books as an anthology, a collection of cases presented in their entirety to the student to read and analyze. Langdell thought using primary sources, the law itself in its original authoritative form, would teach students “what the law is.”⁹¹ By analogy to chemistry, Harvard University President Eliot explained Langdell’s methodology:

[Langdell] told me that the way to study [law] was to go to the original sources. I knew it was true, for I had been brought up in the science of chemistry myself; and one of the first rules of a conscientious student of science is never to take a fact or a principle out of second hand treatises, but to go to the original [source].⁹²

Interestingly enough, for the last century, the case law method has departed from its original meaning, as envisaged by what purports to be the Langdell method: asking the students to read and analyze cases, “the original source” of law. Now, casebooks are such a collection of heavily edited and shortened versions of

⁸⁶ 2 CHARLES WARREN HISTORY OF THE HARVARD LAW SCHOOL AND EARLY LEGAL CONDITIONS IN AMERICA 372 (1908).

⁸⁷ *Payne v. Cave*, 3 T.R. 148, 3 Burr. 1921 (1789).

⁸⁸ WARREN, *supra* note 86, at 373.

⁸⁹ *Id.*

⁹⁰ *Id.* at 361.

⁹¹ Interestingly, however, Langdell did not claim that his casebook was to facilitate case learning in the Socratic model. In his first casebook, available in the Harvard Law Library, he says simply that he was making the casebook available because there were not enough copies of the cases in the library collection.

⁹² *Id.* at 361.

cases⁹³ that their purpose cannot be Langdell's-- teaching students "to never take a fact or a principle out of second hand treatises, but to go to the original [document for] that fact or principle."⁹⁴ Under the guise of adherence to Langdell's principle that law is science, casebooks are currently serving the students a goulash of definitions and rules, and contextual information, in other words secondary sources. Ironically, this is what Langdell wanted to end, because something like this pot-pourri method is what law students were taught in the pre-Langdell years.

Today, such shorthand study of the law mirrors, perhaps unintentionally, a technological culture, which panders to the limited attention span inculcated and fostered by the advent of MTV, videogames and social media interactions. Could it be possible that this legal ersatz chips away at our professional reverence for the original source of the law, and as professionals we are getting ready to treat a WIKIPEDIA version of the law in the same manner that Langdell's conscientious law student read the original text –albeit reproduced in a case book under the supervision of a law student – the research assistant – and of his law professor?

V. HOW THE DISTRIBUTION OF LEGAL KNOWLEDGE AND OUR USE OF TECHNOLOGY ENCOURAGE RELIANCE ON APOCRYPHAL TEXTS

Perhaps the way professionals are taught encourages a shift of their reliance. Perhaps technology has a role in that too, and it causes both professionals and lay citizens to confuse or ignore differences between the original and the apocryphal version of the law.

In this section we will focus on one factor that we believe continues to make legal knowledge ambiguous for the lay person: the distribution of legal information and how we interact with it and perform legal research in a way that further contributes to the dilution of legal knowledge. Technology intermediates any textual reading, and this paper argues, favors a legal reading of the more widely accessible though not necessarily official texts.

Our society is governed by the "rule of law" which engenders a specific type of legal system with specific legal rules which enjoy a well-established set of characteristics. As Roberto M. Unger explained, to become binding and enforceable rules, the laws of any liberal state, need to be "general, uniform, public, and capable of coercive enforcement."⁹⁵ But what does it mean to be public today in our culture suffused by legal vernacular? Do we need to access the canonic, official, legal texts? Is it sufficient to read a WIKIPEDIA summary? If commercial entities can publish official versions of governmental law, can a WIKIPEDIA summary replace them all? Furthermore, as this paper suggests, if our legal knowledge is by its nature approximate, what is the value of the canonic text? It seems that we

⁹³ E. Allan Farnsworth, *Casebooks and Scholarship: Confessions of an American Opinion Clipper*, 42 Sw. L.J. 903, 909 (1988) (collections of cases easy to digest by students); Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10, 14 (2007) (casebooks collages of cases); Anne M. Corbin & Steven B. Dow, *Breaking the Cycle: Scientific Discourse in Legal Education*, 26 TEMP. J. SCI. TECH & ENVTL. L. 191 (2007) (casebooks collections of heavily edited and summarized cases; empirical data about the percentage of dicta casebooks reproduce).

⁹⁴ 2 CHARLES WARREN HISTORY OF THE HARVARD LAW SCHOOL AND EARLY LEGAL CONDITIONS IN AMERICA. 361 (1908).

⁹⁵ UNGER, *supra* note 7, at 73.

ignore it either because it is dense or because to apply it both jurists and lay people need to understand it and their understanding relies on cultural manifestations of the rule of law.

Our “rule of law” requires its legal norms to be public, as Unger makes clear. This mandate was established by the Articles of Confederation. Article I, §5, cl. 3 of the U.S. Constitution requires the same: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same...” Article IV, §1 also adds that all legal norms be published and authenticated:

Full faith and credit shall be given in each state to *the public acts, records, and judicial proceedings of every other state*. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.⁹⁶

However, publicity has a historical reality and it may mean different things depending on the technology available at a specific point in time. For instance, since 1813, the government became responsible for distributing legal information to specific institutions, libraries. The *Resolution for the Printing and Distribution of an Additional Number of the Journals of Congress, and of the Documents Published Under Their Order*,⁹⁷ was subsequently amended and it became the *Act Providing for Keeping and Distributing All Public Documents*.⁹⁸ A year later the Government Printing Office was created, charged with “packing, distributing, collecting, arranging, classifying, and preserving such documents.”⁹⁹

Until very recently, technology reduced this conversation to print. The GPO’s publications were: one collection of print statutes, the Statutes at Large and their codified version, *the United States Code*, one set of cases from the United States Supreme Court, the United States Reports, ominously abbreviated U.S., and the rules issued by federal agencies, again in two formats, sequentially –the Federal Register - and topically – the Code of Federal Regulations. With few exceptions, such as New York’s statutory compilations privately published by Thomson/West and Elsevier/Lexis, state governments were responsible for making sure that, as Kafka suggested, and Bentham demanded, law remains accessible at all times to everyone.¹⁰⁰

Where the government does not print the information there is no official legal text for the specific set of legal norms. New York, for instance, has no official statutory compilations, as all statutory print publications belong to the duopoly – West and Lexis. Professionally, one may argue, there is a preference for the West product, as the national guide to uniform legal citations, *The Bluebook*, positions the West publication, *McKinney’s Consolidated Laws of New York Annotated* ahead of the Lexis/Nexis product, *New York Consolidated Law Service*.¹⁰¹ *The*

⁹⁶ U.S. CONST., art. IV, §1 (emphasis added).

⁹⁷ J. Res. 1, 13th Cong., 3 Stat. 140 (1813).

⁹⁸ Ch. 22, § 1, 11 Stat. 379, 379 (1859).

⁹⁹ *Id.*

¹⁰⁰ For more on the history of accessing legislation, see, e.g., Shannon E. Martin & Gerry Lanosga, *The Historical and Legal Underpinnings of Access to Public Documents*, 102 LAW LIBR. J., 613 (2010).

¹⁰¹ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 255 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

Bluebook itself, however, specifically says “Cite to one of the following sources, if therein.”¹⁰² However, as a practical matter, English reads from top to bottom, and McKinney’s position as first listed further encourages its use by those following *The Bluebook*. In other words, while there is no official source,¹⁰³ the preferred sources are the financially highly prohibitive sources published by West and Lexis, making legal information the fiefdom of a legal duopoly.¹⁰⁴

The advent of digitization did cause some extravagant results in the distribution of legal information. Within certain limits which have suddenly become both more obvious and insurmountable, the federal government has improved its digital presence and made legal research possible for free using the official digital repositories of statutes and administrative law.¹⁰⁵ At the federal level, the search engine of the official web site, FDSys¹⁰⁶ continues to amass more and more statutory and administrative information, but its access remains cumbersome. Moreover, when it comes to case law, in addition to the overwhelming process of locating cases, updating their status is a money proposition dictated by the older behemoths Westlaw and Lexis, and their younger contender, the seemingly more affordable Bloomberg which charges a fraction of the price of the others.¹⁰⁷ At the state level, the legal research problems are so intractable that despite the fact that we could talk about New York officially published statutes for the first time, - ny.gov – open legislation – the questions of currency and authentication,¹⁰⁸ for instance, remain unanswered, unknown, and unknowable.

Thus, while digitization made the government’s work of publishing its laws much less difficult, the government – federal and state- chose to outsource this fundamental job of providing the official text of its laws, by contracting with commercial entities or making it easier for corporations to cannibalize its responsibilities – see the New York situation – and generate, collect, store, and retrieve the official version of our legal information, such as statutes and cases and then make legal knowledge a matter of who has enough money to pay for it. Perhaps the most outrageous legal dissemination is related to federal case law, which has hitherto

¹⁰² *Id.* at 215.

¹⁰³ KENDALL SVENGALIS, LEGAL INFORMATION BUYER’S GUIDE AND REFERENCE MANUAL 651 (2012).

¹⁰⁴ See generally, David Hall, *Google, Westlaw, LexisNexis and Open Access: How the Demand for Free Legal Research Will Change the Legal Profession*, 26 SYRACUSE SCI & TECH L. REP., 53 (2012).

¹⁰⁵ LEGAL RESEARCH WIKI, <http://legalresearch.wikischolars.columbia.edu/> (last visited Aug. 5, 2014).

¹⁰⁶ FDSYS, <http://www.gpo.gov/fdsys/> (last visited Aug. 5, 2014).

¹⁰⁷ There are less costly alternatives of these databases, some offered by each state Bar Association to their members. FastCase is such an alternative. CaseText.com is the new kid on the block still working to create a free-of-charge case law database with a crowd sourcing citatory.

¹⁰⁸ For more information on authentication, see, e.g., <http://community.aallnet.org/digitalaccesstolegalinformationcommittee/stateonlinelegalinformation>
<http://govinfo.sla.org/2011/07/28/authentication-digital-law-report-from-aall/>
<http://www.cga.ct.gov/2010/rpt/2010-R-0511.htm> <http://blog.law.cornell.edu/voxpath/tag/authentication-of-electronic-legal-information/> (last visited Aug. 5, 2014).

been the unchallenged print fiefdom of West. The 2002 E-Government Act¹⁰⁹ encouraged federal courts to post their decisions on-line, but this is not necessarily going to facilitate legal research; legal research is not something tantamount to finding one's name in the phone book: you do not tend to locate it by the court and parties' names.

First, PACER, the federal courts' system for electronic access to records, has recently celebrated a quarter century.¹¹⁰ That milestone happened to coincide with the troubled launch of the Healthcare.gov website. In sharp contrast, the venerable Public Access to Court Electronic Records is a government site that with the caveat presented below, has been remarkably stable and successful.

