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MILK AND OTHER INTOXICATING CHOICES: OFFICIAL STATE SYMBOL ADOPTION

Ryan Valentin

I. INTRODUCTION

Every fall, I ask my first year Introduction to Legal Research students: “What is the official drink of the Commonwealth of Kentucky?” Every year, without fail, the most common answer to this question is “bourbon”. The second most common answer is “Ale-8-One”.¹ Both answers are obvious, reasonable, and culturally conscious. Both answers are also incorrect. Upon elimination of the usual suspects, most students are at a loss to venture another guess. When there is a rare third attempt the answer tends to be “water” – also incorrect. If not bourbon, soda, or a liquid essential to life as we know it, what, then, is the official drink of the Commonwealth of Kentucky? In a word: Milk.²

How does it come to be that Kentucky, the foremost bourbon producing state in the country (and the world for that matter), chooses milk as its official state drink? What does it mean when Ale-8-One, a beverage having historical ties and iconic status within the Commonwealth, is not granted such a distinguished honor? What motives are at play when milk, a beverage so pedestrian it happens to be the official state beverage of the vast majority³ of official-beverage-adopting states, is selected? Do the symbols states officially adopt matter?⁴ If official state symbols do matter, what factors for adoption should be considered and by whom?

Although the practice of adopting official state symbols is widespread,⁵ little has been written on what legislators, when tasked with choosing a state symbol, should take into consideration. An examination of select official state symbols of the Commonwealth of Kentucky will contribute to an understanding of what

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¹ Described as having a mild ginger flavor, Ale8One is a soft drink native to Kentucky. THE KENTUCKY ENCYCLOPEDIA 11 (John E. Kleber et al. eds., 1992).
² KY. REV. STAT. ANN. § 2.084 (West 2013) (Milk is named and designated as the official state drink of Kentucky).
³ For a complete list of citations to official state beverages please see Appendix A: Official Beverages by State.
⁴ Historically the perception has often been no. “[I]t is precisely because many people think that such proposals don’t really matter that the selection of a particular flower, bird, snack, or bug is seen as a suitable activity for a cohort of children.” Kerry Dobransky & Gary Alan Fine, The Native in the Garden: Floral Politics and Cultural Entrepreneurs, 21 SOC. F. 559, 569 (2006).
⁵ See generally Alan Rosenthal, Symbolmania, ST. LEGISLATURES, January 2005, at 34-36.
official state symbols are, the purpose they serve, the qualities they should reflect, and how the value of symbols adopted may be improved through the application of standard best practices.

II. OFFICIAL STATE SYMBOLS

A. Defined

Official state symbols are representations of particular qualities or attributes of a state, as adopted through a democratic process, that connect people to place.6 This definition is derived from consideration of each term in the phrase. For purposes of this paper, the terms official and state have simple meanings. Official means “authorized or approved by a proper authority.”7 The mechanism by which most states adopt official symbols is through the passage of legislation.8 Any symbol adopted by a state through a proper authority, especially by legislative process, is deemed official.9

State means a community of people politically united under a common government administered by a body of elected officials.10 Although this definition and some examples below include activities at a national and international level, the primary focus here is on any of the fifty United States. The state of Kentucky11 is used extensively for demonstrative purposes.

The meaning of the term symbol is a bit more complicated.12 Many disciplines have developed descriptions for the term. A symbol has been described as “a person, object, image, word, or event that evokes a range of additional meaning beyond and usually more abstract than its literal significance;”13 “a word or an image . . . implying something more than its obvious and immediate meaning;”14 and “only the vehicles of communication . . .
not [to] be mistaken for the final term, the tenor, of their reference.” As a whole is greater than the sum of its parts, what makes a symbol a symbol is the attribution of meaning beyond a representative word or image.

A series of representations are made when we attach an external meaning to a word. For example, "the verbal symbol ‘cat’ is a group of black marks on a page representing an image or memory representing a sense experience representing an animal that says meow." Such symbols “stand for and point to things outside the place where they occur . . . the word ‘cat’ is an element in a larger body of meaning [and] not primarily a symbol ‘of’ anything, for in this aspect it does not represent, but connects.” Taking this observation further, “[w]hen effective, symbols can embody an emotional and thoughtless linkage to [a] place.” Due to their gestaltic nature, symbols are powerful, having the potential to create a viscerally innate connection between people and place. Although this symbol theory is derived from the literary criticism context, the same concept of symbol as connection beyond representation is applicable within a legal framework. Statutes are the literary device by which representatives communicate information about the symbol to the masses, not the symbol itself.

Official state symbols are commonly created through the same legislative processes as all legislation. Although most state symbols end up codified within a state’s statutory scheme, there are a few exceptions. Some official state symbols fall short of codification and remain un-codified resolutions. Still other official state symbols are created by gubernatorial designation, avoiding the legislative process altogether.

explores the symbol, it is led to ideas that lie beyond . . . the range of human understanding, we constantly use symbolic terms to represent concepts that we cannot define or fully comprehend.”).
Statutes come in a variety of flavors and those codifying symbols are a particular sort. Applying to an entire community and relating to the public at large, official state symbols are public rather than private law. By definition many symbol statutes are special, as opposed to general or local, as they often relate to particular persons or things of a class. Finally, symbol statutes tend to be permanent rather than temporary in nature.

As official state symbols are typically created through the same legislative process as other legislation, the same primary ingredients are required: time and money. Adopting state symbols through an expensive bureaucratic process creates a presumption that such symbols have value. Why else would legislators spend often limited resources adopting them? Attributing value to official state symbols due to the circumstances of their creation does not fully explain their purpose, however. Adopting symbols merely for the sake of having official state symbols is not self-justifying. After all, “[t]he idea of a statute without an intelligible purpose is foreign to the idea of law…” If official state symbols must have an intelligible purpose in order to exist, what purpose do they serve? What do official state symbols do?

26. See Earl T. Crawford, The Construction of Statutes 101 (1940). “Genericall[y], all statutes may be classified as public or private, or general or specific, or local. Public statutes may be further classified with reference to duration into temporary or perpetual statutes; as to their effective date into prospective or retroactive statutes; as to the nature of their operation into directory or mandatory, remedial, declaratory, permissive, prohibitive, perceptive, and repealing statutes; and as to their form into affirmative or negative statutes.”

27. See id. (“A public act is a universal rule that regards the whole community, or relates to the public at large.”).

28. See id. at 102.

29. See id. at 103. (“A general law is one which embraces a class of subjects or places and does not omit any subject or place naturally belonging to such class.”).

30. See id. “[A] local act is one whose operation is confined to the property and persons of a limited portion of the state.” Id. Although most official state designations are special, there are statutes that appear to be special-local hybrids as they relate to a particular thing of a class and are confined to a geographical area. See Ky. Rev. Stat. Ann. § 2.270(2) (West 2010) (designating the Switzer Covered Bridge in Franklin County as the official covered bridge of Kentucky).


32. See id. at 103-04. Permanent acts are “not limited to a particular term of time but . . . continues in force until it is duly altered or repealed” whereas “a temporary act is one whose life or duration is fixed for a specified period of time at the moment of its enactment, and continues in force, unless sooner repealed, until the expiration of the time fixed for its duration.” Id.

33. See generally Rosenthal, supra note 5.

B. Purpose

The simple answer is that “on their surface, symbols don’t ‘do’ anything. And in fact many symbols – at least for most of the time – do not receive public attention.”\(^{35}\) However, just beneath the surface, official state symbols serve significant state interests by what they are designed and intended to do. The primary functions of official state symbols are to legitimize state power, promote state commerce, and create state allegiance.\(^{36}\)

The flower is a commonly adopted symbol serving these state interests. Consider the status of the Flanders poppy in Britain. Adopted by the British Legion as its official symbol, the Flanders poppy has proven valuable in legitimizing state power.\(^{37}\) Symbols “can provide a material basis for reinforcing identification every day, especially at moments when neighbors come together. Communities may be imagined, but the reality of treasuring one’s lilac, camellia, and peony provides a real pleasure that suggests that the state springs from the very soil.”\(^{38}\) The perceived legitimacy of the state is nurtured by associating the state with the natural order. If the same source of power responsible for the divine right of kings is credited with creation of the earth,\(^{39}\) the divinity and thus legitimacy of the state is not too far a leap.

Symbols help states accomplish the goal of promoting commerce. “Lawmakers hope that symbols will provide an advertisement for the state, its citizens, products, and industries.”\(^{40}\) The poppy has certainly achieved these goals and more.\(^{41}\) From its beginning in the 1920s,\(^{42}\) the poppy has become “one of the most respected charity appeals in British history.”\(^{43}\) Making up part of the income for the Royal British Legion\(^{44}\) the poppy has grown in both popularity (with sales in the first year of £106,000\(^{45}\) to nearly £36.7m\(^{46}\) in 2011) and controversy.\(^{47}\)

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35. Dobransky & Fine, supra note 4, at 562.
36. See id. at 560. “States are always interested in creating affiliation as essentialist and inherent, and symbols in their small and taken-for-granted way cement this allegiance.” Id.
37. For an excellent examination of the poppy’s transformation from symbol of forgetfulness to one of remembrance see Jennifer Iles, In Remembrance: The Flanders Poppy, 13 Mortality 201 (2008).
38. Dobransky & Fine, supra note 4, at 582.
39. See James I, Speech to the Lords and Commons of the Parliament of White-Hall (Mar. 21, 1610) (“The State of Monarchie is the supremest thing upon earth: For Kings are not onely Gods lieutenants upon earth, and sit upon Gods throne, but even by God himself they are called Gods.”).
40. Dobransky & Fine, supra note 4, at 560.
41. See Iles, supra note 37, at 206-07.
42. See id. at 201.
43. Id. at 205.
44. The Royal British Legion is a charity organization serving the Armed Forces of the United Kingdom. See id. at 218.
The Flanders poppy has also facilitated citizen allegiance to the state. As “one of the most enduring and powerful symbols of remembrance of the war dead in Britain” the poppy is a summarizing sacred symbol able to synthesize a mass of complex ideas and feelings, and encourage an all-or-nothing emotional allegiance to the whole package. Apparently, “somebody” is the proper answer in turning the question “who wants flowers when you’re dead?” Apparently, the living do. Extending to the public the opportunity to select an official flower symbol further benefits the state by encouraging allegiance from historically disenfranchised members and those yet to be fully vested in the political process.

III. STATE SYMBOL QUALITIES

In the spring of 1918 the United States was fully engaged in war. As casualties mounted and public sentiment grew, a call for the adoption of a national floral symbol was made. The purpose was to crystallize national sentiments and demonstrate America’s aesthetic taste by adopting an “emblem . . . of all that is noble and good in the nation.” While other countries had a national flower at the time, the United States did not. England had the rose, France the Fleur-de-lis, Scotland the thistle, and Japan the chrysanthemum. Noting its many qualities, an attempt to make the wild columbine the national flower of the United States is made.

Although the wild columbine was ultimately not adopted as the national floral symbol, the enumerated qualities a symbol should possess in order to be eligible for the honor are still worth considering today as they were nearly 100 years ago.

48. Iles, supra note 37, at 201.
49. Id. at 206.
51. See Dobransky & Fine, supra note 4, at 564. “[S]electing a state flower was seen as a proper act for women and children; these symbols would bind citizens to a state in which they lacked political rights.” Id.
52. Rosenthal, supra note 5, at 35 (“Legislators are especially responsive to proposals put forth by kids, since they realize how difficult it is to get young people to participate in the political process. What better way to promote civic education, they feel, than to give children ‘hands-on experience’ of the legislative process.”).
53. See Albert A. Hansen, A National Floral Symbol, 47 SCI. 365, 365-66 (1918) (arguing for the adoption of the wild columbine as the national floral symbol).
54. Id. at 365.
55. Id.
56. See id. at 366.
57. The flower commonly known as the rose was adopted as the national floral symbol of the United States in 1998. 36 U.S.C.A. § 303 (West 2013).
years ago. In deciding whether to adopt a new state symbol, legislators should determine whether the proposed symbol is: beneficial, indigenous, accessible, and aesthetically pleasing. Adding to this list an evaluation of exclusivity and historical cultural value, a framework of qualities that legislators should strive to apply during their deliberative process is created. Although few proposed symbols will exhibit each and every quality, legislators should make their best effort to adopt symbols reflecting as many qualities as possible while being mindful that subjectivity is an underlying issue.

A. Beneficial

Not only should the adoption of problematic symbols be avoided, legislators should seek out symbols with potential economic benefit to the state. Initially this may appear to be an obvious notion because states are aware of how nationwide perception can directly impact their economy. The commercialization of both official and unofficial state symbols by the tourist industry is evident by “what is sold in tourist shops, vacation destinations, and airports.” However, states do not regularly or systematically engage in an economic impact analysis of every official state symbol adopted. Some legislators have lamented the loss of potential revenue for failing to fully leverage the opportunity symbol adoption could provide. If state promotion is one goal of spending time, money, and other resources adopting official symbols, legislators should formally engage in a critical analysis of the potential economic impact any proposed symbol is likely to have.

58. Hansen, supra note 53, at 366.
59. Dobransky & Fine, supra note 4, at 566.
60. See id. ("Few flowers meet all of these criteria, and so those who propose – or oppose – a state flower draw upon potential themes. These become the resources that cultural entrepreneurs use to argue that their choices deserve to be institutionalized.").
61. See Hansen, supra note 53, at 366. The national flower “should not be a troublesome weed in any sense of the word.” Id.
62. "Mass perception affects how those across the country see Wisconsin, which, in turn, can have an effect on our economy." Joseph Kapler, Jr., On Wisconsin Icons: When You Say "Wisconsin", What Do You Say?, 85 THE WISCONSIN MAG. OF HIST. 18, 28 (2002).
63. Id. at 29.
64. If states performed this analysis it would appear in the legislative history of every state symbol. Although speculation or general discussion of the economic impact may take place, an official report, issued by experts researching the potential economic benefit of a particular symbol, rarely exists.
65. See Howard Fischer, Bill on Official State Gun Likened to ‘Advertisement’, ARIZ. DAILY STAR, Mar. 14, 2011, at A5 (recognizing that the state was facing a $1.1 billion deficit next budget year, Arizona state senator Adam Driggs thought the state should get the “equivalent of naming rights” for adopting a brand name symbol).
B. Indigenous

Legislators should consider the indigenousness of a proposed symbol because the weakest symbols tend to be those branded as non-indigenous. Although such symbols can become official, making a case to adopt such symbols is more difficult because the community views them as invaders or worse. By contrast, symbols perceived to be or confirmed as indigenous are easier to adopt because their origins are not suspect. The challenge here is determining what qualifies as indigenous. How far back does a symbol’s history have to reach in order to be considered native?

C. Accessible

When it comes to state symbols, the issue of accessibility should be assessed. Accessibility permits all the citizenry an opportunity to participate, which in turn reinforces the interest of the state. Designation of a symbol having a rare or endangered status is potentially problematic because increased attention to an already compromised symbol may hasten its ultimate demise. Additionally, if a symbol is not widely available, access is limited and de facto adoption in the community is less ensured. The latter concern can be mitigated by adopting symbols that are economically beneficial and indigenous.

D. Aesthetic

Symbols should also be aesthetically pleasing. Economists and psychologists have demonstrated that attractive people earn more, get hired more quickly, tend

66. See Hansen, supra note 53, at 366. “The plant should be native and fairly common in all parts of the country.” Id.
67. See id.
68. See Dobransky & Fine, supra note 4, at 567. Where a proposed symbol is “supported by a powerful and well-connected industry, region, or group within the state, the forces supporting natural nativeness can be overcome.” Id.
69. Id. at 575. Characterized as a Yankee invader in Alabama, the goldenrod was no longer a ‘native’ plant “but was itself an invader, penetrating and threatening the South as General Sherman had nearly a century earlier.” Id.
70. Id. at 578 (noting that the Zinnia elegans was characterized as a foreigner, infiltrator, window box spy, and floral Mata Hari).
71. Id. at 582 (“If a plant has grown in a place in the course of the memory of those alive, it may be constituted as native. Botanical time and cultural time are not the same.”).
72. See id. at 581.
73. Hansen, supra note 53, at 366 (“A national flower should be easy of cultivation in all regions of the United States.”).
74. See id. (noting that a national flower should be native and fairly common in all parts of the country).
75. Id. (“When a plant becomes well known, there is created a tendency toward the extinction of that species because of the abnormal demand thus created.”).
to hold positions higher up the corporate ladder, and bring in more money to their companies – all of which make them more valuable assets. By adopting attractive symbols, states could benefit from the same advantages. The challenge here is identifying attractiveness, which is often subjective. Legislators should make a conscious effort to capture the aesthetic zeitgeist of their constituency by considering the tastes and sentiments of the community they represent.

E. Exclusive

States should strive for exclusivity in that the symbols are unique to the adopting state. This is different from being indigenous. A symbol may be indigenous to multiple states, diluting its potential potency. A symbol may be exclusive where claim to the symbol is limited to the citizenry of the state through an originator or monopolistic theory. Alternatively, the call for exclusivity may be satisfied where an otherwise common symbol has a superlative nature. A state claiming a biggest, smallest, tallest, shortest, or other notable status satisfies the exclusivity requirement.

F. Historic Cultural Value

A proven pedigree is the final quality legislators should look for in a symbol. Although a symbol may embody some or all of the qualities mentioned above, if it lacks a historical connection to the culture, acceptance by the community could be problematic because the symbol may be viewed as not being truly representative. Those making a case for a symbol’s adoption will “attempt to demonstrate that the symbol has a core and unshakeable connection to place or

77. Dobransky & Fine, supra note 4, at 566.
78. See Lawrence Barish, Coining Wisconsin: The Work of the Wisconsin Commemorative Quarter Council, The Wis. Mag. of Hist., Autumn 2004, at 16, 22 (noting that a council responsible for creating a design for the Wisconsin quarter rejected prospective symbols because they were not unique to and informational about Wisconsin).
80. See id. at 19 (noting that the Department of Treasury approved the use of historically significant buildings as a potential design for state coins).
81. See id. at 24 (“The agriculture design, jointly submitted by the Cheesemaking Center Inc., and Rose Marty of Monticello, reflected Wisconsin’s status as America’s Dairyland with a design consisting of the head of a cow, a wheel of cheese, and an ear of corn.”).
82. Dobransky & Fine, supra note 4, at 566.
83. Id. at 561.
to cultural values” to avoid this problem. How historic and culturally connected a symbol must be to qualify is difficult to determine.

IV. STATE SYMBOL CONSIDERATIONS

Over several decades, Kentucky’s General Assembly has enacted legislation designating a variety of items as official symbols of the Commonwealth. Do these official state symbols accurately reflect the connection people share with the state? Or do the Commonwealth’s official symbols continue to reflect confusion about the state’s identity that has existed long before the Civil War? What best practices should be put in place to ensure symbols achieve state goals and reflect the qualities noted above? When evaluating proposed symbols, legislators should consider context, evaluate connotation, engage in consultation, assess categories, and be open to change.

A. Context

Of the over twenty statutes Kentucky has created to name and identify official symbols, some fit iconic imagery associated with the state better than others. The most obvious and reasonable choices appear to simply be codifications of conspicuous symbols commonly associated with Kentucky. Thoroughbreds, coal, Bluegrass music, My Old Kentucky Home, Blue Moon of Kentucky, Appalachian dulcimers, cardinals, Kentucky agates,
and tulip poplars are all designated as official symbols and reasonably associated with either Kentucky specifically or include Kentucky regionally.

Officially enacted, but less obvious (and perhaps less reasonable) Kentucky symbol choices include: fresh-water pearls, goldenrod, blackberries, brachiopods, viceroy butterflies, gray squirrels, and honey bees. Not exclusive to Kentucky or its geographic region, all of these symbols can be found in many parts of the United States. The adoption of common symbols results in a loss of opportunity to identify the uniqueness of the state and contribute to the cultivation of a marketable image.

Legislators should first consider whether a symbol makes sense within the context of the state. Suppose the Commonwealth wants to adopt a sports car as an official state symbol. What sports car should it adopt? How about the Ferrari? Beautiful, exclusive, and expensive the Ferrari was a popular choice in the 1980s. The Ferrari even uses a horse for a symbol and who doesn’t think of horses when they think of Kentucky? In 2010, Kentucky did adopt a “state sports car” but it wasn’t the Ferrari – it was the Corvette. It makes sense that, within the context of the Commonwealth, if any sports car was going to be adopted it was going to be an American icon built exclusively in Bowling Green, Kentucky.

B. Connotation

Prior to adoption, careful consideration should be given to whether a symbol has a positive, neutral, or negative connotation. Preference for positive attributes should be given over neutral. Negative attributes should be avoided. In 1997, Congress passed the State Commemorative Coin Program Act in order to honor and promote knowledge of the states, modernize coinage, raise revenue, and encourage the collecting of “memorable tokens of all the States for the face value of the coins.” The designs were not to be “frivolous or inappropriate.” The

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95. K Y. REV. STAT. ANN. § 2.095 (West 2013) (codifying the State tree).
96. K Y. REV. STAT. ANN. § 2.092 (West 2013) (codifying the State gemstone).
97. K Y. REV. STAT. ANN. § 2.090 (West 2013) (codifying the State flower).
100. K Y. REV. STAT. ANN. § 2.083 (West 2013) (codifying the State butterfly).
102. K Y. REV. STAT. ANN. § 2.081 (West 2013) (codifying the State insect).
103. 3 ENCYCLOPEDIA OF CONSUMER BRANDS 144 (Janice Jorgensen ed. 1994) (noting that Ferrari started using the cavallino rampante or “prancing horse” in the 1920’s).
main issue for one state was whether the quarter design should “highlight an immediately recognizable and significant aspect of the state or . . . reflect a theme that, while not as well known, tells a story and educates the public about [the state’s] traditions, culture, and history.” 108 Kentucky adopted a state quarter design that ticked all the boxes. A Thoroughbred racehorse stands behind a four-board horse fence, with Federal Hill, a Bardstown home said to have inspired the Stephen Foster song *My Old Kentucky Home*, in the background. 109 The design avoids being viewed as frivolous or inappropriate while being immediately recognizable and educates others about the state.

