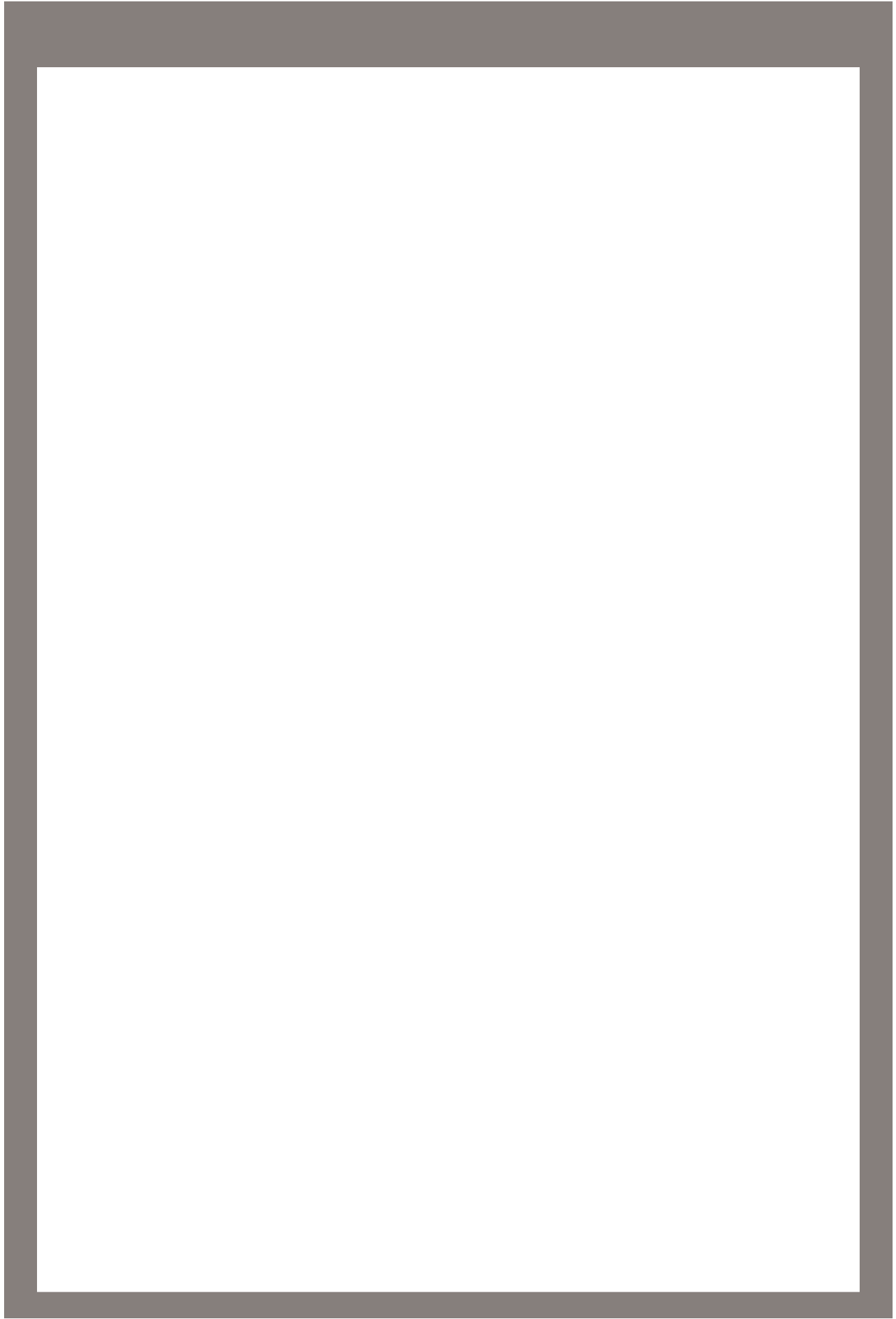


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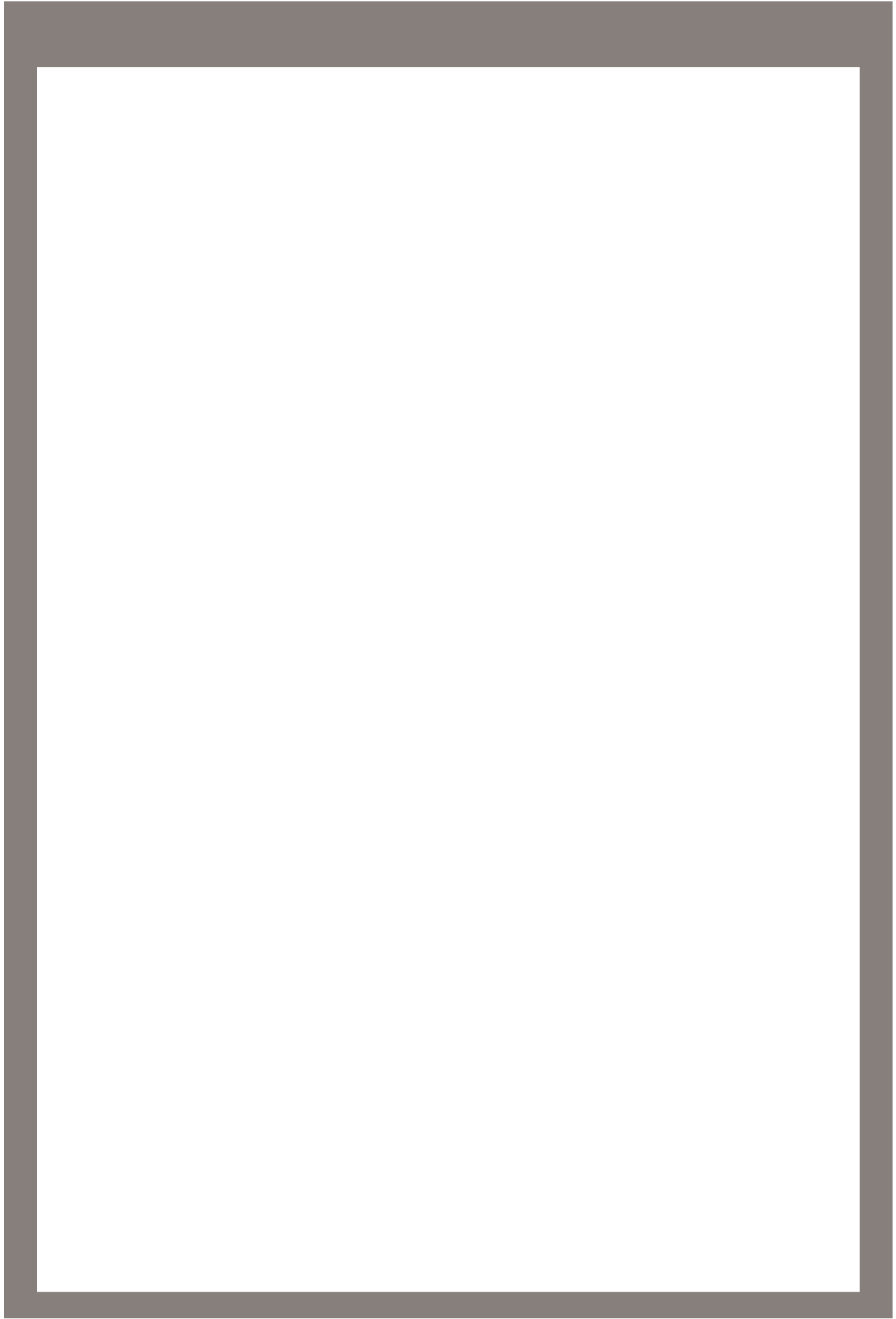
CONTENTS

ARTICLES

- HOW PROHIBITION REWROTE THE
FOURTH AMENDMENT *Mitchell A. Del Bianco* 223
- ANGELS, DEMONS, US: RECONCILING
RAZ AND AQUINAS ON THE
COORDINATIVE FUNCTION OF LAW *Anna Lukina* 293
- THE FOURTEENTH AMENDMENT RIGHT
TO ACCESS CRIMINAL JUSTICE *John Crain* 325

NOTES

- A GUIDE ALONG THE SPIRIT ROAD:
NAGPRA, CULTURALLY
UNIDENTIFIABLE HUMAN REMAINS,
AND DEFERENCE TO ORAL
TRADITION *Caleb Ritzheimer* 377
- IN SEARCH OF LOST RELIANCE:
REVISITING THE SUPREME COURT'S
USE OF RELIANCE IN STARE DECISIS
ANALYSIS *Brian Roberts* 411
- A PROPHETIC REALITY: LEGAL
BUREAUCRACY IN "THE TRIAL" AND
ITS PARALLEL TO THE U.S. JUDICIAL
SYSTEM *Divya Rajagopalan* 439



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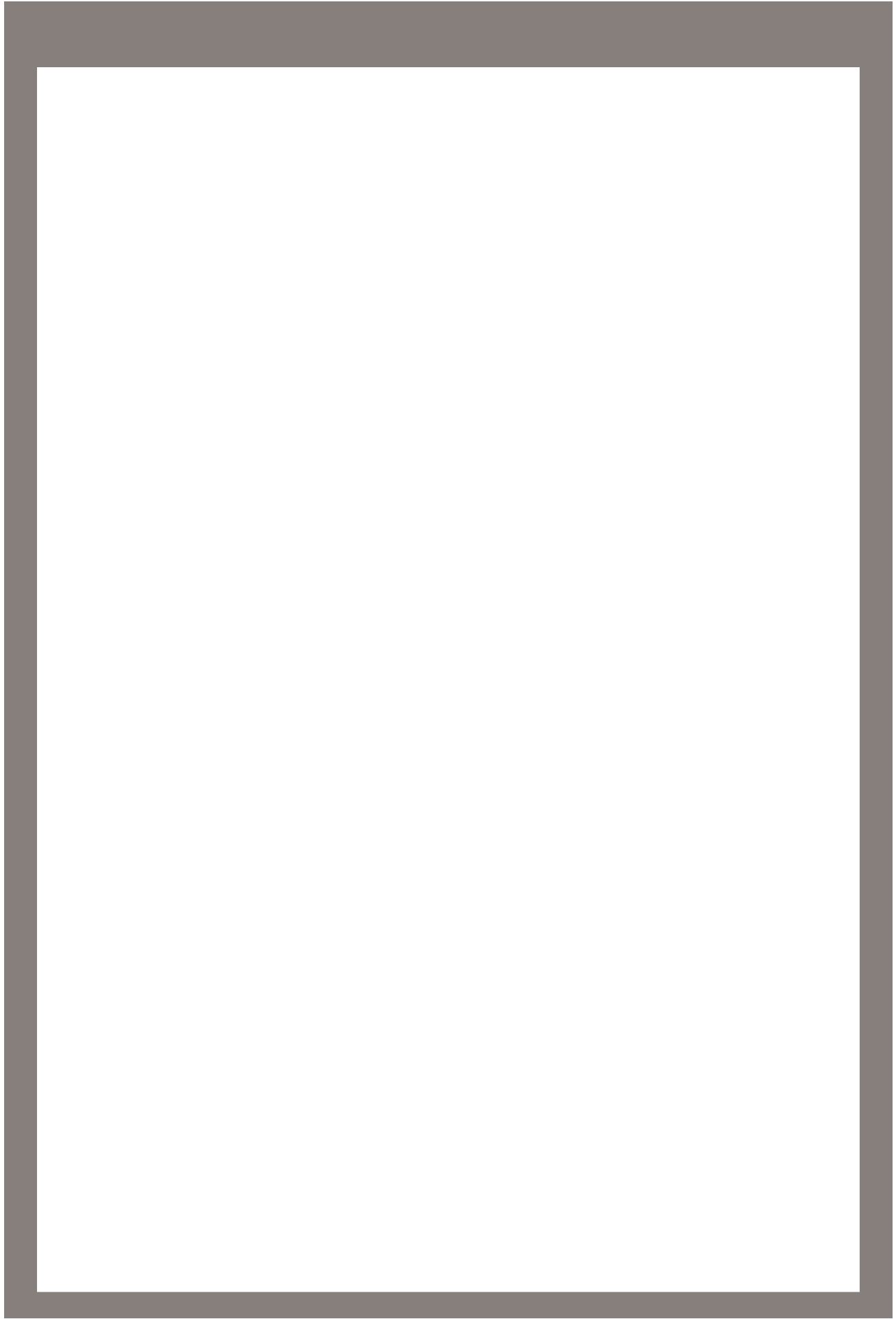
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HOW PROHIBITION REWROTE THE FOURTH AMENDMENT

MITCHELL A. DEL BIANCO*

ABSTRACT

During Prohibition, legion defendants—armed with a liberal construction of the Fourth Amendment and the newly minted exclusionary rule—stormed the federal courts with challenges to the introduction of evidence obtained by the searches and seizures of federal officers. This was a period where, by all accounts, Prohibition was vastly altering American policing in lasting ways. Yet little study has been given to how federal courts facilitated that alteration.

This Article surveys and examines decisions, briefings, and contemporary legal commentary and uncovers that much of the judiciary interpreted the Fourth Amendment during Prohibition as having a doctrinal association with the Eighteenth. Federal courts practically reconstrued the meanings of “reasonable,” “persons, houses, papers, and effects,” and “searches and seizures” to adjust to the realities wrought by the new constitutional mandate of the Eighteenth Amendment to prohibit “intoxicating liquors.” At the same time, decisions frequently reflected a desire to enforce national prohibition within the particular statutory bounds of the National Prohibition Act. The result was not only a policing landscape that differed greatly from preceding American history but also a Fourth Amendment landscape that exalted the home while offering second-class protections for searches and seizures occurring outside its walls—a jurisprudential legacy that lives on in the present day.

* Judicial Law Clerk. An earlier draft of this paper earned the Roger and Madeleine Traynor Prize for best written work by a graduating student at the University of Virginia School of Law.

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TABLE OF CONTENTS

INTRODUCTION 225

I. THE PRE-PROHIBITION CONSTRUCTION OF THE FOURTH
AMENDMENT..... 229

II. ENFORCING THE EIGHTEENTH AMENDMENT IN THE LOWER
FEDERAL COURTS 234

A. In the Federal District Courts..... 235

B. In the Federal Circuit Courts..... 245

III. THE SUPREME COURT AND THE FOURTH AMENDMENT 252

A. Open Fields and Automobiles 258

B. Whispering Wires..... 271

C. The Home Becomes Sacred..... 279

CONCLUSION 290

INTRODUCTION

[S]ooner or later the spectators will challenge their government by asking an embarrassing question: “Shall there be two constitutions, one for prohibition and one for all other matters whatsoever?”

— FORREST REVERE BLACK,
ILL-STARRED PROHIBITION CASES 78 (1931)

Up in the mountains of Montana, federal officers approached a lonely cabin.¹ They smelled fermentation and soon stumbled upon whiskey-making paraphernalia in a nearby open shed.² They turned back to the cabin and moved closer to look inside. Peering through a window, they saw two covered barrels, probable cause for the violation of liquor laws.³ The officers decided to break in. Once inside, they opened the barrels and found odorous mash fermenting within.⁴ They also found a still under the bed—more evidence that intoxicating liquors were being produced.⁵ The only question federal district Judge George McClellan Bourquin asked in resolving the constitutionality of the officers’ search was whether the cabin constituted a “private dwelling”⁶ within the meaning of the National Prohibition Act.⁷ It did not; no warrant was required.⁸ Protection from such a search might—if at all—emanate from statute, not the Fourth Amendment.

The Prohibition Era abounds with stories like this: Brazen searches and seizures, the legality of which was determined by the desire to enforce a new constitutional mandate at the expense of the Fourth Amendment. Doing otherwise, as Judge Bourquin put it, would be “to sanction the most pernicious evil of the day, and to undermine obedience to law, respect for government, and national morality.”⁹ These words appear inconsistent with his personal beliefs: Prohibition was “silly,” “beneath the dignity of the federal court,” and “an absolutely disgraced act of the government trying to

-
1. United States v. Apple, 1 F.2d 493, 493 (D. Mont. 1924).
 2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.* at 494.
 7. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919), *repealed by* U.S. CONST. amend. XXI.
 8. *See Apple*, 1 F.2d at 494.
 9. *Id.*

regulate personal conduct.”¹⁰ But on the bench, Judge Bourquin was not venting his personal opinions. He was expounding the law of the land. And the law of the land had recently felt a minor addition: The Eighteenth Amendment to the United States Constitution became effective on January 17, 1920, practically outlawing alcohol.¹¹ At that time, one could scarcely predict that by Prohibition’s end, the new amendment would transmogrify American policing and, consequently, the protections of the Fourth Amendment.

The noble experiment of national alcohol prohibition was conducted not only by police but also by judges, who condoned increasingly bold criminal investigation tactics. The Supreme Court allowed police to trespass onto land and seize alcohol without a warrant,¹² pull over cars and tear up their upholstery looking for intoxicating liquors,¹³ arrest tax filers for failure to report illicit alcohol-related gains,¹⁴ and wiretap home and office phone lines to gather evidence for liquor prosecutions¹⁵—to cite a few momentous decisions. The lower federal courts similarly did their part.¹⁶ Though it proved impossible to end the manufacture, sale, and transportation of alcohol, police were granted extraordinarily broad leeway in their attempts to do so. Thus, the judiciary facilitated intrusive criminal investigations by limiting the protections of the Fourth Amendment, helping carry out the nation’s only ever constitutionally mandated drug war.

The Prohibition Era came to a brisk end in 1933 through the only constitutional repeal to date.¹⁷ Nevertheless, the Eighteenth Amendment left lasting effects—Fourth Amendment search and seizure jurisprudence had been bent and molded to accommodate its newly estranged sibling. That jurisprudence was relied on in countless drug prosecutions following the end of Prohibition and influenced the trajectory of future doctrinal

10. ARNOLD GUTFELD, *TREASURE STATE JUSTICE: JUDGE GEORGE M. BOURQUIN, DEFENDER OF THE RULE OF LAW* 14 (2013).

11. U.S. CONST. amend. XVIII § 1 (“After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”).

12. *Hester v. United States*, 265 U.S. 57 (1924).

13. *Carroll v. United States*, 267 U.S. 132 (1925).

14. *United States v. Sullivan*, 274 U.S. 259 (1927). *Sullivan* is not discussed in-depth in this paper as I have written about it elsewhere as a necessary product of the Sixteenth Amendment’s enumerated power to allow the collection of taxes on income “from whatever source derived.” Mitchell A. Del Bianco, “*The Government Can’t Take Taxes from Illegal Money!*” *The Self-Incrimination Carveout for Taxes on Illicit Gains* (unpublished manuscript) (on file with author).

15. *Olmstead v. United States*, 277 U.S. 438 (1928).

16. See discussion *infra* Part II.A–B.

17. U.S. CONST. amend. XXI § 1 (“The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”).

development.¹⁸ Many of the Prohibition Era search and seizure cases remain good law to this day.¹⁹

In the lone law review article comprehensively evaluating the effect of Prohibition on Fourth Amendment jurisprudence, legal historian Kenneth Murchison asserted that the Supreme Court's decisions were the "product of major shifts in public opinion" about the national prohibition of alcohol.²⁰ He also recognized that the influence of Prohibition on the Fourth Amendment had been "largely ignored" and called for further research.²¹ Many historians in the interim have demonstrated that Prohibition, at least as a sociocultural phenomenon, brought about significant changes in the administrative state and policing.²² But none have evaluated the impact of Prohibition as a constitutional phenomenon.

This Article approaches the question of Prohibition's impact by recognizing what made it distinctive: Congress and the states went beyond ordinary statutes to enshrine a "bone-dry" national prohibition in the Constitution.²³ With that, liquor prohibition was elevated to the same position of legal authority as the abolition of slavery and the freedoms manifested in the Bill of Rights, including the right to be free from unreasonable searches and seizures. In the absence of other published work on the impact of the Eighteenth Amendment specifically, this Article seeks to examine how the changes legal historians observed in policing occurred via judicial action at the constitutional site where criminal investigations and citizens meet: the Fourth Amendment.

Ultimately, this Article explores and posits an alternative hypothesis about Prohibition's significance to Fourth Amendment doctrine: The existence of the Eighteenth Amendment itself, a new constitutional provision, allowed the judiciary to interpret the Fourth Amendment in a new

18. For an explanation of the Eighteenth Amendment's effects in this domain, see Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 520–32 (1982).

19. For some examples, see discussion *infra* note 387.

20. Murchison, *supra* note 18, at 529.

21. *Id.* at 472, 530.

22. See, e.g., DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 157 (2010); LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE ADMINISTRATIVE STATE* 5 (2015); SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 113–55 (2019); MARA L. KEIRE, *FOR BUSINESS AND PLEASURE: RED-LIGHT DISTRICTS AND THE REGULATION OF VICE IN THE UNITED STATES, 1890–1933* 114–35 (2010); WESLEY M. OLIVER, *THE PROHIBITION ERA AND POLICING: A LEGACY OF MISREGULATION* (2018); see also BEVERLY GAGE, *G-MAN: J. EDGAR HOOVER AND THE MAKING OF THE AMERICAN CENTURY* 113–28, 173 (2022) (detailing relationships between the fledgling Federal Bureau of Investigation and Bureau of Prohibition in enforcement and administration).

23. RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920* 232–33 (1995).

but doctrinally principled manner, reconstruing the meanings of “reasonable,” “persons, houses, papers, and effects,” and “searches and seizures”²⁴ in light of the constitutional mandate to prohibit the manufacture, sale, transportation, importation, and exportation of intoxicating liquors.

However, this focus on constitutional interpretation does not ignore external pressures faced by courts during the Prohibition Era. To be sure, national prohibition had real-world effects to which the judiciary responded: an influx of cases through which doctrinal development could occur²⁵ as well as widespread violent²⁶ and organized²⁷ crime that invited new police authority. Indeed, the Eighteenth Amendment transformed how courts could respond to those very pressures, providing judges a constitutional basis to reconfigure Fourth Amendment protections.

Approaching Prohibition holdings from this angle reveals that the Court did not simply track public opinion in its judicial decisions. Rather, when police pushed the boundaries of the Fourth Amendment for the enforcement of national prohibition, the Court validated and encouraged those efforts whenever they were consistent with the Eighteenth Amendment and its principal enforcing statute, the National Prohibition Act. Indeed, the only Fourth Amendment area that received regular protection in the period was the home—an area carefully carved out in national prohibition statutes for special treatment. This finding offers a novel historical explanation for the exceptionalism of the home in Fourth Amendment jurisprudence beginning in the Prohibition Era and carrying on into the present.

This Article proceeds in three parts. Part I explores several cases that culminated in the Supreme Court’s development of the exclusionary rule and demonstrate the liberal construction provided to the rights of citizens

24. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

25. It is difficult to overstate just how significantly Prohibition affected the federal criminal legal system. In 1929, there were 56,455 Prohibition cases, making up 66.2% of the federal caseload—in 1920 by comparison, the total number of federal criminal cases was just 34,230. See, e.g., JOHN C. GEBHART, PROHIBITION ENFORCEMENT: ITS EFFECT ON COURTS AND PRISONS 2 (1930). Even on the civil side, Prohibition also came to represent an outsized portion of the federal docket—in 1930, civil federal Prohibition cases numbered 12,938, 52.3% of federal civil cases; in 1920, the total number of federal civil cases was just 5,526. *Id.* at 7.

26. See U.S. Dep’t of Com., HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, pt. 1, ser. H 971–986 (1975) (indicating that the number of homicides increased practically every year during Prohibition, rising from 5,815 in 1920 to 12,124 in 1933).

27. See, e.g., The FBI and the American Gangster, 1924–1938, FED. BUREAU INVESTIGATION, <https://www.fbi.gov/history/brief-history/the-fbi-and-the-american-gangster> (last visited May 16, 2026) (“In one big city alone—Chicago—an estimated 1,300 gangs had spread like a deadly virus by the mid-1920s. . . . Dealing with the bootlegging and speakeasies was challenging enough, but the Roaring Twenties also saw bank robbery, kidnapping, auto theft, gambling, and drug trafficking become increasingly common crimes.” (internal quotes omitted)).

subject to criminal investigations prior to Prohibition. Part II proceeds by examining how the lower federal courts interpreted the interaction between the Fourth Amendment and the Eighteenth Amendment and its enforcing act. Part III discusses the Supreme Court's holdings in the area.

I. THE PRE-PROHIBITION CONSTRUCTION OF THE FOURTH AMENDMENT

*Any beginning schoolboy knows
there is an Eighteenth Amendment—
and if there is an Eighteenth there must be a Fourth.*

—Arthur Chapman, *The Newly Discovered Fourth Amendment*,
N.Y. TRIB., Sep. 25, 1921, at 53

To understand how the Eighteenth Amendment altered conceptions of the Fourth Amendment, it is necessary to peek at the early twentieth century view of criminal investigation jurisprudence. The rule that evidence obtained in violation of one's rights should be excluded from being used against them at trial—the exclusionary rule—has been a fixture of federal criminal law for over one hundred years, but at the beginning of Prohibition, it was novel. Also relatively novel was the fact of the Supreme Court interpreting the Fourth Amendment at all. The first two decisions of the Court substantially interpreting the Fourth Amendment were handed down in 1878²⁸ and 1886,²⁹ long after the Amendment entered the Constitution.³⁰

By the time of Prohibition, Fourth Amendment protections were amalgamated with the Fifth Amendment protection against self-incrimination. The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³¹

28. *Ex parte Jackson*, 96 U.S. 727 (1878) (holding that the protections of the Fourth Amendment extended to sealed mail sent via the postal system).

29. *Boyd v. United States*, 116 U.S. 616 (1886).

30. *But see Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807); *Stacey v. Emery*, 97 U.S. 642 (1878).

31. U.S. CONST. amend. IV.

And the Fifth Amendment ratified alongside it,

No person . . . shall be compelled in any criminal case to be a witness against himself.³²

Neither provision denotes a remedy for a violation. Nor does either provision clearly reference the other.

Nonetheless, the Fourth and Fifth Amendments (and their remedies) became intertwined in the Supreme Court's second significant interpretation of the Fourth Amendment in *Boyd v. United States*.³³ In *Boyd*, the Court was faced with an importation of thirty-five cases of polished plate glass where duties had not been paid.³⁴ The government sought to obtain the invoices for the glass as evidence for their case against the importers for forfeiture of the glass.³⁵ The government cited a statute which authorized the collection of such evidence for civil and criminal penalties as well as forfeiture of the imported goods.³⁶ The Court found that forcing by government action (a subpoena) the production of a company's own invoices would be tantamount to compelling one to be a witness against himself and an unreasonable search and seizure, violating *both* the Fourth and Fifth Amendments even in a civil forfeiture action.³⁷ This liberal construction was not only helpful, but *required* to protect the rights themselves:

32. U.S. CONST. amend. V.

33. See *Boyd*, 116 U.S. at 633.

34. *Id.* at 617–19.

35. *Id.* at 619–20.

36. *Id.* at 619–21 (discussing the statute).

37. *Id.* at 633–38. The Court also stated, “proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offences committed by him, though they may be civil in form, are in their nature criminal.” *Id.* at 633–34. Recall that the Fifth Amendment privilege against self-incrimination specifically applies “in any *criminal* case.” U.S. CONST. amend. V (emphasis added).

It may be that [the search and seizure here] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.³⁸

The Court then invalidated the statute and stated that the admission of the invoice into evidence had resulted in *an unconstitutional proceeding*.³⁹ The holding also indicated that compelling one to turn over documents—even if the means of compulsion took the form of a court-reviewed subpoena—was a search or seizure within the meaning of the Fourth Amendment. Through *Boyd*, the Fourth and Fifth Amendments became doctrinally linked, with the strong suggestion that evidence obtained in violation of either right could not be utilized in court.⁴⁰ Besides suggesting the exclusionary rule, *Boyd* also demonstrated a mode of constitutional interpretation that would carry forward into the Prohibition Era. Parts of the Constitution were not siloed. Rather, they contemplated one another and were thus interactive.

Eleven years later, the Court confronted a case with a crime more significant than failing to pay import duties. *Bram v. United States* presented an instance of murder on the high seas.⁴¹ At midnight, First Officer Bram was assigned to take the deck.⁴² At two in the morning, passenger Lester H. Monks heard a scream followed by a gurgling sound.⁴³ He investigated, entering the captain's room and finding the captain dead on the floor, his cot overturned.⁴⁴ Such was only the beginning of Monks's traumatic discoveries. He next went to the captain's wife's room and found blood on her bed.⁴⁵ He then went abovedeck to fetch Bram and took him below with

38. *Boyd*, 116 U.S. at 635.

39. *Id.* at 638.

40. For a fascinating discussion on *Boyd's* role (and eventual decline) in Fourth and Fifth Amendment jurisprudence, see Note, *The Life and Times of Boyd v. United States (1886–1976)*, 76 MICH. L. REV. 184 (1977).

41. 168 U.S. 532 (1897).

42. *Id.* at 535.

43. *Id.*

44. *Id.*

45. *Id.*

a lantern to investigate the scene of the brutal crime.⁴⁶ As it would turn out, the captain was not the only victim; his wife and the second mate were later found dead as well, each with gashes carved through their skulls.⁴⁷ Bram took command of the ship for four days until another man, detained by the crew for the murders, told the others that he saw Bram kill the captain.⁴⁸ Bram was overpowered by the crew and brought off the ship in chains, claiming his innocence all the while.⁴⁹

Back on dry land, a police detective stripped and questioned Bram, inviting him to accept moral responsibility for the crime which he suggested involved multiple perpetrators.⁵⁰ Bram persistently denied any involvement but stated that he thought the man who claimed to see him kill the captain was the murderer.⁵¹ The trial court allowed the detective to testify to the conversation and Bram was subsequently found guilty and sentenced to death.⁵² The Supreme Court, reviewing the case, invoked *Boyd*, stating:

[B]oth [the Fourth and Fifth] [A]mendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.⁵³

Despite the seriousness of the crime, the Amendments were no less applicable in *Bram* than in *Boyd*. The Court held that no matter how slightly coercion was involved in obtaining Bram's responses, the existence of coercion *at all* meant his responses were not admissible at trial.⁵⁴ The language used by the Court was broad: "In this Court, the general rule that the confession must be free and voluntary—that is, not produced by inducements engendering either hope or fear—is settled."⁵⁵ Like in *Boyd*, the evidence could not be admitted without violating the Fourth and Fifth

46. *Id.*

47. *Id.* at 535–36.

48. *Id.* at 536.

49. *Id.* at 536–37.

50. *Id.* at 539.

51. *Id.*

52. *Id.* at 540–41.

53. *Id.* at 543–44.

54. *Id.* at 565.

55. *Id.* at 557–58. For a discussion of the Supreme Court's treatment of *Bram*'s seemingly broad protection of the Fourth and Fifth Amendments, see Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1234 (2001), and Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606–07 (2006).

Amendments. Showcasing the rarity of such issues rising to the Supreme Court prior to Prohibition, it would still take nearly two decades for the exclusionary rule to formally develop.⁵⁶

Finally, in 1914, the Supreme Court began requiring the exclusionary remedy in federal criminal prosecutions. The perfect case to mandate such a remedy was one where police had ostentatiously violated the rights of a criminal defendant. In *Weeks v. United States*,⁵⁷ Fremont Weeks was arrested without a warrant and had his home searched; police seized “all of his books, letters, money, papers, notes, evidences of indebtedness, stock, certificates, insurance policies, deeds, abstracts, and other muniments of title, bonds, candies, clothes, and other property in said home.”⁵⁸ Among those papers were lottery tickets and writings regarding the lottery which the government used in the prosecution of Weeks for the use of the postal system to distribute lottery tickets.⁵⁹ As in *Boyd* and *Bram*, the Court confidently vindicated the Fourth Amendment, stating, “[i]f letters and private documents can thus be seized and held and used in evidence . . . the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”⁶⁰ The Court held that the search of Weeks’s home and the taking of his papers violated his constitutional rights and required the exclusionary remedy.⁶¹ The Court was careful to circumscribe the remedy as limited to the federal government,⁶² a choice that would remain in force well after Prohibition, until 1961.⁶³

* * *

56. Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L.J. 536, 537 (1927) (“When, in 1886, the United States Supreme Court decided the *Boyd* case . . . the exigencies of a prohibition era could not have been foreseen. Cases in which evidence had been procured by unconstitutional searches and seizures were relatively infrequent.”).

57. 232 U.S. 383 (1914).

58. *Id.* at 387.

59. *Id.* at 386, 388–89, 399.

60. *Id.* at 393. The Court went further, stating that “[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.” *Id.* at 394.

61. *Id.* at 398.

62. *Id.* This choice had clear repercussions through the Prohibition Era, with many states allowing illegally seized evidence in state criminal proceedings. See *The Meaning of the Federal Rule on Evidence Illegally Obtained*, *supra* note 56 (discussing the variety of state approaches to illegally seized evidence).

63. *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring the exclusionary remedy in state prosecutions where the Fourth Amendment had been violated).

Over the span of almost thirty years, *Boyd*, *Bram*, and *Weeks* made evident that the Supreme Court was ready to unravel federal cases that utilized evidence gathered by Fourth Amendment violations—from cases of import tax evasion to triple homicide. During the period, no single item on the Fourth Amendment’s list of “persons, houses, papers, and effects” seemed to receive special treatment—all found protection under the promise of a liberal construction of the Amendment. Moving into the Prohibition Era then, a question loomed: How liberally would courts construe the Fourth Amendment, violations of which required impairing prosecutions, when the Constitution itself mandated the prohibition of alcohol?

II. ENFORCING THE EIGHTEENTH AMENDMENT IN THE LOWER FEDERAL COURTS⁶⁴

When men can seriously debate whether or not under the Eighteenth Amendment Congress is authorized to destroy the Fourth Amendment . . . a serious breach has been made in the fundamental law of the land.

—*The Sacred Law of Prohibition*, AMERICA, April 28, 1923, at 38

Beyond the holdings of the Supreme Court which often dominated the focus of law reviews of the era, those of the lower courts have great significance in demonstrating how the Eighteenth Amendment provided a constitutional, doctrinal mechanism for altering the meaning and protections of the Fourth Amendment. The first section of the Eighteenth Amendment, the Prohibition Clause, reads:

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.⁶⁵

64. The cases discussed in this section were identified through comprehensive searches of federal reporters for the period 1920–1935 (including two years after Prohibition to catch any straggler cases) using search terms including “Eighteenth Amendment,” “National Prohibition Act,” “Volstead Act,” “Fourth Amendment,” “unreasonable search,” “unreasonable seizure,” and “exclusionary rule.” However, the volume of Prohibition cases made exhaustive analysis impossible. Nevertheless, the cases presented here reflect a strand of legal thought that transcended circuits, geographies, ethnicities (as indicated by origin of last name), and political party of appointing President. Contemporary legal commentary is also examined that bolsters that finding.

65. U.S. CONST. amend. XVIII, § 1.

And the second, the Enabling Clause:

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.⁶⁶

Pursuant to the Enabling Clause, Congress preemptively passed the National Prohibition Act on October 28, 1919.⁶⁷ In the early Prohibition years, many courts construed the Amendment's provisions as explicitly modifying the protection of the Fourth and Fifth Amendments. But the relationship was not synergistic; that is, the Eighteenth Amendment did not peacefully coexist with the two amendments—it smothered them. A half-decade into Prohibition, Professor Thomas E. Atkinson noted in the *Michigan Law Review* that despite his opinion that Prohibition clearly did not modify the protections of the Constitution, there was evidence that *one* lower court had adopted such a view.⁶⁸

A. In the Federal District Courts

A succinct statement of the perspective of many of these lower courts can be appreciated in *Falstaff Corporation v. Allen*.⁶⁹ The case concerned whether the Eighteenth Amendment allowed Congress to pass a statute to confiscate and destroy liquor created for *medicinal purposes* (as opposed to *beverage purposes* as textually prohibited in the Eighteenth Amendment) in possession of someone who had, in the early years of Prohibition, obtained a permit from the Attorney General for that liquor.⁷⁰ Eastern District of Missouri Judge Charles Breckenridge Faris, later elevated to the Court of Appeals for the Eighth Circuit, declared:

66. U.S. CONST. amend. XVIII, § 2.

67. National Prohibition Act, Pub. L. No. 66-66, ch. 85, 41 Stat. 305 (1919).

68. Thomas E. Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748, 749 (1925) (citing *United States v. Bateman*, 278 F. 231 (S.D. Cal. 1922)).

69. 278 F. 643 (E.D. Mo. 1922).

70. *Id.* at 643–44, 649.

If so it be, that the power so conferred upon Congress by the Eighteenth Amendment had the effect to narrow, or impinge upon, or wholly wipe out, constitutional rights and guaranties heretofore deemed vested and inviolable, the situation may be regrettable, but it cannot be helped. The Constitution when amended must be construed as a whole. If later amendments destroy, impinge upon, modify, or wipe out old provisions, the newer provisions must stand, because they are the last utterance of the people, who reserve to themselves the right to change the organic law, in the way provided by the organic law itself. Of course, the Constitution, when amended, should, if possible, be so construed as to give effect to both the old and the new parts thereof; but if this be impossible, if the new inevitably and unquestionably changes old provisions and destroys antecedent guaranties, the only help for the situation is an amendment which will restore these rights and guaranties.⁷¹

Judge Faris thought it straightforward that the new Eighteenth Amendment, while only enacting a prohibition of intoxicating liquors “for beverage purposes,”⁷² gave Congress the authority to bar further activity related to liquor traffic for the purpose of enforcing the Amendment.⁷³ Moreover, asserting a due process violation for the taking of alcohol after the Eighteenth Amendment was “utterly futile” because accepting such a claim would rob the Eighteenth Amendment of “what it fairly and obviously mean[t]” as an instrument to effectively prohibit the sale and traffic of alcohol.⁷⁴

Only a day earlier, the Southern District of California noted a similar ripple effect of the Eighteenth Amendment on the Constitution.⁷⁵ In *United States v. Bateman*, the court stated in plain language that the Eighteenth Amendment had altered the meaning of the Fourth Amendment.⁷⁶ The new interpretation of “unreasonable searches and seizures” stemmed from the

71. *Id.* at 648–49.

72. U.S. CONST. amend. XVIII § 1.

73. *Falstaff*, 278 F. at 643–45.

74. *Id.* at 649 (“[U]pon the passage of the Act of November 23, 1921 (which outlawed a large quantity of beer thus made and held by complainant), [defendants] were threatening to destroy the same unless complainant dealcoholized it at once. . . . [S]uch loss, which, in my view, would have been tantamount to taking the property of complainant without due process of law”); see U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

75. *United States v. Bateman*, 278 F. 231 (S.D. Cal. 1922).

76. *Id.* at 233 (“The Eighteenth Amendment must be considered in determining the question of what is an unreasonable search and seizure. . . . If there were no Eighteenth Amendment to the Constitution to be enforced, the court might have an entirely different idea of what is an unreasonable search or seizure in this case.”).

reality of enforcing the Eighteenth Amendment. Everyone travelling anywhere in the country had become a potential constitutional violator, hiding intoxicating liquors in their cars, suitcases, and satchels.⁷⁷ Warrants for such searches were formalities that would render the Eighteenth Amendment unenforceable.⁷⁸ A person carrying liquor, whether on their person or in their bag or car, was not subject to the protections of the Fourth Amendment.⁷⁹ If such protections were provided, Judge Oscar A. Trippet opined, “the Eighteenth Amendment would have been stillborn.”⁸⁰

Hundreds of cars and thousands of containers had already been warrantlessly searched and seized without issue.⁸¹ For Judge Trippet, the failure of Congress to add additional protections in light of national prohibition meant that they had tacitly agreed that the Fourth Amendment would provide less protection: “[If it] was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures.”⁸² Fourth Amendment jurisprudence was fundamentally altered to allow for post hoc reasonableness; it was now the case that the “finding of the liquor justifies the search.”⁸³

Atkinson (and decades later Murchison) attempted to claim the kind of perspectives espoused by Judges Faris and Trippet as aberrational.⁸⁴ Yet many district courts throughout the country were reconceptualizing their interpretations of the Fourth and Fifth Amendments to accommodate the Eighteenth.

In the District of Montana, Judge Bourquin, a jurist unmistakably concerned with federal prohibition enforcement,⁸⁵ held that unlawful arrests could not prevent the introduction of liquor into evidence because all liquor in transportation was forfeited to the United States government “the moment defendants embarked upon the unlawful transportation” under the National

77. *Id.* at 234.

78. *Id.*

79. *Id.* (“If an automobile, a suit case, satchel, tin container, jug, or bottle could not be taken away without a search warrant, they could not be seized at all Before a search warrant could be obtained, of course, the effect to be searched would be out of reach.”).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 235. This rhetoric was not unique to federal cases and was adopted in the highest courts of some states. *See, e.g.,* *Tranum v. Stringer*, 113 So. 541, 543 (Ala. 1927) (“In dealing with the individual case the fact that the automobile upon search is found to be transporting contraband liquors is of decided weight in passing upon the reasonableness of the search without warrant.”).

84. Atkinson, *supra* note 68, at 749 n.6 (citing only two examples of cases in which courts appreciated the change in Fourth and Fifth Amendment jurisprudence as a result of the Eighteenth Amendment); Murchison, *supra* note 18, at 522 n.297 (citing the same two cases).

85. *See* discussion *supra* accompanying notes 6–9.

Prohibition Act.⁸⁶ And one could have no Fourth Amendment interest in something that was not theirs.

More broadly, the National Prohibition Act's protections for the home, "private dwellings," with a warrant requirement⁸⁷ meant to many judges that the other enumerated categories were worthy of less protection⁸⁸—or, for the more zealous among them, that the definition of private dwelling needed constraining to enforce the Eighteenth Amendment.⁸⁹

The warrant requirement also begot other creative jurisprudence: probable cause itself would provide the grounds to enter a house to conduct an arrest, permitting a search incident to arrest of the home after the fact.⁹⁰ A Western District of Pennsylvania judge related that providing a liberal construction of the Fourth Amendment—requiring a warrant—would mean that federal judges were "aid[ing] or abet[ting]" in the commission of a crime.⁹¹ The Eighteenth Amendment was easily rallied to negate the interests of the Fourth when liquor law enforcement was at issue.⁹²

An especially innovative judge in the District of Rhode Island invoked the Amendment's purposes (and borrowed the words of his colleague Judge

86. *United States v. Fenton*, 268 F. 221, 222 (D. Mont. 1920) ("An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property [liquor], of which it is entitled to immediate possession, does not entitle the offender . . . to exclusion of its use in evidence against him.").

87. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919) ("No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor . . .").

88. *See, e.g., United States ex rel. Soeder v. Crossen*, 264 F. 459, 462 (E.D. Pa. 1920) (indicating that while dwellings are subject to Fourth and Fifth Amendment protections, vehicles are not due to the National Prohibition Act).

89. *See, e.g., O'Connor v. United States*, 281 F. 396 (D.N.J. 1922) (holding that the warrantless seizure of liquor in a back-office room of a saloon was not an unreasonable seizure because all liquor not in a private dwelling is forfeited to the government as of Prohibition); *United States v. Apple*, 1 F.2d 493, 493–94 (D. Mont. 1924); *see also* FORREST REVERE BLACK, *ILL-STARRED PROHIBITION CASES: A STUDY IN JUDICIAL PATHOLOGY* 134–36 (1931) (describing an unpublished case from the Eastern District of South Carolina's October 1925 term where Judge Ernest F. Cochran extended the logic of warrantless automobile searches to a houseboat on land).

90. *United States v. Borkowski*, 268 F. 408, 412 (S.D. Ohio 1920) (holding that police could warrantlessly enter a home upon smelling raisins cooking and search and seize incident to arrest of the people therein); *cf. United States v. Lorenz*, 17 F.2d 829, 829–30 (D. Mont. 1927) (permitting warrantless searches of three private dwellings where the odor of liquor provided probable cause).

91. *United States v. A Quantity of Contraband Liquor & Miscellaneous Articles*, 47 F.2d 321, 327–28 (W.D. Pa. 1930).

92. *See United States v. Hilsinger*, 284 F. 585, 588 (S.D. Ohio 1922) ("On the one side stand the fundamental rights of which I speak, upon the other side stands the impossibility of enforcing the Eighteenth Amendment and the law . . ."), *aff'd*, 2 F.2d 241 (6th Cir. 1924); *United States v. Ashworth*, 7 Alaska 64, 79 (D. Alaska 1923) ("The searches and seizures [of liquor] were plainly authorized and adapted to constitutional ends, in view of the Eighteenth Amendment . . ."); *United States v. Vatune*, 292 F. 497, 498 (N.D. Cal. 1923) ("[T]he real contention of defendant is that . . . the terms of the Fourth and Fifth Amendments actually protected him in the positive and flagrant violation of the Eighteenth Amendment.").

Bourquin over two thousand miles away) to justify a search of a private dwelling where there was suspicion of liquor *manufacture*, defying the plain language of the National Prohibition Act which only allowed warrants to issue for private dwellings where there was evidence of *sale*.⁹³ In the hands of federal judges, the Prohibition Clause could be weaponized to undercut protections of the principal statute passed under the Enabling Clause when a bootlegger might run free. Indeed, when a search turned up liquor, “whether a search warrant has issued or not,” that meant to some judges that a “seizure not only is legal but mandatory.”⁹⁴

93. *United States v. Nobriga*, 19 F.2d 92, 93–95 (D.R.I. 1927) (“To impute to Congress an intent to . . . put violations of [liquor statutes] beyond the pale of the law, is, as said in one case, ‘to charge it with an intent . . . to sanction the most pernicious evil of the day.’” (quoting *Apple*, 1 F.2d at 494)), *rev’d*, 22 F.2d 507 (1st Cir. 1927).

Judge Bourquin, likely because of his well-received zealotry, soon found himself much closer to Rhode Island, temporarily assigned to the District of New Jersey to help with its massive caseload. *Jurors Praise Judge Bourquin in Liquor Cases*, L.A. TIMES, Apr. 2, 1925, at 19; *Quits New Jersey Bench*, N.Y. TIMES, Nov. 19, 1931, at 25. In his brief time on assignment in New Jersey, Judge Bourquin, “disposed of more cases in his two months’ stay than usually were handled in a year. He assessed heavy fines and filled the jail in sentencing offenders, most of whom were tried for violation of the liquor laws.” *Quits New Jersey Bench*, N.Y. TIMES, Nov. 19, 1931, at 25. Some of the prosecutorial success in Judge Bourquin’s cases owed to the fact that in several liquor cases, Judge Bourquin stated “[t]he crimes have been proven,” prejudicing juries. *6 Wet Convictions Upset*, N.Y. TIMES, May 10, 1932, at 22. For Judge Bourquin’s most incendiary opinion in his time on the East Coast, see *United States v. Rogers*, 53 F.2d 874 (D.N.J. 1931), *aff’d in part sub nom. Mabee v. United States*, 60 F.2d 209 (3d Cir. 1932), *aff’d sub nom. Burkis v. United States*, 60 F.2d 452 (3d Cir. 1932), *aff’d sub nom. Strogan v. United States*, 60 F.2d 483 (3d Cir. 1932).

Judge Bourquin’s harshness on defendants did not mean he was soft on prosecutors. To the contrary, poor prosecutorial practice in Bourquin’s courtroom resulted in so many findings of contempt that *Washington Post* claimed, “it is probable no other judge has fined so many district attorneys.” *Speedy Judge in Senate Race a Zestful Critic*, WASH. POST, June 3, 1934, at 6.

94. *See, e.g., United States v. Charles*, 8 F.2d 302, 302–03 (N.D. Cal. 1925).

Of course, some judges attempted to stop the onslaught against the Fourth Amendment,⁹⁵ but the rhetoric of the pro-enforcement judges seemed to win out. As Alaska territorial Judge Gudbrand J. Lomen put it in 1923, only three years after the start of Prohibition, “[t]he courts have held that the Fourth Amendment must be construed in the light of the Eighteenth Amendment.”⁹⁶

Even if courts never adopted the position that the Eighteenth Amendment meant an implied repeal of the Fourth and Fifth Amendments,⁹⁷ taking that particular position is not essential to maintain the claim that courts changed Fourth and Fifth Amendment jurisprudence in the shadow of the Eighteenth Amendment. As one comment in a 1925 volume of the *Yale Law Journal* observed,

95. See, e.g., *United States v. Rykowski*, 267 F. 866 (S.D. Ohio 1920) (“The Eighteenth Amendment to the federal Constitution is as sacred as the Fourth and Fifth Amendments, but no more so. They stand on an equality. There is no inconsistency between them.”); *United States v. Marquette*, 271 F. 120, 122 (N.D. Cal. 1920) (“The outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home.”); *United States v. Mitchell*, 274 F. 128, 129–30 (N.D. Cal. 1921) (similar); *United States v. Vallos*, 17 F.2d 390, 393 (D. Wyo. 1926) (“The Fourth and Fifth Amendments to the Constitution of the United States are as much a part thereof as the Eighteenth Amendment, and must be as equally observed.”); *United States v. Innelli*, 286 F. 731, 732 (E.D. Pa. 1923) (“Let it not be forgotten that there were prohibitions in the Constitution before the Eighteenth Amendment. Among them are the Fourth and Fifth.”); *United States v. Rembert*, 284 F. 996, 1004 (S.D. Tex. 1922) (“[It] cannot be the law in criminal cases that an illegal arrest or search could be legalized by the finding of evidence that a crime had been committed”); *United States v. Allen*, 16 F.2d 320, 322 (S.D. Fla. 1926) (“[I]t is incumbent upon those empowered to enforce the Eighteenth Amendment to be careful at the same time not to violate the rights guaranteed under the Fourth Amendment.”); *United States v. Falloco*, 277 F. 75 (W.D. Mo. 1922) (finding that the exclusionary remedy was required where there was collusion between federal and state officers and state officers engaged in the search); *United States v. Di Corvo*, 37 F.2d 124, 132–33 (D. Conn. 1927) (“[T]he barn was not the dwelling house of the defendants. But this [point] could become of importance only if the defendants had insisted upon immunity [under] . . . the National Prohibition Act. The Fourth Amendment throws a mantle of protection around ‘houses’ generally—not merely dwelling houses.”).

96. *Ashworth*, 7 *Alaska* at 71 (emphasis added).

97. So far as I can tell, such an argument was only raised in legal academic writing and was not advocated by the broader temperance movement. See, e.g., Frederic A. Johnson, *Some Constitutional Aspects of Prohibition Enforcement*, 97 *CENT. L.J.* 113 (1924) (arguing that the means used to obtain evidence in Prohibition cases will usually be unlawful due to the Fourth and Fifth Amendment protections, and thus the Eighteenth, the newer amendment, meant the implied repeal of earlier amendments which render it inefficacious).

The application of the federal [exclusionary] rule to these new conditions has not been easy. The purpose of the rule as an auxiliary to the Constitution has often been found incompatible with the task of enforcing present day laws, and courts have been willing to forego the former to accomplish the latter.⁹⁸

* * *

The role of the district courts cannot be overstated. As trial courts, they were presented with the first opportunities to determine the interaction of the Eighteenth Amendment and the exigencies of its enforcement with the Fourth Amendment. Moreover, several of their opinions found their way into briefings before the Supreme Court.⁹⁹ The district courts were also quickly inundated with vast numbers of alcohol-related cases. By 1921, federal criminal Prohibition cases numbered 21,297, about 45% of the federal district court criminal docket.¹⁰⁰ In 1929, the cases numbered 56,455, 66% of the federal criminal docket.¹⁰¹ District court judges found no respite from Prohibition in their handling of civil cases. The same year, there were 10,617 civil Prohibition cases, 50% of the federal government's civil district court docket—mainly padlock injunctions and forfeitures.¹⁰² In total, federal district judges were confronted with at least 659,333 criminal and 113,165 civil Prohibition cases.¹⁰³ There were also indeterminate numbers of associated cases that flowed from liquor manufacture and

98. *The Meaning of the Federal Rule on Evidence Illegally Obtained*, *supra* note 56.

99. *See, e.g., infra* Part III.A (discussing briefings in *Hester* and *Carroll*).

100. GEBHART, *supra* note 25, at 2.

101. *Id.*

102. GEBHART, *supra* note 25, at 5–8. *Cf.* above figures with numbers detailed *infra* note 103.

103. 1920 ATT'Y GEN. ANN. REP. 142 (7,291 criminal and 611 civil National Prohibition Act cases commenced); 1921 ATT'Y GEN. ANN. REP. 101 (29,114 criminal and 1,898 civil); 1922 ATT'Y GEN. ANN. REP. 82 (34,984 criminal and 2,137 civil); 1923 ATT'Y GEN. ANN. REP. 86 (49,021 criminal and 4,109 civil); 1924 ATT'Y GEN. ANN. REP. 120 (45,878 criminal and 5,741 civil); 1925 ATT'Y GEN. ANN. REP. 138 (50,743 criminal and 7,271 civil); 1926 ATT'Y GEN. ANN. REP. 132 (44,492 criminal and 8,642 civil); 1927 ATT'Y GEN. ANN. REP. 84 (40,709 criminal and 9,479 civil); 1928 ATT'Y GEN. ANN. REP. 92 (55,729 criminal and 9,928 civil); 1929 ATT'Y GEN. ANN. REP. 3 (56,786 criminal and 11,237 civil); 1930 ATT'Y GEN. ANN. REP. 110 (56,992 criminal and 11,882 civil); 1931 ATT'Y GEN. ANN. REP. 6 (57,405 criminal and 12,374 civil); 1932 ATT'Y GEN. ANN. REP. 8 (65,960 criminal and 15,455 civil); 1933 ATT'Y GEN. ANN. REP. 3 (57,553 criminal and 11,478 civil); 1934 ATT'Y GEN. ANN. REP. 3 (6,676 criminal and 923 civil). Note that these numbers only account for cases arising under the National Prohibition Act, not other liquor offenses.

trafficking: tax fraud,¹⁰⁴ racketeering,¹⁰⁵ homicides in defense of bootlegging,¹⁰⁶ kidnapping, and election fraud,¹⁰⁷ to give a few examples.

SEVEN SLAIN IN MASSACRE BY CHICAGO GANGSTERS

*Victims Stood Up Against Wall and
Mowed Down by Machine Guns;
Killers Coolly Drive Off*

Seven Slain in Massacre by Chicago Gangsters, L.A. TIMES,
Feb. 15, 1929, at 1¹⁰⁸

These massive increases in docket size foreclosed greater scrutiny into individual cases at the very moment when careful scrutiny was most needed, as searches and seizures multiplied exponentially. One federal judge, John F. McGee of the District of Minnesota, became known as the “bootlegger’s terror,” sentencing 112 defendants in 193 minutes—providing each defendant a little less than 2 minutes of attention.¹⁰⁹ But the terror of Prohibition was not felt by defendants alone in Judge McGee’s court. On February 15, 1925, Judge McGee’s daughter entered his chambers and

104. See, e.g., *United States v. Yuginovich*, 256 U.S. 450 (1921).

105. See, e.g., *Perry v. United States*, 18 F.2d 477 (8th Cir. 1927); *Hogan v. United States*, 48 F.2d 516 (5th Cir. 1931), *on reh’g*, 54 F.2d 924 (5th Cir. 1932).

106. See, e.g., *Jury Charges Murder in Dry Agents’ Deaths*, N.Y. TIMES, Jan. 24, 1930, at 19.

107. John Landesco, *Prohibition and Crime*, 163 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 126 (1932).

108. This story, published in the *Los Angeles Times*, concerned the infamous Saint Valentine’s Day Massacre, a sensational mass killing in Chicago. For a less sensational account of the facts from the period, see Calvin Goddard, *The Valentine Day Massacre: A Study in Ammunition-Tracing*, 1 AM. J. POLICE SCI. 61, 61 (1930).

109. *Federal Judge J.F. McGee Shoots Himself*, N.Y. TIMES, Feb. 16, 1925, at 1. Beyond the sheer volume of cases, Judge McGee was reputed for his harsh sentences. In 1923, he was noted as issuing “[t]he heaviest fines and the longest jail sentences ever recorded in Minnesota since the advent of national prohibition.” *Fines, Prison Terms Startle Rum Violators*, MINNEAPOLIS DAILY STAR, July 11, 1923, at 2. One of those records was ten years imprisonment for two counts of liquor possession. *Id.*; *cf. Limit in Rum Penalties Fixed by Judge M’Gee*, MINNEAPOLIS DAILY STAR, Apr. 24, 1923, at 13 (recounting that for Judge McGee’s first liquor cases, he gave prisoners the maximum fine, “a penalty exceeding in severity all records in Minneapolis.”).

found her father dead from a gunshot to the heart.¹¹⁰ In a handwritten note on his desk, Judge McGee reflected on the role that he found himself trapped in:

About Jan. 10, last, I finished the St. Paul term in a very much exhausted condition, both mentally and physically. I have . . . held court since I went on the bench in March, 1923, six days in the week instead of five, and seven and one-half hours per day instead of five, winter and summer, without vacation, the matters heard and submitted piling up except when taken home nights and Sundays and worked on there.

March, 1924, after one year of that sort of work, I practically collapsed but rested for a short time and when the April, 1924, term commenced, I went on with my work.¹¹¹

But the work did not stop, and Judge McGee, despite advice from others, forged on: “I thought how foolish to say rest with my desk drawers filled with undecided cases and demands daily made upon me for decisions . . . and then on for another year with no rest in sight.”¹¹² To Judge McGee, Prohibition had inexorably changed what it meant to be a federal judge, “the United States district court has become a police court for the trial of whisky and narcotic cases Those cases occupy 80 per cent of the court’s time and are exciting and trying on the nerves with the end not in sight.”¹¹³ The docket was insurmountable: “I started, in March 1923, to rush that branch of litigation and thought I would end it, but it has ended me.”¹¹⁴

* * *

By the waning years of Prohibition, sufficient time had passed for judges to master ruthlessly efficient prohibition enforcement. Judge Bourquin, grizzled by over a decade of experience in Prohibition cases, disposed of

110. See *Federal Judge J.F. McGee Shoots Himself*, *supra* note 109, at 1; *cf. Judge M’Gee’s Death is Laid to Overwork*, MINNEAPOLIS DAILY STAR, Feb. 16, 1926, at 1 (indicating cause of death as gunshot wound to forehead).

111. *Judge M’Gee’s Death is Laid to Overwork*, *supra* note 110, at 1.

112. *Id.* at 2.

113. *Id.*

114. *Federal Judge J.F. McGee Shoots Himself*, *supra* note 109, at 1. Despite his reputation in the space, McGee garnered respect among his defendants. At his funeral, a group of bootleggers provided a floral wreath and another was quoted in the press as stating “[h]e was against bootlegging and he didn’t make any secret of it. He was fighting in the open. He did a lot of good, too.” See *Omaha Bootleggers Send Floral Tribute to McGee Funeral*, MINNEAPOLIS DAILY STAR, Feb. 19, 1925, at 3.

defendants at a rate of two per minute, almost three times as fast as the “bootlegger’s terror.”¹¹⁵ As district court caseloads became disproportionately composed of cases involving liquor, judges were themselves judged on their stances in enforcing the Eighteenth Amendment and the National Prohibition Act—their performance reviews were not positive. As noted in the government’s 1931 Report on the Enforcement of the Prohibition Laws of the United States—two years before the repeal of the Eighteenth Amendment—“[t]here has been a general bad effect upon the whole administration of justice. There has been a tendency to appraise judges solely by their zeal in liquor prosecutions.”¹¹⁶ In enforcing the Eighteenth Amendment, federal district courts had been transformed from “impressive tribunals of superior jurisdiction” into “police courts.”¹¹⁷ And inevitably, that sheer volume of cases generated important doctrinal momentum. “Out of the mass of printed precedent,” the district courts began the project of crystallizing “a new federal rule defined to meet the needs of [P]rohibition.”¹¹⁸

115. *Speedy Judge in Senate Race a Zestful Critic*, WASH. POST, June 3, 1934, at 6.

116. NAT’L COMM’N ON LAW OBSERVANCE & ENF’T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 103 (1931) [hereinafter REPORT ON PROHIBITION].

117. *Id.* at 101. For a far more vivid and poetic contemporary description of this transformation, see H.L. Mencken, *Editorial*, 1 AM. MERCURY 161 (1924).

118. Comment, *Enforcing Prohibition Under the Federal Rule on Unreasonable Searches*, 36 YALE L.J. 988, 988 (1927).

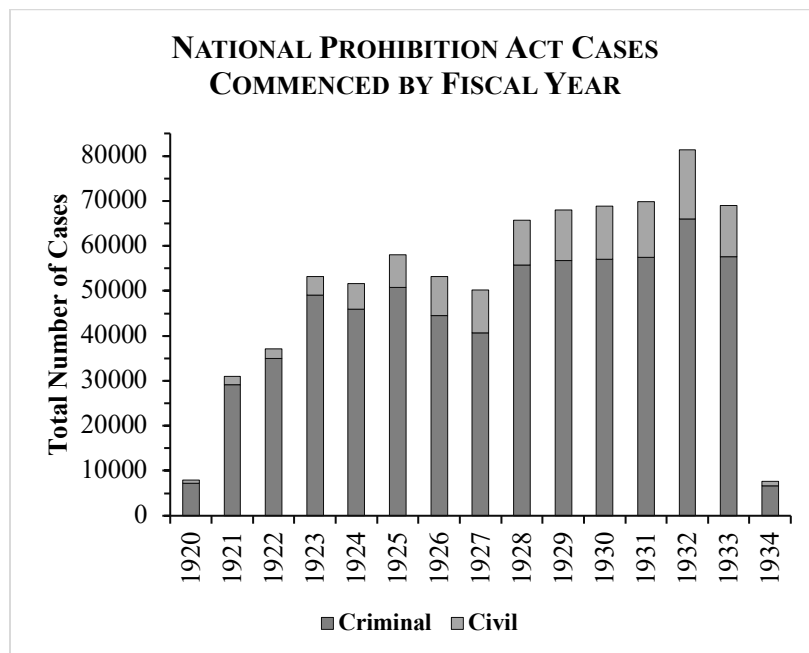


FIG. 1. NATIONAL PROHIBITION ACT CASES COMMENCED IN FEDERAL DISTRICT COURT BY FISCAL YEAR¹¹⁹

B. In the Federal Circuit Courts

Like many district courts, several circuit courts advanced the position that Prohibition altered the Fourth Amendment. In *Milam v. United States*, prohibition officers had notice a few days in advance that an automobile loaded with liquor would travel from Florida to Virginia.¹²⁰ Officers did not obtain a search warrant but instead camped in wait at a Virginia bridge they expected the automobile to cross.¹²¹ On the night of August 16, 1922, the officers conducted a warrantless stop of a truck crossing the bridge.¹²² The driver disclaimed that there was anything inside.¹²³ Opening the back of the truck, the officers did not find liquor; instead, they found eighteen undocumented Chinese immigrants.¹²⁴ The driver and immigrants were charged with conspiracy to “conceal, harbor, transport, and convey persons

119. Created using Reports discussed *supra* note 103.

120. *Milam v. United States*, 296 F. 629, 630 (4th Cir. 1924), *cert. denied*, 265 U.S. 586 (1924).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

of Chinese descent not duly admitted into the United States” and various other immigration offenses.¹²⁵

Milam is unique because it provided a test case whereby an appellate court was faced with a rationale to search (for liquor) which was not justified by the findings (not liquor). However, the Fourth Circuit was quick to point out the extraordinary transformation that the Eighteenth Amendment had worked on the Constitution:

The constitutional expression, “unreasonable searches,” is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in the light of the mandate of the Constitution that intoxicating liquors shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions and circumstances in the progress of the nation and the state.¹²⁶

The court further expounded that “[o]bjections to such searches made by officers with due courtesy and judgment generally come, not from citizens interested in the observance of the law, but from criminals who invoke the Constitution as a means of concealment of crime.”¹²⁷ Requiring a warrant meant the courts would be aiding the very crimes outlawed in the Constitution itself.¹²⁸ With this ardent rhetoric, the court upheld the constitutionality of the search on the grounds that searching for alcohol without a warrant was not an unreasonable search barred by the Fourth and Fifth Amendments.¹²⁹

With cases like *Milam*, the Fourth Circuit presented the view that many district courts throughout the country pushed: The Eighteenth Amendment was a part of the Constitution that necessarily modified Fourth Amendment protections.

125. *Id.* at 629–30.

126. *Id.* at 631; *cf.* *Elrod v. Moss*, 278 F. 123, 129 (4th Cir. 1921) (espousing this view in one of the Fourth Circuit’s first Prohibition Era liquor search and seizure cases).

127. *Milam*, 296 F. at 631.

128. *Id.* (“To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the courts in aid of the traffic outlawed by the Constitution.”).

129. *Id.* at 632.

But the Fourth Circuit was not alone in shifting Fourth Amendment jurisprudence to enforce the mandate of the Eighteenth. In *McBride v. United States*, the Fifth Circuit held there was no Fourth Amendment violation when prohibition officers trespassed past a property's gate, approached a stable on the property and, upon smelling whiskey, entered and opened a trapdoor inside, revealing two Black men and a still.¹³⁰ The court stretched the concept of searches incident to arrest to allow the officers' testimony about the search against the White estate owner. Despite recognizing that the officers trespassed onto the property while looking for violators of the National Prohibition Act before smelling any whiskey, the court held: "The entry on these premises and into the stable was not to search for evidence, but, upon ascertaining that whisky was in process of manufacture thereon, to arrest those engaged in the commission of an offense then in progress."¹³¹ In doing so, the Fifth Circuit signaled that prohibition agents could trespass onto properties, articulate a non-evidentiary reason for their presence, and then, when discovering evidence of an ongoing crime, search the property, rendering the initial entry reasonable or otherwise not part of the search. Here, like in *Bateman*, the finding of the liquor seemed to justify the search.

The trend of degradation of the Fourth Amendment continued. The Fourth Circuit extended *Milam's* doctrine to allow a warrantless search of a yard in a lot surrounded "on three sides by a high fence, with a barbed wire on top, and a wire fence in front" behind a store after warrantlessly searching the building and finding nothing.¹³² The Ninth Circuit greenlit the warrantless searches of a double-layered package within an automobile,¹³³ the cabinets behind the bar of a soft drink parlor,¹³⁴ and a car parked inside a basement garage of a home.¹³⁵ Following a string of apparently coordinated state and federal raids in Kentucky, the Sixth Circuit held that the fact that a federal officer accompanied state officers fell short of the "minimum of participation" that "could justify invoking the Fourth Amendment" in the first place.¹³⁶ (Recall that the Fourth Amendment had not yet been incorporated.) In Pennsylvania, after state troopers unlawfully seized a truck for use in a federal prosecution, the Third Circuit was faced

130. 284 F. 416, 416–17 (5th Cir. 1922), *cert. denied*, 261 U.S. 614 (1923).

131. *Id.* at 419.

132. *Jones v. United States*, 296 F. 632, 633–34 (4th Cir. 1924).

133. *Lambert v. United States*, 282 F. 413, 413–17 (9th Cir. 1922).

134. *Kathriner v. United States*, 276 F. 808, 809–10 (9th Cir. 1921).

135. *Earl v. United States*, 4 F.2d 532, 532 (9th Cir. 1925).

136. *Gatterdam v. United States*, 5 F.2d 673, 673–74 (6th Cir. 1925) (citing *Crawford v. United States*, 5 F.2d 672 (6th Cir. 1925)) (holding that defendants who had their property searched, including a house, by state officers were not subject to the protection of the Fourth Amendment).

with the same problem from the opposite angle.¹³⁷ No matter; the court held that even where state troopers were accompanied by federal officers, took the defendant before a United States Commissioner, and subjectively believed (“merely their personal opinion”) that they were enforcing the National Prohibition Act, those facts were not enough to “give a federal character to their action.”¹³⁸ The Fourth Amendment was therefore unavailable. Though not every circuit decision proved destructive to the Fourth Amendment,¹³⁹ many of them bound district courts therein to interpret searches and seizures in a manner that would enforce the mandate of the Eighteenth.

Sometimes, not even the home was sacred. The Eighteenth Amendment provided the Eighth Circuit justification to effectively dispose of the National Prohibition Act’s provision requiring warrants to search private dwellings for alcohol and allowing their issuance only when a dwelling was used for the sale of intoxicating liquors.¹⁴⁰ In *Wida v. United States*, officers without a warrant drove 120 miles to a home where they had “reasonable information” that the appellant was *manufacturing*, not *selling*, liquor.¹⁴¹ Upon arriving at the house, they smelled fermentation.¹⁴² When the appellant answered the door, he was arrested and questioned about the location of the alcohol.¹⁴³ The officers proceeded to search his home and basement, finding a still.¹⁴⁴

137. *Miller v. United States*, 50 F.2d 505, 507 (3d Cir. 1931).

138. *Id.* at 507–08.

139. *See, e.g., Murby v. United States*, 293 F. 849, 852 (1st Cir. 1923) (“We must enforce the Fourth and Fifth Amendments and statutes intended to protect rights thus guaranteed, as faithfully as we enforce the Eighteenth Amendment and the National Prohibition Act.”); *Peru v. United States*, 4 F.2d 881, 882 (8th Cir. 1925) (“[T]o enforce and give effect to the Eighteenth Amendment to the Constitution, the force of other amendments thereto should not be minimized. It is fully as important to enforce the Fourth and Fifth Amendments to the Constitution as it is to enforce the Eighteenth Amendment.”); *Kroska v. United States*, 51 F.2d 330, 333 (8th Cir. 1931) (rejecting the use of information obtained from entry into curtilage for probable cause for an automobile search); *Snyder v. United States*, 285 F. 1 (4th Cir. 1922) (refusing to allow a search of a person for alcohol based on mere suspicion). The *Snyder* court also noted “[t]hat [the bottle] happened in this instance to contain whisky, we think, neither justifies the assault nor condemns the principle which makes such an act unlawful.” 285 F. at 3.

140. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305, 315 (1919). Puzzlingly, the court also acknowledged the National Prohibition Supplemental Act, ch. 134, § 6, 42 Stat. 222, 223 (1921), which made it a misdemeanor for any “officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search.” Therefore, the court was well aware of the specific protections that the drafters of the National Prohibition Act intended but decided to sideline them in the practical interest of enforcing Prohibition.

141. 52 F.2d 424, 425–26 (8th Cir. 1931).

142. *Id.* at 424.

143. *Id.*

144. *Id.*

The Eighth Circuit held that there had been no unreasonable search or seizure.¹⁴⁵ The court, noting the special difficulties of prohibition enforcement, retorted to would-be critics that holding otherwise would mean “a man could openly and notoriously conduct a distillery in his own house which the officers might . . . absolutely know was there, and yet there could be no search of these premises because the officers were unable to prove a sale of liquor on or from the premises.”¹⁴⁶ With that, the court balked at the idea of requiring police officers to obtain a warrant to search a home for alcohol where they had probable cause, even when such a warrant was required and could not issue by the plain text of the National Prohibition Act.¹⁴⁷



PHOTOS OF HOME DISTILLERY in *Huge Still Uncovered by Raiders*, SHEBOYGAN PRESS, May 6, 1932, at 6¹⁴⁸

An Assistant United States Attorney’s statement in the *New York Times* from eight years earlier now appeared prophetic:

145. *Id.* at 426.

146. *Id.* at 425.

147. A similar rationale was provided for a home search in *United States v. Apple*, discussed *supra* Introduction. See 1 F.2d 493, 494 (D. Mont. 1924).

148. This home distillery, while not the one in *Wida*, demonstrates that homes could be an immense source of liquor traffic. The vats pictured in the left image contained “about 14,800 gallons of grain mash.” *Huge Still Uncovered by Raiders*, SHEBOYGAN PRESS, May 6, 1932, at 6.