PACER does contain hundreds of millions of digitized court documents, dockets, memos, opinions, etc., but it is cumbersome and crotchety to use, often cryptic in its naming and coding, and archaic in its document handling, so it is more an access-teaser than an access point to information. Part of PACER's problem is that it is actually 214 separate systems. Every appellate, district and bankruptcy court maintains its own site, each requiring a separate search. The site's partial solution to this dispersion is the Case Locator, an index for searching case information across the PACER system. But the Case Locator is updated only once daily, collects only subsets of data from court sites, and has limited functionality. What PACER needs is a whole new interface—one that provides universal search, more robust search tools, more informative search results, and better ways to manage documents and downloads.

It turns out that such an interface already exists. It comes from PacerPro, a service started by Gavin McGrane, a San Francisco lawyer who became frustrated with PACER's shortcomings and wanted an easier way to use it. Even better, PacerPro is now free. It launched in November 2012 as a subscription service at \$25 a month. But in January it eliminated the subscription fee. "We decided to allow people to get a chance to know us and see how good the product is," McGrane said ominously, implying a future plan to revert to a pay-to-play service.¹¹¹

Second, the text of the United States laws has become a profitable commodity. To the extent that corporations own the monopoly over information and the copyright over the pagination of that information,¹¹² they "dictate the movement

¹⁰⁹ Pub.L. 107-347, 116 Stat. 2899, 44 U.S.C. § 101 (2012).

¹¹⁰ Robert Ambrogi, *Service Offers a Better Way to Search Federal Court Records Than PACER*, ABA JOURNAL (Mar. 1, 2014, 2:30 AM) http://www.abajournal.com/magazine/article/service_offers_a_better_way_to_search_federal_court_records_than_pacer/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly.

¹¹¹ *Id.*

¹¹² It is not absolutely clear yet that mere pagination is any different than the alphabetization found uncopyrightable in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991), which thus limits West's 1986 triumph over Mead Data Central, Lexis's parent company, in the Eighth Circuit, which held that West had a copyright interest in the paginated arrangement of the cases in its National Reporter System (*West Publ'g Co. v. Mead Data Cent. Inc.*, 799 F.2d 1219, 1241) (8th Cir. 1986)). For more, see, e.g., Olufunmilayo B. Arewa, *Open Access in A Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 839 (2006). William R. Mills, *The*

and use of that information, which is very profitable.”¹¹³

The few free sources of legal information are trying to reproduce the official information, for example Cornell’s LII¹¹⁴ while others editorialize that information, (see WIKIPEDIA), and even others create guides about how to navigate the free sources of legal information and to learn to what extent you can rely on them.¹¹⁵ WIKIPEDIA summaries are by far the best known and the most influential in production of legal knowledge. They come at the top of any list generated by a Google search. Furthermore, the language the WIKIPEDIA editors use is devoid of legalese and other trade-imposed jargon, endearing it to readers as user-friendly. While professionals may be skeptical of calling this true legal knowledge, it is only from the point of the Hartian that only what judges see must be termed legal. From the point of what is “public,” it is clear that WIKIPEDIA probably wins that contest hands-down.

If the majority of the public relies on WIKIPEDIA summaries, then what can be said about the legal knowledge of legal professionals? Their research patterns simulate the lay person’s search patterns because Google searches and WIKIPEDIA summaries are ingrained in our searches – to the extent we use the Internet, of course.¹¹⁶ Additionally, all legal research, if topical, starts with a commentary or analysis which is labeled as “secondary sources.” Yale’s Morris Cohen said it many times: “Secondary sources are usually more straightforward and try to explain the law.”¹¹⁷ Their language is the one that students of the law will remember when they read a statute or case. Of course, the student and jurist will ultimately cite to the official text of the law, but its use is determined by that apocryphal version of the law, whether it comes from WIKIPEDIA or a professional journal, and if you take Hart seriously, the penumbra, which far outnumbers the core of any statute, will be dominated by WIKIPEDIA or similar publications of the future.

Reaching the end of this paper, it seems ominously possible that we could live in a WIKIPEDIA world and few would know the difference. Were it not for the BLUEBOOK, which requires the citation to the official canonic text of the law, perhaps we would be already there.

A century ago, this conclusion would have been only acceptable to the likes of Walter Lippmann, a journalist who choreographed the government war propaganda efforts under the Wilson administration, partly because he mistrusted the ability of the masses to govern themselves. Lippmann believed ordinary citizens did not have the ability to gather the knowledge required by what he considered

Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age, 53 N.Y.L. SCH. L. REV. 917, 926 (2009).

¹¹³ Gary Wolf, *Who Owns the Law?*, WIRED,

http://www.wired.com/wired/archive/2.05/the.law_pr.html (last visited Aug. 5, 2014).

¹¹⁴ *Legal Information Institute*, CORNELL LAW SCHOOL, <http://www.law.cornell.edu/> (last visited Aug. 5, 2014).

¹¹⁵ LEGAL RESEARCH WIKI, <http://legalresearch.wikischolars.columbia.edu/> (last visited Aug. 5, 2014).

¹¹⁶ See generally, Dana Neacsu, *The Internet: Academic Foe or Friend- Google and Federated Searches May Point the Way Forward for Branding Law Libraries*, AALL SPECTRUM, 25-26 (2013).

¹¹⁷ MORRIS L. COHEN & KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 32 (2010).

our utopian democratic principles.¹¹⁸ Lippmann's position was that governing was the job of the educated elites and, if his background were to be an indication of what he understood to be elites, then these were limited to Harvard graduates. In his view, the educated elites would also editorialize the news and other pieces of knowledge and coat it with a lot of cultural gossip disseminated for mass consumption through mass media. But judging by what we have discussed here, it seems that at the beginning of the twentyfirst century, our legal elites are, in addition to our U.S. Supreme Court Justices, the WIKIPEDIA editors as well as the Google engineers who write the Google algorithms promoting the WIKIPEDIA entries at the top of any Google search we perform.

VI. CONCLUSION

This paper addressed the law's textual identity which seems to dictate legal knowledge: its depth and comprehensiveness. Furthermore, the distribution of legal information and our legal research habits, tend to have users invoke the specific and tangible statutes or cases, such as the Voting Rights Act 1965, or the U.S. Supreme Court decision in *Brown v. Board of Education*, in their official canonic version, but use their interactions with other versions of the law, commercial or not, summarizing in various cultural forms the official record. The more complicated question now becomes whether anything should be done about our canonic official legal texts, or whether we should allow the fiction regarding their cognitive legal role to continue.

Most of the time law is conceived abstractly -- in its esoteric form -- as a norm designed to dictate our behavior. However, when we talk about legal norms we invoke their grounds and sources. At that moment law becomes more than an abstract concept. At that moment we can visualize it as something technologically accessible. Its location depends on the reader's interaction with the legal technology. Jurists tend to invoke an official legal repository, such as the United States Code, and will cite the exact location of a statute, in its official, canonic version, such as 42 U.S.C. § 1983 (2012). We summon the powers associated with the official text of the law but, this essay contends, due to the nature of legal knowledge, including its language, and the distribution of legal information, which influence the way we access or research law, we use some apocryphal and widely available but not necessarily reliable version of the law-- including its WIKIPEDIA summary.

This is not a new problem, internationally, or in the United States. One of the goals of the French Revolution was to destroy the system whereby judges ruled as tyrants, applying an unknowable law in an unknowable way. The immediate result was the famous French Code Civil, which reduced dozens of treatises into a simple volume in which all of the law could be found, at least according to the intents of its authors. Around the same time Jeremy Bentham insisted that law, to be truly law, had to be knowable to the extent that it should be posted, and concise enough to be so posted, at the entrance to every train station. Big business for abstract-writers, we suppose. And, at around the same time, New York's Justice Field suggested and led a nationwide campaign to simplify the common law into a code

¹¹⁸ See generally, WALTER LIPPMANN, PUBLIC OPINION (1922); WALTER LIPPMANN, THE PHANTOM PUBLIC (1925).

along the French model, so to achieve Bentham's goal of codifying the entire Common Law.¹¹⁹

We are clearly farther from the goal than ever. And it seems the goal is receding at record pace. What does it mean for the meaning of law?

¹¹⁹ LORD HALSBURY quoting Bentham in his Introduction to THE LAWS OF ENGLAND (Vol. I, p, ccviii): "To render a code of laws complete [requires] taking the body of the laws in their entirety..." See C.K. Ogden, *Introduction*, xviii-xix in JEREMY BENTHAM, THE THEORY OF LEGISLATION (1931).

UNEXPECTED INSIGHTS INTO TERRORISM AND NATIONAL
SECURITY LAW THROUGH CHILDREN’S LITERATURE:
READING *THE BUTTER BATTLE BOOK* AS MONSTROSITY

Nick J. Sciullo*

ABSTRACT

Legal knowledge often comes from unexpected encounters with legal theory. In this Essay, I critically analyze Dr. Seuss’s *The Butter Battle Book* as a source of international legal knowledge. Although this text was originally written as a criticism of the Cold War, I find modern parallels to the evolution of terrorism and national security law theorizing in the United States. As a result of this investigation, I provide a unique window onto civil society, and our continued fascination with the specter of terrorism.

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INTRODUCTION: BEGINNINGS, OR LAW, CULTURE, AND CHILDREN'S LITERATURE

In this Essay, I explain the ways in which Dr. Seuss's *The Butter Battle Book*¹ may be read in order to give legal scholars and practitioners insights on terrorism and related ideas of international law and national security law. Indeed, I understand children's literature as being instructive not only for acculturation,² but also for the ways in which we understand law, politics, and people.³ My argument is not so much that Dr. Seuss radically reconfigures the ways in which lawyers and law scholars "come to the law,"⁴ but that children's literature is often an unexplored avenue for understanding the complexities of law. Dr. Seuss's *The Butter Battle Book* is exemplary of the power of children's literature to comment on and critique law and politics. Specifically, *The Butter Battle Book* provides interesting and informative pathways into the critical study of terrorism and national security law.

I read *The Butter Battle Book* as contributing significantly to critical terrorism studies,⁵ and as understood through Jean-François Lyotard's conception of the libidinal economy,⁶ and Edward Said's *Orientalism*,⁷ psychoanalytic ideas of embodiment, and the complex politics of monstrosity. Admittedly, in such a short essay, this is a tall order. Yet rather than attempt to close the book on studies of

¹ DR. SEUSS, *THE BUTTER BATTLE BOOK* (1984).

² See BEVERLY LYON CLARK, *KIDDIE LIT: THE CULTURAL CONSTRUCTION OF CHILDREN'S LITERATURE IN AMERICA* (2003); JACK ZIPES, *STICKS AND STONES: THE TROUBLESOME SUCCESS OF CHILDREN'S LITERATURE FROM SLOVENLY PETER TO HARRY POTTER* (2002).