The unique opportunity presented by the state quarter design is due to the nature of currency. Currency circulates widely and is, by definition, valuable as a medium of exchange. 110 Many who find advertisements attached to the doors of their homes or pinned beneath the windshield wiper on their car quickly dispatch the ephemera. However, the discovery of a single bill or coin is considered a fortuitous find by many and quickly pocketed. The state quarter serves as a low-cost, assured way for a state to promote itself through its symbols on a regular basis to millions of individuals, many of whom would have never thought of the state otherwise. If the goal is to incentivize people to pay attention to a symbol, put the symbol on something of value, put it on currency.

If agreeing on a positive symbol is unlikely, a neutral symbol should be considered. In Oregon, a newspaper solicited readers’ suggestions for the new state quarter design. 111 A leaping salmon, Crater Lake, Mount Hood, and a covered wagon were selected as finalists among themes that also included gambling, slugs, and explorers Lewis & Clark. 112 Ultimately, Oregon selected Crater Lake National Park – a reasonably neutral motif especially when compared to one reader’s suggestion that the quarter feature a solitary tree stump. 113

Negative attributes of a state should not be adopted as official symbols. In the Commonwealth, high rates of diabetes, lung cancer, illiteracy, and poverty have been identified as “Kentucky uglies”. 114 Such attributes, even if true, are facially negative and should not be appropriated for official symbol purposes. Sometimes negative attributes like those noted above are easy to identify. At

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107. Barish, *supra* note 78, at 17 ("Public Law 105-124 decreed that our nation’s coins and currency must reflect dignified designs of which the citizens of the United States can be proud.").
108. *Id.* at 22.
112. *Id.*
113. *Id.*
other times making this determination can be a challenge as the nature of a symbol is often subjective, depending largely on the perspective of the symbol advocate or opponent. This subjectivity is illustrated where some states, in searching further afield for symbols, are adopting official state weapons, garnering the praise of some and the ire of others.

Several states, including Kentucky, have adopted an official weapon. Opinion was mixed when Utah made the decision to adopt the Browning M1911 as its official firearm. Those in favor of adoption suggest the symbol is an appropriate and fitting tribute to John M. Browning, the gun’s iconic Utah inventor. Others noted the gun is an implement of freedom that has defended America for 100 years and can be used for purposes other than killing people including self-defense, as a collector’s item, or a paperweight. One senator argued that having a state gun “might prompt students to go to the library and learn more about the weapon and the history of the Browning family.”

Utahns opposed to adopting the weapon as an official state symbol noted semiautomatic pistols are the weapons of choice for those committing massacres and it would be inappropriate for the state gun to appear in coloring books. Others thought it insensitive to adopt a state gun considering the recent violence in Arizona. Such sentiments, however, did not sway Arizona which, on April 28, 2011, named the colt single action army revolver its official state firearm.

Regardless of whether or not a state should adopt a weapon as an official symbol, the debate over the Browning M1911 provides an opportunity to consider the types of questions legislators should be asking. What do politicians want their states to be known for? Who is the primary audience for learning

115. KY. REV. STAT. ANN. § 2.156 (West 2013) (codifying the Kentucky Long Rifle as the official State weapon).
118. Id.
121. Davidson, supra note 117.
123. Id. (referring to the death of six people in Tucson and the serious wounding of Congresswoman Gabby Giffords on January 8, 2011).
124. AZI. REV. STAT. ANN. § 41-860.02 (2011) (West).
125. Davidson, supra note 117 (noting that the State of Utah does not want to be known for its state gun).
about state designations? To what degree is this symbol exclusive? Is a balancing among selected state symbols called for? What type of message is being sent to those outside the state?

C. Consultation

Experts, particularly those employed by the state, should be consulted when drafting legislation. Effective July 15, 1998, coal was named and designated as the official mineral of Kentucky. Nearly two years later to the day, Kentucky agate became the official rock of Kentucky. Kentucky is one of the largest producers of coal in the United States and the Kentucky agate can be found in several counties throughout the state. Upon first impression, both coal and the Kentucky agate are reasonable choices for official state symbols.

The problem arises in the title designation. Technically, coal is a rock, not a mineral, and Kentucky agate is a mineral, not a rock. In the preamble to the Act, the state noted that the “designation of a state rock will promote interest in geology, the hobby of mineral collecting, and the lapidary arts.” One geologist suggested the state should call a rock a rock and a mineral a mineral if it wants to promote an interest in geology. This initial and subsequent mistake could have been avoided had the General Assembly consulted the Kentucky Geological Survey prior to the adoption of this legislation.

Just as the “history of what the law has been is necessary to the knowledge of what the law is,” the history of a potential state symbol is critical to determining the appropriateness of official adoption. Failure to be fully informed about a symbol results in inaccurate language. In order to avoid folly, expert advice and guidance should be sought prior to the advancement of

126. Montero, supra note 116 (noting children are the primary audience for learning about state designations).
127. Gehrke, supra note 120 (noting state can claim a connection to the gun’s inventor and designer that no other state can claim).
128. See id. (noting weapons or guns especially are so demonized by certain elements of society that adoption as an official state symbol adds a balance).
129. See id. (noting an official state weapon is not the right message to send to states).
130. KY. REV. STAT. ANN. § 2.091 (West 2013) (codifying the State mineral).
131. KY. REV. STAT. ANN. § 2.091 (West 2013) (codifying the State rock, effective July 14, 2000).
133. WARREN H. ANDERSON, ROCKS AND MINERALS OF KY. 37 (1994).
136. Mead, supra note 134.
139. Dobransky & Fine, supra note 4, at 559-60, 571, and 581.
proposals for new state symbols. Even though experts may not always agree, their advice should be solicited in order to avoid blatant mistakes. When experts offer advice sua sponte, it should be thoughtfully considered. Legislators should make every effort to be precise in meaning, whether such precision comes by resolution or the correction of statutory language.

D. Category

Recently, Kentucky adopted the honey bee as the official state agricultural insect. Of the states with honey bee colonies in 2010, only one, Vermont, had fewer colonies than Kentucky. Why would Kentucky adopt the honey bee? The adoption of the honey bee relates, at least in part, to a finding by the General Assembly that the reclamation of coal mine sites can benefit from pollinator habitat sites. Consecutive sections of the same bill designate the honey bee as the official state agricultural insect and find pollinators beneficial to mine site reclamation. This perceived link to mining earned the honey bee a top spot in the Commonwealth.

States miss opportunities to promote the superlative nature of common symbols. The honey bee, although common throughout the United States, has the potential to become an apt and powerful symbol when a state is the largest producer of honey in the country. From 2000 to 2010, California and North Dakota have vied for the spot of top honey producer with North Dakota leading

140. Id. at 571 (noting that after a New Hampshire committee became deadlocked on trying to select the state flower, it decided to bind itself to the recommendation of two local botanists only to find that the botanists could not agree on a state flower).


143. U.S. DEPT. OF AGRIC., NAT’L AGRIC. STAT. SERV., AGRIC. STAT. BD., HONEY 3 (2011) (noting that Kentucky, Virginia, and West Virginia had five honey producing colonies each, Vermont had four).

144. KY. REV. STAT. ANN. § 350.097 (West 2010) (“These sites are an important conservation resource which will encourage and protect the habitat for pollinators like honeybees, bumble bees, and other bee species.”).


since 2007. However, neither California nor North Dakota have adopted the honey bee as an official state symbol. California adopted the dogface butterfly (Zerene eurydice) several decades ago as its official state insect. North Dakota adopted the convergent ladybug (Hippodamia convergens) as its official state insect in 2011 after the lobbying efforts of an elementary school second grade class proved persuasive. Unlike the dogface butterfly, which is at least endemic to California, the convergent ladybug is found throughout the United States. Although the ladybug lobbyists in North Dakota noted myriad ways in which the insect benefits farmers, adopting the honey bee as the official state insect would have highlighted North Dakota’s dominance in honey production.

Qualification of a symbol by placement in a category creates opportunity for states to adopt more symbols. By qualifying the honey bee as an agricultural insect and also adopting the viceroy (an insect that falls into the butterfly category), Kentucky has made room for the adoption of even more insects. Although California and North Dakota already have state insects, California could place the dogface butterfly into the “official state butterfly” category and North Dakota could place the lady bug into the “official state beetle” category. Each could also adopt the honey bee under the agricultural or some other qualification. In doing this, states more precisely describe the symbols adopted, open the field to even more possibilities, and seize an opportunity to capitalize on a symbol that represents the state at a market level.

149. N.D. CENT. CODE ANN. § 54-02-19 (West 2011) (“The convergent lady beetle, hippodamia convergens, commonly known as a ladybug, is the official insect of the state of North Dakota.”).
150. CAL. GOV’T CODE § 424.5 (West 1995).
152. Tamara McNeiley, Ladybugs Are Good for N.D., BISMARCK TRIB., Feb. 23, 2011, http://bismarcktribune.com/news/opinion/mailbag/article_48d36a48-3ed9-11e0-8b99-001cc4c002e0.html; Dobransky & Fine, supra note 6, at 567 (“[C]hoosing a state flower has been seen as an appropriate act for women and children, impetus often has come from these groups. In 13 states, decisions were based entirely or in part on the votes of schoolchildren.”).
155. McNeiley, supra note 152.
156. See KY. REV. STAT. ANN. § 2.083 (West 2013) (adopting a state butterfly).
157. Perhaps the lightning bug or cicada could vie for the honor of official insect. Or the woolly worm, to which an annual festival is devoted in Beattyville, Kentucky. Festivals and Events, WELCOME TO BEATTYVILLE, LEE COUNTY, http://www.beattyville.org/tourism/festivals-and-events/ (last visited September 21, 2013).
E. Change

State adoption of official symbols, including songs, occurs throughout the United States and such adoptions have the potential to powerfully connect a people to a place. In Lexington, Kentucky, just before the velvet curtain is drawn away for a Summer Classics movie, the audience members at the Kentucky Theatre rise, remove their hats, and sing *My Old Kentucky Home*. The Kentucky General Assembly noted that *My Old Kentucky Home* has “immortalized Kentucky throughout the civilized world, and is known and sung in every State and Nation.” Whether you have lived an entire lifetime in Kentucky or are just visiting, it is difficult to stand in a crowd singing this song and not feel a present connection to the Commonwealth’s past – real or imagined. The same song opening movies at the Kentucky Theatre and heard at the Kentucky Derby is also the official state song of the Commonwealth. Few songs are as near and dear to the hearts of Kentuckians as *My Old Kentucky Home*.

However, no amount of tradition, affection, or deference to artistic intent was enough to prevent a substantive change to the song. In 1986, the General Assembly recognized “the style and verbiage used by Foster while penning ‘My Old Kentucky Home’ was contemporary of the era which included the tragic division of Americans in the Civil War.” The original words, as Stephen Foster wrote them, were: “*Tis summer, the darkies are gay.*” No longer acceptable, resolutions from both the House and Senate replaced the word “darkies” with “people.” Changing a symbol in an effort to conform to contemporary standards of propriety is not a call for the implementation of revisionist history. Other symbols that reflect moments from our collective past, where reasonably considered benign, should be left intact.

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158. GREGORY A. WALLER, MAIN STREET AMUSEMENTS 212-14 (1995). Following an overture from the Wurlitzer organ, the audience first sang My Old Kentucky Home at the Kentucky Theatre’s grand opening in 1922. The Kentucky Theatre’s “Mighty Wurlitzer Theatre Pipe Organ” is the official theatre pipe organ of the Commonwealth of Kentucky. KY. REV. STAT. ANN. § 2.104 (West 2013).

159. STEVEN A. CHANNING, ENCYCLOPEDIA OF KENTUCKY 6 (2000).

160. KAREN CERULO, IDENTITY DESIGNS: THE SIGHTS AND SOUNDS OF A NATION 165 (1995) (“The conditions of change are narrow and highly restrictive. In lieu of the right provisions, national symbols, like the nicknames and mementos of our personal histories, cling to that which they signify – their bonds not easily severed, their meaning not easily forgotten.”).


163. Periodically members of the Kentucky General Assembly will make an attempt to remove the “dueling” language from the Oath of Office. For now the language remains, reminding us of
conveys “connotations of racial discrimination that are not acceptable in our present day,” legislators should be open to the idea of changing symbols that trample on the sensibilities of the citizenry.

Being open to the idea of change is not easy and can often be quite difficult. Those involved with an ever-changing official flag of the State of Georgia know this all too well. With three different versions of its flag since 1956 alone, it is likely there have been more versions of the Georgia state flag than that of any other state. “The contentious flag issue led to the defeat of one governor [Barnes] (in 2001), embroiling both him and his successor in bitter political controversies marked by legislative arm-twisting [sic] and backroom deal-making.” Although actual change can come with high cost, if legislators want official symbols to fulfill state purposes, they must not shy away from new ideas and changing perspectives.

V. OFFICIAL STATE DRINK OF KENTUCKY: DOES IT DO A BODY (POLITIC) GOOD?

Perhaps most peculiar of all Kentucky state symbols is the official state drink. Many unfamiliar with Kentucky’s official state symbols may be surprised or even perplexed to discover milk is the official state drink. However, Kentucky is not alone in its official drink preference. Of the twenty-eight states adopting an official beverage, twenty-one (seventy-five percent) have selected milk. Having defined what official state symbols are, determined the purpose they serve, noted the qualities they should exhibit, and the considerations made Kentucky’s past without causing any great harm. See, e.g., Jack Brammer, Lawmakers duel over wording in state oath, LEXINGTON HERALD-LEADER Nov. 18, 2009, at A5.

165. Dobransky & Fine, supra note 4, at 570 (“Legislators who lack personal or professional stakes in such issues may find that replacing a state symbol is more trouble than it is worth.”).
168. Id. at 84.
169. KY. REV. STAT. ANN. § 2.081 (West 2010) (“Milk is named and designated the official state drink of Kentucky.”).
170. Coffee milk, a beverage made by combining milk with coffee syrup, is included as a milk-based beverage and is the official state drink of Rhode Island. Nebraska and South Carolina are included as both states have more than one official beverage including milk. Appendix A, supra note 3.
171. Appendix A, supra note 3.
when evaluating a symbol’s adoptability, should milk continue to be the official state drink of the Commonwealth?

A. A Brief Legislative History of Milk as Official Drink in Kentucky

How did milk become the official drink of Kentucky? Often “individuals or groups, operating out of their own interests and relying upon a set of material concerns, social connections, or cultural capital draw on accepted rhetorical themes to make the case for a symbol.”

Effective June 20, 2005 milk was named and designated as the official state drink of Kentucky. Sponsored by a dairy farmer senator, the Bill passed the Senate with 37 yeas, 0 nays, and no abstentions. The Bill then passed the House with 88 yeas and 5 nays. The entire process transpired over the span of 34 days from the introduction of Senate Bill 93 to being signed by the Governor. Much like the florist specializing in zinnia seeds pushing for the zinnia, or the peony grower pulling for the peony, it is no surprise to see a dairy farmer leading the charge to officially recognize milk.

The preamble to the Act noted many benefits of milk production to the Commonwealth, including: milk production and the manufacture of dairy products are major contributors to the economic well-being of Kentucky agriculture; there were 1,614 dairy farms in Kentucky in 2002-2003, with a milk production value of $213 million; the 2005 Dietary Advisory Committee increased the recommendation for dairy foods from 2-3 servings in the 2000 Guidelines, to 3 servings of low-fat and fat-free dairy foods every day; milk is an invaluable source of calcium, B vitamins, protein, and other nutrients such as phosphorous, magnesium, potassium, riboflavin, and vitamins A and D; milk and milk products promote and maintain strong bones and good health. The language of the milk statute (a single sentence consisting of twelve words) is also

172. Dobransky & Fine, supra note 4, at 561 (“If the symbol is not seen as divisive (e.g., dividing regions of the state), and if no group opposes the adoption of the proposed symbol, then the process of selection will be smooth.”).
173. KY. REV. STAT. ANN. § 2.084 (West 2010).
179. Dobransky & Fine, supra note 4, at 576 (“In 1931... the zinnia was selected as the state flower [of Indiana], suggested by another popular legislator, apparently a florist who sold zinnia seeds.”).
180. Id. at 579 (In 1957 Indiana changed the state flower with the help of Representative Baker who “was the largest peony grower in the state and owned three large nurseries near Fort Wayne.”).
relatively short. Its pithiness combined with a public perception of milk’s virtues and innocuous nature may further help to explain its passage with little opposition.

Any choice has the potential to be controversial. Although milk faced little opposition in the Kentucky General Assembly, nationally the idea of milk as healthy food has been met with opposition. A variety of organizations, including the Physicians’ Committee for Responsible Medicine and People for the Ethical Treatment of Animals, are dedicated to shaping a different public view of dairy products. These groups disagree with the position that milk promotes a healthy lifestyle.

Many are familiar with the “got milk?” campaign on billboards across the United States. Billboards have also been used to depict milk in a less flattering light. From “the Grim Reaper with a wedge of cheese on its head with the words ‘Cheese can sack your health’” near Wisconsin’s Lambeau Field, linking milk consumption to autism in children, Ben & Jerry’s co-founder Ben Cohen’s heart surgery, and Baskin-Robbins co-founder Burt Baskin’s death are often referenced in the “is milk good or bad?” debate.

Assuming the above noted virtues of milk outweigh the criticisms, should this have been enough to elevate milk to official state drink status? How does it measure up to bourbon, an obvious contender? The following is a case study for bourbon as official state beverage applying the adoptive qualities and considerations described above. Although it is rare for a symbol to exhibit all the qualities, a strong showing is acceptable and should be preferred.

182. K Y. REV. STAT. ANN. § 2.084 (West 2010) (“Milk is named and designated as the official state drink of Kentucky.”).
186. Rickert, supra note 184.
187. Salahi, supra note 184.
189. Id. (noting Baskin died of a heart attack at 59).
190. JOHN ROBBINS, DIET FOR A NEW AMERICA 110 (1998) (John Robbins, heir apparent and abdicator of the Baskin-Robbins empire, arguing the costs of milk are too high.).
B. Adoptive Qualities of Bourbon

1. Economically beneficial

Bourbon production and the manufacture of bourbon products are major contributors to the economic well-being of Kentucky. A January 2012 report, produced for the Kentucky Distillers’ Association, found the bourbon industry was comprised of 18 major distilleries, employing around 3,100 people, and had an annual payroll of about $246 million. For fiscal year 2010, the estimated annual Kentucky tax on the production and consumption of distilled spirits was $126 million. What bourbon may lack in nutritional value is made up for by the estimated dollars spent by nearly 23,000 Kentucky Bourbon Trail (KBT) passport holders. Participants who complete the KBT by having their passport stamped at each of the seven distillers along the trail receive a KBT t-shirt. All are strong reasons for Governor Beshear to note the bourbon industry gives him “a sales tool that is second to none” in his efforts to create jobs for Kentucky. Recognizing bourbon as the official drink of Kentucky would give the Governor an even sharper marketing tool.

2. Indigenous

The status of bourbon as indigenous spirit of the United States is widely recognized. The term ‘bourbon’ is federally regulated in that it “shall not be used to describe any whiskey or whiskey-based distilled spirits not produced in the United States.” Several agreements, including the North American Free Trade Agreement, United States-European Union Agreement on Nomenclature of Distilled Alcoholic Beverages, and the United States-Hong Kong Agreement, recognize the distinctive nature of bourbon.

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192. Id. (This amount excludes fringe benefits.).
193. Id. at 24.
194. Id. at 41. Although data is limited, the estimated economic impact per 1,000 passport holders is about $585,000. Id.
195. Id. at 39. Between August 2007 and November 2011 there were 22,770 Kentucky Bourbon Trail passport holders. Id.
198. 27 C.F.R. § 5.22(k)(1) (2012)
199. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 319 (1993) (“Canada and Mexico shall recognize Bourbon Whiskey . . . as [a] distinctive product[s] of the United States. Accordingly, Canada and Mexico shall not permit the sale of any product as Bourbon Whiskey . . . unless it has been manufactured in the United States in accordance with the laws and regulations of the United States governing the manufacture of Bourbon Whiskey . . . .”).
Distilled Spirits, 200 and the United States-Australia Free Trade Agreement 201 recognize bourbon whiskey as a distinct product of the United States. 202 Although the individual responsible for producing the first bourbon is open for debate, 203 historians place its origin firmly within the United States in what is now Kentucky. 204

3. Accessible

With approximately 4.7 million barrels aging in 2010 alone, 205 bourbon is abundant in Kentucky and accessible to those of legal drinking age. Providing even greater access to the bourbon industry, approximately 400,000 people visited the KBT in 2010, 206 which attracts more and more visitors every year. 207 The Trail has grown recently with the addition of the Craft tour which features the efforts of smaller, artisan distillers. 208 If the tour just begins to whet the taste for bourbon, several drinking establishments throughout the Commonwealth serve bourbon in abundance. Recognized as one of the best bourbon bars in the world, 209 the Horse & Barrel in Lexington offers patrons an opportunity to join the Bluegrass Bourbon Club. 210 Upon completion of their education, which entails the imbibing of fifty-plus bourbons (not all in one sitting), members’ names are immortalized on a plaque. 211 The annual Kentucky Bourbon Festival in Bardstown is recognized as the official bourbon festival in Kentucky. 212 Not of legal drinking age but still interested? Consider participating in the Bourbon

202. See supra notes 198-200.
204. Id. at 38.
205. Coomes, supra note 191, at 7.
207. Janet Patton, Bourbon Trail sees 15% jump in visitors, LEXINGTON HERALD-LEADER, Jan. 29, 2013, at C5 (noting over a half-million people visited the Kentucky Bourbon Trail in 2012).
208. Truman, supra note 197.
211. Id.
212. KY. REV. STAT. ANN. § 2.400 (West 2010).
Chase, an annual 200-mile run along the KBT. Additionally, a variety of bourbon-based products such as chocolate, sauces, and smoked sea salt are widely available.