For a hundred and forty-odd years, of course, we have had our Constitution, and in a vague way most people felt comfortable in the thought that under this document a man's home was, somehow or other, his castle. That castle was erected, however, many years ago; it seemed for a while after the commencement of the Volstead era that it had become antiquated and must crumble before the onslaughts of the minions of prohibition.¹⁴⁹

Even earlier, in 1921, editors for the Jesuit magazine *America* wrote similar predictions for Catholic religious Free Exercise rights,¹⁵⁰ citing the destruction of the Fourth Amendment among others as precedent: "The Eighteenth Amendment has already destroyed a right reserved under the Constitution to the respective States. . . . In many parts of the country it has destroyed the right guaranteed by the Fourth Amendment. The next extension will be to destroy the Mass."¹⁵¹ The article's title distilled the provocative question many Americans undoubtedly pondered: *Prohibition or the Constitution?*¹⁵² Of course, as the reasoning of many lower courts laid bare, this was oversimplistic. The choice was not between Prohibition or the Constitution: The Bill of Rights and the Eighteenth Amendment were equally part of it. Instead, the choice was how to balance the Eighteenth Amendment's "inflexible and perpetual war" against liquor against other parts of the Constitution that stood in the way of that crusade.¹⁵³

By the mid-1920s, the choices of lower courts in that balancing were widely felt. An Alabama farmer vented his frustration in a letter to the *Birmingham Post*: "They should have repealed the fourth amendment before passing the 18th. I am for 'liberty or death.'"¹⁵⁴ A Vermont editor similarly expressed, "[i]f prohibition enforcement is to be respected, there

149. Victor House, *Search and Seizure Limits Under the Prohibition Act*, N.Y. TIMES, Feb. 11, 1923, at 148. Such an appraisal of the protection afforded to the home was not isolated. See also MCGIRR, *supra* note 22, at 89–95 (describing the particularly egregious treatment of the homes of minority groups and noting that an editor of one African-American newspaper wrote "[a] man's home used to be his castle. Now it is the United States government's castle and the rights and privileges have been taken away").

150. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

151. *Prohibition or the Constitution?*, AMERICA, Aug. 20, 1921, at 425.

152. *Id.* at 424. I have written at length on the interaction of the Eighteenth Amendment, the National Prohibition Act's exemption for sacramental wines, and the Free Exercise Clause. See Mitchell A. Del Bianco, *Free Exercise on the Rocks: Religious Liberty in the Prohibition Era*, 13 DARTMOUTH L.J. (forthcoming).

153. S. Rep. No. 65-52, at 5 (1917).

154. *Farmers' Views on Prohibition Widely Varied*, BIRMINGHAM POST, June 25, 1926, at 9 (quoting Patrick Henry, Speech at the Second Virginia Convention (Mar. 23, 1775)).

must be respect shown for the fourth amendment.”¹⁵⁵ In Miami, a columnist railed against the state of policing and wrote exasperatedly, “[o]ne constitutional amendment cannot be invoked to cancel another. The two must harmonize. . . . For the sake of [Prohibition] itself[,] some of the enforcers must reform.”¹⁵⁶ A New Jersey reader of the *Brooklyn Citizen* blamed judges clearly and directly, “[t]he courts everywhere, . . . have whittled away this amendment until there is nothing left but protection of the home.”¹⁵⁷ Likewise, under a front-page headline blaring, “FOURTH AMENDMENT THREATENED,” an editor in Nebraska wrote, “[i]t has been decided by thinking men and by those who have had occasion to define our laws . . . that the eighteenth amendment . . . directly opposes the fourth.”¹⁵⁸ The editor had a threatening message for those “thinking men.” If the Fourth Amendment continued to be trampled, “our thinking people are willing to fight and die again [like the founding generation] to maintain its sacredness.”¹⁵⁹

* * *

When examining the Eighteenth Amendment and the National Prohibition Act, a not insignificant number of district and appellate courts modified their Fourth Amendment jurisprudence in ways that accommodated the mission of Prohibition enforcement. On one hand, the finding of alcohol often seemed to render warrantless searches for alcohol per se reasonable. On the other, holdings like *Milam* explicitly stated that the Eighteenth Amendment had changed what was a reasonable search even when no alcohol was found. The Supreme Court, though not as brazen in its language as many of the lower courts, also indicated that the Eighteenth Amendment altered the meaning of the Fourth Amendment and the Constitution more broadly.

155. *Search and Seizure*, RUTLAND DAILY HERALD, May 21, 1926, at 4.

156. *Illegal Dry Enforcement*, MIA. HERALD, Sep. 11, 1925, at 6.

157. William L. Fish, *Lawless Law Enforcement Only Hope of Prohibition*, BROOKLYN CITIZEN, Jan. 26, 1926, at 7.

158. *Fourth Amendment Threatened*, MEDIATOR, Feb. 6, 1925, at 1.

159. *Id.*

III. THE SUPREME COURT AND THE FOURTH AMENDMENT

*He may be guilty . . . and this is a whisky case,
but [sound] law must be written even in whisky cases.*

—Justice John Kennish,
Ex parte Creasy, 148 S.W. 914, 923 (Mo. 1912)

Even before it began deciding liquor search and seizure cases, the Supreme Court was clear that the Eighteenth Amendment had altered the fabric of the Constitution. In the early days of Prohibition, the Court expressed that constitutional changes were required for the country to adapt to “the progress of time and the development of new conditions.”¹⁶⁰ In the *National Prohibition Cases*, confronted by challenges to the legitimacy of the Eighteenth Amendment, the Court made plain that alcohol prohibition was part of the supreme law of the land following its proper integration into the Constitution.¹⁶¹ No legislature, court, public officer, or individual could violate the Prohibition Clause.¹⁶² The Eighteenth Amendment also granted a new power to Congress by its Enabling Clause, allowing the legislature to take measures intended to further alcohol prohibition.¹⁶³ But more than that, new laws passed under the power would not simply fall within the authority of Congress; they would fulfill what the Court recognized as a “constitutional mandate.”¹⁶⁴

The Court was also clear from the beginning that the Eighteenth Amendment modified rights elsewhere in the Constitution. Regarding the

160. *Hawke v. Smith*, 253 U.S. 221, 226 (1920).

161. 253 U.S. 350, 386 (1920) (“That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.”); *see also* *United States v. Sprague*, 282 U.S. 716 (1931) (rejecting, in the waning years of Prohibition, further challenges to the Amendment’s enactment).

162. *National Prohibition Cases*, 253 U.S. at 386 (“The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits . . .”).

163. *Id.* at 387. For an example of the new plenary power in use, *see James Everard’s Breweries v. Day*, where the Court held the 1921 Act Supplemental to the National Prohibition Act’s provision banning the prescription of malt liquors a valid use of the power. 265 U.S. 545 (1924). *See also* *Lambert v. Yellowley*, 272 U.S. 581 (1926) (finding the same for the barring of liquor prescriptions in certain amounts); *Selzman v. United States*, 268 U.S. 466, 468–69 (1925) (holding the coverage of denatured alcohol not fit for consumption and poisonous to the consumer by the National Prohibition Act was valid under the “power of the federal government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale, and transportation of intoxicating liquor, [which] carries with it power to enact any legislative measures reasonably adapted to promote the purpose”).

164. *National Prohibition Cases*, 253 U.S. at 387.

Fifth Amendment's Takings Clause,¹⁶⁵ the Court held that there was no violation when the government seized alcohol manufactured prior to the Eighteenth Amendment. Arguably, prior manufacture rendered the alcohol beyond the scope of the National Prohibition Act passed under a prospective-looking construction of the Eighteenth Amendment.¹⁶⁶ Instead, the Court declared that accepting a construction of the Eighteenth Amendment as limiting against such takings by the government of alcohol privately owned but stored by the government

would defeat the purpose of the act and its achievement of the mandate of the Constitution. That mandate is, as will be seen by reference to section 1 of the amendment, 'that the transportation of intoxicating liquor within . . . the United States . . . for beverage purposes' shall be prohibited. And, as we have said, the [National Prohibition Act] declares (sec. 3) that all of its provisions shall be liberally construed 'to the end,' to quote its words, 'that the use of intoxicating liquor as a beverage may be prevented.'¹⁶⁷

Accordingly, the Court was willing to accept that a liberal construction of the National Prohibition Act was necessary to accomplish the goals of the Eighteenth Amendment despite the act's incursions on the Fifth Amendment's protection against takings.¹⁶⁸

The Court also made clear that implied repeal of statutes and treaties by the new constitutional provision, albeit unpreferred, was a natural

165. U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

166. *Corneli v. Moore*, 257 U.S. 491, 493–98 (1922). The appellant argued that his alcohol, stored in a bonded warehouse to be later taken home for personal use was allowed under the National Prohibition Act. *Id.* at 495–96. This was not a frivolous argument; the Court had earlier accepted that individuals could store alcohol in warehouses and retrieve it and transport it to the home for personal use without running afoul of the National Prohibition Act. *See Street v. Lincoln Safe Deposit Co.*, 254 U.S. 88 (1920).

167. *Corneli*, 257 U.S. at 496 (1922); *but see United States v. Katz*, 271 U.S. 354 (1926) (declining to construe provision of National Prohibition Act to permit prosecution of non-authorized sellers of alcohol for failure to keep record of sales).

168. Yet the Court did reject the government's argument of implied repeal of the Takings Clause in this context. The Court noted that the government's construction was "contrary to the Fifth Amendment to the Constitution and that the Fifth Amendment [was] not repealed by the Eighteenth Amendment," issues "answered in all their phases by the *National Prohibition Cases*." *Corneli*, 257 U.S. at 498.

consequence of the constitutional evolution that had taken place.¹⁶⁹ To the Court, the Eighteenth Amendment represented a “great revolution” which was “obviously meant to upset a good many things on as well as off the statute book.”¹⁷⁰

In only two years, the Court had firmly established that the Eighteenth Amendment could bend other constitutional provisions¹⁷¹ and correspondingly recognized the Amendment as revolutionary. The Court’s jurisprudence also respected the dictates of section thirty-five of the National Prohibition Act, which mandated the repeal of all provisions of law inconsistent with it.¹⁷² Notably, implied repeal was not entertained in cases where it would have constrained the government’s ability to prosecute liquor cases.¹⁷³ The National Prohibition Act itself was “comprehensive and disclose[d] a legislative purpose fully to enforce the prohibition declared by the Eighteenth Amendment.”¹⁷⁴

In the early part of the 1920s, the Court took a number of Fourth Amendment cases not pertaining to alcohol in which it continued to occupy its traditionally protective role. In the 1920 case of *Silverthorne Lumber Co.*

169. *Grogan v. Hiram Walker & Sons*, 259 U.S. 80, 89 (1922) (“The routine arguments . . . the repeal of statutes and a fortiori of treaties by implication is not to be favored. . . . We appreciate all this, but are of opinion that the letter [of the law] is too strong in this case.”); *cf. Ford v. United States*, 273 U.S. 593 (1927) (illustrating the deference given to a treaty which would allow the search and seizure of vessels in international waters thought to contain liquor); *Cook v. United States*, 288 U.S. 102, 119 (1933) (“The purpose of the provisions for seizure in section 581, and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty.”).

170. *See Grogan*, 259 U.S. at 89; *see also Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 129–31 (1923) (recognizing the Eighteenth Amendment’s revolutionary impact and noting that the “sanction of antiquity, generality and statutory recognition” was not enough to allow ships sailing within the United States’ jurisdictional waters to carry stores of liquor). In *Cunard*, Justice Sutherland’s dissent highlights that the majority’s interpretation of the Eighteenth Amendment granted power not contemplated by Congress and the states to prohibit alcohol outside the United States itself. *Id.* at 132–33.

171. *See also United States v. Constantine*, 296 U.S. 287, 294–95 (1935) (suggesting that the Eighteenth Amendment, while in effect, provided Congress the power to constitutionally utilize alcohol taxes as penalties exceeding the ordinary scope of the taxing power).

172. National Prohibition Act, ch. 85, tit. II, § 35, 41 Stat. 305–323, 317 (1919) (“All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency . . .”). Importantly for tax evasion cases, the section also provided that the statute “shall not relieve anyone from paying any taxes or charges imposed upon the manufacture or traffic in such liquor.” *Id.*

173. *See Gen. Motors Acceptance Corp. v. United States*, 286 U.S. 49 (1932) (declining to extend implied repeal by the National Prohibition Act in a scenario that would have limited the government’s choices of law for asset forfeiture of liquor law violators); *McCormick & Co. v. Brown*, 286 U.S. 131 (1932) (declining to extend implied repeal to prior Congressional act that criminalized alcohol transport across state borders and affirming that the Eighteenth Amendment gave states the authority to legislate in ways that went beyond the provisions and contravened protections in the federal National Prohibition Act in order to enforce the Eighteenth Amendment).

174. *Donnelley v. United States*, 276 U.S. 505, 513 (1928).

v. United States,¹⁷⁵ the Court, staring at a *Boyd*-like scenario,¹⁷⁶ developed the fruit of the poisonous tree doctrine, affording the exclusionary remedy to byproducts, or *fruits*,¹⁷⁷ of violations of the Fourth or Fifth Amendment.¹⁷⁸ Where “any advantages” were gained stemming from an initial unconstitutional search, the government was not allowed to rely on them.¹⁷⁹

Next, in the 1921 case of *Gouled v. United States*,¹⁸⁰ the Court was concerned with the surreptitious search by a military private who, at the direction of Intelligence Department officers, “under the pretense of a friendly call,” went into Gouled’s office and took possession of documents.¹⁸¹ The military private then “abstracted” the papers and his abstractions were utilized at Gouled’s trial.¹⁸²

The Court recited the text of the Fourth and Fifth Amendments and cited *Boyd*, *Weeks*, and *Silverthorne*:

The effect of the decisions cited is: That such rights are declared to be indispensable to the ‘full enjoyment of personal security, personal liberty and private property’; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.¹⁸³

175. 251 U.S. 385 (1920).

176. The government had warrantlessly searched and seized papers and books which were returned, and then the trial court subpoenaed Silverthorne Lumber Company’s same books and documents. *Id.* at 390–91. Compare this with the facts of *Boyd*, discussed *supra* Part I. One initial difference is that in *Silverthorne*, the government first unlawfully searched and seized the items, but barring that, the same *Boyd* problem would have arisen.

177. Note that the phrase “fruit of the poisonous tree” was not coined until 1939 in *Nardone v. United States* by Justice Frankfurter who derived the idea from “the *Silverthorne* case.” 308 U.S. 338, 341 (1939).

178. *Silverthorne*, 251 U.S. at 385.

179. *Id.* at 391–92. The Court strongly vindicated the Fourth Amendment in rejecting the government’s argument to the contrary, stating that to hold only the initial wrongly obtained evidence inadmissible “reduces the Fourth Amendment to a form of words.” *Id.* at 392.

180. 255 U.S. 298 (1921).

181. *Gouled v. United States*, 264 F. 839, 839 (2d Cir. 1920).

182. *Id.* at 841.

183. *Gouled*, 255 U.S. at 304.

With that, it was evident the Court was still supplying a liberal construction of the Fourth Amendment with the aim of defending against its erosion by the judiciary or executive. The Court then declared that the surreptitious taking of documents by the government was a violation of the Fourth Amendment and that their derivative use in evidence against their owner was a Fifth Amendment violation per *Boyd*.¹⁸⁴ Notably, the Court had no reticence in finding the consensual (albeit under false pretenses) entry into the office and the abstraction of documents taken therefrom as within the scope of “searches and seizures.”¹⁸⁵

The Court also held that search warrants for homes and offices could only be issued when in the public interest, where the public has a right of possession of the property to be seized, or where police powers granted that the property inside may be taken.¹⁸⁶ These categories seemed to readily include the constitutionally prohibited intoxicating liquors. However, immediately after delineating those categories, the Court emphasized that those requirements were not limited to searches and seizures of any particular kind of property: “[t]here is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure.”¹⁸⁷ With language so broadly protective,¹⁸⁸ it appeared the Court was prepared to be a bulwark against the lower courts and prohibition agents overzealous in enforcing the law at the expense of the Fourth and Fifth Amendments.¹⁸⁹

184. *Id.* at 304–06.

185. *Id.* at 305–06.

186. *Id.* at 309.

187. *Id.* Murchison’s article ignores this in his review of *Gouled*, calling *Gouled* a “papers” case despite the Court making clear that its holding was intended to encompass all types of evidence. Murchison, *supra* note 18, at 483. An additional, subtler result of *Gouled*, later noticed by Justice Louis Brandeis, was that a search or seizure within the meaning of the Fourth Amendment occurred when “a friendly visitor abstracts papers from an office.” See *Olmstead v. United States*, 277 U.S. 438, 476 (1928) (Brandeis, J. dissenting).

188. Note, however, the slight carveouts to *Silverthorne* and *Gouled* that came shortly after in other non-alcohol-related Prohibition cases. *Burdeau v. McDowell*, 256 U.S. 465 (1921) (allowing evidence passed to police by a private party, even if wrongfully obtained by the private party, to be used in criminal prosecution, and implicitly cabining the fruit of the poisonous tree doctrine to initial wrongful searches and seizures by police); *Essgee Co. of China v. United States*, 262 U.S. 151, 158 (1923) (permitting compulsory production of corporate documents not held by individuals qua individuals even where they may disclose the guilt of corporate officers who themselves hold the documents).

189. Fiery defenses of the rights seemed to be the norm in addressing police overreach to that point. See *Fed. Trade Comm’n v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924) (“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to . . . sweep all our traditions into the fire . . .” (internal citations omitted)).

The Court's first true liquor prohibition Fourth Amendment case accompanied *Gouled: Amos v. United States*.¹⁹⁰ In *Amos*, the defendant's wife was confronted by investigators claiming they were looking for evidence of "violations of the revenue law."¹⁹¹ She allowed them to search her and her husband's store and home.¹⁹² The investigators found alcohol inside the home under a quilt on the bed and in a barrel of peas in the store "within *his* curtilage."¹⁹³ The government introduced these findings at trial.¹⁹⁴ The Supreme Court thought the investigators' behavior toward the defendant's wife constituted "implied coercion," rendering the warrantless searches of the home and resulting seizures unconstitutional.¹⁹⁵ On its face, *Amos* seemed to indicate that the Court would maintain its role as a champion of Fourth and Fifth Amendment rights. However, *Amos* was not a difficult case because it concerned a warrantless search and seizure of areas that fell squarely within the text of the Fourth Amendment: areas inside the four walls of a person's house. Further, the National Prohibition Act—though passed after the search had occurred—confirmed continuity of that principle into Prohibition by expressly requiring warrants for searches of the home and forbidding them from being issued except where the home was being used for the unlawful sale of liquor.¹⁹⁶

Even with an expansive reading of the Eighteenth Amendment, the constraints enumerated in the National Prohibition Act barred any debate about the special carveout of protection for the home under the then-existing statutory regime.¹⁹⁷ Put another way, the Court acted to enforce alcohol prohibition consistent with the limits of the act effectuating the Eighteenth Amendment. Even viewed in a manner most charitable to the Court's Fourth and Fifth Amendment safeguarding role, *Amos* stood for the proposition that the coercion of a wife in the absence of her husband was not a permissible

190. 255 U.S. 313 (1921). I call this a *true* Prohibition case because it was the first time the Court addressed the alleged encroachment of Fourth and Fifth Amendment rights in a case involving an alcohol search and seizure. Note, however, that the search occurred before Prohibition, in 1919.

191. *Id.* at 315.

192. *Id.* at 315–16.

193. *Id.* at 314–15 (internal quotes omitted) (emphasis added). Also, the point on the store being within the curtilage was uncontested by the government in this case. See generally Brief for Defendant in Error, *Amos v. United States*, 265 U.S. 313 (1924) (No. 114). Even if it were, it would not likely have impacted the analysis in the way that occurred in *Hester v. United States*, discussed at length *infra* Part III.A, because the search of the store involved a search of effects: an almost half-pint of liquor was found in a barrel of peas. *Amos*, 255 U.S. at 315.

194. *Id.* at 314–15.

195. *Amos*, 255 U.S. at 317.

196. National Prohibition Act, ch. 85, tit. II, § 25, 41 Stat. 305–323 (1919).

197. *But cf. Wida*, discussed *supra* Part II.B (demonstrating that the National Prohibition Act could be construed to allow searches of the home where someone was "openly and notoriously" engaging in manufacture therein by invoking the purpose of the Eighteenth Amendment and the National Prohibition Act).

means to conduct a complete search of a home, at best a mild expansion of the Fourth Amendment's protections in 1920s America.¹⁹⁸

A. *Open Fields and Automobiles*

Three years after *Amos*, in 1924, the Court presided over its next alcohol search and seizure case. *Hester v. United States*¹⁹⁹ concerned what might have been considered a dramatic violation of a person's Fourth and Fifth Amendment rights under a different court.²⁰⁰ The case arose from the intense enforcement of the Eighteenth Amendment's mandate in South Carolina that forced the Western District of South Carolina to hold a "special term" in January 1923.²⁰¹ Charlie Hester's case was 1 of a batch of 160—almost all for violations of the National Prohibition Act—scheduled for trial between January 8 and January 24.²⁰²

On "information" police went to the Hester family home without a search or arrest warrant.²⁰³ They trespassed past a fence²⁰⁴ onto land owned by Charlie Hester's father and "concealed themselves from fifty to one hundred yards away" from the house on the property.²⁰⁵ Hiding beyond the fence and next to the Hester family's barn, the officers watched the back of the house.²⁰⁶ As one officer put it "The first thing I *seed* was Hester hand the [quart] bottle to Henderson."²⁰⁷ Thereafter, the officers alerted the men to their presence.²⁰⁸ At the time of the alert, the officer admitted that he could not recognize the liquor from the distance but thought it a reasonable assumption since he recognized Hester, stating, "I know his reputation."²⁰⁹ Hester and Henderson ran with an officer in tow, who fired his pistol, after

198. The Court also stated, "[w]e need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effected." *Amos*, 255 U.S. at 317; *see also* Atkinson, *supra* note 68, at 754 (implying that *Amos* was an easy case).

199. 265 U.S. 57 (1924).

200. Joshua Windham & David Warren, *Good Fences? Good Luck*, 47 Regulation 10 (2024) (demonstrating the differing opinions of several state courts and legislatures on *Hester*); *see also* *Oliver v. United States*, 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) (asserting that open fields are subject to Fourth Amendment protections).

201. *Big Docket for Special Term of U.S. Court Here Is Announced*, Greenville News, Dec. 22, 1922, at 2.

202. *Id.*

203. *Hester*, 265 U.S. at 58.

204. This detail is missing from the Court's recounting of the case. Transcript of Record at 16, *Hester*, 265 U.S. (No. 243) [hereinafter *Hester* Transcript of Record].

205. *Hester*, 265 U.S. at 58; *cf.* *Hester* Transcript of Record at 16, 19 (providing the testimony of the officer who stated he was "fifty to seventy-five yards" away on multiple occasions).

206. *Hester* Transcript of Record at 16.

207. *Id.* at 19.

208. *Hester*, 265 U.S. at 58.

209. *Hester* Transcript of Record at 20–21.

which Hester and Henderson dropped their whiskey-filled bottles.²¹⁰ Eight to ten other people on the side of the house were searched for “liquor and firearms.”²¹¹ The police then entered the house²¹² and found another jar outside which contained whiskey.²¹³

To Hester’s attorneys, the loss in district court notwithstanding, this seemed an easy case. In their seven-page brief to the Supreme Court, they string-cited *Boyd*, *Weeks*, *Silverthorne*, *Gouled*, and *Amos*.²¹⁴ Surely, the broad protections of the Fourth Amendment and its liberal construction had to protect the “little country home.”²¹⁵ Trespassers, police or otherwise, could legally be repelled with force—even deadly force if resistant—from every inch of one’s property; they had no right to be there, much less to investigate.²¹⁶ So confident were Hester’s attorneys that they ended their brief as follows:

[T]he proceedings . . . were in direct and positive conflict with the Fourth and Fifth Amendments and in conflict with the decisions of this Honorable Court. We are not attempting to furnish to the court an elaborate argument, literally saturated with State, Circuit and U.S. court decisions. We have only attempted to show the facts briefly, to point out the grievous errors below and ask and demand that, not only the rights of this humble defendant be protected, but the rights of all the American people be protected from unreasonable searches and seizures.²¹⁷

The government’s twenty-three-page brief was defensive, fighting for probable cause when Hester’s brief raised no such error, and asserting in the alternative that the evidence, even if unconstitutionally obtained, was still admissible in the form of testimony—an argument straightforwardly foreclosed by *Weeks* and *Silverthorne*.²¹⁸ Yet the government also found room in the law to go on the offensive. It took inspiration from the lower courts and cited cases, including *Bateman*, to imply that reasonableness had

210. *Hester*, 265 U.S. at 58.

211. *Hester* Transcript of Record at 21.

212. *Hester*, 265 U.S. at 58; *cf. Hester* Transcript of Record at 21 (“I then started to search the house . . .”).

213. *Id.*

214. Brief for Plaintiff in Error at 5, *Hester v. United States*, 265 U.S. 57 (1924) (No. 243) [hereinafter *Hester’s Brief*].

215. *Id.* at 4.

216. *Id.* at 6–7.

217. *Id.* at 7.

218. Brief for Defendant in Error at 8–19, *Hester v. United States*, 265 U.S. 57 (1924) (No. 243) [hereinafter *Government’s Brief in Hester*].

shifted in the context of searching for intoxicating liquors.²¹⁹ Similarly, the government asserted a logic that percolated in some lower courts that made virtually any seizure of liquor reasonable: because alcohol was illegal and Hester had no property rights in intoxicating liquors as contraband, the government, even before the bottles were thrown, had the right to seize them as the only party with a “legitimate and proper interest” in them.²²⁰ The government’s least fleshed out reason for the constitutionality of the search was that there had been no search or seizure at all.²²¹

The Court latched onto that final argument. In an opinion limited to a single paragraph, Justice Oliver Wendell Holmes, Jr. wrote that the testimony of the two prohibition officers could be utilized at trial.²²² The Court stated, “[i]t is obvious that even if there had been a trespass, [the testimony to those facts] was not obtained by an illegal search or seizure.”²²³ Further, the Court held that by dropping the containers of alcohol, the men had abandoned them so there was “no seizure in the sense of the law.”²²⁴ By this point in the short opinion, the Court indicated insult at the fact the case was appealed. It was “immaterial” to discuss the entry of the house; the “suggestion that the defendant was compelled to give evidence against himself d[id] not require an answer.”²²⁵ To the Court, the sole question worth investigating at all was whether the examination of the vessels on Hester’s father’s land was covered by the Fourth Amendment, and even that constituted a “shadow of a ground for bringing the case up.”²²⁶ With a minimum of explanation, the Court held that “open fields” were not covered by the Fourth Amendment because they were apparently distinguished from

219. *Id.* at 9. Recall that *Bateman* is the case that outright posited the Eighteenth Amendment had changed the meaning of the Fourth Amendment. *United States v. Bateman*, 278 F. 231 (S.D. Cal. 1922); *see also Lambert v. United States*, 282 F. 413 (9th Cir. 1922).

220. Government’s Brief in *Hester* at 18–19. Amongst other cases, the government cites *Fenton*, quoted *supra* note 86, which radically held that even if an arrest occurred unlawfully, liquor found therefrom was admissible as evidence because it is the government’s property per the National Prohibition Act. *See also United States v. Hilsinger*, 284 F. 585 (S.D. Ohio 1922).

221. Government’s Brief in *Hester* at 7–8.

222. *Hester*, 265 U.S. at 59.

223. *Id.* at 58.

224. *Id.*

225. *Id.* at 58–59.

226. *Id.* at 59.

“persons, houses, papers and effects,”²²⁷ at common law²²⁸—a claim without support in the Court’s citation of Blackstone or history.²²⁹

Through its decision in *Hester*, the Court also narrowed what constituted a search or seizure. Trespassing onto one’s land and hiding near a home, then watching the activities immediately outside of it were not searches of the home, but at most searches of an open field,²³⁰ which was not included in the Fourth Amendment’s list of protected constructs. No inquiry into probable cause was necessary when officers came to a property with “information” and then saw an unidentified quart bottle change hands. Firing a gun and telling individuals to stop did not amount to coercion to give up the objects possessed by those individuals. Troublingly, the Court left open what constituted “open fields” and ignored that any area immediately outside the home could have been considered within the meaning of “houses” and the items immediately outside still as “effects.”²³¹

227. U.S. CONST. amend. IV.

228. *Hester*, 265 U.S. at 59. The lack of descriptiveness by the Court on this point has been noted by others. *See, e.g.*, T. Michael Goldey, Oliver and the *Open Fields Doctrine*, 7 CAMPBELL L. REV. 253, 256 (1984) (“The Court mentioned the existence of a distinction between an open field and a house by noting that the difference is as old as the common law, however, no explanation of the actual difference was given.”); *see also* Rowan Themer, *A Man’s Barn is Not His Castle: Warrantless Searches of Structures Under the “Open Fields Doctrine”*, 33 S. ILL. L.J. 139, 139–40 (2008) (illustrating how “open fields” have been construed to encompass structures, which are neither “open” nor “fields”).

229. Professor Chad Flanders has noted the Court’s assertion of a historical distinction for open fields from the house and its curtilage has no rooting in the text of Blackstone the Court cites. Chad Flanders, Collins and the *Invention of “Curtilage”*, 22 J. CONST. L. 755, 769–72 (2020). My own study of legal dictionaries, treatises, and cases from the period reveals that such a distinction likely cannot be found elsewhere. *See* Mitchell A. Del Bianco, *What is a House? An Exhibit Investigating Common Law Origins of the Open Fields Doctrine*, UVA Law Special Collections (Dec. 22, 2024), <https://archives.law.virginia.edu/exhibits/shaping-law-at-the-margins/del-bianco> [<https://perma.cc/YQ3X-A2S9>]; Mitchell A. Del Bianco, *What is a House?: Searching for the Meaning and Scope of Curtilage at Common Law*, 94 FORDHAM L. REV. ONLINE 138 (2026).

230. Note that the Court could have also called the officer’s actions in the fields a search. *See* discussion pertaining to *Olmstead* *infra* Part III.B.

231. Subsequent jurisprudence has addressed this by fleshing out a test for “curtilage” which is protected under the Fourth Amendment. *See e.g.*, *United States v. Dunn*, 480 U.S. 294 (1987) (providing a four-factor test). Curtilage was a concept that existed at the time of the decision. *Amos v. United States*, 255 U.S. 313, 313 (1921) (concerning “a search of defendant’s house and store ‘within his curtilage’”). Indeed, *Hester*’s attorneys referenced it in their brief and one portion of Blackstone’s commentaries cited by the Court states, “the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall.” WILLIAM BLACKSTONE, COMMENTARIES *225; *Hester*’s Brief at 6–7.

Curtilage was also protected in several state and federal courts with some care. *See, e.g.*, *United States v. Kaplan*, 286 F. 963, 965 (S.D. Ga. 1923) (“[T]he barn wherein the automobile was standing at the time certain papers were removed therefrom was within the curtilage, and the papers taken from the automobile shall be returned. It is held that the place where certain liquor was found was without the curtilage.”); *Childers v. Commonwealth*, 250 S.W. 106, 107 (Ky. 1923) (“Both the pond and the garden were appurtenant to and used in connection with the residence, and so closely situated thereto as to be a part thereof.”); *McClannan v. Chaplain*, 116 S.E. 495, 499 (Va. 1923) (“It is too manifest for further elaboration that the search without a warrant, of the plaintiff’s premises, remote from his home and curtilage, and not even in his personal presence, was not an ‘unreasonable’ search, and hence was not forbidden by the common law.” (emphasis added)).

Moreover, the Court ignored that its new doctrine created an anomalous carveout, privileging trespass onto private land and looking at items on that land beyond any ordinary search or seizure of a person's chattels.²³² Further, the Court's assertion that the men had *abandoned* the three containers of alcohol was strange, given that the men deposited the containers *on their property* which apparently extended far beyond where they dropped the containers.²³³ The Court, like the Fifth Circuit in *McBride*, had practically authorized officers to trespass onto the land on which one's home was located specifically to obtain evidence. Because there was no illegal search in trespassing into one's open fields, there could be no fruit of the poisonous tree in the evidence gathered therefrom, even if it was police who created the exigencies which somehow resulted in the abandonment of an effect on one's own property. This was not the liberal interpretation of the Fourth Amendment promised by the Court,²³⁴ but it was one that enforced the Eighteenth Amendment while conforming to the regulations of the National Prohibition Act by limiting the definition of the home to exclude much of the area around it.

After *Hester*, Prohibition roared on and violations of the law climbed. In 1924, there were 46,609 federal criminal Prohibition cases (63.9% of the docket) and 4,210 federal civil Prohibition cases (37.9% of the docket).²³⁵ These cases involved not just consumers of alcohol but also traffickers who realized "[t]he money to be made by violating the Eighteenth Amendment's proscriptions . . . was spectacular."²³⁶ Legislatures responded. Over a period of five months in 1925, Wayne B. Wheeler, renowned political operative and head of the Anti-Saloon League—the organization that drafted the Eighteenth Amendment²³⁷—reported the strengthening of dry laws in forty states and claimed Congress would be soon to follow, signaling lobbying

232. This unusual result was recognized at the time of the opinion's release. See Merwyn Grant Leatherman, *Search of Automobile Without Warrant—When Reasonable*, 23 MICH. L. REV. 891, 893 (1925) ("If outlying property is not included in effects, it seems to be the only exception made or found.").

233. *Hester* Transcript of Record at 19 (indicating that Hester was about 150–200 yards behind the house when he threw the jug).

234. Such was apparent at the time the decision was reported. Reviewing *Hester*, the *Virginia Law Register* observed:

It is quite refreshing every now and then to see Blackstone's Commentaries quoted, and the Supreme Court of the United States goes back to that venerable law writer in a case which at first sight looks as though it were in conflict with some of the earlier decisions of the Court in regard to the exclusion of evidence obtained by unlawful search.

Evidence—Liquor Taken without Warrant—Unlawful Search, 10 VA. L. REG. 281, 283 (1924).

235. GEBHART, *supra* note 25, at 2, 7.

236. OKRENT, *supra* note 22, at 157.

237. HAMM, *supra* note 23, at 229–30; see also Margot Opdycke Lamme, *The "Public Sentiment Building Society": The Anti-Saloon League of America, 1895–1910*, 29 JOURNALISM HIST. 123 (2003).

efforts to come.²³⁸ Wheeler stated his assessment of the temperance movement's force in the *North American Review*: "Election returns, showing increased numbers of dry candidates elected, and the popular vote in referenda on enforcement of the law, reveal the strength of the dry public sentiment. The law is not being enforced against the American people. It is being obeyed by the American people . . ."²³⁹ Wheeler continued—"and enforced against the un-American, the alien, the lawless and the vicious minority."²⁴⁰ That enforcement would increasingly occur on the nation's roads, where automobiles presented a primary means of liquor transportation and the next frontier for Fourth Amendment contraction.

The next Supreme Court Prohibition decision confronted an exercise of police power that put the Court's promise of a liberal construction of the Fourth Amendment to the test. As recognized by legal historian Sarah A. Seo, "[t]he convergence of Prohibition, the mass production of the automobile, and the rule of exclusion raised one of the most contentious questions in twentieth-century criminal procedure: when did the Fourth Amendment require a warrant to stop and search a car?"²⁴¹

Telegraphing its answer, the Court denied certiorari in *Milam*—the case where the Fourth Circuit sanctioned the warrantless search of a vehicle that disclosed undocumented Chinese immigrants hiding within²⁴²—indicating that courts might be allowed to enforce the Eighteenth Amendment at the expense of a liberal construction of the Fourth in the automobile context.²⁴³ Nevertheless, a year later, the contentious question still remained officially unanswered. The Court filled the void with its most significant Prohibition Fourth Amendment case, *Carroll v. United States*.²⁴⁴

In September 1921, agents attempted a controlled buy of alcohol that fell through; "the Carroll boys" never returned with the cases of alcohol the undercover officers had requested.²⁴⁵ The officers had, however, identified and recorded information about the car the Carroll boys came to the apartment in.²⁴⁶ In December, two and a half months after the initial failed sale, with no indication that the car was presently carrying alcohol, officers

238. Wayne B. Wheeler, *Gives Anti-Saloon Victories in 40 State Legislatures with None for Wet Side*, THE EVENING SUN, May 4, 1925, at 1, 2.

239. Wayne B. Wheeler, *Is There Prohibition? And to What Extent?*, 222 N. AM. REV. 29, 35 (1925).

240. *Id.*

241. SEO, *supra* note 22, at 119.

242. Discussed *supra* Part II.B.

243. *Milam v. United States*, 265 U.S. 586 (1924).

244. 267 U.S. 132 (1925). For a comprehensive look at the *Carroll* litigation, see SEO, *supra* note 22, at 113–15, 126–42.

245. *Carroll*, 267 U.S. at 133–35.

246. *Id.*

stopped it on the highway and proceeded to conduct an intrusive search, tearing up the upholstery and finding sixty-eight concealed bottles of liquor.²⁴⁷ After a failed bribe, the Carroll boys were arrested and charged with violations of the National Prohibition Act.²⁴⁸

This case was the vehicle through which the Court provided that only probable cause, not a warrant, was required to search automobiles—and that police officers, rather than magistrates, would have the first pass at determining whether they indeed had probable cause. At first pass, *Carroll* may be striking to modern readers because the Court found probable cause on weak facts (a failed alcohol sale over two months earlier) and merely asserted without discussion that a non-owner of a car cannot object to its search and the use of resulting evidence.²⁴⁹ However, the Court did something much more doctrinally significant. The Court did not straightforwardly find that the automobile created an exigency that made stopping a car with probable cause reasonable. That rationale would have gone something like: “Cars can quickly move between jurisdictions, so securing a warrant is impractical and thus searching based on probable cause is reasonable.” Rather, it found automobile searches reasonable by looking at the Eighteenth Amendment and National Prohibition Act²⁵⁰—the

247. *Id.*

248. *Id.* at 135–36.

249. *Id.* at 159–62. Nevertheless, at least one modern reader recognizes the Court’s framing of its decision as—at least in part—compelled by the Eighteenth Amendment. See G. EDWARD WHITE, 2 LAW IN AMERICAN HISTORY 300 (2016) (“[T]he Court decided to conform the ‘unreasonable’ search or seizure requirements of the Fourth Amendment to enforcement of the Eighteenth . . .”).

250. *Carroll*, 267 U.S. at 143–47. This approach was clearly at the forefront of Chief Justice William Howard Taft’s mind as he wrote for the majority, as in his private letters he wrote to Justice Willis Van Devanter, “I shall try to steer away from the suggestion that we are introducing any new law and new principle of constitutional construction, but are only adapting old principles and applying them to new conditions created by the change in the National policy which the 18th Amendment represents.” See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 123–25 n.406 (2006) (quoting Letter from William Howard Taft to Willis Van Devanter (Dec. 23, 1924)). Post notes that the day before, in a letter to his son, Taft had written that *Carroll* was “having to establish ‘some rather new principle.’” *Id.* (quoting Letter from William Howard Taft to Charles P. Taft II (Dec. 22, 1924)). Therefore, it was evident, at least to Taft, that the Eighteenth Amendment was being instrumentalized to change the reasonableness of a search.

approach suggested by the government’s briefing that quoted the lower court decisions in *Milam* and *Bateman*.²⁵¹

The Court examined legislative hearings around amendments to the National Prohibition Act which further codified the distinction between the searches of homes and other kinds of searches.²⁵² The Court acknowledged Congress’s view that the Fourth Amendment did not require a warrant in “many cases, and especially . . . in the enforcement of liquor legislation.”²⁵³ Further, they acknowledged the concern that an amendment to the National Prohibition Act penalizing warrantless searches beyond the home would “make it impossible to stop the rum-running automobiles engaged in like illegal traffic.”²⁵⁴ The Court proceeded to reconstruct the Fourth Amendment in light of the mission of the Eighteenth:

The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established. . . . Is such a distinction consistent with the Fourth Amendment? We think that it is. The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.²⁵⁵

Then, the Court revisited *Boyd*, *Weeks*, *Silverthorne*, *Gouled*, and *Amos* in quick succession to say that none of those cases concerned a search and seizure in the course of transportation, seemingly referring to the express

251. Substituted Brief for the United States on Reargument at 39–41, *Carroll v. United States*, 267 U.S. 132 (1925) (No. 15). The government stopped short of endorsing implied repeal but made clear that their interpretation was that the Eighteenth Amendment played a certain, clear doctrinal role in the Fourth Amendment analysis:

We do not contend that the Eighteenth Amendment must be enforced in such manner as to set aside the provisions of the Fourth, but we believe that *what is reasonable in the constitutional sense must be interpreted in the light of the fact that another constitutional provision of equal weight and importance* forbids the transportation of liquor. If the Eighteenth Amendment had forbidden only the manufacture and sale of intoxicating liquor, and the prohibition against transportation were contained only in an act of Congress passed for the purpose of carrying such amendment into effect, the question might be a materially different one.

Id. at 39–40 (emphasis added).

Additionally, like in *Hester*, the government’s position was one on the defensive in comparison to that of Carroll’s attorneys—as the content and lengths of the briefs reveal. Compare *id.* (providing an over one-hundred-page brief) with Brief for the Plaintiffs in Error on Reargument, *Carroll v. United States*, 267 U.S. 132 (1925) (No. 15) (providing a nineteen-page brief that addresses some of the arguments made by the government).

252. *Carroll*, 267 U.S. at 144–46.

253. *Id.*

254. *Id.* at 146.

255. *Id.* at 147.

prohibition of transporting liquor in the Eighteenth Amendment.²⁵⁶ Contradicting its prior cases, the Court seemed to state that the Fourth and Fifth Amendments were mercurial and subject to being reconstrued “in a manner which will conserve public interests as well as the interests and rights of individual citizens.”²⁵⁷ The Court finally remarked:

The main purpose of the Act obviously was to deal with the liquor and its transportation, and to destroy it. The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use. Section 26 was intended to reach and destroy the forbidden liquor in transportation.²⁵⁸

The Court thus made clear that its decision was necessary to enforce the Eighteenth Amendment. Like the lower courts, the Supreme Court suggested that searching for intoxicating liquors (“contraband goods”) seemed to justify the search.²⁵⁹ The constitutional right to be free from unreasonable searches and seizures was subject to the conservation of public interests—which now principally entailed the enforcement of the Eighteenth Amendment. While *Carroll* was consistent with the demands of the new amendment, its reasoning evoked the fears of the earlier *Boyd* and *Gouled* Courts: a “gradual depreciation” of civil protections,²⁶⁰ driven by the “imperceptible practices of courts.”²⁶¹

By the estimate of the *Baltimore Sun*, *Carroll* provided unassailable evidence that the Eighteenth Amendment was cannibalizing the rest of the Constitution.²⁶² The Court’s decision was formally sanctioning the status quo of overzealous alcohol policing that had developed by 1925.²⁶³ A note

256. *Id.* at 148–49. Recall that the Eighteenth Amendment prohibits the “transportation of intoxicating liquors within . . . the United States and all territory subject to the jurisdiction thereof.” U.S. CONST. amend. XVIII, § 1.

257. *Carroll*, 267 U.S. at 149.

258. *Id.* at 154–55.

259. *Id.* at 153; see BLACK, *supra* note 89, at 60–62 (demonstrating the connection of *United States v. Bateman*, 278 F. 231 (S.D. Cal. 1922), *United States v. Fenton*, 268 F. 221 (D. Mont. 1920), and *Carroll*). For a discussion of these lower court cases, see *supra* Part II.A.

260. *Boyd v. United States*, 116 U.S. 616, 635 (1886).

261. *Gouled v. United States*, 255 U.S. 298, 304 (1921).

262. *Has the Rest of the Constitution Been Repealed by the Eighteenth Amendment?*, BALTIMORE SUN, Mar. 4, 1925.

263. See *id.* at 10 (“[S]ome enforcement officers have been doing this all along . . . whenever they pleased. . . . The decision of the Supreme Court legalizes these highway hold-ups, and will . . . tend to increase them, if not to make them one of the rules of the road.”); but see *Andrews Upholds Search for Liquor in Boats and Autos*, N.Y. TIMES, Nov. 22, 1925, at 1–2 (indicating that the Treasury Department began requiring agents to search upon probable cause).

in the *Texas Law Review* expressed uncertainty about the balance struck by the Court, concluding that *Carroll* placed a “burden of unknown weight . . . upon the individual for the benefit of a newly appended amendment.”²⁶⁴ The author stated that the decision was a “decided back-swing of the pendulum” from the approach of cases like *Bram* which demanded that the Fourth and Fifth Amendments be interpreted as immune to legislative change.²⁶⁵ Instead, that principle of immunity had been subordinated to “conserve public interests as well as the interests and rights of individual citizens”—that is, the interests of citizens in enforcing national prohibition.²⁶⁶ Another author in the *Virginia Law Review* lamented the Court’s finding of probable cause and worried that *Carroll* could be interpreted to confer undue deference to officers in making such determinations.²⁶⁷ Yet another remarked that *Carroll* was decided by “‘liberal construction’ of the [National Prohibition] Act and strict construction of the Bill of Rights,” in shameless derogation of *Boyd*.²⁶⁸

Through *Carroll*, the Eighteenth Amendment and the National Prohibition Act transformed the roads of America into a place where police had essentially unchecked discretion to stop and search automobiles. If officers were ever challenged, their determinations of probable cause would be deferentially examined using a Fourth Amendment bearing a practical carveout for the effectuation of the Eighteenth. Near the end of the Prohibition Era, legal scholar Forrest Revere Black remarked:

264. John P. Bullington, *A New Interpretation of the Fourth Amendment*, 3 TEX. L. REV. 460, 469 (1925).

265. *Id.* at 469.

266. *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 149 (1925)). The author, despite his misgivings about the decision, also noted:

[T]he prevalent idea of the Anglo-Saxon spirit of “individual freedom before all” must be taken with many qualifications. It is to be remembered that the Eighteenth Amendment, imposed upon themselves by the people, is in itself a direct subduction of individual freedom. A very respectable argument might be advanced that the Eighteenth Amendment qualified the Fourth Amendment in so far as necessary for the complete realization of the former.

Id. at 471. Here again, legal minds seemed to consider that the Eighteenth Amendment was influencing Fourth Amendment jurisprudence in a principled, doctrinal manner.

267. Richard W. Hagan, Jr., Note, *Constitutional Law—Illegal Searches and Seizures*, 12 VA. L. REV. 573, 581–82 (1926) (“The license implied . . . would be in effect identical to the ‘general search warrant’ against which the Fourth Amendment was especially aimed. The Eighteenth Amendment is to be enforced with all rigor, but the guaranty of the Fourth Amendment in no respect is to be lessened to that end.”).

268. Sterling E. Edmunds, *Mining and Sapping Our Bill of Rights*, 16 VA. L. REV. 1, 17 (1929).

In the last decade, the American Government has been engaged in “the noble experiment” of enforcing constitutional prohibition. As the direct result of this effort it is being discovered that Bills of Rights, federal and state, are being denaturalized; certain old landmarks in the law are crumbling and the relation between the nation and the states is being altered.²⁶⁹

Black’s book traced those changes back to a single case: *Carroll*.²⁷⁰



STOP WHEN YOU SEE THIS SIGN, Aug. 25, 1930 (archived at Library of Congress)

After *Carroll*, the Fourth Amendment continued to be “denaturalized.” An officer’s asserted experience with liquor law enforcement could be

269. BLACK, *supra* note 89, at 15.

270. *Id.*

considered in determining whether they had probable cause to search.²⁷¹ And with federal dockets crowded by liquor law enforcement cases, there was more than enough experience to go around. Officers could also unlawfully destroy seized liquor upon finding it and use samples to prove illegal possession of liquor.²⁷² Illegally seized evidence could be used at trial if a defendant failed to object.²⁷³ Such a failure to object acted as a permanent waiver of a defendant's Fourth Amendment exclusionary remedy in their case.²⁷⁴ When busting speakeasies, items considered in the "immediate possession and control" of a person for the purposes of a valid search incident to arrest went beyond plain view liquor and items near a person to include effects as distant as a ledger in a closet and bills next to a

271. Compare *Steele v. United States*, 267 U.S. 498, 504–05 (1925) ("What Einstein saw and ascertained was quite sufficient to warrant a man of prudence and caution *and his experience* in believing that the offense had been committed . . ." (emphasis added)), with *Carroll v. United States*, 267 U.S. 132, 161 (1925) ("If the facts and circumstances before the officer are such as *to warrant a man of prudence and caution* in believing that the offence has been committed, it is sufficient." (emphasis added) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878))). The importance of such a finding becomes apparent in the context of *Steele*, where the sole basis for the prohibition agent's warrant affidavit was that he saw a truck driver unloading boxes that, according to the officer, "were the size and appearance of whisky cases and I believe that they contained whisky." 267 U.S. at 500. The Court did not rely on the *Steele* articulation of probable cause when probable cause was obvious. See *Dumbra v. United States*, 268 U.S. 435, 441 (1925) (reiterating the old test for probable cause where undercover prohibition agents negotiated multiple purchases of wine and watched the seller retrieve the wine at the grocery store searched).

272. *McGuire v. United States*, 273 U.S. 95 (1927).

273. *Segurola v. United States*, 275 U.S. 106, 111–12 (1927).

274. *Id.* at 112.

cash register, even after the arrestee was in the custody of four prohibition agents.²⁷⁵

With each opinion, the liberal construction of the Fourth Amendment appeared more a relic of the pre-Eighteenth Amendment Constitution. At one point, the Court seemed to outright repudiate its historic approach, speaking of the Amendment in terms concerned with its burden on law enforcement rather than as an essential right of individuals:

[W]e are concerned here not with [the officers'] liability but with the interest of the government in securing the benefit of the evidence seized, so far as may be possible without sacrifice of the immunities guaranteed by the Fourth and Fifth Amendments. A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility.²⁷⁶

275. *Marron v. United States*, 275 U.S. 192, 199 (1927) (“They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise.”). While there was a search warrant in the case that could have been used to support a plain view argument, the Court stated that the seizure of the ledger and bills was improper under the warrant. *Id.* at 198.

There were two liquor cases in this period that broke the streak of governmental victories, but they were not boons for civil libertarians of the era. *See Gambino v. United States*, 275 U.S. 310 (1927) (reversing a conviction where New York state officers stopped and searched an automobile without any state law authority). *Gambino*’s outcome, however, is not a repudiation of *Carroll*; the Court implies the facts were so clear as to the lack of probable cause that they were “unnecessary to detail.” *Id.* at 313. The transcript of record in the case confirms this—the only information the officers provided in the affidavit in support of their stop and search was that they saw a car, heavily loaded, traveling at twenty-five to thirty-five miles per hour, with license plates from a county in the central part of the state. Transcript of Record at 17, *Gambino*, 275 U.S. (No. 226). Nevertheless, because the Court refuses to recite and analyze the facts in the opinion, no descriptive modification was made to *Carroll*’s easily meetable standard of probable cause. The state of the lower federal courts is also revealed by the reality that the federal district court and Second Circuit found no issue with probable cause in this case. *See Gambino v. United States*, 16 F.2d 1016 (2d Cir. 1927).

The other case, *Byars v. United States*, required the exclusionary remedy in federal cases where federal officers assisted state officers who found evidence used in a federal prosecution through an unconstitutional search. 273 U.S. 28, 32–33 (1927). Note also that in *Byars*, which concerned an unconstitutional home search, the Court attempted to revive its image of safeguarding the Fourth Amendment. *Id.* at 33–34 (“The Fourth Amendment . . . is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.”). Despite that strong statement, the Court also held that the federal government was able to use unconstitutionally seized evidence by state officers so long as they were not involved in the investigation. *Id.* at 33.

276. *McGuire*, 273 U.S. at 99. The Court went out of its way to make this statement, as the liquor used in evidence in the case was completely distinct from that which was destroyed (which the Court itself observed). *Id.*

With the Eighteenth Amendment in play, a liberal construction of the Fourth Amendment was inappropriate and a close and literal approach preferable.²⁷⁷ The Court was well on its way in adapting the country to the new conditions imposed by the Eighteenth Amendment.²⁷⁸ However, there were some limits. More mindful of the boundaries set in the National Prohibition Act than several of the lower courts, the Court continued to provide distinct protection to the home.²⁷⁹

B. Whispering Wires

The Eighteenth Amendment continued to influence the Supreme Court's Fourth Amendment jurisprudence as national prohibition enforcement showed no signs of slowing. By the end of 1927, alcohol prohibition cases still made up the majority of the federal criminal and civil docket.²⁸⁰ Outright repeal was not yet a serious consideration. Most ordinary

277. Compare this approach with that of *Boyd v. United States*, 116 U.S. 616, 633 (1886), discussed *supra* Part I. See also *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (requiring a physical invasion of a constitutionally protected article or area for the Fourth Amendment to apply).

278. See *Hawke v. Smith*, 253 U.S. 221, 226 (1920).

279. See *Agnello v. United States*, 269 U.S. 20, 32–33 (1925). *Agnello* concerned an investigation for narcotics trafficking that culminated in a patently unlawful search of a home. *Id.* at 30–31 (indicating that *Agnello* was arrested several blocks away from his home and in custody when his home was warrantlessly searched). Nevertheless, the Court recognized the unlawfulness of the search in part by analysis that “[t]he search of a *private dwelling* is in itself unreasonable and abhorrent to our laws,” citing the National Prohibition Act and its supplemental act. *Id.* at 32–33 (emphasis added). One of *Agnello*'s less-noted holdings applied the fruit of the poisonous tree doctrine to prohibit the use of illegally seized evidence as rebuttal (at least to answers provided via cross-examination). *Id.* at 35. For a discussion of the dismantling of this holding, see the argument between the majority and dissent in *United States v. Havens*, 446 U.S. 620 (1980). For an applied synthesis of many of the holdings of the Supreme Court up to 1927, see *United States v. Lee*, 274 U.S. 559, 563 (1927).

Maul v. United States, also decided in 1927, permitted searches and seizures of vessels beyond the coast guard's normal twelve-mile jurisdiction. 274 U.S. 501 (1927). Because that case concerns an admiralty seizure and issues of jurisdiction beyond the Fourth Amendment, I do not address it here. See *The Underwriter*, 6 F.2d 937 (D. Conn. 1925), *rev'd*, 13 F.2d 433 (2d Cir. 1926), *aff'd sub nom. Maul*, 274 U.S. 501; see also *Dodge v. United States*, 272 U.S. 530 (1926) (ratifying a prior seizure without authority when the federal government later pursued forfeiture proceedings for the seized vessel).

280. GEBHART, *supra* note 25, at 2, 7.

Americans likely supported continuing prohibition in a loosened form, while a small group sought even stricter enforcement.²⁸¹

Interestingly, organized criminal empires also likely supported continued national prohibition due to the lucrative black-market opportunities it provided. Prohibition had “changed the organization and economics of illicit enterprise.”²⁸² Through a combination of bloody competition and cartelization, vice markets became monopolies. Bootleg kingpins oversaw vast commercial enterprises. Among them, the lawyer-bootlegger George Remus ran operations that grossed fifty million dollars annually and employed thousands.²⁸³ In 1933, Al Capone’s *take-home pay* was conservatively estimated by the Internal Revenue Service as about \$100,000 to \$200,000 annually, an amount roughly equivalent to \$2,500,000 to \$5,000,000 today.²⁸⁴ The illegal liquor trade in the United States was a behemoth—valued at two to three billion dollars annually by 1931, roughly forty-two to sixty-three billion modern dollars.²⁸⁵

One bust of this lucrative trade caught up former police lieutenant and then-“King of the Bootleggers”²⁸⁶ Roy Olmstead.²⁸⁷ Knowledgeable of the rules of evidence and operating in a state that criminalized wiretapping,²⁸⁸ Olmstead appealed a sensational case of “whispering wires”²⁸⁹ that

281. *Prohibition Poll is 84% Wet to Date*, N.Y. TIMES, Feb. 19, 1932, at 3 (indicating that in 1922, about 72% of respondents supported modification or stricter enforcement and in 1930, about 59% supported the same); *see also Near Tie on Bonus in Digest’s Ballot*, N.Y. TIMES, Aug. 14, 1922, at 5; *but see* H. H. Mitchell, *Prohibition and the Straw Ballot*, 35 SCI. MONTHLY 443 (1932) (criticizing the validity of the straw ballots and ultimately concluding that as of 1932, a clear majority would be in favor of modification to allow the sale of less-intoxicating liquors). Mitchell’s opinion was supported by Franklin D. Roosevelt’s brisk legalization of beer and wine with under 3.2% alcohol upon taking office. Beer Permit Act, Pub. L. No. 73-3, 48 Stat. 16 (1933). At the same time, polling by Literary Digest proved accurate regarding the later ratification of the Twenty-First Amendment despite the methodology of the polling. *See* Claude E. Robinson, *The Literary Digest Held Too Optimistic*, N.Y. TIMES, Mar. 12, 1933, at 57.

282. KEIRE, *supra* note 22, at 117, 121–22.

283. DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY, AND LAW 64 (1984). An interesting tidbit is that Remus was later prosecuted by William Howard Taft’s son, Charles Taft II, for the murder of his wife. *See Remus Near Blows with Prosecutors*, N.Y. TIMES, Nov. 19, 1927, at 19. Doubtless, criminals like these must have been on the minds of the Justices when they decided *Olmstead v. United States*, 277 U.S. 438 (1928) (*see* discussion *infra* Part III.B).

284. I.R.S., In Re: Alphonse Capone Report 2 (Dec. 21, 1933).

285. REPORT ON PROHIBITION, *supra* note 116, at 157.

286. William C. Lyon, *Seattle Rum ‘King’ to Have Rehearing*, N.Y. TIMES, Apr. 1, 1928.

287. *Olmstead v. United States*, 277 U.S. 438, 456 (1928) (recognizing Olmstead as the “leading conspirator and the general manager” whose operation grossed over two million annually).

288. Karen Abbott, *The Bootlegger, the Wiretap, and the Beginning of Privacy*, NEW YORKER (July 5, 2017), <https://www.newyorker.com/culture/culture-desk/the-bootlegger-the-wiretap-and-the-beginning-of-privacy> [<https://perma.cc/Z3P4-ZFHC>].

289. MABEL WALKER WILLEBRANDT, *THE INSIDE OF PROHIBITION* 232 (1930) (internal quotes omitted).

highlighted the role of the Eighteenth Amendment in altering Fourth Amendment jurisprudence.

Olmstead and ninety other defendants were indicted for conspiracy to violate the National Prohibition Act.²⁹⁰ The prosecution relied on transcripts of conversations obtained through the warrantless months-long wiretap surveillance of the defendants' homes and Olmstead's main office.²⁹¹

At the trial level, the wiretaps were cursorily dealt with by Western District of Washington Judge Jeremiah Neterer at two stages. First, the wiretaps, regardless of their propriety, could be used in the grand jury proceedings.²⁹² Then, at trial, evidence from the wiretaps could not be excluded because the interception of the telephone calls occurred beyond the four walls of the home and the defendants lacked any property right to the conversations themselves; the evidence was beyond the Fourth Amendment's scope.²⁹³ At bottom, the contention of unconstitutionality was incomprehensible to Judge Neterer, who "kn[e]w of no rule of law or evidence which would exclude [the evidence], and no decision which, even by inference, sustains the contention of the defendant [in favor of suppression]."²⁹⁴ Nevertheless, though indignant at the invocation of the Fourth Amendment to protect criminals, his conception of the bounds of the Amendment is a striking reminder of the constriction of its interpretation and scope to this point:

The Fourth and Fifth Amendments cannot be emasculated so as to give criminals carte blanche in the use of the public telephone utility, whether the conspiracy is to violate the Eighteenth Amendment and [National Prohibition] Act[,] or for the destruction of life or property, . . . These amendments do not make the walls of [a] house, or castle, co-extensive with the limits of the city, [s]tate, or nation, and give immunity. . . . [I]n light of the evil to be guarded against, which must be taken into consideration, such license cannot be given.²⁹⁵

And yet the irony was stark. Judge Neterer's rhetoric suggested that the Fourth Amendment had already been "emasculated" in another way. His invocation of "the evil to be guarded against"—including "conspiracy to

290. *Olmstead v. United States*, 19 F.2d 842, 843 (9th Cir. 1927).

291. *Olmstead*, 277 U.S. at 456–57.

292. *United States v. Olmstead*, 7 F.2d 756, 759 (1925).

293. *United States v. Olmstead*, 7 F.2d 760, 763 (1925).

294. *Id.* Decisions which support suppression, at least by inference, are cited *infra* note 311.

295. Mabel Walker Willebrandt, *Telephone Wires Tapped to Smash Liquor Ring*, L.A. TIMES, Aug. 19, 1929, at 3 (quoting Judge Neterer).

violate the Eighteenth Amendment”—tied its narrow construction to the national prohibition mandate. Further, in a world where private dwellings were the boundary carved out for protection under the National Prohibition Act, imagining the Fourth Amendment applied in Olmstead’s case required construction of a house encompassing an entire city. Olmstead was out of luck.

After Olmstead was convicted, he appealed on the theory that the transcripts should have been excluded because the wiretapping violated his Fourth and Fifth Amendment rights.²⁹⁶



OLMSTEAD RESIDENCE (1925) (*archived at Museum of History & Industry*)

Olmstead’s arguments found little reception at the Ninth Circuit.²⁹⁷ Wiretapping did not “come[] within the letter of the prohibition of constitutional provisions.”²⁹⁸ Listening was not searching and transcribing statements was not seizing. Nor did the government have to physically enter the home, an area protected by the National Prohibition Act and enumerated in the Fourth Amendment, to obtain the information. Judge Frank Rudkin dissented, examining wiretapping in a way that both invoked pre-Eighteenth Amendment jurisprudence and recognized the momentum of lower courts in its erosion:

296. See *Olmstead v. United States*, 19 F.2d 842 (9th Cir. 1927).

297. *Id.* at 848.

298. *Id.* at 847.

[T]here is a growing tendency to encroach upon and ignore constitutional rights. For this there is no excuse. . . .

But, whatever the tendency may be in the direction I have indicated, in other quarters, fortunately the Supreme Court has set its face against it. That court has consistently and persistently declared that the [Fourth and Fifth Amendments] must be liberally construed in favor of the citizen and his liberty, and that stealthy encroachments will not be tolerated. Nor are the guaranties contained in these amendments limited to houses and papers. Their chief aim and purpose was not the protection of property, but the protection of the individual in his liberty and in the privacies of life.²⁹⁹

Judge Rudkin and Roy Olmstead did not fully comprehend that the other judges on the panel—and the Justices of the Supreme Court—were not looking at the same Constitution anymore. The Eighteenth Amendment was now just as much a part of the Constitution as the Fourth. After the Court granted certiorari,³⁰⁰ Mabel Walker Willebrandt, Assistant Attorney General in charge of alcohol prohibition cases (who had remarkably argued over forty cases before the Supreme Court)³⁰¹ withdrew in protest of the government’s support of the “dangerous and unwarranted practice” of wiretapping.³⁰² Willebrandt knew the Supreme Court was being forced to make a decision it had already made again and again over the Prohibition Era: allow the flouting of the Eighteenth Amendment by finding a violation of the Fourth or conform the reading of the Fourth to vindicate the

299. *Id.* at 849 (Rudkin, J., dissenting).

300. As an aside, this is the first instance of the Court “us[ing] certiorari to take particular questions instead of reviewing a case as a whole.” Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 840 (2022). As Professor Johnson observes, differing perspectives over the scope of review using the writ colored the opinions of the dissenting Justices. *See id.* at 841–44.

301. *Celebrating the Women of the Department of Justice*, U.S. DEP’T OF JUST. (Mar. 15, 2012), <https://www.justice.gov/archives/opa/blog/celebrating-women-department-justice-0> [<https://perma.cc/N4R2-JC2U>]. Willebrandt’s arguments “set the basic interpretations of the scope of the . . . Eighteenth [A]mendment[] to the Constitution.” BROWN, *supra* note 283, at xi. For a contemporary, succinct summary of Willebrandt’s role in prohibition enforcement, see A.H. Ulm, *A Woman Directs the Dry Battle*, N.Y. TIMES MAG., Jan. 25, 1925, at 1, 22.

302. ROBERT C. POST, *THE TAFT COURT, MAKING LAW FOR A DIVIDED NATION, 1921–1930*, at 1063 (2024); WILLEBRANDT, *supra* note 289, at 232. Willebrandt later reflected on *Olmstead*, stating “[I] would still use my influence to prevent the *policy* of wire tapping being adopted as a prohibition enforcement measure, I nevertheless recognize the interpretation of the . . . Constitution against the lawbreaker and in favor of the government’s right to apprehend him, was a prohibition victory of no small proportions.” *See* WILLEBRANDT, *supra* note 289, at 237.

Eighteenth.³⁰³ Her decision to withdraw indicated an awareness of what the Justices would choose.

The outcome of Olmstead’s appeal was unsurprising provided the past eight years of prohibition-enforcing decisions handed down by the Court: Warrantless wiretaps did not violate the Fourth Amendment.³⁰⁴ The rationale, however, resembled that of *Hester* rather than the other Prohibition Era cases: the Fourth Amendment did not cover the actions taken by police here. The home was not the fields around it,³⁰⁵ nor the highways connecting them to society,³⁰⁶ nor the telephone wires extending from it.³⁰⁷ A close and literal interpretation of the Fourth Amendment meant that a *house* was the area within four walls and roof.³⁰⁸ It also meant that the core inquiry was whether people, by using telephones, intended to put their voices beyond those walls, not whether they had a reasonable expectation that their words would be private.³⁰⁹ Eavesdropping for months on telephone conversations and recording the words spoken was not a search.³¹⁰ *Boyd* could not help—the Court chose to take the “practical

303. That tension was becoming apparent to legal communities of the time. *See, e.g., State Bar to Fight to Modify Dry Law*, N.Y. TIMES, Dec. 11, 1927 at 22 (“the resolution follow[s]: ‘The Eighteenth Amendment is inconsistent with the spirit and purpose of the constitution of the United States and in derogation of the liberties of the citizens and rights of the States as guaranteed by the first ten amendments thereto.’” (quoting resolution of the New York City Bar Association)); Austin Haines, *The Crimes of Law Enforcement*, 33 NEW REPUBLIC 316, 316–18 (1923) (examining the bind of law enforcement to zealously enforce prohibition or respect fundamental rights and stating, “[a]ready many courts are growing tired of winking at such violations of fundamental rights and are making it more and more difficult to enforce prohibition.”). For more, revisit the footnotes accompanying the discussion of *Carroll* *supra* Part III.A.

304. *Olmstead v. United States*, 277 U.S. 438, 466 (1928).

305. *Id.* at 465 (citing *Hester v. United States*, 265 U.S. 57 (1924)).

306. *Id.* (citing *Carroll v. United States*, 267 U.S. 132, 149 (1925)).

307. *Id.*

308. *Cf.* Brief for the United States at 41, *Olmstead v. United States*, 277 U.S. 438 (1928) [hereinafter *Government’s Brief in Olmstead*] (“[C]learly the Constitution does not forbid [wiretapping] unless it involves actual unlawful entry into a house.”).

309. *Olmstead*, 277 U.S. at 466 (“The reasonable view is that one [using a telephone] intends to project his voice to those quite outside, [in an area beyond] the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.”). It is worth remembering that long before *Katz*, the latter approach could have been embodied by a liberal construction of the Fourth Amendment. *See id.* at 471–85 (Brandeis, J., dissenting); *Katz v. United States*, 389 U.S. 347 (1967) (formalizing the reasonable expectation of privacy test).

310. *Olmstead*, 277 U.S. at 464.

meaning” of *house* and *search*—no matter if they had long taken impractical meanings in non-liquor cases.³¹¹

Though the analysis could have ended there, with the actions of officers neither physically intruding upon the home nor a search, the Court appeared to deem the obtaining of evidence by conduct illegal under state law reasonable in any event.³¹² The balancing language of the Court resembled *Carroll*'s, that reasonableness be determined “in a manner which will conserve public interests.”³¹³ The Court was unequivocal:

[Excluding evidence] obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore . . . [T]hose who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.³¹⁴

At first glance, Chief Justice William Howard Taft's words seem like realist gold. The majority does not mention the Eighteenth Amendment and alcohol prohibition but rather general criminality. At the same time, the Court did not need to. In 1928, there was still little indication that the Eighteenth Amendment would be repealed entirely,³¹⁵ and alcohol prohibition cases still made up the majority of federal criminal and civil cases—even without considering any associated crimes.³¹⁶ In other words, behind *Olmstead* raged the continuing “inflexible and perpetual war against liquor.” It was with this backdrop that the Court cited its Prohibition Era liquor search and seizure precedent in discussing what constituted a house

311. *Id.* at 463–65; *cf.* *Gouled v. United States*, 255 U.S. 298 (1921) (finding a search where a surreptitious visitor *abstracted* from papers found in an office); *Ex parte Jackson*, 96 U.S. 727 (1878) (letters provided to the post are protected by the Fourth Amendment); *Bram v. United States*, 168 U.S. 532 (1897) (coercing a confession is a search and seizure); *Boyd v. United States*, 116 U.S. 616, 633 (1886) (lawful subpoenas to produce evidence are searches and seizures); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (same).

312. *Id.* at 468. This was especially questionable provided that the Court's analysis foreclosed a reasonableness analysis in other cases involving wiretapping because no search or seizure occurs. It also raises the question of why the Court chose to say, in essence, “no search here” rather than “the search here was reasonable.”

313. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

314. *Olmstead*, 277 U.S. at 468.

315. *See, e.g.*, HOWARD LEE MCBAIN, PROHIBITION: LEGAL AND ILLEGAL 17 (1928) [hereinafter MCBAIN, PROHIBITION].

316. *See* GEBHART, *supra* note 25, at 14; *see also* discussion *supra* accompanying notes 99–103.

(*Hester*) and what was reasonable (*Carroll*) and cited pre-national prohibition precedent and non-liquor cases to show dissimilarity.³¹⁷

Justice Louis Brandeis's dissent clarified the Eighteenth Amendment's role in the decision, asserting, "[t]he Eighteenth Amendment has not in terms empowered Congress to authorize any one to violate the criminal laws of a state" to suggest that the majority's allowance of such tactics must have precipitated from an embrace of the Eighteenth Amendment.³¹⁸ Even if he was correct in his assessment, Brandeis was hypocritical. Seven years earlier, he had joined the Court's unanimous judgment in *Hester* allowing officers to trespass to obtain evidence.³¹⁹ Further, when Justice Brandeis later wrote that the Fourth Amendment's clauses had to be adaptable to a changing world,³²⁰ he missed that the country and his own jurisprudence³²¹ had changed the Constitution to accommodate a changing world, one with an Eighteenth Amendment that mandated the prohibition of alcohol.³²² Despite all the vigorous protest in *Olmstead*, the Court continued its practice of narrowing the scope of the Fourth Amendment to vindicate the Eighteenth. Justice Brandeis's wishful premonition that *Boyd* would live "as long as civil liberty lives in the United States" seemed immediately mistaken in the context of a dissent to an opinion that condoned illegal warrantless wiretapping.³²³

* * *

317. See generally *Olmstead*, 277 U.S. at 458–65; but cf. *id.* at 461 (citing *Amos v. United States*, 255 U.S. 313 (1921)). The citation of *Amos* is not persuasive enough to show that the Court was ignoring the Eighteenth Amendment because *Amos* was an intrusion of the home case that was recognized as a straightforward decision at the time of its publication. See discussion *supra* Part III.

318. *Id.* at 482 (Brandeis, J., dissenting); but see POST, *supra* note 302, at 1092 nn.94, 96 (2024) (quoting letters from Justice Taft which demonstrate his resistance to the decision being categorized as a national prohibition decision). Nevertheless, Taft later writes of his decision as "stand[ing] by the law" and states that Holmes' dissent would lead to having "no constitution . . ." Letter from William Howard Taft to Horace D. Taft (June 8, 1928) (excerpted in POST, *supra* note 302, at 1094 n.98).

319. Also, the government had noted *Hester* in its briefing, citing it to support the proposition that "[e]vidence obtained by trespass, by fraud, by unethical or even criminal methods is admissible if the Fourth Amendment be not violated," providing daylight for the majority's adoption of that position. Government's Brief in *Olmstead* at 12.

320. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting).

321. *Hester v. United States*, 265 U.S. 57 (1924); *Carroll v. United States*, 267 U.S. 132 (1925); *Steele v. United States*, 267 U.S. 498 (1925); *Dumbra v. United States*, 268 U.S. 435 (1925); *McGuire v. United States*, 273 U.S. 95 (1927); *Segurola v. United States*, 275 U.S. 106 (1927); *Marron v. United States*, 275 U.S. 192 (1927); *United States v. Lee*, 274 U.S. 559 (1927) (authored by Brandeis); but see *Gambino v. United States*, 275 U.S. 310 (1927) (authored by Brandeis).