³ Ian Ward, *Children's Literature and Legal Ideology*, in IAN WARD, *LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 90-118 (1995); Alyssa A. DiRusso & Letitia Van Campen, *Law and Literature Junior: Lawyers in Books for Young Children*, 11 WHITTIER J. CHILD. & FAM. ADVOC. 39 (2011-2012); Jo S. Kittinger, *A BREATH OF HOPE* (2012); Jo Watson Hackl, *A New Legal Literacy: Review of Jo S. Kittinger's A Breath of Hope*, CLEARING HOUSE REV. J. POVERTY L. & POL'Y 367-370 (2012); Robert D. Sutherland, *Hidden Persuaders: Political Ideologies in Literature for Children*, 16 CHILDREN'S LIT. EDU. 143-157 (1985).

⁴ See Nick J. Sciullo, *Conversations with the Law: Irony, Hyperbole and Identity Politics or Sake Pase? Wyclef Jean, Shottas, and Haitian Jack: A Hip-Hop Creole Fusion of Rhetorical Resistance to the Law*, 34 OKLA. CITY U. L. REV. 455 (2009).

⁵ See for example Taylor & Francis's journal *Critical Studies on Terrorism*. See also Nick J. Sciullo, *On the Language of (Counter)Terrorism and the Legal Geography of Terror*, 48 WILLAMETTE L. REV. 317 (2012) (hereinafter *On the Language*); Nick J. Sciullo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561 (2011) (hereinafter *The Ghost*); Jeroen Gunning, *A Case for Critical Terrorism Studies?*, 42 GOV. & OPPOSITION 363 (Summer 2007); JASON FRANKS, *RETHINKING THE ROOTS OF TERRORISM* (2006).

⁶ JEAN-FRANÇOIS LYOTARD, *LIBIDINAL ECONOMY* (1974) (Continuum 2004) Libidinal economy is a disorder of machines, if you will; but what for ever prevents the hope of producing the systematization and functionally complete description of it, is that, as opposed to dynamics, which is the theory of systems of energy, the thought – but this is still to say too little – the idea of libidinal economy is all the time rendered virtually impossible by the indiscernibility of the two instances. *Id.* at 30).

⁷ EDWARD W. SAID, *ORIENTALISM* (Vintage 1979); see also EDWARD SAID, *CULTURE AND IMPERIALISM* (Vintage 1994).

law and literature generally or terrorism studies and children's literature specifically, in this Essay I open up space for continued dialogue into the powerful forces shaping the complexities of terrorism and national security law. In the beginning of this Essay, I discuss Seuss's work with respect to libidinal economy, ideology, critical theory, and continental philosophy to ground the text in a broader discursive space or critical engagement with law. I then structure this Essay to provide several short interventions into Seuss's text. These interventions should be considered as significant breaks in the striated spaces of contemporary terror discourse. This is to say, I continually challenge staid readings of national security law that focus on institutional practices at the expense of rhetorical understanding. With each intervention, I hope to illuminate a worthwhile nexus between Dr. Seuss and our current understanding of terrorism in a multi-mediated, legally complex space. My goal is to expand opportunities for discussion of the national security state and broaden our appreciation for literature's impact on legal knowledge.

This Essay is about a children's book, which might be monstrous in its own right. Monstrosity, as I discuss below, structures our life and much of our legal knowledge.⁸ For how are legal scholars, students, and activists to conceptualize civil society in light of a text meant for children unfamiliar with law, violence, and trauma? What does it mean if law, as an academic discipline, considers the importance of a children's book? Yet, while many lawyers, law students, and even a few legal scholars may be inclined to think that legal scholarship is somehow more important than or divorced from literature, Dr. Seuss's oeuvre⁹ provides a critical access point to the tremendous potential of literature to reveal significant commentary on our complex world.¹⁰ There is a simple logic to Robert Fulghum's book, *All I Really Need to Know I Learned in Kindergarten*.¹¹ Fulghum's point is, of course, that our childhood years are some of the most enriching in our acquisition of knowledge as well as the formation of our identities. This is one reason why the turn to Dr. Seuss is appropriate. All of this is not to say that the law and literature movement¹² is non-existent or even that it is unconcerned with children's

⁸ See *infra* notes 72-90.

⁹ DR. SEUSS, OH, THE PLACES YOU'LL GO! (1990); DR. SEUSS, HOW THE GRINCH STOLE CHRISTMAS! (1957); DR. SEUSS, THE LORAX (1971); DR. SEUSS, THE SNEETCHES AND OTHER STORIES (1961); DR. SEUSS, I CAN LICK 30 TIGERS TODAY! AND OTHER STORIES (1969); DR. SEUSS, THE CAT IN THE HAT (1957); DR. SEUSS, GREEN EGGS AND HAM (1960); DR. SEUSS, ONE FISH TWO FISH RED FISH BLUE FISH (1960); DR. SEUSS, HORTON HEARS A WHO! (1954); DR. SEUSS, THEODOR SEUSS GEISEL: THE EARLY WORKS, VOL. 1 (2005); DR. SEUSS, THEODOR SEUSS GEISEL: THE EARLY WORKS, VOL. 2 (2006).

¹⁰ JACOB M. HELD (ED.), DR. SEUSS AND PHILOSOPHY: OH, THE THINKS YOU CAN THINK! (2011); JUDITH MORGAN & NEIL MORGAN, DR. SEUSS & MR. GEISEL: A BIOGRAPHY (1996); ROBERT L. SHORT, THE PARABLES OF DR. SEUSS (2008); JAMES W. KEMP, THE GOSPEL ACCORDING TO DR. SEUSS (2004); PHILLIP NEL, DR. SEUSS: AMERICAN ICON (2003); DONALD E. PEASE, THEODOR SEUSS GEISEL (2010).

¹¹ ROBERT FULGHUM, ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN (1989).

¹² See Benjamin N. Cardozo, *Law and Literature*, 14 YALE L. J. 699 (1925); Jerome Bruner, *The Legal and the Literary*, 90 REV. 42 (2002); JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE (2003); RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992); JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973); IAN WARD, LAW AND LITERATURE:

literature, but simply to indicate that law and literature falls outside of mainstream legal scholarship. In particular, Dr. Seuss's lyrical wit serves as a window into complex legal, political and rhetorical relationships and theories.¹³ Of course, law and literature has its critics, most notably Richard Posner.¹⁴ Yet, even if we approach law and literature with a critical eye, as we should with every theoretical or methodological framework, we ought not abandon law and literature in light of the criticisms against it because law and literature remains helpful in understanding the ways ideology influences legal understanding. It seems popular culture, which includes children's literature, does much to both mirror and create the realities in which we live, and not just in the sense that we buy whichever jeans Kim Kardashian is wearing¹⁵ or that we buy the car Blake Griffin tells us to buy.¹⁶ What I am concerned with is the more profound ways popular culture can help scholars interrogate existential realities of violence, danger, otherization, and progress.¹⁷ Of course labeling these *threats* (suicide bombings, nuclear war, regional conflict, chemical and biological warfare, etc.) as existential realities is problematic, but we

POSSIBILITIES AND PERSPECTIVES (2008); KIERAN DOLAN, A CRITICAL INTRODUCTION TO LAW AND LITERATURE (2011); AUSTIN SARAT, CATHERINE O. FRANK, MATTHEW ANDERSON (EDS.), TEACHING LAW AND LITERATURE (2011); Robin West, *Communities, Texas, and Law: Reflections on the Law and Literature Movement*, 1 YALE J. L. & HUM. 129 (1988); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

¹³ See Tanara Belinfanti, *Corporations in a Lorax State*, HUFFINGTONPOST.COM, Mar. 7, 2013, available at http://www.huffingtonpost.com/tamara-belinfanti/corporate-responsibility_b_1322136.html; Joe Patrice, *CLE With Dr. Seuss: I Do Not Like Jurisdiction in Rem, Said Sam-I-Em*, ABOVEHELAW.COM, Mar. 4, 2013, available at <http://abovethelaw.com/2013/03/cle-with-dr-seuss-i-do-not-like-jurisdiction-in-rem-said-sam-i-em/>.

¹⁴ RICHARD POSNER, LAW AND LITERATURE (3d ed. 2009). Additionally, Jane B. Baron has argued that law and literature has failed for several reasons including its failure to deliver the intellectual enrichment scholars claimed it would as well as the movement's inability to sustain itself in the face of tremendous factional interests and complex relationship to disciplinary boundaries. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L. J. 1059 (1999).

¹⁵ Cristina Everett, *Hey, Kim, It's All in the Jeans!*, N.Y. DAILY NEWS, Jan. 31, 2012, at 3; Ellie Krupnick, *Kardashian Kurves Contest Launches Sisters' Plus-Size Denim Line*, HUFFINGTONPOST.COM, July 27, 2013, available at http://www.huffingtonpost.com/2012/07/27/kardashian-kurves-contest-plus-size_n_1710120.html.

¹⁶ Chris Woodyard, *Kia's New Pitchman is a Slam-Dunk; NBA Rookie Griffin Vaults to New Fame*, USA TODAY, June 22, 2011, at 2B; Staff Reporters, *Clippers' Griffin Signs Deal with Kia*, THE OKLAHOMAN, June 23, 2011, at 5C; Jonathan Abrams, *As Chorus Swells, Griffin Leaps Car to Win Contest*, N.Y. TIMES, Feb. 20, 2011, at SP7.

¹⁷ This approach has been characterized by the rise of popular culture studies and then cultural studies. See ANDREW ROSS, NO RESPECT: INTELLECTUALS AND POPULAR CULTURE (1989); MARSHALL McLUHAN, THE MECHANICAL BRIDE: FOLKLORE OF INDUSTRIAL MAN (1951); JIM CULLEN (ED.), POPULAR CULTURE IN AMERICAN HISTORY (2013); LAWRENCE GROSSBERG, CARY NELSON, & PAULA TREICHLER (EDS.), CULTURAL STUDIES (1991); LAWRENCE GROSSBERG, CULTURAL STUDIES IN THE FUTURE TENSE (2010); LAWRENCE GROSSBERG, DANCING IN SPITE OF MYSELF: ESSAYS ON POPULAR CULTURE (1997).

think of them as existential threats.¹⁸ They are out there somewhere in the world—really out there.¹⁹ The veracity with which we endow threat discourse demands creative assessments of the very threats we construct. For this reason, the creative ethos of law and literature is appropriate to critique the national security state.

What makes Dr. Seuss so significant to law and politics is that he makes speakable the realm of the unspeakable while at the very same time making the banal seem new. Existing moral and political commentary receives the artful cover of children's literature in Seuss, making palpable controversial topics. Literature often works this way as it is frequently deeply political.²⁰

Without the silly drawings, made-up words, and outlandish plots, Dr. Seuss would have had substantially less luck pushing his poetic and political agenda. The method and message are intertwined. When *The Butter Battle Book* was published in 1984, it was not fashionable to critique the absurdity of the Cold War.²¹ Ronald Reagan had labeled the Soviet Union “the evil empire,”²² words which President George W. Bush would later echo in the State of the Union Address after the terrorist attacks on September 11, 2001 when he proclaimed “the axis of evil.”²³ Evil was never far from law and certainly never far from national security policy.