4. Aesthetically pleasing

Anyone experiencing the unique landscape of Kentucky firsthand, even if their heart has been hardened by the world, would agree that “heaven must be a Kentucky kind of place.” If Daniel Boone were to visit today, he may very well find the bourbon distilleries that dot the countryside to be beautiful indeed. Of particular interest would be those recognized on the official list of the Nation’s historic places worthy of preservation. Of the twelve Kentucky distilleries listed on the National Register of Historic Places, Labrot & Graham’s Old Oscar Pepper Distillery in Woodford County is notable for its restored historic buildings. Home to Woodford Reserve, this distillery features several restored buildings, uses traditional copper-pot stills, and is among some of the oldest operating distilleries in Kentucky.

Those interested in exploring the ways in which bourbon is appealing by way of the applied aesthetics field note receptivity, quality in manufacturing, taste profile, and the association of ideas with the psychology of taste as enhancing the consumer experience. “Deeply important in our making a selection and then experiencing the whiskey is the story that our minds will associate with that particular label, the story of how it was made, the story of where it was made, the story of what happened in the past when drinking it and with whom we drank.

213. The 200-mile race is sold out, but everyone’s welcome at after-party, LEXINGTON HERALD-LEADER, Sept. 28, 2012, at T5.
215. Often attributed to Daniel Boone, noted explorer and settler of what is now Kentucky, this sentiment may be apocryphal.
218. Id.
it.\textsuperscript{220} The environments, accoutrements, and stories associated with bourbon have the potential to produce a pleasing aesthetic that is carried in the mind everywhere.

5. Exclusive

Although Kentucky does not produce every ounce of bourbon in the world, it comes close. Approximately ninety-five percent of global bourbon production comes from the Commonwealth.\textsuperscript{221} The General Assembly, in recognizing the importance of the bourbon industry to the Commonwealth, passed legislation to ensure certain standards are met for products labeled Kentucky.\textsuperscript{222} Label disclosure of original distilling location has been required where bourbon whiskey is distilled in one state and then redistilled in Kentucky.\textsuperscript{223} The superlative claim relating to production volume, coupled with regional geographic-indication protections, satisfy the exclusivity requirement for most intents and purposes.

6. Culturally and historically valuable

To people outside the Commonwealth, bourbon is synonymous with Kentucky.\textsuperscript{224} To many citizens of Kentucky, bourbon is a way of life. A visitor declaring Jack Daniels as their favorite Kentucky bourbon is committing a fatal social blunder. Although all bourbon is whiskey, not all whiskey is bourbon.\textsuperscript{225} Jack Daniels is the latter.\textsuperscript{226} It is also made in Tennessee.\textsuperscript{227} Bourbon is also a key ingredient in a mint julep,\textsuperscript{228} the quintessential Kentucky libation. With

\textsuperscript{220.} Id. at 135 (crediting David Hume’s philosophy of the association of ideas as giving “a far more insightful and plausible account of what goes on when we select and drink a whiskey”).

\textsuperscript{221.} Coomes, supra note 191, at 1.

\textsuperscript{222.} KY. REV. STAT. ANN. § 244.370 (West 2010) (codifying requirement of aging for whiskey bottled in Kentucky or removed from the state).

\textsuperscript{223.} Rev. Rul. 54-416, 1954-2 C.B. 470 (“‘Sour Mach Bourbon Whisky’ may not be produced by a distiller in Illinois and transferred to a distiller in Kentucky for redistillation without substantial change and, after storage and bottling, be labeled as ‘Kentucky Bourbon Whisky’ without indication of Illinois origin and with redistiller’s name and address stated on the label as the name and address of the distiller.”).

\textsuperscript{224.} See Coomes, supra note 191, at 1.

\textsuperscript{225.} See Fritz Alhoff & Marcus P. Adams, Introduction: Start up the Still, in WHISKEY & PHILOSOPHY: A SMALL BATCH OF SPIRITED IDEAS 1, 6 (2009).


\textsuperscript{227.} See id.

\textsuperscript{228.} JOE NICKELL, THE KENTUCKY MINT JULEP 3 (2003) (“The essential mint julep is made with bourbon and mint syrup poured over ice and garnished with a sprig of fresh mint.”).
thoroughbred racing being the primary draw for tourists and locals alike, approximately 120,000 mint juleps are sold during Kentucky Derby weekend.  

Bourbon is an essential ingredient in Kentucky culture. Historically, bourbon has been valued by some of Kentucky’s most venerable figures. During the 1950’s, Old Crow solicited any and all historical records linking their product to famous people. Many popular stories associate bourbon with Henry Clay who was among several individuals identified through this advertising campaign effort. Tales attribute the measure of his political success to the size of his bar bill, and describe him shipping barrels of bourbon to his Senate office in Washington, D.C., and recording his recipe for the mint julep in his diary. The verifiability of such anecdotes varies considerably. However, Henry Clay did write a letter to his son discussing, among other things, his instructions to have a barrel of old bourbon delivered to a Dr. H.S. Levert of Mobile. The status of bourbon as the native spirit of the United States along with its deep cultural and historical roots in Kentucky make it the reasonable choice for the official state beverage.

230. Old Crow Almanac, LIFE, April 9, 1956, at 161 (“Snoopers, Peepers, Paul Pry’s and Sam Spy’s win $250. Old Crow will pay you $250 for every accepted, authentic historical fact relating Old Crow to famous men of the past. Look in newspapers, books, old letters and personal diaries. Write: Old Crow Historical Bureau, 149 Madison Ave., New York 16, N.Y.”).
231. Old Crow Almanac, LIFE, April 21, 1958, at 61 (“Money on your mind? History in your attic? Put them all together they can spell $250.00 for you. Look through old trunks, attics, newspapers, family papers, diaries for documented information relating James Crow’s whiskey to famous 19th Century Americans. Acceptable material will be paid for by the undersigned with 250 lawful and legal U.S. dollars. Old Crow Historical Bureau 149 Madison Avenue, New York, N.Y.”).
232. Duane Bolin, Kentucky Profiles: Compromising Secret, KY. MONTHLY, Nov. 2011, at 12 (noting Mr. Clay’s compromisers were always agreeable when they were well lubricated).
233. James Crow, Whisky Maker, The Man Who Reduced Distilling to a Science in Kentucky in the Thirties, THE SUN, Sept. 5, 1897, at 6 (noting that “[f]or many years there was treasured in Versailles as a relic an old letter from Henry Clay to his friend [James] Crow ordering a barrel of his wonderful elixir to take to Washington with him to lubricate the wheels of Government.”).
234. See Nickell, supra note 228, at 31 (citing a newspaper article and personal correspondence with a director at the Kentucky Derby Museum, claiming the recipe is “historically authoritative, from the diary of the Great Compromiser himself, Henry Clay”).
235. Letter from Henry Clay to his son (Oct. 14, 1845) (available at University of Kentucky archives) (discussing how Henry Clay is going to take care of various debts incurred by his son).
236. Id.
C. Adoptive Considerations

1. Context

Does the designation of milk as official state drink make sense within the context of Kentucky? Milk is not the first thing that comes to mind when people think of Kentucky because milk does not fit within the context of what many envision when it comes to the Commonwealth. Unlike bourbon distilleries, dairy farms are located throughout the United States.\(^{237}\) In 2008, three years after Kentucky adopted milk,\(^{238}\) the state was not even close to being a top milk producer in the United States with only 90,000 milk cows.\(^{239}\) That same year, twenty-two other states had more milk cows.\(^{240}\)

If milk as official state drink does not make sense in Kentucky, where does it make sense? Wisconsin. Wisconsin adopted milk as their official state beverage\(^{241}\) with good reason. In 2008 Wisconsin had 1.25 million milk cows.\(^{242}\) “Wisconsin is known as ‘America’s Dairyland,’ and . . . license plates have been telling everyone that since 1940. [The] official symbols bolster the idea: milk is the official beverage, and six breeds of purebred dairy cows constitute the official state domesticated animal.”\(^{243}\) Dairy themes were the most popular submission\(^{244}\) when it came to designing the Wisconsin state quarter which ultimately featured an ear of corn in addition to a cow and block of cheese.\(^{245}\) “Mass perception affects how those across the country see Wisconsin, which, in turn, can have an effect on [Wisconsin’s] economy.”\(^{246}\) When milk is adopted as the official state drink of Kentucky it may represent something, it may connect to something, but that something is not a representation or connection to the Commonwealth. Milk as official state drink makes better sense within the context of Wisconsin, not Kentucky.

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\(^{240}\) Id.


\(^{243}\) Kapler, supra note 62, at 21.

\(^{244}\) Barish, supra note 78, at 20-21 (noting that of the over 9600 design submissions for the Wisconsin state quarter, the category with the most submissions, over 2,000 or 22 percent of all entries, was ‘dairy’, which included designs featuring milk, cheese, or cows).

\(^{245}\) Id. at 24; see also Kapler, supra note 62, at 21 (“Wisconsin produces 15 percent of the nation’s milk…and 30 percent of the cheese.”).

\(^{246}\) Kapler, supra note 62, at 28.
2. Connotation

Whether a product, either milk or bourbon, has a positive, negative, or neutral connotation is difficult to objectively determine. Milk may be positive to dairy farmers and those who enjoy dairy products. It may be negative to those who associate cow milk with poor health or are involved in the promotion of a competing industry. To many, milk may be neutral. The same may apply to bourbon. Bourbon may be positive to those associated with its production, marketing, distribution, and sale. Negative associations with bourbon may be attributed to juvenile misadventure or collateral problems such as drunk driving, alcoholism, and health-related concerns – attendant issues with the irresponsible use of any intoxicating beverage, not just bourbon.

3. Consultation

Experts from the dairy or spirits industry would likely champion the official adoption and recognition of their respective products. However, in light of the adoptive qualities of milk and bourbon along with the context and connotation considerations noted above, what would experts in marketing select to promote the state? Charged with marketing the Commonwealth to increase tourism, the Kentucky Tourism, Arts & Heritage Cabinet divided the state into nine regions and named each according to its attributes. Only the terms bourbon, horses, and bluegrass were named attributes in more than one region. No regional name noted milk or any dairy product as an attribute. These regional designations, developed by experts to promote the state, serve as an indicator of bourbon’s value to the Commonwealth.

4. Category

Would a categorical approach be a reasonable way to resolve this issue? Instead of having one official state beverage, why not have several qualified drinks within the beverage category? Legislatures have used the categorical

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247. See Leigh Hornbeck, Dairy Dilemma, TIMES UNION, Ap. 10, 2013, at F1 (noting recent study found women who eat high-fat dairy products after they are diagnosed with breast cancer are at a higher risk for death).


250. See id.

251. See id.

252. See id.
approach in the past and Kentucky could theoretically have an official state drink, spirit, and soda. As there is precedent for adoption of a spirit as an official symbol, Kentucky would not be alone if it were to adopt bourbon. Alabama adopted Conecuh Ridge Alabama Fine Whiskey as the official spirit of Alabama. Since there are a multitude of bourbon producers marketing their product under an even greater number of labels, adoption of bourbon generally, rather than endorsing a specific brand, would best serve the industry as a whole.

For teetotalers, a reasonable alternative to bourbon as the official drink of Kentucky exists: Ale-8-One. Bottled in Winchester, Kentucky since 1926, "A-Late-One," claims to be the only soft drink invented in Kentucky still in existence. The soft drink as official beverage also has precedent. In 2005, the state of Maine adopted Moxie as the official state soft drink.

In 2013, the Kentucky General Assembly considered a bill that would designate Ale-8-One as "the official Kentucky original soft drink." Intervention by a major soda corporation with significant lobbying resources resulted in the passage of an amended version of the bill. The issue had to do with the terms "the" and "official." The corporation contacted the bill’s sponsor noting it had started bottling soda in Kentucky before Ale-8-One. The House Standing Committee on State Government spent little time discussing

253. See Rosenthal, supra note 5, at 36 (“When brought to a vote, however, legislatures are adept at compromising interests. That is no doubt why Tennessee had two official fish, a commercial fish and a game fish, three official insects and two state rocks.”).
255. See MICHAEL R. VEACH, KENTUCKY BOURBON WHISKEY: AN AMERICAN HERITAGE 98-99 (2013) (“Heaven Hill, which has built a substantial portfolio through in-house development and outside acquisition of a variety of bourbon labels, even sells bulk whiskey to high-end organizations interested in their own private label.”).
260. Interview with DeAnne Elmore, Marketing and Public Relations Director, Ale-8-One (July 2, 2013).
261. Audio tape: Hearing on various proposed legislation, including HB 205, held before the House State Government Committee, Committee Chair Rep. Yonts, and the Commonwealth of Kentucky (Feb. 21, 2013) (on file at the Legislative Research Commission).
263. The House Standing Committee on State Government handles “[m]atters pertaining to the sovereignty and jurisdiction of the Commonwealth; the General Assembly; its committees, officers and service agencies; redistricting; the Governor; the Lieutenant Governor; administrative organization; administrative regulations; administrative agencies; Department of Law; constitutional offices; state personnel; state retirement systems; public property and public printing; public officers, their terms, appointments, fees, compensation, removal, oaths and bonds; public information; disaster and emergency services; state and regional planning; libraries; archives and
the language substitution. Ultimately, “the” was changed to “an”, the term “official” was deleted, and Ale-8-One was designated as “an original Kentucky soft drink”. This result is peculiar. As originally drafted, the term “the” reasonably qualified either the entire sentence generally or the term “official” specifically, not the term “original” which was qualified by the term “Kentucky.” Although the corporation had a valid claim of bottling in Kentucky prior to Ale-8-One, it could not claim its current product line was original to Kentucky, nor did it have a basis to claim it was official. Ale-8-One may have been able to obtain official status had the bill language tracked that of milk: *Ale-8-One is named and designated as the official state soda of Kentucky.*

Qualifying symbols provide a state with an opportunity to honor a variety of unique qualities. The potential downside with this approach is having so many symbols that the individual identity the state is trying to establish and market is lost in an attempt to satisfy a plethora of special interests. Concerned about the proliferation of state symbols, Texas lawmakers set out to change the manner in which official symbols are adopted. Citing steep competition between towns for official designations and an ever growing list of state symbols, the legislation calls for proposed symbols “to be filed as bills instead of resolutions, which would require additional scrutiny from lawmakers, including committee hearings.”

Ultimately, the language adopted by the Texas legislature addresses both state symbols and place designations. Proposed state symbols must specify an item’s historical or cultural significance to the state and may not be a commercial product, an individual, an event, or a place. Proposed place designations may

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264. Interview, supra note 262 (“Ok. I’m trying to get this docket down to two bills. Representative Mayfield I’m going to do yours next. You’ve got about two minutes. Representative Mayfield has a committee sub. Because of the issues of the official soft drink is named – the amendment calls for it to be named and designated as an original Kentucky soft drink. The sub is being passed out. Is there a motion on the committee sub? Mr. Kearny motions on the committee sub. Is there a second? Representative Brad Montell. Motion is to adopt Ale-8-One as an original Kentucky soft drink. Representative Mayfield you’ve got about forty-five seconds.”).

265. Id. Rep. Mayfield noted had the term “official” been retained, a variety of soda producers would likely have objected.


267. See BENJAMIN F. SHEARER & BARBARA S. SHEARER, STATE NAMES, SEALS, FLAGS AND SYMBOLS: A HISTORICAL GUIDE 108 (1987) (supporting the idea that only symbols adopted through the legislative process are deemed official).

268. See David Tarrant, *Texas is Big on Symbols*, DALLAS MORNING NEWS, Mar. 14, 2001, at 1C.


not be assigned to more than one event or location, must include relevant historical or cultural information, and be supported by a local chamber of commerce or elected governmental body.\textsuperscript{272} Except for re-designation by the legislature, a sunset provision ensures place designations expire on the designation’s 10th anniversary.\textsuperscript{273}

5. Change

Are Kentuckians open to change when it comes to their official state drink? At times Kentuckians have been open to change when it comes to state symbols,\textsuperscript{274} and at other times not so much.\textsuperscript{275} Some citizens of the Commonwealth have called for a change to Kentucky’s official state slogan – currently “Unbridled Spirit” – to “Kentucky Kicks Ass” suggesting the “time is right for a more democratic (little “d”, not big “D” or big “R”) slogan, something that bubbles up, trips off the lips, [and] sings to the subversive soul\textsuperscript{276} - essentially what milk does not do (and what bourbon would do) as the official state drink.

Symbols “work best when . . . they serve as the metaphorical reflections of the properties of the population they reflect.”\textsuperscript{277} In 2005, when milk became the official drink in Kentucky,\textsuperscript{278} it was suggested, “the measure would also help promote healthier lifestyles.”\textsuperscript{279} In a 2012 ranking of overall health among the fifty states, Kentucky ranked near the bottom at 44.\textsuperscript{280} A report that same year noted “Kentucky is predicted to jump from a 30 percent adult obesity rate in 2011 to 60.1 percent in 2030.”\textsuperscript{281} Symbols should reflect what a state has accomplished, not what a state hopes to accomplish sometime in the future.

\textsuperscript{272} Tex. Gov’t. Code Ann. § 391.003 (West 2013).
\textsuperscript{274} See Ky. Rev. Stat. Ann. § 2.100 (West 2010) (noting the modern version of “My Old Kentucky Home” was adopted during the 1986 Regular Session of the General Assembly by the House of Representatives in House Resolution 159 and the Senate in Senate Resolution 114 substituting the word “people” for the word “darkies”).
\textsuperscript{277} Dobransky & Fine, supra note 4, at 578.
\textsuperscript{278} Ky. Rev. Stat. § 2.084 (West 2013).
\textsuperscript{279} Bill Targets Illegal Sales of Narcotics Over Internet, LEXINGTON HERALD-LEADER, Feb. 17, 2005, at C2 (noting milk bill sponsor believes measure will help promote healthier lifestyles).
\textsuperscript{280} United Health Found., America’s Health Rankings, A Call To Action For Individuals And Their Communities, 14 (2012).
\textsuperscript{281} Cheryl Truman, A Fatter Future for our Kids? – New Obesity Predictions Should Disturb Us All, LEXINGTON HERALD-LEADER, Sept. 25, 2012, at B1 (citing findings of F as in Fat: How
Failing to celebrate and promote that which makes Kentucky unique, particularly by adopting highly pedestrian symbols such as milk, squanders opportunities to capitalize on that which makes the Commonwealth special. This failure causes the de facto adoption of the proposed state slogan in that “Kentucky kicks ass. Often, unfortunately, its own.” Kentucky’s failure to be united in embracing and honoring its uniqueness will contribute to its falling behind.

VI. CONCLUSION

States reasonably aspiring to legitimize power, promote commerce, and create allegiance through the adoption of official state symbols should use the following considerations to inform the decision making process. Official state symbols should go beyond merely representing an idea, as symbols fundamentally do, by making connections between people and places. In order to reach full potential, state symbols should bind residents’ perceptions to the state and be readily associated with the state by non-residents. This is particularly important where populations trend toward diversity as they do in the United States. Prior to the adoption of a proposed state symbol, legislators should consider whether the symbol merely represents a place, or goes further by connecting people to the state. Only symbols that do the latter should be adopted.

Adoption of ordinary symbols is potentially harmful to states on several levels. A state failing to embrace and honor its character through the adoption of symbols reflecting unique and positive qualities squanders opportunity to capitalize on individuality. At best this loss manifests itself as casting a state in a mediocre light. At worst this failure creates a space for a state’s shortcomings to become its identity. States should resist the temptation to adopt symbols that fail to reflect a state’s qualities and should avoid holding on to official symbols that fail to reflect a state’s positive attributes.


283. See KY. REV. STAT. ANN. § 2.020 (West 2010) (The seal of the Commonwealth shall have upon it the device, two (2) friends embracing each other, with the words “Commonwealth of Kentucky” over their heads and around them the words, “United We Stand, Divided We Fall.”); see also Shearer & Shearer, supra note 287, at 21 (“A motto might be considered a terse statement, sometimes humorous, sometimes serious, that describes a certain spirit of the bearer. State mottos, whether in English, Latin, French, or Spanish, or a native American Language, express simply the character and beliefs of the citizenry.”).