322. Recall the Court's statement that constitutional change was necessary to accommodate "the progress of time and the development of new conditions." *Hawke v. Smith*, 253 U.S. 221, 226 (1920).

323. *Olmstead*, 277 U.S. at 474.

The decision in *Olmstead* sent shockwaves through America. It was called the *Dred Scott*³²⁴ of national prohibition.³²⁵ Even the Anti-Saloon League decried the holding, scared that perceptions of the Court’s decision as related to alcohol prohibition would engender “a certain amount of prejudice against the Eighteenth Amendment and the [National Prohibition] Act.”³²⁶

With *Olmstead*, “[t]he highest tribunal of the land . . . placed the seal of its approval on methods which should shock the common man’s sense of decency and fair play.”³²⁷ Even radical prohibition advocates knew that the Court’s accommodation of the Eighteenth Amendment by “perforating the Bill of Rights” was unpopular.³²⁸ Although cognizant of its unpopularity, Chief Justice Taft stood by the decision.³²⁹ Constitutional scholar and progenitor of the term “living constitution,” Howard Lee McBain was somber.³³⁰ Surveying case law throughout the judiciary post-*Olmstead*, he wrote “[t]he family of the amendments is no longer happy and harmonious. This belligerent new brother is and will continue to be an alien and disturbing element.”³³¹

C. *The Home Becomes Sacred*

The Supreme Court did not address another alcohol search and seizure case until it found an easy one in 1931—and when it did, it did not reverse precedent to track the souring public opinion on the Eighteenth Amendment.³³² Go-Bart Importing Company had been provided a vague federal permit to import “other wines and distilled spirits” since 1920 and used it to create an illegal liquor distribution business.³³³ Reportedly, thirty-

324. *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (1868).

325. RICHARD F. HAMM, *OLMSTEAD V. UNITED STATES: THE CONSTITUTIONAL CHALLENGES OF PROHIBITION ENFORCEMENT* 10 (2010) (quoting *A New Dred Scott Decision*, 149 THE OUTLOOK 293, 293 (1928)).

326. *Dr. Nicholson Backs Dry Wire-Tapping*, N.Y. TIMES, June 24, 1928, at 58.

327. BLACK, *supra* note 89, at 147–48.

328. OKRENT, *supra* note 22, at 286.

329. *See discussion supra* note 250 (letters of Taft).

330. HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION. A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* 168 (1927).

331. MCBAIN, *PROHIBITION*, *supra* note 315, at 168.

332. The Great Depression was becoming serious and there was indication that Americans were shifting toward repeal. *See, e.g.*, Gary Richardson, *Banking Panics of 1930–31*, FED. RSRV. HIST., <https://www.federalreservehistory.org/essays/banking-panics-1930-31> [https://perma.cc/UTT3-KFQT]. *Prohibition Poll is 84% Wet to Date*, N.Y. TIMES, Feb. 19, 1932, at 3 (comparing 1930 and 1932 polling figures and indicating that when the options were repeal versus maintenance of prohibition, voters were more likely to choose repeal).

333. *Find Accused ‘Ring’ Had Liquor Permit*, N.Y. TIMES, June 9, 1929, at 1.

seven *arrest* warrants were issued.³³⁴ Unfortunately for the government, the arrest warrants issued “did not specify any building structure, location, or place, or set forth any particulars or other overt act or show any connection [to the] offense referred to in the complaint.”³³⁵ No *search* warrant was issued.³³⁶

To make matters worse for law enforcement, prohibition agents merely showed Bartels, the secretary-treasurer (and the *Bart* of *Go-Bart*), a piece of paper falsely claimed to be an arrest *and* search warrant, and then arrested him.³³⁷ Gowens, the president of the company (and the *Go* of *Go-Bart*), arrived and was likewise arrested; under threat of force, he opened a desk and safe.³³⁸ The facts got even worse for the government. The unspecific warrants did not authorize prohibition agents to make the arrests, rather they authorized a marshal and his deputies.³³⁹ And in a “general exploratory search,” the agents seized “papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and other things.”³⁴⁰ On these extraordinarily bad facts for the government, the Court, now led by Chief Justice Charles Evans Hughes (Chief Justice Taft’s successor, who, by coincidence, had been first appointed to the Court by then-President Taft in 1910), unanimously held the warrant to be facially invalid.³⁴¹ While Gowens and Bart won, the Supreme Court doubled down on its broadened definition of immediacy regarding searches incident to arrest.³⁴² The Court was standing on its earlier decisions, not reining them in when public opinion waxed against the Eighteenth Amendment.

The Report on the Enforcement of the Prohibition Laws of the United States was released two days later. Therein, President Herbert Hoover’s National Commission on Law Observance and Enforcement, chaired by George W. Wickersham—the former United States Attorney General under President Taft—bemoaned and diagnosed the failures of the “bad start” to Prohibition.³⁴³ The Wickersham Commission found that a significant cause of the “bad start” was the very “attempt to enforce the National Prohibition

334. *Id.* at 3.

335. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 349 (1931).

336. *Id.* at 352.

337. *Id.* at 349.

338. *Id.*

339. *Id.* at 356.

340. *Id.* at 350, 358.

341. *Id.* at 356.

342. Specifically, the Court distinguished but unnecessarily endorsed *Marron*, described *supra* note 275, reiterating that the seized items there were “visible and accessible and in the offender’s immediate custody” even though the key items seized were in a closet and the arrestee was in the custody of four prohibition officers. *Compare id.* at 358, *with Marron v. United States*, 275 U.S. 192, 194 (1927).

343. REPORT ON PROHIBITION, *supra* note 116, at 79.

Act as something on another plane from the law generally; an assumption that . . . constitutional guarantees and legal limitations on law enforcement . . . must yield to the exigencies or conveniences of enforcing it.”³⁴⁴ The Commission also expressed that “guarantees of liberty and [the] sanctity of the home” transgressed by law enforcement had actually been “deemed fundamental in [its] policy,” the National Prohibition Act.³⁴⁵ Ultimately, ten of the Commission’s eleven members opposed repealing the Eighteenth Amendment but also opposed “legislation allowing more latitude for federal searches and seizures.”³⁴⁶ Through the Report on Enforcement, the public’s disdain for the liquor searches and seizures that had multiplied over the past eleven years of Prohibition was now trumpeted by an investigative commission created by the reelection-seeking pro-national prohibition candidate, President Hoover.³⁴⁷ The discontent with national prohibition had become undeniable.

In 1931, when confronted with an opportunity to roll back the holding of *Carroll* in *Husty v. United States*,³⁴⁸ the Court stood firm.³⁴⁹ The Eighteenth Amendment’s impact on the Fourth Amendment was less masked this time, with the Court specific about its application in instances involving alcohol: “The Fourth Amendment does not prohibit the search, without warrant, of an automobile, *for liquor illegally transported or possessed*, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search.”³⁵⁰ The same was true of the probable cause determination: “It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man *to believe that liquor is illegally possessed* in the automobile to be searched.”³⁵¹ Faced with facts providing much greater probable cause than those of *Carroll*, the Court refused to qualify its earlier determination that information that someone had been

344. *Id.* at 81–82.

345. *Id.* at 82.

346. *Id.* at 145, 147.

347. President Hoover even found himself resolutely standing with the Eighteenth Amendment against the Wickersham Commission’s suggestion of revision should enforcement difficulties continue. *See, e.g.*, Herbert Hoover, Message to Congress Transmitting the Report on Prohibition (Jan. 20, 1931) (“[I] must not be understood as recommending[] . . . revision of the eighteenth amendment My own duty and that of all executive officials is clear—to enforce the law with all the means at our disposal without equivocation or reservation.”).

348. 282 U.S. 694 (1931).

349. *Id.* *But see* Murchison, *supra* note 18, at 501 (asserting that the legal ideology of “reluctance to overrule existing precedents” was the cause).

350. *Husty*, 282 U.S. at 700 (emphasis added) (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

351. *Id.* at 701 (citing *Dumbra v. United States*, 268 U.S. 435, 441 (1925); *Stacey v. Emery*, 97 U.S. 642, 645 (1878)).

engaging in illegal activity months before constituted probable cause for an automobile search.³⁵² In the same case, the Court also went further than *Carroll*, allowing the search of containers within a vehicle on minimal probable cause that they contained liquor.³⁵³ However, like in *Go-Bart*, the defendants had their sentences overturned³⁵⁴ while the Court continued to affirm and rely on its earlier decisions as doctrinally sound.

The next year, in *United States v. Lefkowitz*,³⁵⁵ the Court was confronted with an egregious search like that in *Go-Bart* where officers had attempted to use an arrest warrant to conduct a general exploratory search. Agents took a valid *arrest* warrant and went to an office “about ten feet wide and twenty feet long” divided by a partition to execute it.³⁵⁶ Following the arrest and search of the person therein, police proceeded to search all the drawers of two desks, wastebaskets, and a towel cabinet, seizing books, binders, and papers.³⁵⁷ The Court held that the search and seizure of the items in the room was illegal and limited the search incident to arrest power by clarifying that its earlier broad conferral to search incident to arrest was confined to instances of maintaining a nuisance—an offense class specifically

352. Compare *id.* at 700 (noting that police had received a reliable tip and that two of the passengers fled from the vehicle upon the traffic stop) with *Carroll*, 267 U.S. at 133–36.

353. The record of the suppression hearing contains the pertinent exchange between the defense attorney and the searching officer: “You saw bags? A. I saw bags, and I know whiskey bags. . . Q. Isn’t it possible to put other goods in a bag that has the resemblance of a whiskey bag? A. I suppose it is . . . I knew it was whiskey.” Transcript of Record at 27, *Husty*, 282 U.S. (No. 447). The holding of *Husty* as concerning the authority to search containers within automobiles was later verified in *United States v. Ross*, 456 U.S. 798, 818 (1982).

354. In *Husty*, the ground for reversal was improper sentencing, 282 U.S. at 702–04.

The same day *Husty* was decided, the Court decided *United States v. Sprague*, a case presenting the most ambitious opportunity for jurisprudential backtracking in the entire era. 282 U.S. 716 (1931). In the District of New Jersey, Judge William Clark was confronted with a prosecution of a local farmer, William Sprague, under the National Prohibition Act for transporting fifty “half-barrels of beer in his truck” on the Franklin Turnpike. *Clark Ruling Results From Beer Seizure*, WASH. HERALD, Dec. 17, 1930, at 2. In the background, a committee of volunteer lawyers had selected Sprague’s case for something bigger than an ordinary liquor prosecution—the case, for its “simplicity,” “presented a clear-cut issue of the constitutionality of Eighteenth Amendment.” *Drive Began in 1927 for Dry Law Test*, N.Y. TIMES, Dec. 17, 1930, at 23. Accordingly, Sprague’s argument for quashing his indictment went beyond the usual Fourth Amendment objections. His lawyers contended that the Eighteenth Amendment was improperly adopted and thus invalid, rendering the National Prohibition Act passed under its authority likewise invalid. See generally *United States v. Sprague*, 44 F.2d 967 (D.N.J. 1930). Judge Clark agreed. *Sprague*, 44 F.2d at 986. The Court, relying in part on its earlier holdings, enthusiastically did not. See *Sprague*, 282 U.S. at 734 (“[W]e reiterate what was said in the *National Prohibition Cases*, that the ‘Amendment by lawful proposal and ratification, has become a part of the Constitution.’” (quoting 253 U.S. 350, 386 (1920))).

355. 285 U.S. 452, 465 (1932).

356. *Id.* at 458.

357. *Id.* at 459 n.1, 460 n.2 (listing the items seized).

delineated in the National Prohibition Act but not charged in the complaint in *Lefkowitz*.³⁵⁸

Lefkowitz, however, was not a radical pushback against Prohibition Fourth Amendment jurisprudence—had it been decided differently, officers would have more authority to search under a search incident to arrest than if they had obtained a search warrant.³⁵⁹ Finding the search reasonable would have departed even from the Prohibition Era decisions protecting the interior of “one’s house or place of business” from unreasonable searches and seizures.³⁶⁰ The Court again left all of its recent decisions intact.

The Court was likewise provided an opportunity to roll back *Hester* and *Olmstead* by fleshing out the bounds of what constituted a house in *Taylor v. United States*, where officers searched an adjacent garage without a warrant despite having what the Court suggested to be ample probable cause.³⁶¹ Officers had received complaints over the course of a year about bootlegging; they finally went to the garage one early morning, smelled alcohol, and peered inside through a small crack, discovering many cases which they thought contained alcohol.³⁶² The officers then broke in and searched.³⁶³ The Court punted the major questions. There was no need to decide whether or not the garage was a private dwelling or within the curtilage of the home—there was an easier way out that did not rely on a liberal construction of the Fourth Amendment. The officers’ failure to make any effort to obtain a warrant after “abundant opportunity” (over a year) and with “no probability of material change in the situation” in the interim if

358. *Id.* at 462–63; National Prohibition Act, ch. 85, tit. II, § 21–22, 41 Stat. 305, 305–323 (1919). Note that the Court still did not back down from its holding in *Marron* but seemed to articulate a plain view rationale rather than immediate control. *Lefkowitz*, 285 U.S. at 462. However, this makes less sense when the Court takes issue with the fact that officers in *Lefkowitz* looked at the items to ascertain whether they were involved in crime—the papers in *Marron* taken from a closet were not evidently involved in crime. *Id.* at 464. A distinguishing feature of *Lefkowitz* may have been that the prosecution trickily charged nuisance after the fact in an attempt to rectify the search. *Lefkowitz v. U.S. Att’y for S.D.N.Y.*, 52 F.2d 52, 53 (2d Cir. 1931).

359. *Lefkowitz*, 285 U.S. at 464 (“The authority of officers to search one’s house or place of business contemporaneously with his lawful arrest . . . certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained.”).

360. *Id.* at 464; *see, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305–06 (1921); *Amos v. United States*, 255 U.S. 313 (1921); *but cf. Marron v. United States*, 275 U.S. 192 (1927) (providing no such application to a place of business where the business itself was plainly illegal). This distinction of *Marron* is also evidenced by the Court’s note that the search and seizure for “illicit liquor in order to prevent the commission of crime” is different from that to obtain evidence for prosecution. *Lefkowitz*, 285 U.S. at 465–66.

361. *Taylor v. United States*, 286 U.S. 1, 5 (1932).

362. *Id.*; *Taylor v. United States*, 55 F.2d 58, 59 (4th Cir. 1932) (indicating that the hole officers peeped through was a crack in the door of the garage), *rev’d, Taylor*, 286 U.S. at 6.

363. *Taylor*, 286 U.S. at 5.

they had gone to get one was unreasonable.³⁶⁴ These “exceptional circumstances” made for an easy case that was hardly a blessing for the Fourth Amendment.³⁶⁵ Despite saying nothing overtly about what constituted the home, the Court’s recitation that officers could have validly obtained a warrant *after* smelling liquor and peeping inside the garage further confined the protections of the Fourth Amendment to enclosed private dwellings.³⁶⁶ Indeed, greenlighting the issuance of a warrant after such a search indicated that officers *could* walk onto one’s property and up to the edge of a garage adjacent to one’s home, literally sniff around, and peek inside in the middle of the night without such constituting an unreasonable search, whether the area was encompassed in the curtilage of the home or not.³⁶⁷

By 1932, Franklin D. Roosevelt began openly campaigning on total repeal of the Eighteenth Amendment.³⁶⁸ The decade of support for national prohibition was clearly over. Roosevelt positioned himself against the official position of an incumbent government that proposed modified enforcement as a solution to widespread misgivings about national prohibition.³⁶⁹ But modification was not enough. Repeal was now on the table. Unlike the 1928 election, open contempt for Prohibition could now serve as a sturdy plank in a viable political platform.³⁷⁰

364. *Id.*

365. *Id.* at 4.

366. *Id.* at 6.

367. *Id.* at 5–6. But because the case suggested that officers could trespass onto one’s property up to the edge of a building for purely investigative purposes and look inside openings in the building to obtain probable cause, *Taylor* indicated that the area immediately outside one’s house was *not* protected as within the curtilage of the home.

368. *See, e.g.*, Franklin D. Roosevelt, Campaign Address in Sea Girt, New Jersey (Aug. 27, 1932).

369. *See generally* REPORT ON PROHIBITION, *supra* note 116.

370. *See* TERRY GOLWAY, FRANK AND AL: FDR, AL SMITH, AND THE UNLIKELY ALLIANCE THAT CREATED THE MODERN DEMOCRATIC PARTY 190, 210 (2018).



WOMAN POINTING AT *ABOLISH PROHIBITION!* POSTER (1931)
(archived at Library of Congress)

The day before Roosevelt's landslide election in 1932, the Supreme Court continued its doctrinal balancing between the Fourth and Eighteenth Amendment, but for the first time, it was the Eighteenth Amendment that was forced to give—albeit in a rather inconsequential way.

In *Grau v. United States*, the Court dealt with a home search where police had failed to demonstrate that the “place to be searched is not a private dwelling [while] the record affirmatively shows it was.”³⁷¹ The Court found a harmony that deferred to the Fourth Amendment's purpose rather than the Eighteenth's goal, but it relied on the National Prohibition Act in a manner reminiscent of the Wickersham Commission: “Congress intended, in adopting [section] 25 of Title 2 of the National Prohibition Act, to preserve, not to encroach upon, the citizen's right to be immune from

371. 287 U.S. 124, 128 (1932).

unreasonable searches and seizures.”³⁷² In other words, the National Prohibition Act’s contemplation of extra protection for private dwellings foreclosed interpreting the act in conflict with the Fourth Amendment’s protections in that domain.³⁷³ But the Court’s reasoning suggested its logic in other cases: where Congress had not adopted specific protections, perhaps it had intended to encroach upon the other rights of citizens. Indeed, the Court could have, but did not, take other opportunities to rebalance its prior Eighteenth Amendment cases in ways that “preserve, not . . . encroach upon” the Fourth Amendment. In any event, *Grau*’s concern with the search of an area indisputably protected by the National Prohibition Act and the Fourth Amendment, the home’s interior, limited its impact.³⁷⁴

The Supreme Court’s final Prohibition Era liquor search and seizure decision, *Nathanson v. United States*, followed its line of home search cases and formalized a requirement that was self-evident—warrants could not be issued when an affiant did not provide “any statement of adequate supporting facts.”³⁷⁵ Had the Court held otherwise, officers could claim they had information to suspect someone of a crime and obtain a warrant without ever allowing a magistrate to examine the information that supported probable cause—vitiating the entire point of having an impartial party examine the evidence to make probable cause determinations.³⁷⁶ The self-evidence of the decision likewise flowed from the preceding warrant cases of *Go-Bart* and *Lefkowitz*, where the Court held search warrants invalid because of the insufficiency of facts therein. If the facts alleged could be

372. *Id.*

373. *Id.* (“The broad construction of the act by the Court of Appeals unduly narrows the guaranties of the Fourth Amendment, in consonance with which the statute was passed.”).

374. *Sgro v. United States*, 287 U.S. 206 (1932), similarly to *Grau*, concerned the use of a bad warrant to search a hotel room (an area also covered under the National Prohibition Act’s private dwelling protections). The commissioner did not show any information to demonstrate probable cause to renew the warrant and “simply changed the date of the old warrant.” *Id.* at 212. Also like *Grau*, *Sgro* falls into the line of private dwelling search cases, limiting discussion of the case as a departure from the Eighteenth Amendment’s dictates. *See e.g.*, *Gouled v. United States*, 255 U.S. 298, 305–06 (1921); *Amos v. United States*, 255 U.S. 313 (1921); *see also* *United States v. Berkeness*, 275 U.S. 149 (1927) (extending the private dwelling protections of the National Prohibition Act to the Territory of Alaska). *Sgro* also relied on a discussion and straightforward language of the National Prohibition Act which required the execution of the warrant within ten days of its issuance. 287 U.S. at 209–10.

Nevertheless, the more important rule established by *Sgro* was that federal judges could not reissue warrants without a demonstration of probable cause in the subsequent application for a warrant. This, I think, *Murchison* misstates by writing that “*Sgro* construed a federal statute to deny magistrates discretion to reissue warrants” rather than “. . . deny magistrates discretion to reissue warrants when an affiant has not demonstrated probable cause and is merely asking for an old warrant to be redated.” *Murchison*, *supra* note 18, at 515.

375. 290 U.S. 41, 46 (1933) (emphasis added).

376. This is not an exaggeration; the affidavit in *Nathanson* had only the belief and suspicion of an officer to support probable cause without any description of how the officer came to his conclusions. *Id.* at 44.

insufficient to justify a warrant, it followed that alleging no facts at all would also be insufficient.

The Court again demonstrated respect for the National Prohibition Act's concern for the home's interior ("private dwelling") in its holding, first stating, "[i]n some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling."³⁷⁷ The Court continued, "[u]nder the Fourth Amendment, an officer may not properly issue a warrant *to search a private dwelling* unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough."³⁷⁸ With that, the Court's final balancing of the Fourth and Eighteenth Amendment left a bubble of pre-Prohibition sanctity floating in the jurisprudence. The home, "a private dwelling," carved out for special protection in the National Prohibition Act, had become sacred to the Supreme Court—if sacred meant that individuals only obtained relief where there was a physical entry and search inside.³⁷⁹

* * *

In the end, though the Court most explicitly embraced the Eighteenth Amendment as modifying the interpretation of the Fourth Amendment in *Carroll*, the Prohibition Era saw more than searches of automobiles as reasonable or entirely outside the protection of the Fourth Amendment. In the late years of Prohibition, faced with mounting public opinion against National Prohibition and its enforcement, the Court stuck with its doctrinal developments rather than doubling back even when it ruled for

377. *Id.* at 46.

378. *Id.* at 46–47.

379. *See* *Amos v. United States*, 255 U.S. 313 (1921); *Hester v. United States*, 265 U.S. 57 (1924); *Olmstead v. United States*, 277 U.S. 438 (1928); *Taylor v. United States*, 286 U.S. 1 (1932).

defendants.³⁸⁰ It continued to construe the protections against unreasonable searches and seizures in line with the mandate of the Eighteenth Amendment and the associated safeguards for the home in the National Prohibition Act. The Fourth Amendment—the legal site where criminal investigations and citizens meet—had been profoundly altered by the Eighteenth Amendment with virtual unanimity at the Supreme Court.

380. From Part III.A: *Amos v. United States*, 255 U.S. 313 (1921) (9–0) (for defendant) (home search); *Hester v. United States*, 265 U.S. 57 (1924) (9–0); *Carroll v. United States*, 267 U.S. 132 (1925) (6–2, the opinion indicates that Justice Joseph McKenna would have voted with the majority but retired); *Steele v. United States*, 267 U.S. 498 (1925) (9–0); *Dumbra v. United States*, 268 U.S. 435 (1925) (9–0); *Byars v. United States*, 273 U.S. 28 (1927) (9–0) (for defendant) (home search); *McGuire v. United States*, 273 U.S. 95 (1927) (9–0); *Segurola v. United States*, 275 U.S. 106 (1927) (9–0); *United States v. Berkeness*, 275 U.S. 149 (1927) (9–0) (for defendant) (home search); *Marron v. United States*, 275 U.S. 192 (1927) (9–0); *United States v. Lee*, 274 U.S. 559 (1927) (9–0); *Gambino v. United States*, 275 U.S. 310 (1927) (9–0) (for defendant).

From Part III.B–C: *Olmstead v. United States*, 277 U.S. 438 (1928) (5–4); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (9–0) (for defendant); *Husty v. United States*, 282 U.S. 694 (1931) (9–0) (Fourth Amendment issue decided for government); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (8–0) (for defendant); *Taylor v. United States*, 286 U.S. 1 (1932) (9–0) (for defendant); *Grau v. United States*, 287 U.S. 124 (1932) (7–2) (for defendant) (home search); *Sgro v. United States*, 287 U.S. 206 (1932) (7–2) (for defendant) (home search); *Nathanson v. United States*, 290 U.S. 41 (1933) (9–0) (for defendant) (home search).

PROHIBITION ERA LIQUOR SEARCH AND SEIZURE CASES AT THE SUPREME COURT³⁸¹				
<i>Year</i>	<i>Case</i>	<i>Vote</i>	<i>Prevailing Party on 4A Claim</i>	<i>Private Dwelling</i>
1921	<i>Amos</i>	9–0	Defendant	Yes ³⁸²
1924	<i>Hester</i>	9–0	Government	No, open fields
1925	<i>Carroll</i>	6–2	Government	No, automobile
	<i>Steele</i>	9–0	Government	No, commercial garage
	<i>Dumbra</i>	9–0	Government	No, grocery store
1927	<i>Byars</i>	9–0	Defendant	Yes
	<i>McGuire</i>	9–0	Government	Yes, but not covered by National Prohibition Act ³⁸³
	<i>Segurola</i>	9–0	Government	No, automobile
	<i>Berkeness</i>	9–0	Defendant	Yes
	<i>Marron</i>	9–0	Government	No, speakeasy
	<i>Lee</i>	9–0	Government	No, marine vessel
	<i>Gambino</i>	9–0	Defendant	No, automobile
1928	<i>Olmstead</i>	5–4	Government	No, telephone wires
1931	<i>Go-Bart</i>	9–0	Defendant	No, office, bad warrant
	<i>Husty</i>	9–0	Government	No, automobile
1932	<i>Lefkowitz</i>	8–0	Defendant	No, office, bad warrant
	<i>Taylor</i>	9–0	Defendant	No, garage, “extraordinary circumstances”
	<i>Grau</i>	7–2	Defendant	Yes
	<i>Sgro</i>	7–2	Defendant	Yes
1933	<i>Nathanson</i>	9–0	Defendant	Yes

381. Provided that the “bad warrant” cases of *Go-Bart* and *Lefkowitz* concerned the requirements of deficient warrants to conduct exploratory searches and *Taylor*’s nature as an outlier case where officers had probable cause for over a year sufficient to obtain a warrant for a garage adjoining a private dwelling, the only case that appears to conflict at face value with my thesis is *Gambino*, addressed *supra* note 275.

382. Note that the search in *Amos* occurred prior to Prohibition.

CONCLUSION

*God save you, reader—me no less,
And wet or dry, the old U.S.*

—MICHAEL MONAHAN, DRY AMERICA 174 (1921)

It hardly took the first year of the Prohibition Era for the Supreme Court to conclude that the Eighteenth Amendment was meant to change the nature of law enforcement in the United States.³⁸⁴ As alcohol manufacturers and traffickers, from rural moonshiners to international liquor kingpins, assailed the Eighteenth Amendment and invoked the Fourth Amendment for protection, they were defeated at the Court practically every time a search or seizure occurred outside of the (narrowly construed) home. The Court's decisions did not track public opinion. Even in the face of imminent repeal, the Justices continued to interpret the Fourth Amendment in a manner consistent with the vision of enforcement contemplated by the Eighteenth Amendment and the National Prohibition Act and refused to roll back recent doctrinal developments. Not for the judiciary's lack of trying to effectuate enforcement, on December 15, 1933, alcohol prohibition ceased to be part of the Constitution.³⁸⁵

Because courts relied on the Eighteenth Amendment as a constitutional, doctrinal tool to contract Fourth Amendment protections, perhaps its repeal by the Twenty-First Amendment should have resulted in a reconsideration of Prohibition Era doctrine and a return to the pre-Prohibition construction of the Fourth Amendment.³⁸⁶ This would have meant the rebirth of a broadly liberal construction of the Amendment and a repudiation of the idea that protections for persons, papers, and effects are subordinate to that provided for houses.

Yet no such overt doctrinal recalibration occurred. Extraordinarily

383. *United States v. McGuire*, 300 F. 98, 100 (N.D.N.Y. 1924) (indicating that the whole two-story building was seen as used for the sale of intoxicating liquors where the ground floor was a saloon and the upstairs was a residence where the liquors sold downstairs were kept, thus beyond the protections of the National Prohibition Act's warrant requirement). When the case reached the Supreme Court in the form of questions certified for review, the dispute over whether the residence upstairs was covered was not a relevant issue. *McGuire v. United States*, 273 U.S. 95 (1927).

384. *See National Prohibition Cases*, 253 U.S. 350, 386 (1920).

385. U.S. CONST. amend. XXI.

386. *See United States v. Chambers*, 291 U.S. 217, 223 (1934) ("Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality."); cf. Gretchen Ritter, *Jury Service and Women's Citizenship Before and After the Nineteenth Amendment*, 20 L. & HIST. REV. 479, 503–05 (2002) (describing the Court's revision of women's *Lochner* freedom of contract rights following the passage of the Nineteenth Amendment conferring suffrage).

powerful criminal investigatory authority may now rest on a partial vacuum in the Constitution created by the Twenty-First Amendment.³⁸⁷ This profound legal lacuna was produced by the sanctioning of more intrusive criminal investigations at the expense of the Fourth Amendment during Prohibition. Those who aided enforcement included not only Congress and the executive but also legions of federal judges.

To many, the choice to build national prohibition into the Eighteenth Amendment was more consequential than producing a law with staying power: it made law that altered the functioning of other constitutional provisions. Across the federal judiciary, from district courts to the Supreme Court, the Fourth Amendment was not construed in a way that merely mapped onto public opinion about Prohibition. Rather, it was regularly transformed to effectuate the Prohibition Clause in liquor search and seizure cases. When significant alterations to the Fourth Amendment had been made for the enforcement of alcohol prohibition within the bounds set by the National Prohibition Act, the Court maintained them. The doctrinal project that percolated through the federal courts from 1920 to 1933, however principled or misguided, left lasting marks. The question of whether those marks ought to endure either as justified by practicality or on independent doctrinal grounds is left outstanding. But any answer will be impoverished if it does not first reckon with the history told here, namely: How Prohibition rewrote the Fourth Amendment.

387. The most obvious is the continued allowance of warrantless searches of automobiles and land. *See e.g.*, *California v. Acevedo*, 500 U.S. 565 (1991) (automobile exception, relying on *Carroll*); *United States v. Ross*, 456 U.S. 798 (1982) (automobile exception, relying on *Husty* and *Carroll*); *Oliver v. United States*, 466 U.S. 170 (1984) (open fields exception, relying on *Hester*); *United States v. Dunn*, 480 U.S. 294 (1987) (same); *Arizona v. Gant*, 556 U.S. 332 (2009) (tracing search incident to arrest exception to *Marron*); *Draper v. United States* 358 U.S. 307 (1959) (relying on *Carroll*, *Husty*, *Dumbra*, and *Steele* for the benchmark of probable cause). The exceptionalism of the home (“first among equals”) in the jurisprudence also looms large. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

ANGELS, DEMONS, US: RECONCILING RAZ AND AQUINAS ON THE COORDINATIVE FUNCTION OF LAW

ANNA LUKINA*

ABSTRACT

Contemporary legal theorist Joseph Raz claimed that, in a society of angels, there would still be need for law. This article will trace the history of this thought experiment back to the works of the medieval theologian St. Thomas Aquinas on the divine government and the society under the state of innocence. Despite writing centuries apart and belonging to the rival legal positivist and natural law jurisprudential traditions, both thinkers, quite surprisingly, agree that imagining a society of virtuous beings matters not only for recognizing the necessary coerciveness of law, but also its coordinative function. While disagreeing on the nature of law, Raz and Aquinas equally recognize the practical indispensability of legal rules even in a government of morally perfect beings and would also do so when it comes to its opposite—a society of demons. That this shared insight is not undermined by where Raz and Aquinas diverge is further proven when it comes to applying their theories when discussing the need for laws' coordinating ability in atypical settings, such as post-legal societies, wicked regimes, extraordinary measures, and international law.

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TABLE OF CONTENTS

INTRODUCTION 295

I. LAW 296

II. ANGELS 297

A. Raz and Law in the “Society of Angels” 297

B. Aquinas, Divine Government, and Mastership in the State of Innocence 299

C. Implications 304

 1. *Law and Coercion* 304

 2. *Moving Beyond Coercion: the Concept and Functions of Law* 305

 3. *Coordination and Law’s Practical Necessity* 307

 4. *Individual Interests and the Common Good* 309

III. DEMONS 311

A. Raz 311

B. Aquinas 313

 1. *Law and Justice* 313

 2. *Law and Coordination* 314

IV. US 316

A. Post-Legal Societies 317

B. Wicked Regimes 318

C. Extraordinary Measures 320

D. International Law 321

CONCLUSION 323

INTRODUCTION

“If men were angels, no government would be necessary.”¹ So claimed James Madison in Federalist 51. The very existence of government, in his words, was a “reflection on human nature.”² Specifically, man’s hunger for power, the urge that makes the strong oppress the weak. Thus, the government exists to further justice and must restrain ambition to do so. I submit that Madison was wrong. His idea is successfully challenged by the legal philosopher Joseph Raz in his famous “society of angels” thought experiment. There, Raz claimed that, while there would be no need for legal coercion in a society of virtuous beings, law in this society would still be possible and, even more so, necessary, in part because it resolves issues of expertise, coordination, and efficiency.³ Broadly speaking, this is law’s coordinative function.

In this paper, I show that Raz’s contribution was anticipated centuries before by comparing, for the first time, Raz’s account of the angelic society to the medieval theologian St. Thomas Aquinas’s unexplored but much more elaborate discussion of law in the divine government⁴ and mastership of men over men in the state of innocence.⁵ Even though I recognize that Aquinas’s concept of law differed drastically from Raz’s (Part I), I nonetheless argue that the thinkers’ reasoning as to whether a society of perfectly virtuous beings needed law was strikingly similar. Like Raz, Aquinas relied on the coordinative function when explaining the need for law in the societies of angels and, even more strongly, men in the state of innocence (Part II). Next, I add to the society of angels thought experiment by reconstructing, also for the first time, what Raz and Aquinas would think about a converse society of demons. Unlike when it comes to the society of angels, only Raz would find law proper there, with Aquinas recognizing the existence of only rules that are law-like in the “secondary” sense in such a setting. Nevertheless, both thinkers acknowledged that demons would find the opportunities provided by these rules’ coordination function—providing solutions to not just issues of coordination, but also prisoners’ dilemmas—attractive (Part III). Finally, I demonstrate that Raz’s and Aquinas’s shared insight about the practical indispensability of law for coordinative purposes

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1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).
 2. *Id.*
 3. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159–60 (1999).
 4. THOMAS AQUINAS, SUMMA THEOLOGICA pt. I, q. 108, art. 1 (Fathers of the English Dominican Province trans., 1947), <https://aquinas101.thomisticinstitute.org/st-index>. I argue that it is not necessary to believe in the existence of angels to find value in Aquinas’s “political angelology,” as Aquinas uses angels in part to teach about men. I thank Professor Ryan Meade for this idea.
 5. *Id.* at pt. I, q. 95, art. 4. I thank Professor Adrian Vermeule for alerting me to this comparison.

transcends their differences, by exploring the indispensability of coordination through legal means in atypical settings: post-legal societies, wicked regimes, extraordinary measures, and international law (Part IV).

I. LAW

To start, one needs to distinguish the concept of law used by Raz from the one adopted by Aquinas. “Put in a nutshell,” Raz states, law “is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority.”⁶ Aquinas, on the other hand, defines a law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”⁷ Aquinas’s definition is in one sense narrower, but in another sense broader than the one suggested by Raz. Firstly, Aquinas is narrower in that, while Raz only looks at positive criteria (systemic character, relatedness to guidance and adjudication, claim to supreme authority, and efficacy), he adopts a normative check by looking at whether the promulgated ordinance is reasonable and oriented towards the common good. As a result, some of the rules recognized as legal by Raz would not be considered as such, at least in the focal sense, by Aquinas.⁸ Secondly, at the same time, Aquinas recognizes several different types of law—eternal, natural, divine, and human. Eternal law is the order of things according to God’s plan.⁹ Natural law is the “participation of the eternal law in the rational creature”¹⁰ including angels and humans. Divine law contains rules given to us by God.¹¹ Human (or positive) law is created by humans to better realize the precepts of natural and divine law in human affairs.¹² These are not just different senses in which the word “law” can be used, but elements of the same larger normative system, brought together by a combination of divine providence and practical reason, that human (positive) law is only one part of. Therefore, under Raz’s conception of law, only human

6. JOSEPH RAZ, *Legal Positivism and the Sources of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 43 (1979).

7. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 4.

8. *See* AQUINAS, *supra* note 4, at pt. I-II, q. 92, art. 1, ad. 4; *see also* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 264 (2011). “Focal meaning,” a device John Finnis borrowed from Aristotle, attends to more straightforward instances of a phenomenon, while “secondary meaning” is the “lowest common denominator” uniting both central and more problematic cases. For instance, to follow the Aristotelian example, the focal meaning of friendship is one where one has the best interests of another in mind, but the secondary meaning of friendship will include friendships made for convenience or pleasure. *See* FINNIS, *supra*, at 9–11. I will be returning to it again further on in Part IV.B.1.

9. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 1.

10. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 2.

11. *Id.* at pt. I-II, q. 91 art. 4.

12. *Id.* at pt. I-II, q. 91, art. 3.

(positive) law would be seen as law proper, as “legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions.”¹³ Both divine and eternal law are outside Raz’s theoretical ambitions as, in his work, he does not recognize the world as operating in accordance with the divine providence. Moreover, he characterizes natural law as “social rules and conventions” or “morality”¹⁴ rather than law proper, while to Aquinas natural and positive law are united by practical reason.

II. ANGELS

With all this in mind, one may be surprised that such radically different thinkers came to similar conclusions when it comes to law in the society of morally perfect human beings. According to both Raz and Aquinas, said “angels” still need law as they need to coordinate themselves in pursuit of their ultimate aims.

A. Raz and Law in the “Society of Angels”

I will start by outlining Raz’s “society of angels” thought experiment from his *Practical Reason and Norms*. In order to claim that coercion is not a necessary feature of law, Raz imagines a society of “rational beings . . . who have more than enough reasons to obey the law regardless of sanctions.”¹⁵ They are not “self-denying saints” and “pursue their self-interest when they think they are right to do so”, and they “may be wrong.”¹⁶ In such a “society of angels,” he adds, there will still be law, even though it would not be coercive.

Firstly, “angels may be in disagreement both about their values and the best policies for implementing them.”¹⁷ The legislature and the executive, therefore, would be necessary to issue rules and regulations that ensure harmony between these varying directions in which angels navigate their lives.¹⁸ This line of argument tracks Raz’s normal justification thesis, stating that practical authority, the ability to create reasons for action or impose

13. JOSEPH RAZ, *The Obligation to Obey the Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 233 (1979).

14. *Id.*

15. RAZ, *supra* note 3, at 159.

16. *Id.* at 160. Raz likely meant that they could be wrong not about moral matters, but about factual matters, even though, of course, factual errors might make these beings behave in a way which would be morally wrong. I thank Angelo Ryu for pressing me on this point.

17. *Id.* at 159.

18. *Id.*

duties¹⁹ like a lawmaker does, is justified when the alleged subject can comply with reasons which apply to him (other than the alleged authoritative directives) better if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him independently.²⁰

The normal justification thesis can work in practice by solving the problems of expertise, coordination, or efficiency.²¹ In the first place, it will work because of the superior expertise of authorities compared to individuals under their command, broadly construed. For instance, an authority can possess superior knowledge—such as when it comes to regulation of dispensation and use of dangerous materials²²—be less biased and prone to passions, exceed in available resources, or be better at indirect strategy or more complex planning.²³ In the second place, the normal justification thesis will hold when it comes to coordinating for shared activities—which is more explicitly seen in the case of game-theoretical coordination problems²⁴—games in which players win if they choose to do the same thing, regardless of what it might be.²⁵ Borrowing an oft-quoted example: suppose car owners in a city need to decide whether to drive on the left or the right side of the road.²⁶ In this context, “deciding for oneself what to do causes anxiety, exhaustion, or involves costs in time or resources,”²⁷ so there should be some indication as to how to behave. This, among other options—such as developing a custom—can be achieved by a directive issued by an authority to this effect. This directive would not need to be coercive, as we take the participants in the coordination problem as

19. As contrasted with theoretical authority – the ability to create reasons for belief by giving expert advice. See JOSEPH RAZ, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 211–12 (1995).

20. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 53 (2003).

21. A classification also made in Larry Alexander, “*With Me, It’s All Er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 534 (1999).

22. This example is given in Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1014 (2006).

23. This is roughly adapted from the list of reasons in RAZ, *supra* note 19, at 75. Later on, Raz claimed that expertise is relevant to practical (as opposed to theoretical) authorities “only when it is mixed with other considerations, such as need for coordination, for concretizing indeterminate boundaries, and the like.” Joseph Raz, *On Respect, Authority, and Neutrality: A Response*, 120 *ETHICS* 279, 301 (2010).

24. I distinguish coordination in this narrower sense from coordination broadly speaking, specifically as encompassing expertise, coordination of shared activities, and prisoners’ dilemmas. I shall indicate it further on in the paper by talking about “coordination of shared activities” and “coordination” respectively.

25. JOHN FINNIS, *Law as Coordination*, in *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 67 (2011).

26. This example is given in Scott Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 400, 400–01 (Scott Shapiro & Jules L. Coleman eds., 2002).

27. RAZ, *supra* note 19, at 75.

being equally invested in all possible courses of action equally and would be happy with any choice the authority makes. In the third place, one can draw on Larry Alexander's extension of Raz's theory to the question of efficiency brought by authoritative settlement, claiming that "[e]ven if members of the community could, through lengthy deliberations, arrive at coordinated and correct decisions, the moral cost in terms of time and other resources devoted to such deliberations might outweigh the moral gains."²⁸

Secondly, a society of angels will need to have courts for two reasons. One is to resolve disputes about the interpretation of the rules they are subject to.²⁹ The other is to exercise discretion when "[t]he law rules out certain solutions but does not decide between some other possible solutions."³⁰

Thirdly, since accidental damage can occur even in this community due to angels' "misapprehend[ing] the facts or misinterpret[ing] the law"³¹ (as they can, on Raz's conception, "be wrong"), laws will be needed to create a system of remedial rights and duties.³²

B. Aquinas, Divine Government, and Mastership in the State of Innocence

Aquinas accepts Raz's argument for law's relevance even in a society of virtuous beings—that legal rules help them sort out their affairs—in his discussion of the angelic government and the society in the state of innocence. Unlike Raz's portrayal of a society of angels as merely a thought experiment, Aquinas's *Summa Theologica* is a work of theology, or study of the divine, that takes the existence of angels as part of the natural world as revealed by God and contemplated through reason. Even though Aquinas's angels are similar to Raz's in that they are by their nature benevolent in the sense of being incapable of sin,³³ the former differ from the latter in other ways. Angels in Aquinas's theology are incorporeal,³⁴ subsisting without matter. As a result, they do not have bodies,³⁵ are not vulnerable to human passions, or sensual appetites, and only possess a will,

28. Alexander, *supra* note 21, at 536.

29. RAZ, *supra* note 3, at 159.

30. *Id.*

31. *Id.* at 160.

32. *Id.* Further, Raz considers whether these remedial measures would be coercive.

33. AQUINAS, *supra* note 4, at pt. I, q. 62, art. 8.

34. AQUINAS, *supra* note 4, at pt. I, q. 50, art. 1.

35. *Id.* at pt. I, q. 51, art. 1. They, however, may assume bodies when appearing before humans. *Id.* at pt. I, q. 51, art. 2.

or intellectual appetite.³⁶ This intellect manifests in love and is grounded in knowledge. Aquinas states that angels love God more than they love themselves and ultimately direct their actions towards Him as the ultimate end rather than their private good.³⁷ Moreover, angelic intellect is superior to that of humans as they do not gradually acquire knowledge. Rather, God impresses onto the angelic mind the entirety of the knowledge needed to perform its respective functions at its creation.³⁸ Therefore, angels cannot be self-interested or wrong,³⁹ except in the moment of angelic choice, when some of the angels rejected God and became known as demons.⁴⁰

Still, even Aquinas's angels need the authority of law to better "know[] and lov[e] God by natural knowledge and love",⁴¹ despite surpassing the beings in Raz's thought experiment in intellect and virtue. One can argue that angels cannot achieve better knowledge of God by being subjected to authority, as it is a substitute for understanding rather than something that gives understanding.⁴² However, "understanding" does not necessarily refer to "autonomous reflection," as it can be gained from following the instructions of a superior, especially if they are better placed to assess the situation at hand.⁴³ A student can, for instance, achieve greater understanding of the class material if they follow instructions of the teacher. In this vein, Aquinas clearly believes that this understanding is impossible if angels do not form a hierarchical relationship with one another. Building on Pseudo-Dionysius's "Celestial Hierarchy,"⁴⁴ Aquinas contends that angels are ranked according to their abilities⁴⁵—namely, the higher angels possess more universal concepts than lower angels, making them better equipped to know things outside of themselves.⁴⁶ For example, "what a superior knowledge grasps *in one glance* through the idea of 'animal,' . . . an inferior angel grasps through several ideas, such as the ideas 'bird,'

36. Which means that they can experience "emotions" like love, joy, and sorrow only through intellect and not passion. See AQUINAS, *supra* note 4, at pt. I, q. 59, art. 1, art. 4. See ROBERT C. MINER, THOMAS AQUINAS ON THE PASSIONS: A STUDY OF SUMMA THEOLOGIAE 1A2AE 22–48, at 36–37 (2009).

37. AQUINAS, *supra* note 4, at pt. I, q. 60, art. 5. As explained in SERGE-THOMAS BONINO, ANGELS AND DEMONS: A CATHOLIC INTRODUCTION 163–64 (Michael J. Miller trans., 2016). As will be explained in Part II.C.4, this is not unique to angels, but natural to all beings.

38. AQUINAS, *supra* note 4, at pt. I, q. 55, art. 2.

39. *Id.* at pt. I, q. 58, art. 5. This only applies to the sphere of his natural knowledge, but not supernatural truths. BONINO, *supra* note 37, at 151.

40. A more detailed discussion of demons will appear later in Part II.

41. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 4.

42. I thank Dr. Lars Vinx for this potential counterpoint to my argument.

43. I thank Dr. Alex Green for this point.

44. DIONYSIUS THE AREOPAGITE, WORKS 120–24 (John Parker trans., 1897), https://www.documentacatholicaomnia.eu/03d/0450-0525,_Dionysius_Areopagita,_Works,_EN.pdf.

45. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 1.

46. *Id.* at pt. I, q. 55, art. 3.

‘reptile,’ ‘amphibian.’⁴⁷” Such hierarchy is necessary as, in order to further their plans, higher-ranking angels need to guide lower-ranking angels whose intellect is weaker.⁴⁸ This line of thinking roughly corresponds to Raz’s description of expertise. Angels’ guidance is law under Aquinas’s definition,⁴⁹ as it uses the authority of higher angels (“made by him who has care of the community”) to direct lower angels towards their proper end (“an ordinance of reason for the common good”). As a result, angelic guidance is analogous to human positive law—law promulgated by humans, as it is a means by which angels organize themselves to carry out the precepts of natural law—law by which humans operate as a species.⁵⁰ It is no wonder that Aquinas compares the divine government to the one within an army or a state, where everyone is placed differently with regards to “the king or leader.”⁵¹

Another passage that even better resembles Raz’s “society of angels,” *Summa* pt. I q. 96 art. 4,⁵² deals not with angels, but with men—albeit “in the state of innocence,” or before the Fall of Man (original sin).⁵³ These men are more similar to Raz’s “angels” than to the disembodied beings discussed in the paragraphs above, as they are indistinguishable from humans after the Fall in everything but their disposition. Without discovering sin, men, naturally loving God more than themselves,⁵⁴ would have no motivation to refuse to act virtuously, making coercion redundant. Aquinas argues that even in this state, man would have been “master over man.”⁵⁵ This does not mean slavery, or one man using another for his own gain—which is impossible in the world devoid of sin, but “directing him . . . towards his proper welfare, or the common good.”⁵⁶ In this way, since some angels rule over others, as explained above, to better serve God, so do humans, to approach the common good. One reason is akin to the justification for a hierarchy in the angelic order. Even though, unlike angels, men are only one species, some of them “surpass[] [others] in knowledge and virtue.” As a result, it is the more knowledgeable and virtuous men’s duty to guide those

47. BONINO, *supra* note 37, at 139.

48. AQUINAS, *supra* note 4, at pt. I, q. 55 art. 3, q. 108 arts. 1, 4.

49. *Id.* at pt. I-II, q. 90 art. 4. *See also* Part I, *supra*.

50. This idea was suggested at the Thomistic Institute Study Group on the Creation, Governance, and the Angels, November 10, 2020, and further explained by Br. Nicholas Hartman, O.P. On the distinction between human positive law and natural law, see Part I, *supra*.

51. AQUINAS, *supra* note 4, at pt. I q., 108, art. 6.

52. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.

53. Finnis refers to it as “the society of saints.” JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 256 n.7 (1998).

54. BONINO, *supra* note 37, at 163. As will be explained in Part II.C.4, *infra*, this is natural to all beings.

55. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.

56. *Id.*

who are less well-endowed.⁵⁷ This, like Aquinas’s discussion of angels, corresponds to the expertise dimension of Raz’s normal justification thesis—men in the state of innocence need to be guided by their betters in order to fulfill their shared goals, which, again, is better achieved via the legal form.

The other reason—that corresponds to coordination rather than expertise—builds on the differences between angels and humans. Aquinas says: “a social life cannot exist among a number of people unless under the presidency of one to look after the common good; for many, as such, seek many things, whereas one attends only to one.” Common good, according to Petar Popovic, can refer to two distinct things—the common good (singular) as the *telos* of one’s existence,⁵⁸ or the common goods (plural) or common enterprises.⁵⁹ As claimed by John Finnis⁶⁰ and Russell Hittinger, and underscored by Popovic, the latter act as preconditions for the fulfillment of the former.⁶¹ The common enterprises, in turn, can, in most cases, be achieved only under the lead of a designated authority that helps rational beings to coordinate. As a result, one often cannot achieve the pursuit of the common good without that authority. In the same way that Raz’s “angels” need legislators to structure their shared social life, men in the state of innocence require authoritative guidance to advance the common good. Even though, as Finnis notes, this passage does not explicitly state that “in such state of affairs there would be need for specifically

57. *Id.*

58. This notion of the common good will be employed further on in this paper and expanded on later on in Part II.C.4.

59. PETAR POPOVIC, NATURAL LAW AND THOMISTIC JURIDICAL REALISM: PROSPECTS FOR A DIALOGUE WITH CONTEMPORARY LEGAL THEORY 151 (2022). Popovic builds on John Finnis’s and Russell Hittinger’s observations to this effect. FINNIS, *supra* note 8, at 168. Russell Hittinger, *Polity in Catholic Social Doctrine: Some Recent Perplexities*, in RELIGION AND CIVIL SOCIETY: THE CHANGING FACES OF RELIGION AND SECULARITY 42–43 (Mary Ann Glendon & Rafael Alvira eds., 2014).

60. The “New Natural Law Theory” developed by Finnis, Germain Grisez, John Boyle, and Robert George is not infrequently criticized by Thomists for diverging from Aquinas in a number of ways. See, e.g., Steven A. Long, *Fundamental Errors of the New Natural Law Theory*, 13 THE NAT’L CATH. BIOETHICS Q. 105 (2013); John Goyette, *On the Transcendence of the Political Common Good: Aquinas versus the New Natural Law Theory*, 13 THE NAT’L CATH. BIOETHICS Q. 133 (2013). To do this debate justice, I will focus on more uncontroversial observations made by Finnis and take note of all the divergences and points of contention.

61. FINNIS, *supra* note 8, at 168. Hittinger, *supra* note 59, at 42–43. See POPOVIC, *supra* note 59, at 151 (citing Hittinger).

political government or law,”⁶² he states, based on Aquinas’s other observations, that this argument undoubtedly still applies to legal systems.⁶³

Specifically, while Aquinas’s main *use* for having human (positive) laws in the current state of society is that those “prone to vice” are made to refrain from acting on their immoral dispositions for the sake of others and themselves,⁶⁴ which is redundant in the state of innocence, it is not the main *reason* for having such laws, which is its coordinative function in service of the common good.⁶⁵ As stated above, Aquinas defines natural law as the way in which human beings participate in eternal law—the plan of God.⁶⁶ Even though some opponents of natural law claim otherwise,⁶⁷ human (positive) law is not a mere copy of this natural law. There are two types of human (positive) law—one is derived from natural law as “a conclusion from premises” (for instance, that “one must not kill”), and the other “by way of determination of certain generalities” or *determinatio* (say, “the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature”⁶⁸). This is because “the general principles of the natural law cannot be applied in the same way on account of the great variety of human affairs”⁶⁹ and hence *determinatio* is needed to respond “to specific coordination problems of communal life.”⁷⁰ In the state of innocence, as Aquinas claims, the need for coordination will still exist, and so will laws responding to this need.

While Aquinas does not address efficiency directly in either his discussion of the angelic government or the society in the state of innocence, this argument can be implied when it comes to both. Both angels and men before the Fall want to live more well-ordered lives that will allow them to pursue their goals, and having to decide on the best course of action based

62. FINNIS, *supra* note 53, at 248. Finnis also notes that Aquinas, without contesting, reports the Aristotelian view that there would be “no need for kings and judges” if people were disposed well enough to comply with parental admonitions and that “law is for the unjust, not the just.” However, in *Summa Theologica*, Aquinas agreed with the latter only in a limited sense of AQUINAS, *supra* note 4, at pt. II, q. 96, art. 5., where “the good are not subject to the law, but only the wicked: referred to only the being coerced by law rather than said law only existing for the wicked as opposed to the good. *See also Id.* at pt. I-II, q. 96, art. 5, ad.1. For Aquinas, this coercion is only secondary, law being principally a “work of reason.” Goyette, *supra* note 60, at 142. *See also* Part II.C.2.

63. As Finnis himself hints at in FINNIS, *supra* note 53, at 265.

64. AQUINAS, *supra* note 4, at pt. I-II, q. 95 art. 1.

65. I thank Br. Nicholas Hartman, O.P., for alerting me to the distinction between *reason* and *use*.

66. AQUINAS, *supra* note 4, at pt. I-II, q. 91, art. 4.

67. This point is particularly emphasized by Finnis in his response to Hans Kelsen. FINNIS, *supra* note 8, at 28–29.

68. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 2.

69. *Id.* at pt. I-II, q. 95, art. 2, ad.3. *See also Id.* at pt. I-II, q. 91, art. 3, ad.1.

70. FINNIS, *supra* note 8, at 28; *see also* FINNIS, *supra* note 53, at 265; *see also* John Goyette describing the same rationale in Goyette, *supra* note 60, at 143–44.

on first principles will slow them down compared to having some of this intellectual work done by an authority.

Turning to Raz's second statement on law's place in a society of angels, there is also no reason a Thomistic divine government or a society in the state of innocence would not, likewise, have courts issuing interpretations of authoritative directives or discretionary judgments when they are incomplete. Aquinas himself states that while, in general, human life is better regulated by general laws rather than particularized individual decisions,⁷¹ certain "individual facts," that cannot be dealt with by law alone, "have necessarily to be committed to judges."⁷²

Finally, when it comes to Raz's third claim, it is not clear whether there would be any need for remedies to cover the aftermath of accidental damage. It is hard to imagine it in the case of angels. Firstly, as they are not embodied, it significantly lowers the possibility of their suffering any relevant damage. In addition, angels, as discussed above, possessing complete knowledge, cannot make mistakes that will lead to any such damage. Likewise, Aquinas strongly implies that while men in the state of innocence are, of course, embodied, God would have given human beings the grace to direct their own lives and the lives of others perfectly,⁷³ therefore making unintentional damage unlikely, if not impossible—depending on how broadly one interprets this statement.

C. Implications

The reason both Raz's and Aquinas's "angels" need law is ultimately rooted in the fact that, beyond coercion, law performs an important coordinative function that they would use, respectively, for their own private ends or the common good.

1. Law and Coercion

Both Raz's "society of angels" and Aquinas's "divine government" and "state of innocence" bear on whether coerciveness is a necessary feature of law. Raz's thought experiment was, in his words, intended to show that a legal system that "does not provide for sanctions or which does not authorize their enforcement by force" is "humanly impossible but logically

71. AQUINAS, *supra* note 4, at pt. I-II, q. 95 art. 1, ad.2.

72. *Id.* at pt. I-II, q. 95, art. 1, ad.3.

73. "[T]he first man was established by God in such a manner as to have knowledge of all those things for which man has a natural aptitude . . . [and] knowledge of . . . supernatural truths as was necessary for the direction of human life in that state." *Id.* at pt. I, q. 94, art. 3. I thank Br. Nicholas Hartman, O.P., for this idea.

possible.”⁷⁴ On Lucas Miotto’s exposition, this means that, to Raz, a non-coercive legal system is practically impossible “given the biological and psychological dispositions of human beings,”⁷⁵ but nevertheless theoretically “consistent with the most fundamental logical principles and categories that structure reality.”⁷⁶ In other words, while it is impossible to guarantee human compliance with law without sanctions since some humans would otherwise not have sufficient motivation to obey the law, this is not true in a society where everyone wants to obey the law.⁷⁷

Similarly, to Aquinas, angels and men in the state of innocence, being incapable of not acting virtuously, do not need to be coerced into following the law. In relation to angels, law without coercion remains not only a logical, but also a practical possibility. However, when it comes to men, after the Fall, the state of innocence no longer exists. The Original Sin, at least on the interpretation that Aquinas accepts,⁷⁸ means that human beings may become prone to vice. Therefore, coercion through law is required as these men need to be restrained from evil by force and fear. Firstly, this is needed so these men might desist from evil-doing and leave others in peace. Secondly, this is important so “that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous.”⁷⁹

According to Aquinas, human law without coercion is thus only a logical possibility, even though it was once humanly possible.

2. *Moving Beyond Coercion: the Concept and Functions of Law*

One can, of course, question the relevance of Raz’s thought experiment and Aquinas’s theology as to determining the nature of law. Law, after all, is an artefact which is distinctly man-made.⁸⁰ As a result, Kenneth Himma argued, there is “no plausible reason for adopting a concept of law that

74. RAZ, *supra* note 3, at 158.

75. Lucas Miotto, *From Angels to Humans: Law, Coercion, and the Society of Angels Thought Experiment*, 40 L. & PHIL. 277, 280 (2020).

76. *Id.* at 281–82 (citing E. J. LOWE, THE POSSIBILITY OF METAPHYSICS: SUBSTANCE, IDENTITY, AND TIME 13 (2001)). Miotto refers to “nomological” and “metaphysical” possibility instead of “human” and “logical” possibility, but this paper will remain faithful to Raz’s language.

77. RAZ, *supra* note 3, at 159.

78. “According to the Catholic Faith we are bound to hold that the first sin of the first man is transmitted to his descendants, by way of origin.” AQUINAS, *supra* note 4, at pt I-II, q. 81 art. 1. The precise workings of the original sin depend on which Christian tradition we are talking about.

79. *Id.* at pt. I-II, q. 95, art. 1. *See also id.*, at pt. I-II, q. 90, art. 3, ad 2 (“[A] private person cannot lead another to virtue efficaciously: for he can only advise, and if his advice be not taken, it has no coercive power, such as the law should have, in order to prove an efficacious inducement to virtue.”).

80. I thank Angelo Ryu for directing me towards this line of thought.

departs from what we are and what we do with law.”⁸¹ Or, as per Frederick Schauer’s slightly more forgiving, but similar, point, while coercion is not a necessary feature of law,⁸² it does not matter much as we ought to inquire “what is typical of law rather than what is necessary for it,”⁸³ lamenting “preoccupation with law’s conceptually necessary properties.”⁸⁴ As a result, one so inclined might suggest that Aquinas’s discussion of angels and the society before the Fall does not tell us much about law as it currently exists in an imperfect world populated by humans who are susceptible to “sin.” Unlike in a society of morally perfect beings, coercion would be a “natural necessity”⁸⁵ in a legal system of humans as fallible creatures. Some, however, may object to this line of thought, appealing to both hypothetical examples of non-coercive law,⁸⁶ or anthropological insights into some non-Western societies that were not governed in a coercive manner,⁸⁷ and study of international law as a legal system that is not coercive in the same way as ones of individual states.⁸⁸ While this discussion is of much interest to

81. Kenneth Einar Himma, *The Authorisation of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, 7 JURISPRUDENCE 593, 603 (2016).

82. FREDERICK SCHAUER, *THE FORCE OF LAW* 93–94 (2015).

83. *Id.* at 94.

84. *Id.* However, this charge has been questioned by Leslie Green as “unfair” as it is not representative of the state of the field and “incorrect” because absence of coercion from the list of necessary features of law does not make it not worth examining (in which, I believe, he actually agrees with what Schauer claims). Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164, 176–77 (2016).

85. SCHAUER, *supra* note 82, at 93 (citing H. L. A. HART, *THE CONCEPT OF LAW* 190 (3rd ed. 2012)).

86. For example, Miotto employs, to this effect, “the argument from the wounded state,” imagining a situation when the coercive apparatus is disabled yet citizens continue to obey the law out of solidarity, and “the argument from the fair criminal system,” or envisaging a criminal law system built on mutual respect. See Miotto, *supra* note 75, at 295–301.

87. For example, David Graeber and David Wengrow write about how, according to archeological evidence, prehistoric cities in Mesopotamia, the Indus Valley, Ukraine, and China operated without a centralized coercive power. DAVID GRAEBER & DAVID WENGROW, *THE DAWN OF EVERYTHING* 123–44 (2021). Or, Pierre Clastres, writing about indigenous inhabitants of North and South America, writes about chiefs of these tribes as “peacemakers” or mediators rather than authorities, grounding their power in consent and not coercion. PIERRE CLASTRES, *SOCIETY AGAINST THE STATE: ESSAYS IN POLITICAL ANTHROPOLOGY* 22, 130 (Robert Hurley & Abe Stein trans., New Edition ed. 1990). As cited in JOHN GLEDHILL, *POWER AND ITS DISGUISES: ANTHROPOLOGICAL PERSPECTIVES ON POLITICS* 27–30 (2d ed. 2000). Finally, Fernanda Pirie describes how in Ladakhi villages, any wrongdoings—even serious ones such as rape—would be addressed through reconciliatory meetings rather than coercive mechanisms. Fernanda Pirie, *Legalism: A Turn to History in the Anthropology of Law*, 15 CLIO@THEMIS, 5–6 (2019). I thank Dr. Alex Green for this suggestion and Dr. Lucas Miotto for examples.

88. For instance, Alexander Thompson notes that sanctions in international law are by and large “decentralized” in that they are imposed by states themselves rather than some higher bodies. Alexander Thompson, *Coercive Enforcement of International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 502, 504 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012). International law will also be investigated below at Part IV.D. I thank Dr. Alex Green for this suggestion.

jurisprudence, Raz's and Aquinas's descriptions of the society of angels matter beyond identifying the extent to which law needs to be coercive.

Even if one agrees with Himma that coercion is necessary for law as it exists in any human community, the society of angels thought experiment is still conceptually as well as practically useful in understanding the multiplicity of law's functions. More precisely, it shifts our focus from coercion to coordination by imagining the legal system in question without the former. If we only consider coercive legal systems, we are likely to only focus on what Tom Campbell terms the control rationale for legal rules—"the general need to prevent directly harmful and encourage directly beneficial behavior,"⁸⁹ but there are other functions in play. Firstly, for Aquinas, law in a world of imperfect humans is used not just to prevent harm, but to perform an educational function by "training" individuals to forego their vices through the force of habit.⁹⁰ Secondly, and even more importantly for this paper, the non-coercive legal systems described by Raz and Aquinas show that law is needed also for coordination, or to "enable people to anticipate the conduct of others and thus more successfully achieve their objectives either personally or in cooperation with others."⁹¹ More so, for Aquinas, this function of law is more important than its coercive function—"law is principally a work of reason: it belongs to the very definition of law to be a work of reason, whereas coercive power is something secondary, made necessary by those who do not cooperate with the intention of the legislator."⁹²

In other words, to quote Alexander, "the problem to which law is a solution is not that men are not angels, but that they are not Gods,"⁹³ a statement with which both Raz and Aquinas would agree with, the latter probably more literally than the former.

3. *Coordination and Law's Practical Necessity*

One can ask, however, whether the need for coordination leads to the need for law. After all, as Finnis, whose theory of law builds on Aquinas's arguments, admits, coordination can be achieved by a variety of

89. TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 50 (1996).

90. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 1. While this paper centers on Aquinas's account of such, this point was also made by others. See generally Brian Burge-Hendrix, *The Educative Function of Law*, in *LAW AND PHILOSOPHY* (Michael Freeman & Ross Harrison eds., 2007).

91. CAMPBELL, *supra* note 89, at 50.

92. Goyette, *supra* note 60, at 142.

93. Alexander, *supra* note 21, at 549.

mechanisms such as “propaganda, extortion, and custom.”⁹⁴ Yet there is something special about law that renders it better suited for coordinative purposes. Finnis argues several characteristics of law lend it to coordinative purposes. Firstly, law is a “seamless web” that connects benefits and burdens imposed by legal means. As a result,

[w]here burdened by a legally enforced coordination scheme he thinks misguided, each can reflect that he has been or at some time will be benefited by the burdens which the law has in other respects (other ways, other contexts) imposed and will impose on others.⁹⁵

This can be read in two alternative but not necessarily mutually exclusive ways—either as an appeal to self-interest, which does not matter to angels, or as a guarantee of fairness, which might be applicable even to morally perfect beings.

Secondly, Finnis writes that law’s three “procedural” features “give reason for regarding it as authoritative in identifying and solving coordination problems.”⁹⁶ I will first deal with the two features that are not applicable to angels. The first one is law’s ability to penalise free-riders “so that the willing collaborator in the legally required coordination solution can have some assurance that he is not a mere sucker or fall-guy.”⁹⁷ The second one is the resulting minimization of unfairness.⁹⁸ With angels being naturally predisposed to follow the law and never acting as free riders, these two points seem not to be of our concern here.

What is left is the third feature, which, by contrast, is wholly relevant to the discussion in this paper. In describing it, Finnis writes,

the law’s legislative capacities hold out the prospect of generating relatively prompt but also relatively clear and subtle solutions to coordination problems [and, by extension, coordination in general] as they emerge and change.⁹⁹

This is what makes law so attractive even to angelic communities—it possesses the possibility to perform coordination in a more efficient way, making it practically necessary for pursuing this goal.

94. See John Finnis, *Law as Coordination*, in *PHILOSOPHY OF LAW: COLLECTED ESSAYS* 67, 70 (2011) (citing Raz, *supra* note 20, at 233–49).

95. Finnis, *supra* note 94, at 470.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

4. *Individual Interests and the Common Good*

The key difference between Raz and Aquinas lies in the “objectives” to which the coordinating function of law is oriented. Raz’s “society of angels” experiment envisions a pluralistic society, whose members disagree about their values.¹⁰⁰ To him, harmony produced by coordination via law is necessary for the pursuit of angels’ individual interests in “settling disputes and resolving conflicts of interest by mutual agreement.”¹⁰¹

Conversely, for Aquinas, law’s coordination is needed to serve not the individual interests, but the common good, even though the two are not mutually exclusive. All creatures (including angels and men) are also naturally oriented towards this good rather than just their particular good, as

in the physical world it appears that every subject whose nature depends on another by way of participation is primarily inclined toward that other, more so than toward itself . . . in the body, the hand exposes itself to harm in order to protect the head; in the animal world, the individual faces its own destruction for the survival of the species.¹⁰²

The common good, for Aquinas, is common, “not as to a common genus or species, but as to a common final cause.”¹⁰³ In other words, it is not just any sum of individual goods, e.g., when two friends both want to share a bottle of wine and the more wine one of them has, the less is left for the other,¹⁰⁴ but is “a good that is one in number and is able to be shared by many without being diminished.”¹⁰⁵ Common good is also not mere “community interest”—as Dominic Legge notes, it is not something “alien and hostile” that

trumps or even destroys the good of the individual . . . [but] is a good for the individual, a good of a higher and nobler sort in which the individual participates, and without which it is impossible to have a full measure of human happiness.¹⁰⁶

100. RAZ, *supra* note 3, at 159.

101. *Id.*

102. BONINO, *supra* note 37, at 163–64.

103. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 2, ad. 3.

104. To borrow Goyette’s example. Goyette, *supra* note 60, at 137–38.

105. *Id.* at 138.

106. Dominic O.P. Legge, *Do Thomists Have Rights?*, 17 NOVA ET VETERA 127, 145–46 (2019).

This “universal happiness” is the ultimate end of political communities,¹⁰⁷ and hence the law as noted, *inter alia*, in its definition as an “ordinance of reason for the common good.”¹⁰⁸ More specifically, Aquinas writes that “[i]n order that man might have peace¹⁰⁹ and virtue [justice]¹¹⁰ [the two elements of the common good of a political community], it was necessary for laws to be framed.”¹¹¹ As Goyette points out, justice and peace (intrinsic common good) matter not for their own sake, but to order the lives of members of the political community towards virtuous living (extrinsic common good).¹¹² Securing peace and justice is of paramount importance as it plays a special role of actively ordering and directing men “toward the good life, the life of virtue lived in common with other members of the city (*civitas*).”¹¹³

Aquinas’s orientation of the state and law towards the common good of the community rather than the individual good of its members comes out in the discussions of both societies of angels and saints. Angels need to be hierarchically ordered to “know and love God by natural knowledge and love,”¹¹⁴ not to accumulate knowledge for their own vanity or power, which is contrary to their nature.¹¹⁵ Likewise, in the state of innocence, the mastership of men over men is necessary for securing the common good rather than their individual interests.¹¹⁶

As a result, while Raz’s and Aquinas’s angels benefitted from law’s coordination, they did so for different purposes—pursuit of individual interests and common good respectively.

107. AQUINAS, *supra* note 4, at pt. I-II, q. 90, art. 2. In relation to which it is known as *public good*.

108. *Id.* at pt. I-II, q. 90, art. 4. For a detailed discussion, see *Id.* at pt. I-II, q. 90, art. 2. See also Part I, *supra*.

109. By peace in this context, Aquinas means not just, as one would expect, the “concord” between persons and groups encompassing the community, but, in addition, inner tranquility or harmony between an individual’s desires. AQUINAS, *supra* note 4, at pt. II-II, q. 96, art. 1.

110. Virtue, as applied to interpersonal relations translates as “justice” or “a habit whereby a man renders to each one his due by a constant and perpetual will.” *Id.* at pt. II-II, q. 58, art. 1. While abundance will only join peace and justice later as an expression of the *ragion di stato* tradition (see, e.g., GIOVANNI BOTERO, REASON OF STATE 71 (Robert Bireley trans., 2017)), Aquinas suggests that the peaceful condition would include sufficiency of at least necessities of life. “[H]ousekeepers or civil servants . . . have to provide the household or the state with the necessities of life.” AQUINAS, *supra* note 4, at pt. II-II, q. 77, art. 4. See also FINNIS, *supra* note 53, at 227. (discussing the same topic).

111. “In order that man might have peace and virtue, it was necessary for laws to be framed.” AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 1.

112. Goyette, *supra* note 60, at 154–55.

113. *Id.* at 141.

114. AQUINAS, *supra* note 4, at pt. I, q. 108, art. 4.

115. Unlike in case of fallen angels, or demons.

116. AQUINAS, *supra* note 4, at pt. I, q. 96, art. 4.

III. DEMONS

One can juxtapose a society of angels, perfectly moral beings, to a society of perfectly immoral beings, a society of demons. Demons would instinctively refuse to follow the law when it conflicts with their self-interest. Surprisingly, those “demons” or “devils,” in both Raz’s and Aquinas’s paradigms, nevertheless, would, similarly to angels, be appreciative of the coordinative benefit that law-like rules provide.

A. Raz

Let us first imagine demonic beings in Raz’s paradigm. Demons in Raz’s paradigm would, like angels, be rational, at least in the instrumental sense—while they do not desire good, they have other, evil, goals in mind and are willing to act in pursuit of those aims. As a result, unlike “angels” from Raz’s thought experiment, those demons would not want to follow the precepts of law for their intrinsic good. At first sight, such actors would not allow themselves to be limited by laws, rendering the institution of law and state impossible. This logic can, however, be resisted. One can build on Immanuel Kant’s remarks that “the problem of the formation of the state, hard as it may sound, is not insoluble, even for a race of devils, granted that they have intelligence”¹¹⁷ as devils would comply with such law for self-preservation reasons. This formulation of the problem can be further corrected. Contrary to Kant, H.L.A. Hart has rightly remarked that, if we take devils as having plans of some sort beyond just behaving in a chaotic way for its own sake, “with devils prepared to destroy, reckless of the cost to themselves, [rules requiring forbearances] would be impossible.”¹¹⁸ In cases like these, we ought to modify the Kantian view by talking about self-interest instead, which might, but does not have to include, self-preservation. Devils might be indifferent to their own demise as long as they successfully pursue their destructive plans, but they will still be invested in that success, akin to how angels are invested in following good objectives.