¹⁸ Christopher P. Niemiec, et al., *Being Present in the Face of Existential Threat: The Role of Trait Mindfulness in Reducing Defensive Responses to Mortality Salience*, 99 J. PERSONALITY & SOC. PSYCHOL. 244 (2010); Michael C. Williams, *Words, Images, Enemies: Securitization and International Politics*, 47 INT'L STUD. Q. 511 (2003); Barry Buzan, *Rethinking Security after the Cold War*, 32 COOPERATION & CONFLICT 5 (1997); BARRY BUZAN, *PEOPLE, STATES & FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST COLD WAR ERA* (2d ed.) (Lynne Rienner 1991); OREN BARAK & GABRIEL SHEFFER (EDS.), *THREATS AND CIVIL-SECURITY RELATIONS* (Lexington 2009); see also CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George D. Schwab, trans. 1922) (University of Chicago 2004); CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer, trans. 1932) (Duke University Press 2004).

¹⁹ DAVID SLATER, *GEOPOLITICS AND THE POST-COLONIAL: RETHINKING NORTH-SOUTH RELATIONS* (2004); SIMON DALBY, PAUL ROUTLEDGE, & GERARD TOAL, *THE GEOPOLITICS READER* (2d ed.) (2006); JOHN AGNEW, *GEOPOLITICS: RE-VISIONING WORD POLITICS* (2d ed. 2003); JEREMY BLACK, *GEOPOLITICS* (2009).

²⁰ Jacques Rancière, *The Politics of Literature*, 33 SUBSTANCE 10-24 (2004); Paul A. Cantor, *Literature and Politics: Understanding the Regime*, 28 PS: POL. SCI. & POL. 192-195 (1995); Clinton Omohundro, *Politics and Literature*, 12 AMALGAM 29-36 (2006); JAN-PIETER BARBIAN, *THE POLITICS OF LITERATURE IN NAZI GERMANY: BOOKS IN THE MEDIA DICTATORSHIP* (2013).

²¹ For general histories of the Cold War, see ROBERT MCMAHON, *COLD WAR: A VERY SHORT INTRODUCTION* (2003); MELVYN P. LEFFLER, *THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1917-1953* (1994); THOMAS G. PATERSON, *ON EVERY FRONT: THE MAKING AND UNMAKING OF THE COLD WAR* (1992); DAVID S. PAINTER, *THE COLD WAR: AN INTERNATIONAL HISTORY* (1999); H. W. BRANDS, *THE DEVIL WE KNEW: AMERICANS AND THE COLD WAR* (1993).

²² President Ronald Reagan, Speech to the House of Commons (June 8, 1982), available at <http://www.fordham.edu/halsall/mod/1982reagan1.asp>; see Newt Gingrich, *The Evil Empire*, 58 AM. HERITAGE 18-21 (Spring/Summer 2008).

²³ President George W. Bush, State of the Union Address (January 22, 2002), available at <http://millercenter.org/president/speeches/detail/4540>.

This absence, this obsession with the unspeakability of the unspeakable is of course the folly of fear. In the libidinal economy,²⁴ fear and violence are the coin of the realm. What manifests itself as existential reality is equivalential chains of fear.²⁵ We trade in violence, manufacturing it to power our military-industrial complexes.²⁶ This occurs in policy circles when justifications for military action are based on various fear regimes. Just as fear is a motivating factor in how many of us live our lives (fear of car accidents, fear of being fired, fear of not fitting in, fear of being wrong, etc.), it is also a factor in how we engage national security. It occurs in activist circles where there is an abiding fear of the federal government, no matter who might reside at the White House. And it occurs at dinner tables as people grapple with the everyday implications of national policies designed to protect them.

Nowhere is this more evident than in the continuing discourse on terror and terrorism where existential realities become exposed as coin in the libidinal economy traded at will, and manufactured at such a rate that inflational pressures manifest themselves as an ever increasing complex of biopolitical fear. There is a libidinal joy about Dr. Seuss. At some visceral level, Dr. Seuss is about libido. The

²⁴ See LYOTARD, *supra* note 6, at 102 (“What Marx perceives as failure, suffering (and maybe even lives through as resentment) is the mark on his work of a situation which is precisely the same as that of capital, and which gives rise to a strange success as much as to an awful misery: the work cannot *form a body*, just as capital cannot form a body. And this absence of organic, ‘artistic’ unity gives rise to two divergent movements always associated in a single vertigo: a movement of fight, of plunging into the bodiless, and thus of continual invention, of expansive additions or affirmations of new pieces (statements, but elsewhere musics, techniques, ethics) to the insane patchwork – a movement of *tension*. And a movement of institution of an organism, of an organization and of organs of totalization and unification – a movement of reason. Both kinds of movement are there, effects as force in the *non-finito* of the work just as in that of capitalism.” (citations omitted).)

²⁵ See ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC PROJECT* (1985); SLAVOJ ŽIŽEK, ERNESTO LACLAU, & JUDITH BUTLER, *CONTINGENCY, HEGEMONY, UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT* (2000); ERNESTO LACLAU, *ON POPULIST REASON* (2005); Christian Lundberg, *On Being Bound to Equivalential Chains*, 26 *CULTURAL STUD.* 299-318 (2012).

²⁶ The military-industrial complex has long been the focus of political and legal scholarship. That violence seems to power the military-industrial complex is perhaps obvious, yet still worth repeating. It needs both violence external to its apparatuses to legitimate its activities as well as violence internal to its functioning to demonstrate its necessity. See Dwight D. Eisenhower, *Farewell Address to the Nation* (Jan. 17, 1961); Ann Scales & Laura Spitz, *Militarization: The Jurisprudence of the Military-Industrial Committee*, 1 *SEATTLE J. SOC. JUST.* 541 (2003); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 *WASH. U. L. Q.* 1001 (2004); Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 *ARIZ. L. REV.* 675 (2010); Don Mayer, *Commentary: Corporate Citizenship and Trustworthy Capitalism: Cocreating a More Peaceful Planet*, 44 *AM. BUS. L. J.* 237 (2007); J. Robert Lilly & Richard A. Ball, *Special Comment: Selling Justice: Will Electronic Monitoring Last?*, 20 *N. KY. L. REV.* 505 (1993); Ismael Hossein-Zadeh, *Origins of the Recent Wars of Choice and Their Impact on U.S. Global Markets*, 13 *ILSA J. INT’L & COMP. L.* 67 (2006); Jerry Brito & Tate Watkins, *Loving the Cyber Bomb? The Dangers of Threat Inflation in Cybersecurity Policy*, 3 *HARV. NAT’L SEC. J.* 39 (2011).

fish, the elephants, the Whos, the Grinches are all manifestations of an investment in the flesh. Dr. Seuss's art is, after all, about bodies, furry, on display, opened to the imagination, reveling in their imperfections. Dr. Seuss, through fanciful art, makes plain the logic of the body as existential terror. The tremendous horror of William Blake's paintings—marked with the genius of the famed British Romantic poet and artist—pale in comparison to Seuss's work in many respects.²⁷ Bodies are on display. Dr. Seuss is invested in the flesh, a flesh that is exchangeable at the scales of history. If one has read *One Fish Two Fish Red Fish Blue Fish*,²⁸ one has viewed William Blake's *Los*, a horrifically beautiful painting depicting the fallen form and the rapture leading to God's rule on earth.²⁹ A reading of Seuss demands a traumatic reckoning with the hidden desires and fears we harbor in our corporeal and psychic lives. The nexus of Seuss and civil society is that Seuss makes plain the unspeakable. Law needs this. Law needs the shock to action that Seuss delivers.

I want to reconsider the last paragraph. Understanding the ways in which terror can be expressed and critiqued is important to legal understanding. Indeed, sometimes law may be best understood in the non-black letter law forms it takes. The literature on racial coding suggests the importance of unmasking law in inconspicuous places. Lawmakers use racially coded rhetoric because it allows them to make laws and make statements that express bodily fear in ways that are not immediately rendered visible.³⁰ Seuss (re)appropriates the logic of coding to offer a counter-code to dominant discourses about fearing the Other. There is terror in Seuss because he writes it into the text. His message is carried by that terror. Humorists and illustrators have long relied on shock and disturbance to advance their points.³¹ Sometimes that disturbance is not overt; it requires a second and third reading. Seuss's story functions in this way by engaging the reader several times before the political message becomes apparent. Once it does, the reader has already engaged with the story in a number of sittings.

The danger of an unchecked libidinal economy is continued violence and fear, which in itself is the enabler of more violence. This is a cycle of violence like

²⁷ William Blake (1757-1827) was a British poet, painter, and printmaker. His paintings, etchings, and engravings are haunting images of mystical worlds of evil, desire, and lost. There have been many fine biographies of Blake, although relatively few in the last few years. See PETER ACKROYD, *BLAKE* (1995); TRISTANNE J. CONNOLLY, *WILLIAM BLAKE AND THE BODY* (2002); MICHAEL DAVIS, *WILLIAM BLAKE: A NEW KIND OF MAN* (1977); MICHAEL FERBER, *THE SOCIAL VISION OF WILLIAM BLAKE* (1985).

²⁸ See *supra* note 9.

²⁹ William Blake's *Los* is an etching with pen, watercolor, and gold leaf. It was created sometime between 1804 and 1820. It may be viewed at <http://www.backtoclassics.com/artist/williamblake/>.

³⁰ andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141 (2011); Fred Slocum, *White Racial Attitudes and Implicit Racial Appeals: An Experimental Study of 'Race Coding' in Political Discourse*, 29 POL. & POL'Y 650 (2001).

³¹ See e.g. Ira P. Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 UC DAVIS L. REV. 1403-1485 (2008); Caran Wakefield, *Dark Roots: Humor and Tragedy in Doctor Strangelove*, 2008 MERCER STREET 191-198 (2008) (discussing some of the humorous uses of the middle finger) (discussing Doctor Strangelove as politically significant dark humor).

those we read about in food instable³² and water instable countries³³ and civil war-torn regions.³⁴ The parallels between Dr. Seuss and Blake, and Blake and Lyotard, are indeed striking for their unmitigated reliance on the trope of fear in the flesh. Whether it is Seuss's fear of not knowing, unloving, or unlearning (of the childlike wild)³⁵ or William Blake's fear of the soul, the dark corners of the psyche, the evilness within,³⁶ fear and violence matter intimately to the way our world is constructed and reflected in our interactions. William Butler Yeats said, "[I]t takes more courage to examine the dark corners of your own soul than it does for a soldier to fight on the battlefield."³⁷ If we ask nothing more of participants in civic discourse, we should ask that they "examine the dark corners" of their souls. Seuss's contribution is so tremendously important we may feel shocked to consider his work in light of civil society because he is almost too contributory. It is Dr. Seuss's light that casts a warm glow over those dark corners to help us better understand the irrationality of our fears.