284. See Dobransky & Fine, supra note 4, at 581 (“[I]dentification with one’s landscape is a source of unifying ties in diverse societies. Native rootedness can serve as a metaphor for the expertise of collective identification.”).
If the law is always “approaching, and never reaching, consistency . . . forever adopting new principles from life at one end, and . . . always retains old ones from history at the other, which have not yet been absorbed or sloughed off” it is imperative states remain vigilant in vetting the appropriateness of symbols prior to adoption and continue monitoring their viability afterwards. Prior to adoption, states should consider whether a proposed symbol reflects the following qualities: indigenousness, aesthetic appeal, uniqueness, availability, potential economic impact, and cultural-historical value.

Finally, states should consider the following questions: Does this symbol make sense in this context? What connotations are associated with this symbol? Have experts on the subject matter been consulted? Have the opinions of experts been given serious consideration and sensible deference? Is the symbol too general? If so, should the symbol be qualified in some manner? For official state symbols currently in use, a process of reevaluation in light of the above considerations should occur by replacing symbols where a more qualified candidate can be identified. Ultimately, a state should strive towards harmonization amongst its official symbols. Adoption of state symbol statutes that are *in pari materia* should result in the creation of an indelible state identity in the minds of citizens and non-citizens alike.

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## APPENDIX A: OFFICIAL BEVERAGES BY STATE*

<table>
<thead>
<tr>
<th>STATE</th>
<th>BEVERAGE</th>
<th>CITATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama**</td>
<td>Conecuh Ridge</td>
<td>H.J. Res. 100, Reg. Sess. (Al. 2004); 2004 Ala. Acts 103</td>
</tr>
<tr>
<td></td>
<td>Whiskey</td>
<td></td>
</tr>
<tr>
<td>Alaska</td>
<td>none</td>
<td>See Alaska Stat. §§ 44.09.010- .09-140 (West 2013)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Milk</td>
<td>Ark. Code Ann. § 1-4-112 (West 2012)</td>
</tr>
<tr>
<td>California</td>
<td>none</td>
<td>See Cal. Gov’t Code §§ 1-399 - 2-429.8 (West 2012)</td>
</tr>
<tr>
<td>Delaware</td>
<td>Milk</td>
<td>Del. Code Ann. tit. 29 § 312 (West 2012)</td>
</tr>
<tr>
<td>Georgia</td>
<td>none</td>
<td>See Ga. Code Ann. §§ 50-3-1 – 50-3-100 (West 2012)</td>
</tr>
<tr>
<td>Iowa**</td>
<td>none</td>
<td>See Iowa Off. Reg. (Redbook)</td>
</tr>
<tr>
<td>State</td>
<td>Designation</td>
<td>Statute</td>
</tr>
<tr>
<td>------------------</td>
<td>------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Milk</td>
<td>Miss. Code Ann. § 3-3-29 (West 2012)</td>
</tr>
<tr>
<td>Missouri</td>
<td>none</td>
<td>See Mo. Ann. §§ 10.010 – 10.185 (West 2012)</td>
</tr>
<tr>
<td>Nebraska**</td>
<td>Kool-Aid, Milk</td>
<td>Gubernatorial Designation of Kool-Aid (May 21, 1998)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Gubernatorial Designation of Milk (Sept. 10, 1998)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>none</td>
<td>See N.M. Stat. Ann. §§ 12-3-1 – 12-3-19 (West 2012)</td>
</tr>
<tr>
<td>New York</td>
<td>Milk</td>
<td>N.Y. State Law § 82 (McKinney 2012)</td>
</tr>
<tr>
<td>N. Dakota</td>
<td>Milk</td>
<td>N.D. Cent. Code Ann. § 54-02-12 (West 2012)</td>
</tr>
<tr>
<td>Ohio</td>
<td>Tomato juice</td>
<td>Ohio Rev. Code Ann. § 5.08 (West 2012)</td>
</tr>
<tr>
<td>Oregon**</td>
<td>Milk</td>
<td>S.J. Res. 8, 69th Leg., Reg. Sess. (Or. 1997)</td>
</tr>
<tr>
<td>S. Dakota</td>
<td>Milk</td>
<td>S.D. Codified Laws § 1-6-16 (2012)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Milk</td>
<td>Tenn. Code Ann. § 4-1-331 (West 2012)</td>
</tr>
<tr>
<td>Utah</td>
<td>none</td>
<td>See Utah Code Ann. § 63g-1-601 (West 2012)</td>
</tr>
<tr>
<td>State</td>
<td>Beverage</td>
<td>Code</td>
</tr>
<tr>
<td>----------------</td>
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</tr>
<tr>
<td>W. Virginia**</td>
<td>none</td>
<td>See W. Va. Acts</td>
</tr>
</tbody>
</table>

* Most official state symbols are codified within a state’s statutory scheme. Where a state does not designate an official beverage within its statutory scheme, the presumption has been made that no official state beverage exists. Where ‘none’ is listed, a citation to where a state’s official symbols appear is included.

**Denotes official state symbol adoption other than, or in addition to, incorporation into a statutory scheme, e.g., resolution, proclamation, etc.
DRED SCOTT, JOHN SAN(d)FORD, AND THE
CASE FOR COLLUSION

David T. Hardy*

I. INTRODUCTION

Few Supreme Court rulings have been as thoroughly examined as Dred Scott v. Sandford,1 one of the Court’s great “self-inflicted wounds,”2 and perhaps the ultimate legal example of the law of unintended consequences. The purpose of this article is to explore an aspect of Dred Scott that has generally been overlooked or rejected: was the case collusively brought?3 By this is meant, not collusion in the sense that both sides desired the same outcome, but rather that both sides cooperated in creating a fictitious case, with the aim of securing a Supreme Court determination despite the absence of a case or controversy. Was a key historical case, one that did much to bring on the election of Lincoln, the Civil War, and the Thirteenth, Fourteenth, and Fifteenth Amendments, based on a fictitious stipulation that John Sanford claimed Dred Scott as his slave?

A brief historical background is appropriate. The early 1850s were doubtful times for the American anti-slavery movement. The Whig party, where many anti-slavery candidates had found a home, was disintegrating. In 1850 the anti-slavery movement saw a few gains – the admission of California as a free State—and some major losses – the enactment of the appallingly draconian Fugitive Slave Act of 1850,4 followed by the Kansas-Nebraska Act,5 which repealed the

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1. 60 U.S. 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV..

Among the major treatises devoted to the case are: AUSTIN ALLEN, ORIGINS OF THE DRED SCOTT CASE, JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT 1837-1857 (2006); WALTER EHRlich, THEY HAVE NO RIGHTS: DRED SCOTT’S STRUGGLE FOR FREEDOM (1979); DON E. FEHRENbACHER, THE DRED SCOTT CASE (1978); PAUL FINKELMAN, DRED SCOTT v. SANFORD: A BRIEF HISTORY WITH DOCUMENTS (1997); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIl (2006); VINCENT C. HOPKINS, DRED SCOTT’S CASE (1951); and LEA VANDERVELDE, MRS. DRED SCOTT: A LIFE ON SLAVERY’S FRONTIER (2010).


3. See, e.g., EHRlich, supra note 1, at 77-78 (treating the subject as a mistake; not collusion); FINKELMAN, note 1 supra, at 23 n.28 (giving it a footnote); HOPKINS, supra note 1, at 23-24 (barely mentioning the issue raised here); VANDERVELDE, supra note 1, at 295 (considering it a matter of convenience to the parties).


Missouri Compromise,\(^6\) thereby opening the northern portion of the Louisiana Purchase to slavery.

James Buchanan, a strongly pro-slavery Pennsylvanian, took over the presidency, winning not only the South, but much of the North. A rising politician named Abraham Lincoln lost his bid for the Senate, after voicing the radical prediction that the United States must become all free or all slave; friends warned him that he had committed political suicide.\(^7\)

Then came *Dred Scott v. Sandford*.\(^8\)

**II. *DRED SCOTT* AND UNINTENDED CONSEQUENCES**

In *Dred Scott*, the hitherto-respected Chief Justice Taney undertook to finish off the struggling anti-slavery movement.\(^9\) Taney’s opinion, which became accepted as the opinion of the Court,\(^10\) stretched to reach and rule against as many anti-slavery positions as possible:

- The trial court had had no diversity jurisdiction, since no free black American could be a citizen of a State or of the United States, even if the State, or Congress, were to decide otherwise. Being a citizen of a State for *purposes of the National Constitution* was something different from being treated as a citizen by the State itself. At the framing of the Constitution, slave states would never have agreed that free blacks were State citizens; if they were such, then Article IV, Section 2 of the U.S. Constitution\(^11\) would oblige the slave States to allow migrating free blacks rights which the ratifying slave States would never have accepted:

  For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction,

\(^6\) Id. §14.

\(^7\) 3 JOHN G. NICOLAY & JOHN HAY, EDs., COMPLETE WORKS OF ABRAHAM LINCOLN 1-2 n.1 (1905).

\(^8\) Dred Scott v. Sandford, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

\(^9\) GRABER, *supra* note 1, at 82.

\(^10\) The Justices delivered their opinions *seriatim*, but Taney put his first and labeled it the opinion of the Court, even though some of his positions did not command a majority.

\(^11\) “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”
to sojourn there as long as they pleased, to go where they
pleased at every hour of the day or night without molestation,
unless they committed some violation of law for which a
white man would be punished; and it would give them the full
liberty of speech in public and in private upon all subjects
upon which its own citizens might speak; to hold public
meetings upon political affairs, and to keep and carry arms
wherever they went.\footnote{12}

- A slave whose master took him into a State where slavery was illegal
would nonetheless return to slave status upon his return to a slave State.
Local law would govern his status: once free did not mean always free.\footnote{13}
- The Missouri Compromise was unconstitutional, because Congress has no
power to restrict slavery in the western territories. The Congressional
power to “dispose of and make all needful rules and regulations
respecting the territory or other property belonging to the United
States”\footnote{14} relates only to territory owned by the States in common at the
time of the framing – \textit{i.e.}, the Northwest Territory.\footnote{15}
- Territorial governments could not ban slavery either: this would be a
deprivation of property without due process of law.\footnote{16}

For half a century, a major focus of the conflict over slavery had been the
creation of free versus slave territories.\footnote{17} Taney had taken that off the
Congressional table: the Constitution forbade the exclusion of slavery from a
territory.\footnote{18} Taney might well have concluded that he had buried the anti-slavery
cause forever; certainly many of his supporters thought so:\footnote{19}

\begin{itemize}
\item Dred Scott, 60 U.S. at 417. Taney extensively rewrote his opinion after reading it. The
version reported as read was more clumsy and did not invoke Article IV: “It cannot be supposed
that the States conferred citizenship upon them; for all those States at that time established police
regulations for security of themselves and families, as well as of property. In some minor cases
there were different modes of trial, and it could not be supposed that those States would have
formed or consented to a government which abolished this right and took from them the safeguards
essential to their own protection. They have not the right to bear arms and appear at public
meetings to discuss political questions or urge measures of reform, which they might deem
advisable. They cannot vote as electors, nor serve as jurors, nor appear as witnesses where whites
are concerned.” \textit{Decision of the Supreme Court in the Dred Scott Case – The Position of Slavery in
news5.html.
\item HOPKINS, supra note 1, at 16.
\item U.S. CONST., Art. IV, §3.
\item Dred Scott, 60 U.S. at 436-439.
\item Id. at 450.
\item See GRABER, supra note 1, at 200-202; \textit{see also} HOPKINS, supra note 1, at 47.
\item GRABER, supra note 1, at 68.
\item 1 ALLAN NEVINS, THE EMERGENCE OF LINCOLN 90 (1950) (“[Buchanan’s] friends assured
the country that the Supreme Court had scattered his enemies and cleared his path for a successful
term in office.”).
\end{itemize}
The main goal of the Republican Party was to prevent the spread of slavery in the territories. From Taney’s perspective, the Republican Party was a dangerous, sectional organization that might push the nation toward civil war. . . . If the nation accepted his ruling – that Congress could not forbid slavery in the territories – then the raison d’etre for the Republican Party would disappear, the sectional party would die, and the nation could get back to politics as usual.

Instead, Dred Scott became an illustration of unintended consequences. Abraham Lincoln, then “virtually unknown,” seized upon it, arguing that Dred Scott and the Kansas-Nebraska Act were the work of a pro-slavery conspiracy embracing all three branches of government, and warning that the Court might next forbid States to exclude slavery. Others argued that the case was collusive, in the sense of having a pre-ordained result. The Richland Observer called it “a fictitious case” meant to strike the Missouri Compromise and argued that the choice of Sanford, a New Yorker, as defendant was “proof of the finished cunning of these political intriguers,” since “they wanted to show that northern men as well as southern men were holders of slaves.” The Baraboo Republic claimed, “There is every reason to believe that this case got into the Supreme Court collusively.”

The ruling aroused a “storm of anger” in the North; Lincoln’s secretaries later wrote that, while the repeal of the Missouri Compromise and the struggle in Kansas had agitated the public temper, Dred Scott “suddenly doubled its intensity.”

In the developing Lincoln-Douglas rivalry, Dred Scott became the ill wind that blew no one good. It had held unconstitutional Lincoln’s position that Congress could stop slavery in the territories, but it did the same for Stephen

20. Graber, supra note 1, at 80-81.
22. Id. at 183.
23. 3 Nicolay & Hay, supra note 7, at 2-3, 9-10. Making his case in his “divided house” speech, Lincoln asserted that the nation was sliding toward becoming all slave. Congress had repealed the Missouri Compromise, the president was supporting slavery for Kansas, against the will of its people, and the Supreme Court had now joined in. His comparison was to a prefabricated building, with all parts fitting together even though made by different craftsmen, showing that they had worked pursuant to a plan. See id.
24. See Pittsfield Berkshire County Eagle (Mass.), Oct. 15, 1858, at 2, col. 3 (“[T]he Dred Scott decision makes slavery as legal in Massachusetts as in any other state or territory.”); Extracts from the Speech of Senator Trumbull, Olney Times (Ill), Aug. 27, 1858 at 1, col. 6 (“Next, they will deny the power of the people when they form a State constitution to exclude it; and that such is the next step to be taken is manifest from the Dred Scott decision.”).
26. The Case of Dred Scott, Baraboo Republic (Wis.), Apr. 16, 1857, at 2 col. 5.
27. Nevins, supra note 19, at 96.
Douglas’ position that while Congress could not outlaw slavery, the people of a territory could. Douglas had presented “popular sovereignty” as a compromise – but now Taney had swept his legs from under him.

Douglas responded with his “Freeport Doctrine” – slavery could only exist where legislation supported it, so the people of a territory could exclude slavery simply by not affirmatively allowing it. This was unacceptable to the pro-slavery side, which insisted that slaves were ordinary property.

It is impossible to exaggerate the effect of the Dred Scott decision. It destroyed Douglas. . . . Douglas was forced to fall back upon the doctrine of unfriendly legislation which he had originally promulgated in 1850. . . . Upon this issue, the South deserted Douglas and the Democratic Party divided.

III. BACKGROUND TO THE DRED SCOTT LITIGATION

A. Dramatis Personae

The events that were relevant to Dred Scott’s suit spanned decades and involved a number of persons. The more important ones were:

Dred Scott was born around 1790 in Virginia as a slave to the Peter Blow family, which later moved to St. Louis. By the time he brought suit, Dred had long since married Harriett, and had two surviving daughters, Eliza and Lizzie; his wife and daughters were joined in his litigation.

Of Scott, we know regrettably little; prior to 1857, he was one more resident of St. Louis and by 1858 he was dead of tuberculosis. Only in 2009 did historian Lea VanderVelde discover his real name: Etheldred.

29. GRABER, supra note 1, at 239.
30. See FINKELMAN, supra note 1, at 213-15.
31. F. H. Hodder, Some Phases of the Dred Scott Case, 16 MISS. VALLEY HIST. REV. 3, 21 (1929). To be sure, there is a strong argument that Dred Scott takes second place to events in President Buchanan’s drive to force a pro-slavery constitution upon Kansas, and the Kansas-Nebraska Act, in the creation of these unintended consequences. GRABER, supra note 1, at 39-44. Yet those nearer in time to the events seem to see Dred Scott as pivotal. The Dred Scott Decision, N.Y. TIMES, Aug. 15, 1857 (noting that “the country was convulsed” by the ruling). Fifty years after the ruling, D. W. Grissom, a St. Louis newspaper editor, said that the ruling served the anti-slavery cause “by arousing an anti-slavery feeling in the North beyond that produced by any other case except ‘Uncle Tom’s Cabin.’” Typescript copy of unsigned letter dated Feb. 11, 1907 (on file with Missouri Historical Society’s Dred Scott collection). The newspaper controversy is well documented in FINKELMAN, supra note 1, at 127-67.
32. V ANDERVELDE, supra note 1, at 326. Prior to this discovery, it had been speculated that the name might have arisen from Scott’s mispronunciation of “Great Scott!” The discovery of his real name undercuts a theory that Dred was the same person as a slave “Sam,” who had been sold by Peter Blow’s estate, and later came to be known as “Dred.” See FEHRENBACKER, supra note 1, at 239-40. The oldest of the Blow children was Peter Etheldred Blow. EHRlich, supra note 1, at 10.
The Peter Blow Family. Peter Blow brought Dred to St. Louis in 1830 and died there in 1832. He or his estate sold Dred to Dr. Emerson. Peter’s son Taylor Blow apparently remained Dred’s close friend and supported him in his litigation.

Dr. John Emerson. Dr. Emerson was a physician and, from to time, a surgeon serving at Army posts. In this capacity, he took Dred Scott and his family for long stays in the State of Illinois, where slavery was forbidden by the Illinois Constitution, and in the Wisconsin Territory, where slavery was forbidden by the Missouri Compromise and before that by the Northwest Territories Act of 1787.

Dr. Emerson died in 1843, near present-day Davenport, Iowa. His will left everything but his medical books to his wife, Irene Emerson, for her life, and then to their daughter Henrietta.

Irene Sanford/Emerson/Chaffee. Her full maiden name was Eliza Irene Sanford, but she usually went by Irene, and she will be so identified here. Irene was the daughter of Alexander Sanford, a minor figure in the Dred Scott litigation, and sister to John F. A. Sanford, who would become a major figure in it.

She was the Scott family’s slaveholder at the outset of their litigation. In 1849 or 1850 she moved from St. Louis to Massachusetts, where she soon married a congressman, Dr. Calvin Chaffee.

John F. A. Sanford. John Sanford was named the defendant in Dred Scott’s Federal lawsuit; as we shall see, there is little reason to believe he had any real claim to owning Scott.

Sanford led a very interesting life. A graduate of West Point, he rose to the rank of major. He became a frontiersman, then married into the Chouteau family, one of the first families of St. Louis. Eventually he became partners in Pierre Chouteau Jr. & Co., which at that point had a near monopoly on the northwest’s lucrative fur trade, and moved to New York City as the company’s representative. He became insane in late 1856 and died in 1857, not long after the Supreme Court decision.

Given the unusual character of the name, this is suggestive that Dred acquired his name while with the Blow family, not later, and it was not “Sam.”

33. EHRlich, supra note 1, at 12-13.
34. FINKELMAN, supra note 1, at 14-15.
35. Charles E. Snyder, John Emerson, Owner of Dred Scott, 21 ANNALS OF IOWA 440, 453 (1938).
36. Id. at 455.
38. A significant rank in the small Army of the times.
Dr. Calvin Chaffee. Dr. Chaffee married the widowed Irene Emerson in 1850. He served two terms in Congress, spanning 1854 - 1858. First elected to office on the American (or “Know-Nothing”) ticket, he won his second election as a Republican.40

Roswell Field. A St. Louis attorney opposed to slavery, Field brought Dred Scott’s Federal suit in the Federal Circuit Court in St. Louis. After losing there, he appealed via writ of error to the U.S. Supreme Court, and began to seek attorneys who could handle the appeal.41

Montgomery Blair. At Field’s request, Montgomery Blair became Dred Scott’s principal attorney before the Supreme Court. Blair was a member of the politically powerful Blair family of Maryland, and an experienced member of the Supreme Court bar. It was natural that Field would seek him out: they had known each other for fifteen years.42 His correspondence with Field and with Calvin Chaffee is preserved in the Manuscript Division of the Library of Congress, and illuminates many aspects of Dred Scott’s case.

B. Dred Scott’s State “Freedom Suits”

Scott’s Federal case was preceded by two state-level “freedom suits,” one of which went to judgment and appeal.43 Such lawsuits were authorized under Missouri law44 and were brought with some frequency. Researchers have found over 300 freedom suits filed in the St. Louis courts.45 The most frequent basis for suit was that a slave’s master had taken him or her into areas where slavery was illegal, thus legally dissolving the status of master/slave. A long line of appellate rulings had established that such a residence, unless of brief duration, caused emancipation as a matter of law, and this free status was unchanged by the
plaintiff’s return to Missouri. Scott’s state suits were aimed at freedom, not creation of a political test case, and under existing Missouri case law would have been a proverbial “slam-dunk.”

Scott’s first state freedom suit began in early April 1846, with F. B. Murdock representing Scott; the defendant was Irene Emerson. The complaint alleged that the defendant was holding him, a free man, as a slave. It also alleged that she had “beat, bruised, and ill-treated him, the said plaintiff, and kept and detained him in prison . . . .” The allegations do not suggest that Mrs. Emerson was a brawler; Scott’s attorneys appear to have been using old boilerplate.