Regardless of whether we emphasize demons’ self-preservation or self-interest, we can make similar conclusions about the desirability of law to those beings. While Kant, in the passage reproduced above, was interested in the question of whether a legal system is possible rather than desirable for a demonic society, one can further extend this claim by drawing on his

117. IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 153–54 (Mary Campbell Smith trans., 1917), <https://www.gutenberg.org/files/50922/50922-h/50922-h.htm> [<https://perma.cc/3TVC-U7PA>].

118. HART, *supra* note 85, at 194.

Metaphysics of Morals. Kant wrote that entering the “civil condition,” or placing oneself in a law-governed society, was necessary to realize and preserve one’s freedom.¹¹⁹ In the terms employed in this paper, to him, self-preservation might not just be a reason to follow the law, but also a reason to have law in the first place. This can be unpacked as follows if one talks about demons. Firstly, the “race of devils” scenario, unlike the converse case of the society of angels, resembles a prisoner’s dilemma¹²⁰—situations when actors will be motivated to pursue their self-interest to the exclusion of compromise, but may reach a negative outcome as a result. While devils would be incentivized not to follow social rules so they would not be constrained in their actions, they would lose out both individually and collectively. Coercion is thus necessary to reorder these incentives and allow devils to make an optimal choice. This coercion would benefit from being framed as law—as discussed earlier,¹²¹ per Finnis, the seamlessness of law and its procedural features incentivize compliance with its coercive directives.¹²² Secondly, devils—just like any other rational beings—would need these instructions to be clear and thus would benefit from non-coercive functions of law as described in Raz’s thought experiment: to resolve issues of expertise, coordination, and efficiency, to interpret the law and resolve discretionary matters, and to remedy accidental damage.¹²³ This, similarly to a case of angels,¹²⁴ will be helped by the law’s procedural features, namely, as per Finnis, its superior “legislative capacities.”¹²⁵

One can object that devils would not be moved by these arguments by virtue of their immorality. However, the need for coordination Raz describes is not unique to “angels”—even immoral actors have individual needs that would be satisfied by legality. Stability in our day-to-day life and ability to plan our actions are what we all desire, whether good or evil. Raz recognized this, writing that the Rule of Law in the formal sense¹²⁶ (and

119. See generally IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 77 (Mary Gregor trans., 1991).

120. I thank Dr. Jordan Perkins and Angelo Ryu for this suggestion.

121. Part II.C.3, *supra*.

122. Finnis, *supra* note 94, at 71.

123. RAZ, *supra* note 3, at 159.

124. As discussed in Part II.C.3, *supra*.

125. Finnis, *supra* note 94, at 71.

126. In other words, describing how the legal rules are constructed as opposed what do these rules say (substantive sense). For an exploration of both, see generally Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC LAW 95 (1997). The language employed with regards to this distinction had since been challenged, most notably by Gardner, who would rather describe the Fullerian Rule of Law as “modal.” John Gardner, *The Supposed Formality of the Rule of Law*, in LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 211 (2012).

therefore the existence of law in general¹²⁷) is at least instrumentally valuable as it facilitates individual planning because the existence of clear and unambiguous rules allows the law-subjects to rely on them for guidance when living their day-to-day lives.¹²⁸

B. Aquinas

Aquinas, taking a different stance, maintains that demons do not have law strictly speaking as true law can never be unjust. However, he still agrees with the account laid out above that those immoral beings would still resort to law-like rules' ability to help them coordinate in pursuit of their evil goals.

1. Law and Justice

In Christian theology, demons are fallen angels that have chosen to defy God. Their nature mirrors that of good angels: they are incorporeal (and so only possess will and intellect rather than passion) and are similarly knowledgeable with regards to natural matters.¹²⁹ However, as a result of their choice, they are "misled with regard to supernatural matters" as they are "utterly perverted from the Divine wisdom."¹³⁰ As a result, the demons' will is "obstinate in evil," rather than "confirmed in good."¹³¹

I submit that Aquinas would not consider governance in such a society to be "legal" in the primary sense of the word. To that effect, one should recall Aquinas's definition of law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."¹³² As a result, following Aquinas's definition,¹³³ laws contrary to human good can be so in three ways: (i) in respect of the end, (ii) in respect of the author, and (iii) in respect of the form.¹³⁴ For the

127. Raz states that some conformity with the Rule of Law is required for law to exist—"[t]he law to be law must be capable of guiding behaviour, however inefficiently." JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 227 (1979).

128. *Id.* at 219–23.

129. AQUINAS, *supra* note 4, at pt. I, q. 64, art. 1. However, this natural knowledge is not referred to the praise of God. "[T]he demon's mind is darkened: it is totally deprived of the light of wisdom." BONINO, *supra* note 37, at 211.

130. AQUINAS, *supra* note 4, at pt. I, q. 58, art. 5. BONINO, *supra* note 37, at 211.

131. AQUINAS, *supra* note 4, at pt. I, q. 64, art. 2.

132. See the definition at *id.* at pt. I-II, q. 90, art. 4.

133. As highlighted in E. J. Damich, *The Essence of Law According to Thomas Aquinas*, 30 *THE AM. J. JURIS.* 79, 92–93 (1985) (noting that injustice 'in respect of the form' (iii), or disproportionality, does not directly correspond to any element of Aquinas's definition, but can nevertheless be construed as being contrary to the common good).

134. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

purposes of this discussion, I will center on the first category of (i) unjust laws in respect of the end, or “when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory.”¹³⁵ Hence, for Aquinas, such law—the kind of which the law of demons would undoubtedly be—is not law *simpliciter* (in the focal sense)¹³⁶ as it does not fit his definition of law in the primary sense. It is no wonder that Aquinas remarks that “these are like acts of violence rather than laws.”¹³⁷ In other words, the “law” of demons would be analogous, to paraphrase St. Augustine, to the “honor code” of a band of robbers rather than a state.¹³⁸

Many laws in a society of wicked beings would be undoubtedly unjust and hence, not laws *simpliciter*, however, one can wonder whether this would be the case with all laws produced in such an order. After all, such a society will not just need laws compelling or permitting evil and prohibiting good, but, on the surface, neutral or even benign laws that would prevent the demonic society from disintegrating similar to those regulating traffic rules as per the example above.¹³⁹ However, Aquinas’s definition of unjust laws is not framed in terms of the consequences of laws, but their end and their author.¹⁴⁰ Therefore, even neutral or benign laws would be unjust if not produced for the common good. This will be the case of all laws in a demonic or quasi-demonic order, the goals of which are presumed to be antithetical to the objectively existing common good as opposed to their own good. Like the “honor code” of a band of robbers, which exists to sustain a criminal entity, the “law” of demons ultimately serves their fight against God’s justice.

As a result, it can be seen that Aquinas, unlike Raz, would not classify the internal arrangements of the society of demons as law, strictly speaking.

2. Law and Coordination

However, Finnis is correct to note that while to Aquinas unjust law would not be “law” in a primary sense, it would still be law *secundum quid*

135. *Id.*

136. FINNIS, *supra* note 8, at 264 (quoting THOMAS AQUINAS, *SUMMA THEOLOGICA*, at pt. I-II, q. 92, art. 1, ad.4).

137. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

138. AUGUSTINE, *THE CITY OF GOD* bk. IV, ch. 4 (Rev. Marcus Dods trans., 1871), <https://www.gutenberg.org/files/45304/45304-h/45304-h.htm> (“Without justice what are kingdoms but great bands of robbers? And what is a band of robbers but such a kingdom in miniature?”) [perma.cc/4Z2X-PEGK].

139. See *supra* Part II.A.

140. The third type—in respect of the form—will not be discussed here as it only concerns laws that are oriented towards the common good. See AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4.

(in a secondary sense)¹⁴¹ that I will hence refer to as “law-like rules.” These rules, despite being unjust, share some features with laws in the first sense of the word. As such, they would be laws in Raz’s formulation. Law-like rules operate similarly to laws by purporting to employ a specific set of techniques. Recognising this affects our understanding of what they can do and informs us how to best respond to them. In Finnis’s explication to that effect,

the [classical] tradition [that Aquinas belongs to] explicitly (by speaking of ‘unjust laws’) accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both these grounds and in both these senses.¹⁴²

There are indeed at least three instances in which Aquinas expresses this sentiment: (i) tyrannical laws issued for the tyrant’s good;¹⁴³ (ii) unjust laws issued by someone in a position of authority;¹⁴⁴ and (iii) unjust laws being obligatory when not conforming to them will cause a “scandal or disorder.”¹⁴⁵ As Campos notes, (ii) and (iii) might only be exceptions to the rule that “unjust law is not a law” because “ultimately they are justified by the fact that they are preferable to the common good (the good *simpliciter*) when compared to the possibility of having no laws whatsoever.”¹⁴⁶ As a result, Aquinas’s account of law-like rules is, by and large, still influenced by the notion of the common good.

Nevertheless, the plausibility of the aforementioned reading is underscored by the fact that the same sentiment shines through Aquinas’s remarks on the society of demons. One would expect these immoral beings to thrive on chaos and being opposed to order, but this proposition is undermined in Aquinas’s angelology. To Aquinas, since demons retain

141. See FINNIS, *supra* note 8, at 364.

142. *Id.* at 365.

143. See Andre Santos Campos, *Aquinas’s “Lex Iniusta Non Est Lex”: A Test of Legal Validity*, 100 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 366, 370 (2014) (citing AQUINAS, *supra* note 4, at pt. I-II, q. 92, art. 1, ad. 4). Even though, as Andre Campos notes further on, that “further on, Aquinas says that tyranny is totally corrupt and therefore is no law”, there is no reason why one should dismiss the earlier, and not the latter, statement as a mistake. *Id.* (citing AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 4).

144. AQUINAS, *supra* note 4, at pt. I-II, q. 93, art. 3, ad. 2. See also Campos, *supra* note 143, at 371.

145. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4. See also Campos, *supra* note 143, at 371.

146. Campos, *supra* note 143, at 371.

some of their nature after the angelic choice is made, they, like angels, are ordered hierarchically.¹⁴⁷ However, while the divine government is oriented towards the goal of serving God, the demons' subjection to one another is based "on their common wickedness whereby they hate men, and fight against God's justice."¹⁴⁸ In order to "carry out their own wickedness," weak demons must necessarily be joined to and subject to those whom they see to be stronger.¹⁴⁹ Just as angels need to coordinate (broadly speaking) for good ends, demons need to coordinate for evil aims. As such, a demonic order is still an order, and "if anarchy were to triumph, it would immediately self-destruct."¹⁵⁰ And, as stated right above,¹⁵¹ just as in the case of Razian demons, this order is better secured through law due to its unique propensity for coordination, even though Aquinas's demons, just like his angels, are less individualistic and pursue collective—albeit evil—aims. Therefore, under both Aquinas and Raz, a society of demons would need some sort of structure of law-like authority for reasons of coordination, even though that authority would not be *stricto sensu* legal. In that, both outlined perspectives on demons resemble the literary exploration of the demonic government in C.S. Lewis's *The Screwtape Letters*, where demons are depicted as forming a bureaucratic structure that the author calls a "Lowerarchy."¹⁵²

IV. US

To sum up, even though we are neither angels nor demons, a discussion of Raz's and Aquinas's descriptions of angelic societies, their application to demonic societies, and additional commentary leads to the following conclusions that will be relevant beyond that context:

- Non-coercive legal systems are at least logically possible. They are also humanly possible if we believe in the existence of angels.¹⁵³
- Legal systems exist not only to coerce the law-subjects, but also to coordinate them in pursuit of their individual or collective goals.¹⁵⁴

147. AQUINAS, *supra* note 4, at pt. I, q., 109 art. 2.

148. *Id.* at pt. I, q. 109, art. 2, ad.2.

149. *Id.*

150. BONINO, *supra* note 37, at 280.

151. *Supra* Part III.A.

152. C. S. LEWIS, *THE SCREWTAPE LETTERS: LETTERS FROM A SENIOR TO A JUNIOR DEVIL* (2016).

153. *See supra* Part II.C.1.

154. *See supra* Part II.C.2.

- This coordination is best accomplished via law—or, at the very least, law-like rules.¹⁵⁵
- The coordination-maximising features of these rules make them practically necessary to pursue both the particular good of individuals (Raz’s conception) and the common good of the community (Aquinas’s conception).¹⁵⁶
- That coordination function can also work against the common good of the community¹⁵⁷ (even though Aquinas only considers such systems legal in a limited sense).¹⁵⁸

One can see how these conclusions play out in four scenarios: post-legal societies, wicked regimes, extraordinary measures, and international law. Specifically, the differences between Raz’s and Aquinas’s conceptions of law do not matter when it comes to addressing the relevance of coordinative power in those practical scenarios.

A. *Post-Legal Societies*

Many claim that it is possible to build post-legal societies with perfect citizens and conditions, so that there is no need for law. One example is the promise of a communist society by Karl Marx, Friedrich Engels, and their heirs. After the proletarian revolution and subsequent abolition of class distinctions, as Engels remarked in a famous passage, the state and hence the law would “die out” or “wither away”¹⁵⁹ as they would no longer be needed to maintain and justify domination of some individuals over others. However, one may question this prediction. Brian Leiter noted that even in such a society, both law (in the sense employed in this paper)¹⁶⁰ and morality would persist, invoking nothing other than Raz’s “society of angels”

155. See *supra* Part II.C.3.

156. See *supra* Part II.C.4.

157. See *supra* Parts III.A, III.B.2.

158. See *supra* Part III.B.1.

159. Frederick Engels, *Anti-Dühring*, in 25 COLLECTED WORKS OF MARX AND ENGELS 286 (1987).

160. But cf. Evgenii Pashukanis, *The General Theory of Law and Marxism*, in PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 61 (Peter B. Maggs ed., 1980). A notable outlier to this communist theory is Evgenii Pashukanis, who defined law as those rules that regulate the relationship of possessors of commodities. As a result, he stated that it would be obsolete in a communist society where no such relationship persists. *Id.* at 46. Pashukanis, however, admitted that law-like ‘technical rules’ would persist even under communism. See generally *id.* at 58. As emphasized by me earlier in Anna Lukina, *Between Exception and Normality: Schmittian Dictatorship and the Soviet Legal Order*, 35 *RATIO JURIS* 139, 147 (2022).

thought experiment.¹⁶¹ Even under communism, “in the absence of the need for constant competition for economic survival, individuals will behave quite a bit differently than they do under capitalism,”¹⁶² they would still have the same needs as Raz’s “angels.”¹⁶³ That is, they would be used to coordinate such “angels” lives, interpret laws and make discretionary judgments, and remedy accidental damage.¹⁶⁴ As a result, even if we accept the controversial proposition that communism would not need coercive laws,¹⁶⁵ it would have laws nevertheless, serving other purposes. While Leiter’s approach is hardly a natural law one, one could reach the same conclusion by referring to Aquinas’s discussion of the state of innocence, where authority, including legal authority, continues to be needed even in a drastically different social context. This need for coordination is the reason why Vladimir Lenin, Evgeny Pashukanis,¹⁶⁶ and Andrey Vyshinsky, building on Marxist ideas in the context of a new Soviet state, envisioned a space for law even after the transition to a new socio-economic order.¹⁶⁷ This was important not just theoretically, but practically—this shift in ideas was mirrored in a gradual revitalization, or “refetishization,”¹⁶⁸ of legality in the Soviet state culminating in 1930s legal reforms that brought law and legality back on the agenda.¹⁶⁹

B. *Wicked Regimes*

Engaging the 1930s Soviet Union is impossible without bringing up another theme—that of unjust, wicked, or evil law. This very category can seem paradoxical—as Nigel Simmonds has remarked, wicked regimes have no need for the rule of law, as for them legality “gets in the way” by putting fetters on legal terror.¹⁷⁰ The discussion of the society of demons goes against this thesis—as shown above, even intrinsically immoral actors can

161. Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1181–82 (2015).

162. *Id.* at 1182.

163. *Id.*

164. *Id.*

165. This might be questioned as one can imagine, for instance, non-property related crimes—such as murder—being committed under communism. Lenin acknowledged that, saying that, “[a]ll ‘individual excesses’ would be responded to ‘by the armed people themselves as simply and as readily as any crowd of civilised people, even in modern society, interferes to put a stop to a scuffle or to prevent a woman from being assaulted.’” It is unclear whether these actions would amount to law or not. Vladimir Lenin, *The State and Revolution*, in COLLECTED WORKS (VOLUME XXV), 464 (1974). As cited in Lukina, *supra* note 160, at 145. I thank Angelo Ryu for alerting me to this.

166. In the non-Pashukanist sense described in note 160 above.

167. As explored in detail in my previous paper. Lukina, *supra* note 160.

168. PETER H. SOLOMON, SOVIET CRIMINAL JUSTICE UNDER STALIN 153 (1996).

169. *See*, in more detail *Id.* at 153–89.

170. NIGEL E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAW AND RIGHTS 230–32 (1986).

favor law-like mechanisms for self-preservation or to better achieve their goals. For instance, Matthew Kramer has remarked that wicked regimes would need law to systematically coerce their subjects into not going against their plans.¹⁷¹ Moreover, as Kramer further notes,¹⁷² such societies would need law—or, at the very least, law-like rules—not just for coercion, but for coordination. Wicked governments would need law to solve prisoners’ dilemmas unique to them or problems of expertise, coordination, and efficiency that are also on the agenda of non-evil regimes, both in their wicked plans and in the routine maintenance of stability needed for the survival of the state. It is no wonder that a number of historical wicked systems have been described as “dual states” combining a “prerogative” element when it comes to more “political” issues and a “normative” element in relation to mundane matters.¹⁷³ This is something that both Raz and Aquinas would agree with. Even though, as indicated above, these two thinkers would disagree on whether law produced in those regimes is law properly so called,¹⁷⁴ Aquinas would still converge with Raz on the following two points. Firstly, as demonstrated above,¹⁷⁵ to Aquinas wicked law was still law *secundum quid*, and shared some characteristics with law properly speaking, overlapping, in multiple ways, with Raz’s conception of it as fully law. Secondly, as per Ronald Dworkin’s observation, this distinction is separate from the more practically relevant question of duties of obedience one would have in relation to such law, as a right to disobey unjust law can be ultimately derived not just from its imperfection as law, but from external moral duties.¹⁷⁶ This can be shown by the fact that both Raz’s and Aquinas’s theories have space for such a dispensation from law’s authority. Raz emphatically argues that there is not even a *prima facie* obligation to obey the law, even in a good society.¹⁷⁷ One can either be guided by *ad hoc* moral judgments on individual matters or the general

171. Matthew H. Kramer, *On the Moral Status of the Rule of Law*, 63 CAMBRIDGE L.J. 65, 69 (2004). Simmonds replied that it is true only inasmuch as one conceives of legality or the rule of law as a “threshold” idea of minimal conditions of law rather than a full-blooded ideal of common good and justice, however, this has little bearing on this part of the discussion. N. E. Simmonds, *Freedom, Law, and Naked Violence: A Reply to Kramer*, 59 U. TORONTO L. J. 381, 385–88 (2009).

172. MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS 70 (1999).

173. The term was put into use by Ernst Fraenkel, who applied it to Nazi Germany. ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (2017).

174. *See supra* Part I.

175. *See supra* Part III.B.1.

176. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 410–12 (2011). Further on, in *Law’s Empire*, he argued that both positions might have value as they are employed for different purposes. RONALD DWORKIN, *LAW’S EMPIRE* 101 (1998).

177. Raz, *supra* note 13, at 233.

moral attitude of “respect for law.”¹⁷⁸ In an unjust regime, the latter would be morally culpable.¹⁷⁹ Therefore, one has a right to disobey an unjust law and even an obligation to do so unless mandated by moral reasons independent of this attitude. Similarly, according to Aquinas, unjust law, being law only *secundum quid*, does not “bind in conscience,” except when it may be necessary “in order to avoid scandal or disturbance,” or when our separate personal moral obligation to the common good—and its “peace” component—directs us to do so.¹⁸⁰ Overall, even though Raz and Aquinas use different pathways, the conclusions are comparable.

C. *Extraordinary Measures*

Next, we must consider extraordinary or emergency measures that often stray from the boundaries of law. This phenomenon is most lucidly expressed by Carl Schmitt’s notion of dictatorship—a departure from an existing legal order that is necessitated by emergencies: either the need to protect the *status quo* or to transition to a new regime.¹⁸¹ This phenomenon can be seen in many legal cultures, including Ancient Rome,¹⁸² Revolutionary France,¹⁸³ the Weimar Republic, and the Post-9/11 United States.¹⁸⁴ As I have argued in my previous discussion of dictatorships, even with supposed departure from the normal legal order, such dictatorships would still rely on legality due to law’s practical necessity for coordination¹⁸⁵—a conclusion one can derive from both Raz’s and Aquinas’s discussions of the society of angels and the application of their argument to the “race of devils.” Whether aiming to protect or bring about good or wicked regimes, a dictator will rely on law—or, at least, law-like rules—to ensure the success of his plans. As to the relationship between law and justice, the same conclusions as above apply here. Both frameworks provided by Raz and Aquinas would allow for moral evaluation of such a system, however, the latter approach would deal with potential injustices within rather than outside the law.

178. *Id.* at 260.

179. “While it is never wrong not to respect the law it is morally wrong to respect it in South Africa or other fundamentally iniquitous regions.” *Id.* at 258–59.

180. AQUINAS, *supra* note 4, at pt. I-II, q. 96, art. 4. As interpreted by Keith D. Wyma, *When and How Should We Respond to Unjust Laws? A Thomistic Analysis of Civil Disobedience*, 43 CHRISTIAN SCHOLAR’S REV. 157 (2014).

181. CARL SCHMITT, *DICTATORSHIP* 7–8 (Michael Hoelzl & Graham Ward trans., 2014).

182. *Id.* at 1–2.

183. *Id.* at 127.

184. See discussion in BERNARD E. HARCOURT, *THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* (2018).

185. Lukina, *supra* note 160, at 152–53.

D. International Law

According to Hart, since states are different from individuals, “there is neither a similar necessity for sanctions . . . nor a similar prospect of their safe and efficacious use”¹⁸⁶ in international law. This is due to two reasons: (i) that the possibility of the use of force by states already provides enough deterrence from breaching the peace (akin to a society of angels), and that (ii) differences in strength and power between individual states will necessarily render sanctions either meaningless or unequal in their application (akin to a society of demons).¹⁸⁷ Both claims, however, can be questioned. First, in response to (i), while contemporary wars—from Syria to Ukraine—do not reach the magnitude of both World Wars, they are still palpably present in the international order, leading to death and destruction of great magnitude. Second, two points can be made to the claim (ii). One is that individuals are equally different in their capabilities,¹⁸⁸ although the state in state-individual relationships tends to be more powerful. Another is that sanctions are often applied within the international order. It does not mean, however, that this form of coercion is the same one as when it comes to states. Alexander Thompson concedes that coercion in international law, unlike in domestic law of individual states, is mostly decentralized, with coercive acts being undertaken by the states themselves rather than imposed top-down by some governmental body.¹⁸⁹ However, he echoes Anthony D’Amato that this does not mean that international law is not law, or is not coercive—there, coercion is just differently organized.¹⁹⁰ Aggrieved states can take actions against those who have wronged them, either individually, on their own, or collectively, as members of international bodies. The options available to them are numerous, ranging from economic sanctions to military action.¹⁹¹ Even more so, these mechanisms may be rather effective in the right circumstances,¹⁹² even though they might not be able to influence some States that have both the desire and power to ignore coercive measures.

Still, even if we accept Hart’s characterization of the international order as at least partially true, international law is needed because of the practical

186. HART, *supra* note 85, at 219.

187. *Id.* at 219–20.

188. Dr. Alex Green has alerted me to that point.

189. Thompson, *supra* note 88, at 504–06.

190. Thompson, *supra* note 88, at 504, cites D’Amato for the same point. See ANTHONY D’AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 24–25 (1987).

191. As indicated by Thompson, *supra* note 88, at 505–06. For a more detailed treatment, see MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008).

192. See O’CONNELL, *supra* note 191, Part II.

necessity of legal mechanisms for coordination as drawn from the theories of Raz and Aquinas. The primacy of this function is widely accepted in international law literature. For instance, Prosper Weil’s influential article locates the rise of international law in “social organization,” not only enabling the states to live peacefully (co-existence), but also making sure they succeed in pursuit of their common interests (co-operation).¹⁹³ Regardless of whether the states forming the international community are committed to peace (out of conviction or self-preservation) or to war, they would need to organize their mutual relationships to form military alliances, conduct trade, collaborate in pursuit of various projects—which is particularly important in the face of terrorism, global health problems, environmental challenges, scientific and technological advances, and more. According to Aquinas, the “law of nations,” or what is currently referred to as international law, belongs to the same category of positive law as “civil law,” or the law of individual states.¹⁹⁴ As a result, the same conclusions he made about domestic law—its practical necessity and its dependence on common good—apply to international law with the same force. Aquinas’s version of “just war theory” is a vivid example of how the common good can provide checks on positive international law. Aquinas presents three conditions necessary for a war to be just and hence “lawful”: that it is declared by an authoritative sovereign, that those who are attacked are pursued “because they deserve it on account of some fault,” and that “the belligerents have rightful intention, so that they intend the advancement of good, or the avoidance of evil.”¹⁹⁵ These conditions are the opposite of the previously discussed attributes of unjust law, namely lack of authority and orientation to a private rather than a common good respectively. As a result, one can conclude that, according to Aquinas, international law would have a fully law-like character insofar as it conforms to the common good of the international community.¹⁹⁶

193. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 418–19 (1983). Weil’s view is shared by many, including John Tasioulas, despite him critiquing Weil’s suggestions as to how the suggested ends of international law ought to be pursued. John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case*, 16 OXFORD J. LEGAL STUD. 85, 113 (1996). As noted by Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT’L L. 627, 628 (2001).

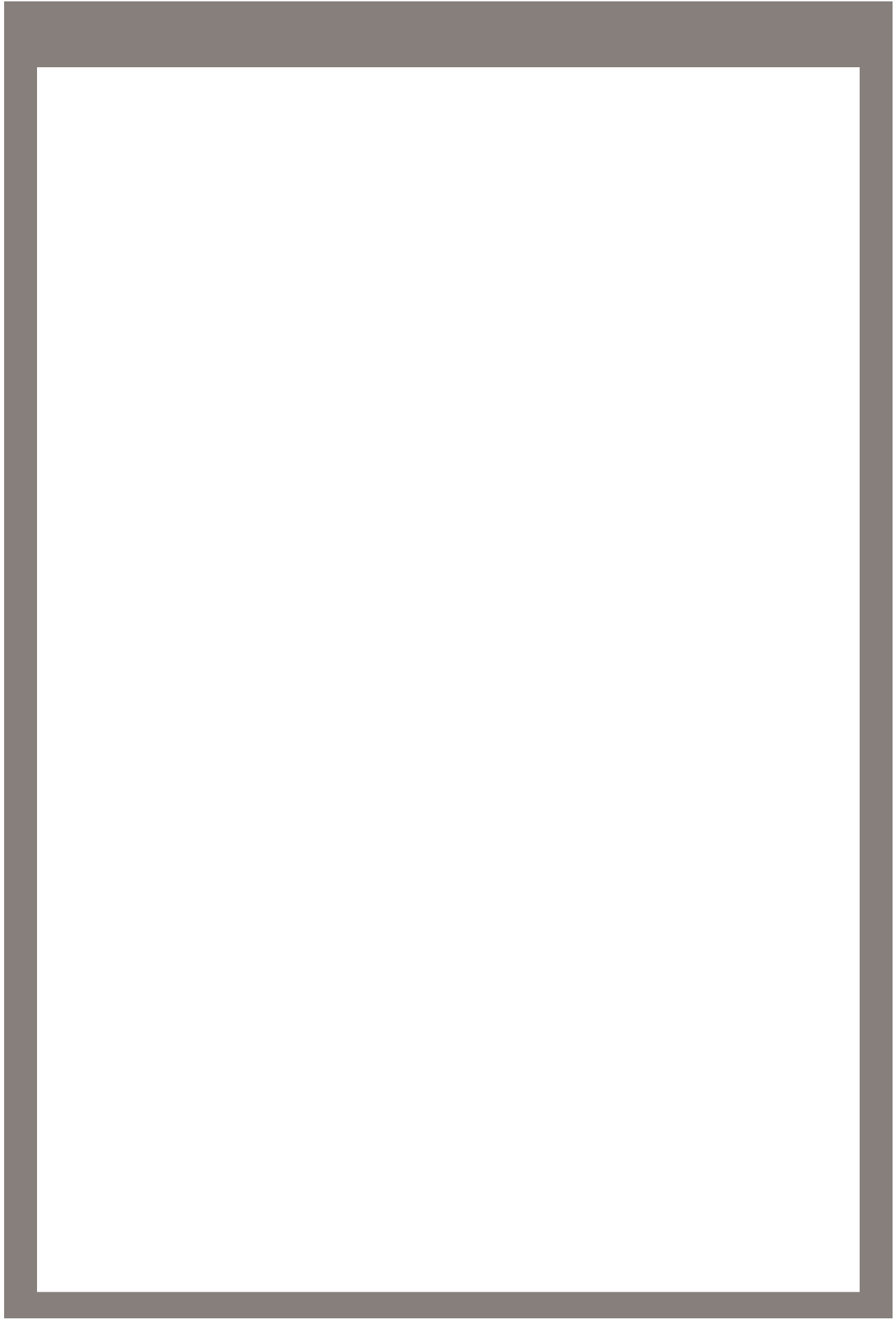
194. AQUINAS, *supra* note 4, at pt. I-II, q. 95, art. 4.

195. *Id.* at pt. II-II, q. 40, art. 1.

196. This is a strong caveat. Many scholars, mostly writing in the Third World Approaches to International Law (TWAIL) tradition, deny that modern international law serves the common good of all states, privileging ones from the Global North. *See, e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT’L CMTY. L. REV. 3 (2006).

CONCLUSION

Even in a society of angels or demons, some form of law—or, at least, law-like rules—would be necessary for coordination. This idea has survived through centuries, finding expression in both Aquinas’s and Raz’s philosophy. To the present day, it continues to illuminate our understanding of law not just in ordinary, but in extraordinary situations, including in imagining post-legal societies, wicked regimes, Schmittian dictatorships, and in the international arena. The point of tension between Raz and Aquinas—on whether unjust law is properly regarded as law—does not undermine the thesis about law-like rules’ practical necessity for coordinative reasons that seems to cross the boundary between the two thinkers’ concepts of law. Therefore, anyone, regardless of their understanding of the interaction between law and morality, can gain from the medieval theological perspective just as much as from contemporary analytical jurisprudence.



THE FOURTEENTH AMENDMENT RIGHT TO ACCESS CRIMINAL JUSTICE

JOHN CRAIN*

ABSTRACT

American law, typified by cases like Linda R.S. and Leake, assumes that private citizens lack a “judicially cognizable interest” in the criminal prosecution of others. This assumption has no substance. Examining nineteenth-century criminal procedure and Congressional enactments after the Civil War, including the Civil Rights Act of 1866 and the Fourteenth Amendment, this article argues that Americans long enjoyed a well-defined, personal, civil right to initiate criminal proceedings against wrongdoers.

The era’s legal sources demonstrate that crime victims and eyewitnesses long possessed the right to initiate criminal proceedings. This article examines treatises, statutes, and, innovatively, malicious prosecution cases, which usually detailed the underlying arrest, to argue that Americans expected their oath, sworn on personal knowledge before a local magistrate, to trigger arrest and a probable cause examination.

During Reconstruction, Southern states weaponized anti-testimony laws to deny freed people this common right to access criminal justice. Even when Southern legislatures passed testimony laws under federal pressure, they burdened the testimony of Black Americans, like by requiring that their testimony be taken orally, while other criminal complaints had to be reduced to a written deposition. No article, to my knowledge, has discussed these technical burdens on Black testimony during the post-war period.

In response, Congress included in the Civil Rights Act of 1866 the right to “give evidence” in “proceedings for the security of person and property.” Put in proper context, these provisions must be understood to safeguard Black Americans’ access to arrest and examination proceedings against both discriminatory legislation and discriminatory enforcement. Thus, history demands a revision of our understanding about the “cognizable interests” of crime victims and witnesses.

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TABLE OF CONTENTS

INTRODUCTION 327

I. WHY THE CIVIL RIGHTS ACT OF 1866? 330

II. THE RIGHT TO GIVE EVIDENCE..... 332

III. THE CONTEXT OF NINETEENTH-CENTURY CRIMINAL
PROCEDURE..... 336

A. The Magistrate’s “Ministerial” Role..... 338

*B. Practice Before Committing Magistrates: Mandatory
Initiation and Duty of Arrest..... 345*

*C. Practice Before Committing Magistrates: Arrest
versus Examination 354*

*D. Practice Before Committing Magistrates: The Victim’s
Responsibility for the Legal Validity of His Affidavit 356*

E. The End of the Examination 359

F. Summary and Preliminary Analysis..... 360

IV. THE RECONSTRUCTION APPROACH TO CRIMINAL LAW
ENFORCEMENT 362

A. The Struggle Over Anti-Testimony Legislation..... 362

B. The Coming of the Civil Rights Act of 1866..... 368

CONCLUSION 373

INTRODUCTION

In American law, victims and witnesses to crime are thought to have no civil right to access the criminal justice system. Arrests are obtained only through the grace and acquiescence of police departments; prosecutions are continued only in the discretion of states' prosecutors. Prosecutorial discretion of this kind is a bedrock of our system, yet it is difficult to say why. This principle—that crime victims and witnesses have no personal rights in the criminal justice system—does draw some support from a series of Supreme Court decisions interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments, but these precedents themselves beg the question; they take up the principle and project it onto history and legal tradition, denying citizens' power to prosecute based on the assumption that they never possessed the right to access criminal justice in the first place. But that assumption about American legal history is unwarranted. Instead, legal and historical sources from the nineteenth century show that American victims and crime witnesses long exercised a definite right to commence criminal prosecutions. This evidence leads to a major revision of our understanding of American jurisprudence: The average citizen's right to participate in criminal prosecution deserves to be restored to the tradition of American civil rights.

How did American law arrive at the conclusion that the average citizen has no civil right to participate in criminal prosecution, if the conclusion has no historical basis? It likely grew from the *a priori*s of decisions about federalism, through which the Court blocked Congress from protecting crime victims. During Reconstruction, the Court first held that Congress could not give the federal courts removal jurisdiction over state-law criminal proceedings, even where state law barred a crime victim from participating as a complainant in criminal proceedings.¹ Later, the Court held that Congress could not seek to enforce criminal laws directly against private, non-state actors, even when the circumstances of a crime suggested that it had been permitted by state neglect, or when the criminals intended to violate the civil rights of the victims.² In the mid-twentieth century, the Court held that crime victims could not use civil rights statutes to compel

1. United States v. Blyew, 80 U.S. (13 Wall.) 581 (1872).

2. United States v. Cruikshank, 92 U.S. 542, 548–49 (1876); United States v. Harris, 106 U.S. 629 (1883). *But see* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION (2011), in which Brandwein argues that the cases have been overread and that Congress has the power to regulate the discriminatory conduct of private actors where states fail or neglect to do so. This article is in broad agreement with Professor Brandwein. While I offer here the typical narrative of Reconstruction-era Supreme Court cases, I likewise believe they have been read too expansively.

prosecutors to prosecute, nor compel law enforcers to arrest.³ In these modern cases, the Court stated the assumption as a holding for the first time, reasoning that a plaintiff-victim lacked “standing” to sue because “in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”⁴ The Court has since held that Congress may not create a private cause of action for survivors of gender violence, even upon a strong showing of neglect by state law enforcers in protecting victims of gender-based violence.⁵ Finally, the Court held that there was no due-process right to protection by state officers, even where a state held out promises of protection.⁶ In these cases over the centuries, what began as an unspoken assumption in dicta about federalism and the powers of Congress ended as a rule of law about individual civil rights.

But since the earlier cases in this series addressed issues of federalism rather than the rights of crime victims, when the modern Court finally announced the broad “no standing” rule of *Linda R.S.* and *Leeke* in the 1970s, there was nothing to base it on. The statement from *Linda R.S.* that “a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another,” in (we are told) “American jurisprudence,” is unsupported at best, and unabashedly circular when viewed critically.⁷ *Linda R.S.* and *Leeke* are wrong, baseless, and due for reconsideration.⁸

While these cases depend on broad, confident intonations about American legal history, that confidence leads them (and us) astray. There is in truth little historical research to draw on in this area. What we have is tinged by the glow of legend and storytelling. One historian tells us that criminal law enforcement in the nineteenth century drew no distinction between “riot and disorder on the one hand and law enforcement on the other,” and left a wide opening for “[v]igilantes and lynch mobs.”⁹ Other historians have found, by contrast, that nineteenth century criminal law aspired to order and control, and, indeed, often achieved levels of both that are overbearing to modern sensibilities.¹⁰

This mixed history yields at least one clear conclusion: there was a tradition of victims filing and prosecuting cases without heavy

3. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981).

4. *Linda R.S.*, 410 U.S. at 619.

5. *United States v. Morrison*, 529 U.S. 598 (2000).

6. *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

7. *Linda R.S.*, 410 U.S. at 619.

8. I have previously critiqued these cases. See John Crain, *The Constitutional Tort of Shielding Criminal Wrongdoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599 (2023).

9. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 214 (2001).

10. See LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE* (2009).

intermediation by government officials.¹¹ Upon the oath of a victim or complaining witness, nineteenth century officials commenced hearings, took statements, and transmitted evidence to the grand jury, as a matter of definite and ministerial process activated by the victim or complaining witness.¹² While this system had its drawbacks, and while it could break down and miscarry in ways that appear colorful or shocking to a modern observer, it also did not make the mistake of cutting victims out of criminal procedure. It saw the crime victim or witness as participants in criminal procedure, with definite rights to activate and access criminal justice proceedings. While we may look back in horror on the vigilantes and lynch mobs of the era, a time traveler from the nineteenth century would scorn our system for its reliance on the grace of executive officials.

This article recounts the evidence—at least preliminarily, since so much more could be said—that Congress legislated the Fourteenth Amendment to address lapses in criminal law enforcement in the post-Civil War South. Congress legislated against a backdrop not solely or even primarily of “vigilantes and lynch mobs,” but of well-known, orderly procedures of arrest and commitment.¹³ The law of the period viewed the initial arrest of criminal offenders as the fulfillment of an official duty, contrary to the modern theory of police discretion.¹⁴ Citizens could swear an oath before a local official—variably called a “magistrate” or “justice of the peace”—that a crime had occurred.¹⁵ If they swore that oath on personal knowledge, magistrates were generally expected and required to issue an arrest warrant.¹⁶ When Congress legislated civil rights in the aftermath of the Civil War, they referenced these universal, duty-bound arrest procedures. The best evidence of Congress’s intent to secure access to criminal justice comes from the Civil Rights Act of 1866 (1866 CRA), Congress’s first attempt after the Civil War to protect the rights of Black Americans. In the 1866 CRA, Congress used language that would have signaled to contemporaries that the law secured access to criminal justice and, specifically, to arrest proceedings.

In Part I, I explain why the 1866 CRA should be viewed as evidence for the intent of the framers of the Fourteenth Amendment, under the holding of 2010’s *McDonald v. City of Chicago*. In Part II, I turn to one of the rights enumerated by the 1866 CRA, the right to “give evidence.” Coupled with a

11. See *infra*, Part III.

12. See *id.*

13. See *infra*, Part III.A.

14. See *id.*

15. See *infra*, Part III.B.

16. See *id.*

later clause in the 1866 CRA, ensuring equal access to “proceedings for the security of person and property,” the “give evidence” clause would have overturned Southern laws that barred slaves and free Black Americans from testifying against White people in criminal cases. One well-understood effect of those laws was to prevent slaves and free Black Americans from opening criminal proceedings against White people. Therefore, in overturning those discriminatory testimony laws, the 1866 CRA intended to ensure that Black Americans would be able to commence criminal proceedings, regardless of the race of the accused.

Having established the hypothesis, I flesh it out in two ways. First, in Part III, I analyze the criminal justice institutions of the nineteenth century. I show that magistrates and justices of the peace generally had no choice but to issue a warrant of arrest upon receiving an oath by a (White) complainant with personal knowledge. This rule informs the “give evidence” clause and puts it in its context: anyone with the right to testify, i.e. to “give evidence,” had the right to the issuance of an arrest warrant. Second, in Part IV.A, I look at the years 1865–66, immediately after the Civil War, to show that racist anti-testimony laws were viewed by Congress, the military, and even conservatives like Andrew Johnson as an impediment to securing the protection of Black Americans in the South. In Part IV.B, I examine their actions to show that the 1866 CRA targeted both formal law and discrimination in-fact to ensure that Black Americans could obtain the arrest and prosecution of criminal assailants.

I. WHY THE CIVIL RIGHTS ACT OF 1866?

Because this Article will draw primarily on the 1866 CRA, both on its substance and on its enforcement provisions, it needs a brief introduction.

As well as directly protecting certain civil rights against race discrimination, the 1866 CRA serves as an interpretive key to the Fourteenth Amendment, owing to the circumstances surrounding its passage. When passed, it ignited a constitutional debate in Congress.¹⁷ Though Congress had used its Thirteenth Amendment enforcement powers to pass the 1866 CRA, many believed that the Amendment’s ban on slavery did not imply a power in Congress to secure civil rights to the freed people.¹⁸ Congress therefore re-passed the 1866 CRA under the Fourteenth Amendment as part of the Enforcement Act of 1870, and, owing to those circumstances, as the

17. GEORGE RUTHERGLEN, *CIVIL RIGHTS IN THE SHADOW OF SLAVERY* 73–74 (2013); WILLIAM D. ARAIZA, *ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW* 88, 90 (2016).

18. ARAIZA, *supra* note 17, at 88, 90.

Supreme Court has explained, “it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.”¹⁹

In the 2010 case *McDonald v. City of Chicago*, for instance, the 1866 CRA served as linchpin to the Court’s holding that the Fourteenth Amendment incorporates the Second Amendment right to bear arms. For context, the 1866 CRA, after declaring birthright citizenship, first enumerated (and still, as codified, enumerates) civil rights belonging to those under the “jurisdiction” of the United States: “to make and enforce contracts, to sue, be parties, give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property.”²⁰ It then provided for a catchall right to the “full and equal benefit of all laws and proceedings for the security of person and property.”²¹ With its language protecting the right to “sue, be parties, and give evidence,” coupled with its catchall clause, the 1866 CRA meant to ensure full equality of legal process, including, as its proponent in the House, Lyman Trumbull, put it “the right to enforce rights in the courts.”²²

The Supreme Court decision in *McDonald* exemplifies the breadth of the “proceedings” catchall and furnishes some further tools for interpreting the 1866 CRA (and, therefore, the Fourteenth Amendment). In the broad phrase “laws . . . for the security of person and property,” the *McDonald* Court situated the right to own firearms for self-defense.²³ To aid its interpretation of the 1866 CRA, the Court incorporated the intent of the contemporaneous Freedmen’s Bureau Bill, which protected the right to bear arms.²⁴ The Court also looked to events surrounding the passage of these laws, such as the experience of freed people living under oppressive Southern governments and “Union Army commanders t[aking] steps to secure the right of all citizens to keep and bear arms.”²⁵

All of these interpretive tools—the 1866 CRA’s text regarding “laws and proceedings for the security of person and property,” the context of accompanying legislation, the political goals of the Reconstruction Congress, and the actions of officials enforcing the 1866 CRA—are relevant to understanding the Fourteenth Amendment’s treatment of criminal justice procedures, too. Specifically, the 1866 CRA secures the right to “give

19. *McDonald v. City of Chicago*, 561 U.S. 742, 775 (2010).

20. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).

21. *Id.*

22. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

23. *McDonald*, 561 U.S. at 774–75.

24. *Id.* at 773.

25. *Id.* at 773.

evidence.” “Give evidence” means, essentially, “to testify under oath.”²⁶ Crucially, however, while “give evidence” has always signified “to testify under oath,” it also previously conveyed more of its literal sense “to furnish evidence.”²⁷ This broad right to “give evidence” or “furnish evidence” must be read, like the other rights enumerated in the 1866 CRA, in conjunction with the catchall phrasing at the end of Section 1, securing the “full and equal benefit of all laws and proceedings for the security of person and property.”²⁸ These two clauses of the 1866 CRA work in tandem, the first clause guaranteeing the right to testify and otherwise “give evidence” under oath in the “proceedings for the security of person and property” described in the second clause.²⁹

II. THE RIGHT TO GIVE EVIDENCE

A close examination of the “give evidence” and “proceedings” clauses of the 1866 CRA will ground the hypothesis that these clauses had a certain and established meaning for victims and witnesses testifying in criminal proceedings. That hypothesis may then be corroborated by the statutes, cases, and treatises of the era.

The “give evidence” clause targeted contemporary laws that discriminated against Black witnesses. Under Black Codes before and after the Civil War, slaves were either totally denied oath-making capacity,³⁰ or permitted only to testify against other slaves or free Black Americans.³¹ This meant they could not usually prosecute criminal cases as complaining victims. Abolitionists of the period, for instance, bitterly criticized the way the pre-war Black Codes barred slaves in criminal proceedings from bearing

26. Give Evidence, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/give%20evidence> [perma.cc/WL25-EA9S] (“to talk and answer questions about something especially in a court of law while formally promising that what one is saying is true : testify.”); Testify, BLACK’S LAW DICTIONARY (11th ed. 2019) (“to give as a witness”).

27. Richard A. Nagareda, *Compulsion “To Be A Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1603–23 (1999).

28. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

29. Exactly how they worked in conjunction is the topic of this article and is explored more fully below.

30. See, e.g., Ga. Code § 3772 (Clark, Cobb & Irwin 1861); Tex. Code Crim. Proc. art. 644 (Willie 1857).

31. See, e.g., An Act to Protect Freedmen in Their Rights of Person and Property in this State, 98 (Alabama); 1865-66 Ala. Acts 200 (Act No. 98). CONG. GLOBE, 39th Cong., 1st Sess. 588 (1866) (Speech of Ignatius Donnelly, discussing the post-war code of Mississippi).

witness against White aggressors.³² Northern treatise-writers also frequently lamented that laws blocking the testimony of Black Americans against Whites effectively nullified the nominal criminal laws protecting Black Americans in southern jurisdictions.³³ Contemporary legislative debates, including those surrounding both the 1866 CRA and the Fourteenth Amendment, also reveal the nexus between the right to testify and complainants' access to criminal justice.³⁴

These laws of course kept Black witnesses from taking the witness stand against White defendants.³⁵ But they also radically precluded all law enforcement proceedings on behalf of Black people against White people, barring slaves and free Black Americans from making even an initial

32. Deborah A. Rosen, *Slavery, Race, and Outlawry: The Concept of the Outlaw in Nineteenth-Century Abolitionist Rhetoric*, 58 AM. J. LEGAL HIST. 126, 136–37 (2018); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 510–11 (1985). These laws were especially solicitous of the rights of slave-masters. Two leading cases on the right of the master are *State v. Mann*, 13 N.C. 263, 268 (1829) and *Commonwealth v. Turner*, 26 Va. 678 (1827). *Mann*, for instance, drew the ire of Harriet Beecher Stowe in a passage of *Uncle Tom's Cabin*. Sally Greene, Eric L. Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. REV. 669 (2009).

33. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 178 et passim* (Am. & Foreign Anti-Slavery Soc'y 1853) (From the United Kingdom: "At present, the wilful, malicious, and deliberate murder of a slave, by whomsoever perpetrated, is declared to be punishable with death, in every State... The exclusion of all testimony of colored persons, bond or free, is a feature sufficient, of itself, to render these laws nugatory."); see also GEORGE M. STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA, WITH SOME ALTERATIONS AND CONSIDERABLE ADDITIONS* 107 (1856) ("A white man may, with impunity, if no other white be present, torture, maim, and even murder his slave, in the midst of any number of negroes and mulattoes.").

34. The topic was not central to debates around the passage of either the 1866 CRA or the Fourteenth Amendment. Nonetheless, legislators during both debates understood the nexus between the right to testify and the capacity to prosecute crimes. See Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966). Congress also passed a law to bar discrimination against Black witnesses in federal court in 1862, and those debates make the connection even clearer. See CONG. GLOBE, 38th Cong., 1st Sess. 3260–61 (1864). For instance, Senator Sumner, who introduced the law as an amendment, argued,

If colored persons cannot testify against white persons, what protection can they have against outrage? The white person may perpetrate any brutality upon colored persons with impunity.

There is nothing in the dreary catalogue of crime, from a simple assault to murder itself, which may not be committed with impunity by a white person if no other white person be present.

Id. at 3260.

35. See, e.g., *Bowlin v. Com.*, 65 Ky. 5, 26 (1867), a Kentucky case holding the 1866 CRA unconstitutional, with the result that a conviction based on the trial testimony of Black person had to be reversed and remanded.

criminal complaint.³⁶ For example, Frederick Douglass recounts trying to complain to a committing magistrate about being assaulted, only to be turned away for lacking the capacity under Maryland law to swear a criminal complaint against White men.³⁷ In overturning these discriminatory evidence laws, the 1866 CRA opened all criminal justice institutions—not just trial courts—to the freed people.³⁸ This is an important nuance. Arrests and investigations can be provided to victims as a matter of right; final verdicts at trial cannot. But prompt arrests and thorough investigations impact final verdicts and are their own deterrents.

Congress could not, of course, change popular prejudice, according to which Black people, slave or free, were incapable of understanding the import of an oath. These prejudices took deep root in conceptions of conscience.³⁹ One legal scholar, for instance, advised magistrates in 1828 to reject the oath of a person who did not believe in “a God, and a future state of reward and punishment.”⁴⁰ A person who lacked such beliefs could not

36. *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 598 (1872) (“Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender.”) (Bradley, J., dissenting). (I return to *Blyew* below.) There would have been a great variety of actual practices; the laws often created carve-outs and exceptions that could result in slaves and free Black Americans being able to prosecute some crimes, usually with the corroboration of White witnesses. THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, chs. 9–10 (1996) discusses some of these. This article will not, for the most part, address these nuances. The crucial point here is that this was a second-class right. See MORRIS and LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE* (2009) for a lengthy discussion of these nuances. Edwards, especially, has endeavored to tell the story of the participation of Black Americans in the Southern legal system, especially free Black Americans. One of her main points was that a slave or free Black with enough standing amongst the Whites of a given community likely could seek redress. For even more on this topic, though mostly from the perspective of civil law, MARTHA S. JONES, *BIRTHRIGHT CITIZENSHIP: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

37. WILLIAM S. MCFEELY, *FREDERICK DOUGLASS 61–63* (1991) (quoting FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM*). For instance, one treatise writer, H.S. McCall, explaining his disagreement with placing disabilities on a former felon’s right to swear out a warrant, asked rhetorically “Must he [the former felon], therefore, suffer all injuries, and have no way to help himself?” H.S. MCCALL, *NEW YORK CIVIL AND CRIMINAL JUSTICE: A COMPLETE TREATISE ON THE CIVIL, CRIMINAL, AND SPECIAL POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK* (3d ed. 1865).

38. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 568–69 (1991); see also Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. CIV. RTS. L.J. 1, 68 (2008) (explaining the right to testify as part of the “protection of the laws.”); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1410–13 (1992) (explaining that the 1866 CRA targeted the Black Codes, including their discriminatory evidence rules). Of course, this is also one of the main conclusions this article is seeking to prove, and if the reader is skeptical, they should continue reading.

39. Thomas Morris observed this of slave oaths. THOMAS MORRIS, *SOUTHERN SLAVERY AND THE LAW 1619–1860*, ch. 10 (1996).

40. DANIEL DAVIS, *A PRACTICAL TREATISE UPON THE AUTHORITY AND DUTY OF JUSTICES OF THE PEACE IN CRIMINAL PROSECUTIONS 66* (2d ed. 1828).

be trusted to keep an oath, he advised.⁴¹ In 1861, a Northern scholar might still consider, if only to reject as unconstitutional, British precedents holding invalid the oaths of persons with “religious scruples or infidelity, which renders them incapable of taking an oath.”⁴² But even in this period, many jurisdictions continued to allow a cross-examination of the witness’s religious convictions to probe credibility.⁴³ Like a person lacking religious convictions, Black people were said to have “no idea of the sanctity of an oath.”⁴⁴ As one scholar observed, many Whites thought that “the hope of gain” or “fear of punishment” would induce slaves to give false testimony.⁴⁵ These ideas were so engrained, both North and South, that former slaves writing narratives of their experiences would carefully justify their acts of deception while enslaved, even when they had been deceiving slavers or White aggressors in ways that appear obviously just to a modern reader.⁴⁶ These writers understood that a White reading public would closely interrogate their capacity to speak the truth.

The 1866 CRA targeted bias in criminal law enforcement and secured the right to access criminal justice by giving the freed people an oath as good as a White person’s. But what would this mean practically? Of course, the right to testify would allow a victim to bear witness in a courtroom, but a closer look at the period’s criminal procedure will show that it meant something more. The average American had a fundamental expectation about what law enforcers would do upon the oath of a complaining witness: examine the complainant, issue an arrest warrant (if appropriate), take the accused into custody, and hold a probable cause hearing. These were the

41. *Id.*

42. JOHN STILWELL JENKINS, *NEW YORK CIVIL AND CRIMINAL JUSTICE: A COMPLETE TREATISE ON THE CIVIL, CRIMINAL, AND SPECIAL POWERS AND DUTIES OF JUSTICES OF THE PEACE IN THE STATE OF NEW YORK* 515 (2d ed. 1861).

43. *See, e.g.*, Ga. Code § 3772 (Clark, Cobb & Irwin 1861). Modern evidentiary rules such as Federal Rule of Evidence 610 were meant to end the practice of cross-examining a witness on the religious beliefs underpinning their oaths.

44. So reported a professedly “liberal” planter to Carl Schurz in 1865. CARL SCHURZ, *REPORT ON THE CONDITION OF THE SOUTH* 188 (1865) [hereinafter *Schurz Report*].

45. GEORGE MCDOWELL STROUD, *SKETCH OF THE SLAVE LAWS* 48 (1856).

46. *See* the accounts compiled in WILLIAM L. ANDREWS & HENRY LOUIS GATES, JR., *THE CIVITAS ANTHOLOGY OF AFRICAN AMERICAN SLAVE NARRATIVES* (1998). *Id.* at 223, *Narrative of William W. Brown, an American Slave* (“This incident shows how it is that slavery makes its victims lying and mean; for which vices it afterwards reproaches them, and uses them as arguments to prove that they deserve no better fate.”); *id.* at 303, *Narrative of the Life and Adventures of Henry Bibb, an American Slave* (“In fact, the only weapon of self defense that I could use successfully was that of deception. It is useless for a poor helpless slave, to resist a white man in a slaveholding State.”); *id.* at 554, *Incidents in the Life of a Slave Girl, Harriet A. Jacobs* (“Who can blame slaves for being cunning? They are constantly compelled to resort to it. It is the only weapon of the weak and oppressed against the strength of their tyrants.”). The idea itself comes from the Introduction by editor William L. Andrews.

proceedings denied to Frederick Douglass when he sought to report his assault. Had Douglass been regarded as a citizen with a good oath his complaint would have entailed an arrest and probable cause hearing. This Article turns to these procedures, to demonstrate that they were considered as-of-right to complainants and victims with a good oath.

III. THE CONTEXT OF NINETEENTH-CENTURY CRIMINAL PROCEDURE

There were generally two methods for commencing a criminal prosecution in the nineteenth century. First was appearance before a grand jury. The second was appearance before a magistrate, who would arrest, examine, and commit the accused for further proceedings, including before a grand jury (depending on the crime and jurisdiction). After an overview and analysis of these procedures, the power of the victim-complainant's "oath" will be considered again in context.

In this era, the doors of the grand jury were open to all citizens, not just states' attorneys.⁴⁷ It was a common and accepted practice for complainants to report crimes directly to these bodies.⁴⁸ Yet it was the magistrate, known interchangeably as a "justice of the peace," who was "the great committing force of the country" according to one popular criminal procedure treatise of the era.⁴⁹ If anything, the convenience and accessibility of the magistrate made them a far more important presence in most communities than the grand jury. In the course of the nineteenth century, "the grand jury went into eclipse" in many jurisdictions.⁵⁰ This is attested by the 1884 Supreme Court decision in *Hurtado v. California*, where the Court declined to overrule a California statute permitting prosecution of felonies without a grand jury indictment, leaving it to the local magistrate to find probable cause in most cases.⁵¹ All jurisdictions also permitted a "surety to keep the peace" whereby a person threatened by violence could have a Justice arrest the

47. Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 308–52 (1994).

48. See, e.g., *Hains v. Elwell*, 3 N.J.L. 843 (1811) ("The plaintiff complaineth of the defendant for this, to wit, that the plaintiff did, in September, or court term, 1810, make a malicious complaint to the grand jury, without having any just cause, to the great damage of the plaintiff."). In *Kendrick v. Cypert*, 29 Tenn. 291 (1849), the complainant went to the grand jury and presented his evidence, even against the advice of the state's attorney, a situation difficult to imagine in modern practice.

49. JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE; OR, PLEADING EVIDENCE AND PRACTICE IN CRIMINAL CASES § 239 (2d ed. 1872).

50. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 242 (1993).

51. *Hurtado v. California*, 110 U.S. 516 (1884).

source of the threat and force them to post a bond, a practical procedure which bolstered the Justice's position as a protector of the community.⁵²

Historian Edward L. Ayers describes the basic procedure that would be followed in a nineteenth-century criminal case in the following way:

The usual procedure within this system was for a victim of violence or theft to initiate a case by swearing out a complaint before a neighborhood justice of the peace, who in turn would issue a warrant for the arrest of the accused party. The county sheriff then brought the accused before the magistrate for a preliminary hearing, after which the magistrate would either dismiss the case or, if he found sufficient cause, bind the accused over to the Superior Court for a hearing by the grand jury. . . . After the grand jury had indicted a defendant, a petit jury would determine his guilt or innocence.⁵³

This was a process initiated by the victim, encompassing arrest, examination, grand jury, and—ultimately—petit jury. (For clarity, this article will refer to the entire process as the “commitment” process and will refer to the presiding magistrate as the “committing magistrate” or “justice of the peace.”) This procedure had roots in English common law.⁵⁴ Blackstone's Commentaries describe it.⁵⁵ Professor Laurent Sacharoff has noted it in the Founding Era.⁵⁶ It also appears in criminal procedure treatises of the nineteenth century, notably the influential treatise by Joel Prentiss Bishop.⁵⁷

But there is a better source for confirming contemporary practice. Courts deciding the law in malicious prosecution suits often described the

52. Many statutory and judicial examples could be cited here, but *Arnold v. State*, 92 Ind. 187, 192 (1883), is instructive for acknowledging the long provenance of a “surety to keep the peace” and holding it exempt from the constitutional protections afforded criminal defendants, such as the right to jury trial. James Kent listed the “preventive arm of the magistrate” as one of three rights of “personal security,” along with the “terrors of the penal code” and protection against “tyrannical” government action. JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 15 (13th ed. 1884).

53. EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY SOUTH* 109 (1984).

54. I generally use “English law” or “English common law,” because the phrase “common law” has become meaningless. It sometimes refers to a tradition of civil or human rights as developed in English courts, sometimes to the practice of allowing judges to make substantive law, or to the general principles underlying the Anglo-American legal tradition. All I mean by “common law” or “English common law” is the inheritance of English law—that is, the law used in English law and equity courts as opposed to other religious, mercantile, manorial, or customary jurisdictions.

55. 4 WILLIAM BLACKSTONE, COMMENTARIES XXI–XXII.

56. Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 622–32 (2022).

57. BISHOP, *supra* note 49, §§ 225–238; *see also* DAVIS, *supra* note 40, chs. I–VI; HENRY HITCHCOCK, *THE ALABAMA JUSTICE OF THE PEACE* 204–05 (1822).

circumstances of the plaintiff's arrest and initial examination, since these circumstances bore on the questions of malice and absence of probable cause (the elements of a prima facie case of malicious prosecution). These descriptions open a window into the commitment process, corroborating that the universal practice was for a magistrate to issue an arrest warrant upon the oath of a complaining victim; call the accused and other witnesses to a hearing; and then decide whether to discharge the accused (ending the prosecution) or commit the accused for further proceedings before a higher court, which could include a grand jury indictment or motion practice.⁵⁸ This procedure, in sum, was ancient and universal.

With the outline of this procedure in mind, the next sections turn to judicial and scholarly discussions about the powers and duties of committing magistrates at different stages of the commitment procedure. These discussions show that committing magistrates had only a cabined discretion to reject the evidence of a victim-witness during the processes of arrest and examination. They lacked the discretion to reject complaints or decline prosecutions for policy reasons. Their lack of discretion stands in contrast to the modern law enforcer, who generally may decline to prosecute for any reason or no reason at all. To the extent the magistrate had non-discretionary duties upon the complaint of a crime victim, this implies—I will argue—that the victim had a right to access criminal justice.

A. *The Magistrate's "Ministerial" Role*

To begin, contemporary authorities called the commitment process “ministerial”; that is, non-discretionary and non-judicial. The arresting magistrate was seen as duty-bound to arrest upon complaint.⁵⁹

The distinction between ministerial/non-discretionary and judicial/discretionary arose in numerous legal contexts and could determine,

58. See, e.g., *Baird v. Householder*, 32 Pa. 168 (1858) (plaintiff arrested on warrant, examined, committed, and discharged by superior court for legal insufficiency of the complaint); *Center v. Spring*, 2 Iowa 393, 394 (1856) (plaintiff arrested, examined, and discharged); *Shock v. M^cChesney*, 1808 WL 1464, at *1 (Pa. 1808) (plaintiff arrested, examined, and committed, but grand jury declined to indict); *Stancliff v. Palmeto*, 18 Ind. 321, 321–22 (1862) (plaintiff arrested, brought before U.S. commissioner, examined, and discharged); *Long v. Rogers*, 17 Ala. 540, 544 (1850) (plaintiff arrested, brought before magistrate, examined, discharged); *Johnson v. Shove*, 72 Mass. 498, 498 (1856) (plaintiff bound over by justice of the peace, but no indictment returned by grand jury); *Johnson v. Chambers*, 32 N.C. 287 (1849) (plaintiff arrested and discharged after examination); *Goggans v. Monroe*, 31 Ga. 331, 332 (1860) (plaintiff arrested and committed, but no true bill found by grand jury); *Bliss v. Wyman*, 7 Cal. 257, 261 (1857) (plaintiff arrested, examined and committed); *Burlingame v. Burlingame*, 1828 WL 1902 (N.Y. Sup. Ct. 1828) (plaintiff arrested, examination held, and defendant discharged after an hours-long session); *Griffin v. Chubb*, 7 Tex. 603, 604 (1852) (plaintiff arrested, committed, indicted, and tried before jury).

59. This idea is further developed in Part III.B, *infra*.

for instance, when an official would be held liable for an official act.⁶⁰ Regarding magistrates, the law was that a ministerial, non-discretionary act was subject to challenge in a civil suit by the party aggrieved, while a judicial, discretionary act was immune to civil suit.⁶¹ Where a justice was sued for some mistake in commencing a criminal case, the issue was whether commencing a criminal case was ministerial (exposing the justice to liability) or judicial (rendering the justice immune).⁶²

In English law, authorities agreed that a justice of the peace in arresting, examining, and committing criminals acted ministerially and could be held liable by the party aggrieved.⁶³ Bishop, writing in 1872, remained confident that a justice of the peace acted ministerially in the commitment process.⁶⁴ Yet he withheld a full endorsement of this principle, likely because it had become unclear by the time he wrote if the old rule held. Some courts adhered to the old rule of English law that the justice of the peace played a purely ministerial role in arrest and examination.⁶⁵ Or, they at least held that certain parts of the process of arrest, examination, and commitment were ministerial.⁶⁶ According to those judges, justices of the peace could be held liable for defects in the commitment process. Nonetheless, by 1872, the case law appeared to be trending towards extending “judicial” immunity over the

60. One such doctrine is famously expressed in *South v. Maryland*, 59 U.S. (18 How.) 396 (1855).

61. This, for now, can only stand as a generalization. There were situations where ministerial acts were held immune, and where judicial acts were held actionable. *See, e.g.,* *McCarthy v. De Armit*, 99 Pa. 63, 71–72 (1881) (discussing the difference and embracing many of the ambiguities in the doctrine); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?* 74 STAN. L. REV. ONLINE 115 (2022) (also discussing these ambiguities).

62. *McCarthy*, 99 Pa. at 71–72.

63. *See, e.g.,* 3 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 32 (17th ed. 1793); 2 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN: OR, A SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, DIGESTED UNDER PROPER HEADS* ch. 13, § 20 (John Curwood ed., 1824).

64. BISHOP, *supra* note 49, § 237.

65. *See, e.g.,* *Flack v. Harrington*, 1 Ill. 213, 214 (1826) (issuing warrant not supported by oath of a complaining victim subjected justice of the peace to civil liability); *State v. Sneed*, 84 N.C. 816, 825–26 (1881) (defendant justice of the peace could be held criminally liable to state for corruptly issuing a warrant of arrest, because such issuance was a ministerial duty); *Lining v. Bentham*, 2 S.C.L. 1, 4 (S.C. Const. App. 1796) (counsel argued the English common law ministerial-judicial distinction; the court agreed that the action at issue was judicial). But note that both *Flack* and *Sneed* involved arrest warrants, for which the strongest case of a purely “ministerial” duty can be made.

66. *See, e.g.,* *Blythe v. Tompkins*, 1856 WL 6596 (N.Y. Sup. Ct. 1856) (decision whether evidence sufficed to issue warrant was judicial; decisions made in drafting the warrant were ministerial, since statute dictated what the warrant had to contain).

commitment process.⁶⁷ Likely aware of the state of case law, yet wishing to honor the old rule, Bishop hedged.

It should, in the first place, be observed, that, in the exercise of this jurisdiction [to bind over the accused], the magistrate is deemed to act, not judicially, but ministerially; at least, he does not put forth “judicial power,” within the meaning of the constitution of the United States.⁶⁸

Bishop then cited two constitutional cases: *Prigg v. Pennsylvania*⁶⁹ and *Ex parte Gist*.⁷⁰ These two citations are instructive for their imprecision, suggesting that Bishop was reaching for a desired result using imperfect dicta. In citing *Prigg* and *Gist*, he appeared to inject a practical understanding of how the law worked into cases that did not quite support his position. A close look at his use of these two cases reveals what that practical understanding was.

Prigg held that the slaver-friendly federal Fugitive Slave Act of 1793 (the “Act”) preempted Pennsylvania laws dealing with the same subject.⁷¹ The Act, as written, permitted a slaver to seize and take his “fugitive” before either a federal judge or a state magistrate.⁷² The judge or magistrate was then supposed to decide whether the so-called “fugitive” had the legal status of a slave, and accordingly issue or decline to issue a certificate of removal.⁷³ The Act prescribed no punishments to the slaver who declined to obtain such a certificate, while the Pennsylvania law punished as kidnapping any removal accomplished without a certificate.⁷⁴ Arguably, the Pennsylvania law forced slavers to respect the federal procedure. Nonetheless, the Court, in an opinion written by Justice Joseph Story, held

67. See, e.g., *McCarthy*, 99 Pa. at 71–72 (calling the decision to act on a “complaint” judicial, but calling the decision to arrest upon the magistrate’s own investigation, at issue in this case, ministerial); *Bailey v. Wiggins*, 6 Del. 299, 305–06 (Del. Sup. Ct. 1856) (whether probable cause existed after an oath taken was a judicial decision); *Mangold v. Thorpe*, 33 N.J.L. 134, 137–38 (Sup. Ct. 1868) (same). At a minimum, the old rule had weakened.

68. BISHOP, *supra* note 49, § 237. This section is part of a longer passage, §§ 235–39, in which Bishop addressed whether a magistrate acted as an inferior or superior court when exercising the power to examine and commit. The significance of the issue was that ambiguities would be resolved in favor of the jurisdiction of a superior court, but against an inferior court.

69. 41 U.S. (16 Pet.) 539 (1842).

70. 26 Ala. 156 (1855).

71. 41 U.S. at 625–26.

72. 1 Stat. 302, § 3.

73. *Id.*

74. *Prigg*, 41 U.S. at 550.

that Pennsylvania's kidnapping provision was preempted by federal law, which prescribed no such punishment for a certificateless removal.⁷⁵

The Pennsylvania law also furnished the slaver some help that he had not enjoyed under the Act: any state magistrate could issue an arrest warrant to a constable to apprehend the "fugitive."⁷⁶ If the Act preempted state law in all cases, could Pennsylvania allow its magistrates even to issue these arrest warrants for "fugitives"? That, after all, was not a procedure prescribed by the Act, and arguably it too should have been preempted, no matter how helpful it was in the scheme of federal law enforcement.⁷⁷ Unlike with Pennsylvania's law punishing certificateless removals as kidnapping, the Court did not hold that Pennsylvania's warrant-and-arrest procedure was preempted by federal law, even though, like the kidnapping law, it purported to add extra provisions in aid of the Act.⁷⁸ Instead, the Court "entertain[ed] no doubt whatsoever, that the states, in virtue of their general police power, possess[] full jurisdiction to arrest and restrain runaway slaves."⁷⁹ The concurrence of Justice Wayne put an even finer point on Story's vague formulation:

I deny all right in the states to legislate upon this subject; unless it be to aid, by mere ministerial acts, the protection of an owner's right to a fugitive slave; the prevention of all interference with it by the officers of a state, or its citizens, or an authority to its magistrates to execute the law of congress; and such legislation over fugitives as may be strictly of a police character.⁸⁰

Story's main holding, coupled with Wayne's concurrence, suggests that the commitment process was a "mere ministerial act" as Bishop believed, unmixed with "judicial power." The implication was that there was nothing for federal law to preempt in Pennsylvania's permission to state magistrates to issue arrest warrants for "fugitives." The states were free to fulfill or not to fulfill these law enforcement functions without conflicting with federal power.

75. *Id.* at 625–26.

76. This comes from the explanation of the Pennsylvania Attorney General. *Id.* at 599–600. For the quote of the law itself, see *id.* at 554–55.

77. Justice Story's opinion underplays this issue. Justice Wayne's concurrence, as further explained below, puts a finer point on it, see *id.* at 644 (Wayne, J., concurring), as does Justice Daniels's concurrence. *Id.* at 656–57 (Daniels, J., concurring).

78. *Id.* at 623.

79. *Id.* at 625.

80. *Id.* at 644 (Wayne, J., concurring).

While neither set of holdings explicitly mentioned “judicial power,” when read together they implied to Bishop that the commitment process was something separate and less than “judicial power.” Based in part on *Prigg*, Bishop concluded that magistrates, if not exercising “judicial power” under the constitution, must fall on the ministerial end of the judicial-ministerial binary.⁸¹ Bishop’s other citation in this passage, to *Gist*, supports a similar chain of inferences in holding that Congress could allow state justices of the peace to arrest violators of federal law under the Judiciary Act of 1789, without impermissibly ceding “judicial power.” In the 1897 case of *Robertson v. Baldwin*, the Supreme Court depended on both *Prigg* and *Gist* to hold that state justices of the peace could arrest seamen deserting their ships in violation of federal law, again without any unconstitutional cession of “judicial power.”⁸² Separately, Justice Story held that the states were not required to aid in enforcement of the federal law, even if they could voluntarily (and safe from preemption).⁸³ This holding led to a wave of “personal liberty laws,” whereby Northern states banned their law enforcers from aiding in fugitive removals, leading in turn to passage of a strengthened second Fugitive Slave Act in 1850.⁸⁴

Bishop’s reasoning, equating constitutionally “non-judicial” to “ministerial,” works on a first glance. Yet *Gist*, upon which Bishop depended, expressed the exact rule Bishop had struggled to circumvent,

81. BISHOP, *supra* note 49, § 237 n.1. Story’s opinion also appeared to examine whether the issuance of a warrant of removal was a “ministerial” task. *Id.* at 621–22. I say “appeared” because his holding dodged the question, essentially saying that Congress could confer the power to issue warrants of removal if the states and their officials consented to Congress’ taking and exercising it. *Id.* At least one official issuing a warrant of removal under the later Fugitive Slave Act of 1850 resolved the same issue by calling the warrant-issuing power “ministerial.” THE BOSTON SLAVE RIOT, AND TRIAL OF ANTHONY BURNS, CONTAINING THE REPORT OF THE FANEUIL HALL MEETING, THE MURDER OF BATCHELDER, THEODORE PARKER’S LESSON FOR THE DAY, SPEECHES OF COUNCIL ON BOTH SIDES, CORRECTED BY THEMSELVES, VERBATIM REPORT OF JUDGE LORING’S DECISION, AND A DETAILED ACCOUNT OF THE EMBARKATION 80–82 (1854).