Dr. Seuss is the perfect candidate for further analysis. W. J. T. Mitchell wrote, "Blake occupies an often ambiguous borderline between the divine madness of inspiration, and the demonic madness of incapacity and false or fruitless labor, a madness of irrationality, slavery, and compulsive repetition."³⁸ What if

³² Dimitris Diakosavvas, *On the Causes of Food Insecurity in Less Developed Countries: An Empirical Evaluation*, 17 WORLD DEVELOPMENT 223 (1989); Josef Schmidhuber & Francesco N. Tubiello, *Global Food Security Under Climate Change*, 104 PROCEEDINGS NAT'L ACAD. SCIENCES 19679 (2007); Christopher Green & Colin Kirkpatrick, *A Cross-Section Analysis of Food Insecurity in Developing Counties: Its Magnitude and Sources*, 18 J. DEVELOP. STUD. 185 (1982).

³³ NATASHA BECHORNER, *WATER INSTABILITY IN THE MIDDLE EAST* (Routledge 1992); Kathleen A. Cannon, *Water as a Source of Conflict Instability in China*, 30 STRATEGIC ANALYSIS 310 (2006); Eugenia Ferragina, *The Effects of the Israeli-Palestinian Conflict on Water Resources in the Jordan River Basin*, 2008 GLOBAL ENV. 152 (2008); Jan Selby, *The Geopolitics of Water in the Middle East: Fantasies and Realities*, 26 THIRD WORLD Q. 318 (2005); Roni N. Halabi, *Stability in the Middle East Through Economic Development: An Analysis of the Peace Process, International Trade, Joint Ventures, and Free Trade Agreements*, 2 DRAKE J. AGRIC. L. 275, 285 (1997); but see Aaron Wolf, Shira Yoffe & Marc Giordano, *International Waters: Identifying Basins at Risk*, 5 WATER POL'Y 31 (2003).

³⁴ See Laurence Juma, *The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process in a Civil War Situation*, 30 DENV. J. INT'L L. & POL'Y 325 (2002); Luca Renda, *Geography and the Boundaries of Confidence: Ending Civil Wars: The Case of Liberia*, 23 FLETCHER F. WORLD AFF. 59 (1999); Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795 (2003).

³⁵ See Jason Mraz, *Childlike Wild* (Nov. 2009), available at http://www.youtube.com/watch?v=-62G1bvR_jg.

³⁶ See generally Andrew M. Cooper, *Blake and Madness: The World Turned Inside Out*, 57 ELH 585-642 (1990) (discussing Blake, madness, and psychology); C. H. Collins Baker, *William Blake, Painter*, 10 HUNTINGTON LIBR. BULL. 135-148 (1936) (discussing William Blake as a painter, generally); Nicholas M. Williams, *Eating Blake, or an Essay on Taste: The Case of Thomas Harris's "Red Dragon"*, 42 CULTURAL CRITIQUE 137-162 (1999) (discussing Blake, horror, and appropriation in mass culture).

³⁷ William Butler Yeats, quoted in Cornel West, *Truth*, in ASTRA TAYLOR (ED.), EXAMINED LIFE: EXCURSIONS WITH CONTEMPORARY THINKERS (2009).

³⁸ W. J. T. Mitchell, *Dangerous Blake*, 21 STUD. ROMANTICISM 410, at 413 (1982).

Mitchell was addressing Seuss? Seuss also seems to have operated in a realm of irrationality, madness, and inspiration. He was subject to the “compulsive repetition” of his maddening dedication to joy and children. His “divine madness of inspiration” made him one of the most prolific children’s authors of the 20th century.³⁹ Legal scholars may be able to, and indeed should, disrupt these libidinal economic pressures by engaging in innovative scholarship that disrupts the politics of fear and violence. Engaging Dr. Seuss is precisely such an intervention and it results in a task critical to any scholar, practitioner, or activist: the unmasking of legal discourse.⁴⁰

When Dr. Seuss wrote *The Butter Battle Book*,⁴¹ it was intended to be an indictment of Cold War politics, escalatory arms conflicts, irrationality, and the confluence of otherization and complex notions of geopolitical space.⁴² In our time, the Cold War often seems like a distant memory.⁴³ Most of today’s young lawyers and legal scholars in their 20s and 30s (and there are an increasing number in law schools and the legal academy, not to mention practicing attorneys) have

³⁹ See *supra* note 9.

⁴⁰ Nick J. Sciallo, *A Working Paper on The Mask of Law: Montoya’s Mask and the Un/Masking of Legal Discourse*, HARV. J. L. & GENDER (Mar. 2013) (reflection on Margaret Montoya, Máscaras, Trenzas, y Greñas: *Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L. J. 185 (1994), 15 CHICANO-LATINO L. REV. 1 (1994)), available at <http://harvardjlg.com/2013/03/a-working-paper-on-the-mask-of-law-montoyas-mask-and-the-unmasking-of-legal-discourse/>.

⁴¹ See *supra* note 1.

⁴² National Review, *The Butter Battle Book*, 36 NAT’L REV. 15, 15-16 (July 27, 1984); Toni Sills-Briegel & Deanne Camp, *Using Literature to Explore Social Issues*, 74 LIT. & SOC. 280, 283 (2001).

⁴³ The “cold” war is an abstraction far removed from many of us born in the 1970s and 1980s. To be sure, we remember, if vaguely, the Berlin Wall coming down. We remember Ronald Reagan and Mikhail Gorbachev, but not much about their political theories. Many of us know there was some fear of someone using nuclear weapons decades before our birth, but in hindsight many of us are unclear about the threat posed during our formative years. Instead we remember Desert Storm and Operation Enduring Freedom, and Operation Iraqi Freedom. No matter what one remembers, what we hear about is these more modern conflicts. Yet, memories of the Cold War persist. Julia Danylow, et al., *The Cold War: History, Memory, and Representation*, 50 BULL. GHI 109 (Spring 2012); David Hoogland Noon, *Cold War Revival: Neconservatives and Historical Memory in the War on Terror*, 48 AM. STUD. 75 (2007); JON WIENER, *HOW WE FORGOT THE COLD WAR: A HISTORICAL JOURNEY ACROSS AMERICA* (2012).

only a vague memory of the Berlin Wall falling.⁴⁴ *Glasnost*⁴⁵ and *perestroika*⁴⁶ mean little more to us than something Barry Melrose⁴⁷ might have uttered on an ESPN broadcast when some Russian-born hockey player scored a goal in a NHL hockey game. In this respect, then, Seuss's original meaning, this criticism of the Cold War, means relatively little.

Yet, while the Cold War might not resonate with students entering and graduating from law school, not to mention those entering the professoriate or just coming up for partner, this does not render Seuss's allegory meaningless for contemporary discussion. On the contrary, because Seuss provides such a trenchant critique of existing Cold War irrationality, we might now be able to repurpose his critique to address new concerns. Read in light of terrorism, *The Butter Battle Book* takes on new depth and can provide a necessary complement to current terror discourse and expanded explorations of terror's complex relationship to civil society.⁴⁸ Indeed, some scholars have already suggested the war on terror parallels the Cold War.⁴⁹ It is then incumbent upon new scholars to consider the ways in which critiques of the Cold War might be repurposed. We need not scrap the tools of yesterday because the political and rhetorical currents of today have changed course.

Dr. Seuss is relevant today because *The Butter Battle Book* reminds us both how the past informs the future and how our inability to grapple with the past leads to disastrous results. Again, civil society is built upon an engagement with the past.

⁴⁴ See WILLIAM F. BUCKLEY, JR., *THE FALL OF THE BERLIN WALL* (20th Anniversary ed.) (2009); JEFFREY A. ENGEL (ED.), *THE FALL OF THE BERLIN WALL: THE REVOLUTIONARY LEGACY OF 1989* (2011); DEREK CHOLLET & JAMES GOLDGEIER, *AMERICA BETWEEN THE WARS: FROM 11/9 TO 9/11: THE MISUNDERSTOOD YEARS BETWEEN THE FALL OF THE BERLIN WALL AND THE START OF THE WAR ON TERROR* (2009); PETER SCHWEIZER (ED.), *THE FALL OF THE BERLIN WALL: REASSESSING THE CAUSES AND CONSEQUENCES OF THE END OF THE COLD WAR* (2000).

⁴⁵ A Russian policy instituted by Mikhail Gorbachev in the 1980s, of transparency in government.

⁴⁶ The term literally translates to "restructuring." This was a movement in the 1980s by the Communist Party of the Soviet Union to modernize. It involved an increase in individual liberties and eventually led to changing perceptions of Russia around the world.

⁴⁷ Barry Melrose is a National Hockey League (NHL) commentator for ESPN and the NHL Network, and former Head Coach of the Los Angeles Kings. *Barry Melrose*, WIKIPEDIA.ORG, available at http://en.wikipedia.org/wiki/Barry_Melrose.

⁴⁸ Although the Global War on Terror (GWOT) has officially ended (or at least the use of that phrase has officially ended), terrorism remains an important concern in policy, military, and legal circles.

⁴⁹ Barry Buzan, *Will the 'Global War on Terrorism' Be the New Cold War?*, 82 INT'L AFF. 1101 (2006); Stephen D. Reese, *Framing Public Life: A Bridging Model for Media Research*, in *FRAMING PUBLIC LIFE* 7, 11 (Stephen D. Reese, Oscar H. Gandy, Jr., & August E. Grant eds., 2001); but see John Tirman, *The War on Terror and the Cold War: They're Not the Same*, 6.6 AUDIT OF THE CONVENTIONAL WISDOM (Apr. 2006); Thomas H. Johnson & James A. Russell, *A Hard Day's Night? The United States Global War on Terrorism*, 24 COMP. STRATEGY 127 (2005).

Friedrich Nietzsche gives us three types of history: monumental,⁵⁰ antiquarian,⁵¹ and critical.⁵² While none of these are perfect, it is with an eye to Nietzsche's critical history through the interpretation of scholars from Fernand Braudel⁵³ to Michel Foucault⁵⁴ to Hayden White,⁵⁵ Edward Said⁵⁶ to Henry Louis Gates⁵⁷ that I consider terror and terrorism. Indeed, a turn toward a critical understanding of history is an enabler of expanded civic discourse. The more we know about where we have been the more we know about where we can go. This is one of Seuss's

⁵⁰ FRIEDRICH NIETZSCHE, ON THE ADVANTAGES AND DISADVANTAGES OF HISTORY FOR LIFE 16-23 (Peter Preuss, trans. 1980) (1874).