A defense verdict resulted, but a new trial was granted, and the litigation became rather muddled for a time, as Irene attempted to appeal a non-appealable order. Scott’s attorneys filed, then dismissed, a second suit, this time naming as defendants Irene Emerson, her father Alexander Sanford, and a Samuel Russell.

At the retrial, Mrs. Emerson’s attorneys raised a defense that would become prominent as the case continued to evolve: even if the Scotts were freed by being taken into a free state and territory, their slave status resumed once they returned to Missouri. Counsel contended that:

[T]he best considered judicial opinion is that if a slave comes back here although he has been in a free territory he becomes a slave again. . . . The voluntary return of the slave places him under the operation of our local laws and the rights of his master, if ever divested, reattach the moment they are again in a State that recognizes the institution of domestic slavery.

The judge, however, instructed the jury otherwise, and the jury ruled in Scott’s favor.

Mrs. Emerson appealed her loss to the Missouri Supreme Court. The appeal did not seem promising, given that the court’s extensive case law, going back for

46. See Winny v. Whitesides, 1 Mo. 472, 474–75 (1824); Merry v. Tiffin & Menard, 1 Mo. 725, 725–26 (1827); Julia v. McKinney, 3 Mo. 270, 273–74 (1833); Nat v. Ruddle, 3 Mo. 400, 401 (1834); Randolph v. Alsey, 8 Mo. 656, 656–57 (1844).
48. Id.
49. Id.
50. The 1845 Missouri Revised Statutes required only that “[t]he action to be brought under the leave given, shall be an action of trespass for false imprisonment, but the previous statutes had required the action “shall be in form, trespass, assault and battery, and false imprisonment.”
51. 13 LAWSON, supra note 47, at 229.
52. Id. at 232. The appeal was dismissed because no final judgment had been entered. Id.
53. See generally FEHRENBACKER, supra note 1, at 254.
54. 13 LAWSON, supra note 47, at 255.
55. Id. at 235-37.
decades, had supported the judge’s instruction. Perhaps Mrs. Emerson’s attorneys knew that Court’s composition, and their attitudes, were changing in a more pro-slavery direction, or perhaps they thought the gamble worth it.

Whatever their thoughts, the action remained a freedom suit with few political overtones. Mrs. Emerson’s attorney did not attack the Missouri Compromise – “Admitting, for the sake of argument, that Congress had the constitutional power to enact this section of the law, we maintain that it is entirely local in this provision [allowing slavery in Missouri, while prohibiting it elsewhere], and by express reservation Missouri is exempted from its operation.”

In the Missouri Supreme Court, Mrs. Emerson won a 2-1 decision. Missouri law determined the Scotts’ status: “It is a humiliating spectacle, to see the courts of a State confiscating the property of her own citizens by the command of a foreign law.” Other States’ slave laws were not entitled to comity:

Times are not now as they were when the former decisions on this subject were made. Since they not only individuals but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures, whose inevitable consequences must be the overthrow and destruction of our government. Under such circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit.

IV. THE SCOTTS’ FEDERAL SUIT

Scott’s attorneys did not take a direct appeal to the U.S. Supreme Court, but began planning (rather slowly) a separate Federal suit. The latter was not filed

57. See Dennis K. Boman, The Dred Scott Case Reconsidered: The Legal and Political Context in Missouri, 44 A. J. LEGAL HIST. 405, 407 (2000). Part of the hardening was the breakdown of comity, the judicial quid pro quo that had evolved in the past. Id. This allowed a slaveholder to briefly visit free States with his slaves, without them being freed; in turn, if he resided in a free State with them, they would be free even if they returned to a slave State. Id. This began to break down in the 1820s and was disintegrating by the 1840s. Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 11–12 (Morris S. Arnold ed., 1981).
58. Scott, 15 Mo. at 580–81. This was a reiteration of a theme that had arisen in British law. See Somerset v. Stewart (Somerset’s Case), (1772) 98 Eng. Rep. 499 (K.B.) 510; Loft 1, 19. Lord Mansfield had ruled that the bringing of a slave into England resulted in legal emancipation because slavery was so extraordinary a state that only positive law could permit it. Id. Half a century later, Lord Stowell distinguished Somerset, finding that the return of the alleged slave to British territory that allowed slavery had the effect of reversing the emancipation. See The Slave Grace, (1827) 166 Eng. Rep. 179 (Admlty) 179; 2 Haggard 94, 94 (appeal taken from Ant.); see also generally William M. Wiecek, Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World, 42 U. CHI. L. REV. 86 (1974), available at http://www.jstor.org/stable/1599128.
59. Scott, 15 Mo. at 584.
60. Id. at 586.
until November 1853, a year and eight months after the Missouri Supreme Court’s ruling. Since original “Federal question” jurisdiction was then nonexistent, the suit was founded upon diversity jurisdiction. Roswell Field filed the lawsuit and sought thousands of dollars in damages, alleging that the defendant not only held the Scotts as slaves but had, on January 1, 1853, managed to assault all four Scotts and detain them for six hours.

The Scotts’ state suits had been straightforward efforts to gain their freedom, based on well-established (albeit soon to be discarded) precedent. The Federal suit was something else entirely; the parties saw it as a test case, aimed at the Supreme Court. The State freedom suit was still pending after its remand, and shortly after the Federal suit was filed, the State suit was stayed by stipulation: “Continued by consent, (awaiting decision of Supreme Court of the United States.)” Both sides knew where the Federal suit was going.

The Federal complaint has a remarkable aspect. It nowhere mentions Irene Emerson. Instead, it names as defendant her brother, John F. A. Sanford, who was at this point a prominent New York City businessman. Sanford replied to the complaint that, inter alia, Dred Scott was “the lawful property of the defendant” and his family members were “the lawful slaves of the said Sanford.” His attorneys thereafter joined in an agreed-upon statement of facts, upon which the case was tried, including the statement:

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and defendant has ever since claimed to hold them and each of them as slaves.

61. See An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, § 25 (1789). Original Federal question jurisdiction was not conferred by the Judiciary Act of 1789, which in fact gave only partial appellate jurisdiction on the subject. Id. Even after the Civil War, and the passage of postwar civil rights acts, original jurisdiction of Federal questions was considerably narrower than it is today. See Revised Statutes of the United States tit. 13, chs. 3, 13, 15, 16, 17, 18 (George S. Boutwell ed., 2d ed. 1878), available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=018/llsl018.db&recNum=1.
62. 13 Lawson, supra note 47, at 246–47. The sums listed in the complaint total $16,500, but the summons mentions $3,000. Id.
64. 13 Lawson, supra note 47, at 248–49.
65. Id. at 250.
The Supreme Court would later accept this statement as a summary of Sanford’s interest as defendant and appellee. There is one difficulty with it: It cannot possibly be true.

A. John F. A. Sanford, Calvin Chaffee, and Dred Scott

To understand John F. A. Sanford’s role as the Scotts’ alleged slaveholder, we must assess four possible ways in which he might have claimed that status.

1. Might Sanford Have Been the Scotts’ Slaveholder?

John F. A. Sanford was at this point a wealthy New York City businessman, a partner in Pierre Chouteau Jr. & Co., and its representative to European fur buyers. He was also a founding director of the Illinois Central Railroad Company, an enormous economic and technical operation, and partner in Pierre Chouteau Jr., Sanford & Co., which produced railway rails. He reportedly played roles in other companies and was a commercial banker to boot.

His work was both lucrative and time-consuming: an 1857 obituary refers to the “herculean mental labors demanded by the gigantic interests entrusted to him,” his “brilliant success,” and “[t]he tide of wealth that flowed upon him.”

It is hard to see just what interest he would have had in acquiring an elderly slave in St. Louis, whose services were being rented out for five dollars a month.

Moreover, if Dr. Emerson had, prior to his 1843 death, sold the Scotts to John F. A. Sanford, why had the state freedom suits (filed in 1854) named Irene as a defendant and why had she gone to the expense of defending them?

But, the most compelling proof that the stipulated facts were lies in the conduct of Irene and her new husband, Dr. Chafee. As will be shown, after the Court ruled, the pro-slavery press launched a massive attack upon their

66. Dred Scott v. Sandford, 60 U.S. 393, 398 (1857), superseded by constitutional amendment, U.S. Const. amend. XIV. Although the modern “appellant” and “appellee” here, at the time, the roles were known as “plaintiff in error” and “defendant in error.” Id. at 399.


69. 1 Thomas J. Scharf, History of Saint Louis City and County, from the Earliest Periods to the Present Day 183 (1883).

70. Univ. of Mo. Press, supra note 64, at 665. After his death, his probate estate settled claims in Chouteau, Sanford and Company as well as P. Chouteau, Jr. and Company. See Order of the Surrogate in the Estate of John F. A. Sanford, Deceased, Chouteau Collection (Dec. 12, 1859) (on file with the Missouri Historical Society).

71. Philadelphia Inquirer, May 16, 1857, at 2 (listing him as one of “three prominent merchant bankers of New York,” who had died and left a total of $3,000,000 to their heirs).


73. 13 Lawson, supra note 47, at 232.
reputations, asserting that Dr. Chaffee was a hypocrite. In defending himself, Dr. Chaffee never asserted the claim made in the stipulated facts, even though that would have completely cleared him: if Dr. Emerson sold the Scotts to John F. A. Sanford, then Irene had never been their slaveholder. However appealing that position might have been, the Chaffees never invoked it. From this, we can deduce it was simply untenable.

2. Might Sanford Have Controlled the Scotts as Dr. Emerson’s Executor?

Dr. Emerson’s will left almost all his property to Irene and their daughter:

I give and bequeath to my Brother Edward P. Emerson all of my Medical Books. . . . All the rest residue & remainder of my estate & effects real and personal whatsoever & wheresoever & of what nature and kind soever. . . . I give, devise and bequeath to my wife Eliza Irene Emerson to have & hold to my said wife & to her assigns for & during the term of her natural life without impeachment of waste & from & immediately after her decease, I give & devise the same to my daughter Henrietta Sanford Emerson & to her heirs & assigns forever.74

John F. A. Sanford was mentioned in the will, as one of two executors. But, he failed to qualify under Iowa law and the other person named, George L. Davenport, served as sole Iowa executor.75

Dr. Emerson died in 1843: the probate files are lacking an executor’s report and final discharge,76 however, Dr. Emerson’s Realty holdings in Iowa were turned over to Irene in 1848.77 Alexander (father of John F.A.) was named administrator for Dr. Emerson’s (very limited) Missouri assets. When Alexander Sanford died in 1848, he was not replaced, presumably because the estate had been settled.78 This is underscored by the fact that (as discussed below) in 1849, Irene, and not any probate administrator, sold the Missouri realty.

In short, it is hard to see why Dr. Emerson’s estate would still have been at issue in 1857, let alone where John F. A. Sanford had had any involvement in it.

74. Snyder, supra note 35, at 455 (“‘Without impeachment of waste’ reflects that the life tenant – here Irene – cannot be sued for waste of the assets.”).
75. Id. at 456.
76. Id. at 455.
77. Id. at 456.
78. See FEHRENBACKER, supra note 1, at 248–49.
3. Might Sanford have Controlled the Scotts as a Manner of *De Facto* Agent for Irene?

One oft-repeated explanation of John Sanford’s involvement is that, after Irene moved to Massachusetts in 1849-50, Sanford was left to manage her affairs in St. Louis, and was thus sued as her *de facto* agent. But there is no reason to believe that Irene even had any assets in St. Louis to administer. Dr. Emerson’s St. Louis probate estate was limited to a nineteen-acre parcel of realty and some furniture. Irene sold the realty in 1849, before moving to Massachusetts, and presumably sold the furniture or took it with her. Further, if she did have assets in St. Louis, Sanford, an extremely busy executive living in New York City, would hardly be the first choice for manager.

The only evidence cited for this understanding is Walter Erhllicht’s discovery that John Sanford’s estate in 1859 paid $300 to Benammi (or Benoni) S. Garland, “for ten years service attending to Dred Scott’s case suing for freedom for self and family, employing counsels, attending to hires and collecting same at the request of Mr. Sanford from November 1846 to January 1857.”

The claim is more than a bit strange. While attorney Hugh Garland played major roles in both Scott’s state and federal suits, there is no indication that Benammi Garland had any connection to the litigation. Did Benammi Garland pay for a decade of litigation, and forget to bill Sanford until after Sanford’s death? It seems more than a bit implausible.

A Benammi Garland of St. Louis did play a role in a fugitive slave suit brought in Wisconsin. During the litigation, he reportedly borrowed forty dollars from a local, then skipped town. His claim against the Sanford estate may deserve some skepticism.

The evidence, in short, is that John F. A. Sanford was a fictitious defendant, a party with no legal connection to the Scott family. His nominal role in the case is underscored by the fact that his last name is mis-spelled as Sandford in the Federal complaint and in the petition for a writ of error, with the result that the

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79. ERHLICH, supra note 1, at 39.
80. Hodder, supra note 31, at 5; HOPKINS, supra note 1, at 8 n.24.
81. Deed from Eliza Irene Emerson to Alfred Vinton (Mar. 29, 1849) (on file with St. Louis City Recorder of Deeds and Vital Records Registrar, book Y–4 at 446–47). It is noteworthy that Mrs. Emerson signed in her individual capacity; the transaction was not handled by her father, Alexander Sanford, who was the local administrator of Dr. Emerson’s estate. See id.
82. ERHLICH, supra note 1, at 20, 204 n.21.
84. See WIS. FREE DEMOCRAT, May 2, 1855, at 1.
85. See Files of the Clerk, Nos. 1, 4, 10, 15, 16, 20, 22 U.S. Dist. (E.D. Mo.) (on file with author). The summons and complaint used “Sandford.” Sanford’s “plea to the jurisdiction of the court” and “plea of the defendant” (answer) used the correct “Sanford.” Plaintiff’s counsel and the
4. Might the Scotts’ Attorney Have Been Misinformed?

Walter Ehrlich has suggested that the Scott’s attorney at the trial court level, Roswell Field, might have been told, inaccurately, that Sanford was their slaveholder. Field’s letters reflect that the Scotts had first consulted an attorney named Charles LeBeaume, who discussed the case with Field. But Field’s letter does not state that LeBeaume told him of a sale to Sanford. Moreover, it places the date of the supposed sale between the ruling of the Missouri Supreme Court, in March 1852, and the filing of the Federal suit, in November 1853:

Several years ago Dred brought a suit for his freedom against Mrs. Emerson, the widow of his former master in the state court. In conformity with the settled course of decisions in this state, the lower court gave judgment of liberation. An appeal to the majority of the Supreme Court (Gamlele dissenting) overruled all its prior decisions & reversed the judgment, remanding the case for another trial. See the case reported 15 Mo Rep 576.

At this stage of the case I was applied to by C. E. Lebeaume Esq for advice. As Dred in the meantime had been sold with his family to Sanford of New York who was accustomed to visit Missouri, I advised the institution of a suit in the Circuit Court of the United States. This sequence is inconsistent with the stipulated statement of facts, signed by Field, which stated that Dr. Emerson, who died in 1844, had sold the Scotts to Sanford. Apart from that, the letter shows that Field knew of the State freedom suits, in which Irene had been the defendant. At the very least, it demonstrates that Field filed a stipulation as to the facts that he knew were untrue and that recast the facts so as to leave Irene out of the matter.
5. Then Why Did the Scotts Sue Sanford?

But, we might ask, why would the litigants have gone to such lengths to conceal the simple fact that Irene Emerson had a claim to owning the Scott family? After all, there had been no problem naming her as the proper defendant in Scott’s State litigation, and after she relocated to Massachusetts, naming her would not have impaired diversity jurisdiction.

There is a simple reason why Irene Emerson would have wanted her role concealed. From the outset, it was foreseen that the Federal suit was not a simple freedom suit, but a case destined for the U.S. Supreme Court, that would settle the most divisive political issues of the day. And in 1850 Irene Emerson had married Dr. Calvin Chaffee.

Dr. Chaffee was a Republican congressman, elected and re-elected to office on an antislavery platform.

B. The Chaffees’ Role Is Exposed

The Chaffees’ desire to avoid being named as the Scott family’s owners was not, however, successful.

1. Pro-Slavery Newspapers Spotlight the Abolitionist Congressman Calvin Chaffee as the Scotts’ Real Slaveholder

On March 6, 1857, the Court announced its opinion. As noted above, the impact was immediate and enormous.

At that point, when slavery’s supporters had gained all they could from the litigation, things began to happen to Dr. and Mrs. Chaffee. Within a week of the ruling, the Springfield Argus, in Dr. Chaffee’s hometown of Springfield, Mass., broke the story that he and Irene were the true owners of the Scott family.

What we know of the Argus is extremely limited. It was apparently a pro-slavery newspaper that published for about two years before it closed in late 1857.

90. Dred Scott v. Irene Emerson, 24 St. Louis Cir. Ct. Rec. 33 (Mo. Cir. Ct. Jan. 25, 1854), available at http://digital.wustl.edu/cgi/t/text/text-idx?c=dre;cc=dre;view=text;idno=dre1854.0100.102;rgn=div1;node=dre1854.0100.102%3A1. The State freedom suit was still pending on remand when the trial court, on January 25, 1854, entered a stipulation: “Continued by consent, (awaiting decision of Supreme Court of the United States.)” Id. Dred Scott’s Federal suit had not yet gone to trial – that would occur in May – but both parties were already anticipating its appeal to the Supreme Court.

91. FEHRENBACKER, supra note 1, at 659 n.21.

92. See Ex-Congressman Chaffee Dead, SPRINGFIELD REPUBLICAN (Mass.), Aug. 10, 1896, at 10 (“He was a sturdy representative of Massachusetts anti-slavery sentiment during his two terms of service . . . .”), Dr. Calvin C. Chaffee’s Death, SPRINGFIELD REPUBLICAN (Mass.), Aug. 9, 1896, at 7; Served Two Terms in Congress, BOSTON HERALD, Aug. 9, 1896, at 3.

93. EHRHILICH, supra note 1, at 173.
1857.95 Exactly one issue, and that from 1856, is known to survive.96 We must accordingly reconstruct its coverage from articles in other newspapers that reprinted its articles, a common practice of the time. The lengthiest such article appeared in the March 17, 1857 edition of the Syracuse, N.Y. Daily Courier:

From the following article, which we copy from the Springfield Argus, it appears that Dred Scott and his family became, by the recent decision of the Supreme Court, the property of the wife of Dr. Chaffee, the Republican Member of Congress from the Springfield (Mass.) district:

It may perhaps astonish some of our rabid Fremonters [Republicans], to know that the late decision in the Supreme Court remanding to slavery Dred Scott and his family, declaring the unconstitutionality of the Missouri Compromise, and establishing the right to slave-holders to carry their chattels into Northern States without affecting their security in them – was obtained on behalf of our present honorable member of Congress. The facts are simply these: Some years ago, Dr. Chaffee, then a widower, married the widow of Dr. Emerson, of Missouri, who had died, leaving to his wife and only daughter a considerable slave property. Among those slaves was Dred Scott and his family.

... The suit, thus brought, was defended by the administrator of the estate on behalf, and with the consent of the wife of Dr. Chaffee and her daughter, who were the heirs at law. The decision of the bench that Dred Scott was not a citizen of the U.S. and could not sue in the U.S. Court, has remanded him and his family to the chattelhood of Mrs. Chaffee. What does the Doctor propose to do with this [illegible] property? Does he consent to the prosecution, and under cover of his wife’s crinoline, propose to keep good friends with the Black Republicans, by saying that he has nothing to do with her estate, and at

94. See BOSTON POST, June 8, 1857, at 1 (“[T]he attitude of Massachusetts on the slavery question is one indefensible and inconsistent with her relations to the general government. Men are becoming convinced that our duties to our own state and her material interests have been too long neglected, in the idle and insane pursuit of the abolition lobby . . . .”) (quoting SPRINGFIELD ARGUS (Mass.), Mar. 1857).

95. See PITTSFIELD SUN (Mass.), Dec. 3, 1857, at 2 (“The Springfield Argus, which has been published daily and weekly about two years by Elon Comstock, Esq., has been discontinued. – The recent financial difficulties are stated as the cause of the suspension.”).