82. *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897).

83. *Prigg*, 41 U.S. at 622.

84. See *infra* text accompanying notes 208–211.

siding with the authorities holding that the commitment process was judicial and not ministerial.

We concede, that the power or authority conferred by this section of the judiciary act is in its nature judicial. The justice of the peace is called upon to exercise judgment and discretion: he is to judge of the sufficiency of the affidavit on which the warrant of arrest is founded; he must determine, upon the evidence adduced against the prisoner, whether there is a reasonable ground of suspicion against him, so as to require that he should be put upon trial for the offence; and he is to imprison, or take bail for the appearance of the party at court to abide his trial.⁸⁵

Try as Bishop might, he could find no way through these thickets to the conclusion that the justice of the peace exercised only “ministerial” powers in arresting, examining, and committing. Yet the weakness of his reasoning (which he himself acknowledged) says much. To cite these cases and still draw the conclusion he drew shows that Bishop was incorporating a customary understanding of the role of the magistrate, one that his readers might be prepared to accept even without the benefit of precise reasoning.

Yet, it would be going too far to call Bishop’s analysis tendentious. Even the cases supporting the “judicial” view tend to describe the magistrate’s discretion in a cabined way. They evince an embarrassment in ceding a total “judicial” discretion to the common magistrate, who was thought to operate beneath the level of educated legal professionals.⁸⁶ The court in *Gist*, which labeled the commitment process judicial, described only two exercises of discretion: “judge of the sufficiency of the affidavit” and determine whether the evidence supports a “probable cause” determination.⁸⁷ In the 1856 Delaware malicious-prosecution case of *Bailey v. Wiggins*, the court held that a committing magistrate had acted judicially. Nonetheless, it reasoned that the magistrate had been “required to exercise judgment” on the “complaint” and that, had he “refused to decide that question of probable cause,” he could have been held liable. This formulation implies that the decision to commence probable-cause proceedings was “ministerial” even if the final probable cause decision was not.⁸⁸ The 1868 New Jersey Supreme Court case of *Mangold v. Thorpe* used a similar formula, first calling the committing magistrate a “judicial officer[,]” but then reasoning

85. Ex parte *Gist*, 26 Ala. 156, 161 (1855).

86. See *infra*, Part III.D.

87. *Id.*

88. *Bailey v. Wiggins*, 6 Del. 299, 305 (Del. Super. Ct. 1856).

that the “proofs [i.e. from the sworn complaint] manifestly placed before the justice a case, upon which it was his duty to exercise his official judgment. He was bound to decide whether the circumstances proved were such as to call for the arrest of the party inculpated.”⁸⁹ “Duty to exercise;” “Bound to decide.” Under these holdings, if a magistrate had judicial “discretion,” it was only within the narrowest bounds. He could not decline jurisdiction for a policy reason. He could determine probable cause in his discretion but could not make legal, equitable, moral, or policy-based judgments about the facts before him.

The 1828 treatise of Daniel Davis, *A Practical Treatise Upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions*, follows a similar outline.⁹⁰ Davis began his explanation of the “Complaint, and Application for Process” by writing that “every man of common right is entitled to prefer an accusation against a party whom he suspects to be guilty of an offence.”⁹¹ He explained that the magistrate should carefully examine the complainant for “motives of private interest.”⁹² “A justice of the peace” could “upon deliberate consideration, refuse to institute” further proceedings.⁹³ But this could not “be legally done where there [was] an accusation upon oath of an offence of a higher nature than is within his jurisdiction [i.e., generally a felony], if there appear any reasonable ground for the charge.”⁹⁴ Yet (again), if “there is no credit to be given” to the complaint, the magistrate could “decline receiving the complaint and issuing a warrant.”⁹⁵ According to Davis, the magistrate’s decision on the complaint was limited to considering whether the complainant might have ulterior motives or could not be credited at all. After arresting the accused, according to Davis, the magistrate could go further in inquiring into facts but could still only discharge after a hearing if “it manifestly appear[ed], either that no crime was committed by any person, or that the suspicion entertained against the prisoner was wholly groundless. But if there be an express charge of felony on oath, against the prisoner, though his guilt appear doubtful, the justice cannot discharge him.”⁹⁶ The magistrate might receive evidence from the accused, but could not enter judgment and discharge based on an affirmative defense, and could only discharge in

89. *Mangold v. Thorpe*, 33 N.J.L. 134, 137 (Sup. Ct. 1868).

90. DAVIS, *supra* note 40. No treatise I have been able to find from this period deals with the preliminary examination process in the same detail as Davis.

91. *Id.* at 5.

92. *Id.* at 10.

93. *Id.* at 11–12.

94. *Id.*

95. *Id.* at 11–12.

96. *Id.* at 75.

general if it “appear[ed] in the clearest manner that the charge [was] malicious as well as groundless,” regardless of his personal belief in the guilt or innocence of the accused.⁹⁷

The sum of these sources is that the committing magistrate exercised only a narrow discretion, even if not universally recognized as acting ministerially. He was expected upon complaint to make a probable cause determination and could only decline to prosecute if he had a specific, articulable reason to believe that a complaint was totally groundless. To the extent he had discretion, then, it was nothing like that of the modern law enforcer. He could not decline the case for just any policy reason or preference.⁹⁸ He could only do so if he found an absence of probable cause.

B. Practice Before Committing Magistrates: Mandatory Initiation and Duty of Arrest

Courts were reluctant to call the entire commitment process “ministerial,” likely because they wished to shield committing magistrates from liability. But recall that the commitment process had two stages: complaint and arrest, then examination. Statutes and case law of the era tended to describe at least the initiation of the process—that is, receipt of the complaint and arrest—as mandatory, duty-bound, and (often) “ministerial.”

State statutes in the era around 1866 were generally written to imply strong, non-discretionary duties on the part of committing magistrates who received a complaint on oath. Out of thirty-five English common-law derived jurisdictions, seven used language that left magistrates no arguable latitude in issuing an arrest warrant after a complaint. Florida’s statute exemplified these: “When any complaint shall be made upon affidavit, before any Justice of the Peace, of any offence committed against the laws of this State, or the laws of the United States, it shall be his duty forthwith

97. *Id.* at 76.

98. Scholars have long noted the nearly unfettered discretion of law enforcers like police officers. *See, e.g.*, KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (3d ed. 1976).

to issue his warrant.”⁹⁹ Five jurisdictions used the arguably vaguer phrase “shall issue” with regards to issuance of the arrest warrant after receiving a complaint under oath, but used mandatory language with regards to the initial examination of the complainant prior to issuing a warrant. New York’s statute was typical of this class of statutes:

99. MANUAL OR DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA, 4th Div., Tit. II, § 1, para. 1 (Thompson ed., 1847). The other states are Ohio, Alabama, Florida, Illinois, Kentucky, Arkansas, and Oregon. See THE REVISED STATUTES OF THE STATE OF OHIO, ch. 65, sec. 1 (Critchfield ed., 1870) (“he is authorized and required, on view, or complaint made on oath or affirmation”); CODE OF ALABAMA, secs. 3379–3381 (Ormond, Bagby, Goldthwaite eds., 1852) (“If the magistrate is satisfied therefrom, that the offence complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he must issue a warrant of arrest.”); STATUTES OF ILLINOIS, part. II, div. XVIII, sec. 207 (Treat ed., 1858) (“When a charge shall be exhibited upon oath . . . it shall be the duty of the judge or justice of the peace . . . to issue his warrant.”); CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF KENTUCKY, the Criminal Code, Ch. 1, tit. III, sec. 28 (Stanton ed., 1859) (“It shall be the duty of a magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense, when, from his personal knowledge, or from information given to him on oath, he shall be satisfied that there are reasonable grounds for believing the charge.”); CODE OF PRACTICE IN CIVIL AND CRIMINAL CASES FOR THE STATE OF ARKANSAS, tit. III, sec. 28 (1869) (“It shall be the duty of a magistrate to issue a warrant for the arrest of a person charged with the commission of a public offense, when, from his personal knowledge, or from information given him on oath, he shall be satisfied that there are reasonable grounds for believing the charge.”); ORGANIC AND OTHER GENERAL LAWS OF OREGON, Criminal Code, tit. I, ch. XXXIII, §§ 343–44 (1874) (“Thereupon, if the magistrate be satisfied that the crime complained of has been committed, and that there is probable cause to believe that the person charged has committed it, he must issue a warrant of arrest.”)

Whenever complaint shall be made to any such magistrate that a criminal offence has been committed, it shall be the duty of such magistrate to examine on oath the complainant, and any witnesses who may be produced by him. . . . If it shall appear from such examination, that any criminal offence has been committed, the magistrate shall issue a proper warrant.¹⁰⁰

The same number of states as used clearly mandatory language (twelve) employed the arguably vaguer “shall.” Of these, Massachusetts’s statute was typical:

100. IV STATUTES AT LARGE OF THE STATE OF NEW YORK, Part IV. Tit. II, Secs. 2–3 (Edmonds ed., 1863). The other jurisdictions in this category were Iowa, Missouri, California, and Nevada. *See* CODE OF CIVIL AND CRIMINAL PRACTICE AS PASSED BY THE EIGHTH GENERAL ASSEMBLY OF THE STATE OF IOWA, Code of Criminal Practice, ch. XIV, sec. 111 (1860) (“If the magistrate be satisfied therefrom, that the offense has been committed, and that there is reasonable ground to believe, that the person alleged to be guilty thereof, has committed it, he shall issue a warrant of arrest.”); REVISED STATUTES OF THE STATE OF MISSOURI, ch. 127, Sec. 3 (Hardin ed., 1854–1855) (“If it appear on such examination that any criminal offence has been committed, the magistrate shall issue a proper warrant.”); GENERAL LAWS OF THE STATE OF CALIFORNIA, pars. 1692 and 1694 (Parker ed., 1865) (“When a complaint is laid before a magistrate of the commission complaint, &C. of a public offense, triable within the county, he must examine on oath the complainant or prosecutor, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them. . . . If the magistrate be satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.”); COMPILED LAWS OF THE STATE OF NEVADA, pars. 1731 and 1733 (Bonnifield, Healy eds., 1873) (“When a complaint is laid before a magistrate of the commission of a public offense triable within the county, he must examine on oath the complainant or prosecutor, and any witness he may produce. . . . If the magistrate be satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he shall issue a warrant of arrest.”).

Upon complaint made to any such magistrate, that a criminal offence has been committed, he shall examine on oath the complainant and any witnesses produced by him, shall reduce the complainant to writing, and cause the same to be subscribed by the complainant, and if it appears that such offence has been committed, the court or justice shall issue a warrant.¹⁰¹

101. GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, Part IV, Tit. II, Ch. 170, Sec. 10 (1859). The other jurisdictions in this category were Virginia, Delaware, Kansas, Michigan, Maine, Minnesota, Rhode Island, Tennessee, West Virginia, and Wisconsin. *See* CODE OF VIRGINIA, tit. 55, ch. CCIV, par. 2 (1860) (“On complaint to any such officer, of a criminal offence, he shall examine on oath the complainant and any other witnesses; and if he sees good reason to believe that an offence has been committed, shall issue his warrant reciting the accusation.”); REVISED STATUTES OF THE STATE OF DELAWARE, Tit. XV, sec. 16 (1852) (“When complaint is made in due form to a justice, that an offence has been committed, the justice shall carefully examine the complainant on oath, or affirmation, and if he considers there is probable ground for the accusation, he shall issue his warrant.”); JOHN GENERAL STATUTES OF THE STATE OF KANSAS, ch. 82, sec. 36 (1868) (“Upon complaint, made to any such magistrate, that a criminal offence has been committed, he shall examine, on oath, the complainant, and any witness produced by him . . . if it shall appear that any such offence has been committed, the court or justice shall issue a warrant.”); COMPILED LAWS OF THE STATE OF MICHIGAN, vol. II, par. 5978 (Cooley ed., 1857) (“If it shall appear from such examination, appear that an offence has been that any criminal offence, not cognizable by a Justice of the Peace, has been committed, the magistrate shall issue a warrant.”); REVISED STATUTES OF THE STATE OF MAINE, tit. XL, ch. 132, sec. 6 (1857) (“When complaint is made to them, charging any person with the commission of an offence, they shall carefully examine the complainant and witnesses by him produced, on oath, in the circumstances, and, when satisfied that the person committed the offence, issue a warrant.”); GENERAL STATUTES OF THE STATE OF MINNESOTA, ch. CVI, sec. 2 (1867) (“upon complaint being made to any such magistrate that a criminal offence has been committed, he shall examine on oath the complainant, and any witness provided by him . . . if it appears that any such offence has been committed, the court or justice shall issue a warrant.”); GENERAL STATUTES OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, tit. 25, ch. 186, § 12 (1872) (“the trial justice or clerk of such justice court shall forthwith issue his warrant.”); CODE OF TENNESSEE, par. 5022 (1858) (“If the magistrate is satisfied therefrom that the offence complained of has been committed, and there is reasonable ground to believe the defendant is guilty thereof, he shall issue a warrant of arrest.”); CODE OF WEST VIRGINIA, ch. CLVI, sec. 2 (1868) (“On complaint to any such officer of a criminal offence, he shall examine, on oath, the complainant and any other witnesses, and if he see good reason to believe that an offence has been committed, shall issue his warrant.”); REVISED STATUTES OF THE STATE OF WISCONSIN, vol. II, tit. XXVII, § 2 (Taylor ed., 1872) (“Upon complaint made to any such magistrate that a criminal offence has been committed, he shall examine on oath the complainant and any witnesses produced by him . . . ; and if it shall appear that any such offence has been committed, the court or justice shall issue a warrant.”).

Five additional states elided clear language about the duties of committing magistrates, and six used open-ended language. For instance, replacing “shall” in “shall examine” or “shall issue” with “may.”¹⁰²

However, there is good reason to construe “shall” and even open-ended or silent statutes as implying ministerial or mandatory duties at the initial complaint and arrest stages. In the “shall” states, accompanying authorities or case law described the committing magistrate’s initial duties as non-discretionary in some degree. As already discussed above, cases in both Delaware and New Jersey—states whose statutes both stated that the magistrate “shall” issue a warrant after a complaint—described the duty to make an arrest as non-discretionary, even as they described the subsequent probable-cause factfinding itself as judicial and discretionary.¹⁰³ The Delaware case went as far as cautioning that the Justice “would have been himself criminally liable for a breach of his official duty” had he refused to initiate criminal proceedings, hearkening to case law holding that magistrates might be liable for failing in a ministerial duty.¹⁰⁴ Cases and statutes in other jurisdictions likewise held that magistrates might be criminally liable where they failed to make an arrest.¹⁰⁵ As a further example, margin notes provided by the statutory compiler in Rhode Island used the phrase “duty to issue a warrant” to label the passage about warrant issuance, even where the statute used the phrase “shall forthwith issue.”¹⁰⁶ And the State of Georgia—which used the facially discretionary “may”—

102. These states are New Jersey, Georgia, Pennsylvania, Indiana, Maryland, North Carolina, and South Carolina (all vague or elided), and Texas, Connecticut, Mississippi, New Hampshire, and Vermont (all “may” or “is empowered.”) *See* LUCIUS Q.C. ELMER & JOHN T. NIXON, *DIGEST OF THE LAWS OF NEW JERSEY*, p. 781 (4th ed. 1868); FREDERICK C. BRIGHTLY, ESQ. *A DIGEST OF THE LAWS OF PENNSYLVANIA, “Justices of the Peace,”* sec. 120 (1857); *STATUTES OF THE STATE OF INDIANA, “Criminal Pleading and Practice,”* Art. V., Sec. XVII (2d ed. 1862); *REVISED STATUTES OF THE STATE OF SOUTH CAROLINA*, part IV, tit. II, ch. CXXXVIII (1873); *REVISED CODE OF NORTH CAROLINA*, ch. 35 sec. 1 (Moore, Biggs eds., 1855) (all vague or elided). *THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS*, Art. 218 (1857); *GENERAL STATUTES OF THE STATE OF CONNECTICUT*, tit. XII, sect. 216 (1866); *REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI*, ch. LXIV, art. 329 (1857); SAMUEL D. BELL, *PRACTICAL FORMS, FOR THE USE OF JUSTICES OF THE PEACE, SHERIFFS, CORONERS AND CONSTABLES*, ch. 38 § 15 (1856); *GENERAL STATUTES OF THE STATE OF VERMONT*, tit. XV, Ch. 31, sect. 6 (1870) (all “may” or “is empowered”). I was unable to find any description of the relevant procedures in contemporary compilations of Maryland law.

103. *See supra* notes 88–89.

104. *Bailey v. Wiggins*, 6 Del. 299, 304 (Del. Super. Ct. 1856).

105. *State v. Leigh*, 20 N.C. 126, 128 (1838), though, tellingly, the court there went to great lengths to strictly construe and ultimately dismiss the indictment. *See* A. VAN DOREN HONEYMAN, *HONEYMAN’S JUSTICE OF THE PEACE: PRACTICE AND FORMS IN NEW JERSEY, “When Justice May Refuse to Act”* (1904). Honeyman found the magistrate’s potential criminal liability in the general statute punishing breaches of duty. Such statutes were common, but unlikely to lead to many decisions rendered. After all, a determined complainant could go to a grand jury if a justice of the peace refused to proceed.

106. The margin notes of the compiler in Rhode Island used the word “duty” in glossing the “shall language” describing the Justice’s role in issuing warrants. *See* *GENERAL STATUTES OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS* tit. 25, ch. 186, §§ 10–12 (1872) and notes thereto.

would probably be better described as a mandatory state, because the statute itself prescribed a simple form of affidavit that it said “shall *in all cases* be deemed sufficient.”¹⁰⁷

Returning to the ministerial-judicial discussion, while courts were reluctant to hold magistrates liable for mistakes of judgment in deciding whether to commit a prisoner, a decision courts usually regarded as “judicial” and therefore immune, they were more likely to find the initial complaint and arrest stages “ministerial.”¹⁰⁸ Contemporaneous decisions in Illinois (which used mandatory language) and North Carolina (which used open-ended language) both held magistrates liable for mistakes in issuing an initial warrant.¹⁰⁹ Further decisions in Massachusetts and Wisconsin, both states that used “shall” in describing the duty to issue a warrant, described the issuance of a warrant as a “ministerial” duty, at least in contexts outside of the personal liability of a committing magistrate.¹¹⁰

These statutes and laws gave rise to a fixed expectation on the part of Americans. They expected to be able to complain directly to judicial officials, and they expected those officials to commence criminal proceedings. Unlike today, prosecutors would not intervene to stop cases that they feared might not convince a jury, and police would not decline an arrest because they deemed some crime a low enforcement priority.

As an illustration, in the 1861 Maryland case *Cecil v. Clarke*, the plaintiff sued for malicious prosecution, after the defendants complained to a magistrate that the plaintiff had been attempting to kidnap slaves.¹¹¹ On an appeal regarding the jury instructions, the court described the evidence at trial in this way:

107. CODE OF THE STATE OF GEORGIA pt. 4, tit. 1, div. 16, § 4596. (Clark, Cobb, Irwin eds., 1861).

108. See cases in *supra* note 65.

109. *Id.*

110. See, for example, *Commonwealth v. Roark*, 62 Mass. 210, 215 (1851), where the court described the power to arrest and commit as “ministerial,” when a convicted defendant challenged his initial detention as void. The defendant argued that the statute in question did not allow the Justice of the Peace to commit an accused for trial before another court (the police court of Lowell). After interpreting the statutes, the court added that the Justice had acted ministerially in issuing an arrest warrant, tending to alleviate any issue that might be taken with a concurrent exercise of jurisdiction by the Justice and the police court of Lowell. *Id.* In *State v. Keyes*, 75 Wis. 288, 44 N.W. 13, 16 (1889) the court denied a writ of prohibition against a committing magistrate, brought by a witness resisting a subpoena issued during the pre-arrest stage of a commitment proceeding, on the basis that a writ of prohibition would not lie against an officer performing a ministerial duty such as issuing an arrest warrant. Likewise, though the statute used clearly mandatory language that speaks for itself, the court in *Molitor v. State*, 1888 WL 289, at *4 (Ohio Com. Pl. 1888), *aff’d sub nom*, *Molitor v. State*, 1892 WL 289 (Ohio Cir. Ct. 1892) held that a clerk could issue an arrest warrant, as such issuance was merely “ministerial.” The contrast between these cases and cases about the liability of individual magistrates for failures of duty is apparent: Courts were far more comfortable describing a magistrate’s duties as “ministerial” where it meant upholding the magistrate’s power rather than challenging it.

111. *Cecil v. Clarke*, 17 Md. 508 (1861).

On the plaintiff's arrival at Clarksville, after an unsuccessful search for [the slaves], the defendant, Thaddeus Clarke, demanded to see his authority, which was exhibited . . . William Welling and others said they were no authority to plaintiff to seize negroes, and Welling further remarked, that plaintiff could not be arrested without some one making an oath. John R. Moore replied, that he would make the oath. The plaintiff was then permitted to depart. The next day Moore went before justice Nichols and made an oath, and a warrant was issued. On the 11th of August 1857, the plaintiff was arrested and committed to jail, where he remained until the 13th of the month, when he was released on bail by justice Allen.¹¹²

Here, in a slavers' dispute over the ownership of slaves, at a heated moment when it appeared someone would seek the prosecution of the plaintiff for attempted kidnapping, Welling cautioned that there could be no arrest "without some one making an oath."¹¹³ In saying so, he was conveying an understanding about how criminal procedure would operate. All of the participants expected that an arrest and criminal prosecution could begin at will, as ultimately it was here, but that someone would have to take an oath. (Again, it would have to be one of the slavers—the oath of the enslaved was unlikely to be accepted.) The parties believed that commencing a prosecution came at the risk of damage to a man's reputation and a perjury charge, but that anyone willing to venture those risks could start a criminal prosecution at will. Note, too, that Maryland is one of the states whose statute used vague language regarding the duties of magistrates—even more reason to suppose that vagueness or silence should be construed in favor of a ministerial view of the committing magistrate's duties at the initial arrest stage.¹¹⁴

That a criminal arrest warrant would issue almost automatically becomes less remarkable in light of the period's practice of permitting arrests in civil cases.¹¹⁵ Authorities used arrests to coerce any number of desired responses, such as keeping the peace, as discussed above, taking responsibility for a bastard child,¹¹⁶ or answering for a debt.¹¹⁷ To take another notable

112. *Id.* at 518–19.

113. *Id.*

114. *See supra* note 102.

115. *See, e.g.*, Herman v. Brookerhoff, 1839 WL 3564 at *242 (Pa. 1839); Collins v. Hayte, 50 Ill. 353, 354 (1869); Bradley v. Morris, 44 N.C. 395, 395 (1853); Richard Bache, *The Manual of a Pennsylvania Justice of the Peace*, 132 (1810). The period's statutes also amply attest this.

116. *See, e.g.*, State v. Simons, 30 Vt. 620, 623 (1858); Moore v. State, 47 Kan. 772, 28 P. 1072, 1074 (1892).

117. *See, e.g.*, Wever v. Baltzell, 6 G. & J. 335, 339 (1834).

illustration, recall that Pennsylvania law allowed for the arrest of “fugitive” slaves by state officials on the complaint of the slaver.¹¹⁸ The purpose of that law would not have been to criminally punish the “fugitive,” but to secure the “property” of the slaver, and this would have appeared a typical use of civil jurisdiction to contemporary observers (to the same extent it shocks the modern conscience and infuriated contemporary abolitionists).¹¹⁹ Finally, legal authorities of the era considered it the duty of both citizens and officials to arrest felons on credible information, and this duty was also said to underpin the right to begin a criminal prosecution on complaint.¹²⁰ The ease of obtaining a criminal arrest warrant, thereby opening the process of criminal prosecution, harmonized with these related principles and practices.

Lest it appear that committing magistrates were rubber-stamping complaints by crime victims, the prerequisite that they examine witnesses “under oath” was more substantive than it may first sound to modern ears. First, again consider that oaths were taken much more seriously in this period.¹²¹ Second, as Professor Sacharoff has shown, in the era of the founding, “oath” was a term of art that implied “personal knowledge,” and statutes or constitutional provisions requiring an “oath” before issuance of a warrant therefore required that the complaining witness have personal knowledge of the occurrence.¹²² In the rare instance a magistrate was held liable or potentially liable for breach of a ministerial duty, it was usually because the complainant lacked personal knowledge and could therefore only file a complaint on “information” or “suspicion,” themselves terms of

118. See *Prigg v. Com. of Pennsylvania*, 41 U.S. (16 Pet.) 539, 551–52 (1842).

119. In other words, the law disdainfully considered the arrest of the “fugitive” as a sort of impoundment of chattels, permitting a more casual procedure than one that would apply to the arrest of citizens with cognizable rights; that is exactly what infuriated its critics. Cf. *Gilmore v. Holt*, 21 Mass. 258, 272–73 (1826) (discussing a Massachusetts ordinance allowing Justices to order the appraisement and sale of impounded cattle) (“Next it was objected, that the application for a warrant of appraisement is insufficient, because it does not appear to have been in writing. It is a sufficient answer to this, that the statute does not require it to be in writing, and it was competent to the legislature to authorize a verbal application, where the warrant sought for relates to chattels, though by the constitution no arrest of the person can be justified without a warrant founded on a complaint in writing; or at least such is the judicial construction of the declaration of rights, in this respect.”).

120. BISHOP, *supra* note 49, § 164; *Fulton v. Staats*, 41 N.Y. 498, 499 (1869) (describing how constable had offered in his defense at trial for assault and battery that he had had duty to arrest on an accusation of felony); H.S. MCCALL, *NEW YORK CIVIL AND CRIMINAL JUSTICE* 537, 538 (1865) (“As private persons who are present when a felony is committed, are bound to arrest the felon, so it is the common duty and right of every citizen to prefer an accusation against a party whom he suspects to be guilty.”).

121. See *supra* Part II.

122. See Sacharoff, *supra* note 56.

art implying lack of personal knowledge.¹²³ The case *State v. Keyes*¹²⁴ illustrates the process a magistrate would follow before ordering an arrest, in the more complex situation where the complainant lacked personal knowledge and could not swear an “oath.” *Keyes* involved a magistrate’s response to a secondhand report of a riot.¹²⁵ Because the original informant lacked personal knowledge about who was culpable, and because the potential percipient witnesses appeared hostile to the prosecution, the justice of the peace was forced to issue subpoenas.¹²⁶ The case involved a witness’s challenge to the justice’s subpoena power.¹²⁷ The court struck down the witness’s objections as inconsistent with the justice’s duty to examine some witness on oath—that is, with personal knowledge—before moving forward with a warrant.¹²⁸ The court explained that

[i]f an examining magistrate, who under our statute has no right to issue a criminal warrant on a complaint based on mere suspicion, and cannot do so without such facts as will make it appear that the offense has been committed, has no right to examine any other witnesses than the complainant and such as may have voluntarily appeared before him at the time with the complainant, then he has no jurisdiction competent or efficient for the arrest and examination of offenders.¹²⁹

Here, suspicion is a term of art meaning the absence of a witness with personal knowledge.¹³⁰ In other words, the *Keyes* court explained, unless the magistrate could issue subpoenas to percipient witnesses, he would lack power to turn mere suspicion into actionable oath and would therefore be unable to arrest in many cases.

123. See cases in *supra* note 65. Cases discussing defenses to the validity of prosecutions amply attest that the oath requirement continued to encompass a personal knowledge requirement into the nineteenth century, at least when it came to complaints filed by crime victims rather than law enforcers. See, e.g., *Broadhead v. McConnell*, 1848 WL 4970 (N.Y. Gen. Term. 1848) (citing cases, upholding invalidation of a warrant issued without personal knowledge).

124. 75 Wis. 288, 44 N.W. 13, 14 (1889).

125. See *id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 17.

130. The case *Osborn v. Sargent*, 23 Me. 527 (1844), demonstrates how “suspicion” was used as a term of art contrasting with “probable cause,” which in turn implied “supported by oath” (as in the Fourth Amendment). The court in *Sargent* contrasted an older statute that permitted arrest upon “suspicion” with a newer statute requiring “probable cause.” *Id.* at 533. As explained elsewhere in the case, the new statute required a complaint on “oath.” *Id.* at 532. Interestingly, while the older statute left the magistrate discretion, the newer made it his “duty” to arrest. *Id.*

The upshot is that an individual who had personally witnessed a crime had a right to commence a criminal action; their oath would unlock nondiscretionary duties of inquiry, arrest, and examination on the part of committing magistrates. The reverse of the coin was that the process could not be unlocked unless the complainant had personal knowledge—a robust limitation which, if followed, cloaked the committing magistrate in immunity, at least in the majority of jurisdictions.¹³¹

C. Practice Before Committing Magistrates: Arrest versus Examination

There is a simple reason to suppose that the initial arrest was basically automatic upon the swearing of an oath. Recall again that taking the oath and issuing an arrest warrant was preliminary to examining the defendant at a probable cause hearing. The inference from this bifurcation is that arrest was a mere preliminary to the examination.¹³² It was after this examination that the magistrate decided on the evidence whether to release the accused or commit for further proceedings. This bifurcation implies that the initial arrest involved comparatively less factfinding.

This bifurcation can be observed in judicial discussions of malicious prosecution cases. One element of the malicious prosecution tort is that the allegedly malicious case terminated in favor of the plaintiff, and so defendants sometimes argued that a given prosecution could not have “terminated” if it was merely dismissed by a magistrate.¹³³ To this defense, courts generally responded that the magistrate’s release of the prisoner after examination was a sufficient “termination” of the cause of action, without the plaintiff needing to plead or prove acquittal by a court, grand jury, or jury.¹³⁴ Plaintiffs, for their part, would argue that acquittal by the magistrate furnished proof of lack of probable cause, and this inference was usually

131. See *infra* Part III.D.

132. BISHOP, *supra* note 49, § 238; see, e.g., *Brant v. Higgins*, 10 Mo. 728, 734 (1847), discussed below. Depending on statute and local practice, these examinations could be substantive and extensive. See *Burlingame v. Burlingame*, 1828 WL 1902 (N.Y. Sup. Ct. 1828) (defendant argued for three to four hours, and convinced the magistrate that the witness to the crime did not deserve credit).

133. *Secor v. Babcock*, 1807 WL 857 (N.Y. Sup. Ct. 1807) (discharge by magistrate could infer probable cause); *Long v. Rogers*, 17 Ala. 540 (1850) (same); *Chapman v. Dodd*, 10 Minn. 350, 354 (1865) (record of proceedings, admitted to prove the termination of the previous action but showing that the magistrate made his findings on the basis of the prosecution’s failure to prosecute, did not contradict allegation in the complaint that the magistrate acquitted the plaintiff).

134. See *Secor*, 1807 WL 857 (disagreeing with petitioner on appeal, holding that the discharge of the prisoner was properly an “acquittal” from which absence of probable cause could be inferred); *Long*, 17 Ala. at 546 (“We think a discharge by the justice of the peace, upon an examination into the alleged causes of the plaintiff’s arrest, is altogether sufficient. Nothing further can be done with that prosecution.”); *Chapman*, 10 Minn. at 363 (overruling objection on appeal that the record inappropriately replaced the word “discharge” with “acquittal”; the court held that either word would have the same effect on the jury).

allowed in some form.¹³⁵ Indeed, the determination of a magistrate would be better proof of lack of probable cause than acquittal by a petit jury, since probable cause to arrest is sometimes consistent with innocence. As the Supreme Court of Missouri explained in 1847:

[I]n a criminal proceeding, the final acquittal of the accused can have but little weight as evidence of probable cause, compared with an acquittal or discharge before the magistrate or grand jury. The magistrate and the grand jury have the very question of probable cause to try. . . . Under such circumstances, the refusal of the examining tribunal to hold the accused over to trial, must necessarily be very persuasive evidence that the prosecution is groundless. But this would not be the case with a verdict of acquittal, after a full investigation of the case, and an examination of the testimony on both sides. . . . It would be hard if every suitor who fails to recover, whether upon technical grounds or on the merits, should, for such failure, be presumed to have instituted a groundless action. The result of the action may depend upon facts and contingencies which no skill or foresight, however honest and persevering, could anticipate or prevent.¹³⁶

The decision whether to issue an initial warrant would not be as substantive as the findings of “examining tribunals.”

“Bifurcated” may not even go far enough. After all, as already shown, proceedings before the magistrate were usually only preliminary to proceedings before the grand jury, depending upon the crime and jurisdiction. An arrest, then, was a mere preliminary to a preliminary, and it follows that it would entail only a slight inquiry, if any at all; a mistake in the initial arrest was to be corrected at the examination or by the grand jury, and so the arrest could be made without apprehension.

135. *Straus v. Young*, 36 Md. 246 (1872); *see Paukett v. Livermore*, 5 Iowa 277, 281–82 (1857) (In discussing jury instructions, explaining that probable cause could be inferred from discharge of accused); *but see Williams v. Vanmeter*, 8 Mo. 339, 341–42 (1844) (discharge by magistrate satisfied only part of plaintiff’s burden of proof).

136. *Brant v. Higgins*, 10 Mo. 728, 734 (1847). The court was rejecting a jury instruction to the effect that the jury should presume lack of probable cause from acquittal in a civil case. In this passage, the court was explaining why that inference would be permitted, by contrast, in a criminal case, and especially where it was the grand jury or magistrate that had discharged the accused.

D. Practice Before Committing Magistrates: The Victim's Responsibility for the Legal Validity of His Affidavit

A criminal case, then, could be commenced by an affidavit swearing that the affiant had personally witnessed a crime. The initial arrest was likely considered a matter of right, even if there was no guarantee that a committing magistrate would find probable cause at the subsequent examination. As further corroboration that commencement of a criminal case was as-of-right, case law shows that the affidavit could be crafted without (for better or worse) significant intercession by a state official or attorney.¹³⁷ Indeed, the majority view throughout the nineteenth century was that the affiant-crime witness crafting their affidavit could not plead the advice of the magistrate as a defense in a subsequent malicious prosecution case,¹³⁸ while they could plead the advice of their own attorney.¹³⁹ It was the prosecutor and not the magistrate who owned the legal and factual contents of the initiating instrument, and a shrewd prosecutor would consult with an attorney in framing their affidavit.

A case from the minority position explains why courts usually declined to allow affiants to depend upon the advice of magistrates. *Monaghan v.*

137. *Frierson v. Hewitt*, 20 S.C.L. 499 (S.C. App. L. & Eq. 1834) (complainant swore affidavit of criminal misconduct and procured arrest of defendant, though conduct turned out not to be criminal); *Leidig v. Rawson*, 2 Ill. 272 (1836) (affidavit on which warrant of arrest issued included pronoun “I” referring to complainant); *Whitfield v. Westbrook*, 40 Miss. 311 (Miss. Err. & App. 1866) (complainant first consulted with a judge before swearing out affidavit); *Steel v. Williams*, 18 Ind. 161 (1862) (complainant’s affidavit defectively charged no crime); *Ctr. v. Spring*, 2 Iowa 393, 394 (1856) (warrant issued on complainant’s affidavit); *Goggans v. Monroe*, 31 Ga. 331 (1860) (defendant arrested “on the instance and upon the affidavit” of the complainant); *Laville v. Biguenaud*, 15 La. Ann. 605, 605 (1860) (oath of complainant initiated case); *Cooper v. Turrentine*, 17 Ala. 13 (1849) (same); *Chubb v. Griffin*, 13 Tex. 392 (1855) (same); *Ctr. v. Spring*, 2 Iowa 393, 394 (1856) (same); *Cox v. McLean*, 3 Ill. App. 45, 47 (Ill. App. Ct. 1878) (complainant swore out affidavit after consulting attorney).

138. *Olmstead v. Partridge*, 82 Mass. 381, 382 (1860) (upholding decision of trial court to exclude testimony of justice of the peace on issue of probable cause); *McCullough v. Rice*, 59 Ind. 580, 586 (1877) (upholding jury instruction that advice of justice of the peace was inadmissible to negate malice); *Rigdon v. Jordan*, 81 Ga. 668, 7 S.E. 857, 860 (1888) (reversing court that admitted advice of justice of the peace); *Sutton v. McConnell*, 46 Wis. 269, 50 N.W. 414, 415 (1879) (reversing instruction that advice of magistrate could be relied upon as complete defense); *Straus v. Young*, 36 Md. 246, 256 (1872) (upholding trial court that held advice of magistrate, a “nonprofessional man,” was inadmissible on question of malice); *but see Hall v. Hawkins*, 24 Tenn. 357, 359 (1844) (circumstances under which complainant sought advice of a third-party justice of the peace was not a complete defense but could be admitted in defense of malice); *White v. Tucker*, 16 Ohio St. 468, 470 (1866) (same). Yet I am aware of no cases from the period that went as far as to hold the advice to be a *complete* defense.

139. *E.g.*, *Walter v. Sample*, 25 Pa. 275, 277 (1855) (advice of counsel would negate lack of probable cause and therefore would be a complete defense to malicious prosecution); *Bartlett v. Brown*, 6 R.I. 37 (1859) (advice of counsel negated malice element and therefore was a complete defense to malicious prosecution, even though the advice of counsel was wrong); *Griffin v. Chubb*, 7 Tex. 603, 612 (1852) (advice of counsel should have been admitted on question of malice, though not, in this case, as a complete defense).

Cox, decided in 1892, reversed an earlier Massachusetts case.¹⁴⁰ The earlier case, *Olmstead v. Partridge*, had sided with the majority and excluded the testimony of a justice of the peace on the defendant's advice-of-counsel defense.¹⁴¹ In reversing, and holding the advice of a magistrate to be admissible for the defendant, the Court in *Monaghan* explained:

Olmstead v. Partridge was decided in the year 1860. Since that time the authority to issue warrants for criminal offenses has been taken from ordinary justices of the peace, and is lodged in officers specially designated for the purpose, and in trial justices, and the justices of police, district, and municipal courts. A very large majority of the gentlemen now having this authority are members of the bar, and all have been selected with care, and are known to the community as wise and discreet men. Besides this, they are disinterested and independent, and not, as was sometimes felt to be the case with justices of the peace under the old system, under the control or influence of particular persons.¹⁴²

The majority exclusionary rule was based on the understanding that justices of the peace were uninformed on questions of law and prone to corrupt influence. The Court in *Monaghan* was only willing to change the old rule because the magistracy of whiggish Massachusetts had improved in professionalism between 1860 and 1892. Yet the old doctrine has remained persuasive wherever states continue to depend on laypeople to enforce criminal law.¹⁴³

While legal professionals in Massachusetts might have looked down their noses, the magistrate's lack of legal training was probably viewed as a

140. 155 Mass. 487, 488, 30 N.E. 467, 467 (1892).

141. 82 Mass. 381, 382 (1860).

142. 30 N.E. at 468. *See also* Brobst v. Ruff, 100 Pa. 91, 94 (1882) ("When a prosecutor fully and fairly submits to his counsel learned in the law all the facts which he knows are capable of proof, and is advised that they are sufficient to sustain a prosecution, and, acting in good faith on that opinion, does institute the prosecution, he is not liable to an action for malicious prosecution, although the opinion be erroneous. Shall the advice of a committing magistrate have the same effect? We think not. Justices of the peace are not required to be learned in the law. In fact, generally through the state they are not. They are not qualified by a course of study to give advice on questions of law. They do not pursue it as a profession. They are not charged with the duty of advising any person to commence a prosecution. They ought not to act as attorney or agent for one in regard to a prosecution he is about to institute before them.")

143. *Harris v. Harris*, 542 So. 2d 284, 287 (Ala. Civ. App. 1989) (rejecting complete defense where defendant relied upon the advice of "the investigating officer rather than the advice of counsel"); *Williams v. Confidential Credit Corp.*, 114 So. 2d 718, 720 (Fla. Dist. Ct. App. 1959) ("Although individual justices of the peace may have broad experience and knowledge of the law, the courts may not conclusively presume that they are qualified to determine whether probable cause for an arrest exists. This is especially true in Florida where such officers are not required to have legal training.")

feature, not a flaw. Americans viewed their criminal justice institutions as expressions of popular sovereignty, to be guarded against intrusions by experts and legislators.¹⁴⁴ At the same time, there was an “intense popular dislike of lawyers” in the period of the early republic.¹⁴⁵ The committing magistrate took his place in this milieu. As Alexis de Tocqueville observed:

The Americans have borrowed from their English forefathers the conception of an institution which has no analogy with anything we know on the Continent, that of justices of the peace. A justice of the peace is halfway between a man of the world and a magistrate, an administrator and a judge. A justice of the peace is an educated citizen but does not necessarily have any knowledge of the laws. For that reason his responsibility is only to be society’s policeman, a matter requiring good sense and integrity more than knowledge. When a justice of the peace has a share in the administration, he brings with him a taste for formalities and for publicity, which renders him a most inconvenient instrument for a despotism; but he is not the slave of these legal superstitions which make magistrates so little capable of administration.¹⁴⁶

In this telling, the magistrate’s lack of legal training kept him close to popular sovereignty, forcing him to follow clear and simple rules that average folk could understand.¹⁴⁷ Being uneducated in the law, he was expected to follow the rules ministerially—the “taste for formalities” noted by De Tocqueville.¹⁴⁸

The sum of this evidence—the precise and duty-bound way in which statutes and courts described the commitment procedure, the analyses furnished by contemporary treatise-writers, and the observations of historians on the period’s legal culture—suggests that magistrates could not even apply case law to reject a complaint. Even if for instance a Supreme Court ruling invalidated some criminal statute or proceeding, applying that ruling would appear to lie outside the scope of the magistrate’s limited duty to find probable cause. For example, recall *Prigg*. After *Prigg* weakened the

144. ELIZABETH DALE, *CRIMINAL JUSTICE IN THE UNITED STATES, 1789–1939* 45–64 (2011). See EDWARDS, *THE PEOPLE AND THEIR PEACE* (2009), for an argument that in the nineteenth century, magistrates and individual citizens occupied a level of “local,” popular law—separate from either state or federal law—that regulated daily social and economic relationships.

145. GORDON S. WOOD, *EMPIRE OF LIBERTY* 402–403 (2009).

146. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 75–76 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1966). Confusingly, in this translation, “magistrate” means continental judges.

147. *See id.*

148. *Id.*

Fugitive Slave Act of 1793, Congress passed a new Fugitive Slave Act in 1850, punishing any use of state legal process to impede a removal.¹⁴⁹ Though this new law—not to mention the explicit holding of the *Prigg* decision—put it beyond doubt that Northern states could not enforce state kidnapping laws against slave hunters, abolitionist activists continued to take out arrest warrants for kidnapping on slavecatchers who ventured north, often under circumstances where the committing magistrate likely understood that the warrant violated the Fugitive Slave Act of 1850.¹⁵⁰ As a final example, consider *In re Neagle*, a famous case about federal law enforcers' immunity to criminal prosecution.¹⁵¹ In that colorful case, an unhinged complainant was able to obtain the arrest of a United States Supreme Court Justice on an allegation of assault, after the *complainant's* husband had attacked the Justice and been killed by a federal marshal.¹⁵²

This kind of behavior on the part of committing magistrates, while it may appear strange to us, is consistent with the principles that ruled in this era. It was not the magistrate's role to decide questions of law, such as whether a Supreme Court decision had invalidated a state criminal law. When a magistrate heard a good oath (on personal knowledge), he relinquished all potential liability, which was taken up instead by the complainant. It was the complaining affiant who took responsibility for the contents of their affidavit (or oral oath), factually and legally.

E. The End of the Examination

Before analyzing these procedures and putting them in the context of Reconstruction, one more feature of the preliminary magistrate hearing should be explained. Recall that the magistrate proceeding was preliminary to a grand jury.¹⁵³ With an eye towards the grand jury and an eventual trial, the examining magistrate would take witness depositions, freezing the record and protecting the testimony against the subsequent unavailability of witnesses for a trial that could be weeks or months in the future.¹⁵⁴ That is,

149. SYDNEY LUBET, *FUGITIVE JUSTICE: RUNAWAYS, RESCUERS, AND SLAVERS ON TRIAL* 44 (2010).

150. *See, e.g.*, ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS, FREEDOM AND SLAVERY IN EMERSON'S BOSTON* 33–34 (1998); LUBET, *supra* note 149, 241–47, 280–83, 298–99.

151. *In re Neagle*, 39 F. 833, 840 (C.C.N.D. Cal. 1889), *aff'd sub nom.* *Cunningham v. Neagle*, 135 U.S. 1 (1890).

152. *Id.*

153. *See supra* Part III.A.

154. *See, e.g.*, Texas Code of Criminal Procedure, Arts. 778–80 (1857); JOHN W. EDMONDS, *STATUTES AT LARGE OF THE STATE OF NEW YORK* 732 (1863); CODE OF VIRGINIA INCLUDING LEGISLATION TO THE YEAR 1860 825 (1860); JOHN J. ORMOND, ARTHUR P. BAGBY, & GEORGE GOLDTHWAITE, *CODE OF ALABAMA* 608 (1852).

while a deposition could not be used in a criminal trial without the defendant's consent, it could be used where a previously-deposed witness was unavailable because they were "dead . . . insane . . . or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant . . . or so ill as to be unable to travel."¹⁵⁵ Freezing the evidence through depositions ensured that a conviction would not be lost because of the passage of time or bad faith of the defendant. The magistrate, then, performed an important public service in gathering and preserving evidence. As will be further discussed in the context of Reconstruction, this gathering of depositions by the magistrate was an important constituent of the victim-complainant's right to testify in criminal proceedings.

Finally, Americans in the mid-late nineteenth century likely enjoyed a right to appoint their own counsel and prosecute their own case.¹⁵⁶ Thus, many if not most complainants had the opportunity to prosecute their criminal case from arrest through trial.

F. Summary and Preliminary Analysis

This article began by proposing that the right to swear an oath implied a right to access criminal justice proceedings on the part of crime victims and witnesses. It first adduced some preliminary evidence about the passage of the 1866 CRA, to justify an initial hypothesis that the Fourteenth Amendment aimed to protect a right to access criminal justice.¹⁵⁷ This article then studied contemporary cases, statutes, and treatises to show that in the time period around 1866, a witness's complaint under oath to a magistrate prompted an arrest followed by a probable cause hearing.¹⁵⁸ Based on this initial evidence, I propose that Americans enjoyed a right to access criminal justice proceedings. Therefore, the "give evidence" clause of the 1866 Civil Rights Act contemplated and incorporated that right. Or, since it was universally understood that an eyewitness's oath unlocked non-discretionary duties of arrest and a probable-cause hearing, protecting the rights to "give evidence" and to access "proceedings for the security of person and property" necessarily protected access to criminal process and

155. BISHOP, *supra* note 49, § 1093.

156. Jonathan Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. REV. 119, 156 (2022).

157. *See supra* Part II.

158. *See supra* Part III.

would have been understood by contemporaries as doing so.¹⁵⁹ Yet another way, if an official had a “duty” to arrest, “then somebody else ha[d] a corresponding right” to the arrest.¹⁶⁰

I can imagine the following objection: law enforcers may have a “duty” to enforce the law, but that does not imply that a crime victim has an individualized, court-enforceable right to law-enforcement services.¹⁶¹ That is the view endorsed by the Supreme Court in cases such as *Leeke* and *Linda R.S.*¹⁶² In a similar vein, pre-modern (and some early modern) scholars believed that the wealthy had a duty to feed the poor, because the poor had a natural right to live (which was the will of God).¹⁶³ Yet these scholars often conceded that the right was unenforceable by the hungry.¹⁶⁴

I will offer a preliminary response to this fair objection and then defer a final response until the conclusion. The evidence presented so far hopefully proves that the criminal law-enforcement duties of magistrates in the nineteenth century were taken literally. Perhaps the sense of duty was weakening, a shift that may be guessed from the ambiguity of Bishop’s criminal procedure treatise, and from the reluctance of courts to hold magistrates liable according to the old rules. Yet there remained a strong sense amongst litigants that their oath had the power to compel a law-enforcement response, while statutes treated the initiation of criminal process as non-discretionary—sometimes even holding magistrates criminally liable when they failed to initiate process. The evidence of nineteenth century criminal justice is corroborated by evidence about the era’s legal culture and the role of the justice of the peace within that culture: not to decide legal questions or to advise on the wisdom of commencing a prosecution, but simply to follow known procedures, gather evidence, and pass that evidence onward to higher authorities.

Before taking up this objection again, this Article turns to the Reconstruction era, which furnishes numerous examples substantiating that the “give evidence” provision of the 1866 CRA contemplated complainant access to criminal justice.

159. In other words, magistrates were officials with “a jurisdiction competent . . . for the arrest and examination of offenders,” as one contemporary case put it. *State v. Keyes*, 75 Wis. 288, 44 N.W. at 17. Such language is unimaginable to describe the official acts of police officers or state’s prosecutors today; these officials instead occupy a position prior to the state’s criminal jurisdiction, and they are, instead, the gatekeepers of that jurisdiction.

160. Duty, *Black’s Law Dictionary* (12th ed. 2024).

161. See *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Leeke v. Timmerman*, 454 U.S. 83, 86–87 (1981) (per curiam) (quoting *Linda R.S.*, 410 U.S. at 619).

162. *Id.*

163. BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997).

164. *Id.* The Church eventually created a procedure whereby episcopal authorities could compel alms upon the plea of an indigent person. See *id.*

IV. THE RECONSTRUCTION APPROACH TO CRIMINAL LAW ENFORCEMENT

During Reconstruction, Congress sought to protect the freed people against criminality when that protection was denied by Southern authorities. Their actions and enactments, especially the 1866 CRA, are best understood in the context of the period's criminal procedure. Congress, acting in cooperation with Union army officers, sought to protect the freed people's right to access not only (or even primarily) the witness box, but the duty-bound commitment proceedings of local magistrates. The story of this early phase of Reconstruction completes the backdrop for understanding the "give evidence" clause—and by extension, the Fourteenth Amendment.

A. The Struggle Over Anti-Testimony Legislation

As the Civil War gave way to a tense peace, the South remained under martial law.¹⁶⁵ In March 1865, shortly before the war's end, Congress partially organized the army's peacekeeping function under the Freedmen's Bureau.¹⁶⁶ The First Freedmen's Bureau Act gave the Bureau "control of all subjects related to refugees and freedmen" under regulations to be prescribed by the Freedmen's Bureau Commissioner. On May 30, 1865, Commissioner Oliver Otis Howard issued "Circular No. 5," "Rules and

165. See GREGORY P. DOWNS, *AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR* (2015) *passim*.

166. 13 Stat. 507. The Bureau was established in "the War Department" and was to continue during the rebellion plus one year.

regulations for assistant commissioners.”¹⁶⁷ Regarding the anti-testimony laws of the former slave states, Howard’s Circular No. 5 provided:

In all places where there is an interruption of civil law, or in which local courts, by reason of old codes, in violation of the freedom guaranteed by the proclamation of the President and the laws of Congress, disregard the negroes’ rights to justice before the laws, in not allowing him to give testimony- the control of all subjects relating to refugees and freedmen being committed to this bureau-the assistant commissioners will adjudicate, either themselves or through officers of their appointment, all difficulties arising between negroes themselves, or between negroes and whites or Indians, except those in military service, so far as recognizable by military authority and not taken cognizance of by the other tribunals, civil or military, of the United States.¹⁶⁸

The order was drafted broadly to address “all difficulties,” necessarily encompassing criminal cases. Freedmen’s Bureau field reports corroborate that one of the chief “difficulties” contemplated by Circular No. 5 was the inability of the freed people to obtain arrests and prosecute criminal aggressors.¹⁶⁹ The powerlessness of the freed people to access criminal justice was especially troubling given the racist violence roiling the region.¹⁷⁰ Against the backdrop of the period’s criminal procedure, Circular No. 5 aimed to restore the right to access the ministerial commitment proceedings denied by anti-testimony laws.¹⁷¹ For instance, in Georgia, a local Judge in late 1865 called on Union troops to control White violence

167. WILLIAM A. BLAIR, *THE RECORD OF MURDERS AND OUTRAGES: RACIAL VIOLENCE AND THE FIGHT OVER TRUTH AT THE DAWN OF RECONSTRUCTION* 5 (2021).

168. REPORT OF COMMISSIONERS OF FREEDMEN’S BUREAU, 39 CONG. EXEC. DOC. NO. 70 AT 102 (1866) (“1866 Bureau Report”).

169. *See, e.g.*, 1866 Bureau Report at 237 (“The civil authorities will neither arrest nor punish said Roberts, as there is no testimony except of colored persons.”); 398 (“In case, however, when the civil authority refused to offer relief to the freedmen, or refused to receive their testimony or hear their complaints, as they are bound to do by law, it was ordered that the matter should be laid before the nearest military commander, who would make arrests or take such action as the case required.”) Carl Schurz likewise reported that magistrates’ rejection of freed people’s oaths made it impossible for the freed people to access justice. *See, e.g.*, *Schurz Report* at 161 (“Little or no business is done before other magistrates, as the colored people are aware, from experience, that their oath is a mere farce and their testimony against a white man has no weight; consequently all complaints of the colored people come before this bureau.”)

170. *See* RICHARD D. WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE 1865–1896* 54–55 (2017); STEVEN HAHN, *A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS, 1830–1910* 303–304 (2016).

171. *See supra* Part III.

against freed people, in a plea summarized by a New York Times correspondent:

Several bands, calling themselves bushwhackers, jayhawkers, and regulators, are perpetrating the most shameful outrages—shooting, burning and beating negroes, to get money and for revenge. Their barbarous acts cannot be made known for legal effect except through negro testimony, and therefore cannot be punished. He asks that officers may be sent to take affidavits, and carry the offenders to Augusta for punishment, if any can be awarded them.¹⁷²

In this account, the correspondent, reader, Judge, and military authorities all spoke a common legal language, with “affidavit” signifying the commencement of as-of-right law enforcement proceedings.

Ex-Confederates realized that Howard’s Circular No. 5 gave them a path back to jurisdiction, since it conditioned the Freedmen’s Bureau’s extraordinary jurisdiction on (1) interruption of civil law or (2) the continuation of slave-code anti-testimony laws.¹⁷³ They understood that if a state opened its courts and repealed its anti-testimony laws, it could eject the Freedmen’s Bureau.¹⁷⁴ Under Howard’s Circular No. 5, Mississippi’s provisional governor negotiated a withdrawal of the Freedmen’s Bureau courts in October, 1865 by ordering the state’s judges to accept the testimony of Black residents.¹⁷⁵ A newly elected governor, responding to pressure from the Johnson administration, pressed the state’s legislature to permit Black people to testify in the courts,¹⁷⁶ leading shortly after to passage of a limited law.¹⁷⁷ Governor Parsons in Alabama likewise pressed the legislature there,¹⁷⁸ leading to passage of a testimony law in December.¹⁷⁹ Elsewhere, too, the Johnson administration prodded Southern governments to embrace limited testimony rights. When North Carolina attempted to game the occupation by passing a law conditioning the right to

172. *Washington News*, N.Y. TIMES, Dec. 11, 1865.

173. See *supra* note 169 (quoting 1866 Bureau Report, *supra* note 168).

174. Carl Schurz reports one racist Southerner stumping in favor of accepting the testimony of freed people, in order to eject federal authorities from jurisdiction. See *Schurz Report* at 141 (“If you refuse his testimony, as is being done, the result will be the military courts and Freedmen’s Bureau will take it up, and jurisdiction is lost.”).

175. See DOWNS, *supra* note 165, at 78; Mississippi, *Proclamation of Gov. Sharkey on Negro Testimony*, N.Y. TIMES, Oct. 11, 1865, at 5.

176. Mississippi, *Message of Gov. Humphreys to the Legislature on Negro Troops—He Holds that the Courts Should be Open to the Negro—His Views of the Freedmen’s Bureau*, N.Y. TIMES, Dec. 3, 1865; see also DOWNS, *supra* note 165, at 84.

177. See statutes listed *infra* note 189.

178. *Testimony of Colored Persons*, N.Y. TIMES, Sept. 5, 1865.

179. See statutes listed *infra* note 189.

testify upon the withdrawal of occupation troops, Johnson pressed the legislature “not to inflame northern opinion.”¹⁸⁰

Though little acknowledged in the secondary literature, Johnson’s support for testimony rights bespeaks the contemporary importance of this civil right.¹⁸¹ Because of his later opposition to Congressional efforts to secure the civil rights of Black people, including vetoing the 1866 CRA, Johnson usually features as the villain of Reconstruction, a dragon slain by Radical Republicans in Congress.¹⁸² For instance, in his message vetoing the 1866 CRA, Johnson espoused the view that the Thirteenth Amendment—Congress’s source of power for passing the 1866 CRA—did not secure civil rights to the former slaves.¹⁸³ Yet, in 1865 and 66, Johnson deployed the military to enforce the Thirteenth Amendment,¹⁸⁴ and insisted that Southern governments adopt limited testimony rights. In the twilight between the war and Radical Reconstruction, Southern politicians like Provisional Governor Sharkey even adopted the theory that the end of slavery implied a limited right to testify—a convenient theory for politicians trying to save face with Southern constituencies.¹⁸⁵ Both Johnson and the new Southern governments were responding to a popular sentiment: Americans believed that the inability to testify radically negated the protection of criminal laws, and they found the denial of this protection abhorrent.¹⁸⁶ Even as he blocked the most radical Reconstruction plans, Johnson knew he could not face Northern voters without this most fundamental civil right installed in Southern law codes.

So it was that reluctant ex-Confederates began passing laws to permit Black people to testify, even as those same ex-Confederates passed Black Codes throughout 1865 and 1866 otherwise impairing the civil rights of the freed people.¹⁸⁷ Historians have sometimes described the testimony laws of 1865–66 as though they cleared away all substantive disabilities on Black

180. DOWNS, *supra* note 165, at 85.

181. Foner for instance, does not ascribe any role to the Johnson administration in changing testimony laws between 1865 and 66. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877, at 204 (updated ed. 2014).

182. See DOWNS, *supra* note 165, at 63–64.

183. See S. Exec. Doc. No. 31 (1866).

184. See DOWNS, *supra* note 165, at 1–84.

185. *Mississippi, Proclamation of Gov. Sharkey on Negro Testimony*, N.Y. TIMES, Oct. 11, 1865, at 5 (“the late constitutional amendment which abolishes slavery, abolishes also all laws which constituted a part of the policy of the system of slavery.”)

186. See *supra* Part II.

187. BLAIR, *supra* note 167, at 5; see FONER, *supra* note 181, at 204–205; see also DOWNS, *supra* note 165, at 84–87.

testimony.¹⁸⁸ Not so. Southern legislators limited these laws as much as they could get away with, but the North would not let them get away with denying Black citizens the protections of criminal law outright. Southern states would restrict Black Americans' civil right to testify to a bare minimum; the North would insist that the right would not be restricted past the point of barring Black Americans' ability to file criminal complaints. The record left by this political struggle shows that everyone in the United States, North and South, understood how the right to testify secured the right to access criminal justice.

The Southern testimony laws of 1865–66 came with two major limitations. First, they generally permitted Black testimony only in cases where Black people were interested parties, i.e., either plaintiff or defendant in a civil action, or complaining witness or defendant in a criminal action.¹⁸⁹ This would allow them to access the courts as parties or complaining witnesses, hopefully (from the point of view of the Southerners) doing what was strictly necessary to satisfy federal authorities, but no more. Remarkably, the interested-party limitation would prejudice only White litigants, in cases where a White person litigated against another White person and attempted to call a Black witness.¹⁹⁰ Here was a surprisingly principled racism, running so deep that Whites would prejudice themselves to limit Black testimony as much as possible. How can that be? Recall that White Americans believed that Black Americans could not understand the sacred nature of an oath.¹⁹¹ Whites in the South likely believed that it would be all too easy to buy, sell, fraudulently obtain, or otherwise coerce Black testimony, making it important in their eyes to protect Whites from other Whites willing to act in bad faith.¹⁹² These laws, in sum, distinguished between cases where permitting Black testimony was necessary to secure personal rights to Black residents and thus (it was no doubt hoped) oust federal authorities, and cases where the testimony was not necessary to that goal. These lawmakers (and sometimes the federal officials for whose eyes they legislated) believed that testimony laws were important because they secured personal rights in civil and criminal cases, and they identified an outer zone where testimonial laws did not secure any personal civil rights.

188. See, e.g., FONER, *supra* note 181, at 204 (“By mid-1866, most of the Southern states allowed blacks to testify on the same terms as whites.”); see THEODORE BRANTNER WILSON, *SLAVE CODES OF THE SOUTH* (1965).

189. 1865 Miss. Laws 82; 1865 S.C. Acts 282; 1865–66 Ala. Laws 98; 1865 Ga. Laws 239–40; Fl. Const. Art. XVI Sec. 2 (1865); 1866 Va. Acts 89–90; 1866 N.C. Sess. Laws 102; Texas. Const. Art. VIII Sec. 2 (1866).

190. See DOWNS, *supra* note 165, at 85.

191. See *supra* Part II.

192. See *id.*

This might be the best evidence that access to criminal justice was a “cognizable right” in “American jurisprudence” when the Fourteenth Amendment was passed.¹⁹³

Several Southern states wrote their Black codes to emphasize access to criminal justice. Mississippi specified that Black people would “be competent witnesses in all criminal prosecutions where the crime charged is alleged to have been committed by a white person upon or against the person or property of a freedman, free negro or mulatto.”¹⁹⁴ To further reassure that commitment procedures would be open to Black residents, it provided that it would be

lawful for any freedman, free negro or mulatto, to charge any white person, freedman, free negro or mulatto, by affidavit, with any criminal offense against his or her person or property and upon such affidavit the proper process shall be issued and executed as if said affidavit was made by a white person.¹⁹⁵

This provision perfectly illustrates the common understanding that a criminal proceeding was commenced as-of-right, and that a bar on the testimony of Black people would act as a total bar to accessing those proceedings. Likewise, Florida’s new constitution specified that Black people would be permitted to testify “[i]n all criminal proceedings founded upon injury to a colored person;”¹⁹⁶ and North Carolina’s law similarly provided that Black people would be permitted to testify “in pleas of the State, where the violence, fraud or injury alleged shall be charged to have been done by or to persons of color.”¹⁹⁷ But a recalcitrant Georgia initially sought to burden the right of Black people to file affidavits, with a law providing that “a free person of color” could “make and file any affidavit” only in cases where they were “party plaintiff, or defendant,” omitting the filing of affidavits in criminal cases.¹⁹⁸

In its bad faith, this legislation in Georgia resembled the other common limitation set on the testimony of Black people in the immediate postwar. To my knowledge, this limitation has not been commented on before; that may be because it is only recognizable once put in the context of nineteenth century criminal procedure. Mississippi, Alabama, Virginia, Texas, and

193. *See supra* note 7.

194. 1865 Miss. Laws 83.

195. 1865 Miss. Laws 86.

196. FL. CONST. art. XVI § 2 (1865).

197. 1866 N.C. Sess. Laws 102.

198. 1865 Ga. Laws 240. Georgia cleared away this limitation several months later. *Id.* at 239.

Florida all passed laws requiring that Black people testify only orally,¹⁹⁹ or suggesting that such oral testimony would be heavily favored.²⁰⁰ This would have the potential to interrupt a key step in the commitment procedure. Recall that magistrates would freeze the record by taking the affidavit and depositions of witnesses to a crime.²⁰¹ In case a witness was made unavailable before trial, for instance by disability or procurement of the defendant, their testimony could be replaced by the affidavit or deposition taken previously by the magistrate.²⁰² The potential for mischief in the oral-testimony requirement would have been palpable—a criminal could kill, maim, or scare away a witness or complainant, without fear of an affidavit or deposition replacing the lost testimony. Violence like this is easily imaginable in the immediate post-war period. Moreover, unscrupulous magistrates likely could have used the impotence of the oral testimony requirement to refuse taking up the complaint to begin with. In other words, if an “affidavit” were required to commence a criminal complaint, and the affidavits of Black witnesses had no effect, a magistrate could claim at the outset that he lacked power to commence criminal process.²⁰³

B. The Coming of the Civil Rights Act of 1866

The 1866 CRA responded to and swept away the Southern Black Codes, including their anti-testimonial provisions.²⁰⁴ It is easy to see, then, how the 1866 CRA secured the right to access criminal justice. The testimonial provisions of the Black Codes in 1865–66 meant to reassure a Northern audience that Black residents of the South would be protected against criminality. The Codes (and constitutions) of Mississippi, Florida, and North Carolina all specified a right to testify in criminal proceedings, at least insofar as those proceedings involved a Black victim.²⁰⁵ Now, recall the expansive phrasing of the 1866 CRA, creating a right “to give evidence”

199. 1865 Miss. Laws 83 (“Provided that in all cases said witnesses shall be examined in open court on the stand.”); 1865–66 Ala. Laws 98 (“And they shall be competent to testify only in open court.”); 1866 Va. Acts 89–90 (“The testimony of colored persons shall, in all cases and proceedings, both at law and in equity, be given ore tenus, and not by deposition.”); Tex. Const. Art. VIII Sec. 2 (1866) (“Africans and their descendants shall not be prohibited, on account of their color or race, from testifying orally, as witnesses in any case, civil or criminal.”)

200. I place Florida in this category because, after passing a testimony law with no apparent limitation, the legislature clarified that it had declined “to authorize the testimony of colored persons to be taken by depositions in writing or upon written interrogatories, otherwise than in such manner as will enable the court of jury to judge of the credibility of the witness.” 1865 Fl. Laws 36.

201. See *supra* Part III.E.

202. See *id.*

203. See *Washington News*, *supra* note 172 and *The Freedmen of Mississippi*, *infra* note 207.

204. See *supra* Part II.

205. See *supra* notes 195–97.

and to the “full and equal benefit of all laws and proceedings for the security of person and property.”²⁰⁶ This language certainly also contemplated protecting complainants’ access to criminal justice. As we have now seen, the most reasonable inference is that this language in the 1866 CRA meant access not only to the witness box, but to initiation and commitment proceedings. But, with the “give evidence” clause, the 1866 CRA did better than the grudging Black Codes in two respects: it contained no interested party limitation and no oral testimony limitation. These limitations mattered to Northerners, and getting rid of them was a significant step. For instance, oral testimony limitations had likely led to the chicanery expected of Southern law in 1865–66. One moderate Republican publication in 1865, for instance, noted that Mississippi courts were rejecting the depositions of Black witnesses even after the proclamation of Mississippi’s governor instructing the state’s courts to receive their testimony.²⁰⁷

The 1866 CRA also contained enforcement provisions. More than even the “give evidence” and the catchall “proceedings” clauses, these enforcement provisions reflect contemporaneous understandings about the right to access to criminal justice. They created an alternative framework whereby victims and complainants could secure the arrest of criminals, even when state officials refused to make arrests.

In creating this framework, Congress acted with a sharp awareness of racist violence against Black people in the South.²⁰⁸ That awareness informed not only the 1866 CRA, but also the Fourteenth Amendment.²⁰⁹ With this awareness, Congress modeled the enforcement provisions of the Civil Rights Act of 1866 on the Fugitive Slave Law of 1850,²¹⁰ and a comparison between the two helps shed light on the 1866 CRA. Recall that after *Prigg* held the Fugitive Slave Act of 1793 to be non-binding on state officials, including committing magistrates, Northern states like Massachusetts began passing “personal liberty laws,” banning the use of

206. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981(a)).

207. *The Freedmen of Mississippi—Opposition of the Courts to Negro Testimony—Terrible Sufferings of the Freedmen in Washington*, CHI. TRIB., Oct. 27, 1865, at 1 (“Notwithstanding the proclamation of the Governor directing the admission of negro testimony, many of the courts still refuse to receive their depositions.”).

208. BLAIR, *supra* note 167, at 7–17 and *passim*.

209. John Crain, *The Constitutional Tort of Shielding Criminal Wrongoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599, 611–12 (2023).

210. See Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005). This was a conscious imitation, and one intended to send a message about Congress’s transformation into an anti-slavery institution. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1839–40 (2010).

state personnel and resources to enforce it.²¹¹ Such laws would have forbidden magistrates from exercising their arrest and commitment powers in aid of the capture of a fugitive slave.²¹² In response, Congress passed a stronger Fugitive Slave Act as part of the Compromise of 1850, putting the law enforcement duties previously entrusted to state officials in the hands of newly-created federal law enforcers.²¹³ The new law created magistrate-like “commissioners” to enforce the law, and empowered them to “issue warrants, appoint deputies, hold hearings, and issue ‘certificates of removal.’”²¹⁴ Indeed, the new law explicitly set forth that commissioners would have the powers of a “justice of the peace, or other magistrate . . . in respect to offenders . . . by arresting, imprisoning, or bailing.”²¹⁵

Like the 1850 Act, the Civil Rights Act—after setting forth the rights already discussed, including to “give evidence” and “to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens”—created commissioners with powers of “arresting, imprisoning, or bailing.”²¹⁶ It specified that the commissioners could be agents of the Freedmen’s Bureau, or anyone appointed by the President.²¹⁷ These commissioners fulfilled the same law-enforcement duties as the slave commissioners of the 1850 Act, who had been explicitly modeled on “justice[s] of the peace” and “magistrates.”²¹⁸ While the 1866 CRA did not specifically analogize its commissioners to “justices of the peace” as the Fugitive Act of 1850 had, it included language redolent of their ministerial duties, specifying that the commissioners and other officials were “authorized and required” to institute proceedings and “arrest” those who had violated the 1866 CRA.²¹⁹ The commissioners created by Congress under the 1866 CRA, then, would have occupied the familiar role of “justices of the peace” for those who filed complaints with

211. See LUBET, *supra* note 149, at 34.

212. See *id.*

213. See LUBET, *supra* note 149, at 42 *et seq.* (“[T]he new fugitive slave bill . . . was designed to respond to the Supreme Court ruling in *Prigg v. Pennsylvania* by completely federalizing the apprehension of runaways while denying states any power to interfere.”)

214. *Id.* at 42–44.

215. 9 Stat. 462, Ch. LX sec. 1.

216. Civil Rights Act of 1866, ch. 31, § 4, 14 Stat. 27 (An Act to protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication).

217. *Id.*

218. See Kaczorowski, *supra* note 210.

219. *Id.* “Authorized and required” was a phrase used to delineate ministerial powers, for instance in the contemporary Ohio Statute describing the arrest and commitment power of justices of the peace. SWAN, J. R., CRITCHFIELD, L. J., THE REVISED STATUTES OF THE STATE OF OHIO, OF A GENERAL NATURE, IN FORCE AUGUST 1, 1860: WITH NOTES DESIGNATING THE SECTIONS REPEALED PRIOR TO AUGUST 1, 1868, AND REFERENCES TO SWAN & SAYLER’S STATUTES FOR THE LAWS SUPPLYING THE REPEALED SECTIONS, ch. 65 sec. 1 (1870).

them. The 1866 CRA also provided for military enforcement of the act as necessary.²²⁰

Thus, the 1866 CRA gave law-enforcement powers to the commissioners and military. Presaging the Fourteenth Amendment and its enforcement statutes, the 1866 CRA also made it a violation for any person acting “under color of any law, statute, ordinance, regulation, or custom,” to deprive any other person of the substantive enumerated rights of the 1866 CRA, including the rights “to give evidence” and to access “proceedings for the security of person and property.”²²¹ This clause permitted the military to substitute itself for arresting authorities who refused to act against criminals. In his July 6, 1866, General Order 44, Ulysses Grant ordered field commanders

to arrest all persons who have been or may hereafter be charged with the commission of crimes and offenses against officers, agents[,] citizens and inhabitants of the United States, irrespective of color, in cases where the civil authorities have failed, neglected, or are unable to arrest and bring such parties to trial; and to detain them in military confinement until such time as a proper judicial tribunal may be ready and willing to try them.²²²

Inferentially, as 1866 progressed, the problem was no longer the formal absence of laws to permit the testimony of Black Americans, it was that magistrates were unwilling to enforce those laws. In Virginia, for instance, a law permitting Black people to testify was passed in February,²²³ but newspapers reported magistrates refusing to make arrests even after that time, necessitating military arrests under General Order 44.²²⁴ As discussed at the beginning of this article, the United States might pass laws to permit the testimony of Black Americans, but it could not legislate an end to race discrimination.²²⁵ The 1866 CRA and its enforcement powers stepped into the breach by replacing with military authority the criminal “proceedings

220. Civil Rights Act of 1866, ch. 31, § 9, 14 Stat. 27, 29.

221. *Id.* at 27.