⁵¹ *Id.* at 17-23.

⁵² *Id.* at 17-25.

⁵³ FERNAND BRAUDEL, CIVILIZATION & CAPITALISM, VOL. 1 15TH-18TH CENTURY: THE STRUCTURE OF EVERYDAY LIFE, THE LIMITS OF THE POSSIBLE (Siân Reynolds, trans. 1982); FERNAND BRAUDEL, CIVILIZATION & CAPITALISM, VOL. 2 15TH-18TH CENTURY: THE WHEELS OF COMMERCE (Siân Reynolds, trans. 1982); FERNAND BRAUDEL, CIVILIZATION & CAPITALISM, VOL. 3 15TH-18TH CENTURY: THE PERSPECTIVE OF THE WORLD (Siân Reynolds, trans. 1982); H. R. Trevor-Roper, *Fernand Braudel, the Annales, and the Mediterranean*, 44 J. MODERN HIST. 468 (1972); Samuel Kinser, *Annaliste Paradigm? The Geohistorical Structuralism of Fernand Braudel*, 86 AM. HIST. REV. 63, 63, 66 (1981); Nick J. Sciallo, *Corporate Personhood in the Wake of Occupy Wall Street*, 22 WIDENER L. J. 611 (2013); John A. Marino, *Braudel's Mediterranean and Italy*, 1 CAL. ITALIAN STUD. 1 (2010), available at <http://www.escholarship.org/uc/item/5qp086z8>.

⁵⁴ See MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE (1969) (Vintage 1982); MITCHELL DEAN, CRITICAL AND EFFECTIVE HISTORIES: FOUCAULT'S METHODS AND HISTORICAL SOCIOLOGY (1994); Michael S. Roth, *Foucault's "History of the Present"*, 20 HIST. & THEORY 32 (1981); Quinn Lester, *An Archeology of French Critical History*, 1 FIVE 35 (2012); Lynn Fendler, *Praxis and Agency in Foucault's Historiography*, 23 STUD. PHIL. & EDUC. 445 (2004).

⁵⁵ HAYDEN WHITE, METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE (1975); HAYDEN WHITE, THE CONTENT OF FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1990); Hayden White, *The Burden of History*, 5 HIST. & THEORY 111 (1966); Hayden White, *Foucault Decoded: Notes from Underground*, 12 HIST. & THEORY 23 (1973); Hayden White, *Interpretation in History*, 4 NEW LITERARY HIST. 281 (1973); Hayden White, *Historicism, History, and the Figurative Imagination*, 14 HIST. & THEORY 48 (1975); Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5 (1980); Hayden White, *Getting out of History*, 12 DIACRITICS 2 (1982); Hayden White, *The Question of Narrative in Contemporary Historical Theory*, 23 HIST. & THEORY 1 (1984); Hayden White, *Historiography and Historiophoty*, 93 AM. HIST. REV. 1193 (1988); ROBERT DORAN (ED.), PHILOSOPHY OF HISTORY AFTER HAYDEN WHITE (2013); A. Dirk Moses, *Hayden White, Traumatic Nationalism, and the Public Role of History*, 44 HIST. & THEORY 311 (2005).

⁵⁶ SAID, ORIENTALISM, *supra* note 7; EDWARD SAID, CULTURE AND IMPERIALISM (Vintage 1994); *supra* note 7; Edward Said, *Invention, Memory, and Place*, 26 CRITICAL INQUIRY 175 (2000).

⁵⁷ Henry Louis Gates, Jr., *Editor's Introduction: Writing "Race" and the Difference It Makes*, 12 CRITICAL INQUIRY 1 (1985); HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM (1988); HENRY LOUIS GATES, JR., TRADITION AND THE BLACK ATLANTIC: CRITICAL THEORY IN THE AFRICAN DIASPORA (2010); HENRY LOUIS GATES, JR. & GENE ANDREW JARRETT (EDS.), THE NEW NEGRO: READINGS ON RACE, REPRESENTATION, AND AFRICAN AMERICAN CULTURE, 1892-1938 (2007).

guiding principles. It is at the center of his work in *The Butter Battle Book*. And, it is the greatest contribution *The Butter Battle Book* makes to our current legal realities. His critical disposition to the political past and present provides significant help as we consider current political problems.

Lest we get lost, it is appropriate to return to the libidinal economy for an example. Television commercials on many television networks now contain advertisements for automobiles with warning systems that warn a driver if a car is in her or his blind spot or if the driver is about to back into an unsuspecting child.⁵⁸ One might conclude that these warning systems are laudable safety innovations that reduce the likelihood of certain vehicular accidents, yet these safety systems⁵⁹ are prime examples of the libidinal economy at work. It is a biological fear of death that motivates us to spend more on such safety equipment, confident that our added expenditure will prevent the worst things from happening. Drivers are not concerned with the biological impact their poor decisions have on the driver in their blind spot or the child behind their car, but rather with their own biological finitude. These safety innovations trade upon fear, the fear that drivers might run over a child or that they might change lanes into an oncoming car.⁶⁰ Drivers are asked to make economic decisions based upon the fear that these incidents will cause biological and psychological harm. In other words, biology drives economic decisions. The driver is afraid that she or he will kill someone, and that someone will kill her or him.

The Butter Battle Book provides both a glimpse of monumental history, the importance of an actual monument, depicted by the wall⁶¹ that heightens in the text⁶² separating the Yooks from the Zooks, and the antiquarian history of looking back to an unspoken better time.⁶³ The wall in Seuss's story represents the Berlin Wall,⁶⁴ a monument that represented the very worst in irrational geopolitical divisions. It is never clear exactly what the before was in the book, but Dr. Seuss gives us hints that there was a time before the wall, before the difference. Of course,

⁵⁸ Roy Woodstock, *A Star in the Making; Mercedes' New A-class Certainly Lives up to Its Name and More*, HULL DAILY MAIL, Mar. 22, 2013, at 2-3; Rashid Razaq, *Clever Cascade Packs a Real Punch*, THE EVENING STANDARD, May 17, 2013, at 59.

⁵⁹ Martyn Williams, *Nissan Car Brakes Automatically to Avoid Collisions*, TECHHIVE.COM, July 28, 2010, available at http://www.techhive.com/article/202067/nissan_brakes_woot.html; Phil LeBeau, *Volvo Unveils New Technology to Avoid Cyclists*, CNBC.COM, Mar. 8, 2013, available at <http://www.cnbc.com/id/100538100>.

⁶⁰ One can only guess at the number of cases to be brought because one of these warning systems did not warn someone or provided an insufficient warning. Tort law will soon be asked to find cars liable for their artificial intelligence. I, of course, jest, but only to underline the important legal implications for this new form of libidinal economic system.

⁶¹ See *supra* note 1, at 2-3.

⁶² *Id.* at 4, 38-41.

⁶³ *Id.* at 2 (“In those days, of course, the Wall wasn’t so high and I could look any Zook square in the eye.”).

⁶⁴ No simpler understanding is needed. The wall in *The Butter Battle Book* divides two people who are quite similar. On each side of the wall the people begin to build up their militias. They attempt to outdo each other. Their disagreement seems inconsequential—the side of the bread to butter. The wall structures every interaction the two sides have, sometimes as acknowledged barrier and other times as unspoken specter of difference.

there was a time when there was no wall in Berlin, no division between East and West Germany. To be sure, there was no Germany as we know it today for much of the region's history. Prior to unification, there were many German states.⁶⁵ However, to the extent that anyone born after 1980 in the United States knows a Germany history, they know vaguely of a Berlin Wall, but this knowledge fails to have the same resonance it has for people born a mere five to ten years earlier. So, the story of the Yooks and the Zooks is confusing at first, and its original allegorical intent a distant, if existent, memory.

The book is replete with monuments that represent unique ways to memorialize the history of the Yook-Zook conflict. Perhaps it is the uniforms that get fancier as the conflict progresses.⁶⁶ Indeed the libidinal desire for protection from the elements is itself a motivating factor in the increasing tensions in the book. The libidinal desire for clothing unmoors itself from corporeal protection to a desire to be better, to best the other libidinal strategies of those Others over there, across the wall. Or, perhaps it is the weapons that get more outlandish,⁶⁷ suggesting alternately wombs and phalluses,⁶⁸ power relations bound up in the libidinal metaphors of eggs, projectiles, missiles, and bombs.⁶⁹ Or, perhaps it is the final scene in which one Zook and one Yook stand on the wall, a return to that very real barrier, each holding a Big-Boy Boomerang,⁷⁰ the future of two peoples held in the power of an explosive edamame-like superweapon.⁷¹ Seuss is toying with us. He is engaging psychoanalytic symbols, evoking the deepest or of our psychological trembling. Comparing the Yook-Zook conflict to Israel-Palestine, India-Pakistan, or the war on terror is appropriate. Seuss's concern with the othering and irrationality of the Cold War mirrors the fears of contemporary policymakers, and more specifically war hawks.

When I wrote an article entitled "The Ghost in the Global War on Terror,"⁷² I drew from the work of Gilbert Ryle, who masterfully criticized René Descartes's⁷³ dualist conception of the mind and body, as well as Jacques Derrida's work in Giovanna Borradori's edited volume.⁷⁴ That discussion highlighted the irrationality both of discussions of terrorism and national security law. What I did

⁶⁵ See DENNIS SHOWALTER, *THE WARS OF GERMAN UNIFICATION* (2004); WILLIAM CARR, *THE ORIGINS OF THE WARS OF GERMAN UNIFICATION* (1991); DAVID G. WILLIAMSON, *BISMARCK AND GERMANY: 1862-1890* (3d ed. 2010); ARDEN BUCHOLZ, *MOLTKE AND THE GERMAN WARS, 1864-1871* (2001).

⁶⁶ See *supra* note 1, at 13, 26.

⁶⁷ *Id.* at 13, 17, 19, 22, 23, 27-29, 32-33.

⁶⁸ See *id.* Each weapon is built on reproductive imagery. There are increasingly large projectiles. Guns, voids, holes, and caverns are all used to varying degrees Dr. Seuss's illustrations. Considering these illustrations, it is no wonder that scholars might see phallogocentric logic to the story. Things rise, getting higher and bigger like a rising penis. One leaves *The Butter Battle Book* as if one has just observed an awkward first date.

⁶⁹ *Id.*

⁷⁰ *Id.* at 34-35.

⁷¹ *Id.* at 42.

⁷² See Sciuillo, *The Ghost*, *supra* note 5.

⁷³ *Id.* at 564-65.

⁷⁴ GIOVANNA BORRADORI, *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* (2004).

not address was the Cold War. Here I make that corrective. Seuss demonstrates the parallels between the Cold War and the war against terrorism. He makes speakable these connections.