96. See GREGORY WINIFRED GEROULD & GERTRUDE CLARKE AVIS, UNION LIST OF AMERICAN NEWSPAPERS 1821–1936 at 299 (1967). The issue of February 6, 1856 survives. Id. That issue is in the possession of the American Antiquarian Society in Springfield, Massachusetts. See Email from Margaret Humberston, Wood Museum, to author (June 15, 2012). The Wood Museum of Springfield History has no copies of the Argus. Id.
the same times enjoy with her the benefit of the estate, which does not stop with the unfortunate Dred and his family?97

The Argus apparently ran follow-up stories, although none of these survive. From other newspapers’ descriptions of its series, it sounds as if Chaffee originally denied everything. When, a few months later, the Syracuse Daily Courier praised the Argus’ coverage, it referred to “Dr. Chaffee, writhing under the scathing exposures of the Argus” and noted that when Chaffee protested his innocence, “[t]he Argus followed this up with facts and statements fully authenticated, proving the falseness of this excuse, and finally copied from a St. Louis paper a history of the case, more than proving all that had previously been charged upon Dr. Chaffee.”98

It did not remain a local story. The Syracuse Daily Courier retrospective claimed that “[t]he telegraph has carried the faithful message to every part of the country, and the black Republican trader in the flesh and blood of the illustrious Dred Scott, is known by this time to every gentleman who will be honored by a seat with him in the next Congress.”99 Shorter versions of the Argus report are found in the Fort Wayne Sentinel and the Loganport Democratic Pharos (Ind.),100 while the Pittsfield Massachusetts Sun jabbed, “It seems that while Dr. Chaffee was ‘shrieking for freedom,’ and receiving the support of his Black Republican friends for Congress, he was at the same time prosecuting a suit for the recovery of a runaway negro! Admirable consistency!!”101

The story received such widespread publicity that Stephen Douglas could invoke it during the Lincoln-Douglas debates, with the audience knowing enough to be amused by the jab. To Lincoln’s claim that the Dred Scott case was, with the Kansas-Nebraska Act, a pro-slavery conspiracy, Douglas replied:

He [Lincoln] ought to have known that the at time of the passage of the Nebraska bill the Dred Scott case had not yet been taken up to the Supreme Court; it was still pending in the district courts of Missouri. It had been begun by Dred Scott, and we had not possession of him because he was in the hands of abolitionist friends. (Laughter.)102

99. Id.
100. Fort Wayne Sentinel, Mar. 28, 1857, at 1, col. 5; Who Owns Dred Scott?, Democratic Pharos (Logansport, Ind.), Apr. 1, 1857, at 4, col. 4.
102. Democratic Pharos (Logansport, Ind.), Aug. 18, 1858, at 5, col. 2.
2. Dr. Chaffee Opens His Defense

The first defenses of Dr. Chaffee did not (officially, at least) come from his own pen, but from antislavery editors. The first such defense came in Chaffee’s hometown newspaper, the *Springfield Republican*, which on March 14, 1857, ran two articles on the subject. The first article took the form of a letter to the editor, at least supposedly by an anonymous and disillusioned supporter, demanding information on Dr. Chaffee’s involvement. Why did Irene defend against the State freedom suits? Did Sanford act with her consent? Are there other slaves involved?

The second article carried the newspaper’s defense of Dr. Chaffee. It began by noting that defendant John F. A. Sanford was indeed Mrs. Chaffee’s brother, then quoted from the agreed statement of facts to the effect that the Scotts had been sold to him prior to suit, calling these “common and well known public facts” and stating:

> [W]e have been assured that these slaves long since passed out of the control of Mrs. Chaffee. We can hardly think there is anyone so foolish as to suppose that Dr. Chaffee was a party to this suit, or holds and proprietary interest in these slaves. . . . The matter is one which has assumed such a phase that Dr. Chaffee will feel called upon to declare himself definitely in the matter; and we can have no doubt he will be able to do so satisfactorily.103

*The Lowell Daily Citizen and News (Mass.)* took its cue from the *Republican*, running the agreed statement of facts and arguing:

> It is true that the defendant in this case was the administrator of the estate of Dr. Emerson. It is true that he is the brother of Mrs. Chaffee. It is true also that he bought the slaves of Dr. Emerson before his death, and that Dr. Chaffee and his wife have no more to do with them than the “man (and woman) in the moon.”104

Dr. Chaffee quickly set out to explain himself, and it is significant that he abandoned any defense based on the stipulated facts.

His first defense was given to the *Springfield Republican* and reprinted in the *New York Herald-Tribune*. Chaffee began with a note that he had not seen the *Republican*’s article until recently, adding:

> I have lived to little purpose if, after more than twenty years’ service in the Anti-Slavery cause, it not necessary that I should put in a

formal disclaimer of my own participation in the sin and crime of slave-holding. . . . [T]here is no earthly consideration that could induce me to exercise proprietorship in any human being; for I regard Slavery as a sin against God and a crime against man.

In the case of Dred Scott, the defendant [Sanford] was and is the only person who had or has any power in the matter, and neither myself nor any member of my family were consulted in relation to or even knew of the existence until after it was noticed for trial, when we learned of it in an accidental way – and I agree with you that if I had possessed of any power or influence in the case, and failed to use it then I should have been “guilty of treason to my professions and betrayal of the confidence of my constituents.”

But possessed of no power to control – refused all right to influence the course of the defendant in the cause – and all the while feeling and openly expressing the fullest sympathy with Dred Scott and his family, in their efforts to secure their just rights to freedom – no man in this land feels more deeply the intense wrong done, not only to them but to the whole people, by the monstrous decisions of the majority of the United States Supreme Court. And if in the distribution of the estate, of which this decision affirms these human beings to be part, I or mine consent to receive any part of the thirty pieces of silver, then, and not till then, let the popular judgment, as well as the public press, fix on me the mark of a traitor to my conscience, as well at the true rights of our common humanity.105

The New York Herald Tribune went further, telling its readers that Dr. Chaffee:

[W]as utterly ignorant that Dred Scott existed, down to the present year; and even Mrs. Chaffee, to whom he had been a servant, supposed him dead throughout last year, and was only apprised in February, 1857, that the Dred Scott about whom the great law suit was going on in the Supreme Court, was the slave of her deceased husband. (He has been left to himself since Dr. Emerson’s death).106

The date of Chaffee’s alleged discovery is quite unclear. “Noticed for trial” presumably means set for argument or re-argument in the Supreme Court. The Court granted re-argument on May 12, 1856, with the argument beginning on

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106. N.Y. HERALD-TRIBUNE, June 6, 1857, at 4, cols. 2-3. The claims that Mrs. Chaffee had left Scott to his own devices since Dr. Emerson’s death are not consistent with the evidence. Dr. Emerson died in 1843. The State suits for freedom, in which the evidence indicated that when Scott was “hired out” the funds went to Mrs. Emerson/Chaffee, occupied 1846-1852.
December 15. But the *Herald Tribune* article places his discovery in February of the next year.

3. The Pro-Slavery Press Counterattacks

Chaffee did not have the last word. The *Argus* returned to the attack, again in articles we know only from other newspapers:

. . . Dr. Chaffee denies that has any personal influence or interest at stake in the Dred Scott case, and also that his feelings would not permit him to hold slaves. . . . The questions which now arise are: has not Dr. C. received the benefits arising from the sale of those negroes? Would he not have suffered pecuniary loss had the suit been decided for the plaintiff? Was not the DR.’s influence with his wife and brother-in-law sufficiently powerful to have stopped this suit by refunding the monies arising from their sale, and giving them their freedom without a trial? and is not the Dr. receiving benefit either from slave labor or from monies accruing from the sale of slaves. We say nothing as to the morality of thus holding slaves, or of using monies acquired, but if such really is the case, is not a little inconsistent to be shrieking for freedom and harping on the wrongs of the slave? Will the Doctor explain? *Springfield Argus.*

Newspapers soon uncovered records of the Scott’s State freedom suits, and the *Milwaukee Daily News* demanded additional explanation:

Mrs. Emerson (now Mrs. Chaffee) leased these slaves out for hire during the first year after her husband’s death. She has never manumitted them nor has she ever sold them. She did, however, propose to sell them in 1846, and this occasioned the instigation of the suit for freedom.

Mr. Chaffee says that neither himself nor any member of his family knew of the suit until the case was noticed for trial, when it came to his knowledge accidentally. Now, the record of this case shows that suit was [illegible – filed?] in the St. Louis Circuit Court against Mrs. Chaffee herself, who had personal service of the writ on the 7th day of April, 1846. Moreover, the same record shows that she has defended that case in the courts of Missouri for more than ten years, where the case of Dred Scott v. Irene Emerson (Mrs. Chaffee) is still pending. . . . The truth is, Mr. Sanford never had anything to do with these slaves, except as the executor of Dr. Emerson, or agent of Mrs. Chaffee.

Had Mrs. Chaffee surrendered her claim to Dred Scott [illegible] the first suit was brought, it would have effectually liberated that slave. Nay, had she been satisfied with the verdict of the Missouri jury, that declared Dred Scott a free man, instead of appealing to the Supreme Court of the State, the slave would now have enjoyed the inestimable privilege which Mr. Chaffee admits he deserves.¹⁰⁸

The Pittsfield, Massachusetts Sun was more blunt:

Dred brought his suit for freedom ten years ago, and has spent $500 in prosecuting it—This money he has been obliged to raise by overwork, and now at an advanced age finds himself minus his cash and his liberty too. – Poor old African! in falling into the hands of a Massachusetts freedom-shrieker his chains were not loosened, but his old body and soul are clutched with the same tenacity as though he were the property of some border ruffian. Why don’t the Hon. Dr. Chaffee free his slave? Perhaps the Sentinel can inform the public on this point.¹⁰⁹

4. The Chaffees Free the Scott Family

Dr. Chaffee was well on the way to answering that question. On April 1, 1857, Chaffee had written Montgomery Blair:

CONFIDENTIAL

Since the decision of the case Dred Scott vs. J.F.A. Sanford has so profoundly stirred the public mind and some of the pro slavery news papers have attributed to me an interest in the persons claimed as slaves, my wife, as the widow of the late doct. Emerson, and the sole legatee of the will, desires to know whether she has the legal power and right to emancipate the Dred Scott family. . . . If she has this right[ ] if you [would? forward?] the necessary papers, she will cheerfully execute them. . . . May I not hope to hear from you at an early day.¹¹⁰

The response cannot be located,¹¹¹ but ten days later Chaffee again wrote Blair, thanking him for his response and adding:

I perceive by a communication in the Mis. Republican of the 5th or 6th inst., that Mrs. C. is the overseer of the “Scott” family – that may be

¹⁰⁸. MILWAUKEE DAILY NEWS, Apr. 16, 1857, at 2, col. 2.
¹¹¹. In the days before photocopiers and carbon paper, few persons kept records of their outgoing correspondence. Blair’s outgoing letters would thus be found in Field’s files … which cannot be found.
true or not – if so I am as you may well imagine, anxious to free myself and family from the odious relationship. If not too much trouble, my dear sir, I beg of you to forward to me the [ ] of my wife’s ownership & the necessary papers for the [ ] of the freedom of the Dred Scott family – my whole soul utterly loathes and abhors the whole system of slavery & not only myself but my family must be cleared from it.\(^\text{112}\)

Blair apparently forwarded the Doctor’s correspondence to Roswell Field, Scott’s St. Louis attorney, who replied that Mrs. Chaffee and her daughter had full power over the Scotts, and enclosing a draft deed transferring the Scotts to Taylor Blow, explaining that “Our law requires that all deeds of emancipation be acknowledged or proved before the circuit court; and it has been thought advisable to effect the object by transfer to a citizen here who is ready to go into circuit court to make the necessary acknowledgement.”\(^\text{113}\) The letter adds an interesting human element to the tale:

Dred desires that the copy of the will of Dr. Emerson may be returned to him. He was enabled to procure it with a dollar presented to him by Judge Catron of the United States Supreme Court, who, in his recent visit here to hold the Circuit Court, sent for Dred and treated him with much friendly conversation and Christian sympathy, showing that in the opinion of the judge if they were not fellow citizens, they were at least fellow men. Dred wishes that the copy of the will may be returned so that he may keep it as a memorial of Judge Catron’s kindness.\(^\text{114}\)

The deed was executed – an event delayed by Mrs. Chaffee’s attendance at John Sanford’s death\(^\text{115}\) -- and Chaffee transmitted it with a request: “I desire now, in conclusion of the case, to be privately informed of the act of emancipation, but that there should be no publicity given the subject beyond

\(^{112}\) Letter from Calvin Chaffee to Montgomery Blair, \textit{supra} note 110.
\(^{113}\) Letter from Roswell Field to Montgomery Blair (Apr. 29, 1857) (on file with the Library of Congress, Manuscript Division, \textit{in} Blair Family Papers). Some historians have assumed the transfer to Blow was necessary since only a Missouri resident could free Missouri slaves. Field’s letter makes clear the real reason: the person freeing the slaves must appear in open court, and it was far easier to deed the Scotts to a local resident than for the Chaffees to travel to St. Louis.
\(^{114}\) \textit{Id.} (underlining in original). Catron had voted with the majority, holding that Dred Scott remained a slave. Catron also filed a separate concurring opinion. Dred Scott v. Sandford, 60 U.S. 393, 518 (1856) (Catron, J., concurring), \textit{superseded by constitutional amendment}, U.S. \textit{CONST. amend. XIV}.
\(^{115}\) \textit{Id.} See Letter from Calvin Chaffee to Montgomery Blair (May 6, 1857) (on file with the Library of Congress, Manuscript Division, \textit{in} Blair Family Papers) (“My wife is now in N.Y. being summoned by the fatal illness of her Br. J. F. A. Sanford the deft. of the suit which has made humanity grieve and all true Americans blush – Mr. Sanford died yesterday at 12 M. I suppose of congestion of the brain. My wife will remain there till Saturday & I hope next week to get the papers executed, of which I will apprise you.”).
strict legal necessity.”116 On May 26, 1857, Taylor Blow promptly manumitted the Scott family. This did not end the controversy, however, but merely posed the question, asked in several newspaper articles -- if the Chaffees owned Dred Scott, why did they not free him sooner?117

We cannot know the impact of the dispute on Dr. Chaffee’s political career, but in 1858, he lost the Republican primary, and retired from politics.118

V. TO WHAT EXTENT WAS DRED SCOTT V. SANDFORD A COLLUSIVE ACTION?

It seems safe to conclude that John F. A. Sanford was a nominal defendant, with no claim to the Scotts, and that the real defendants should have been Irene and Calvin Chaffee – who had obvious reasons for keeping their names out of the case. These facts would have been obvious to the attorneys beginning the Federal action, and especially to the defense, which employed Hugh Garland, the same attorney that it used in the State cases against Mrs. Emerson/Chaffee. Yet the case went forward on stipulated facts that John F. A. Sanford was the Scott’s slaveholder, having purchased them from Dr. Emerson.119

The fact that the Chaffees’ ownership hit the anti-slavery press within days of the Supreme Court’s ruling120 -- i.e., as soon as its disclosure would not imperil the litigation -- further suggests that pro-slavery forces were very much cognizant of that ownership, and ready to exploit it the moment they were free to do so.

Charges of collusion were leveled even before the Court ruled. A reprinted article in the Chicago Tribune charged that even the choice of Sanford as defendant was part of the plot:

> Here we have proof of the finished cunning of these political intrigues. . . . They selected Sanford as the new owner of Dred, not only because

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117. See Dred and the Doctor, DAILY ARGUS AND DEMOCRAT (Madison, Wis.), June 5, 1857, at 2, col. 3 (“Had Dr. Chaffee done this act long ago, there would have been no decree, and surely Dred was as fit for freedom before people found out that Dr. Chaffee owned him as after that time. Why did the Dr. do it when he was shrieking in the House of Representatives at Washington? Why did the Dr. attempt to make the world believe that he didn’t own him at all, just after the decision was made, and he was charged with ownership of the slave?”); FORT WAYNE SENTINEL, June 6, 1857, at 5, col. 5 (“[T]hey have now given him his freedom and turned him out to die, we suppose. A few years ago liberty would have been a grateful boon to Dred Scott.”).

118. SPRINGFIELD REPUBLICAN (Mass.), Sept. 25, 1858, at 4, col. 1. Dr. Chaffee faced two challengers, the votes split and deadlocked, whereupon a fourth candidate was proposed, to whom Dr. Chaffee’s supporters shifted their votes, in order to deprive the first challengers of the nomination. The fourth candidate won the primary.

119. See supra notes 64-66 and accompanying text.

120. See supra Part IV.B.1.
it was necessary that the defendant in their intended suit should be a citizen of another State than Missouri, but because they wanted to show that northern as well as southern men were holders of slaves.121

Others, curiously, charged that the collusion more was on Dred Scott’s side of the case.122 Yet there may be some truth in both accusations. We can discard the allegations that the suit was collusive in the sense of both parties seeking to reach a single result. The attorneys on each side were firmly committed to supporting and opposing slavery, respectively.123 Yet both were willing to collude – knowingly to sue a nominal defendant, and to stipulate to incorrect facts, in order to bring the action (and keep Mrs. Chaffee’s name out of it). Both sides also knew that the case was targeted at the U.S. Supreme Court.

We are left with the question – why? Why would both sides be interested in bringing the case and taking it to the Supreme Court?

The interests of the pro-slavery side in advancing the case are obvious. The Court’s membership was then split five to four in favor of Justices from slave States,124 and the four from free States had so far “distinguished themselves by defending national power to recapture fugitive slaves.”125 Chief Justice Taney, if not the bigot that he came to appear,126 was by this point very pro-slavery;

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121. The Tribune article was reprinted in Nationalization of Slavery, R ICHLAND COUNTY OBSERVER (Wisc.), Jan. 20, 1857, at 2, col. 5. Other papers claimed that “the case had been made up by Washington politicians” for “the purposes of the Democratic party,” and that “Dred was a cat’s paw, and the case was urged on by some super-serviceable and ultra-sectionalists of the South.” MILWAUKEE DAILY SENTINEL, Dec. 24, 1856, at 2, col. 3; The Case of Dred Scott, BARABOO REPUBLIC (Wisc.), Apr. 16, 1857, at 2, col. 5. The Tribune’s theory is of course untenable; if the purpose was to show that Northerners owned slaves, Dr. Chaffee and Irene would have been the better defendants.

122. Newspaper editor D. M. Grissom is quoted as saying “My recollections of the Dred Scott case credits the free-spoilers, or anti-slavery party with engineering of it into and through the U.S. Court at St. Louis, with the object and expectation of extorting from the court of last resort a decision that the voluntary taking of the slave by his owner into free territory, ipso facto, made him free.” Unsigned letter to Mr. Hill (Feb. 11, 1907) (on file with the Missouri Historical Society, Dred Scott collection).

123. EHRlich, supra note 1, at 79.

124. Chief Justice Taney was from Maryland; Justices Wayne and Campbell from Georgia; Justice Daniel from Virginia; and Justice Catron from Tennessee. Justice Nelson hailed from New York; Grier from Pennsylvania; Justice Curtis from Massachusetts; and Justice McLean from Ohio.

125. GRABER, supra note 1, at 37.

126. Taney had freed his own slaves, “except for two who were too old to take care of these, and these he supported until their death.” Hodder, supra note 31 at 17. As a young attorney he made a sensation by successfully defending an abolitionist minister, who had preached a fiery anti-slavery speech (arguing that slave owners were destined for hell) to a congregation that included slaves. Taney’s argument referred to the “evil of slavery,” and “a blot on our national character,” noting that “every real lover of freedom” must hope that it be gradually ended. The Trial of Rev. Jacob Gruber, in 1 AMER. STATE TRIALS 69, 88 (1914). He sided with the majority in United States v. The Amistad, 40 U.S. 518 (1841).
moreover, he had as Attorney General ruled that free blacks were not citizens.\(^{127}\) Two of the Justices had formerly held slaves, and three still did.\(^{128}\) The Court had recently handed down *Strader v. Graham*,\(^{129}\) ruling in favor of the slaveholder on arguments quite similar to those raised in Scott’s appeal.\(^{130}\) It is no wonder that pro-slavery elements were lobbying in favor of a quick decision.\(^{131}\)

The real question, then, is why would an anti-slavery attorney have been cooperative?

The short answer appears to be that Roswell Field, who began the Federal litigation, was far more optimistic than circumstances could justify. In his eyes, for example, the question of citizenship would easily be won: Sanford had waived the point by continuing to proceed after his plea in abatement (essentially, a common-law motion to dismiss) on that ground had been denied.\(^{132}\)

Field likewise wrote off *Strader v. Graham*,\(^{133}\) a recent ruling that came in the context of an action for damages, against a steamboat owner, who had allegedly facilitated the escape of slaves. The owner’s defense was that their master had previously allowed the slaves to travel to free States, thereby freeing them. The Supreme Court held that (1) local law governed the slaves’ status, hence when they returned to a slave state their servile status resumed, and (2) as a result there was no Federal issue posed that could support the Court’s appellate jurisdiction.

The possibility that in 1855-57 the Chief Justice was “not himself” must also be considered. On the night of September 29, 1855, while vacationing in Virginia, his youngest daughter died of yellow fever and his wife died of a stroke. Taney had opposed his daughter’s plan to vacation in Rhode Island, which she considered healthier, because that belief reflected “that unfortunately feeling of inferiority in the South, which believes everything in the North to be superior to what we have.” A relative wrote that he “has been in tears like an infant, and he has given way to the most bitter self reproaches . . . .” FEHRENBACKER, supra note 1, at 558-59.

\(^{127}\) FINKELMAN, supra note 1, at 30.

\(^{128}\) *Id.* at 29.

\(^{129}\) *Strader v. Graham*, 51 U.S. 82 (1850).

\(^{130}\) In particular, that even if a slave were freed by being sent into a free State, he became a slave again upon his return, and that the Northwest Ordinance’s ban on slavery ceased to have effect when a territory became a State. *See Strader*, 51 U.S. at 93-94 (“Every state has an undoubted right to determine the status . . . of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject.”).

\(^{131}\) Alexander Stephens, later vice president of the Confederacy, wrote that “I have been urging all the influence I could bear upon the Supreme Court to get them to postpone no longer the case on the Missouri restriction before them, but to decide it.” BERNARD C. STEINER, LIFE OF ROGER BROOKE TANEY 334 (1922).

\(^{132}\) Letter from Roswell Field to Montgomery Blair (Mar, 12, 1856) (on file with the Library of Congress, Manuscript Division, *in* Blair Family Papers)[hereinafter Letter from Roswell Field to Montgomery Blair II].