222. JOHN Y. SIMON, THE PAPERS OF ULYSSES S. GRANT, vol. 16: 1866 (1988), 228 [hereinafter PUG]; DOWNS, *supra* note 165, at 147 (observing that Order 44 implemented the CRA 1866); *see also* PUG, VOL. 16: 1866 at 389–90 (“It is evident to my mind that the provisions of the Civil Rights Bill cannot be properly enforced without the aid of Order No. 44 or a similar one.”).

223. 1866 Va. Acts 89–90.

224. *See, e.g., In Limbo*, CHI. TRIB., July 23, 1866, at 2 (describing a Virginia magistrate’s refusal to detain one J.H. Keene, who had attacked a Black man with a hammer in response to perceived “impuden[ce]”).

225. *See supra* Part II.

for the security of person and property” that Southern officials refused to provide.

General Order 44 did not authorize military commanders to “try” offenders, only to arrest them pending the presence of a “proper judicial tribunal.”²²⁶ Why this limitation? By July 6, 1866, Johnson had nominally ended the state of war, which would have ended the trial of civilians before courts martial.²²⁷ The reality was more complicated, with military commanders responding flexibly to local conditions and President Johnson often turning a blind eye.²²⁸ At this time Grant was a political trimmer, a moderate who was only slowly awakening to the problem of governing recalcitrant Southerners.²²⁹ In this light, General Order 44 is best seen as an attempt to legalistically exploit the enforcement provisions of the 1866 CRA.²³⁰ It was important for Grant to tread carefully, since the 1866 CRA was a peacetime law, meaning it applied to the entire country. Any action Grant took pursuant to its authority could have been taken anywhere in the country (wherever there was state neglect to enforce the law). Yet, neither he nor Congress thought that it would upset civil authority to displace the state magistrates who usually arrested offenders, even in jurisdictions where martial law was not in effect. There is a good reason it was not viewed as a stretch to replace state law enforcement by magistrates, even in peacetime: the 1866 CRA’s enforcement provisions fit comfortably into an American legal custom, well documented in *Prigg*, that viewed arrest and commitment proceedings were as “ministerial.” General Order 44 can even be seen as the mirror image of *Prigg*. If *Prigg* permitted states to provide ministerial support to federal law enforcement, the 1866 CRA permitted the federal government to provide ministerial support to state law enforcement. That is exactly what Grant did in General Order 44. His actions further confirm that the arrest power was seen as “ministerial” and, therefore, duty-bound. In the same way Congress previously legislated to replace local magistrates who

226. See *supra* text accompanying note 222.

227. See Andrew Johnson, Proclamation on the End of the Confederate Insurrection (Apr. 2, 1866), THE MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/april-2-1866-proclamation-end-confederate-insurrection> [perma.cc/F832-9GVN]; see also BLAIR, *supra* note 167, at 17; see also DOWNS, *supra* note 165, at 146–48.

228. DOWNS, *supra* note 165, at 146–48 and *passim*.

229. See BLAIR, *supra* note 167, at 7–10.

230. Military historian John Keegan observed that “Grant was law-abiding to his finger-tips.” JOHN KEEGAN, THE MASK OF COMMAND 232 (1988).

refused to cooperate in arresting fugitives, so too could it replace local magistrates who refused to enforce criminal laws because of discrimination.

CONCLUSION

The foregoing history has been lost because military Reconstruction—that is, the return of the South to martial law in 1867—superseded the enforcement efforts of the immediate post-war. Later Supreme Court decisions further obscured Congress’s post-war concern with securing access to criminal justice in the South. But the 1866 CRA, which the modern Supreme Court has established as a key to interpreting the Fourteenth Amendment, contains crucial clues about that concern. In securing the rights to “give evidence” and to equal access to “proceedings for the security of person and property,” the 1866 CRA unmistakably intended to protect access to criminal justice proceedings, specifically the initial commitment proceedings. So in answer to the objection I imagined earlier, magistrates had not just a moral but a literal duty to enforce criminal law. Lawmakers could, and did, legislate access to criminal justice proceedings. Even if the right to criminal justice has been forgotten or obscured, in 1866 it was viewed as bedrock.

The proper response in the present is not, however, to enjoin the states to reestablish justices of the peace as they existed in 1866. By the literal-minded logic of the Supreme Court in *McDonald v. City of Chicago*, that might make sense, but it is impractical. More importantly, it ignores the principle that matters: the 1866 CRA was an antidiscrimination statute, and the right to arrest that it contemplated is best understood as a right of “equal protection.” As I have advocated elsewhere,²³¹ the Fourteenth Amendment should be construed to protect against discriminatory denials of law enforcement; cases like *Castle Rock*, which held that there is no “due process” right to law enforcement protection, need not be disturbed.²³²

Still, to get to an equal-protection right to prosecute criminals, some rebuttal is needed to the long line of Supreme Court cases denying the civil rights of crime victims and witnesses. Go back to 1871 and the case *U.S. v. Blyew*, the first in the line, which held that a discriminatory denial of the right to testify could not be the basis of a civil-rights removal from state to federal court.²³³ For background, to enforce the Civil Rights Act of 1866 Congress had provided for the removal of criminal actions to federal court

231. John Crain, *The Constitutional Tort of Shielding Criminal Wrongoers in Violation of the Equal Protection of the Laws*, 86 ALB. L. REV. 599 (2023).

232. See *supra* note 7.

233. See *United States v. Blyew*, 80 U.S. (13 Wall.) 581, 591–93 (1872).

where a state denied Black Americans the right to testify against White criminals.²³⁴ In *Blyew*, the United States had removed a case of assault and murder against a Black family, where the only witnesses against the White perpetrators were the Black survivors, and prosecution would therefore have been impossible in the courts of Kentucky.²³⁵ Interpreting the text of the statute, the Court held that removal was not available because crime victims were not “affected” by the criminal case, as required under the text of the removal statute.²³⁶ The Court excoriated the concept of a crime witness having rights:

Those who may possibly be witnesses, either for the prosecution or for the defence, are no more affected by it than is every other person, for any one may be called as a witness. It will not be thought that Congress intended to give to the District and Circuit Courts jurisdiction over all causes both civil and criminal. They have expressly confined it to causes affecting certain persons. And yet, if all those who may be called as witnesses in a case, and who may be alleged to be important witnesses, were intended to be described in the class of persons affected by it, and if the jurisdiction of the Federal courts can be invoke by the assertion that there are persons who may be witnesses, but who, because of their race or color, are incompetent to testify in the courts of the State, there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction.²³⁷

The *Blyew* opinion calls into question whether there was a consensus about the rights of crime victims in 1871. But there are several reasons to treat the *Blyew* opinion as a poor authority. It echoes a typical political attack on the Civil Rights Act of 1866, whose opponents in Congress likewise lambasted the concept of a right to testify.²³⁸ And, to the point here,

234. *Id.* at 591 (removal was provided for in cases “affecting persons who are denied, or cannot enforce in the courts of judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.”)

235. *See id.*

236. *Id.* at 591–92.

237. *Id.*

238. CONG. GLOBE, 39th Cong., 1st Sess. 480 (1866) (As Sen. Willard Saulsbury, a Delaware Democrat argued, “[i]t is no right in the citizen. A party to an action has the power to call for the testimony of a witness, but it is no right on the part of the person to testify.”)

it willfully ignored actual practice, as observed by Justice Bradley in a dissent.

The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons, disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the person murdered, as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender. I say ‘right,’ for it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property.²³⁹

Bradley goes on to reason that if an assault victim has a common law right to commence process against their wrongdoer, that right cannot be extinguished just because an assault escalates to murder.²⁴⁰ Moreover, it cannot be extinguished, in Justice Bradley’s view, because it belongs to the whole class of “persons affected,” not to discrete individuals.²⁴¹ He then suggests that witnesses to the crime stand in for the murder victim and take on the right to report crime denied to the victim.²⁴² Still, while Bradley acknowledges the existence of a common-law right to file a criminal complaint, he falls short of saying that mere witnesses have such a right. He appears to think only victims literally did, while witnesses enjoyed a right derivative of the right of the victim. Nonetheless, treatises, cases, and background legal principles all suggest that there was a right in both victims *and* eyewitnesses, whether or not it was always described as a “right.”²⁴³ In sum, rather than viewing *Blyew* as an authoritative statement about the rights of crime victims, it is better viewed as a moot by legal professionals discussing an unsettled area of law in a time period in transition between victim-centric justice and state-centric justice, while straining to navigate

239. *Blyew*, 80 U.S at 598.

240. *Id.* at 598–600.

241. *See id.*

242. *See id.*

243. *See supra* Part III.

difficult questions of federalism.²⁴⁴ Justice Bradley’s dissent was truer to actual practice, but neither appears to be perfectly accurate.

There is no good reason to treat *Blyew* or any of its Reconstruction successor cases as accurate statements of “American jurisprudence” when it comes to the right to access criminal justice.²⁴⁵ “American jurisprudence” is instead on the side of crime victims and witnesses, and cases like *Linda R.S.* and *Leke* should be overturned as erroneous.

244. See *supra* note 5.

245. This is similar to the historical findings in PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011). Brandwein found that the Reconstruction cases are overread and tend to say much less than scholars think once they are taken in their historical and political context.

A GUIDE ALONG THE SPIRIT ROAD: NAGPRA, CULTURALLY UNIDENTIFIABLE HUMAN REMAINS, AND DEFERENCE TO ORAL TRADITION

CALEB RITZHEIMER

He launched his body's burnished bone spears
beyond the race to a point beyond despair,
what broke in him, broken open, like a spore.
Prior to everything but pang and prayer,
he watches us inside a stillness freer
than all the speed that harries us through the air.
His mind unknowable, his face unknown,
the part that lasts was in between them: Bones
that die hard let us know him for our own.
His rise is a promise we will not go under
the jackhammer rain or river's power sander
but take more killing than a death can render
because we are the pearl and pit of matter,
infinite mind in a rind of dura mater
the hardest thing that matter ever mothered,
our historiography of wounds
graven deeper than the flighty winds
that make a rubbing of our eloquence.¹

INTRODUCTION

The Native American Graves Protection and Repatriation Act (“NAGPRA”), enacted in 1990² is best understood as a response to a shameful recurring trope in the United States’ relations with its Indigenous peoples—the disparate treatment of the human remains of Indigenous peoples by institutions such as museums.³ NAGPRA established a

1. Amit Majmudar, *Kennewick Elegy*, SMITHSONIAN MAG. (2014), <https://www.smithsonianmag.com/arts-culture/kennewick-elegy-180952463/> [<https://perma.cc/Q3DG-DKJX>].

2. Native American Graves Protection and Repatriation Act, 25 U.S.C.A. §§ 3001–3013 (Westlaw through Pub. L. 119-59).

3. See NAT'L PARK SERV., *Native American Graves Protection and Repatriation Act* (Apr. 29, 2024), <https://www.nps.gov/subjects/nagpra/index.htm> [<https://perma.cc/X2Y8-RZAT>] (“With this law, Congress sought to encourage a continuing dialogue between museums and Indian Tribes and Native Hawaiian organizations and to promote a greater understanding between the groups while at the same time recognizing the important function museums serve in society by preserving the past.”).

framework for U.S. federal agencies, museums, and institutions receiving federal funding to return human remains,⁴ as well as artifacts falling into the categories of funerary object,⁵ sacred object,⁶ and objects of cultural patrimony⁷ (“OCPs”); to lineal descendants,⁸ tribes, or Native Hawaiian groups. This process of return is referred to as repatriation,⁹ and its overriding intent is surrendering physical control of remains or artifacts to their associated communities.¹⁰ NAGPRA required all collecting institutions possessing ancestral remains to take inventories of relevant collections within five years of the act’s adoption in 1990.¹¹ The collecting institutions were then required to provide a notice of their findings to Indigenous groups whose artifacts or remains were in their collections, including information such as the cultural affiliation of funerary objects, sacred objects, or ancestral remains.¹² Some Indigenous human remains¹³

4. See NAT’L PARK SERV., *Native American Graves Protection and Repatriation Act Glossary* (Jan. 12, 2024), <https://www.nps.gov/subjects/nagpra/glossary.htm> [<https://perma.cc/C3ST-MC7S>] for the definition of human remains in this particular context.

5. *Id.* (“Funerary [objects are any objects] reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.”).

6. *Id.* (“Sacred [objects are] specific ceremonial object[s] needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. While many items might be imbued with sacredness in a culture, this term is specifically limited to an object needed for the observance or renewal of a Native American religious ceremony.”).

7. *Id.* (“[An] object of cultural patrimony [is an] object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group . . . according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization. . . . The object must be reasonably identified as being of such importance central to the group that it: (1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and (2) Must have been considered inalienable by the group at the time the object was separated from the group.”).

8. *Id.* (“[A] lineal descendant [is a] living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to this part; or . . . [a] living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to all the known individuals represented by comingled human remains.”).

9. *Id.* (“Repatriation [is when a] museum or Federal agency relinquishes possession or control of human remains or cultural items in a holding or collection to a lineal descendant, Indian Tribe, or Native Hawaiian organization.”).

10. Stephen E. Nash & Chip Colwell-Chantapong, *NAGPRA at 30: The Effects of Repatriation*, 49 ANN. REV. ANTHROPOLOGY 225, 226 (2020), available at <https://doi.org/10.1146/annurev-anthro-010220-075435>.

11. 25 U.S.C.A. § 3003(b)(1) (Westlaw through Pub. L. 119-59).

12. 25 U.S.C.A. § 3003(d) (Westlaw through Pub. L. 119-59).

13. I will use the term “ancestral remains” to refer to Indigenous human remains, as this term is widely used and preferred by Indigenous communities and affiliated collecting institutions.

were covered by this provision, namely those to which a cultural association could be assigned based on a totality of circumstances test.¹⁴

Few can dispute that the statute has made headway—since NAGPRA’s implementation, “about 67,000 ancestral human remains, 1.9 million funerary objects, and 15,000 sacred and communally owned objects” have been returned to their communities of origin.¹⁵ However, the majority of Indigenous human remains (“ancestral remains”) held by collecting institutions¹⁶ have not been repatriated. The U.S. National Park Service estimates that roughly 127,000 ancestral remains continue to languish in collecting institutions’ custody.¹⁷ Many of these remains are considered “culturally unidentifiable” under the language of NAGPRA.

Culturally unidentifiable human remains pose perhaps the greatest conundrum for NAGPRA’s practical implementation. NAGPRA directly concerns only ancestral remains for which cultural affiliation is already evident, or potentially identifiable through collaborative historical discussions with Indigenous groups or lineal descendants. Ancestral remains for which cultural affiliation cannot be determined under a preponderance of the evidence standard¹⁸ are denoted as culturally unidentifiable. Needless to say, many culturally unidentifiable human remains cannot be assigned a culture of origin under this standard, as the scientific and epistemological complexities of establishing a cultural connection through often upwards of 10,000 years are significant. Consequently, many ancestral remains pulled from Indigenous gravesites on American soil are held in collecting institutions, even after a tribe seeks to repatriate them. They remain severed from their communities, wherever their lineal descendants may be. Such an outcome seems at odds with NAGPRA’s ethos of righting colonialist wrongs and fostering mutual understanding, as well as with the historical epistemologies¹⁹ of many North American Indigenous groups.²⁰ The product is a statute which, while well-

14. 25 U.S.C.A. § 3003(d)(2)(C) (Westlaw through Pub. L. 119-59).

15. Nash & Colwell-Chantapongh, *supra* note 10, at 226.

16. Term used in reference to museums, institutions receiving federal funding, and federal entities as a category.

17. See Nash & Colwell-Chantapongh, *supra* note 10, at 226.

18. See Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 60 n.128 (2013) (citing *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006)).

19. See Cathay Y. N. Smith, *Oral Tradition and the Kennewick Man*, 126 YALE L.J. FORUM 216, 219–20 (2016) for an examination of oral tradition as the primary form of history among Native North American groups.

20. See Nash & Colwell-Chantapongh, *supra* note 10, at 228 (discussing the inherent tension in NAGPRA between Indigenous kinship norms and Western-colonialist epistemological proof structures).

intentioned and profoundly beneficial in the aggregate, fails to make full amends.

Accordingly, this Note argues for the amendment of NAGPRA to require deference to Indigenous oral tradition and other forms of traditional historical knowledge²¹ where conventional means of establishing cultural affiliation, as provided in the statutory language,²² prove inadequate to illuminate connections through the deep past.²³ Such revisions are both consistent with the fundamental nature of NAGPRA as human rights legislation²⁴ and conducive to serving another chief aim of the statute—mending deep-seated wounds between the United States and Indigenous groups in both a historical-moral context²⁵ and for the discipline of archaeology specifically.²⁶

Part I of this Note provides an expansive overview of NAGPRA and its application to the question of effectively repatriating culturally unidentifiable human remains, focusing on the statute's historical context and application to two high-profile repatriations. Part II of this Note argues for an understanding of NAGPRA as human rights legislation dedicated to the promotion of Indigenous self-determination, for which the strong consideration of oral tradition as evidence of cultural affiliation is morally required. Part III argues for the amendment of NAGPRA to require deference to oral tradition and traditional historical knowledge as a particularly compelling form of evidence. Under this proposal, oral and

21. See Smith, *supra* note 19, at 223 (“By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of evidence, Congress effectively acknowledged that oral tradition is valuable evidence.”).

22. 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59) (“[Culturally unidentifiable] Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence based upon *geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.*” (emphasis added)).

23. Cf. Smith, *supra* note 19, at 223 (arguing that oral-traditional evidence should be considered as evidence in a variety of Native American claims adjacent to NAGPRA, such as establishing historical land occupancy and the passing down of ancestral customs and traditions).

24. See Rebecca Tsosie, *NAGPRA and the Problem of “Culturally Unidentifiable” Remains: The Argument for a Human Rights Framework*, 44 ARIZ. ST. L.J. 809, 850 (2012) (“As separate peoples, Native Americans have a human right to reclaim their ancestors as a political right, equivalent to the right of the United States to repatriate the American servicemen who died on foreign soil. This also means that Native peoples have the cultural right to rebury their ancestors with the songs and ceremonies that ensure an unbroken journey on the spirit road. *The United States has a duty to repair the brutal history of its political encounters with the Native peoples of this land*, and it also has the obligation to recognize the moral and spiritual duty of contemporary Native peoples to reclaim their ancestral human remains, along with all associated funerary objects.”) (emphasis added).

25. *Id.*

26. See Chip Colwell-Chantapong, *Reconciling American Archaeology & Native America*, 138 DAEDALUS 94 (Spring 2009) for a brief discussion of the historical phenomena giving rise to an ingrained distrust of Western archaeology ongoing among North American Indigenous groups.

historical knowledge would determine cultural affiliation for culturally unidentifiable human remains where the Western epistemological methods provided in the statute have proven inadequate.

I. NAGPRA OVERVIEW

NAGPRA, though preceded by a number of other statutes at least tangentially linked to protecting Indigenous artifacts and antiquities,²⁷ was the first federal statute to specifically promote the repatriation and respectful treatment of ancestral remains and Indigenous artifacts of religious significance. Previous statutes concerning Indigenous cultural heritage, such as the Antiquities Act of 1906, the National Historic Preservation Act of 1966, the American Indian Religious Freedom Act of 1978, and the Archaeological Resources Protection Act of 1979,²⁸ focused primarily on cultural heritage as archaeological resources useful to the general American public²⁹ or as an element of Indigenous groups' private religious expression.³⁰ Any acknowledgment of the historically disparate treatment of ancestral remains, let alone any plan of action regarding culturally unidentifiable human remains, remained entirely unaddressed.³¹ Certainly, these statutes reflected an increasing political concern for protecting Indigenous antiquities and expressions of Indigenous culture. In this, they were necessary steps towards NAGPRA. However, their failure to center the legislative priorities of the Indigenous community³² sets NAGPRA apart as the first direct statutory acknowledgment of Indigenous people's "moral and spiritual duty . . . to reclaim their ancestral human remains, along with all associated funerary objects"³³ in light of the United States' past brutality and inhumane conduct.³⁴

27. See generally Phelan, *supra* note 18, at 49–55.

28. *Id.*

29. See *id.* at 46–47.

30. See *id.* at 52.

31. See, e.g., *id.* ("Native Americans were not successful in citing the AIRFA as authority for their right to retain their native cultural resources.")

32. See *id.* at 46–47 ("During the 20th century, Indian tribes persistently lobbied Congress for recognition of their rights, particularly for a congressional mandate that museums repatriate Native American human remains, funerary objects, and cultural artifacts in museum collections. . . . [NAGPRA], which became effective in 1991, provided some of the recognition and protection of Indian cultures Native Americans had long sought.")

33. Tsosie, *supra* note 24, at 850.

34. *Id.*

A. NAGPRA's Passage and Contents

Indigenous groups' lobbying for a Congressional repatriation initiative intensified in the late 1980s in the aftermath of *Lyng v. Northwest Indian Cemetery Protective Association*³⁵ and the Northern Cheyenne tribe's discovery that the Smithsonian Institution had custody of over 18,000 ancestral remains.³⁶ These two events spurred Indigenous groups' concerns about the inability of existing statutes to protect the most sensitive aspects of cultural heritage, all while drawing attention to the sheer scope of collecting institutions' disparate treatment of ancestral remains.³⁷

In *Lyng*, the United States Forest Service and a logging company attempted to build a road through forests historically used for spiritual purposes by the Karuk, Tolowa, and Yurok tribes of northern California.³⁸ The involved tribes sued under the American Indian Religious Freedom Act of 1978 (AIRFA), arguing that the resulting damage to the land in question would prevent their free religious expression in violation of the statute and the First Amendment.³⁹ Ultimately, the Supreme Court ruled against the tribes, finding that the Forest Service had attempted to avoid damaging spiritually significant land as much as possible in designing the course of the road, and therefore, construction would not impermissibly burden the tribes' religious expression.⁴⁰ The decision was a resounding expression of AIRFA's inability to secure tribal cultural heritage outside its narrow, specialized context⁴¹ and increased concern regarding cultural heritage among Indigenous advocates.

A simultaneous controversy of national scope arose after leaders of the Northern Cheyenne tribe discovered that the Smithsonian Institution was storing roughly 18,500 ancestral remains in its warehouses.⁴² The incident

35. 485 U.S. 439 (1988).

36. Kevin P. Ray, *NAGPRA and Its Limitations: Repatriation of Indigenous Cultural Heritage*, 15 J. MARSHALL REV. INTELL. PROP. L. 472, 476 (2016) [hereinafter Ray, *NAGPRA and Its Limitations*] (citing Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 44 (1992)).

37. See Phelan, *supra* note 18, at 56 ("In 1988, the Senate Select Committee on Indian Affairs held a hearing on legislation which provided a process for the repatriation of Native American human remains The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate The Panel concluded that Federal legislation . . . was needed." (quoting Pub. L. No. 101-601 (Oct. 15, 1990), 1990 U.S.C.C.A.N. 4367, 4369-70)).

38. *Lyng*, 485 U.S. at 442-43, 451.

39. *Id.* at 455.

40. Phelan, *supra* note 18, at 56.

41. *Id.*

42. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 54-55 (1992).

served as the catalyst for a concerted national effort by Indigenous groups and associated organizations. They brought the issue of repatriation before Congress,⁴³ leading to the introduction of a number of unsuccessful precursor bills between 1986 and 1990.⁴⁴ Early legislation encountered vehement opposition from collecting institutions,⁴⁵ resulting in the tabling of such initiatives until a number of separate repatriation bills were consolidated into NAGPRA during the 101st Congress.⁴⁶

NAGPRA lays out a robust procedural framework for the identification, inventory, and repatriation of ancestral remains, funerary objects, and OCPs and applies the resulting restrictions to collecting institutions.⁴⁷ Fulfilling the long-desired objective of Indigenous cultural heritage advocates,⁴⁸ NAGPRA requires collecting institutions to consult with involved Indigenous and Native Hawaiian groups and conduct a full inventory of ancestral remains, funerary objects, and OCPs in their custody within five years of the statute's passage.⁴⁹ Simultaneously, collecting institutions are obligated to ascertain the cultural affiliation of their ancestral remains, funerary objects, and objects of cultural patrimony to the best of their ability and document their findings.⁵⁰ These inventories and the associated documents are then sent to a committee of Indigenous or Native Hawaiian overseers and other experts, selected by the Secretary of the Interior, for evaluation.⁵¹ If cultural affiliation is established between a tribe or lineal descendants of an extinct group and any materials in the inventory, the collecting institution is required to repatriate the remains or artifacts in question to said tribe or lineal descendants "expeditiously."⁵²

The determination of cultural affiliation is the axis upon which the successful implementation of NAGPRA turns. Correctly identifying ancestral remains', sacred objects', or OCPs' parent culture is self-evidently the most critical aspect of repatriation. NAGPRA accordingly sets out several methods for determining likely cultural affiliation. Notably, the burden of proof is placed on the Indigenous group claiming affiliation.⁵³

43. *Id.* at 55.

44. *Id.*

45. *Id.*

46. *See id.* at 55–56 (explaining how five Senators' and Congressmen's separate bills, all dealing with specific individual aspects of repatriation procedure, were consolidated into NAGPRA).

47. *See generally* 25 U.S.C.A. §§ 3003–3005 (Westlaw through Pub. L. 119-59).

48. Phelan, *supra* note 18, at 56–57.

49. *Id.*; *see also* 25 U.S.C.A. § 3003 (Westlaw through Pub. L. 119-59).

50. 25 U.S.C.A. § 3003(b) (Westlaw through Pub. L. 119-59).

51. 25 U.S.C.A. § 3006 (Westlaw through Pub. L. 119-59).

52. 25 U.S.C.A. § 3005(a) (Westlaw through Pub. L. 119-59).

53. 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59).

Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

In 2006, the District of Nevada elaborated on NAGPRA's preponderance standard in *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management*,⁵⁴ laying out a tripartite test for establishing cultural affiliation based on the above forms of evidence:

Cultural affiliation must only be proven by a preponderance of the evidence, not by scientific certainty, and such a finding should not be precluded merely because there are gaps in the historical record. In making the determination of affiliation, three things must be proven: **(1) the existence of an identifiable present-day tribe; (2) evidence of the existence of an identifiable earlier group; and (3) evidence of the existence of a shared group identity that can be reasonably traced between the present day tribe and the earlier group.** The types of evidence to be considered in this determination are geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. (emphasis added) (internal citations omitted).

Often, proving cultural affiliation by a mere preponderance with such robust routes of investigation is straightforward. However, NAGPRA's most significant controversies arise when these methods of investigation fail to illuminate a firm connection between ancestral remains and extant Indigenous groups. In such cases, even lineal descendants cannot be

54. 455 F. Supp. 2d 1207, 1217 (D. Nev. 2006).

conclusively identified.⁵⁵ When this occurs, the ancestral remains are deemed culturally unidentifiable.

B. Culturally Unidentifiable Human Remains Under NAGPRA

The shortcomings of NAGPRA are most apparent in its framework for repatriating culturally unidentifiable human remains (“CUHRs”). NAGPRA does not explicitly define cultural unidentifiability, nor does it name CUHRs as a distinct category of ancestral remains,⁵⁶ but it does describe them by omission in § 3005(a)(4).⁵⁷ These are ancestral remains for which a cultural affiliation could not be established, in the eyes of collecting institutions,⁵⁸ by a preponderance established through any of the ten statutorily acceptable forms of investigation⁵⁹ and later refined through *Fallon*’s tripartite test of cultural affiliation.⁶⁰

NAGPRA provides little to no guidance about the proper treatment of CUHRs,⁶¹ despite significant controversy around the question during the act’s passage.⁶² The recommendations of a Congressional review committee established to provide an answer—the product of nine years of deliberation—promote greater cooperation between collecting institutions and Indigenous groups but have not been adopted by the Secretary of the Interior as of 2011.⁶³ Troublingly, the Congressional debate surrounding the fate of CUHRs centered entirely around their utility to scientific

55. See, e.g., Christopher Zheng, *31 Years of NAGPRA: Evaluating the Restitution of Native American Ancestral Remains and Belongings*, CENTER FOR ART LAW (May 18, 2021), <https://itsartlaw.org/art-law/31-years-of-nagpra-evaluating-the-restitution-of-native-american-ancestral-remains-and-belongings/> [<https://perma.cc/KQT5-JXYA>] (characterizing putting NAGPRA’s repatriatory principles into practice as “not . . . without difficulty” regarding ancient remains).

56. See 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59).

57. See *supra* text accompanying note 53. CUHRs are those ancestral remains for which, implicitly, no affiliation to any present Indigenous group may be determined by a preponderance standard on the basis of extant evidence.

58. Steven J. Gunn, *The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 524 (2010) (noting that the status of culturally unidentifiable is to some extent subjective and primarily predicated upon the judgment of collecting institutions).

59. See 25 U.S.C.A. § 3005(a)(4) (Westlaw through Pub. L. 119-59) (“[E]vidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”).

60. *Fallon*, 455 F. Supp. 2d at 1217.

61. Gunn, *supra* note 58, at 524.

62. See, e.g., Clayton W. Dumont, Jr., *Contesting Scientists’ Narrations of NAGPRA’s Legislative History: Rule 10.11 and the Recovery of “Culturally Unidentifiable” Ancestors*, 26 WICAZO SA REV. 5, 20–25 (Spring 2011) (summarizing the significant controversy between Indigenous and Western scientific parties in developing the text of NAGPRA as it pertains to CUHRs).

63. See Gunn, *supra* note 58, at 524.

endeavors.⁶⁴ The attitudes of Indigenous groups towards these ancestral remains—effectively individuals unmoored both in time and from their own people—were not discussed.⁶⁵

The most significant obstacle in the way of identifying and repatriating CUHRs is the immense financial commitments required of tribes seeking repatriation.⁶⁶ The process of seeking out CUHRs in the custody of collecting institutions is not only time-consuming and logistically complicated, but is also only the first step if a tribe wishes to pursue repatriation, which is generally subject to a daunting legal framework. Collecting institutions may deny repatriation requests in such cases, and tribes may then go to the Congressional review committee (“the Committee”) to request both reconsideration and a new attempt at establishing cultural affiliation.⁶⁷ If the Committee makes an adverse decision, the tribe may seek review in the federal courts,⁶⁸ but relief is unlikely, as the courts are required to afford “considerable deference” to the Committee’s rulings.⁶⁹ Combined with the federal government’s severely insufficient appropriations for tribal funding,⁷⁰ this situation has forced Indigenous groups to prioritize seeking repatriation of ancestral remains and funerary objects and forgo their sacred objects or OCPs.⁷¹ Moreover, pursuing the repatriation of ancestral remains is often not even a feasible endeavor when CUHRs are considered, as will be explained in greater depth.

Furthermore, the very designation of “culturally unidentifiable” and its implications for Indigenous identity and historical awareness have proven inimical to the repatriation of CUHRs, particularly when applied to ancestral remains of prehistoric origin,⁷² as have historic collecting practices

64. *See id.* (“Congress referred the matter to the Review Committee for its recommendations, noting that there was ‘general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest.’”).

65. *See id.*

66. *Id.* at 524–25.

67. *Id.* at 525.

68. *Id.*

69. *Id.* (citing 25 U.S.C.A. § 3013 (Westlaw through Pub. L. 119-59)).

70. *See Gunn, supra* note 58, at 525.

71. *See id.*

72. *See Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) for an example of how the great age of ancestral remains can obfuscate efforts at establishing cultural affiliation and cast the temporal and anthropological implications of the term “Native American” in the NAGPRA context into doubt. *See also Tsosie, supra* note 24, at 818 (“If the remains pre-date European contact[,] are they not Native American? There have been indigenous peoples on these lands since time immemorial, but the legal category of a federally recognized Indian tribe is a relatively recent concept created by the U.S. government” (internal quotation marks omitted)).

for Indigenous ancestral remains.⁷³ NAGPRA defines “Native American” ancestral remains as those connected by cultural affiliation to a human population that is indigenous to the territory of the United States.⁷⁴ At first, this definition almost appears tautological. However, the temporal implications of this clause have proven markedly consequential in the CUHR context. The Ninth Circuit in *Bonnichsen* understood “Native American” in the NAGPRA context to refer solely to Indigenous groups that are *extant* in the United States.⁷⁵ Opting to read the statute narrowly, the Ninth Circuit denied the repatriation of the Ancient One⁷⁶ to a group of local Plateau tribes asserting a cultural affiliation.⁷⁷ The court held that no connection could be drawn to any extant Indigenous group due to the great antiquity of the Ancient One⁷⁸ and the alleged unreliability of oral tradition as a means of proving cultural affiliation.⁷⁹ The result of applying such a stringent standard⁸⁰ is an effective severance of the most ancient ancestral remains—often CUHRs—from present Indigenous groups, despite the fact that some degree of kinship or descent almost certainly exists between them.⁸¹ This places a burden of proof, financial expenditure, and

73. See Tsosie, *supra* note 24, at 818 (discussing how unethical collecting and storage procedures for Indigenous human remains may severely complicate assigning a tribal affiliation).

74. 25 U.S.C.A. § 3001(9) (Westlaw through Pub. L. 119-59).

75. S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89, 104 (2006) [hereinafter Ray, *The Challenge of Kennewick Man*] (citing *Bonnichsen*, 367 F.3d at 875).

76. The remains of Kennewick Man, also known as the Ancient One by Indigenous groups, date from between 8340 and 9200 years before present and were found in 1996 on the banks of the Columbia River near Kennewick, Washington. Several tribes native to the surrounding region asserted that they were lineal descendants of the Ancient One and pursued repatriation, leading to the *Bonnichsen* suit. See *Bonnichsen*, 367 F.3d at 868–69. The author of this note will use the name “The Ancient One” for the ancestral remains involved in *Bonnichsen*.

77. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 105–06.

78. See *Bonnichsen*, 367 F.3d at 879.

79. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 135–36 (recounting the *Bonnichsen* court’s disregarding an expert witness’ testimony concerning the Plateau Tribes’ oral tradition’s ability to record extremely ancient events in their territory, possibly overlapping with the lifetime of the Ancient One, and attest to long-term occupation).

80. The restrictive nature of this standard was of concern to Congress in the aftermath of the *Bonnichsen* decision. In 2007, Senators John McCain and Byron Dorgan introduced an amendment to NAGPRA expanding the statutory definition of “Native American” to include populations native to the United States who are no longer extant. This amendment was defeated. See Ray, *NAGPRA and Its Limitations*, *supra* note 36, at 480.

81. See Tsosie, *supra* note 24, at 819 (“The existence of an identifiable earlier group is a bit more problematic because the current federally recognized tribes do not map onto the succession of tribes on these lands over time The regulations developed by the Interior Department to implement NAGPRA maintain that the existence of an identifiable earlier group may be established through evidence establishing the identity and cultural characteristics of the group, and which documents distinct patterns of material culture, and which establishes the earlier group as biologically distinct. . . . The categories often do not represent the cultural understandings of contemporary tribes about who they are and where they come from.” (internal quotation marks omitted)).

administrative dealings on the very groups whose human rights NAGPRA is designed to protect⁸² if they wish to pursue the repatriation of CUHRs. The ease of such a predicament occurring under NAGPRA appears inconsistent with the statute's purpose, historical context, and underlying principles.

C. Notable Cases Involving Cultural Unidentifiability

It is readily apparent that the criterion of cultural unidentifiability has dogged repatriation efforts, particularly of the most ancient ancestral remains. Having entered the North American continent at least 15,000 to 20,000 years ago,⁸³ early Indigenous groups have diverged into countless distinct ethnicities, of which a significant portion is no longer extant. Even so, the fact that such groups no longer exist does not preclude their relation, either by cultural commonality or direct lineal ancestry, to modern Indigenous groups.⁸⁴ As Western historical epistemologies—and at times, even the most advanced scientific investigation—may be insufficient to verify an alleged connection between such ancestral remains and present groups to the extent required under NAGPRA,⁸⁵ cases involving extremely ancient CUHRs are perhaps the clearest demonstrations of where NAGPRA fails.

1. *Bonnichsen and the Failings of NAGPRA*

The aforementioned *Bonnichsen v. United States*⁸⁶ is arguably the most obvious example of the difficulties for repatriation posed by the gulf between NAGPRA's standards for rendering CUHRs identifiable under the eye of the law and the epistemologies of Indigenous groups.

Bonnichsen concerned the ultimate fate of the Ancient One as to whether repatriation was an acceptable outcome for this individual, whose great antiquity rendered his remains potentially highly informative to scientists.⁸⁷ The Ancient One was rediscovered in 1996 by two teenagers at

82. *See id.* at 820 (“In many cases, the human right of Native American claimants to repatriate their ancestors will depend upon the group’s ability to hire outside experts to prove cultural affiliation according to the standards of American anthropologists.”).

83. See JENNIFER RAFF, ORIGINS: A GENETIC HISTORY OF THE AMERICAS 201–12 (Hachette Book Group, 1st ed. 2022) for a brief discussion of the hypothesized time of Indigenous Americans’ entry of the Americas from northeastern Asia based on recent archaeological and genetic evidence.

84. *See Tsosie, supra* note 24, at 819.

85. *See id.*

86. 367 F.3d 864 (9th Cir. 2004).

87. *See id.* at 870 (“The skeleton attracted attention because some of its physical features, such as the shape of the face and skull, differed from those of modern American Indians. Many scientists believed the discovery might shed light on the origins of humanity in the Americas.”).

the Columbia River near Kennewick, Washington on land managed by the United States Army Corps of Engineers (“Corps”)⁸⁸ and was thus covered under NAGPRA.⁸⁹ A public controversy soon arose, primarily due to the Ancient One’s physical features atypical of Indigenous Americans and great antiquity.⁹⁰

Soon after the Smithsonian Institution took physical custody of the Ancient One for scientific analysis,⁹¹ four tribes native to the Columbia Plateau region (“Plateau Tribes”) sought his repatriation.⁹² The Corps cooperated, and a number of scientists (“Plaintiffs”) sued to halt the repatriation;⁹³ their motion for summary judgment was denied in 1998, at which point further scientific investigations commenced to determine the cultural affiliation of the Ancient One.⁹⁴ In 2000, the Secretary of the Interior decided nonetheless that the Ancient One qualified as “Native American” *sensu* NAGPRA and ordered repatriation, prompting Plaintiffs to file an amended complaint that reached the Ninth Circuit.⁹⁵

The *Bonnichsen* court ultimately declined to repatriate the Ancient One to the Plateau Tribes,⁹⁶ its primary rationale being skepticism on whether the Ancient One qualified as “Native American” under NAGPRA’s language.⁹⁷ Of greatest significance to the Ninth Circuit were the temporal implications of NAGPRA’s definition of “Native American,” and the heightened standard of proof implied as a result:

88. *Id.* at 869.

89. *Id.*

90. *See id.* at 870.

91. *Id.*

92. *See id.*

93. *See id.* (“The scientists and others, including the Smithsonian Institution, objected to the Corps’ decision, arguing that the remains were a rare discovery of national and international significance.”).

94. *Id.* at 871.

95. *Id.* at 872.

96. *Id.* at 882.

97. *See id.* at 877 (“Though NAGPRA’s two inquiries have some commonality in that both focus on the relationship between human remains and present-day Indians, the two inquiries differ significantly. The first inquiry requires only a general finding that remains have a significant relationship to a presently existing ‘tribe, people, or culture,’ a relationship that goes beyond features common to all humanity. The second inquiry requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe. . . . Because the record shows no relationship of Kennewick Man to the Tribal Claimants, the district court was correct in holding that NAGPRA has no application.”).

The parties dispute whether the remains of Kennewick Man constitute Native American remains within NAGPRA's meaning. NAGPRA defines human remains as "Native American" if the remains are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." (citation omitted). The text of the relevant statutory clause is written in the present tense ("of, or relating to, a tribe, people, or culture *that is* indigenous"). Thus the statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American.⁹⁸

Accordingly, contemporary scientific analyses were unable to indicate—let alone prove by a preponderance standard—any lineal descent between the Ancient One and the Plateau Tribes,⁹⁹ a situation made murkier by the Ancient One's presumptively extinct phenotype.¹⁰⁰ The *Bonnichsen* court declined to consider the Ancient One a "Native American." In this, the designation of CUHR was made antithetical to the status of "Native American." To be culturally unidentifiable—and to remain culturally unidentifiable where Western epistemologies alone fail to establish a cultural affiliation—is to be denied the status of "Native American" entirely.¹⁰¹ Interestingly, the Ninth Circuit's understanding of indigeneity *sensu* NAGPRA conflicts with the very purpose of the statute. The court anticipates such an objection, citing the United States' desire to make amends for the disrespectful treatment of ancestral remains:

NAGPRA was enacted with two main goals: to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death. NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains.¹⁰²

98. *Id.* at 875.

99. *See id.* at 882.

100. *See generally id.* at 871, 880–81 (describing scientific confusion over the Ancient One's ethnicity due to his skeleton's resemblance to those of Polynesians or south Asians). It should be noted that genetic testing, more common in modern archaeological investigations, was unavailable at the time of the studies.

101. The *Bonnichsen* court in fact refused to consider oral history delivered by a tribal expert as evidence at all, even attacking oral tradition as epistemologically suspect in general. *Id.* at 881–82.

102. *Id.* at 876.

The Ninth Circuit evinces a concern that NAGPRA would be neutered and rendered absurd if extended to include CUHRs.¹⁰³ Even so, the court's implied denial that CUHRs might have any ancestral connection or cultural affiliation to modern Indigenous groups is troubling, considering NAGPRA's purpose. Not only does such a rigid construction of NAGPRA's language conflict with the canons of American Indian statutory interpretation,¹⁰⁴ but it also denies the "multivocality of the concept [of] Native American"¹⁰⁵ and favors strict biological or cultural descent, provable by Western standards alone, as the means of establishing cultural affiliation. This represents a flawed application of a statute whose ethos is one of human rights, historical atonement, and prioritizing the pressing cultural concerns of a group long maltreated.¹⁰⁶ To disregard Indigenous epistemologies such as oral tradition—an evidentiary form of particular concern, owing to its great antiquity of use on the North American continent and continued importance to Indigenous self-determination¹⁰⁷—further complicates the ability of NAGPRA to right historical wrongs under a human-rights philosophy.¹⁰⁸

The story of the Ancient One, however, was not without a happy ending for the Plateau Tribes and NAGPRA. New analyses of the Ancient One in

103. See generally *id.* at 878 (“[T]he Secretary’s interpretation would mean that the finding of any remains in the United States *in and of itself* would automatically render these remains ‘Native American.’ . . . But we cannot conclude that Congress intended an absurd result . . .”).

104. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 112–13 (“[T]he Bonnicksen court . . . held ‘that NAGPRA’s requirement that Native American remains bear some relationship to a presently existing tribe, people, or culture is unambiguous,’ the court concluded in a footnote that ‘we need not resort to the ‘Indian canon of construction,’ under which ‘doubtful expressions’ in legislation passed for the benefit of Indian tribes are resolved in favor of the Indians.” (citing *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986)).

105. See Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 94; see also *id.* (discussing NAGPRA’s neglect of the Indigenous conception of cultural kinship, which generally relies more on shared or passed-down cultural traits than strict biological descent).

106. See Tsosie, *supra* note 24, at 850; see also *id.* at 845–46 (“[I]nternational human rights law is premised on Kantian ethics that supports the primary value of respect for persons. . . . Under this approach, the basic moral duty of the United States would be to compensate for these past wrongs and to recognize the basic human dignity of Native peoples by validating their need to repatriate Native American ancestral remains. Only then would we accord the appropriate ‘respect’ for persons that international human rights law requires.”).

107. See Smith, *supra* note 19, at 219–20; see also Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 93 (“*Bonnicksen’s* reasoning, as much as its result, reveals that traditional Indian lifeways remain at best an enigma to most non-Native jurists who do not know how to incorporate stories of Indigenous self-understanding in their legal analyses, which continue to privilege scientific explanations.”); see also *id.* at 93 n.34 (“The [*Bonnicksen*] court’s conclusion seemed to have been based in large part on a fundamental skepticism about and rejection of all oral tradition evidence, which was contrary to Congress’s intentions as expressed in NAGPRA.” (quoting Allison M. Dussias, *Kennewick Man, Kinship, and the “Dying Race”: The Ninth Circuit’s Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 107–17 (2005)).

108. See Tsosie, *supra* note 24, at 845–46.

the early 2010s, relying on genetic and other scientific evidence unavailable at the time of *Bonnichsen*, allowed scientists to determine that the Ancient One was closely related to at least one of the Plateau Tribes, belonging to an extinct group that was likely almost directly ancestral.¹⁰⁹ Accordingly, Washington State representatives introduced a bill in 2016 requiring the repatriation of the Ancient One to the Plateau Tribes, which then-President Barack Obama signed.¹¹⁰ In February 2017, more than 200 members of the Plateau Tribes gathered to lay the Ancient One to rest at an undisclosed location on their land—the land that the Ancient One himself once called home.¹¹¹

2. *Avoiding Litigation: The Anzick Boy*

However, the great antiquity of CUHRs need not be an absolute barrier to their repatriation under NAGPRA, despite the federal courts' skeptical view of Native American lineage in deep time. Recent examples of collaboration between scientific investigators and Indigenous communities who seek to ascertain the affiliation of CUHRs have hastened repatriation and avoided litigation.¹¹² The Anzick Boy discovery is perhaps an archetypal example and offers a blueprint for approaching NAGPRA's question of cultural affiliation in accordance with a human rights philosophy.¹¹³

In 1968, workers discovered the remains of an ancient Indigenous child (“Anzick Boy”) on the Anzick family's land in Wilsall, Montana while mining sandstone.¹¹⁴ Analysis revealed the Anzick Boy to be over 11,000 years old and likely a member of the Clovis culture of Paleo-Indians as evidenced by stone artifacts found in his grave.¹¹⁵ These artifacts were of great number and fine quality, indicating great personal attachment or

109. See Morten Rasmussen et al., *The Ancestry and Affiliations of Kennewick Man*, 523 NATURE 455–58 (2015) [hereinafter Rasmussen, *The Ancestry and Affiliations of Kennewick Man*].

110. Annette Cary, *Tribes Return Ancient Kennewick Man to the Ground*, TRI-CITY HERALD (Feb. 21, 2017), <https://www.tri-cityherald.com/news/local/article133780309.html> [<https://perma.cc/5BSU-JFDL>]

111. *Id.*

112. See Samuel S. White V, *The Anzick Site: Cultural Balance and the Treatment of Ancient Human Remains* (May 2015) (Graduate student thesis, University of Montana) (UMT.edu) at 41–44, 47–49 for two case studies where a collaborative approach was either initially used or eventually agreed upon.

113. Note, however, that the Anzick Boy was not subject to NAGPRA, but a nearly identical Montana statute. The Anzick case study is included here as a model of conduct for similar occurrences on federal land.

114. White, *supra* note 112, at 4.

115. See Ewen Callaway, *Ancient Genome Stirs Ethics Debate*, 506 NATURE 142 (2014); White, *supra* note 112, at 8–10.

religious consideration on the part of the Clovis people who had buried this small child many millennia before.¹¹⁶ Even so, the Anzick Boy's status as a member of the extremely ancient Clovis culture—one of the first in the Americas—approached CUHR status. The Clovis culture's direct genetic ancestry to the vast majority of Indigenous groups¹¹⁷ prevented identifying a single lineal or cultural descendant. After a period in museum custody, the Anzick Boy was transferred to the possession of the Anzick family in the late 1990s.¹¹⁸ Despite the inapplicability of NAGPRA to the Anzick Boy, a Montana statute imposed in 2001 permitted repatriation claims for ancestral remains found on private land and required that consultation with interested Indigenous groups occur, at which point the possibility of cultural affiliation would be ascertained.¹¹⁹

Though no repatriation claim under the Montana statute was ever made on the part of an Indigenous group,¹²⁰ the Anzick family eventually consulted the Crow and Northern Cheyenne tribes about conducting genomic analysis on the Anzick Boy for the purposes of determining cultural affiliation under Montana law.¹²¹ This revealed that the Anzick Boy's Clovis forebears were directly ancestral to almost all Indigenous groups south of the Canadian Arctic,¹²² thereby proving lineal descent. However, controversy arose regarding the stone artifacts with which the Anzick Boy had been buried. Montana law exempted these artifacts in particular from repatriation claims,¹²³ but some Indigenous groups strongly desired their reburial with the Anzick Boy.¹²⁴ Ultimately, the funerary artifacts would remain on display for educational purposes while the Anzick Boy would be reburied.¹²⁵ He rests in his original grave. The Anzick family and representatives of several Indigenous groups conducted traditional

116. White, *supra* note 112, at 13.

117. *Id.* at 73 (“The Clovis boy’s family are the direct ancestors to a roughly estimated 80% of all present day Native Americans.”) (citing Morten Rasmussen et al., *The Genome of a Late Pleistocene Human from a Clovis Burial Site in Western Montana*, 506 *NATURE* 225 (2014)) [hereinafter Rasmussen, *Anzick Boy Genome*].

118. See Callaway, *supra* note 115, at 142.

119. See White, *supra* note 112, at 69–71 for a discussion of the Montana statute postdating the Anzick discovery that would have required consultation with potentially linked Indigenous groups in relation to the Anzick Boy remains. A 2013 revision to this statute imposed new requirements to prove cultural affiliation which were virtually identical to those of NAGPRA. See also Mont. Code Ann. §§ 22-3-801–811 (West 2025) and 05 Mont. Admin. Reg. 319–21 (Apr. 4, 2013) (imposing NAGPRA’s proof structure onto Montana’s existing statutory test of cultural affiliation).

120. White, *supra* note 112, at 69.

121. *Id.* at 73–74.

122. See Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 225, 227.

123. See White, *supra* note 112, at 64–65.

124. White, *supra* note 112, at 74.

125. *Id.* at 74–75.

funerary rites for the child.¹²⁶ No further controversy ensued.

The Anzick Boy case stands as an exemplar for navigating the turbulent cultural waters of NAGPRA's implementation. The Anzick family avoided inciting litigation and ripping open historical wounds by involving the perspectives of Indigenous groups of their own volition and initiative.¹²⁷ Not only did this course of action provide a path for individuals involved in repatriation negotiations to slip out from under the shadow of *Bonnichsen*,¹²⁸ but it also stood as a shining example of good faith, cultural sensitivity, and acknowledgment of NAGPRA's human rights purpose.¹²⁹

II. NAGPRA AS HUMAN RIGHTS LEGISLATION: THE CASE FOR CONSIDERING ORAL TRADITION

NAGPRA's good intentions—mending historical wounds from American institutions' depredatory treatment of Indigenous groups—often fail to manifest where CUHRs are concerned. What often ensues under the statute are financially costly and emotional negotiations.¹³⁰ Even where a tribe is able to muster the financial resources to proceed with repatriation, success is doubtful if cultural affiliation cannot be established by a preponderance under the statutorily-approved epistemologies.¹³¹ Oral traditional knowledge concerning land occupation is typically afforded little weight in determining cultural affiliation, which directly opposes the ethical thrust of NAGPRA.¹³²

Despite this critical flaw, the statute has undoubtedly made significant progress in overall repatriation—roughly 67,000 ancestral remains have been repatriated since the statute's 1990 inception.¹³³ However, a great number of ancestral remains, almost double the amount repatriated thus far,

126. *See id.* at 75–78.

127. *See id.* at 78–79 (discussing scientists' proactive efforts to contact and seek the approval of possibly affiliated tribes before conducting investigations on the Anzick Boy remains).

128. *See id.* at 78.

129. *See id.* (“[T]he effectiveness of interactions between differing cultures depends greatly on mutual respect, tolerance and an empathetic approach to the issues presented.”); *cf.* Tsosie, *supra* note 24, at 849 (“Native American human rights should not depend upon the vagaries of the domestic political process. Rather, the only way to deal with the issue of culturally unidentifiable Native American human remains fairly or equitably is to recognize that any legal right to Native American ancestral remains or associated funerary objects stems from the moral right of contemporary Native American peoples to protect their ancestors. . . .” (internal quotation marks omitted)).

130. *See* Gunn, *supra* note 58, at 524–25.

131. *See, e.g.,* Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 93 n.34.

132. *Cf.* Smith, *supra* note 19, at 223 (“By listing oral-tradition evidence next to biological and historical evidence in NAGPRA, and by not assigning priorities or weight between those types of evidence, Congress effectively acknowledged that oral tradition is valuable evidence.”).

133. *See* Nash & Colwell-Chantapohn, *supra* note 10, at 226.

remain in museum custody as of 2020.¹³⁴ Many of these are CUHRs. The prospect of repatriating many of them is murky at best. While genetic evidence is often pivotal in establishing an affiliation sufficient to repatriate a CUHR,¹³⁵ it is fraught with serious ethical and logistical problems.¹³⁶ If CUHRs cannot be repatriated, it is almost as if the Indigenous groups claiming affiliation have had the truth of their histories taken from them. This is particularly relevant if the indigeneity of the CUHR is questioned¹³⁷—and accordingly, whether the Indigenous claimants are truly Indigenous to their land¹³⁸—as occurred in *Bonnichsen*.¹³⁹ Rex Buck, a leader of one of the Plateau Tribes, lamented the pain felt by his community due to the seemingly permanent stalling of the Ancient One’s repatriation:

Buck places Kennewick Man within a tradition of ancestors whose rest has been disturbed . . . [by] people who have arrived from time to time to “stir around our remains, like they don’t mean anything. Then they go back, and we pick up the pieces with a heavy heart and tears in our eyes. And we ask the Creator that he might forgive those ones that do that, for they must not know any better.”

134. *See id.*

135. *See* Rasmussen, *The Ancestry and Affiliations of Kennewick Man*, *supra* note 109 (genetic research on the Ancient One which directly precipitated his repatriation several years afterwards); Rasmussen, *Anzick Boy Genome*, *supra* note 117 (similar genetic research on the Anzick Boy, which led to his repatriation several years later).

136. *See* Gunn, *supra* note 58, at 527–28. Tribes, generally, are wary of scientific efforts to obtain genetic material from their living members or ancestors, owing to a history of ethical misconduct. *See, e.g.,* Havasupai Tribe of Havasupai Rsv. v. Ariz. Bd. of Regents, 220 Ariz. 214 (Ct. App. 2008) (highly publicized litigation concerning acts of deception on the part of scientists in taking blood samples from the Havasupai people of the Grand Canyon area for scientific analysis).

137. Laurence Straus, an archaeologist involved in the case of the Ancient One, denounced the controversy over the ancestral remains’ indigeneity and cultural affiliation as a naked attempt to “throw it in [Indigenous peoples’] faces that they are not the original Americans after all,” which he regarded as a particularly cruel allegation in light of the atrocious history of the United States vis-à-vis Indigenous peoples. *See* ROGER DOWNEY, RIDDLE OF THE BONES—POLITICS, SCIENCE, RACE, AND THE STORY OF KENNEWICK MAN 60 (2000).

138. The discovery of atypical CUHRs has spurred the growth of alternative scientific theories and public speculation about a lost “Paleoamerican” migration—possibly of ancient European origin—which reached the Americas first and in this constituted a “truer” Indigenous race than those encountered by European colonists. Such claims have been used as an oblique attempt to argue that North America is not Indigenous territory, but the rightful ancestral land of European colonists. *See* Ann M. Kakaliouras, *The Repatriation of the Palaeoamericans: Kennewick Man/the Ancient One and the End of a Non-Indian Ancient North America*, 4 BJHS THEMES 79, 91–92 (2019).

139. In *Bonnichsen*, a White supremacist neopagan sect sought to intervene in the case due to their belief that the Ancient One’s atypical features rendered him a native Caucasian, even Norseman, on American soil, and that NAGPRA’s inapplicability to Caucasian remains was discriminatory. *See* Scott L. Malcomson, *The Color of Bones*, N.Y. TIMES MAG. ¶ 6–9 (Apr. 2, 2000), <https://www.nytimes.com/2000/04/02/magazine/the-color-of-bones.html> [perma.cc/BNZ9-BQ8Y].

In his hesitant English, Buck tried to explain that his tribe's land had in it words from the Creator, and that the land was the means for God to speak to humans. One means for humans to speak to their Creator was by returning themselves to the earth. Being buried gave people a permanent place in this conversation with forces greater than they.

“Our ancestors have returned back to the earth,” he said. “Their body has become earth, as the word was put here. And their heart returned, and their life and spirit went on. But it's of no significance to the nonunderstanding race. But yet it holds the sacredness of the words that were passed through their generation, that are still living today. Those words were passed through those people that had no significance.” As for Kennewick Man, “he, too, was almost dirt. He, too, was giving himself back.”¹⁴⁰

The result is a continued destruction of Indigenous culture, along with practical concerns for future collaboration between Indigenous groups and American archaeologists.

Accordingly, NAGPRA's proof structure for cultural affiliation fails to honor the very purpose of the statute—human rights legislation, aimed at righting historical wrongs and promoting self-determination.¹⁴¹ If colonialist epistemologies are used to determine cultural affiliation for the ancestors of historically oppressed peoples before those of the oppressed peoples themselves, restitution under a Kantian human rights framework does not occur.¹⁴² Oral tradition and traditional knowledge—critical

140. See Malcomson, *supra* note 139, at ¶ 35–37. Cf. Ray, *The Challenge of Kennewick Man*, *supra* note 75, at 97 (“According to the worldviews of [the Plateau Tribes], the remains of the Ancient One should have been reburied at once. As the tribes stated in a joint memorandum to the district court, ‘When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest.’”).

141. Tsosie, *supra* note 24, at 810–11 (“The notion that NAGPRA was enacted primarily to serve the human rights of Native American people was clearly articulated in 1990 by Senator Daniel Inouye. . . . [Inouye] first acknowledged the egregious history that led to the enactment of NAGPRA and the continuing violations of Native American civil rights and then stated that: ‘the bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.’”). Cf. Gunn, *supra* note 58, at 531.

142. See Tsosie, *supra* note 24, at 818 (“There have been indigenous peoples on these lands since time immemorial, but the legal category of a ‘federally recognized Indian tribe’ is a relatively recent concept created by the U.S. government. . . . [t]hus, the rights-holders under current law are a small subset of the indigenous peoples of this land as they have existed over time.”); see also *id.* at 820 (“It may seem rather strange that the very entity that has possession or control of indigenous remains by virtue of an original human rights violation now has the power to make the determination on cultural affiliation . . . but that is the statutory process.”).

aspects of self-determination and cultural identity¹⁴³—must be afforded substantial deference in NAGPRA’s proof structure for the statute to maintain ethical consistency. Where scientific evidence is insufficient to affiliate a CUHR with lineal or cultural descendants, oral tradition must be allowed to fill the gaps.

A. *Human Rights and NAGPRA*

From its 1990 passage, NAGPRA has been acknowledged as affirming the human right to control and possess one’s ancestors and cultural heritage, a direct response to the “egregious history” of atrocities against Indigenous peoples by the United States government and archaeological establishment.¹⁴⁴ In this, NAGPRA is human rights legislation *sensu* Kant¹⁴⁵ and accords with the State and Interior Departments’ 2010 rules in support of Articles 11 and 12 of the United Nations Declaration on the Rights of Indigenous Peoples.¹⁴⁶ These articulate a human right to repatriation of ancestral remains from sovereign states, conducted through “fair, transparent, and effective mechanisms developed in conjunction with . . . peoples concerned,” in accord with a right to maintain cultural traditions and autonomy as aspects of self-determination.¹⁴⁷

Rebecca Tsosie assails NAGPRA’s current procedures for determining cultural affiliation as diametrically opposed to ideals of human rights and self-determination. Their implementation by the courts has trended towards a “balancing” approach in which scientific interests are weighed against the human right of peoples to control the remains of their ancestors.¹⁴⁸ Such an approach permits collecting institutions—many of which are stained by human rights violations themselves¹⁴⁹—to have the final say on cultural

143. *Cf. id.* at 848 (“The principle of indigenous self-determination depends upon the recognition of intergenerational rights and a willingness to honor the spiritual connections that unite contemporary indigenous peoples with their lands and environments. In short, indigenous identity, as expressed by cultural insiders, is pivotal to the realization of self-determination.”).

144. *Id.* at 810–11.

145. *Id.* at 845–46 (“[Under [a Kantian human rights] approach, the basic moral duty of the United States would be to compensate for these past wrongs and to recognize the basic human dignity of Native peoples by validating their need to repatriate Native American ancestral remains.”).

146. *Id.* at 810–12.

147. *Id.* at 811.

148. *Id.* at 812–13 (“[T]he interest-balancing approach is inappropriate to a resolution of the issue of [CUHRs]. . . . Native American peoples are not equally situated stakeholders in the claim to repatriate Native ancestral remains and funerary objects, and therefore, a human rights-based framework has far more capacity to advance the quest for justice than an interest-balancing approach.”) (internal quotation marks omitted).

149. *See id.* at 815 (discussing an 1868 Surgeon General order encouraging the shipment of the remains of Indigenous Americans killed in battle to the Army Museum for analysis under discredited racial science); *see also* Colwell-Chantapohn, *supra* note 26.

affiliation for CUHRs, on some occasions.¹⁵⁰ In fraught scenarios such as these, NAGPRA fails to advance human rights and self-determination. What ensues is a continued subjugation of Indigenous epistemologies in repatriation proceedings to political caprices and archaeological science—the latter of which, unfortunately, remains somewhat tainted in the eyes of Native America—and an intrinsic contradiction in the implementation of NAGPRA.¹⁵¹

Further, the human rights focus of NAGPRA is shaped by the historical circumstances of the United States and scientific establishments' interactions with Indigenous groups. Regrettably, these were often brutal, violent, and founded on a conception of Indigenous peoples as ontologically subordinate and not entitled to respectful treatment of their bodily remains.¹⁵² Tsosie conceives of this history as one of war. Countless Indigenous people died for their nations or were murdered by invaders. The collection of Indigenous remains was, in many cases, a concern ancillary to the United States' policy of mass killing, leading to widespread grave-robbing and unspeakable human rights violations in which the archaeological and museum establishments were complicit:

Later, the search for Indian body parts became official federal policy with the Surgeon General's Order of 1868. . . . In ensuing decades, over 4000 heads were taken from battlefields, burial grounds, POW camps, hospitals, fresh graves, and burial scaffolds across the country. Government headhunters decapitated Natives who had never been buried, such as slain Pawnee warriors from a western Kansas battleground, Cheyenne and Arapaho victims of Colorado's Sand Creek Massacre, and defeated Modoc leaders who were hanged and then shipped to the Army Medical Museum.¹⁵³

150. See Tsosie, *supra* note 24, at 820 (lamenting the extent to which determining cultural affiliation for CUHRs depends in practice on the caprices and financial capabilities of non-Indigenous collecting institutions).

151. *Id.* at 820.

152. See *id.* at 845; see also Kalae Trask, *Toward Mutual Recognition: An Investigation of Oral Tradition Evidence in the United States and Canada*, 13 WASH. J. SOC. & ENV'T JUST. 54, 73 (2023).

153. Trope & Echo-Hawk, *supra* note 42, at 40–41.

During this period, collecting crews from America's newly founded museums engaged in competitive expeditions to obtain Indian skeletons. . . . Some museums employed outright deception in order to obtain skeletons. New York's American Museum of Natural History, for example, literally staged a fake funeral for a deceased [Inuit man] to prevent his son from discovering that the museum had stolen the remains.¹⁵⁴

As distinct peoples with the right to self-determination, the Indigenous nations of the United States have a Kantian human right to seek the return of their deceased ancestors, now interred on soil made foreign.¹⁵⁵ Only then is true Kantian respect for persons achieved, and only if NAGPRA's implementation prioritizes Indigenous self-determination can it remain consistent under principles of human rights law.¹⁵⁶ When applied to the problem of CUHRs, this demands the consideration of oral tradition and traditional knowledge as a prime determinant of cultural affiliation.

B. Oral Tradition and Culturally Unidentifiable Human Remains

Most often, human remains are deemed culturally unidentifiable (and thus CUHRs) due to their great antiquity. As Indigenous Americans have occupied the continent for at least 15,000 years,¹⁵⁷ the sheer depth of occupation obscures direct and specific lineal or cultural descent between ancient and modern groups in most cases. Consequently, oral tradition concerning land occupation is potentially an avenue to illuminate connections between CUHRs and modern populations where scientific evidence alone is either inconclusive or impossible to obtain.¹⁵⁸ Kalae Trask defines oral tradition as traditional stories and historical information passed down generationally by verbal recitation.¹⁵⁹ Oral tradition's ability to

154. *Id.* at 41.

155. Tsosie, *supra* note 24, at 850.

156. *Id.*

157. See RAFF, *supra* note 83, at 201–12.

158. See, e.g., Smith, *supra* note 19, at 222 (noting the scientific verification of certain oral traditions recounting environmental changes and other prehistoric and historic events).

159. See Trask, *supra* note 152, at 55–56.

recount extremely ancient events is well-attested,¹⁶⁰ as is its ability to serve as evidence of distant cultural relatedness and common origin.¹⁶¹ Its use is a particularly relevant consideration in light of the ethical questions associated with obtaining genetic samples from ancient Indigenous human remains.¹⁶²

NAGPRA uplifts oral tradition as an important form of evidence in proving cultural affiliation. Its listing of oral tradition alongside Western epistemological evidence belies no intention on the part of Congress to weigh forms of proof differently.¹⁶³ Nor is the statute to demand “absolute continuity.” Nor does it penalize gaps in Indigenous histories so long as the evidence meets a preponderance standard in the aggregate.¹⁶⁴ Congress’s apparent intention in including oral tradition as permissible in NAGPRA’s proof structure for cultural affiliation was to designate it as a legitimate form of evidence useful in exercising the human right to reclaim the ancestral dead.¹⁶⁵ However, cases such as *Bonnichsen* have directly attacked the reliability of oral tradition on epistemological grounds,¹⁶⁶ striking against NAGPRA’s intentions of human rights and self-determination. Such an outcome is troubling. Countless CUHRs who could be repatriated through

160. See, e.g., Roger C. Echo-Hawk, *Ancient History in the New World: Integrating Oral Traditions and the Archaeological Record in Deep Time*, 65 AM. ANTIQUITY 2 (Apr. 2000) 267, 276–278 (recounting an Arikara oral tradition of emergence from a cold, dark underground world and encountering giant bodies of water en route to the Arikara homeland and likening it to the Indigenous migration into North America via the High Arctic and along glacial lakes); *id.* at 277 (discussing several Indigenous groups’ oral traditions about lakes and catastrophic flooding in the context of Pleistocene glacial lakes). It must be noted that oral traditions also sometimes capture historic data through metaphor and mythic images. See, e.g., Smith, *supra* note 19, at 221 (recounting a First Mesa oral tradition about a clan-chief, which blended historically verifiable information about village sites and individual names with mythic tales about human flight).

161. See David W. Anthony & Dorcas R. Brown, *Late Bronze Age Midwinter Dog Sacrifices and Warrior Initiations at Krasnomarskoe, Russia*, in TRACING THE INDO-EUROPEANS: NEW EVIDENCE FROM ARCHAEOLOGY AND HISTORICAL LINGUISTICS 97, 104–06 (Birgit Annette Olsen et al. ed., 2019) for a fascinating example—the figure of an otherworldly dog (Cerberus being the archetypal example) survives in the myths of both numerous Indigenous American groups and the Indo-European peoples of present-day Europe, hinting at a remote common ancestry that also potentially shared this tradition. In fact, recent advances in archaeogenetics have shown that Indigenous Americans and Europeans share direct common descent from the same ancient Siberian population. See also *id.* at 105 (citing G.E. Lankford, *The “Path of Souls”: Some Death Imagery in the Southeastern Ceremonial Complex*, in ANCIENT OBJECTS AND SACRED REALMS: INTERPRETATION OF MISSISSIPPIAN ICONOGRAPHY 174 (F.K. Reilly III & J.F. Garber eds., 2007) (citing G.E. Lankford, *The Raptor on the Path*, in VISUALIZING THE SACRED: COSMIC VISIONS, REGIONALISM, AND THE ART OF THE MISSISSIPPIAN WORLD 240 (F.K. Reilly III and J.F. Garber eds., 2011)).

162. See *supra* note 136.

163. See Smith, *supra* note 19, at 223.

164. Trask, *supra* note 152, at 61.

165. See Tsosie, *supra* note 24, at 846–47, 850.

166. See Trask, *supra* note 152, at 64–66 (discussing the *Bonnichsen* court’s failure to acknowledge an amicus brief from the Haudenosaunee people concerning oral tradition’s reliability while relying on an amicus brief delegitimizing oral tradition from involved scientists).

an increased consideration of oral tradition instead appear doomed to remain forever separated from descended peoples.

Oral tradition can record historical truths; it is important to Indigenous self-determination¹⁶⁷ and can aid the repatriation of CUHRs. It deserves increased consideration under NAGPRA's cultural affiliation proof structure. Seeking an answer to Western courts' skepticism of oral tradition, Cathay Smith sets out a quadripartite inquiry, of which at least some prongs must be met, for assessing its reliability in court:

First . . . a court . . . should analyze the *individual consistency* of historical facts in oral tradition[.] [This] could mean comparing oral tradition obtained at a deposition with the testimony of the same narrator in a previous deposition, proceeding, or affidavit. . . .

Second, courts should analyze the *conformity* of historical facts in oral tradition. Conformity shows the degree to which the form or content of one individual's testimony conforms with others' testimonies—in other words, the conformity between the oral traditions of multiple people or tribes . . . accounts in oral tradition that are only endorsed by single individuals may be rejected as failing to conform to indigenous canons of the truly historical. . . .

Additionally, courts should consider the *context* of the oral tradition. Narratives that occur in ritual contexts may be more credible as historical facts because in Native American tradition, violations of truth in ritual contexts may subject the individual narrator to the possibility of supernatural sanctions. . . .

167. *See id.* at 73–75 (describing the consideration of Indigenous oral tradition evidence in court as critical to “mutual recognition” between sovereign governments as practiced during the era of treaty-making between Indigenous nations and Western colonies) (citing James Tully, *A Just Relationship Between Aboriginal and Non-aboriginal Peoples of Canada*, in *ABORIGINAL RIGHTS AND SELF-GOVERNMENT: THE CANADIAN AND MEXICAN EXPERIENCE IN NORTH AMERICAN PERSPECTIVE* 41 (Curtis Cook & Juan D. Lindau eds., McGill-Queen's Univ. Press 2000)); *cf.* Tsosie, *supra* note 24, at 846–47 (discussing cultural rights as a “key feature of indigenous self-determination” and compliant with portions of the U.N. Declaration on the Rights of Indigenous Peoples endorsed by the U.S. government in 2010).