In the remainder of this Essay, I make several short interventions in this notion of terrorism, the libidinal economy, and the monstrous other. What follows, then, are several ways we can conceptualize Dr. Seuss's critique of the Cold War in light of the war on terrorism and its connection to the libidinal economy, monstrosity, narcissism, otherization, and irrationality.

I. FIRST INTERVENTION: OTHERIZATION, OR FEAR OF THOSE (UN)LIKE US

In *The Butter Battle Book*, violence occurs as the Yooks and Zooks otherize each other. These two peoples look the same, their land has the same topography, and the only difference the reader is presented is the side on which bread is buttered. If appearance, land, values, religion are the same, then all that is left is how the two peoples butter their bread. Of course, we do the same thing with equally ludicrous results. Otherization resists ontological certainty for epistemological facility. Other Why? The Islamic Other?⁷⁵ Skin color?⁷⁶ Location?⁷⁷ Clothing? Prophets? Eschatological rewards? It's all butter.⁷⁸ We know butter is very powerful; many of us have been to the state fair where butter sculptures take the form

⁷⁵ See Sciuillo, *The Ghost*, *supra* note 5; Sciuillo, *On the Language*, *supra* note 5; Luca Mavelli, *Political Church, Procedural Europe, and the Creation of the Islamic Other*, 1 J. RELIGION EUROPE 273 (2008); Mark Featherstone, et al., *Discourses of the War on Terror: Constructions of the Islamic Other after 7/7*, 6 INT'L J. MEDIA & CULTURAL POL. 169 (2010); Elizabeth Shakman Hurd, *Appropriating Islam: The Islamic Other in the Consolidation of Western Modernity*, 12 CRITIQUE: CRITICAL MIDDLE EASTERN STUD. 25 (2003).

⁷⁶ Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L. J. 1487 (2000); Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657 (2010); Margaret Hunter, *The Persistent Problem of Colorism: Skin Tone, Status, and Inequality*, 1 SOCIOLOGICAL COMPASS 237 (2007); Joni Hersch, *Symposium: Legal Science: An Interdisciplinary Examination of the Use and Misuse of Science in the Law: Skin Color Discrimination and Immigrant Pay*, 58 EMORY L. J. 357 (2008); Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOCIOLOGY 649 (2006); Bim Adewunmi, *Racism and skin colour: the many shades of prejudice*, GUARDIAN.COM, Oct. 4, 2011, available at <http://www.guardian.co.uk/world/2011/oct/04/racism-skin-colour-shades-prejudice>.

⁷⁷ John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1119 (1998); John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1943 (1999); Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J. L. SOC'Y 31, 44 (2002); CLAIRE DWYER & CAROLINE BRESSEY (EDS.), *NEW GEOGRAPHIES OF RACE AND RACISM* (2008); Richard H. Schein, *Introduction*, 54 PROFESSIONAL GEOGRAPHER 1 (2002).

⁷⁸ It is all butter in the sense that butter in this story functions to emphasize the ridiculousness of the conflict. Butter, an everyday additive to thousands of receipts, is the perfect vehicle for a story about the irrationality of war. See also *Butter* (Weinstein 2011)

of a family sitting at the dinner table or a cow, mimetically standing for the United States, which of course we rarely say because we live in America.⁷⁹ The point, more simply, is that butter stands in for the banality of the United States, and Seuss, in so mobilizing this rich imagery, gets at the very fundamental essence of debates about U.S. supremacy in a world in conflict. America has become the United States, which makes those other people in America, those in Brazil, Haiti, Canada, others. Others inside us. Others like us. We create monsters in our political corpus. The body politic is fighting a disease; here I have in mind Jacques Derrida's auto-immunity⁸⁰ where we fight against ourselves in order to flush out the bad us, so that the good us reigns. In fear, the politics of flesh, and otherization, there are always lurking monsters.

Otherization is a necessary process for violence. If it were not for the idea that terrorists were so radically different from us, there would never have been a war on terror. Keep in mind; terror(ism) existed prior to the events of September 11, 2001, although the acknowledgement of terror and terrorism radically changed. Civil wars are caused by othering. The other group has a different religion, different conceptions of rights, different economic situations, and so on. And it is always the Other that seems monstrous. It is difficult to fear one's neighbor, but quite easy to fear one's monster. The Other takes many forms in law: (illegal) immigrants, racial minorities, transgendered peoples, critical legal scholars, conservative legal scholars, terrorists, criminals, etc. Dr. Seuss, in poking fun at this process, makes an important point about the irrationality of irrationality and the way it shapes law and politics. His critique is necessary and appropriate.

What occurs in Dr. Seuss is also visible in modern national security law. Thus, this is my first intervention: the original Cold War commentary and scholarly application of Dr. Seuss's *The Butter Battle Book* is relevant to terrorism studies because it directly confronts otherization. Otherization is fundamental to the ways war is waged, therefore any way to better understand this process should be of fundamental importance to scholars.

II. SECOND INTERVENTION: FEAR OF BUTTERING, OR ABSURDITY IN NATIONAL SECURITY LAW

The Yooks are monsters to the Zooks and the Zooks are monsters to the Yooks. They look the same, dress similarly, and live close to each other.⁸¹ They do not even hurl insults at each other. There is no hate speech, no slurs, nor any previous violence to shape the relationship between the two groups. The insanity of this opposition mirrors the irrational fear of the Other in modern discussions of terrorism. The Yooks are perceived as evil and bad by the Zooks. The Zooks feel simi-

(using butter sculpting to explore the vagaries of interpersonal relationships and democratic politics).

⁷⁹ Gabriel Moran, *The United States is Not America*, NYU.EDU, Dec. 20, 2001, available at <http://www.nyu.edu/classes/gmoran/3USA.htm>; Gustavo de la Torre, *The United States is Not America*, BLOGTOAMERICA.ORG, Apr. 9, 2007, available at <http://www.blogtoamerica.org/2007/04/gustavo-from-peru.html>.

⁸⁰ See *supra* note 4, at 85-136.

⁸¹ See *supra* note 1.

larly about the Yooks. Yet this difference is not the casual other, e.g., we are different, and your difference frightens me. This is the Other, the ghost, the monster that haunts us, that hides under our beds. It is the Other that is dangerous. Dangerous because Arab is Islam, Islam is radical jihadism, radical jihadism is terrorism, terrorism is threat to national security, threat is monstrous violence, and monstrous violence must be eradicated.

In this intervention, I discuss the importance of the monster in reading Dr. Seuss. The exposing of monsters demands careful consideration. Seuss's ability to do this within children's literature is masterful. The biggest fear of any child is the monster under the bed. Seuss's contribution is to expose these monsters. That is no easy task. Indeed, many of the strongest opponents to the Authorization for Use Military Force⁸² and the USA PATRIOT Act⁸³ supported these acts on their way to becoming law. This critical work is important because it shapes our participation in society. It informs us and enlightens us. The more questions we ask about those we think are monsters as well as the monstrous repercussions of our laws, the more likely we are to build a robust civil society where monstrosity is less a guiding principle.

Again, Nietzsche is also instructive on this point. He writes, "He who fights monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee."⁸⁴ Although Nietzsche's gendered language speaks to an earlier time, his point is clear. There is a danger in looking into the monster's eyes because in so doing we create the monster we seek to eradicate. The monster becomes more permanent the more we engage it. Nietzsche's warning suggests that unless those fighting monsters are critical of the process, they risk becoming that which they fear. Thus, even in criticism there is danger. Dr. Seuss provides the opportunity to be critical so that those of us concerned with the impact that terrorism and national security law have on society do not become the monsters we fear. This is a real risk. Legal scholars must reject the temptation to become too enmeshed in the national security state they critique. Seuss demonstrates this critical distance through fanciful art and made-up words. Scholars should embrace this aspect of his methodology—critical distance—to assure meaningful critiques and guard against the co-optive potential of the national security state's apparatuses of control.

The focus on toast must not go unnoticed, as food has long been used to convey cultural meaning.⁸⁵ The book centers not on competing, but more accurately on complementary conceptions of divine worlds. Both the Yooks and the Zooks have visions of what the right world looks like. They may be theoretically incompatible, but they are practically compatible (butter on both sides of bread). But, beyond all

⁸² Authorization for Use of Military Force, PUB. L. 107-40, 115 STAT. 224 (2001).

⁸³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorist Act, PUB. L. 107-56, 115 STAT. 272 (2001).

⁸⁴ FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 97 (Helen Zimmern, trans. 1907) (1886).

⁸⁵ Paul Rozin, *The Meaning of Food in Our Lives: A Cross Cultural Perspective on Eating and Well-Being*, 37 J. NUTRITION EDUC. & BEHAV. S107 (2005); Anne Murcott, *The Cultural Significance of Food and Eating*, 41 PROC. NUTRITION SOC'Y 203 (1982); CLAUDE LEVI-STRAUSS, *THE RAW AND THE COOKED* (1975); JOSHUA J. FRYE & MICHAEL S. BRUNER (EDS.), *THE RHETORIC OF FOOD: DISCOURSE, MATERIALITY, AND POWER* (2013).

theory this is a breakfast-time squabble. Fantasy author Cassandra Clare, in *Clockwork Angel*,⁸⁶ wrote of one of her characters' reactions to learning just something so trivial. She writes, "Will looked horrified. 'What kind of monster could possibly hate chocolate?'"⁸⁷ The question is absurd. How could food preference reveal monstrous propensities? That is the kernel of absurdity at the center of the rhetoric of monstrosity that Seuss achieves in his text. One might look at someone askance if he or she ate toast butter-side down, but one would not think this person a monster. Butter-side down may very well be the most delicious or disgusting thing in the world. The point is not chocolate or toast, it is the absurdity of the label, of the psychology of otherization and fear. The story is about butter, but the effect is critical consciousness and the interrogation of our fears. We need to keep this critical energy alive today as we continue to reel from the pain of a protracted war on terror that never seems to end.

III. THIRD INTERVENTION: DR. SEUSS AND HAUNTINGS, OR THE JURIDICO-POLITICS OF TERROR

We are psychologically built to make monsters. French psychoanalyst Jacques Lacan explains our attempts to paper over the lack that structures our life.⁸⁸ Psychoanalysis is well within Seuss's authorial prerogative as I have indicated. We need to fill the unknown, disguise it. As we try to understand *the Real*, we get further and further away from it. We do this through psychological mechanisms, Freud's defense mechanisms⁸⁹ for example, and these, in turn, lead us closer to danger. Indeed, we are monsters, as dangerous as those we seek to battle. This is the danger of battling terrorism. This was the danger of the Cold War. It creates the possibility of and preconditions for danger. As German documentary filmmaker Werner Herzog says, "What would an ocean be without a monster lurking in the dark? It would be like sleep without dreams."⁹⁰ This is an astute Lacanian observation. The only way we can make sense of the world is through the lurking monsters. A world without monsters is quite boring, and that is part of the drive to continue manufacturing them. The Zooks and the Yooks do nothing in this story but create monsters to give them a reason to live. Nothing happens in this story but military build-ups, appropriations, and celebrations. That simplicity allows the reader the opportunity to fully confront Seuss's call for a more peaceful, rational world. His use of irrationality to critique irrationality is a double move we often see in particularly effective comedic performances. If we out-left the left or outright the right when engaging in political satire, audiences understand precisely the nature of our hyperbolic rhetoric. The success of Seuss's Cold War criticism

⁸⁶ CASSANDRA CLARE, *CLOCKWORK ANGEL* (2010).