\(^{133}\) *Strader*, 51 U.S. 82.
Field lightly wrote Strader off: “I do not think the case of Strader v. Graham stands in the way of Dred’s suit. That case decides only that the question is not such as gives a foundation for a writ of error to a state court under the 25th section of the judiciary act.” 134 That might distinguish (2), but leaves (1) applicable: the Court has diversity jurisdiction to rule that Dred Scott remains a slave.

A later letter shows how unrealistically optimistic Field was about the case. Before the decision, he wrote Montgomery Blair:

I rec’d your brief in the Dred Scott case and your two letters relating to it. I have delayed writing to you in the expectation that the case would soon be decided & that I should have the opportunity of congratulating you on the result. . . . I entirely concur with you in the opinion that there could be no doubt at all about the issue if factious politicks did not mingle in the counsels of the court. 135

By 1856, the slavery issue was all about factions and politics!

Another factor must be borne in mind. Dred Scott’s most stunning blow was its invalidation of the Missouri Compromise, and its holding that Congress had no power to restrict slavery in the territories. But this issue was not raised below, and did not clearly arise until the case’s first oral argument in the Supreme Court. 136 Until then, both sides had proceeded on the assumption that Scott became free by being taken into areas governed by that Compromise: the question was whether he became a slave again upon his return to Missouri. 137

Even after issue was raised, the Court initially sought to avoid it. Its first conference focused upon disposing of the jurisdictional issue. That changed when Justice Wayne successfully argued that the Court must reach all the issues raised. 138

134. Letter from Roswell Field to Montgomery Blair, supra note 88 (underlining in original).
135. Letter from Roswell Field to Montgomery Blair II, supra note 132.
136. EHRLICH, supra note 1, at 95.
137. In disposing of his State freedom suit, the Missouri Supreme Court had privately considered ruling against the Missouri Compromise, but after Justice Napton lost his bid for re-election, the issue was never taken up. Diary of Judge Napton, p. 223, in Napton and Dred Scott Collections, Missouri Historical Society.
138. According to Justice Curtis’ son, the Court’s first conference yielded a decision to rule only that Scott was not a citizen and hence the Circuit Court had had no jurisdiction. Then Justice Wayne persuaded others to reach the additional issues. George Ticknor Curtis, The Dred Scott Case As Remembered by Justice Curtis’s Family, 10 GREEN BAG 2d 213, 217-19, 222-24 (2007). Justice Campbell had a different recollection. He wrote that there was no agreement to “duck” the issues, although the Court’s focus had been on the procedural issues raised. Thereafter, Justice Wayne argued that if the substantive issues were not reached, “the Court would be condemned as failing in a performance of its duty.” Letter from J. A. Campbell to George Ticknor Curtis (Oct. 30, 1879) (on file with the Library of Congress, Manuscript Division, in Dred Scott collection, Carl Brent Swisher folder).
If the issue of Congressional power over slavery in the territories is omitted from the strategic equation, Field’s enthusiasm is at least more understandable. In his first letter to Blair, Field saw the case as raising a single issue: “The question involved is the much vexed one whether the removal by the master of his slave to Illinois or Wisconsin works an absolute emancipation of the slave.”

From this perspective, the anti-slavery side risked little by proceeding. If the Court sided with the Missouri Supreme Court on this issue, it would mean that a slave taken to free territory became a slave again upon returning to a slave State – which was already the legal status quo in Missouri. The harm of a loss could thus be seen as modest.

Should Scott win, however, the gains might be impressive. As Field (concerned that the opposition might spot this issue) wrote to Blair, diversity jurisdiction would offer a way for an alleged slave to make an attack on Fugitive Slave Act proceedings by challenging his status in an ordinary civil action:

You will not fail to see the importance of the question involved here. If, in fact, as Judge Wells has decided, a black man may sue his master in the Federal courts, the right of trial by jury is still left to the slave in an action at common law which if brought in the Federal may be enforced in the judgment throughout the Union. And this jurisdiction, if it exists at all, exists by force of the constitution that no act of Congress can impair. The Fugitive Slave act would undoubtedly become of little value, and this may probably be a strong argument against allowing black men to sue as citizens.

Sidestepping that statute would be a considerable gain for the anti-slavery side. The Fugitive Slave Act had created a procedure appallingly stacked against the defendant, in fact so heavily stacked that free blacks were kidnapped and enslaved with some frequency. Cases were tried to a judge or a specially-appointed commissioner, not a jury. The defendant was forbidden to testify. A commissioner who tried the case was entitled to a fee – which was halved if he found the defendant was not a slave! A diversity action, challenging the status of the alleged fugitive slave, offered a way to escape all these provisions.

Montgomery Blair, Scott’s Supreme Court attorney, faced a different picture. By the time Dred Scott was brought to Blair’s attention, the Supreme Court had already accepted the appeal. Blair’s choices were down to letting the case go by

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139. Roswell Field letter to Montgomery Blair, supra note 41.
140. Letter from Roswell Field to Montgomery Blair, supra note 88 (underlining in original).
141. See generally CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865, (1994). Free States had responded by enacting laws forbidding such kidnapping, but these were ruled unconstitutional in Prigg v. Pa., 41 U.S. 539 (1842).
143. Id. A commissioner received ten dollars if he awarded the plaintiff a certificate allowing removal of the defendant as a slave, and five dollars if he did not.
default, letting a person with far less Supreme Court experience handle it, or tackling it himself. He chose the last.

By the close of the first argument in the case, Blair knew that the anti-slavery cause faced real risks. The issue of Congressional power to restrict slavery had been prominently raised – a printed (and doubtless condensed) version of Blair’s presentation at the second argument devotes 14 pages to the subject. Whatever hopes Blair could have had would have faded when newspaper “leaks” began reporting that he would lose 7-2. As Blair wrote former president Martin van Buren: “It seems to be the impressions that the opinion of the Court will be adverse to my client & to the power of Congress over the territories.”

At this point, Blair knew his cause was facing a legal and political disaster. The fact that the wrong defendant had been named could have been used as an escape – there was no “case or controversy” here – except that Blair had never been told of that fact. Shortly after Blair expressed interest in the case, Field wrote him, claiming that the Scotts had been sold to Sanford. Blair had no clue that he was arguing against a straw man until after Dr. Chaffee wrote him, weeks after the Court had ruled.

After the Scotts were freed, Blair encountered Assistant Attorney General Ransom H. Gillet and discussed the case. Gillet wrote Attorney General Cushing:

I saw Mr. Blair this evening. He informed me that Dred Scott belongs to Emerson, & on the death of the latter he went into the hands of Sanford’s hands as his executor. That Dred remained in St. Louis, while Sanford went to New York to reside. Dred instituted his suit for freedom & Sanford employed counsel to defend. That before the suit was finally ended in the Supreme Court, Sanford had finally administered on the estate & the property was disposed of under Emerson’s will & that Mrs. Chaffee took him with other property as residuary legatee. That finding out the true state of the case, he, Mr. B., wrote Chaffee on the subject & desired that he might be set free. . . . He thinks that Chaffee knew nothing of the early proceedings, if he did the

144. DRED SCOTT, A COLORED MAN VS. JOHN F. A. SANFORD: ARGUMENT OF MONTGOMERY BLAIR, OF COUNSEL FOR THE PLAINTIFF IN ERROR 26-40 (n.d.).
145. See Important from Washington, N.Y. HERALD-Tribune, Jan. 1, 1857, at 4 (reporting that Court will rule 7-2 that Congress has no power over slavery in the territories); By Telegraph, ALBANY EVENING JOURNAL, Jan. 8, 1857 (same: Taney will write the decision); The Dred Scott Case, N.Y. TIMES, Feb. 5, 1857 (reporting that the WASHINGTON UNION states vote will be 7-2, Curtis and McLean dissenting, but discounting the report since it would be “unusual” for a ruling to “leak out in advance.”).
146. Letter from Montgomery Blair to Martin van Buren (Feb. 5, 1857) (on file with the Library of Congress, Manuscript Division, in Martin van Buren Papers, reel 33).
147. See supra Part IV.A.4.
later ones, & was not aware that Dred to his wife [sic] under the residuary clause in the will.148

Of course, this has all the problems of double hearsay, and in places conflicts with the record (Sanford moved to New York before Dr. Emerson died, and did not administer his estate; Chaffee wrote Blair, not the other way around), but it suggests that even months after the *Dred Scott* decision, Blair continued to think that Sanford had had some manner of interest in the case.

There was perhaps another factor operating on the anti-slavery side, a dawning realization that an adverse decision might serve as a rallying cry for a movement that seemed to be faltering. As the *New York Herald-Tribune* saw it:

> Many have expressed the opinion that the question [of Congressional power over slavery] would not be met by the Court, and numbers are still of that way of thinking. It makes but little difference to Slavery whether it gets a decision in its favor now or after the public mind shall have had time to cool a little. But it would be best for Anti-Slavery that the decision should come now, while the popular heart is a fused condition. The impression it would thus make would be deeper and most distinct, and the whole series of Pro-Slavery aggressions and triumphs would then be burned into it together. The Congress, the Court and the Executive would all take their position of joint association, in the mind of the people, as confederates in the work of extending the intolerable nuisance of slavery.149

It was a remarkably prescient political appraisal.

**VI. CONCLUSION**

*Dred Scott* was collusively brought, with both parties falsely stipulating to facts that would give the Federal courts jurisdiction over the claims asserted. Perhaps the most telling evidence of this is that when Dr. Chaffee was being attacked as a slaveowner and a hypocrite, he did not invoke the version given in the complaint and agreed-upon statement of facts, even though that version (Dr. Emerson, while alive, had sold the Scotts to Sanford) would have completely cleared himself and his wife.

The basis for the collusion appears to be that both sides believed they had a sufficient chance of winning. Until the attack on Congressional power over the territories was raised in oral argument, the anti-slavery side could reflect that, if its odds were poor, the cost of a loss would be quite limited while the value of a win would be considerable.

148. Letter from R. H. Gillet to Caleb Cushing (Nov. 16, 1857) (on file with the Library of Congress, Manuscript Division, in Caleb Cushing papers, box 81).
Dred Scott underscores a lesson of experience: anything can happen in a court of law. A case that started out with limited issues, of diversity jurisdiction and whether return to a slave State revives a status of slave, became instead a case at the center of the most divisive political issue of the day and destroyed the basis of decades of political compromises.
Abstract: This is a follow up to a 2007 essay I wrote about what it might take for a well-seasoned practitioner to join a law school faculty as a tenure track professor. Having now wended my way up (or down) that track for over six years, my intended audience this time includes the original one, those seasoned veterans of the law practice trenches who may think but should never utter out loud the words “I would like to retire and teach,” but now also my colleagues in academia who are facing what looks to be the greatest reshuffling of the system in our generation. Much of what I said in the earlier essay still holds true. This essay, however, includes (a) a more nuanced look at the strange hybrid creature that is the scholarly output of academic lawyers; (b) a more respectful appreciation of what it takes to become a good teacher, with some notes about what worked for me, and (c) an attempt to reconcile the interests in scholarship and the interest in teaching after the “Great Retrenchment” of the legal profession and legal education, with some brief thoughts about the opportunities that it may bring for the aging but not ossifying academic aspirant.

I. INTRODUCTION

Six years ago, in 2007, having received an offer to join a law school faculty as a full-time tenure track associate professor, having overcome the almost universal disqualification of having practiced for over twenty-six years at the time, I wrote a little essay about the experience. It was my attempt, having climbed over the wall separating the busy thoroughfare of practice to the

* Associate Professor, Suffolk University Law School. A.B., University of Michigan; J.D., Stanford University. At the core of my scholarly qualification to write this essay is the fact that when I first came up with a title it used the plural of “conundrum.” It seemed somehow important to know whether the correct usage was “conundrums” or “conundra.” But I am also a long time practitioner and business executive, so I didn’t spend too long at it. See What is the correct plural of conundrum? GUARDIAN.CO.UK, http://www.guardian.co.uk/notesandqueries/query/0,5753,-5253,00.html (last visited Sept. 17, 2013). Thanks to Paul Secunda, Alan Childress, Mike Madison, Andy Achenbaum, Nancy Rapoport, Steve Hicks, Brannon Denning, Jessica Silbey, and David Case for comments.

1. Jeffrey M. Lipshaw, Memo to Lawyers: How Not to “Retire and Teach,” 30 N.C. CENT. L. REV. 151 (2008). The hard copy publication date was 2008, but I first posted it to SSRN on June 9, 2007. The original essay began as a list of dos and don’ts I described over lunch to Andy Klein, now the dean of the Indiana University School of Law – Indianapolis, where I had been an adjunct professor. I expanded it when a number of law professors, including Andy, said they would like to have a reprint that they could hand to every practitioner who said, “I’d like to retire and teach.” With this essay, those professors can now offer a twofer.
academic garden on the other side, to tell those back in the streets what it was like over here. I still don’t know whether to be happy, some 2,400 SSRN downloads later, that it is my primary claim to academic fame. It seems to have been helpful to some people. I still get the occasional request for advice, and a couple of really generous people let me call myself a co-author on a book.

Assuming that law faculties continue to hire new faculty (a big if as I write this in the summer of 2013), the essay is still a pretty good primer, because the street and the garden still largely exist in that form, at least in terms of what it takes as between scholarship and teaching to succeed in getting over the wall.

Reading the essay now, however, it seems to have come from a different age, one in which 150 or so new law professors were hired each year through the AALS Faculty Recruitment Conference; there had been no financial crisis; no dramatic shrinking of the legal profession with a concomitant effect on applications to law schools; no ScamProf or Law School Transparency; no layoffs of untenured professors or buyouts of the tenured ones; no news reports about law schools having existential crises; no ABA task forces reciting the need for “rapid action” in light of the “urgency of the problems, and the serious threats to public confidence” in legal education; and very little Internet vitriol spewed at law professors toiling away at their esoterica while teaching the thousands of law students who had absolutely no desire to follow in their teachers’ footsteps. Having now endured successfully the indignities of being a superannuated “junior” (a designation I was able to stomach only because I shared it with one of my fictional heroes, Horace Rumpole), I can revisit it with the reassurance that I will be taken seriously because now I have tenure.

2. I should note that with a smiley-face emoticon, because this is somewhat of a sarcastic metaphor, in keeping with the original notion that jumping to academia did not mean retiring.


7. That is facetious and directed at the odd binary circumstance in which for six years, one is evaluated, reviewed, debated, and renewed, and then it just stops (unless the school has post-tenure review, a subject too hot for this essay). Some of my colleagues contend they are taken less seriously after they have tenure. But apart from the issue of being taken seriously, the important
When I wrote *Retire and Teach*, I said that it wasn’t about retiring and it wasn’t about teaching. The first point is still valid. Despite the anonymous nonsense on the blogs, being a good law professor is hard work, and it’s a full-time job. I would qualify the second point, however. At the time I wrote it, whatever the gap between the two arms of the profession, there wasn’t nearly the kind of bitterness being directed by some law school graduates (particularly the youngest ones) toward their former teachers and their institutions (including lawsuits). That level of rhetoric does make me uncomfortable, as though I were

8. Lipshaw, supra note 1.

9. One of my colleagues suggests this gap between practitioners and law school professors has always existed. I don’t recall caring one way or another what my law professors did when they weren’t teaching or grading my exams. Obviously, the Great Retrenchment, the fact that young law school grads have the debt but not the income to service it, and the blogs that facilitate anonymous commentary have made a difference at least in the perception if not the reality of the intensified rhetoric.

Nor were there ever lawsuits, to my knowledge, meritorious or not. My friend Anna Ivey points to this new “click-through” disclaimer if you want to see the information about law schools on the Law School Admission Council’s website:

QUESTIONS REGARDING THE ACCURACY OR CURRENCY OF ANY DATA OR INFORMATION ABOUT THE LAW SCHOOLS CONTAINED IN THIS WORK IS PROVIDED BY EACH INDIVIDUAL SCHOOL, WHICH MUST CERTIFY TO THE AMERICAN BAR ASSOCIATION (ABA) THAT THE CONTENTS ARE ACCURATE AT THE TIME OF SUBMISSION. NEITHER THE ABA NOR THE LAW SCHOOL ADMISSION COUNCIL

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When I wrote *Retire and Teach*, I said that it wasn’t about retiring and it wasn’t about teaching. The first point is still valid. Despite the anonymous nonsense on the blogs, being a good law professor is hard work, and it’s a full-time job. I would qualify the second point, however. At the time I wrote it, whatever the gap between the two arms of the profession, there wasn’t nearly the kind of bitterness being directed by some law school graduates (particularly the youngest ones) toward their former teachers and their institutions (including lawsuits). That level of rhetoric does make me uncomfortable, as though I were
caught in between fighting parents or friends whom I love equally. Over eight years have passed since I was last a working lawyer, and I still feel like neither fish nor fowl in the legal profession—no longer the sometimes-philosophical work-a-day technician solving practical problems—but now a legal academic who still reacts to many things in the academy with either the frustration or impatience of an old law firm or corporate trooper.

I have observed the war of words between practicing lawyers and professors, dipping into it with commentary from time to time. It has, however, always been from a somewhat self-satisfied (perhaps even smug) perch, because I know that I know as much about the real practice of law (at least in the areas of civil litigation and transactional and corporate practice) as anybody who holds a tenured faculty position in a law school in the United States today. But I also understand why law professors want to be law professors and what it takes to advance in that segment of the occupation that doesn’t have to do with teaching. That stuff, the writing, is precisely what I wanted to do. In other words, teaching is nice, and I think I do a pretty good job of it.10 But I didn’t jump to academia just to teach, and I certainly didn’t do it to teach “practical skills” in the sense of spending the rest of my intellectual life fussing with practical problems I used to solve: for example, how to craft a sentence resolving a disputed issue in a deal so as to address the core of Party A’s concern without raising Party B’s hackles; how to calculate the number of shares we could sell into the market under Rule 144; how to spin off a subsidiary without creating taxable gain; or how to prepare for Monday morning hearing on a motion for temporary restraining order when my client first received the motion papers at 4:00 p.m. on Friday afternoon.

So I look back at Retire and Teach11 with a twinge of embarrassment over the hubris that may have come with thinking of myself as a scholar. This is a

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10. I was too modest (right!) to bring this up at first, but the general requirement that almost everything in a law review article be footnoted obliges me to note that in 2013 I received the Cornelius J. Moynihan Award for Excellence in Teaching, voted on by the Suffolk University Law School students.

11. Lipshaw, supra note 1.
post-tenure reflection—if not mea culpa—about what I may have gotten wrong. Now perhaps there are two audiences: the original one, those seasoned veterans of the law practice trenches who may think but should never utter out loud the words “I would like to retire and teach;” but now, also, my colleagues in academia who are facing what looks to be the greatest reshuffling of the system in our generation. This essay centers on three matters: (1) a more nuanced look at the strange hybrid creature that is the scholarly output of academic lawyers; (2) a more respectful appreciation of what it takes to become a good teacher, with some notes about what worked for me; and (3) an attempt to reconcile the interests in scholarship and in teaching after the “Great Retrenchment” of the legal profession and legal education, with some thoughts about the opportunities that it may bring for the aging academic aspirant.

II. THE IRONICALLY LAWYER-LIKE WORLD OF LEGAL SCHOLARSHIP

I need to explain what I now see as a somewhat disingenuous and idealized view reflected in Retire and Teach.12 I made it clear that I believed being a law professor was first and foremost a writing job rather than a teaching job.13 I still think that is largely true, but I now have a more nuanced view of legal scholarship and thus what it really means. Looking back now, having jumped laterally into legal scholarship, I’m aware of at least three dynamics with which the aspiring professor (of any age or experience) has to contend: (1) the ironically earthbound and even practical nature even of what is generally considered to be theoretical writing (contrary to the protestations of the loudest critics); (2) the tendency of much of the writing to be closer to lawyerly argument than to ivory tower speculation; and (3) the fuzzy boundaries of the discipline yet with an oddly-concomitant institutional pressure to conform.