Finally, courts should analyze the availability of *corroborating evidence* in the oral tradition, looking at whether the historical facts in the oral tradition conform to events recorded in other primary source material such as documents, photographs, diaries and letters **This factor does not necessarily seek external evidence corroborating the specific facts asserted in the oral-tradition evidence. Rather, it seeks evidence corroborating other aspects within the Native American claimants' oral tradition in order to support the credibility of the oral tradition as a whole.**¹⁶⁸

Applying the first two prongs of this test to *Zuni Tribe of New Mexico v. United States*,¹⁶⁹ Smith recounts the oral tradition evidence presented by Andrew Wiget, an expert witness for the Zuni Tribe.¹⁷⁰ Wiget satisfied the consistency prong by piecing together a cohesive narrative from thirty-three separate depositions by Zuni tribal members¹⁷¹ and satisfied the conformity prong by comparing these thirty-three depositions' critical allegations to one another.¹⁷² Smith also recounts the *Delgamuukw* litigation¹⁷³ of Canada, wherein oral traditional evidence concerning land occupation was again at issue,¹⁷⁴ in relation to the context prong. The oral tradition in this case derived from ritual historical recitations of the Gitksan and Wet'suwet'en peoples to which listeners could object if inaccuracies were spotted; error or deceit in such recitations was met with social and spiritual retribution.¹⁷⁵ Lastly, Smith returns to *Zuni Tribe* in assessing the corroboration prong, wherein Wiget reviewed historical and scientific literature concerning Zuni land occupation after gathering oral traditional evidence.¹⁷⁶ Ultimately,

168. Smith, *supra* note 19, at 224–26 (cleaned up) (emphasis added).

169. *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607 (1987). This case concerned the Zuni Tribe's efforts to receive just compensation for the United States government's taking of their land and to establish aboriginal title to this land.

170. Smith, *supra* note 19, at 224. Wiget was presented as an expert witness to render Zuni oral tradition indisputably admissible in court. *See id.* at 220 (“Oral tradition—which by its very nature is passed down orally through generations—could be excluded as hearsay if used as evidence of the events it describes. Recognizing this issue, Native American claimants typically introduce oral tradition through expert testimony and reports, which courts have found not to be subject to the hearsay rule.”).

171. *See id.* at 225.

172. *See id.*

173. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 87 (Can.).

174. *See* Trask, *supra* note 152, at 67 (recounting the origins of the *Delgamuukw* litigation in the efforts of Gitksan and Wet'suwet'en leaders' efforts to claim aboriginal title to some 58,000 square kilometers of land in British Columbia, which oral traditional, historical, and archaeological evidence suggested they had occupied prior to Canadian incursion).

175. *See* Smith, *supra* note 19, at 226; *cf.* Tsosie, *supra* note 24, at 846–47 (discussing cultural rights—that is, the right to maintain one's cultural traditions intact—as a “key feature of indigenous self-determination.”) (citing S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 131–41 (2d ed. 2004) (describing the right to cultural integrity as a central feature of indigenous self-determination)).

176. Smith, *supra* note 19, at 226.

tribal land occupation was established in *Zuni Tribe* in large part due to Wiget's verified evidence.¹⁷⁷ Were the Ninth Circuit in *Bonnichsen* to have applied the quadripartite test to the Plateau Tribes' claim of land occupation, the litigation may well have turned out quite differently:

[T]here was *conformity* of the historical facts in the oral-tradition evidence in *Bonnichsen*. To prepare his expert report . . . Boxberger relied on oral traditions from six separate Columbia Plateau tribes . . . The fact that there were common historical and factual themes in the oral traditions of six separate tribes that had resided in the same area for centuries showed the conformity of the oral tradition.

The factor of *corroborating evidence* also weighed in favor of the credibility of the oral-tradition evidence . . . [Boxberger] further showed that the oral traditions he examined described geological events that occurred in the distant past . . . Geologists and archaeologists confirmed many of the phenomena described in the Native American claimants' oral tradition. For example, all of the Native American claimants' oral traditions included a story outlining the reason for the absence of bison on the Columbia Plateau. A number of the oral traditions suggested that bison had been present on the Columbia Plateau in earlier times—a phenomenon that archaeological evidence dates to over 2000 years ago. Additionally, Boxberger examined oral traditions that described the change in the flow of the Columbia River from the Grand Coulee to the present channel. Current-day geologists have confirmed this phenomenon, and dated it to over 10,000 years ago.¹⁷⁸

Oral tradition evidence (meeting at least two of the rigorous tests of consistency, conformity, context, or corroboration) would have brought a swifter end to *Bonnichsen* and facilitated the repatriation of the Ancient One. Beyond that, it would have allowed an exercise of NAGPRA more consistent with a human rights framework. If the epistemologies of Indigenous peoples are afforded significant weight in the process of determining cultural affiliation, the Kantian human right to the repatriation

177. *Id.* at 227.

178. *Id.* at 230.

of the ancestral dead is better met.¹⁷⁹ In this, the statute achieves ethical consistency vis-à-vis its Congressional intentions.¹⁸⁰

C. Genetic Analysis and NAGPRA as Human Rights Legislation

Although genetic testing—unavailable at the time of the greatest CUHR controversies such as *Bonnichsen*¹⁸¹—can provide enough information to establish a cultural affiliation for even extremely ancient remains,¹⁸² it cannot supplant oral tradition. The ethical problems associated with obtaining genetic material from ancestral remains are severe. Procedures often involve the destruction of at least some bone matter,¹⁸³ which opposes a widespread Indigenous belief that the remains of ancestors must be undisturbed.¹⁸⁴ Moreover, genetic testing is already distrusted by a significant number of Indigenous groups, owing to the history of deception and unethical conduct involved in biometric research on Indigenous people.¹⁸⁵ The conduct underlying *Havasupai Tribe of Havasupai Reservation*¹⁸⁶ is a notorious example and further demonstrates the ethical quagmire of collecting genetic material from Indigenous peoples.

Indeed, the increasing reliance on genetic testing to detect the affinities of CUHRs pushes NAGPRA closer to fulfillment in a strictly material aspect, but it is a deeply flawed remedy. Such testing may attract the ire of Indigenous communities and perpetuate their distrust of genomic

179. See Tsosie, *supra* note 24, at 842 (“[I]n the context of NAGPRA, the United States is attempting to address the egregious history of injustice surrounding its appropriation of Native American bodies and sacred objects and its overt treatment of Native peoples as ‘less than human’ because they were treated as the objects of scientific discovery, rather than as human beings worthy of equal dignity and respect. . . .”); *cf. id.* at 818, 820 (describing the fundamental inconsistency between NAGPRA as Kantian human rights legislation and the fact that its implementation as to CUHRs often tends to discard Indigenous epistemologies in favor of those of colonial entities).

180. See *id.* at 810–11.

181. See, e.g., Rasmussen, *Anzick Boy Genome*, *supra* note 117.

182. See, e.g., *id.*

183. See Rasmussen, *The Ancestry and Affiliations of Kennewick Man*, *supra* note 109, at 455 (describing the acquisition of genomic information by extracting parts of the Ancient One’s metacarpal bone). See also Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 225 (describing the acquisition of genomic information from “bone fragments” of the Anzick Boy found at the site).

184. See Trope & Echo-Hawk, *supra* note 42, at 49.

185. See, e.g., *Havasupai Tribe of Havasupai Rsr. v. Ariz. Bd. of Regents*, 220 Ariz. 214 (Ct. App. 2008). The conduct giving rise to this litigation was an Arizona State University effort to take blood samples from Havasupai tribal members, ostensibly for diabetes research as type 2 diabetes was a widespread health issue among the Havasupai. However, the blood samples were used for archaeogenetic and psychiatric research without the knowledge or consent of the Havasupai, stoking distrust of the scientific establishment—particularly those involved in genetic and biomedical research—among Indigenous groups.

186. See generally *id.*

archaeology as a “vampire science,”¹⁸⁷ and has generally led to an excess of conflicts with Indigenous groups.¹⁸⁸ An excessive reliance on genetic testing risks executing NAGPRA’s human rights aims in an intrinsically flawed manner. Genetic testing of CUHRs is by no means a net wrong—in some cases, Indigenous groups have collaborated in such initiatives.¹⁸⁹ Even so, genetic research simply cannot become the linchpin. This would render the physical desecration of CUHRs the universal cost of repatriation and override a significant part of NAGPRA’s human rights focus. Oral tradition fills this space.

III. AN ORAL TRADITION AMENDMENT TO NAGPRA FOR CULTURALLY UNIDENTIFIABLE HUMAN REMAINS

NAGPRA remains human rights legislation at the core, designed to right the innumerable wrongs perpetrated against Indigenous nations on the part of the United States and the archaeological establishment. Its human rights focus and intent of mending these historic wounds were explicitly stated at its inception on the floor of Congress:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

187. Amelia Cortez et al., DNA Special Issue, *An Ethical Crisis in Ancient DNA Research: Insights from the Chaco Canyon Controversy as a Case Study*, 21 J. SOC. ARCHAEOLOGY 158, 160 (2021).

188. See Debra Harry, *Indigenous Peoples and Gene Disputes*, 84 CHI.-KENT L. REV. 147, 150–154 (2009) (recounting several controversies involving the collection of genetic material from indigenous peoples around the world; namely the *Havasupai* litigation, the nonconsensual use of blood samples from the Nuu-Chah-Nulth people for hundreds of papers’ worth of genetic research, and the use of Maori genetic material to argue that the Maori people in general had a genetic predisposition to substance abuse, violence, and risky behaviors such as gambling (all stereotypically associated with the Maori)).

189. See, e.g., Rasmussen, *Anzick Boy Genome*, *supra* note 117, at 228.

In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. . . .

[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights. . . . This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums. For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate.

. . . [T]his bill represents a major step in correcting an injustice that started over 100 years ago. It is appropriate that Congress take an active role in helping to restore these rights to native Americans.¹⁹⁰ [emphasis added].

At times, the courts have lost sight of this focus, or even blinded themselves to it.¹⁹¹ Great pain has resulted for Indigenous peoples. Though imperfectly implemented and at times generative of controversies that further denied the human rights of Indigenous peoples, the statute has unquestionably been a net good for the cause of Indigenous human rights and self-determination. Even in a time where voluntary repatriation on the part of collecting institutions and Indigenous collaboration with the investigation of cultural affiliation have become increasingly popular,¹⁹² the CUHRs question remains unresolved.

190. 136 Cong. Rec. S17,174–75 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye).

191. See *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004); see also Trask, *supra* note 152, at 64–66.

192. See, e.g., Jack Tamisea, *Meet the Archaeologist Leading the Museum's Repatriation Efforts*, SMITHSONIAN MAG.: NATIONAL MUSEUM OF NATURAL HISTORY (Nov. 30, 2023), <https://www.smithsonianmag.com/blogs/national-museum-of-natural-history/2023/11/30/meet-the-archaeologist-leading-the-museums-repatriation-efforts/> (last visited Apr. 26, 2026); FIELD MUSEUM, *Repatriation at the Field Museum*, <https://repatriation.fieldmuseum.org/> [perma.cc/82CZ-V5WM].

In order to bring NAGPRA closer into line with its aims of furthering human rights, this Note proposes a statutory amendment to NAGPRA's procedural framework for determining the cultural affiliation of CUHRs—specifically, a provision to enshrine oral tradition as a mandatory consideration in assigning cultural affiliation where the provided Western epistemological forms of evidence¹⁹³ are unavailable or inconclusive. Such an amendment would require the gathering and evaluation of oral tradition evidence, or the increased reliance on extant oral tradition evidence, in establishing cultural affiliation in such circumstances. While oral tradition is already listed as a valid form of evidence in NAGPRA's test for determining cultural affiliation,¹⁹⁴ and is afforded equal weight among these forms,¹⁹⁵ its criticality to Indigenous epistemology and self-determination,¹⁹⁶ ability to record events and historical truths outside the reach of other forms of evidence, and ability to hasten repatriation for the countless ancient CUHRs for whom return appears impossible necessitate that it be afforded greater consideration and shielded from fundamental epistemological skepticism¹⁹⁷ on the part of the courts.

This Note further proposes that the amendment include provisions for assessing the reliability of oral traditional evidence as suggested by Smith and practiced by Wiget in *Zuni Tribe*.¹⁹⁸ Not only would mandating the quadripartite test for oral tradition evidence assuage the concerns of the archaeological community that extremely ancient CUHRs may simply be blocked from investigation to the detriment of science and humanity's understanding of its history,¹⁹⁹ but it would also lend credence to oral tradition as a serious form of evidence in the judicial system—and in this, further the “mutual recognition”²⁰⁰ of Indigenous peoples as sovereign nations.

Such a solution is neither radical, unprecedented, nor incompatible with the interests evinced in the statute. NAGPRA's human rights focus has been the subject of continual administrative and legislative discussion, particularly with respect to CUHRs. The NAGPRA Review Committee

193. See *supra* note 22 (providing statutory language).

194. See *supra* note 22 (listing oral tradition and folklore alongside the other forms of acceptable evidence of cultural affiliation, with no indication of to what forms of evidence priority should be given).

195. Smith, *supra* note 19, at 223.

196. See *id.* at 219; see also Trask, *supra* note 152, at 73–75 (describing the consideration of Indigenous oral tradition evidence in court as critical to “mutual recognition” between sovereign governments as practiced during the era of treaty-making between Indigenous nations and Western colonies); cf. Tsosie, *supra* note 24, at 848.

197. *Bonnichsen v. United States*, 367 F.3d 864, 881–82 (9th Cir. 2004).

198. Smith, *supra* note 19, at 224–26.

199. See Tsosie, *supra* note 24, at 842.

200. See Trask, *supra* note 152, at 73; see also *id.* at 75.

(“Committee”) on several occasions responded to outcry by the scientific community and Indigenous groups by seeking to expand on the meaning of CUHRs.²⁰¹ On all such occasions, the Committee recommended that Indigenous groups receive the final say on disposition and that “scientific values should not supersede the ‘spiritual and cultural concerns of Native American people’ who had the closest general affinity to the Native American remains.”²⁰² Moreover, the CUHRs question was of particular concern to Senator John McCain, an early proponent of NAGPRA. In 2007—perhaps in response to the *Bonnichsen* litigation—Senator McCain introduced an amendment striking out the temporality aspect of “Native American” as a group identity in determining cultural affiliation, simply defining it as any group that *is or was* indigenous to the United States.²⁰³ Virulent opposition from the scientific establishment forced the swift tabling of this amendment.²⁰⁴ While such an amendment would do much to advance NAGPRA’s human rights focus with regard to CUHRs, the same aim may be achieved through broader means—more respectful of Indigenous human rights and more in accordance with the statute’s moral posture—through an amendment explicitly requiring primary consideration of oral tradition where scientific evidence fails to establish cultural affiliation or where genetic analysis is unavailable.

Ultimately, repatriation, in accordance with NAGPRA’s overriding intention, is to be prioritized as the end goal. The increased consideration of oral tradition in the question of CUHRs’ cultural affiliation facilitates return and buttresses Indigenous culture and self-determination. In this, the human rights of Indigenous peoples are affirmed,²⁰⁵ and restitution is made for the “reality of the initial political encounter”²⁰⁶ between European colonists and Indigenous peoples and the ensuing depredation of their human remains.²⁰⁷ In this, the wound between Indigenous peoples and the discipline of archaeology²⁰⁸ may begin to be mended.

201. See Tsosie, *supra* note 24, at 835.

202. *Id.*

203. Gunn, *supra* note 58, at 526–27.

204. *Id.* at 527.

205. See Tsosie, *supra* note 24, at 850; *id.* at 810–11 (discussing the human right of Indigenous peoples to reclaim their ancestral dead as established in Articles 11 and 12 of the U.N. Declaration on the Rights of Indigenous Peoples, endorsed by the United States government in 2010); see also *id.* at 848 (discussed *supra* note 143).

206. *Id.* at 845–46.

207. See *id.* at 845.

208. See Colwell-Chantapong, *supra* note 26, at 95 (“Far from an innocuous pursuit, archaeological explorations have played a role in the drama of Native American efforts to protect their lands and dictate their own religious beliefs, identities, and histories. The archaeology of Native America is not only about the power to shed light on the past, but also the ability of native peoples to shape their own futures.”)

CONCLUSION

This Note is a call to remember NAGPRA's fundamental purpose as human rights legislation. NAGPRA was enacted for one primary purpose—to attempt to make amends for the colonial depredation of Indigenous peoples which was foundational to the expansion of the United States,²⁰⁹ and more specifically to repent for the abuse of Indigenous human remains which was ubiquitous in this process.²¹⁰ NAGPRA has been quite successful in the latter regard and has been celebrated for promoting the cultural rights, cultural heritage, and self-determination of Indigenous peoples.²¹¹ In opening the doorway to the mass repatriation of the ancestral dead, NAGPRA has also opened the doorway to affirming the human right of Indigenous peoples, as sovereign nations, to control the fates of their ancestors.²¹² The door is only cracked, however, and still has room to open fully.

By exercising their voice in the practice of archaeology in the United States and taking on their rightful role in determining the fate of their most ancient ancestors, Indigenous peoples counter the worst excesses of American archaeology.²¹³ If the archaeology of Indigenous Americans is a “means of defining and narrating the American soul,”²¹⁴ as Chip Colwell-Chantapongh puts it, NAGPRA has offered an opportunity to tell a new version of the American story—a story that reckons with the legacy of cruelty that underpins this nation's expansion²¹⁵ and leaves space for Indigenous peoples to broadcast that they inhabited this land first, and have done so since time immemorial. Amending NAGPRA to require greater deference to oral tradition and traditional knowledge where Western epistemology cannot prove to which community a CUHR belongs affirms this reality. It straightens its moral spine. As the repatriation movement in the United States continues, and as collecting institutions and Indigenous

209. See NAT'L PARK SERV., *supra* note 3; Tsosie, *supra* note 24, at 845–46.

210. See Trope & Echo-Hawk, *supra* note 42, at 41 (recounting some of the numerous human rights violations involved in the collection of Indigenous human remains by government authorities and collecting institutions alike).

211. See Ann M. Kakaliouras, *The Repatriation of the Palaeoamericans: Kennewick Man/the Ancient One and the End of a Non-Indian Ancient North America*, 4 BJHS THEMES 79, 88 (2019) (“For Native peoples, repatriation also marks the end of the separation between themselves, their ancestors, and many of their sacred objects. This reunification has both been inspired by, and led to, cultural revitalization among many Native groups.”).

212. See Tsosie, *supra* note 24, at 850; Kakaliouras, *supra* note 211, at 88.

213. Colwell-Chantapongh, *supra* note 26, at 95.

214. *Id.*

215. *See id.*

groups finally begin to see eye-to-eye, the future of NAGPRA, and that of the CUHRs whose return it has not yet secured, looks bright.²¹⁶

Intriguingly, recent archaeogenetic research on human remains found in Siberia has demonstrated that modern Europeans and Indigenous Americans share direct common descent from an ancient human population.²¹⁷ Evidently, these bygone people bifurcated somewhere in southern Siberia; some of them went over the Bering Strait into North America, some across the Urals into Europe.²¹⁸ Perhaps more intriguingly, recent investigations have demonstrated that common mythological themes persist among these countless peoples. Most prominent is the concept of a dog as the guardian of the afterlife—one may look at the Greeks and Romans’ fearsome Cerberus as an example.²¹⁹ Similar tales of a psychopomp canine have survived among Indigenous groups such as Siouans and Iroquoians.²²⁰ This dog guards the afterlife and guides the souls of the dead along the Milky Way. Perhaps the repatriation of the most ancient dead, those designated as CUHRs, could guide more souls along the spirit road, and aid the reconciliation of these long-separated peoples.

216. *See id.* at 103 (“Indigenous archaeology . . . provides an epochal path through the wilderness of the discipline’s future, a blending of the arts and sciences that will create more just and accurate understandings of the past and the nature of our material world.”).

217. *See* Anthony & Brown, *supra* note 161, at 104 (describing DNA from ancient human remains found near Mal’ta, Siberia, which proved the existence of an ancient population known as “Ancient North Eurasians” that contributed genes to both modern Europeans and Indigenous Americans).

218. *Id.*

219. *See id.* at 104–06.

220. *Id.* at 105 (citing G.E. Lankford, *The “Path of Souls”: Some Death Imagery in the Southeastern Ceremonial Complex*, in *ANCIENT OBJECTS AND SACRED REALMS: INTERPRETATION OF MISSISSIPPIAN ICONOGRAPHY* 174 (F.K. Reilly III & J.F. Garber eds., 2007) (citing G.E. Lankford, *The Raptor on the Path*, in *VISUALIZING THE SACRED: COSMIC VISIONS, REGIONALISM, AND THE ART OF THE MISSISSIPPIAN WORLD* 240 (F.K. Reilly III & J.F. Garber eds., 2011))).

IN SEARCH OF LOST RELIANCE: REVISITING THE SUPREME COURT'S USE OF RELIANCE IN STARE DECISIS ANALYSIS

BRIAN ROBERTS

INTRODUCTION

With recent landmark cases such as *Dobbs*¹ and *Loper Bright*² that have discarded decades-old precedent, the Supreme Court has become embroiled in public controversy over its treatment of precedent, traditionally subject to stare decisis—the idea that we should treat like cases alike. The judiciary relies on the public's perception for power and legitimacy; neither able to directly control the purse of the United States nor able to dictate the standing army, courts instead gain their influence from the public's perception of the judiciary.³ Stare decisis addresses this need for legitimacy by constraining judges, ensuring they do not yield to personal biases but act as neutral arbiters.⁴ The Court's decision to overturn longstanding cases such as *Roe* and *Chevron* has led to increased public scrutiny, with many beginning to question the Court's impartiality. Considering these developments, analysis of the Court's treatment of stare decisis is due.

Stare decisis is the legal principle that courts should “abide by, or adhere to, decided cases.”⁵ It is a longstanding and fundamental feature of the United States's court system.⁶ Stare decisis has been a significant feature of the common law system because it helps reduce incentives for challenging previously decided cases, fosters evenhanded decision making, contributes

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1. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
 2. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).
 3. Kathleen M. Sullivan, *The Jurisprudence of the Rehnquist Court*, 22 NOVA L. REV. 743, 749 (1998).
 4. *See also id.* (highlighting the fact that some decisions may be explained by the Court's need to preserve legitimacy). Professor Sullivan contends that Justices may favor results that favor a decision that the Justice would not have reached on their own to “diffuse any suspicion that they are caving in to political pressure.” *Id.* *See also* David Cole, *Obamacare Upheld: How and Why Did Justice Roberts Do It?*, THE NATION (June 28, 2012), <https://www.thenation.com/article/archive/obamacare-upheld-how-and-why-did-justice-roberts-do-it/> [<https://perma.cc/HY5N-NY6A>] (“I cannot but think that at the back of Roberts's mind was the Court's institutional standing. Had the law been struck down on ‘party lines,’ the Court's reputation would be seriously undermined.” (discussing Chief Justice Roberts's decision to side with the Court's liberal Justices and uphold the Affordable Care Act in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012))).
 5. 18 MOORE'S FEDERAL PRACTICE, § 134.01 (Matthew Bender 3d ed., 2015 supp.) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring)).
 6. *Id.*

to the actual and perceived integrity of the judicial process, and restrains judicial hubris.⁷ The Supreme Court considers many factors when deciding whether to follow *stare decisis* or to overrule a previous decision.⁸ Paramount among the factors routinely used by the Supreme Court are the reliance interests at stake in deciding to overrule the decision.⁹

The reliance-interest factor requires the Court to consider whether overruling the challenged decision would create special hardships.¹⁰ People and businesses structure their lives according to their expectations of their legal rights and obligations as articulated in judicial opinions.¹¹ These expectations are in turn strengthened by the principle of *stare decisis*.¹² Operating under this reliance on judicial precedent, people's lives may be disrupted and expectations upset when a precedent is overturned.¹³ As an illustrative example, one may look to the *Dobbs* decision. *Dobbs* had immediate and far-reaching consequences as people began to reorder their lives according to the Supreme Court's pronouncement.¹⁴ The preservation of these expectation interests is a critical component of what gives the judicial system its authority and power.¹⁵

The judiciary also gains its power through maintaining an appearance as a neutral arbiter. If the Court's use and analysis of *stare decisis* does not appear to be neutral, the Court risks damaging its authority.¹⁶ The Court must therefore maintain a workable, neutral framework to utilize in its *stare decisis* analysis. Unfortunately, the Court's current use of reliance has been anything but neutral. While there are a few types of reliance that the Court has used when deciding to overturn precedent, reliance interests are often a

7. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263–64 (2022).

8. See 18 MOORE'S FEDERAL PRACTICE, *supra* note 5, § 134.06 (providing a list of eleven factors that the Supreme Court may use when deciding whether to overrule prior precedent or not).

9. *Id.*; Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 414 (2010). See also Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1860 (2023) (noting that Justice Gorsuch suggested reliance of the public in constitutionally protected liberties is one of the most important kinds of reliance interests for the Court to consider).

10. Kozel, *supra* note 9, at 414.

11. Varsava, *supra* note 9, at 1846.

12. *Id.*

13. *Id.*

¹⁴ After *Dobbs*, many clinics began providing more abortions, significantly driven by increased out-of-state patients. Further, some clinics have begun mailing abortion-inducing medication to patients out of state through telehealth appointments. Lily Lau, Mei Liu & Brad Jones, *Post-Dobbs Era: Evolving Abortion Care Restrictions and Public Health Impact*, 116 AM. J. PUB. HEALTH 317, 317 (2026).

15. Kozel, *supra* note 9, at 414–15 (arguing that because reliance interests are critical to the values of *stare decisis*, doctrinal reform is necessary to create a more consistent *stare decisis* analysis).

16. Joseph Daniel Ura & Allison Higgins Merrill, *The Supreme Court and Public Opinion*, in THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 432, 442 (Lee Epstein & Stephanie A. Lindquist eds., 2017) (discussing the relationship with politically salient decisions and their impact on the Court's legitimacy).

determinative factor in the Court’s analysis. But the Court’s reliance-interest analysis often lacks clear and manageable standards. This has led to the Court being criticized for its ability to “massage the scope and nature of affected interests to discard . . . precedent.”¹⁷

Recent cases like *Dobbs* and *Loper Bright* illuminate how the Court analyzes precedent and reliance interests. In both *Dobbs* and *Loper Bright*, the Court assesses reliance costs and whether to overturn precedent.¹⁸ In *Dobbs*, Justice Alito’s opinion addressed tangible and intangible reliance on *Roe*¹⁹ and *Casey*²⁰ to determine whether the reliance costs outweighed overturning *Casey*.²¹ In doing so, Alito noted that the unplanned nature of abortions leads to intangible reliance on the right to abortion.²² He further reasoned that the Court is ill-suited to evaluate claims of intangible reliance.²³ Therefore, his opinion reasoned that reliance interests did not weigh in *Casey*’s favor.²⁴ In *Loper Bright*, decided two years later, Chief Justice Roberts affirmatively denied that the *Chevron* doctrine had engendered any “meaningful” reliance.²⁵ In fact, Roberts went as far as declaring that *Chevron* “affirmatively destroys” reliance interests.²⁶ He reached this conclusion by claiming that the *Chevron* deference doctrine acts as a license to agencies to change positions as many times as they wish.²⁷

Dobbs and *Loper Bright* both fall within the most famous and consequential landmark cases of the Supreme Court’s history, along with

17. Note, *The Thrust and Parry of Stare Decisis in the Roberts Court*, 137 HARV. L. REV. 684, 693 (2023) [hereinafter Note, *Thrust and Parry*] (arguing Justices will minimize reliance interests and dismiss them as either insufficiently concrete or limited in extent).

18. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 287–90 (2022) (stating that concrete reliance interests arise when “advance planning of great precision is most obviously a necessity,” and that, when the Court is unable to find reliance in this traditional sense, it cannot assess nonconcrete, intangible forms of reliance because it is ill-equipped to do so (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992))); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410–12 (2024) (holding that *Chevron* deference fosters unwarranted instability, creating an “eternal fog of uncertainty” (discussing *Chevron USA Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that courts should defer to the interpretation of federal agencies when legislation is ambiguous))). See also Varsava, *supra* note 9, at 1911–12 (providing commentary on the Court’s analysis of reliance interests in *Dobbs* and the impact of *Dobbs* as precedent about precedent on future cases).

19. *Roe v. Wade*, 410 U.S. 113 (1973).

20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

21. *Dobbs*, 597 U.S. at 287–90 (holding that, when a concrete reliance interest is asserted, the Court can adequately assess the claim but cannot assess claims relying on intangible forms of reliance that are difficult for Courts, or anyone, to evaluate).

22. *Id.* at 288.

23. *Id.*

24. *Id.* at 290.

25. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 410 (2024).

26. *Id.*

27. *Id.* at 410–11.

cases like *Plessy*²⁸ and *Brown*.²⁹ Such landmark cases generate outside publicity. When the Supreme Court decides to overturn landmark cases, it can undermine the principles of stare decisis it claims to value—namely, the values of fostering neutrality, protecting the perceived integrity of the Supreme Court, and restraining Justices. Without clear workable guidelines on how to properly evaluate reliance interests, the Court risks fashioning creative arguments to satisfy its interpretive goals. In turn, this will only erode the Court’s legitimacy and image. A better framework is necessary.

This Note argues for a new framework for evaluating reliance interests in the Court’s stare decisis analysis. It asserts that certain types of reliance should not be accounted for in the Court’s analysis. Instead, to improve analytical workability and the values that stare decisis aims to promote, the Supreme Court should adopt more objective standards to evaluate the strength of precedent. By adopting this approach to stare decisis analysis, the Court will prevent the deterioration of its perceived integrity and constrain judges.³⁰

Part I begins by describing the principle of stare decisis in more detail, giving its history within American jurisprudence and its use through the modern-day Supreme Court. Part II analyzes the Court’s use of the reliance cost factor in various cases to illustrate how the Court manipulates reliance cost to reach its favored decision. Finally, Part III provides commentary on how to transform reliance interest jurisprudence in its current form as an ineffectual subjective factor in stare decisis analysis to a more workable and objective standard that can provide fairer results.

I. DOCTRINAL HISTORY

A. *Stare Decisis*

Stare decisis is the legal principle that courts should “abide by, or adhere to, decided cases.”³¹ The principle predates Blackstone and influenced the

28. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

29. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Both *Plessy* and *Brown* were discussed within *Casey* to illustrate the need for a deeper evaluation of the reliance interests at stake in *Casey* and to demonstrate stare decisis demanded adherence to *Roe*. *Planned Parenthood v. Casey*, 505 U.S. 833, 862–64 (1992).

30. Alexander Lazaro Mills, *Reliance by Whom? The False Premise of Societal Reliance in Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2096 (2017) (arguing that using reliance analysis within the stare decisis calculus is untenable because the idea that public opinion factors into the Court’s decisions undermines the Court’s conception of legitimacy).

31. 18 MOORE’S FEDERAL PRACTICE, *supra* note 5, § 134.01 (quoting *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring)).

Founding Fathers.³² Hamilton discussed stare decisis in the Federalist Papers, stating that to avoid arbitrary decisions, it is indispensable that courts be bound by rules and precedents to define and point out their duties in the cases before them.³³ Madison took note that written laws had a degree of uncertainty and, consequently, a range of indeterminacy.³⁴ For Madison, early interpreters of a statute or constitutional provision could provide a permissible construction, and subsequent interpreters would be bound to follow that interpretation.³⁵ If subsequent interpreters remained convinced that the interpretation given to the statute or constitutional provision went beyond the range of ambiguity, then there would no longer be a presumption that the previous interpretation was permissible.³⁶ One exception raised frequently by judges involved property.³⁷ If legal title had passed or transactions conducted in accordance with prior precedent, a reliance interest would take root, providing reason to adhere to precedent.³⁸

Prior to 1916, stare decisis had only been mentioned in forty published Supreme Court opinions.³⁹ Justice Brandeis helped shape the Court's prior stare decisis analysis into a coherent framework.⁴⁰ This culminated in Justice Brandeis's storied dissent in *Burnet v. Coronado Oil & Gas Co.*⁴¹ This dissent is still cited for both its weak and strong stare decisis applications.⁴² In *Coronado Oil*, Justice Brandeis remarked that stare decisis is not an "inexorable command" and is at its weakest in cases involving the Constitution, because any correction through legislative action would be "practically impossible."⁴³ However, Justice Brandeis also identified stare decisis as "the wise policy, because in most matters it is more important that

32. Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 93 n.31 (2020) (listing two historical theories of when stare decisis may have developed). See generally David C. Walker, *Presidential Power Policies*, 114 L. LIBR. J. 167, 168–71 (2022) (providing a history of the development of stare decisis from the reign of King Henry II to Blackstone and its legal realist critics).

33. Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 9 (2001).

34. *Id.* at 11.

35. *Id.* at 13.

36. *Id.* at 14. See also *id.* at 19 (detailing how this framework was widespread throughout the states).

37. *Id.* at 20.

38. *Id.* at 20–21.

39. Gentithes, *supra* note 32, at 93, 93 n.33 ("[T]he vast majority of these early stare decisis references involved no analysis. . . . Instead . . . the maxim usually served a simple rhetorical function." (quoting Colin Starger, *The Dialectic of Stare Decisis Doctrine*, in PRECEDENT IN THE UNITED STATES SUPREME COURT 19, 29 (Christopher J. Peters ed., 2013))).

40. Gentithes, *supra* note 32, at 93.

41. 285 U.S. 393 (1932) (Brandeis, J., dissenting).

42. Gentithes, *supra* note 32, at 93–94. See generally Nelson, *supra* note 33, at 50–53 (for discussion on weak and strong stare decisis).

43. 285 U.S. at 405–07.

the applicable rule of law be settled than that it be settled right.”⁴⁴ These comments became the backbone of modern stare decisis analysis.⁴⁵ Following Justice Brandeis’s dissent, discussion of stare decisis and its proper application have become much more common.⁴⁶

Stare decisis is an important feature of the judicial system.⁴⁷ It helps advance the notion of a “rule of law,” the concept that judges have a duty to apply the law evenly and consistently to all cases.⁴⁸ Stare decisis provides a policy of self-restraint that makes the law a safe basis for individual planning and increasing stability.⁴⁹ This self-restraint is achieved by keeping jurisprudential disagreements between Justices in check.⁵⁰ In addition to stability, stare decisis also promotes efficiency by eliminating the need for the Court to revisit issues.⁵¹ The doctrine can also promote equality and legitimacy.⁵² Adhering to precedent strengthens the idea that courts act as neutral arbiters who treat similarly situated individuals alike. Americans take comfort in the knowledge that all are treated the same under

44. *Id.* at 406.

45. Compare *Gentithes*, *supra* note 32, at 93–95 (stating that Justice Brandeis appeared to suggest that poorly reasoned precedents could be overruled, similar to how Justices seeking to utilize a weak stare decisis focus primarily on the quality of the reasoning when determining whether to overrule precedent) with *Gentithes*, *supra* note 32, at 96 (noting Justice O’Connor’s opinion in *Arizona v. Rumsey*, claiming that prior decisions, no matter how substantively incorrect, could only be overturned when some “special justification” was present (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984))).

46. See *Dobbs*, 597 U.S. 215, and *Casey*, 505 U.S. 833, for discussions on how to apply stare decisis analysis.

47. 18 MOORE’S FEDERAL PRACTICE, *supra* note 5, § 134.01.

48. William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 59 (2002) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139–43 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

49. Varsava, *supra* note 9, at 1849–51 (stating that stability and predictability are the primary goals of the “first layer” of stare decisis).

50. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013) (“Absent a presumption in favor of keeping precedent, and absent the system of written opinions on which stare decisis depends, new majorities could brush away a prior decision without explanation.”). See also Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) (“The force of the doctrine . . . lies in its propensity to perpetuate what was initially judicial error or to block reconsideration of what was at least arguably judicial error.”).

51. Consovoy, *supra* note 48, at 60–61 (noting how the administrative burden of evaluating like cases anew would be “overwhelming” and result in an inefficient use of judicial resources).

52. *Id.* at 61–63.

the law.⁵³ In a similar vein, the concept of reliance has also been advanced as a justification for the doctrine.⁵⁴ When a court upholds a prior decision, even if imperfect, it creates stability by demonstrating the court's preference for predictable laws over the pursuit of perfection.

The current Court is less convinced by these benefits. In response to the Court's willingness to overturn landmark cases such as *Dobbs* and *Loper Bright*, citizens urged President Biden to pack the Supreme Court,⁵⁵ called for sitting Justices to be impeached,⁵⁶ and soured on the Court—all leading to a historic decline in the public's opinion of the Court.⁵⁷ To illustrate, in his confirmation hearing, Justice Kavanaugh replied to the question on how he would rule on a challenge to *Roe* by responding, “[*Roe*] is settled as a precedent of the Supreme Court, entitled the respect under principles of

53. *Id.* at 61. *See also id.* at 61 n.36 (arguing that the true value of stare decisis is in the social context rather than in the legal context). Importantly, not all Americans share this sentiment. And indeed, over our nation's history various groups have been treated differently under our laws. There are many illustrative cases, but Equal Protection Clause litigation demonstrates this well. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Chinese immigrants claiming discrimination); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Black Americans claiming discrimination); *United States v. Virginia*, 518 U.S. 515 (1996) (women claiming discrimination); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (Asian-American students claiming discrimination).

54. *Id.* at 63. *See also Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“Stare decisis . . . fosters reliance on judicial decisions.” (emphasis omitted)).

55. Jordan Rubin, *Planned Parenthood Wants to Pack the Court*, MSNBC (May 15, 2023, 3:32 p.m.), <https://www.msnbc.com/deadline-white-house/deadline-legal-blog/planned-parenthood-supreme-court-packing-abortion-rcna84426> [<https://perma.cc/BWD4-AEH9>] (detailing calls by Planned Parenthood's CEO for expanded courts and term limits). *See also ICYMI: Pressley, Markey, Warren, Advocates Call for Major Supreme Court Reforms*, CONGRESSWOMAN AYANNA PRESSLEY (Apr. 24, 2023), <https://pressley.house.gov/2023/04/24/icymi-pressley-markey-warren-advocates-call-for-major-supreme-court-reforms/> [<https://perma.cc/9WX2-SWT3>] (announcing attempts of Congresswoman Pressley and Senators Markey and Warren to advocate for a Supreme Court expansion in a twenty-stop nationwide tour).

56. Frederic J. Frommer, ‘I Would Vote to Impeach Him Right Now’, POLITICO, (Sept. 16, 2022, 4:30 a.m.), <https://www.politico.com/news/magazine/2022/09/16/when-republicans-tried-to-impeach-a-supreme-court-justice-00056744> [<https://perma.cc/4JHD-X87L>] (noting Congresswoman Alexandria Ocasio-Cortez's anger at Justices Kavanaugh and Gorsuch for voting to overturn *Roe* after remarks suggesting they would not overturn *Roe* and considering their votes to overturn *Roe* an impeachable offense). *See also Victoria Bekiempis, Roe v. Wade: Senators Say Trump Supreme Court Nominees Mised Them*, THE GUARDIAN, (June 25, 2022, 12:42 p.m.), <https://www.theguardian.com/us-news/2022/jun/25/gorsuch-kavanaugh-mised-senators-roe-v-wade> [<https://perma.cc/HQ2Z-QZVW>] (detailing beliefs of Senators Collins and Manchin that they were deceived by both Justices regarding how they would vote on cases on the right to abortion).

57. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sept. 3, 2025), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/> [<https://perma.cc/XV6J-8LZU>] (finding that half of Americans have an unfavorable view of the Supreme Court, near a three-decade low). This public opinion is an example of specific support. Diffuse support for the Court, despite recent controversial decisions, remains relatively constant. *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/DP53-VE8C>] (measuring public confidence in the Supreme Court over time).

stare decisis.”⁵⁸ Justice Kavanaugh then proceeded to join the majority overturning *Roe* in the *Dobbs* decision.⁵⁹ His vote against *Roe* after stating that he believed it settled precedent angered many citizens and senators alike. Of course, his decision to join the Court in overturning *Roe* is not strictly inconsistent with his confirmation hearing’s response; however, his decision does raise questions on how much deference he gave *Roe*’s status as precedent when deciding *Dobbs*.

B. The Forms of Stare Decisis

There are two types of stare decisis present within the legal system: vertical and horizontal stare decisis.⁶⁰ Vertical stare decisis requires lower courts to follow the decisions of higher courts; horizontal stare decisis is a court’s practice of deferring to its own decisions.⁶¹ Vertical stare decisis is widely considered settled and is followed by lower courts without much controversy.⁶² Horizontal stare decisis is a much more unsettled issue, however, and debates continue on the proper application of horizontal stare decisis.⁶³ One reason that horizontal stare decisis is not as settled as vertical stare decisis is that the practice behind horizontal stare decisis—being bound to the decisions made by predecessors—is an uncommon practice in non-judicial settings.⁶⁴

Further, the relative power of horizontal stare decisis can change depending on the court.⁶⁵ For example, it is essentially nonexistent in district courts, a strong, “absolute” rule in courts of appeals, and a “soft” rule within the Supreme Court.⁶⁶ Precedents have also been divided into categories that carry different strengths.⁶⁷ Statutory precedents receive a “super-strong”

58. Becky Sullivan, *What Conservative Justices Said—and Didn’t Say—About Roe at Their Confirmations*, NPR (June 24, 2022, 3:44 p.m.), <https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings> [<https://perma.cc/JPJ9-BRKL>].

59. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

60. Walker, *supra* note 32, at 171.

61. *Id.*

62. Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 124–25 (2018) (analogizing vertical precedent to the practice of a private following the orders of their sergeants or captains and calling vertical precedent a “widely accepted feature” of our judicial system).

63. *Id.* at 125. *See also* Walker, *supra* note 32, at 171 (noting how the principle of stare decisis differs among states in practice). Justice Scalia was a prominent critic of horizontal stare decisis. *See* Schauer, *supra* note 62, at 126–27 (noting that while Justice Scalia often criticized the idea of stare decisis, he acknowledged its pragmatic or principled virtue).

64. Schauer, *supra* note 62, at 125–26 (claiming “we do not expect presidents or members of Congress to make the same decisions as their predecessors”).

65. Barrett, *supra* note 50, at 1712–13.

66. *Id.* at 1713.

67. *Id.*

stare decisis effect, common-law cases receive medium effect, and constitutional cases typically receive the weakest effect and are the easiest to overrule.⁶⁸

In addition to vertical and horizontal stare decisis, there is strong and weak stare decisis.⁶⁹ Under a strong stare decisis framework, a court will follow precedent unless there is a special justification to overrule it.⁷⁰ For example, the precedent may have proven itself unworkable or is causing issues.⁷¹ Conversely, the weak stare decisis framework begins by asking whether the precedent reflects a permissible or impermissible view of the underlying law.⁷² If the Court determines that the precedent does reflect a permissible view of the law, it will then proceed under the strong stare decisis framework.⁷³ Conversely, if the precedent is an impermissible view of law, the Court will deem the precedent to be demonstrably erroneous, and the precedent will be destined to be overturned unless there is a practical reason for adhering to it.⁷⁴ The weakened form of stare decisis has been advocated as better for society because it permits society to challenge the propositions of the Constitution and allows the Court to navigate controversial areas while leaving room for reconsideration.⁷⁵ In recent years, this weakened form of stare decisis has become a cornerstone of the Roberts Court's jurisprudence.⁷⁶ However, the weakened form has proven to be malleable, giving Justices considerable leeway when deciding whether

68. *Id.*

69. Nelson, *supra* note 33, at 53.

70. Gentithes, *supra* note 32, at 87–88 (including precedents that defy workability, are subject to special reliance interests, are remnants of abandoned doctrine, or were based on facts that have changed significantly—causing the rule to be no longer applicable as potential justifications a court may consider).

71. Nelson, *supra* note 33, at 53.

72. *Id.*

73. *Id.*

74. *Id.* See also Gentithes, *supra* note 32, at 87 (describing the weak tradition of stare decisis as positing poor reasoning as a substantive consideration in determining whether to overrule precedent); Michael Gentithes, *Concrete Reliance on Stare Decisis in a Post-Dobbs World*, 14 CONLAWNOW 1, 2–3 (2022) (asserting that Justice Brandeis's famous statements that “[s]tare decisis is not . . . a universal, inexorable command” and “[the] Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained” provided fodder for the evolution of strong and weak stare decisis (emphasis omitted)).

75. Barrett, *supra* note 50, at 1723–24 (acknowledging Post and Siegel's arguments that “[b]acklash to judicial decisions . . . demonstrates that for some constitutional questions, authoritative settlement is neither possible nor desirable” (quoting Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007))).

76. See Gentithes, *supra* note 74, at 1 (noting how *Dobbs* has elevated a weakened form of stare decisis and its rise over the recent decades).

to follow precedent.⁷⁷ This malleability has been abused by Supreme Court Justices to advance preferred outcomes.⁷⁸

C. *Reliance Interests*

When the Supreme Court decides to revisit a prior precedent, it engages in a multi-factor analysis.⁷⁹ The Court may consider if the precedent has become unworkable, if the decision was well-reasoned, and whether the precedent has had any disruptive effects on other areas of law.⁸⁰ Additionally, the Court will look to the reliance interests at stake.⁸¹ Because courts expect individuals to order their lives according to the laws of the nation, courts must determine how strong reliance on precedent has become. If reliance on precedent is strong enough, the court may determine that the precedent warrants deference.

Professor Kozel has identified four types of reliance interests: specific, governmental, doctrinal, and societal.⁸² Specific reliance is perhaps the most obvious form of reliance; it exists when an individual takes action or orders their affairs in dependence on the rule set forth in a precedent.⁸³ Governmental reliance occurs when the legislative and executive branches act on reliance of the Supreme Court's rulings.⁸⁴ Doctrinal reliance refers to reliance by the Supreme Court itself on its prior precedent.⁸⁵ Because precedent tends to build on itself, if a "foundational" precedent is overruled, the structure of the precedent that other cases rely on may be upset, causing

77. Note, *Thrust and Parry*, *supra* note 17, at 684–85 (arguing that stare decisis is not “‘a bedrock principle of the rule of law’ but rather a malleable rhetorical tool” that provides Justices “rhetorical cover for overturning precedent, even when its applicability is indisputable” (quoting Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1537 (2008))).

78. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402, 404–05 (1988) (calling stare decisis a “doctrine of convenience” for both liberals and conservatives because it is inherently subjective, leaving many justices unable to resist the temptation to manipulate it); *see also* Barrett, *supra* note 50, at 1714 (“Thus, some living constitutionalists have argued for freedom to overrule lest precedent hinder progress, and some originalists have argued for freedom to overrule lest doctrine trump the document.”).

79. *See* 18 MOORE’S FEDERAL PRACTICE, *supra* note 5, § 134.06 (providing a list of eleven factors that the Supreme Court may use when deciding whether to overrule prior precedent or not).

80. *Id.*

81. Kozel, *supra* note 9, at 414.

82. *Id.* at 452.

83. Mills, *supra* note 30, at 2103.

84. Kozel, *supra* note 9, at 454.

85. *Id.* at 459.

uncertainty.⁸⁶ Finally, societal reliance refers to the effect precedent has had on shaping societal perceptions about our country, government, and rights.⁸⁷

II. ADDRESSING THE USE OF RELIANCE IN STARE DECISIS ANALYSIS

A. *Use of Stare Decisis in the Supreme Court*

An infamous case that illustrates stare decisis at its maximum power is *Federal Baseball*.⁸⁸ *Federal Baseball* involved the precursors to the modern-day MLB: the National League of Professional Base Ball Clubs and American League of Professional Base Ball Clubs.⁸⁹ Both clubs were sued for violating antitrust laws and conspiring to monopolize the baseball business.⁹⁰ Much as today, clubs were located in cities across the United States.⁹¹ Teams traveled across state lines to compete for league pennants and the World Championship.⁹² Because competition was interstate, the plaintiff, a member of a smaller baseball league competing with the two bigger leagues, argued that the two leagues engaged in interstate commerce and violated antitrust laws by conspiring to monopolize the baseball business.⁹³

Surprisingly, the Court held that the baseball leagues had not violated antitrust rules because the teams' interstate travel was "a mere incident, not [an] essential" component to the exhibition of baseball games.⁹⁴ Despite this ruling, the Court refused to extend the holding to any other organization that attempted to offer a similar incidental-travel argument.⁹⁵ Despite rejecting the reasoning of *Federal Baseball* on numerous occasions, however, the Court continued to allow baseball to be effectively immune from antitrust

86. *Id.* See also *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 472 (2024) (Kagan, J., dissenting) (labeling *Chevron* as "more than a single decision" because the Supreme Court had upheld an agency's reasonable interpretation of a statute at least seventy times and lower courts had applied *Chevron*'s framework thousands of times).

87. *Kozel*, *supra* note 9, at 460.

88. *Fed. Baseball Club, Inc. v. Nat'l League of Pro. Baseball Clubs*, 259 U.S. 200 (1922).

89. *Id.* at 207.

90. *Id.*

91. *Id.* at 208.

92. *Id.*

93. *Id.* at 207–08.

94. *Id.* at 209.

95. See, e.g., *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 274 (1923) (holding, the very next term after *Federal Baseball*, that "what in general is incidental, in some instances may rise to a magnitude that requires it to be considered independently"); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955) (refusing to extend antitrust exemption to the sport of boxing); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957) (refusing to extend antitrust exemption to football).

laws.⁹⁶ The key reason that the Supreme Court has upheld the antitrust exception for what is now the MLB was the reliance by the baseball leagues on the Court's decision to exclude the sport from antitrust laws and the subsequent investment on that reliance.⁹⁷ *Federal Baseball* and the cases that followed are strong examples of how entrenched reliance may justify preserving precedent.

Roe and its progeny, *Casey* and *Dobbs*, have likewise been important Supreme Court cases not only for their landmark rulings on the constitutional right to abortion, but also for the reliance interest analysis expounded in the Court's opinions.⁹⁸ *Roe* established a constitutionally recognized right to an abortion.⁹⁹ In *Roe*, the majority conceded that states have an interest in protecting fetal life but balanced this interest against a woman's right to privacy and autonomy over her body.¹⁰⁰ The Court balanced these interests by creating a trimester framework that dictated when abortions could be performed.¹⁰¹ *Roe* faced immense criticism immediately following its pronouncement from both the public and scholars.¹⁰² Numerous challenges were subsequently brought before the Court, with *Casey* being the most consequential challenge to *Roe*.¹⁰³

96. See *Nat'l Football League*, 352 U.S. at 450–52 (providing a history where the Court has refused to extend or overturn *Federal Baseball*). See also 15 U.S.C.A. § 26b (West) (describing the scope of antitrust laws to professional major league baseball); 15 U.S.C.A. § 1291 (West) (exempting professional baseball from antitrust laws pertaining to the broadcasting of sports).

97. See *United States v. Shubert*, 348 U.S. 222, 229–30 (1955) (recognizing that for thirty years, *Federal Baseball* excluded baseball from antitrust laws and during that period, in reliance on the *Federal Baseball* precedent, the business had grown and developed); see also *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953) (discussing how baseball had developed on its understanding that it was not subject to antitrust laws and any changes should come from the legislature). The Court seems to defer to precedent because the legislature had not acted to subject the sport to antitrust laws. But see *Flood v. Kuhn*, 407 U.S. 258, 288 (1972) (Douglas, J., dissenting) (“[t]he unbroken silence of Congress should not prevent us from correcting our own mistakes” and the erroneous decision of *Federal Baseball*).

98. See *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (detailing how people have organized their affairs and lives for two decades in reliance that abortion would be available); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 288 (2022) (labeling the reliance interests asserted in *Casey* as “novel” and “intangible” and stating that traditional reliance issues were not present because abortions are an unplanned activity).

99. *Roe v. Wade*, 410 U.S. 113, 154 (1973) (holding that the right to privacy included a right to an abortion, considered against state interests in regulation).

100. *Id.* at 162–64.

101. *Id.* at 164 (stating that during the first trimester, a woman's right to an abortion is left to her and her physician; when she reaches the second trimester, the state has an interest in potential human life and can, if it chooses, regulate abortion in ways reasonably related to maternal health; in the final trimester, a state can regulate, and even outlaw, abortion).

102. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

103. See *Casey*, 505 U.S. at 844 (“Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.”).

In *Casey*, a group of physicians and abortion clinics challenged a Pennsylvania statute requiring minors to receive informed consent and married women to give their husbands notice of their intended abortion.¹⁰⁴ In the Court's stare decisis analysis, the Court began by looking at whether *Roe* had proven unworkable, and operated under a strong stare decisis framework.¹⁰⁵ The Court quickly moved onto the reliance interests present, where it spent three paragraphs analyzing the reliance of women on *Roe*.¹⁰⁶ The *Casey* opinion began with an admission that traditional reliance considerations, which typically occur in property and contract cases, were not present.¹⁰⁷ The plurality then rejected the view that reliance on the right to abortion can be limited to specific instances of sexual activity.¹⁰⁸ Instead, the Court asserted that such a view refuses to acknowledge the fact that for decades people have "organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."¹⁰⁹ The Court further reasoned that a woman's ability to participate equally in the economy and in the social life of the nation had been aided by their ability to control their reproductive lives.¹¹⁰ While the plurality admitted that the reliance on *Roe* could not be quantitatively measured, they asserted that neither could the cost of overruling *Roe*.¹¹¹ *Casey* adopted an expansive view of reliance interests, claiming that people have structured their lives in reliance on the availability of abortion.¹¹² That sweeping view of reliance on personal decisions and planning sufficed to justify keeping *Roe*'s central holding in the plurality's opinion.¹¹³ *Casey* did, however, replace *Roe*'s trimester scheme with a new undue burden standard.¹¹⁴

Dobbs dealt the death blow to *Roe* and *Casey*, rejecting much of the reasoning underlying the two cases.¹¹⁵ In *Dobbs*, a challenge was brought

104. *Id.* at 844–45.

105. *Id.* at 855 (dismissing the unworkability of *Roe* in two sentences before moving onto the reliance interests at stake).

106. *Id.* at 855–56.

107. *Id.* ("Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context . . . it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.").

108. *Id.* at 856.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 874–79 (stating that where state regulation imposes an undue burden on a woman's ability to receive an abortion, "the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause"—violating a constitutional right).

115. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231, 268 (2022) (calling *Roe* an "abuse of judicial authority" and "egregiously wrong").

against a Mississippi law that generally banned abortions after fifteen weeks.¹¹⁶ The opinion began its legal analysis by looking to whether the Fourteenth Amendment’s reference to “liberty” protects a right to abortions.¹¹⁷ To do so, the majority engaged in a lengthy thirty-five-paragraph analysis on the history of the Fourteenth Amendment and of abortion in both the U.S. and abroad.¹¹⁸ After reaching the conclusion that *Roe* and *Casey*’s right to abortion is an impermissible reading of the Fourteenth Amendment—an example proceeding under a weak stare decisis framework—the Court then began analyzing its stare decisis factors.¹¹⁹

In its stare decisis analysis, the majority maintained that the lack of concrete reliance interests weighed in favor of overruling *Casey*.¹²⁰ The *Dobbs* majority then quoted *Casey*, where the plurality described abortion as an unplanned activity, and cast aside any contention that conventional, concrete reliance interests were present.¹²¹ The majority then claimed the Court is ill-equipped to measure intangible forms of reliance and proceeded to overturn *Roe*.¹²² Notably, the dissent echoed the *Casey* plurality, claiming “women now of childbearing age have grown up expecting that they would be able to avail themselves of *Roe*’s and *Casey*’s protections.”¹²³

Beyond the abortion rights cases discussed above, the Supreme Court has also dismissed reliance interests if those who have relied on the precedent can quickly reorder their lives in response to the Court’s new rule.¹²⁴ The Court then weighs reliance interests against any countervailing

116. *Id.* at 230.

117. *Id.* at 234.

118. *Id.* at 235–50.

119. *Id.* at 263.

120. *Id.* at 287–88.

121. *Id.*

122. *Id.* at 288–89.

123. *Id.* at 405 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

124. *See, e.g.,* *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009) (where Justice Scalia argues that any criminal who has relied on the precedent of *Jackson* to “order his affairs” would be capable of adjusting to the new rule pronounced by the Court (discussing *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding that once a defendant has invoked his right to counsel, police may not initiate interrogation of the defendant and any confessions received during an invalid interrogation cannot be used against the defendant), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009))).

interests in overturning precedent.¹²⁵ In each case, the Court must make a value decision, deciding whether there has been sufficient reliance on the precedent that overturning it would lead to injustice.

B. Problems in the Supreme Court's Use of Reliance Interests

The Supreme Court is wise to consider the reliance that society has placed on the Court's previous decisions. Stable legal systems provide immense benefits, such as providing predictability and improving efficiency. While the Court has acknowledged the importance of considering reliance interests, the Court has not always been consistent in its evaluation of reliance. The Court has struggled in determining precisely when there has been *sufficient* reliance to justify preserving precedent.¹²⁶ While hard and fast delineation is difficult and likely ill-advised due to the nature of individualized claims and the desire to achieve substantive justice for aggrieved parties, the standard present in the Supreme Court's jurisprudence is unsustainable if the Court wishes to maintain long-term legitimacy. *Federal Baseball's* holding may not anger many Americans, but controversial decisions such as *Dobbs* threaten to irreparably harm the Court's reputation.¹²⁷ If the Supreme Court is to continue to be seen as a neutral, fair arbiter that aims to pursue equal justice under law, then the Court's reliance interest analysis must have clearer parameters.

Karl Llewellyn once remarked that case law precedents are malleable and subject to conflicting applications.¹²⁸ His framework provides an opportunity to demonstrate that *stare decisis*, like other interpretive canons, are easily manipulated.¹²⁹ While *stare decisis's* manipulability itself does

125. See *Arizona v. Gant*, 556 U.S. 332, 349 (2009) (acknowledging police officers' reliance on the *Belton* rule pronounced by the Court but rejecting it as enough to prevent the Court from overruling *Belton* because of a countervailing interest that individuals share in having their constitutional rights protected outweighs police officers' reliance interests (discussing *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile")); *Ramos v. Louisiana*, 590 U.S. 83, 108–11 (2020) (The Court noted how the reliance interests involved did not rely on a property interest and instead on the fact law enforcement may need to retry some cases. However, the Court found the constitutional rights of defendants to outweigh the reliance interests involved.)

126. See *Consovoy*, *supra* note 48, at 64 ("In the end, the point at which reliance reaches a level of societal/political importance is fairly indeterminate. Despite not being readily discernible . . . reliance arguments have been of critical import in constitutional adjudication.")

127. See *Ura & Merrill*, *supra* note 16, at 441 (arguing that public opinion in the long run may be impacted by the Court delivering opinions contrary to the public's demands). *But see Ura & Merrill*, *supra* note 16, at 449 (describing a legitimization theory that claims that the public may sour on the Supreme Court in the short term after politically salient decisions, but adopt the Court's view over time).

128. Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 916 (2016).

129. Note, *Thrust and Parry*, *supra* note 17, at 685.

not lead to the conclusion that precedent should hold no value, it is an important issue because precedent's value is called into question more frequently in hard cases.¹³⁰ Further, when stare decisis is, or perceived as, manipulated, Justices are more likely to be considered unrestrained.¹³¹ Looking at the cases discussed above, it can be difficult to reconcile the Court's use of reliance in each case. But it is possible to find patterns in the Court's decisions by examining the types of reliance present in each case.

C. A New Framework

Professor Kozel provides a strong framework for understanding reliance interests, but improvement is possible. Professor Kozel lists specific reliance as an independent category.¹³² But specific reliance may best be understood as a sub-category of the other three—societal, governmental, and doctrinal. For example, societal reliance may be specific or not. Citizens may reorder their lives and affairs after a landmark Supreme Court case, or they may not. Non-specific societal reliance is likely the most common type of reliance. Most judicial decisions do not have an immediate, far-reaching impact on society that causes people to, in the short term, adjust their lives. Considering the *Dobbs* decision and the language used there, reliance may be either tangible or intangible.¹³³ There may be tangible—or intangible—governmental, commercial, or societal reliance.¹³⁴ Tangible reliance has historically been viewed similarly to investment-based reliance. The Supreme Court has treated contract and title cases—which both utilize tangible-reliance arguments—differently from other reliance-based arguments.¹³⁵ When people enter into legally binding contracts and transactions in reliance that a law will remain in force, that reliance is offered more deference than intangible psychological reliance. The

130. *Id.*

131. Krishnakumar, *supra* note 128, at 916.

132. Kozel, *supra* note 9, at 453–54.

133. Supreme Court opinions such as *Dobbs* use both tangible and concrete reliance interchangeably. For consistency, this Note will use tangible reliance.

134. While Professor Kozel lists doctrinal reliance, such reliance should not factor in a court's reliance analysis and has been excluded from the proposed framework of this Note. This is because such reliance cannot be tangible. The judiciary cannot expend monetary resources or contract around the precedent the Court sets. Because intangible reliance should not factor into stare decisis analysis, as discussed in Part III *infra*, doctrinal reliance is not discussed here and should not factor into stare decisis analysis.

135. *Cf.* Nelson, *supra* note 33, at 20–21 (stating that cases concerning title and transactions—themselves a type of contract—have historically been treated uniquely among reliance-based arguments due to their use of tangible reliance). Consequently, cases not involving tangible reliance and using other forms of reliance argument would be treated differently than simple contract, title, or transaction cases.

Supreme Court has implicitly acknowledged tangible and intangible reliance and used both to justify preserving precedent.

Governmental reliance here is largely the same as Professor Kozel describes, however, it may be tangible or intangible. Governmental reliance here is not limited to merely the executive and legislative branches. Instead, it may encompass local governments, such as police departments. These governmental bodies may act in reliance on precedent, either in a tangible or intangible manner. Tangible governmental reliance may involve legislative branches—state or federal—relying on precedent in their decision to pass a new law that expends monetary resources of the government. Intangible governmental reliance occurs when government bodies rely on a precedent, but do not expend any monetary resources on that reliance. For example, intangible governmental reliance may involve police officers who rely on Supreme Court precedent in their day-to-day operations and interactions with alleged criminals.¹³⁶

Citizens United is an example of intangible governmental reliance.¹³⁷ In the landmark case, the Supreme Court dismissed Congress's reliance on previous precedent.¹³⁸ Congress's ban on political speech, thought to be constitutional, was brushed aside in the Court's *stare decisis* analysis.¹³⁹ The Court opined that considering Congress's reliance may run afoul of the Court's duty to "say what the law is" because legislative acts should not prevent them from overruling precedent.¹⁴⁰ The Supreme Court, in essence, told Congress that it should not rely on the Court's own precedent.¹⁴¹

Commercial reliance is where a corporation or similar entity relies on precedent in making business decisions that expend monetary resources or commit future resources to a project. The aftermath of *Federal Baseball*, where baseball leagues continued to expand and make investments in reliance on the Supreme Court's holding, is an example of tangible

136. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 439, 443 (2000) (stating that the *Miranda* opinion's goal was to provide constitutional guidance to law enforcement agencies to follow, which then became embedded in routine police practices (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966))).

137. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that Congress's reliance on the belief that a ban on corporations spending money on political speech was constitutional could not be a compelling interest for *stare decisis* purposes).

138. *Id.* at 365 (discussing Congress's unjustified reliance on the Supreme Court's earlier ruling in *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990)).

139. *Id.* (stating "[l]egislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*").

140. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

141. However, Congress's own inaction sometimes serves as a judicial bellwether for the Court. See, e.g., *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953) ("Without re-examination of the underlying issues, the judgments below are affirmed on the authority of [*Federal Baseball*] so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." (emphasis added)).

commercial reliance. There, the two growing leagues continued to invest money into their business model by acquiring more teams.¹⁴² To repudiate the Court's own holding after expressly granting the leagues antitrust immunity would have caused irreparable financial harm to these leagues.

Intangible commercial reliance is akin to intangible societal reliance. Intangible commercial reliance occurs when businesses begin to predict legal developments and rely on those judgments to plan business strategies. For example, under the *Chevron* deference doctrine, agencies were given broad deference in their interpretation of statutes. Corporations could rely on the existence of the *Chevron* deference precedent when planning their compliance strategies.

Finally, societal reliance is akin to that seen in *Roe*, *Casey*, and *Dobbs* where the Court considered whether individuals and families across the United States had relied on the right to an abortion in structuring their lives. Tangible societal reliance would include decisions that expend a family's monetary resources such as moving, buying a new house, or arranging legal documents according to precedent. Intangible societal reliance may involve individuals taking mental note of a new precedent, but without spending any money to reorder their lives. For example, the Supreme Court noted that criminals typically do not change their criminal activity because police officers must read them their Miranda rights.¹⁴³

Professor Kozel's doctrinal reliance may also be viewed within my proposed framework but will not be discussed here. Doctrinal reliance is better addressed in a discussion of the Court's treatment of precedent. While the Supreme Court has created precedent on how they treat precedent,¹⁴⁴ reliance on this precedent-on-precedent is fundamentally different from reliance by outside branches of government or businesses and individuals. Further, this Note attempts to discuss how the Court responds to reliance by outside actors in *stare decisis* analysis, not how the Court's Justices believe the Court should treat its own precedent. Doctrinal reliance is an important topic for further research but has little application within the Supreme Court's own reliance analysis.

142. See *Toolson*, 346 U.S. at 357 ("The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.").

143. *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009) ("Any criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own." (discussing *Michigan v. Jackson*, 475 U.S. 625 (1986))). See also *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (holding that *stare decisis* does not carry its normal weight in cases where procedural rules are at stake, which do not "serve as a guide to lawful behavior").

144. See generally Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118 (2020).

D. Revisiting Reliance

Casey and *Dobbs* focus extensively on societal reliance on *Roe*'s precedent.¹⁴⁵ *Casey* acknowledged that the right to an abortion did not provide the same reliance that contract or property cases engender, but reliance on the right was nonetheless similar to the reliance in those cases.¹⁴⁶ The Court reasoned that society's reliance on the right, while intangible, was forceful and significant. The plurality opinion dismissed arguments that labeled any reliance as *de minimis*.¹⁴⁷ *Dobbs* latched onto *Casey*'s concession that reliance was not concrete and claimed societal reliance on the right to an abortion was unascertainable due to the reliance being intangible.¹⁴⁸ In their brief to the Court, Jackson Women's Health Organization relied on the Court's precedent upholding the right to an abortion as its main argument.¹⁴⁹ Missing from the brief, however, is any mention of the reliance engendered by the precedent. The brief merely argues the Court should respect the precedent because it *is* precedent. While reliance is one of many factors the Court considers, the opportunity to discuss the reliance on the right to an abortion that *Roe* and *Casey* created and affirmed was missed. A Brandeis-style brief that contained statistics on the prevalence of abortion and the widespread reliance on the right may have proven more effective in establishing tangible societal reliance. While tangible reliance may not rescue all cases from being overturned, reframing the reliance at stake may be a powerful tool in helping the Court reevaluate the factors at hand.

There exists some difficulty in establishing tangible societal reliance because there may be many reasons for the decisions individuals and families make. Did a woman move from a state like Texas, which has much more restrictive abortion laws, to Nevada, which recognized and

145. Compare *Planned Parenthood v. Casey*, 505 U.S. 833, 855–56 (1992) (the *Casey* plurality focuses on how a woman may shape her life in reliance of the availability of the right to an abortion and its impact on women being able to participate equally in the economy) with *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287–89 (2022) (meanwhile, the *Dobbs* majority rejects any notion that concrete reliance interests are at issue and then proceeds to claim to be unable to measure intangible reliance interests).

146. *Casey*, 505 U.S. at 856.

147. *Id.* ("To eliminate the issue of reliance . . . however, one would need to limit cognizable reliance to specific instances of sexual activity.")

148. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 287–91 (2022).

149. Brief for Respondents at 11–12, *Dobbs*, 597 U.S. 215 (No. 19-1392) ("[T]he Court could simply do what the State requested in its petition: 'clarify,' under this Court's existing precedents, 'whether abortion prohibitions before viability are always unconstitutional.' The answer to that question is undoubtedly 'yes,' as this Court has repeatedly held." (citation omitted)).

safeguarded the right to an abortion before *Dobbs*,¹⁵⁰ because of *Dobbs* or because of a job offer? Could *both* the job opportunity and knowledge that Nevada safeguarded a right to abortion have played a role in the decision? Without empirical data, any attempt at arguing for tangible societal reliance is sure to be a lost cause. Producing statistical data that demonstrates some tangible reliance on a perceived right to abortion will help, but that is only one piece of *stare decisis* analysis. It will not be sufficient to guarantee a victory, but it is a factor in favor of preserving precedent because a court should prefer tangible over nontangible reliance.

Federal Baseball's progeny relies on a specific reliance on the part of the baseball leagues after *Federal Baseball* and Congress's subsequent inaction. This is best described as tangible commercial reliance. The Supreme Court, when asked to revisit *Federal Baseball*, refused to act, despite severely restricting the holding in *Federal Baseball* to its facts.¹⁵¹ The substantial investments made by the growing leagues were central to the Court's decision. Without these investments, it is unlikely that the Court would have continued to refuse to revisit *Federal Baseball*. The specific commercial reliance *in conjunction* with congressional inaction created a strong incentive for judicial restraint.

In later cases, the Court continued to restrict *Federal Baseball* to its facts when other organizations attempted to bring similar arguments.¹⁵² In *Hart v. B.F. Keith Vaudeville Exchange*, the Court rejected a traveling theater group's argument that their interstate travel was merely incidental to their exhibitions of theatrical shows.¹⁵³ *Hart* was decided the term immediately after *Federal Baseball*. If there was a perfect time to overrule the Court's decision, the following term would have been the best opportunity. The Court's reluctance to overturn *Federal Baseball* can be explained by business investments expended after the Court's decision. Precedent resulting from tangible commercial reliance is among the toughest precedent to overturn. Businesses have grown and consolidated over the 20th and 21st centuries. They are no longer small American companies operating in one country but multinational conglomerates with worldwide operations. If the Supreme Court overturns a prior precedent, that decision could have

150. NEV. CONST. art. 1, § 25 (establishing a fundamental right to reproductive freedom, including decisions about pregnancy and abortion).

151. *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953).

152. *See also Toolson*, 346 U.S. 356; *Flood v. Kuhn*, 407 U.S. 258, 258–88 (1972) (prioritizing the MLB's reliance on *Federal Baseball* over the more expansive post-*Wickard* view of interstate commerce in refusing to expressly overrule *Federal Baseball* (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942))). *See generally* Marc Edelman & John T. Holden, *Baseball's Anticompetitive Antitrust Exemption*, 65 B.C. L. REV. 1695 (2024).

153. *Hart v. B.F. Keith Vaudeville Exch.*, 262 U.S. 271, 272–73 (1923).

a significant impact on a company's ability to keep a key department or maintain an operation. Such a decision could cost the American—and global—economy billions of dollars as multiple companies adjust to new decisions.

This treatment of reliance in *stare decisis* analysis is similar to the treatment of detrimental reliance in contract cases. A party's detrimental reliance may provide a ground for relief to a harmed party. In limited circumstances, a party's justified reliance—where the party takes action with expectations that the other party will fulfill the contractual obligations promised—may allow the party to bring a claim against the other party. A court will allow the aggrieved party to bring a claim when reliance has been justified. In a comparable manner, courts decide whether the justified reliance on prior precedent warrants the preservation of precedent. Courts look at the financial investments made on reliance on prior decisions; this explains why cases involving title and contracts are given extra weight in the Court's analysis.

III. TRANSFORMING THE RELIANCE INTEREST FACTOR

The costs associated with overturning settled precedent are a constraint on courts, potentially deterring them from overruling precedent. If the court can reframe the reliance interests to fit their personal preferences, then the constraining effect will be lost, and Justices will be empowered to overrule precedent. Both outcomes illustrate a perplexing picture of how *stare decisis* operates at the Supreme Court and the inefficiencies it brings. By transforming a crucial factor in *stare decisis* analysis into a more objective and workable factor, courts can begin to move away from inefficiency and towards more efficient and fair outcomes.