⁸⁷ *Id.* at 83.

⁸⁸ Nick J. Sciuillo, *Žižek/Questions/Failing*, 47 WILLAMETTE L. REV. 287, 295 (2011).

⁸⁹ MICHAEL KAHN, *BASIC FREUD: PSYCHOANALYTIC THOUGHT FOR THE TWENTY FIRST CENTURY* 122-23 (2002); ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* (Karnac 1993) (1936); SHARON HELLER, *FREUD A TO Z* 67-70 (2005).

⁹⁰ Werner Herzog *quoted in* Philadelphia Association for Critical Thinking, *Monsters*, PHACTUM 13 (Feb. 2013).

affords us an opportunity to engage in the same hyperbole to critique terrorism and the national security state.

For Seuss, particularly in this text, death and fear shape our lives. This paradoxical relationship makes it potentially dangerous to eradicate monsters. Because if death structures our existence, then eradicating monsters is likely only to place our lives in more danger. German existential philosopher Martin Heidegger told us we are being towards death.⁹¹ Might we also be beings toward monsters? Pablo Neruda writes, “Hay la muerte en los huesos” (Death is in the bones).⁹² He then writes, “La muerte está en la escoba” (Death is in the room).⁹³ What that means is that we are surrounded by death, but monsters represent the challenge of living death, an existential risk ever-present in our psycho-social condition. Death is always there. The monstrosity of the Soviet Union was that they might engage the United States with nuclear weapons at any moment. Death was around the corner precisely because the United States was so convinced that death was—well—right around the corner. The fight against terror operates on a similar logic. Although the United States never knows when the next attack is coming, it remains convinced that the next attack is coming. What we find in Dr. Seuss and in modern discussions of national security law and counter-terrorism policy is that monsters are here, always already. Our quest to eradicate them is wrought with peril. We might reconfigure Neruda in this way, “Monstruos siempre estarás en la vida.”⁹⁴ Monsters are always in life. This is true in Seuss where, despite the fanciful illustrations, rhymes, and levity, monsters are always present. Seuss seems to hope that these monsters do not consume us—that we critically consider the logic behind our aggression. National security policymakers and scholars would be wise to mind Seuss’s warning. Dr. Seuss provides us with a story that emphasizes both the haunting of monsters and their imminence.

IV. FOURTH INTERVENTION: MONSTERS EVERYWHERE, OR WHY NATIONAL SECURITY LAW NEEDS FEAR

Monsters are everywhere and nowhere. Dr. Seuss highlights how, in each phase of the story, monsters are lurking. Seemingly simple events, like improving military uniforms, belie a larger evil. This is important because if we go looking for monsters in the same way we might stare at one of those block-based abstract pictures in the mall kiosk where space ships are supposed to be hidden in a geometric maze of blocks and colors, we will never find them. The problem is we want to find them, and we do so by way of specific strategies that often blind us to the monsters we ourselves are becoming. In this way, Seuss’s interest in monsters is profound because he highlights the importance of being critically conscious at all opportunities. Here Seuss echoes Slovenian cultural critic Slavoj

⁹¹ MARTIN HEIDEGGER, BEING AND TIME 235-37 (Joan Stambaugh, trans 1996) (1953).

⁹² Pablo Neruda, *Sólo la Muerte*, in PABLO NERUDA, SELECTED POEMS 88 (1972).

⁹³ *Id.* at 90.

⁹⁴ “Monsters will always be in life.”

Žižek who argues that ideology is everywhere,⁹⁵ it is in the small things. Seuss makes the point in a cartoon in which militarism exists everywhere. It was a motivating logic during the Cold War, and it is one that remains a motivating factor in the twilight of the war against terrorism.

French poet Charles Baudelaire gives us yet another perspective: “What strange phenomena we find in a great city, all we need do is stroll about with our eyes open. Life swarms with innocent monsters.”⁹⁶ There are monsters out there, in the little details. The more we open our eyes, the more we see. Baudelaire’s “innocent monsters” correlate with Seuss’s Yooks and Zooks. Both are innocent of any real aggression, yet beneath the furry loveable exterior there resides a monstrous intent to destroy the other. When we open our eyes, we are bound to see them. They are there, yet not there. We open our eyes to see these monsters as innocent, to repurpose a famous Derridean phrase, as “monsters-to-come.”⁹⁷ They are in the ether, the phantasmic terrorists. So the quest to find monsters, others, terrorists, is always a quest of looking for what we cannot find and finding what we cannot see. The phantasmagoric is the psychological terrain on which these battles and quests take place.⁹⁸ Because the terrorist or monster is always becoming, there is always a fear of the arrival of just such a monster because its arriving is always in process. The ecstasy of arrival gives way to the fear of arriving. It is that fear of arriving that motivates the war on terror just as it did the Cold War.

Jacques Derrida tells us, “Monsters cannot be announced. One cannot say: ‘Here are our monsters,’ without immediately turning the monsters into pets.”⁹⁹ This notion seems to suggest an alternative to the creation model I have laid out, but Derrida’s analysis is more complementary than contradictory. Derrida is suggesting that we cannot simply call a monster into being and have a monster before our eyes. Instead, when we call a monster into being, we also humanize it. It is our pet, albeit a dangerous one. It is that hermit crab that when called forth from its shell is both pet and dangerous finger-snapper. We have made it, of our own creation and in that way it is ours, our pet. This is our pet project, our possession, our charge. Yet that pet is always more dangerous than we might think because the pet becomes more than our little friend, it also our little monster. To segue again, this is the fear and hope of Lady Gaga’s little monsters.¹⁰⁰ She is both vitally devoted

⁹⁵ SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 45 (1989) (“The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape.”).

⁹⁶ Charles Baudelaire, *Mlle. Bistoury*, in *BAUDELAIRE: HIS PROSE AND POETRY* 103 (T. R. Smith ed., 1919).

⁹⁷ See Jacques Derrida, *The “Democracy to Come,” Opening in Two Turns*, 103 *SO. ATLANTIC Q.* 323 (2004).

⁹⁸ See Sciallo, *The Ghost*, *supra* note 5 (discussing the phantasmagorical, terrorism, and national security law).

⁹⁹ Jacques Derrida, *Some Statements and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and other small Seismisms*, in DAVID CARROLL (ED.), *THE STATES OF THEORY* 80 (Columbia University Press 1989).

¹⁰⁰ Nicole Carter, Lady Gaga dedicates her new ‘Little Monsters’ tattoo to her fans, N.Y. Daily News, Feb. 3, 2010, available at <http://www.nydailynews.com/entertainment/gossip/lady-gaga-dedicating-new-monsters-tattoo-fans-article-1.185529>.

to and horribly afraid of her little monsters. They created her and can destroy her. Lady Gaga is on to something profound about the ways in which fear structures reality. Gaga and Seuss both present us with conceptions of the organizing potential of fear. Popular culture opens a window to law and politics that helps scholars understand not only complex areas of law, but also the ways in which legal understandings are formed in the cultural milieu. Cloaked in the language of the pet, the monster seems to be under our control. Yet as we have seen in the blossoming discourse of terror and counter-terrorism, the lines blur and the focal point and locus of our angst loses constraints. Our pets are our monsters. The closeness of those things that are the most frightening renders dangerous the intricacies of life. The dangers of national security policy manifest themselves in these little things, the things that seem safe, normal, and banal.

Popular culture expands our understanding of the embodied politics of being and security. Two of today's most popular cultural commentators provide significant, yet overlooked, insights, which further suggest popular culture's insights into the world: Slavoj Žižek's words, "I am not a human, I am a monster,"¹⁰¹ and Kanye West's words, "Everybody knows I'm a motherfucking monster."¹⁰² The question of where monsters reside and where we create them is the preeminent question in today's discourse about terror and absurdity. Dr. Seuss exposes these monsters in ways that sneak up on readers. He makes speakable the unspeakable. Monsters are us. The claim to be a monster is emblematic of this tension in a postmodern world. In trying to be monster and non-monster at once, trying to battle monstrosity, we are in a place to freely admit our monstrosity. When Žižek and West claim to be monsters they are straddling the complexity fence. They are at once challenging the monstrous and complicit in monstrosity. They feed and challenge the libidinal economy, guiding the politics of the monstrous. Legal scholars may rightly see cause for celebration in their monstrous performance, but also must be weary of getting too close to the monster.

V. CONCLUSION

Dr. Seuss is an important window onto civil society. *The Butter Battle Book* provides a critique of the Cold War that is also applicable to the logic of the war against terrorism. In this Essay, I have made several interventions. These interventions are guided by ideas of the libidinal economy, otherization, and monstrosity. In First Intervention, I discussed otherization and the ways in which Seuss exposes the absurdity of difference.¹⁰³ In Second Intervention, I discussed the ways in which butter functions to highlight the absurdities of conflict.¹⁰⁴ Everything is and is not about butter in Seuss's allegory. In Third Intervention, I concerned myself with hauntings and the psychology of fear.¹⁰⁵ Seuss illustrates the important ways

¹⁰¹ Slavoj Žižek *quoted in* Decca Aitkenhead, Slavoj Žižek: 'Humanity is OK, but 99% of People Are Boring Idiots', GUARDIAN.COM, June 10, 2012, *available at* <http://www.guardian.co.uk/culture/2012/jun/10/slavoj-zizek-humanity-ok-people-boring>.

¹⁰² Kanye West, *Monster*, on MY BEAUTIFUL DARK TWISTED FANTASY (Roc-A-Fella 2010).

¹⁰³ *See supra* notes 75-80, and accompanying text.

¹⁰⁴ *See supra* notes 81-87, and accompanying text.

¹⁰⁵ *See supra* notes 88-94, and accompanying text.

psychology enables militarism and increasing levels of irrationality. This discussion was important during the Cold War and remains important today. Lastly, in *Fourth Intervention*, I highlighted Seuss's call to look everywhere for monsters, which I suggest echoes Žižek's idea that ideology is everywhere.¹⁰⁶ Only when we open ourselves up to unflinching critique can we more thoroughly engage the world as civic-minded participants.

If we take Seuss seriously as a legal and political critic, we expand and enrich a constantly evolving civil society and better challenge the legal regimes that support the national security state and promote misguided policies that complicate terrorism.

¹⁰⁶ See *supra* notes 95-102, and accompanying text.



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