A. Measuring Reliance

An issue with reliance is that it is notoriously difficult to ascertain the costs borne from reliance. Some of these “costs” are non-monetary and instead are purely psychological—such as a belief in the stability of the present legal landscape. An abortion clinic may have monetary costs it can point to—namely, its start-up and operational costs—as a cost of relying on the Court's precedent. But what about a woman's reliance on *Roe* and

Casey?¹⁵⁴ She may expect that the abortion clinic down the road will remain open, but she likely does not have an investment in the abortion clinic's operation. Taking this further, how different is the reliance between a woman who is in her twenties or thirties to that of a three-year-old child or to a seventy-five-year-old woman? How do we evaluate this reliance on *Roe* and *Casey* in light of the fact that numerous news media outlets reported the cases would likely be overturned?¹⁵⁵ After the leaked draft opinion stated *Dobbs* would end the right to abortion?¹⁵⁶ These illustrations demonstrate the difficulty in creating objective criteria to evaluate reliance interests.¹⁵⁷

In *Casey*, the plurality recognized the difficulty in evaluating intangible reliance interests, stating that while “the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe*.”¹⁵⁸ It is this intangible reliance that the *Dobbs* majority relied on to overturn *Casey*.¹⁵⁹ Psychological reliance, a form of intangible societal reliance, cannot, and should not, be weighed by courts in reliance interest analysis. Psychological reliance is inherently difficult to measure. Without quantitative analysis,

154. See, e.g., discussion of *Dobbs*, *supra* Part II.A. In *Dobbs*, the majority asserts that there is no traditional concrete reliance interests at stake because getting an abortion is, generally, an unplanned activity. The dissent accuses the majority of ignoring the “perfectly, viscerally concrete” reliance interests of women in America and details how women will now change their lives in response. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 287–88, 410 (2022).

155. See Julie Rovner, *If High Court Reverses Roe v. Wade, 22 States Likely to Ban Abortion*, NPR (July 10, 2018, 1:21 PM), <https://www.npr.org/sections/health-shots/2018/07/10/627666535/if-high-court-reverses-roe-v-wade-22-states-likely-to-ban-abortion> [<https://perma.cc/CNZ7-AC6K>] (stating in 2018, nearly four years before *Dobbs*, that it is a “not a question of if; it’s a question of . . . when” the Supreme Court will overturn *Roe*); Quoc Trung Bui et al., *What Happens if Roe v. Wade is Overturned?*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/interactive/2020/10/15/upshot/what-happens-if-roe-is-overturned.html> [<https://perma.cc/5VMM-YJX7>] (noting, in 2020, almost two years before *Dobbs*, the increased likelihood of *Roe* being overturned with Justice Barrett’s confirmation to the Court). See also Nelson, *supra* note 33, at 64 (arguing that people’s expectations are partly shaped by their knowledge of courts’ use of stare decisis and may be “fairly sure” that the court will overrule a decision at the “next opportunity” given).

156. See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 p.m.), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/34PQ-UN3P>] (revealing a draft opinion where the Supreme Court had voted to overturn *Roe*); see also Mark Sherman & Zeke Miller, *Report: Supreme Court Draft Suggests Roe Could be Overturned*, ASSOCIATED PRESS (May 3, 2022, 9:01 a.m.), <https://apnews.com/article/supreme-court-abortion-draft-opinion-07439f9fc4542f1500ab78dfd34036b1> [<https://perma.cc/49VJ-8TLR>] (signaling that the Supreme Court was poised to overturn *Roe*).

157. For a discussion on whether individuals are ever justified on relying on precedent, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1554 n.49 (2000) (arguing that people should rely on precedent only to the extent it can be predicted that courts will adhere to the decision as correct and that because courts have never represented stare decisis as an absolute rule of adherence to precedent, there can be no reason to believe that judicial precedent will remain the same).

158. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

159. *Dobbs*, 597 U.S. at 268.

psychological and intangible societal reliance is easily manipulated to advance an outcome-driven analysis. Courts do not recognize psychological reliance in detrimental reliance cases in contract law; they likewise should not recognize intangible reliance in stare decisis analysis.

To improve the Supreme Court's use of reliance interests in stare decisis analysis, only tangible reliance should be considered. Tangible reliance is a more concrete and readily traceable reliance that cannot be as easily manipulated as intangible reliance. It is more in line with a substantive justice framework where courts attempt to provide relief and protection for significant investment and reasonable societal expectations. While the law is everchanging and people ought to expect a healthy amount of change in our laws as years pass, preserving a slightly less perfect precedent may be preferred to upsetting the norms and expectations. This is not to say that tangible reliance will always prevent outcome-driven analysis by courts. As evidenced by *Casey*'s attempt to cast societal reliance as tangible,¹⁶⁰ courts will attempt to reframe society's reliance on precedent as concrete and tangible. But without quantifiable and exacting demonstrations of reliance, a stricter framework that allows only tangible reliance to be considered will function as a screen for true, measurable, and meaningful reliance.

B. Reliance Interests v. Reliance Costs

Measuring the economic costs a business incurs relying on a court's precedent is much easier than measuring an individual's intangible costs, like psychological reliance. Another difficulty lies in the fact that individuals tend to lack the resources of the nation's largest corporations. Thus, while individuals incur costs that are measurable, most will never incur costs similar to large corporations. This may limit someone's ability to argue that there has been meaningful tangible reliance made because of precedent.

One option is to eliminate intangible individual or societal reliance in stare decisis analysis. This argument has been advanced, in different forms, by scholars.¹⁶¹ These scholars head in the correct direction, but they do not

160. *Casey*, 505 U.S. at 856 (“[W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”).

161. See generally Lucas S. Stegman, *Rebalancing the Scales: Why the Reliance Interests of Law Enforcement Should be Irrelevant to Questions of Constitutional Stare Decisis*, 11 CRIM. L. PRAC. 37 (2021) (arguing that law enforcement's reliance on a previous precedent should not be considered in stare decisis analysis for criminal procedure precedent); Mills, *supra* note 30 (arguing that societal reliance should not be considered in stare decisis analysis); Paulsen, *supra* note 157, at 1554 (claiming individuals may not have reason to rely on precedent).

ultimately reach the destination. Courts invoke reliance interests to protect monetary investments and previous transactions involving title—labeled tangible reliance earlier. And while courts attempt to protect these economic transactions, it does not prevent them from overruling precedent; instead, the reliance interest must be weighed against announcing a correct, or improved, law. Sometimes, overturning an incorrect holding may be more inefficient and costly than overturning precedent that has engendered significant, tangible, and measurable reliance.¹⁶² However, all things being equal, a court will typically want to preserve a precedent that has engendered substantial reliance that is measurable and demonstrable. Thus, eliminating intangible reliance from the acceptable types of reliance that the Court takes into consideration would lead to better decision-making at the Supreme Court.

While the Court has stated that *stare decisis* serves some psychological purpose by being “rooted in the psychologic need to satisfy reasonable expectations,” a system that only considers tangible reliance will not distort reasonable expectations.¹⁶³ There is a proper balance between rigid adherence to precedent and a system that places no weight on precedent. Individuals must come to expect some instability in precedent.¹⁶⁴ If the Supreme Court signals that it will begin to consider only tangible forms of reliance, the public will be on notice that intangible reliance, such as psychological reliance, will no longer be considered. Further, this proposed framework is not new. The Court has recently expressed its view that different reliance interests should be given less weight. For example, in *Citizens United*, the Court held that the reliance interest the legislature holds on precedent should be given less weight than those who are structuring transactions.¹⁶⁵

Tying together the pieces, a new framework for analyzing reliance interests within *stare decisis* analysis may look as follows. First, when confronted with a case that fits squarely within a prior precedent, the Court will begin by noting the level of disagreement within its ranks. If there is a mere disagreement, then the Court will proceed under a strong *stare decisis*

162. This is where the court often asks whether the circumstances have changed drastically enough—or whether the precedent has become unworkable—to justify overruling precedent.

163. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

164. In fact, Judge Easterbrook claims that law *ought* to be unstable. Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988) (claiming that with the gift of hindsight, the ability to overrule cases and improve our country’s body of law creates unstable precedent—for the benefit of society).

165. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that Congress’s reliance interest that a ban on corporations spending money on political speech was not a compelling interest for *stare decisis* purposes).

framework and keep the precedent unless there is a special justification to overrule it.¹⁶⁶ If the Court determines there is no justification for overruling the precedent, then analysis ends there and reliance interests are not considered.¹⁶⁷ If the Court determines that there are special justifications for reconsidering the precedent, then stare decisis analysis begins with the Court determining the type of reliance at stake. After this determination, the Court will then determine whether the reliance is tangible or intangible. If there is tangible reliance, the court must properly weigh this consideration with the other stare decisis factors. A finding of tangible reliance interests will militate against overruling precedent while a determination of intangible reliance will weaken the need to refrain from overturning precedent.

If the Court, or a majority of the Court, believes that the previous case is obviously wrong, then the Court will proceed under a presumption of either weak or strong stare decisis.¹⁶⁸ The Court must decide whether the precedent in question reflects a permissible or impermissible view of underlying law. If the Court determines that the precedent reflects a permissible view of the law, then it will proceed under the strong stare decisis framework described above. If, however, the Court deems the precedent to be an impermissible view of law, the Court will proceed under the weak stare decisis framework and the precedent will be declared erroneous.¹⁶⁹ The Court will then

166. See *Gentithes*, *supra* note 32, at 87–88 (such criteria include whether the precedent defies workability, is subject to special reliance interests, is a mere remnant of abandoned doctrine, or is based upon facts that have changed so significantly that the rule is no longer applicable). See also *Payne v. Tennessee*, 501 U.S. 808, 849 (1991) (Marshall & Blackmun, JJ., dissenting) (including the criteria of the advent of subsequent changes or development in the law that undermine a decision’s rationale, the need to reconcile a decision with experience and facts newly ascertained, and a showing that a particular precedent has become detrimental to coherence and consistency in the law).

167. For an example of strong stare decisis analysis that searches for special justification in the face of disagreement among the Court, see *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” (discussing *Miranda v. Arizona*, 384 U.S. 436 (1966))).

168. See *Gentithes*, *supra* note 32, at 114 (explaining poor reasoning is a condition precedent to stare decisis analysis). He claims that poor reasoning may motivate a Justice to begin thinking about whether to overrule a previous case; in effect, poor reasoning triggers stare decisis analysis. *Id.* at 114–15.

169. Professor *Gentithes* objects to Professor *Nelson*’s suggestion that demonstrably erroneous precedent should be given a rebuttable presumption for being overturned and asserts this will require Justices to apply their own interpretive methodologies, which will produce varied, dichotomous results. However, this rebuttable presumption merely leads to the next step of stare decisis analysis, which includes more objective standards, such as the framework described here. It seems unlikely that an objective test will be created that determines when to begin stare decisis analysis. A rigid, formalistic rule may well become under-inclusive of the precedents worthy of reconsideration. A flexible, subjective test may be more suitable for determining when to *begin* stare decisis analysis while a more objective standard should be applied for determining when to *overturn* a precedent. See *Gentithes*, *supra* note 32, at 120–23 for his discussion on Professor *Nelson*’s approach.

presume the case should be overruled, and if there is no practical reason for adhering to it, the precedent shall be overturned. At this stage, the Court may consider the reliance interests at stake. If there is tangible reliance, then the Court may assess whether to overturn precedent by considering the impact it will have on the affected parties. A finding of intangible reliance would support a decision to overturn the precedent because the precedent is both erroneous and has not engendered any clear and measurable reliance to the decision.

Under a third possibility, the Court may decide that a prior case's reasoning is clearly erroneous. This standard is tougher to meet than mere disagreement. A five-to-four majority may not be enough to dictate that a prior decision is clearly erroneous. Defining clearly erroneous is beyond the scope of this Note. But if the Court adopts the view that a precedent's reasoning is clearly erroneous, then the Court will proceed directly under the weak *stare decisis* framework. Unless there is a practical reason for adhering to the precedent, the Court should discard the precedent.

Utilizing this framework will provide the Supreme Court with a structured *stare decisis* framework that is more difficult to abuse than the Court's current framework, which lacks any judicially manageable standards. This framework will limit the ability to engage in outcome-driven analysis and lend more legitimacy to the Court. Further, this proposed framework has historical roots.¹⁷⁰ As discussed in Part I.A, cases involving property and title were often viewed as an exception to traditional *stare decisis* analysis and demanded greater weight to precedent.¹⁷¹ Further, the Supreme Court has itself held repeatedly that *stare decisis* is at its weakest in cases involving procedural and evidentiary rules.¹⁷² This is because psychological reliance is difficult to measure, and the restructuring of lives from psychological reliance is easier to accomplish than with tangible reliance. Conversely, by placing greater weight on cases where there is tangible reliance, courts demonstrate respect for how individuals have structured their lives around the law while still allowing the judiciary to correct erroneous law.

170. See Nelson, *supra* note 33, at 36 n.127 (citing a number of cases showing that cases involving rules of property or generating commercial reliance interests often were given a greater weight to precedent). Nelson also quotes Justice McKean of the Pennsylvania Supreme Court, who states that preference of having property rights known and settled is better than what the exact rule is. *Id.* at 36–37.

171. See *id.* at 20–21.

172. *Payne v. Tennessee*, 501 U.S. 808, 851 (1991) (Marshall & Blackmun, JJ., dissenting). See also *Montejo v. Louisiana*, 556 U.S. 778, 793 (2009) (a case younger than twenty years and in which the Court states that any individual who can incorporate the lessons of a previous precedent can incorporate the lessons of the new precedent overruling an earlier procedural rule); *United States v. Gaudin*, 515 U.S. 506, 521 (1995) (holding that *stare decisis* is weaker in cases where procedural rules are at stake).

CONCLUSION

The Supreme Court's overturning of landmark cases such as *Roe* and *Chevron* has led to increased public scrutiny due to their controversial character and the Court's analysis of stare decisis in these cases. Both *Dobbs* and *Loper Bright* directly discussed reliance interests in the Court's analysis of stare decisis and demonstrated the Court's willingness to revisit precedent under a weak stare decisis framework. With the Court more willing to revisit prior precedent, it is more important than ever to create judicially manageable standards for the Court's stare decisis analysis.¹⁷³

Instituting this new analytical framework will further allow the Court to revisit previous precedent under a new lens. The Court will be able to determine whether such precedent is a valuable legal rule or can be discarded with minimal effect on the public. This new proposed framework is neither a rigid, formalistic rule nor a spineless standard that can be easily manipulated. Instead, it allows for some flexibility to determine the reliance interests at stake and to inquire into the expenses that overturning precedent would impose on all affected parties.¹⁷⁴

The proposed framework starts with asking whether the law in question is a permissible reading of law and leads the Court to engage in either a strong or weak stare decisis analysis. Once the Court determines that it will proceed to analyze whether to overturn the precedent, the Court will undertake its conventional stare decisis analysis. If the reliance interests at stake are tangible, the Court should carefully weigh the factor with the other stare decisis factors to determine whether to overturn the prior case. While the Court is not bound to precedent if there is tangible reliance, it must thoroughly analyze whether the outcome justifies unsettling the reliance interests at stake. If the Court determines the reliance interests of the parties are intangible, the Court must disregard the reliance.

Of course, the inquiry does not end there. There are other factors the

173. See *Gentithes*, *supra* note 32, at 116 ("If stare decisis does anything, it at least occasionally constrains Justices from overturning a case with which they disagree. To perform even that minimal function, it must appeal to some objective criteria beyond individual Justices' interpretive methodologies.").

174. This is an important consideration because courts do not incur the costs of change, at least directly. The burden of the change in law must instead fall on the public. Because the judiciary cannot incur the costs of change, it is wise policy to ensure proposed changes are properly examined such that any costs are weighed against the benefits. Carefully considering whether precedent has engendered tangible or intangible reliance aids courts in properly weighing the costs associated with change. See generally Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES 69 (2003) (arguing for a presumption against transitions in legal rules). See also Mills, *supra* note 30, at 2101 (arguing that because business and contracts can require extensive planning, changes in law may be particularly disruptive and lead to suboptimal levels of investment).

Court must consider and balance when engaging in its stare decisis analysis. Those factors are beyond the scope of this Note. While the other factors in stare decisis are not discussed here, this Note's proposed framework could help discipline the Court's messy stare decisis analysis. This framework attempts to provide a systematic approach that will help the Court maintain a reputation for being fair and neutral. To further develop a better analytical framework for stare decisis, future developments in other stare decisis factors are warranted. Clear, rigid rules are unlikely to result from future developments, but providing more objective standards will help aid in clawing back the Court's ability to engage in results-oriented decision making and aid in protecting the Court's legitimacy.

A PROPHETIC REALITY: LEGAL BUREAUCRACY IN KAFKA'S "THE TRIAL" AND ITS PARALLEL TO THE U.S. JUDICIAL SYSTEM

DIVYA RAJAGOPALAN

INTRODUCTION

Franz Kafka's posthumous work, *The Trial*, is a literary exploration of legal systems and bureaucratic oppression. It depicts the law as a reflection of social anxieties about justice and autonomy.¹ *The Trial* follows Josef K., a man who is arrested for a crime that both he and the reader truly know nothing about. As the narrative unravels, the reader waits to finally learn the secret of this mysterious crime. However, the reader's expectations are left unfulfilled. The reader and Josef sit in the dark, while the rest of the book's characters become progressively clued in. Josef is weighed down by his guilt, constantly questioning and overthinking every action he has taken while he looks for an answer.² It is not forthcoming; there are no concrete indications of Josef's guilt or definite associations between him and a crime.³ Given the lack of information surrounding his trial and charges, the only concrete indication of guilt seems to be his execution.⁴ Of course, the reader grapples with the question: "Was he truly guilty?" But in *The Trial's* faceless bureaucracy, that may not matter much.

Critics have read this novel as a dark and horrifying parody of the complexities of the legal system and the traps that bureaucracies have the power to set.⁵ The story's salience has only grown with the view that the contemporary legal system mirrors Josef's bleak reality, where accusation alone can dictate fate. Kafka's narrative shows what happens when foundational protections fail. In *The Trial*, Josef is condemned and punished without ever being presumed innocent, showing how the absence of the presumption of innocence turns justice into ritualized cruelty.

In the U.S., the presumption of innocence, that one is "innocent until proven guilty," no longer ensures the protection it was designed to provide.

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1. FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans., 1999).
 2. *Id.* at 111–12, 124–25 (describing Josef's anxiety and inability to leave things alone despite displaying apathy at the situation earlier in the narrative).
 3. *See, e.g., id.* at 29.
 4. *Id.* at 228–31.
 5. Benjamin Winterhalter, *Franz Kafka's The Trial—It's Funny Because It's True*, JSTOR DAILY (July 2, 2019), <https://daily.jstor.org/franz-kafkas-the-trial-its-funny-because-its-true/>.

This precept prevents an individual from being branded “guilty” before conviction; the government must show that the individual on trial is the perpetrator of the crime, beyond a reasonable doubt.⁶ However, the media’s influence on contemporary society has contributed to the distortion of the phrase “innocent until proven guilty,” forcing those accused to prove their innocence despite the lack of conviction.⁷ The court of public opinion is a fierce opponent, and pretrial publicity has exposed many accused individuals who, though not convicted, have been linked to crimes.⁸ The media’s duty to inform the public often becomes entwined with the commercial aim of increasing reader and viewership, producing flashy titles and juicy taglines.⁹

The principle of “innocent until proven guilty” emphasizes the importance of not pre-judging an individual until conviction, but when defendants are exposed in the media, it becomes difficult to curtail the negative opinions surrounding them.¹⁰ As a result, even when individuals are acquitted, their peers may treat them as guilty. The stigma associated with publicized guilt persists indefinitely, despite efforts to counter the effects of a “trial by media” through the law’s objective framework.¹¹

But how objective is this “objective framework” when it comes to guaranteeing a fair and just trial despite public outcry against the individual at bar? Courts are often forced to navigate societal biases against a defendant, which can influence determinations of guilt despite the appearance of impartiality.¹² Though the legal system may do its best to insulate jurors, it is an increasingly difficult task as media coverage becomes more extensive and more people are exposed to relevant pre-trial publicity.¹³ With a biased jury and a court that is factoring in public opinion, the law, in some aspects, loses its necessary objectivity.

6. 3.02 *Presumption of Innocence; Proof Beyond a Reasonable Doubt*, U.S. DIST. CT. DIST. MASS., <https://www.mad.uscourts.gov/resources/pattern2003/html/patt4cfo.htm> [https://perma.cc/4CCG-Y74B].

7. Maria Stoyanova, *THE PRESUMPTION OF INNOCENCE AND THE MEDIA COVERAGE OF CRIMINAL CASES 27* (Ctr. for Study of Democracy 2021), <https://arisa-project.eu/the-presumption-of-innocence-and-the-media-coverage-of-criminal-cases-2/3/>.

8. Zakaria Islam, *Media Exposure and Presumption of Innocence*, DAILY STAR (Feb. 23, 2024), <https://www.thedailystar.net/law-our-rights/news/media-exposure-and-presumption-innocence-3550671> [perma.cc/NJ3R-LDQ3].

9. STOYANOVA, *supra* note 7.

10. Zakaria Islam, *supra* note 8.

11. *See generally* STOYANOVA, *supra* note 7.

12. Claire Caton, *Presumption of Innocence, Pre-Trial Media—And Social Media—Coverage*, TWIKI (May 4, 2021), <https://moglen.law.columbia.edu/twiki/bin/view/CompPrivConst/ClaireCatonSecondPaper> [perma.cc/LJ3K-HHY2].

13. *Id.*

Moreover, the act of publicly naming someone in connection to a crime prior to conviction can have devastating psychological and economic consequences, in addition to societal stigma.¹⁴ The more often those accused are called guilty, the higher the risk that they internalize this guilt, which renders them more susceptible to societal detachment and emotional strain.¹⁵

This pretrial exposure, despite lack of conviction, may also cause economic hardships, seeing as it serves as an obstacle to employment, which may endanger the psyche of the accused individual even more.¹⁶

The end of *The Trial* sees Josef executed, a sentence carried out before any formal judgment, showing how guilt is treated as assumed rather than proven. Accusation itself carries the weight of guilt, striking parallel to the court of public opinion, where, upon exposure, “guilt” is inevitable. In this paper, Part I examines the text of *The Trial* and its relation to the presumption of innocence and the court of public opinion. Part II.A discusses the development of the principle of presumption of innocence and its origins, both generally and in United States jurisprudence. Part II.B considers the modern difficulties in enforcing this principle, given the changing technologies and circumstances of daily life now in comparison to the time that this principle was enshrined. Within that discussion, Part III describes how the presumption of innocence does not exist in such a way that it protects the justice and fairness that it promised. Instead, this principle faces constant rebuke due to various government-sanctioned allowances and invasions, disproportionately affecting minority groups who are more frequently presumed guilty and subjected to harsher scrutiny. Part IV sets forth a series of reform proposals attempting to preserve the integrity of the presumption of innocence as it was once intended to function, and in doing so, prevent the criminal justice system’s deterioration into a bleak Kafkaesque reality.

I. *THE TRIAL* AND ITS REAL-WORLD IMPLICATIONS

The Trial, at first glance, is about doubt and fear. Fear for the complex and removed nature of inscrutable bureaucracy, for an inaccessible law. The result is a protagonist crushed by forces he cannot name.¹⁷ Upon closer look, however, one can also find a cautionary tale of a system that abandons the

14. Zakaria Islam, *supra* note 8.

15. Heidi Tobe, *Introjection, Internalization, Identification, Oh My!*, THERAPIST DEV. CTR. (Feb. 7, 2018), <https://therapistdevelopmentcenter.com/blog/introjection-internalization-identification-oh-my>; Zakaria Islam, *supra* note 8.

16. Zakaria Islam, *supra* note 8.

17. *See generally* KAFKA, *supra* note 1.

presumption of innocence, allowing preemptive judgments to determine guilt long before any meaningful process can unfold. Kafka's imagined world shows the horror that awaits in a society where guilt is presumed everywhere.¹⁸

The novel's opening line establishes the inversion of foundational legal norms: "Someone must have slandered Josef K., for one morning, without having done anything wrong, he was arrested."¹⁹ This sentence, while also resoundingly atmospheric, serves to establish the dilemma at the heart of this novel—an individual has been arrested without wrongdoing and without explanation. In ordinary legal systems, the presumption of innocence functions as both a moral and procedural safeguard in that the state must justify coercion.²⁰

Scholars have observed how Kafka treats law and justice in an absurd manner, shown through Josef's entanglement in a "labyrinthine network of bureaucratic traps" without a fair judicial process.²¹ In this absurd legal world, a trial grounded in the presumption that the accused is innocent until proven guilty is not merely absent, but logically impossible. Josef does not even have the ability to confirm his innocence because the terms of his accusation are never revealed.²²

Josef, despite being innocent, makes every wrong move.²³ Though people, such as Fräulein Bürstner and Frau Grubach, started off believing his innocence, his inaction makes others doubt him. In a conversation with his uncle, he states, "[t]he calmer [he] is, the better, as far as the outcome is concerned."²⁴ To which his uncle replies, "that's not how an innocent man acts who still has his strength."²⁵ If lack of action is equated to guilt, one must ask what true innocence should look like.

As Josef's "trial" progresses, it becomes clear that guilt in this system is not inferred from actions, but rather from character, demeanor, and social positioning.²⁶ During Josef's first hearing, he attempts to assert rational

18. Sanan Bansal & Priyanshu Singh, *The Courtroom of Dreams: How Kafka's "The Trial" Reshapes Our Understanding of Due Process*, LHSS COLLECTIVE (Oct. 28, 2024), <https://lhsscollective.in/the-courtroom-of-dreams-how-kafkas-the-trial-reshapes-our-understanding-of-due-process/>.

19. KAFKA, *supra* note 1, at 3.

20. U.S. CONST. amends. V, XIV (Due Process Clause).

21. Barbita Ghosh, *Absurdity of Law and Order: An Existentialist Reading of Franz Kafka's The Trial*, 9 INT'L J. ENG. LITERATURE & SOC. SCI. 150, 150 (2024).

22. KAFKA, *supra* note 1.

23. *Id.* at xviii (discussing how this version of the novel, as the closest translation to the original work, makes it clear that, though the reader is unclear about the circumstances surrounding Josef's arrest, there is no doubt that he is innocent.)

24. *Id.* at 91.

25. *Id.* at 92.

26. *Id.* at 151–52, 156–57.

objections and expects procedural fairness.²⁷ Instead, his behavior itself is treated as incriminating.²⁸ His protestations are interpreted as arrogance, and his insistence on innocence as naïveté or denial.²⁹ Josef's uncle tells him that his attitude is not pleasing at all, emphasizing that Josef's indifferent demeanor is inconsistent with how an innocent man acts.³⁰ Furthermore, in response to Josef discussing the completion of his court petition, the priest responds that his guilt is assumed proven.³¹ Through this, Kafka exposes a dangerous legal logic: asserting one's innocence serves as evidence against oneself. This legal logic replaces the presumption of innocence with a presumption of duplicity—a maxim that only the guilty would protest so forcefully.

This sentiment is echoed later by both Josef's uncle and the painter, both of whom advise him to abandon open assertions of innocence and instead seek quiet accommodation.³² The painter explains that acquittal is rare and often meaningless, discussing how there is no such thing as acquittal in these cases and that the best one can hope for is "protraction."³³ The goal of the defense, then, is to aim to functionally manage the optics of an unfavorable situation. In this system, innocence is not a legal status but a prejudged social performance.

It is inevitable that the erosion of the presumption of innocence ends up reshaping an individual's self-perception as well. Josef's treatment throughout the novel eventually leads to him internalizing accusations of guilt. Josef begins the novel confident in his blamelessness, with Kafka repeatedly emphasizing Josef's indifference to the substance of the legal proceedings.³⁴ Josef initially treats his arrest as a bureaucratic error and assumes that clarity will arrive once the confusion is resolved.³⁵ However, this assumption erodes over time. As one commentator observes: "[Josef K.] thinks it's all a mistake or joke. But as days turn into weeks and months, we see him change."³⁶ By the middle of the novel, Josef oscillates between asserting innocence and anxiously endeavoring to assist his lawyer.

27. *Id.* at 45–53.

28. *Id.*

29. *Id.*

30. *Id.* at 92.

31. *Id.* at 212–13.

32. *Id.* at 152–62.

33. Protraction is where the trial is constantly kept at the lowest level. The defendant will meet the relevant judge at regular intervals, but the trial will never progress beyond its initial stage. With protraction, the defendant is spared the shock of sudden arrests and doesn't have to worry about the "stress and strain" connected with securing an apparent acquittal. *Id.* at 160–61.

34. *Id.* at 91.

35. *Id.*

36. Bansal & Singh, *supra* note 18.

Eventually, Josef’s anxiety regarding the case overwhelms his mental state, causing him to push his work aside in favor of attempting to draft general outlines of a petition to assist with his case.³⁷ The longer Josef exists under accusation without explanation, the more the accusation and the associated guilt become concrete in his mind.

This internalization is further reflected in the parable recounted by the prison chaplain.³⁸ The man from the country never enters the Law³⁹ because he accepts the gatekeeper’s authority without challenge.⁴⁰ The chaplain states, “[t]he court wants nothing from you. It receives you when you come and dismisses you when you go.”⁴¹ This statement frames the court as omnipotent—beyond the requirement of proving guilt. Instead, individuals functionally volunteer themselves into judgment by accepting its legitimacy, rather than challenging the bias protection of the court pre-conviction. In this system without a presumption of innocence, submission replaces fair adjudication.

This reading resonates with existentialist readings of *The Trial* that emphasize the absurdity of law in the novel. Scholars argue that Kafka’s world exposes the fragility of human rights and the incomprehensible nature of justice when procedural norms are distorted or absent.⁴² The novel turns the entire system into an absurd operation where rights cannot be asserted because the mechanisms for asserting them simply do not exist.

Kafka’s *The Trial* artfully anticipates the advent and logic of the court of public opinion. Josef’s case is widely known among court officials, painters, lawyers, neighbors, and the rest of the cast of characters featured in the novel, despite the absence of any formal record.⁴³ Rumors and theories, potential stains on Josef’s reputation, circulate faster than facts. People know of the accusations against Josef, and that knowledge alone alters their behavior toward him. For example, the painter, Titorelli, explains how judges are influenced by social networks and impressions rather than formal proof.⁴⁴ In this regard, guilt mutates into a social contagion sustained through rumor and institutional inertia.

37. KAFKA, *supra* note 1, at 126.

38. The individual once described as the priest in *The Trial* is also titled the prison chaplain. *Id.* at 215.

39. “[T]he Law” is used in the parable, I believe, to represent access to justice. *Id.*

40. *Id.* at 215–22.

41. *Id.* at 224.

42. Ghosh, *supra* note 21, at 151.

43. KAFKA, *supra* note 1.

44. *Id.* at 147–51.

This core principle fits almost perfectly into analyses of contemporary media environments where allegations, especially those amplified by news cycles or media platforms, precede investigation and strongly shape public perception. Kafka's concern is about accusation without clarity and, much like Josef, modern defendants may find that the practical question has changed from "Did this happen?" to "How do you recover once allegations have been cast?" *The Trial's* key insight is that once innocence is undermined in the public eye, the damage is irreversible, even absent conviction.

The novel's final scene, where Josef is executed "like a dog," emphasizes Kafka's key warning: when innocence is not presumed, due process becomes ornamental and the exercise of bureaucratic power no longer requires reasonable justification.⁴⁵ Josef was not secretly guilty or ignorant about the behavior that caused these proceedings to commence.⁴⁶ By the time of his execution, Josef's friends, neighbors, and even his lawyer either withdrew support or proved incapable of intervening, leaving him isolated within a system that offered no real defense.⁴⁷ In this sense, his death was carried out with a ritualistic inevitability rather than as a result of any fair adjudication. The novel never even addresses the question of guilt beyond implications.⁴⁸ Resolution of this question of guilt is purposefully ignored, as it would be antithetical to the concern Kafka is trying to convey: the horror of this system is that it does not need to know whether a person is truly guilty to pass judgment.

II. THE EVOLUTION AND EROSION OF THE PRESUMPTION OF INNOCENCE

A. Development of the Presumption of Innocence

The importance of the presumption of innocence seems to be widely acknowledged, but the origins of it are quite murky. Many legal scholars believe that it originated in English law, while others postulate some French

45. *Id.* at 231.

46. *Id.* at xviii–xix.

47. *Id.* at 157–62, 196–98.

48. *Id.*

and Roman connections.⁴⁹ However, the concept traces all the way back to ancient Babylon's Code of Hammurabi, in which the accuser must present evidence against the accused.⁵⁰ The Code of Hammurabi was a seven-foot stone monument inscribed with an amalgamation of rules from various parts of the kingdom of Mesopotamia.⁵¹ These rules were extremely important when it came to economic, familial, and civil stability.⁵² The stone tablet also featured a carving of the king receiving the laws from Shamash, the Mesopotamian god of justice and equity, implying that this collection of rules was divinely ordained.⁵³ Perhaps there is some truth to the divine and inherent nature of this right, considering its existence in many of the great civilizations, despite language barriers preventing the decryption of the nuances in each civilization's interpretation of this ideal.⁵⁴

Although the principle is not mentioned by name in the American Constitution, it has been ingrained into common law through numerous cases.⁵⁵ *Coffin v. United States* is the first and most well-known of these cases.⁵⁶ In *Coffin*, the lower court refused to give an instruction regarding the presumption of innocence because they mistakenly believed that the reasonable-doubt instruction also encompassed the presumption of innocence statement.⁵⁷ However, the Supreme Court emphasized the importance of this presumption in its opinion, saying that presumption of innocence is an idea that is "the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."⁵⁸ In reasoning as such, the Court held that the presumption

49. Don Pumphrey, Jr., *Innocent Until Proven Guilty: The History and Current Application of the Presumption of Innocence*, PUMPHREY L. (July 1, 2021), <https://www.pumphreylawfirm.com/blog/innocent-until-proven-guilty-the-history-and-current-application-of-the-presumption-of-innocence/> [perma.cc/9S3F-URUK]; Nate Bernard, *What Does "Innocent Until Proven Guilty" Really Mean?*, BERNARD L. (June 11, 2025), <https://natebernardlaw.com/blog/what-does-innocent-until-proven-guilty-really-mean> [perma.cc/9LH2-VXH2]; Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 107 (2003).

50. Pumphrey, *supra* note 49; Heather Wake, *How a 3,800-Year-Old Stone Tablet Helped Create Modern Legal Systems*, UPWORTHY (Oct. 1, 2022), <https://www.upworthy.com/history-of-innocent-until-proven-guilty> (last visited Apr. 26, 2026).

51. Wake, *supra* note 50.

52. *Id.*

53. *Id.*

54. Pumphrey, *supra* note 49.

55. Maedot Teka, *Is the Presumption of Innocence in the Constitution?*, LAWINFO (Nov. 13, 2023), <https://www.lawinfo.com/resources/criminal-defense/is-the-presumption-of-innocence-in-the-consti.html> (last visited Apr. 26, 2026).

56. *Coffin v. United States*, 156 U.S. 432 (1895).

57. *Id.* at 452.

58. *Id.* at 453.

of innocence is more than just a rule of proof that could be lumped together with the burden of proof statement.

Though this is the primary example of the Court's recognition of the presumption of innocence, the Court further elaborated on this principle in *Hopt v. Utah*.⁵⁹ In *Hopt*, the Supreme Court considered jury instructions which stated that "[t]he court charges you [the jury] that the law presumes the defendant *innocent until proven guilty* beyond a reasonable doubt,"⁶⁰ and that "the guilt of the accused . . . must necessarily be deduced from a variety of circumstances leading to proof of the fact."⁶¹ In other words, the Court has historically recognized the importance of preserving an individual's innocence until concrete evidence emerges to suggest otherwise.

The primary importance of this innocence presumption is to prevent jurors from being misled in criminal trials, ensuring they do not construct speculative versions of the truth instead of recognizing the objective reality of the evidence that lies in front of them.⁶² This serves to constrain speculative biases introduced by external influences, such as the media or personal connections. As a result, the sequestration of jurors is an established practice whose aim is to insulate the jury from prejudicial information, media coverage, and community pressures that could serve as a threat to objective judgment.⁶³

Though the United States has integrated this principle, at one point declaring it a core tenet of the legal system, some see a devolution of its social and legal impact.⁶⁴ In 1979, the Supreme Court reduced the presumption of innocence—a once integral part of a just and fair trial—to nothing more than a shadow of its former glory.⁶⁵ Though the Court reiterated the importance of the presumption of innocence as extolled in *Coffin*, the Court limited the application of this principle in its analysis.⁶⁶ The Court expressly stated that the presumption of innocence does not apply to a determination of the rights of a pretrial detainee during confinement,

59. *Hopt v. Utah*, 120 U.S. 430 (1887).

60. *Id.* at 439 (emphasis added).

61. *Id.*

62. *Id.* at 440.

63. *State v. Mastrian*, 171 N.W.2d 695 (Minn. 1969); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *State v. Willis*, 371 So. 2d 1327 (La. 1979).

64. Lily Rothman, *The Meaning of 'Presumed Innocent' Has Evolved. Here's How the Kavanaugh Hearings Fit into That History*, TIME (Oct. 5, 2018, 5:48 PM), <https://time.com/5417005/presumption-of-innocence-history/>; *Coffin v. United States*, 156 U.S. 432 (1895).

65. *Bell v. Wolfish*, 441 U.S. 520 (1979).

66. *Id.*

before their trial even begins.⁶⁷ Critics have responded that the pretrial setting is exactly where the presumption of innocence would do the most good, especially when it comes to the emergence of pretrial and societal biases.

Conversely, the principle has been strengthened in England and France. Regarding seventeenth-century France, in particular, scholars observed its historical fluctuations and attributed them to a competing principle—“the idea that he who spares the guilty punishes the innocent.”⁶⁸ France thus saw a normalization of torture to elicit confessions and punishments being administered upon accusation rather than conviction.⁶⁹ However, scholarly analysis showed that strengthening the right to the presumption of innocence could change this trend, as it had slowly become cemented as a principle that affected human dignity.⁷⁰ The French Civil Code goes so far as to proclaim that “everyone has the right to respect of the presumption of innocence,” leading to the legal recognition of the right not to be handcuffed upon arrest as well as the prohibition of showing the suspect in handcuffs, as it interferes with an individual’s personal right to dignity.⁷¹ Constables in London, too, were warned against handcuffing an “unconvicted prisoner except in case of actual necessity” in an effort to avoid exposing the suspect to “avoidable degradation.”⁷²

In contrast, American scholars have emphasized that adopting a literal and broad interpretation of the presumption of innocence would severely damage the legal system, considering the difficulty it would cause for the police who would no longer be able to arrest people without convictions as easily.⁷³ Even law-and-order campaigners have agreed that this interpretation would lead to severe ramifications.⁷⁴ This narrowed perception of an essential principle has become a human rights issue, allowing police and the public to conflate those accused with those convicted and strip them of their dignitary rights.⁷⁵ From an outsider’s perspective, consequently, it is reasonable to see treatment of this principle

67. *Id.* at 533.

68. Rothman, *supra* note 64.

69. *Id.*

70. *Id.*

71. François Quintard-Morénas, *The French Have a Legal Point*, N.Y. TIMES (May 26, 2011, 10:05 PM), <https://www.nytimes.com/roomfordebate/2011/05/26/can-strauss-kahn-get-a-fair-trial/the-french-have-a-legal-point> [perma.cc/BY2R-8W6U]; Loi 93-2 du 4 janvier 1993 portant réforme de la procédure pénale [Law 93-2 of January 4, 1993 on the Reform of Criminal Procedure], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 5, 1993, p. 215 (Fr.).

72. Quintard-Morénas, *supra* note 71.

73. *Id.*

74. *Id.*

75. *Id.*

as superficial and closer to a popular social norm rather than the legal principle it was meant to be. This perspective is further substantiated by the government's lack of enforcement of this principle, even when it led to many deaths.⁷⁶

This lack of will to preserve the established principle raises Sixth Amendment concerns, particularly regarding the right to a fair trial. In 1978, the Supreme Court held that the trial court's refusal to give an instruction on the presumption of innocence violated the defendant's right to a fair trial under the Due Process Clause of the Fourteenth Amendment.⁷⁷ In fact, this refusal was considered so egregious that the conviction was reversed due to this fundamental error.⁷⁸ However, not even a full year later, the Supreme Court commented again on this principle of presumption of innocence, saying that it is not a requisite instruction that needs to be issued in every criminal case.⁷⁹ In fact, the instruction need only be given if, in light of the totality of the circumstances, it is required.⁸⁰

B. Modern Difficulties in Enforcing the Innocence Presumption

Modern decisions have diverged from the long-held idea that confinement of the jury is required, at least in criminal cases, to ensure an uninfluenced verdict.⁸¹ Reluctance to order sequestration may also stem from the trial court's perspective, balancing the need for a fair trial against the hardships imposed and the costs involved.⁸² Though the exposure of jury members to the media coverage and the opinions of the general public regarding various cases can present a variety of legal issues and negatively impact how the accused individual is viewed, jury sequestration could also result in sympathy to the accused in a way that may also affect objectivity.⁸³

76. *Id.*

77. U.S. CONST. amend. XIV, § 1; *Taylor v. Kentucky*, 436 U.S. 478 (1978).

78. *Taylor*, 436 U.S. at 490.

79. *Kentucky v. Whorton*, 441 U.S. 786, 790 (1979) (discussing that the Court's inquiry regarding whether the instruction should be given depends on their determination of whether the failure to give such an instruction in the present case deprived the respondent of due process of law).

80. *Id.*

81. *State v. Pontery*, 117 A.2d 473 (N.J. 1955) (emphasizing the age of the decisions that favored mandatory jury sequestration).

82. *State v. Mastrian*, 171 N.W.2d 695 (Minn. 1969); *Sheppard v. Maxwell*, 384 U.S. 333 (1966); 2 Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 31.25 (7th ed. 2023). These cases are all more recent in comparison to the *Pontery* case. In these cases, jury sequestration is not a requirement as it was in *Pontery*.

83. See Ryan P. Barry, *Is Jury Sequestration Actually Effective?*, BARRY, TAYLOR & LEVESQUE, LLC (Apr. 9, 2020), <https://www.bbsattorneys.com/blog/is-jury-sequestration-actually-effective/> [perma.cc/6NDW-EAYG].

Proper jury sequestration would require total control regarding a juror's access to everything—mail, television news, cell phones, etc.⁸⁴ Life for these individuals may become something comparable to confinement and, as a result, may cause them to view the accused in a more sympathetic light, consequently affecting their objectivity in determining a suitable verdict.⁸⁵ Though there are difficulties in implementing a mechanism such as this, the result would be a system where those accused would not be preemptively judged and, therefore, subject to baseless assumptions, preserving a principle that was once declared to be “the undoubted law . . . [whose] enforcement lies at the foundation of the administration of our criminal law.”⁸⁶

The presumption of innocence is also negatively affected by the allowance of various surveillance programs and new-age policing.⁸⁷ Much like Josef in *The Trial* was subjected to a faceless judicial process, many individuals today face scrutiny and judgment based on their online data, often without their knowledge or consent. This information can also lead to assumptions of guilt or character without the necessary due process. In cases like *Olmstead v. United States*⁸⁸ and *Katz v. United States*,⁸⁹ the Supreme Court has ruled that each individual is guaranteed a reasonable expectation of privacy, but this rule has proven to be insufficient when it comes to maintaining what a reasonable person would term as private information. In light of *Dobbs v. Jackson Women's Health*, the Supreme Court cast doubt on the scope of previously recognized substantive due process rights, including aspects of privacy.⁹⁰ This means that states may have greater leeway to regulate or require disclosure of medical information.⁹¹ However, *Dobbs*' impact reaches beyond just women's medical history and data being exploited. From surveillance through geolocation monitoring of abortion clinics to monitoring women's search history and private messages under the guise of adhering to preventative tactics, the dystopian reality of an oppressive and almost omniscient bureaucracy risks being brought to life.⁹²

84. *Id.*

85. *Id.*

86. *Coffin v. United States*, 156 U.S. 432, 453 (1895).

87. Antonella Galetta, *The Changing Nature of the Presumption of Innocence in Today's Surveillance Societies: Rewrite Human Rights or Regulate the Use of Surveillance Technologies?*, 4 EUR. J. L. & TECH. (2013), <https://ejlt.org/index.php/ejlt/article/view/221/377> [perma.cc/HPF6-336Z].

88. *Olmstead v. United States*, 277 U.S. 438 (1928).

89. *Katz v. United States*, 389 U.S. 347 (1967).

90. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

91. *Id.*

92. For more on the risks that *Dobbs* poses to privacy, see generally Mikayla Domingo, *One Nation, Under Dobbs: How Dobbs v. Jackson Women's Health Impacts Data Privacy for All*, 15 U.C. SCI. & TECH. J. 35 (2024).

C. Effects of Weakening the Presumption of Innocence

Weakening the presumption of innocence can lead to the government unfairly intruding on an individual's privacy. The Supreme Court has authorized, for instance, surveillance based merely on suspicion instead of searches based on evidence.⁹³ Even if police only have probable cause, rather than concrete proof, regarding the guilt of an individual, authorities may still investigate them. Critics have caught on to this apparent erosion of privacy, noting that the behavior of the individual, "[their] guilt or innocence" and their "use of putatively 'private' space—is irrelevant" to whether they may be investigated.⁹⁴ The Court in *Terry v. Ohio* sanctioned stops and searches based on reasonable suspicion rather than probable cause.⁹⁵ In enforcing laws based on suspicion, there emerges an increased risk of lines blurring in this legal demarcation—what is sufficient to prompt suspicion? Consequently, what level of suspicion results in preconceived societal judgment?

New-age policing also threatens the innocence-presumption principle, especially in relation to warrantless searches and unconstitutional investigatory stops.⁹⁶ The twentieth century saw the emergence of rules such as the exclusionary rule, inevitable discovery doctrine, and attenuation doctrine.⁹⁷ By ruling that certain evidence is admissible despite procurement stemming from an unconstitutional investigatory stop, the Court gives officers the liberty to probe and examine individuals despite a lack of reasonable suspicion, as long as the officer can point to some "pretextual justification after the fact."⁹⁸ If an officer believes an individual to be dangerous, the Supreme Court has given law enforcement the power to stop them for no reason, sometimes even allowing them to go as far as to perform

93. *Florida v. Riley*, 488 U.S. 445, 448–50 (1989) (discussing use of helicopters to surveil property based on a suspicion of a crime).

94. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1468–73 (1996) (further discussing how even if parties are injured by unreasonable searches, there is no violation of the right of privacy nor any constitutional harms despite a sense of discomfort being created because the "reasonable" search is not a strict standard).

95. *Terry v. Ohio*, 392 U.S. 1 (1968).

96. *Utah v. Strieff*, 579 U.S. 232 (2016).

97. See generally ERWIN CHERMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION (4th ed. 2022). In criminal procedure, these doctrines and rules are used to justify whether evidence can or should be suppressed such that they cannot be introduced in trials to induce conviction of an individual. However, these rules share a common characteristic in that, despite warrant protections in the Fourth Amendment implemented to assure a sense of security from invasion (bodily or privacy), they allow law enforcement to circumvent the warrant requirement such that, if there is sufficient societal or government interest in preventing a crime, the warrantless procurement of evidence will be ruled as constitutional and not in violation of an individual's Fourth Amendment rights.

98. *Strieff*, 579 U.S. at 252 (Sotomayor, J., dissenting).

a full body frisk that encompasses more than just a mere pat down.⁹⁹ Despite their innocence, many are, in this way, subjected to the social humiliation of these probably-unconstitutional searches, and those onlookers surrounding this situation subject the searched individual to a level of scrutiny akin to accusation, dooming legally innocent individuals to a civil death.¹⁰⁰ Justice Sotomayor emphasizes the possibility of this horrific sentiment, saying, “[This decision declares] your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.”¹⁰¹ Without the principle of presumption of innocence, it becomes easy to allow groundless searches, since the assumption is that individuals must fight to assert their innocence rather than be afforded the right of the State taking on the burden to prove guilt.

The advent of corporate technology that allows for widespread misinformation and unjust penalties also has a negative impact on the presumption of innocence. Social media companies’ dissemination of incriminating information encourages the general consumer to pass lightning-fast judgments on individuals without understanding the truth of the situation or even caring to explore further to verify the reality.¹⁰² These algorithms create echo chambers, insulating individuals to the point where they truly believe that they are always in the right, and they inevitably create spaces where the spread of fake news and misinformation runs rampant.¹⁰³ This less-than-ideal distortion of information when disseminated is made worse due to the fact that most Americans do not fact-check the information they encounter.¹⁰⁴ Though this may stem out of a sense of trust in their family, friends, and those they surround themselves with in the online space, the effects are no less devastating when it comes to the presumption of innocence.¹⁰⁵ Many studies have discussed the bias that stems from the amount of pretrial publicity a case receives, which is a glaring problem considering that media can disseminate opinions and inaccuracies about a

99. *Id.* at 253.

100. *Id.*

101. *Id.* at 254.

102. William Brady & THE CONVERSATION US, *Social Media Algorithms Warp How People Learn from Each Other*, SCL. AM. (Aug. 25, 2023), <https://www.scientificamerican.com/article/social-media-algorithms-warp-how-people-learn-from-each-other/> [perma.cc/NG2D-MEZM].

103. Yichang Gao et al., *Echo Chamber Effects on Short Video Platforms*, 13 SCL. REPS. 1 (2023).

104. Eileen Brown, *9 out of 10 Americans Don't Fact-Check Information They Read on Social Media*, ZDNET (May 10, 2017, 2:00 PM), <https://www.zdnet.com/article/nine-out-of-ten-americans-dont-fact-check-information-they-read-on-social-media/> (last visited Apr. 26, 2026).

105. *Id.*

case without facing much liability due to First Amendment Protections.¹⁰⁶ In fact, the United States has recognized this issue of pretrial publicity's impact on making "accused" and "convicted" synonymous, particularly with the Scott Peterson case.¹⁰⁷

In the early 2000s, Scott Peterson was suspected to have killed his wife and unborn child and, before Peterson got his chance at a fair trial, the *New York Post* ran an article entitled "Monster in Chains," with a picture of Peterson in an orange jumpsuit with his hands bound.¹⁰⁸ Years later, the Los Angeles Innocence Project would take on this case and new evidence would be put forth, causing the Court to re-examine Peterson's innocence, especially considering the bias of previous jurors in the early trial of the case.¹⁰⁹ Nevertheless, Peterson was vilified through multiple forms of media before judgment; the truth of his innocence or guilt was irrelevant because he was condemned before any formal verdict—much like *The Trial*'s Josef. Despite the effect of these privacy harms, courts are unwilling to do much.¹¹⁰ Frustration, aggravation, anxiety, and inconvenience are all effects that lack legal remedy, but when these "minor issues" are suffered at a major scale, they produce significant harms, many of which do not align with the current judicial definitions of harm.

III. THE EROSION OF THE PRESUMPTION OF INNOCENCE IN THE LEGAL SYSTEM AND ITS EFFECTS ON SOCIETY

In *The Trial*, Kafka portrays a legal system whose primary goal appears to be domination, subjugation, and the perpetuation of its own power. The system is completely self-serving—indifferent to the rights of individuals and obsessed with prioritizing its own survival. In contrast, the U.S. system seems to be built on ideas of protecting individuals, ensuring justice, and maintaining social order. To establish a legal system and government that is truly for the people as lauded in the Constitution, it becomes undoubtedly vital to understand and establish exactly what the purpose of the system is

106. Ariana Tanoos, Note, *Shielding the Presumption of Innocence from Pretrial Media Coverage*, 50 IND. L. REV. 997, 1004, 1008–09 (2017).

107. See Quintard-Morénas, *supra* note 71.

108. See *id.*; Denise Noe, *Scott Peterson: The Pregnant Wife Killer*, CRIME MAG. (Oct. 6, 2010), <https://www.crimemagazine.com/scott-peterson-pregnant-wife-killer> [perma.cc/DAK4-AWTX].

109. Alex Stone et al., *Scott Peterson Case Taken Up by Los Angeles Innocence Project*, ABC NEWS (Jan. 18, 2024, 5:42 PM), <https://abcnews.go.com/US/innocence-project-takes-case-notorious-killer-scott-peterson/story?id=106487571> [perma.cc/JN24-7NN2].

110. Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 798 (2022) (citing Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 NOTRE DAME L. REV. 747, 798–99 (2016) ("For most courts, privacy and data security harms are too speculative and hypothetical, too based on subjective fears and anxieties, and not concrete and significant enough to warrant recognition.")).

and the aims that the system should accomplish. And, at the core of the legal system, based on the historical context from which the nation was forged, is the aspiration to promote equality, safeguard freedoms, and provide a framework within which a society can function harmoniously. Over time, though, it seems as if these objectives have been distorted or transformed, resulting in practices that undermine the presumption of innocence—a key principle that is integral to ensuring true justice and fairness within the justice system and society generally.

Kafka's *The Trial* critiques the justice system by illustrating the devastating consequences of disregarding the presumption of innocence. The protagonist, Josef, is arrested without explanation and denied any meaningful opportunity to defend himself. The legal system in *The Trial* operates on assumptions of guilt, and the overwhelmingly incomprehensible nature of the law traps Josef in a state of helplessness, stripping him of true agency. The absence of the presumption of innocence here distorts the law into an oppressive force that does not protect or serve justice in the traditional sense, but rather works to victimize and subjugate individuals.

The United States justice system seems to reflect this desolate reality with the justice system often isolating disadvantaged individuals, leaving them on the outside looking in, unable to access the protections promised by the law. Throughout history, there have been various policy initiatives that were designed only to benefit members of a specific socioeconomic group. The policies neglected to consider the intersection of race and class as there is a racial component to socioeconomic class.¹¹¹ Criminal justice reformers focus on these policies that fail to consider the intersection of race, class, and even gender.¹¹² Neglecting to provide various disadvantaged groups with the proper equitable policies to close the gaps between various demographics is not only detrimental to the promotion of unity among communities, but also serves as reinforcement of a divide between groups, isolating individuals and communities in a way that is contrary to our best

111. *Id.*

112. Olena Hankivsky & Renee Cormier, *Intersectionality and Public Policy: Some Lessons from Existing Models*, 64 POL. RSCH. Q. 217 (2011).

interest as a country.¹¹³ In this reality, the individual exists apart from society, always on the outside looking in, never feeling the protection of justice that the law promised to uphold. This alienation reflects a breakdown of the presumption of innocence, as marginalized individuals are treated as guilty until proven innocent, whether through racial profiling, socioeconomic bias, or discriminatory practices.

Many judges and justices consciously, or unconsciously, wield their power to increase the presence of chasms in equality such as the race, class, and gender-race gap. For example, many Black Americans have reported that they have been subject to racial profiling.¹¹⁴ Racial bias in policing is one of many details that describe a system that presumes guilt disproportionately when it comes to certain demographics. It is also one that carries heavy consequences. Racial bias in policing can lead to many wrongful convictions, completely disregarding the principle of presumption of innocence, considering that racial injustice is “ingrained in the criminal legal system” in such a way that it leads to a frequent denial of a “fair shot at justice.”¹¹⁵ This racial bias is present in tools used for policing as well, with facial recognition mechanisms violating the privacy of Black and Brown people.¹¹⁶

New tools further undermine the presumption of innocence. For example, algorithmic risk assessment is often used in the criminal justice system to predict a defendant’s likelihood of reoffending and to guide decisions about bail, sentencing, and parole.¹¹⁷ Risk assessment algorithms may rate a person high risk in regards to committing more crimes, but the algorithm does not take into account the fact that certain communities, often those filled with people of color, are typically policed more heavily and, as a result, see a higher number of arrests.¹¹⁸ However, this tool does not take

113. RISA WILKERSON, *SOCIALLY CONNECTED COMMUNITIES: SOLUTIONS FOR SOCIAL ISOLATION, HEALTHY PLACES BY DESIGN* (Sarah Moore ed., 2021), https://healthyplacesbydesign.org/wp-content/uploads/2021/03/Socially-Connected-Communities_Solutions-for-Social-Isolation.pdf (focusing on how social well-being is based on the strength of an individual’s relationships and social inclusion and how socially connected communities contain individuals that are bolstered by their support despite systemic oppression and exclusion). The rise of social isolation is not a personal choice or individual problem, but rather one that is rooted in community design, social norms, and systemic injustices. Without community and social acceptance, an individual suffers from feelings of isolation that may lead to bouts of loneliness, depression, and may even trigger feelings of suicide.

114. See *Racial Profiling*, ACLU, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling> [perma.cc/L54T-SBBZ].

115. Daniele Selby, *How Racial Bias Contributes to Wrongful Conviction*, INNOCENCE PROJECT (July 17, 2021), <https://innocenceproject.org/how-racial-bias-contributes-to-wrongful-conviction/>.

116. *Id.*

117. *Id.*

118. *Id.*

into account the “false positives”—where the people arrested were later found innocent—that were caused by the exorbitant amount of arrests.¹¹⁹

This risk assessment tool was also found to incorrectly predict that Black defendants were twice as likely to commit more crimes in the future compared to their White counterparts.¹²⁰ A ProPublica article highlighted this machine bias and also found that, inversely, the risk assessment tool underestimated the risk of White defendants committing future crimes.¹²¹ One of the main issues here seems to be that this risk assessment tool uses information that comes from unregulated databases—a mechanism that is subject to the unfair discretion of police officials adding whomever they please.¹²² Predictably, people of color are overrepresented in these databases and, since the police are generally not required to inform people that they have been added to this database, there is an extremely low level of transparency surrounding these records.¹²³ When the tools that officials utilize operate on stereotypes and harmful biases, how is the presumption of innocence able to be adhered to? The very purpose for the founding of the principle seems to have gotten lost through the years, with the need for control overwhelmingly outweighing the interest and autonomy of the individual.

Kafka’s novel also comments on the isolationist tendencies of the law, specifically how the legal system seems to victimize and dominate innocent people in such a way that it becomes almost incomprehensible as a mechanism of establishing and perpetuating order.¹²⁴ From the very beginning of the novel, Kafka has established the law to be an overpowering and inescapable presence, creating a chilling sense of helplessness that surrounds Josef, suffocating him through an unjust justice system. The system built to protect its constituents has insulated itself from growth, uncaring of a proper administration of justice and obsessed with maintaining

119. *Id.*

120. Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [perma.cc/2K2B-TRJM].

121. *Id.*

122. Peter DeAngelis, *Racial Profiling and the Presumption of Innocence*, 43 NETH. J. LEGAL PHIL. 43, 43–58 (2014) (specifically discussing how, though the Fourth Amendment could offer protection against the police searches and seizures, it doesn’t actually provide enforceable protections in the occasions of “spurious accusation by state agents that the citizen who is profiled is engaged in criminal wrongdoing”).

123. Selby, *supra* note 115.

124. Espen Hammer, *Kafka’s Modernism: Intelligibility and Voice in The Trial*, in *KAFKA’S THE TRIAL: PHILOSOPHICAL PERSPECTIVES* 227 (Espen Hammer ed., 2018). It is important to note that where Hammer discusses intelligibility as the communication between characters breaking down, I see this intelligibility as lying within the relationship between an individual and the government. Essentially what I seek to put forward is the intelligibility of the law.

its own power. The law is a quietly dominating force, distant and impersonal—with courtrooms hiding in obscure and decaying parts of the city.¹²⁵ These aspects further serve to create a reality where the law is not even interested in ideas of innocence and guilt, simply acting on a whim.

IV. REFORM PROPOSAL

Kafka's narrative introduces this idea of both the psychological and societal impact of this convoluted bureaucracy that refuses to acknowledge the most basic of rights—the idea of inherent innocence until proven otherwise. This fundamental principle, once a cornerstone of justice, is eroded in Kafka's world, replaced by an impenetrable legal system that thrives on secrecy and fear. In such a structure, the law is used as an oppressive force, stifling the potential bonds of community that an individual can create as well as hindering societal development. Kafka's version of bureaucracy is unaccountable and detached from the people it is meant to serve. It is both a harrowing vision for the future and an eerily apt analogy for the present.

Modern parallels can be observed in the overwhelming complexity and subsequent inaccessibility of the judicial process, where prolonged trials, excessive legal jargon, and systemic barriers, such as racial profiling and the consequent mass incarceration, prevent equitable access to justice. These details illustrate how Kafka's critique of bureaucracy is not merely paranoid ramblings, but is rather a mirror that reflects the flaws within our societal structure.

A. Media Coverage and the Court of Public Opinion

In practice, it may be difficult to curb the instinct to jump to conclusions about an individual's guilt—a challenge made harder only by the media's reach and the rapid dissemination of information.¹²⁶ As mentioned in the first section of this paper, the court of public opinion that the media fuels is dangerous, especially for those individuals that have been branded as guilty without conviction. The Goliath-like media conglomerates may only truly be restrained by the very system that otherwise lets them run rampant. Recognizing this, our approach to law and the media must dramatically change to preempt any First Amendment arguments that would allow large

125. KAFKA, *supra* note 1, at 38–43, 164 (explaining how Josef is attending proceedings in the attic of a dilapidated tenement and that court offices are located in cramped attic spaces of run-down buildings).

126. Emily Denniss & Rebecca Lindberg, *Social Media and the Spread of Misinformation: Infectious and a Threat to Public Health*, 40 HEALTH PROMOTION INT'L. 1 (2025).

media corporations to continue eviscerating a core tenet of the legal system—the presumption of innocence.

Though the U.S. has repeatedly held that legislation limiting how the media spreads information risks First Amendment challenges, this issue also demands a sociopsychological perspective. Information is a powerful tool and, if wielded carelessly, many may be harmed. In this light, these First Amendment claims should be considered relatively trivial when compared to the lasting damage many individuals can experience due to biased or incomplete reporting. Misleading media coverage can fuel societal judgment and tarnish reputations, affecting employment opportunities and the creation of communal bonds—even when the person in question is legally innocent.

Media sensationalism often frames innocent individuals as villains, though they may have just been wrongfully suspected. Media guidelines must be stricter and enforced in such a way that they prevent prejudicial reporting. Ideally, these guidelines would take the form of legislation that prohibits language that assumes guilt or the requirement of judicial approval for the release of certain details, such as names of accused individuals or mugshots, before a verdict is reached. This may be in the wheelhouse of “prior restraints,” but the government interest in ensuring that individuals are given a fair trial in accordance with the presumption of innocence substantially outweighs any minor burden that may be borne by the media.¹²⁷ Sanction-like penalties must be established for media outlets that violate these guidelines, considering that peoples’ livelihood, reputation, goodwill, and self-worth are all at stake. These penalties, could, for example burden the outlets’ ability to publish or cut their air time. After the offending article has been published and a rousing negative impact is seen, the media outlet should also be subject to retraction of the article, along with a statement assuming responsibility of the misinformation that was published.

The promotion of media literacy must also be considered. Many members of the public unquestioningly accept media narratives, leading to a distortion of truth in the minds of the public and society generally.¹²⁸ Developing public education campaigns that emphasize the importance of withholding judgment until all evidence is presented in court can shift societal norms and foster critical thinking in legal cases. In addition, the

127. *The Doctrine of Prior Restraint*, JUSTIA, <https://law.justia.com/constitution/us/amendment-01/07-the-doctrine-of-prior-restraint.html> (last visited Feb. 20, 2026) (discussing the definition of prior restraints and how the government may be able to pass a law that resembles a prior restraint as long as the government has carried the “heavy burden of showing justification for the imposition of such a restraint”).

128. Catherine Happer & Greg Philo, *The Role of the Media in the Construction of Public Belief and Social Change*, 1 J. SOC. & POL. PSYCH. 321, 321–26 (2013).

integration of media literacy programs in school curricula would teach individuals, in a stage where they arguably need it most, to critically evaluate news and social media content. Social media platforms can become breeding grounds for mob mentality, perpetuating misinformation and rushing to judgment. Addressing this may also help protect the rights of an individual.¹²⁹ When it comes to media scrutiny, the court of public opinion, and general accusation-based prejudice stemming from split-second judgments, are they not sufficient to warrant express implementation of the presumption of innocence according to the totality of the circumstances? And these biases are overwhelmingly common, so one might argue that this should be reflected in the implementation of this innocence-preservation principle.

It is crucial to recognize that allegations alone can destroy an individual's personal and professional life, even if they are later exonerated. Legal protections that allow falsely accused individuals to seek expedited legal recourse should be passed to help assuage defamation or reputational harms. Penalties for violating these protections could take the form of severe fines or temporary restrictions on publication. A framework will have to be developed to distinguish legitimate newsgathering from reporting that is merely inflammatory. The goal of the penalty is to incentivize media organizations, and people generally, to exercise caution in what they say before they air unchecked allegations that could have a devastating domino effect on the reputation of a person who is falsely accused or unfairly portrayed. There should be some framework in place that can distinguish between responsible, fact-checked reporting and exploitative content that hides behind the First Amendment to generate clicks. For instances where the media did engage in proper fact-checking processes but reputational harm still resulted, funds should be available to support those wrongfully accused. This support could address mental health impacts and job placement, helping those individuals rebuild after the systemic failures led to wrongful convictions.¹³⁰ This fund could also be used for reputation restoration efforts because if significant effort is placed into reputation restoration, perhaps the antisocial effects or general stigma surrounding the

129. *How and Why Does Misinformation Spread?*, AM. PSYCH. ASS'N (Mar. 1, 2024), <https://www.apa.org/topics/journalism-facts/how-why-misinformation-spreads> [perma.cc/3XC5-D23P]; *Research Finds Peer Pressure Drives the Spread of 'Fake News'*, DUKE FUQUA SCH. BUS. (Mar. 9, 2023), <https://www.fuqua.duke.edu/duke-fuqua-insights/research-finds-peer-pressure-drives-spread-%E2%80%9Cfake-news%E2%80%9D> [perma.cc/BFS4-J8PP].

130. *The Issues*, INNOCENCE PROJECT, <https://innocenceproject.org/the-issues/> (last visited Feb. 20, 2026).

wrongfully convicted will slowly dissipate.¹³¹ If it is a community that needs to be built and reinforced, the focus should be on making sure that those who do not deserve the public’s critical scrutiny do not have to bear it.

B. Enhancing Transparency and Accountability

Enhanced transparency and accountability would help us avoid Kafka’s harrowing vision. The public’s ability to keep the government accountable fosters trust and faith, two factors essential to maintaining societal bonds. In addition, a transparent system ensures that individuals understand the charges against them and the steps of the judicial process, affirming their rights and dignity.

In modern bureaucracies, there is an established lack of accountability. Citizen input and oversight is required. Though it could be said that citizen input is present, given our democratic system where citizens engage in direct representation practices, this process has caused citizen representatives to become distant from their constituents, and there is a constant feeling from the general public that their elected representatives fail to capture the essence of their constituents’ worries and needs.¹³² People posit that this divide is due to the status elevation granted to politicians.¹³³ People that come to hear the politicians speak end up looking up to them—elevated figures cordoned off from the general public, as if being elected to represent their constituents means that they are no longer peers in democracy; rather, the constituents sit at their feet, gazing up at them.¹³⁴ As a society, some sort of mechanism needs to be implemented that prevents this divide from forming, increasing accountability and transparency within the government that the individual constituent may be able to reach. Methods like town halls and local meetings may seem to fix this issue, but if one engages in a deeper than surface-level analysis, they will find that attendance rates to these meetings are in a constant decline.¹³⁵

131. Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, 3 AM. AFFS. 198 (2019) (discussing the “marketplace of ideas” theory, where the general consensus is that if everyone is able to voice their opinions, the truth will rise to the top). However, this theory is flawed in practice, in modern day, especially considering that not all thoughts are heard equally given the algorithms’ inclinations to widely disseminate only certain information—viral moments that hold untrue information, but posts refuting this misinformation are rarely as viral.

132. Alex Betley, *The Great Divide: Why We Feel Distant from Our Politicians*, STAR TRIBUNE (Jan. 24, 2016, 8:58 PM), <https://www.startribune.com/the-great-divide-why-we-feel-distant-from-our-politicians/366372001> (last visited Apr. 26, 2026).

133. *Id.*

134. *Id.*

135. See BoxCast Team, *This is Why Your City Council Meeting Attendance is Low*, BOXCAST (July 11, 2018), <https://www.boxcast.com/blog/this-is-why-your-city-council-meeting-attendance-is-low> [perma.cc/8U3R-8ZBC].

The U.S.'s non-local modern economy has created non-local social, political, and legal systems. Town halls or city council meetings were started when people worked nine-to-five jobs that were, in fact, strictly nine-to-five, allowing people to fill their weekly schedule with other social activities.¹³⁶ Nowadays, many people lack the luxury of free time, working all hours to make a living.¹³⁷ In addition, it may be too difficult for constituents to attend the meeting in person because of transportation difficulties or the meeting may run too long, causing individuals to lose time that they needed to finish up other tasks.¹³⁸ The residents of a municipality may care deeply about an issue but may feel excluded when it comes to voicing their opinions because these forums have become inaccessible to them. Failing to give residents the ability to (1) educate themselves about systematic workings and (2) communicate with their representatives erodes trust, leaving constituents doubtful of both officials and the institution.¹³⁹ Public oversight mechanisms to monitor and audit the government, in particular the judicial and legislative systems, are integral to ensure that the government is not acting on biased whims that may lead to an unfair persecution of certain people or unfair policies that create a sense of fear within communities. Without the trust of the public and its ability to keep the government accountable, the government may become an enemy—an overbearing and controlling presence operating at its own discretion without any checks on its power.

The current legal system is one that was founded on many important ideals such as the presumption of innocence but has also reinforced many socioeconomic inequities and granted unequal amounts of power to certain groups. For example, individuals with greater financial means are better positioned to secure experienced legal counsel and, consequently, navigate complex legal procedures, while those from lower-income communities may face prolonged pretrial detention or rely on overburdened public defenders. Similarly, patterns of policing and prosecution have not been evenly distributed, leading to disproportionate surveillance and enforcement in marginalized communities.¹⁴⁰

The amount of precedent accumulated that has permitted intimate surveillance and unchecked investigation is also not something that can be

136. *Id.*

137. *Id.*

138. *Id.*

139. Barbara Gutierrez, *The Public Continues to Lose Trust in Major Institutions—and Each Other*, NEWS @ THEU (Nov. 19, 2021), <https://news.miami.edu/stories/2021/11/the-public-continues-to-lose-trust-in-major-institutionsand-each-other.html>. See particularly the Karin Wilkins sections.

140. Hossein Zare, *Disparities in Policing From Theory to Practice*, 114 Am. J. Pub. Health 384 (2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10937607/>.

undone by the mere adoption of new legislation. In fact, the passage of new legislation, in many cases, only serves to slow down the efficacy of the government.¹⁴¹ It is also impossible to say whether the legislation will also be properly enforced, considering that legislation being passed does not always guarantee proper enforcement. And an unenforced piece of legislation is not better than nothing; in fact, in some cases it may actually be worse than no law at all.¹⁴² An unenforced law comes across as a statement of societal indifference—that, though the public seemed to desire legislation that protected a certain aspect of society, the government does not see the importance to expend resources to actually do what the public desired.¹⁴³

CONCLUSION

From institutional complexities to oppressive bureaucratic forces, *The Trial* serves as a powerful literary lens through which Kafka critiques the systemic failures of the legal system, offering reflection on societal anxieties surrounding justice, autonomy, and human dignity. Josef's plight exposes the alienation and oppression inherent in a system where the presumption of innocence is hollow and where guilt is determined not by evidence, but by societal perception and the judgment of authority figures. In particular, the novel's parallels to the modern "court of public opinion," the disregard as to genuine "reasonable belief" surrounding the implication of an individual's actions, and the lack of respect to an individual's right of privacy highlight the fragility of foundational legal principles in the face of societal evolution and growing systemic flaws.

The presumption of innocence, once a cornerstone of justice, now struggles to maintain relevance in an era dominated by instantaneous (mis)information and public judgment. The interplay between Kafka's depiction of a dystopian legal system and contemporary realities underscores the urgent need to uphold this principle and find ways to establish mechanisms through which this principle is truly enforced, not just referenced. In such a system where the presumption of innocence is not respected as paramount, truth becomes secondary and the rights of the

141. See generally Gabriele Gratton et al., *From Weber to Kafka: Political Instability and the Overproduction of Laws*, 111 AM. ECON. REV. 2964 (2021). See Editorial, *Unenforced Law is Worse Than No Law at All*, BOZEMAN DAILY CHRON. (Jan. 23, 2002), https://www.bozemandailychronicle.com/unenforced-law-is-worse-than-no-law-at-all/article_da0f1c03-e2a1-519b-898e-6d146a32af06.html [perma.cc/6QYU-NLH4] [hereinafter *Unenforced Law Is Worse Than No Law at All*].

142. *Unenforced Law Is Worse Than No Law at All*, *supra* note 141.

143. *Id.*

individual are sacrificed at the altar of an uncaring bureaucracy. Without meaningful reinforcement of this protection, society is bound to find itself staring down the barrel of a future where fairness and objectivity are desecrated by the forces of prejudice, unchecked publicity, and institutional stagnation.