A. Practical Implications and the Canard of Bulgarian Evidence Law

My motivations for wanting to be a tenure-track law professor may have been, despite my own advanced age and experience, even less practical than those of most of my colleagues. When I was a practicing lawyer, I thought a lot about gaps between the mental, linguistic, and social models that constituted legal doctrine, lawyering, and my professional education mindset, on one hand, and, on the other, different ways – philosophically, religiously, and scientifically – of making sense of the world around me.14 The great appeal of the academic garden was that it appeared law professors, as long as they taught classes that law

12. Id.
13. Id. at 162.
14. My wife will confirm that SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (2004) was typical of the books I’d snuggle up on the couch to read.
students needed to take, had carte blanche to think and write about the kinds of mysteries (not just problems) that had come to fascinate me as a business lawyer and executive: how did one accommodate profit-seeking and values; or how did one know when it was time to stop weighing the alternatives and take a leap of faith? I received an offer to run a business law clinic at the law school of a major state university; but I didn’t want to practice law, even in an academic setting. I turned down a sure job running the clinic in favor of a position as a visiting professor at Tulane for a year because I wanted to keep alive the possibility of being not just a problem-solver but also a philosopher contemplating really deep mysteries.\footnote{Actually, I think I already was a philosopher, albeit one operating without a license.}

The level of abstraction in which I wanted to wallow is not for everyone in the law school environment; it entails some professional risk, and not everyone has the freedom to pursue it.\footnote{See infra Part II.C. and discussion of my “orthogonality,” something I am happy to say relates to my writing and not to my physique.} I know that the kind of often recursive, paradoxical, or even metaphysical things I like to think about are not to every taste, even among my academic friends, many (or even most) of whom view themselves not as seekers of mystery; but as practical problem-solvers identifying particular social issues and offering judicial, legislative, or policy solutions.\footnote{Several of the professors who read early drafts of this essay were adamant on this point.} Indeed, the great irony is that—notwithstanding the razzing about impracticality that legal scholarship has taken from the Chief Justice\footnote{See Richard Brust, \textit{The High Bench vs. the Ivory Tower}, 98 A.B.A. J. 50, 51 (Feb. 2012) (“[W]hen asked about the influence of such articles on Supreme Court opinions, Chief Justice John G. Roberts Jr. dismissed them as abstract and irrelevant.”).} on down to the anonymous commenters on the anti-law school blogs—the range of what law professors write about runs from the very earthbound to the very stratospheric; but with the bias, in my casual observation, running far more to the former than the latter. I subscribe to a number of services that keep me posted daily on newly authored work. For example, here’s a sampling of topics of papers written by law professors and recently posted in some of the SSRN journals: the impact of Dodd-Frank on private equity and venture capital;\footnote{David Mangum, \textit{Private Equity and Venture Capital: What’s the Difference?}, SILICON FLATIRONS CTR. (July 2012), available at http://siliconflatirons.com/documents/publications/report/20120306PEVCreport.pdf.} analysis of the effectiveness and implications of SEC cyber-security disclosure guidance;\footnote{Matthew F. Ferraro, “Groundbreaking” or Broken?: \textit{An Analysis of SEC Cyber-Security Disclosure Guidance, its Effectiveness, and Implications}, 77 ALB. L. REV. (forthcoming 2014).} argument that the Supreme Court’s vexatiousness rationale for limiting securities litigation has run its course;\footnote{Wendy Gerwick Couture, \textit{The End of the Vexatiousness Rationale}, 41 SEC. REG. L.J., Fall 2013.} a
discussion of equality, fairness, and reform in education law;\textsuperscript{23} assessment of the impact of globalization on legal education;\textsuperscript{24} and enabling innovation without patents.\textsuperscript{25} These may not be resources to which the work-a-day lawyer turns, but none of the topics strike me as even remotely arcane.\textsuperscript{26} If anyone highlights the more theoretical work, it is Larry Solum on his widely read *Legal Theory Blog*.\textsuperscript{27} His last several posts, as of the moment I am writing this, strike me as fairly typical of a “high theory” approach to scholarship on these topics: a response from a leading legal philosopher to commentaries on his book about moral cognition;\textsuperscript{28} loyalty oaths in contemporary democracies;\textsuperscript{29} physician participation in lethal injection executions;\textsuperscript{30} the rule of law and the arbitrary exercise of government power;\textsuperscript{31} how precedent impacts constitutional interpretation;\textsuperscript{32} and whether law should enforce social morality.\textsuperscript{33}

Compare these topics to several I have randomly selected from the mid-1970s.\textsuperscript{34} On the “elite” end, the articles in Volume 27 of the *Stanford Law Review*...
Review dealt with, among other things: an indigent’s right to the attorney of his choice,35 the involuntary euthanasia of defective newborns,36 standards of proof and preliminary questions of fact,37 proving oligopolistic pricing in antitrust lawsuits,38 and judicial enforcement of the federal trust responsibility to Native Americans.39 Moving slightly down the rankings, the articles during the same period in the Iowa Law Review (selected somewhat randomly) dealt with: assumption of risk in products liability,40 constitutional requirements of written statements of reasons and facts in support of sentencing decisions,41 and criminal law reform in Iowa.42 It is clear (to me at least) that the topics thirty years ago were more “practice-directed” than they are now, but I really don’t think that most of what current law professors write is as arcane as what the Chief Justice sarcastically referred to as “the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria.”43

While still a general counsel, I took a shot at writing an article and showed it to a law school classmate who had become an esteemed professor. It was my first attempt at scholarly writing and, like a lot of professors looking at their early work, there are passages I like; but overall I cringe. One of the reasons may be because one could fairly describe its subject matter (I’m not kidding, so don’t tell the Chief Justice) as “the influence of Immanuel Kant on corporate governance in 21st century America.”44 One of my friend’s pieces of advice was to have a

42. Issue 3 of the Iowa Law Review was devoted to this topic. See, e.g., Mark E. Schantz, Objectives of Criminal Code Revision: Guidelines to Evaluation, 60 IOWA L. REV. 430 (1975).
43. Brust, supra note 18 (quoting Chief Justice Roberts’s comments at the 4th Circuit Judicial Conference).
44. See Jeffrey M. Lipshaw, Sarbanes-Oxley, Jurisprudence, Game Theory, Insurance and Kant: Toward a Moral Theory of Good Governance, 50 WAYNE L. REV. 1083 (2005) (It was also anthologized in a major compilation about the Enron debacle. Jeffrey M. Lipshaw, Sarbanes-Oxley, Jurisprudence, Game Theory, Insurance and Kant: Toward a Moral Theory of Good Governance, in ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER 709 (Nancy B.
section on “implications” and I duly added it.\textsuperscript{45} Fifty, or even thirty years ago, the implications of what you wrote were pretty clear, as you were proposing the resolution of some legal issue before a court, a legislature, or otherwise directly applicable to the practice. Today, there are areas of legal scholarship in which the real-world implications of the debates are attenuated at best (e.g., the Hart-Dworkin dialogue\textsuperscript{46} or the question whether the morality of promise or the consequence of welfare maximization justify contract law). But my sense is that generally if you aren’t writing about things that have real-world implications (generic comment at faculty workshop: “okay, assume you are right, so what, how does this make a difference to anything?”), you are something of an outlier or even a weirdo.

B. The Rhetoric: Advocacy and Explanation

The other aspect of legal scholarship, beyond subject matter, has to do with something I underestimated: the very real—and well-deserved—schizophrenia that exists as between the “descriptive” and the “normative” in the rhetoric of much legal scholarship. The “descriptive” ideally is a matter of understanding and learning what really is about the world. The “normative” is about what the world ought to be (i.e. what is right), and more personally, about \textit{being} right.\textsuperscript{47} In some corners of academia, particularly in the social sciences, law school being one, that distinction is far less than clear.

I will try to convey this with a story. Almost forty years ago, I was a history major at the University of Michigan, and I wanted to become a history professor. (Going to law school turned out to be a pragmatic concession to the sorry state of

\textsuperscript{45} See \textit{id.}, at 1110 (setting forth “Policy Implications”).


\textsuperscript{47} The source of this insight is that, as I have gotten older, I have cared less and less about being right, or at least I limit myself to caring about \textit{being} right only about the really big things, and even then, being conservative about what I deem “big.” Indeed, I have adopted the life maxim “being right isn’t all it’s cracked up to be.” See Jeff Lipshaw, \textit{Being Right and Radical Skepticism}, \textsc{PRAWFSBLAWG} (July 28, 2006, 11:46 AM), http://prawfsblawg.blogs.com/prawfsblawg/2006/07/being_right_and.html. Why? First, I am a passionate moderate. I am not sure where this came from, but I’m pretty sure a lot comes from having other people (wife, children, professional colleagues, other lawyers, judges, etc.) demonstrate so often over the course of a long professional career and raising a family that I was wrong. Second, I have a notoriously misplaced and naïve idealism about institutions. For example, our deepest involvement in organized religion was belonging to a temple while our children were young. I found much that was meaningful in that particular segment of our lives, and some of it shows up in my academic writing. At some point, I was appointed to the temple’s board of trustees, and the distance between my idealized notion of an institution devoted to spiritual meaning, in which the journey was so much more important than the destination, and the in-your-face reality of the board dynamics, in which \textit{being} right was the key thing, was jarring.
In my first undergraduate history course, my teaching fellow and now almost lifelong friend, Andy Achenbaum (who went on to a distinguished career as a historian and gerontologist at Michigan and Houston) gave us instructions as we prepared to write our first paper. “Think of it as a legal brief,” he said. At the time I had no clue what a legal brief looked like, so it was not the most effective coaching I ever received. Almost forty years on, I know what he meant. There is what Wittgenstein would call a “family resemblance” between social scientific argument and legal argument.\textsuperscript{48} While the stock in trade of each discipline is to assemble facts and “make an argument,” the goal of historian or social scientist is causal attribution\textsuperscript{49} as compared to the blame attribution undertaken by lawyers.\textsuperscript{50} At the extreme polarities, say comparing Gibbon’s \textit{Decline and Fall of the Roman Empire}\textsuperscript{51} and Clarence Darrow’s closing argument in the \textit{Leopold and Loeb} trial,\textsuperscript{52} the differences are clear. But in the gray areas, it is much harder to separate objective historiography from lawyerly advocacy.

The common threads between the disciplines are that the authors are historiographers laying out a narrative of past events and employing some theory to make a case. The difference lies in the extent to which the point of the exercise is knowledge or justification. In other words, social history is not merely the accumulation of data, but the organization of that data in a way that does meaningful explanatory work. It is an argument, complete with a thesis and capable of being contested, but the point is the betterment of humankind by way of explanations that may inform us how to do things better the next time around. Now there is a very good argument (recursiveness intended) that all knowledge beyond pure perception (and sometimes even that) is “theory-laden.” Thomas Kuhn and Hilary Putnam have made the point that this is true even in hard science, and it’s pretty obviously true in the social sciences.\textsuperscript{53}


\textsuperscript{51} See \textsc{1 Edward Gibbon}, \textit{The History of the Decline and Fall of the Roman Empire} (J.B. Bury, ed., Fred de Fau & Co. 1906) (1776) (Edward Gibbon is famous for writing a multiple volume history of the Roman Empire).

\textsuperscript{52} See \textsc{generally} \textsc{Clarence Darrow}, Closing Argument in Illinois v. Leopold (Aug. 22, 1924), available at http://law2.umkc.edu/faculty/projects/ftrials/leoploeb/darrowclosing.html.

\textsuperscript{53} See \textsc{Thomas S. Kuhn}, \textit{The Structure of Scientific Revolutions} 124-28 (3d ed. 1996); \textsc{Hilary Putnam, Reason, Truth, and History passim} (1981).
In contrast, knowledge or “truth” (a term that makes me uncomfortable) is not the goal of the lawyer-advocate. When we talk about theory in that context, we mean a “legal theory” or a legal framework that when applied to the facts in question results in the imposition of a legal consequence on someone. But making an argument is making an argument; whether we are doing it descriptively about the fundamental causes of the Civil War or normatively about what the law should be, whether it is about the constitutionality of ObamaCare or same-sex marriage, the circumstances under which a principal has done enough to be responsible for the apparent authority of its agent, or whether Wall Street should be held accountable for the financial crisis of 2008.

We are teleological beings, hard-wired to associate cause-and-effect, even when it’s not the result of sentient intention, with ends and purposes. So we aren’t so far removed from looking for animate gods and demons lurking behind our random misfortunes. For lawyers, the family resemblance of “causation” and “blame” simply exacerbates the teleological impulse. We can dispassionately explain the financial crisis—for example, who did what to whom and when—as a matter of macroeconomics or complexity theory. That is the kind of causal theorizing and attribution that we would expect from social scientists. Closer to home is the bursting of the law industry and law school bubble. I think we can explain that descriptively in much the same way we explain the financial crisis: an inflation of a particular commodity (a law degree) well beyond its fundamental value, fueled by easy money (federally guaranteed loans); and with precisely the same result as the housing bubble—a rapid deflation of the market leaving highly leveraged victims in its wake.

Dealing with the financial crisis as a matter of descriptive causation does not, however, satisfy the desire in many quarters for a “perp walk” in which somebody—preferably the CEO of a major investment bank—takes the blame for the suffering that ensued when the housing bubble burst. If there’s

55. See Lawrence B. Solum, Foreword to Denning et al., supra note 3, at xi (discussing the “normative turn” in the legal academy).
56. Lipshaw, The Financial Crisis, supra note 50, at 1541-45.
57. Id.
60. See generally Alan S. Blinder, After the Music Stopped: The Financial Crisis, the Response, and the Work Ahead (2013).
misfortune, particularly when it arises from human-created social systems; some perp ought to be accountable, and ought to do the walk. The equivalent of the desire for the “perp walk” is the law school scam movement: it was all cooked up and perpetuated by a bunch of greedy law professors who knew a good sinecure when they saw one.  

Two scholars recently completed a study that purports to show descriptively a significant income premium over a career as a result of the choice to attend law school.  

Within days, if not hours, in a predictable way, the critics of the system were on the report normatively like dogs to red meat because it would seem to have undercut the arguments for blame, and the defenders were trumpeting it as vindication. The problem is that people without a dog in the hunt don’t write about it, and the ones who do either (a) have a normative predisposition to whose defense any descriptive study gets put, or (b) use the purported normative predispositions of the empiricists as a means of attacking the descriptive accuracy of what they do.

C. Fuzzy Boundaries and Pressure to Conform

Almost any law professor will tell you that one of the great things about the job is the freedom to research, think, and write just about anything. That doesn’t mean there are no disciplinary boundaries or standards for legal scholarship; it’s just that they are so hard to pin down beyond “I know it’s good when I read it.” We do not have the kind of disciplinary regulation Louis Menand recently described: “a self-governing and largely closed community of practitioners who

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64. See, e.g., Dan Filler, The Long-Term Value of a JD: Michael Simkovic Gets Very Serious, THE FACULTY LOUNGE (July 24, 2013, 12:58 PM), http://www.thefacultylounge.org/2013/07/the-long-term-value-of-a-jd-michael-simkovic-gets-very-serious.html (“I can’t help feeling that the precommitments of the law school critics are so powerful that this study has thrown them for a loop. I wonder whether Campos and Tamanaha would have more equanimity about the methodology if they didn’t have such a horse in this race.”).


65. I wonder about social science empirical work being done by people whose studies always seem to bear out the point they set out to make and about criticism of the work by people who disagreed with the point being made even before they read it.
have an almost absolute power to determine the standards for entry, promotion, and dismissal in their fields.”66 In fields in which double blind peer review of scholarly publication (assuming for the moment that it is blind) is far more the norm, a standard of merit should substitute in theory for class and status: “the product is guaranteed by the expertise the system is designed to create. Incompetent practitioners are not admitted to practice, and incompetent scholarship is not disseminated.”67 The class and status standard is still a concern in academic law. The primary arbiters for publication are second and third year law students, who readily admit they don’t understand much of what they received, and are as much influenced by proxies like the author’s institution as the merits of the piece (it is referred to as “letterhead bias”).68 The downside of peer review in Menand’s view, however, is that because the community of experts ratifies the professional product, “the most important function of the system is not the production of knowledge. It is the reproduction of the system.”69 And that is one of the arguments in favor of the law review system: scholarship gets published quickly and without as much pressure to conform to much of anything except to follow The Bluebook and include a footnote for every assertion in the piece, whether trivial or important, original or researched.70 You are more likely to get out-of-the-box thinking, but also more likely to get garbage.

Having said that, it’s not like it’s an intellectual free-for-all, and there are both disciplinary and careerist pressures to conform. Tenured faculty regularly caution untenured law professors against taking undue risk. A good friend and hugely well-respected law professor and mentor to young scholars, while enjoying my work, told me before I got a tenure-track job that I was far more likely to get hired if I interjected myself in existing debates rather than going off in my own idiosyncratic directions. Just recently, another good friend agreed, suggesting that my writing was “orthogonal” to the extant debates.71 I happen to

67. Id. at 105.
69. Menand, supra note 66, at 105.
70. The enthusiastic students who edited this essay had a far more capacious view of what needed footnote support than I, and are responsible for almost every instance in which you, the reader, might ask, “Did he really need to footnote that?” On the other hand, they had enough of a sense of humor about it to retain this footnote.
71. Some of my law professor friends worried that because I interjected a lot of philosophy into my work, and because the legal philosophers (and philosophers generally) have a reputation of being an ornery bunch, I might have a problem with the external reviews that are part of the tenure process. I am and was independent enough to take that advice for what it’s worth, but it is pressure to conform.
have the luxury of being orthogonal, doing this as a second or third career, and being beyond the worry of raising a family and paying for the kids’ college. It’s hard to pin down in words, but there is a safe spot somewhere in between writing practice manuals and exploring the intricacies of Bulgarian evidence law. And the lower you are on the faculty pecking order, the more you are considered well-advised to stay within it. That kind of thing grinds my gears, and I have advocated a “dare to be great” or “carpe diem” philosophy when the subject of pre-tenure risk comes up, but I do understand the significance of the twenty-year gap between most of the others and me in my professorial cohort. If it turns out that I am not an “interdisciplinary scholar,” but instead an “intellectual dilettante,” I have a lot less at stake outside of potential bruising within the almost limitless bounds of my ego.

I don’t want to overstate this. There’s a lot of mind-expanding free thought without undue preconception in the academy. (I have never met anybody in or out of the academy without preconceptions.) Indeed, I’d go farther than that and say many people I have met will try to deal with ideas they don’t like on their own terms. But if you want to be a law professor because you think you will be spending your days exchanging great thoughts in the spirit of pure learning and teaching with everybody you meet, rest assured that the academy is as fraught (or not, as the case may be) as any corporation or law firm with issues of careerism, faddism, correctness, territory, influence, power, budgetary constraint, clash of ego, and other institutional idiosyncrasies. All of those things hover around in the periphery as you go about the activities of mind, thought, and learning that were the reason for becoming a professor.

III. TEACHING: IT IS REALLY HARD!

I gave short shrift to teaching in Retire and Teach, and now regret it. I was reflecting another canard, which is that professors don’t care about teaching and it is not rewarded. That is simply and overwhelmingly untrue. Abilities vary, but I cannot think of many professors with whom I’ve spent any time at all who don’t want and try to be good teachers. My only excuse in the earlier piece was that I didn’t know at the time what I didn’t know. I want to address (a) the substance of what one teaches; (b) as a kind of atonement, offer some practical suggestions, for whatever they are worth, about pedagogy; and (c) note the

72. Brian Tamanaha, truly a thoughtful and gentle soul, is a perfect example. He pointed out that he had been a reviewer for the Simkovic/McIntyre essay and had recommended it for publication as a useful addition to the literature, notwithstanding his normative views. See generally Tamanaha, supra note 63.

73. See generally Lipshaw, supra note 1, at 156-59.
opportunities for counseling and mentoring of students that are particularly satisfying for the experienced lawyer-professor.

A. The Sweet Spot Between Abstractions and CLE

What I say about the substance of what one teaches in a doctrinal law class will be mercifully short, because it really is a subject all its own and deserving of more dignified treatment than I give it here. In short, despite the odd (and misplaced) attacks on “theory,”74 there is a sweet spot of professional instruction in law school somewhere in between, at one extreme, doing a continuing legal education class on upper-level subjects or bar preparation on first-year and core subjects and; at the other, an inordinate focus on theory from allied fields that may inform the law in that area (for example, spending the first year of contracts teaching transaction cost economics, or ignoring the Securities Act of 1993 in Securities Regulation in favor of an extended discussion of finance theory, including but not limited to the Modigliani-Miller theorem75). My sense is this sweet spot is the one most professors aim for in their teaching if not in their scholarship.76

Putting aside the heightened interest in practical skills training,77 the attack on theory puzzles me for the reasons discussed above regarding the similarity of advocacy and explanation. A solid secondary school and undergraduate grounding in subjects like history, English, or political science teaches you how to make precisely those kinds of arguments that, with a few tweaks here and there, you turn into lawyerly advocacy. That much has been true for over 100 years and is the core of truth that underlies the defense of teaching “thinking” rather than specific skills.78 There’s a more important aspect to theory, one that

74. You see a lot of this in anonymous blog commentary. A more coherent yet in my view incorrect presentation is Lawrence Rosenthal, Those Who Can’t, Teach: What the Legal Career of John Yoo Tells Us About Who Should Be Teaching Law, 80 Miss. L.J. 1563 (2011) (claiming that the controversy over Yoo’s Office of Legal Counsel “torture memoranda” illustrates the problems that inhere with the legal academy’s decision to champion the theoretician as teacher).


76. See Solum, supra note 55.

77. See, e.g., Scott Fruehwald, Why the ABA Should Grant CLEA’s Petition to Require 15 Hours of Skills Courses, LEGAL SKILLS PROF BLOG (July 7, 2013), http://lawprofessors.typepad.com/legal_skills/2013/07/why-the-aba-should-grant-clea-s-petition-to-require-15-hours-of-skills-courses.html (“The Clinical Legal Education Association has petitioned the Council of the America Bar Association’s Section for Legal Education and Admissions to the Bar to require law schools to offer 15 hours of experiential education in the second and third years.”).

78. See, e.g., Brian Leiter, On So-Called “Empirical Legal Studies” and Its Problems, BRIAN LEITER’S L. SCH. REP. (July 6, 2010 6:41 AM), http://leiterlawschool.typepad.com/leiter/2010/07/on-so-called-empirical-legal-studies.html (criticizing empirical legal studies as one that “rewards technical skills related to number crunching and data analysis, as well as research design, rather than smarts on your feet, the ability to draw conceptual distinctions, or construct and deconstruct arguments” and
reflects the sea of changes in the profession that are the result of the Information Age: routine and mechanical legal tasks are going to be mechanized; it’s the thinking/theory part that is going to survive. On this point the best I can do is recommend an excellent essay by the late and inimitable Larry Ribstein on “practicing theory.”

For the seasoned practitioner who wants to teach doctrinal classes (i.e. not skills classes) in the current era, the lesson is to teach the doctrine like a professor, but use one’s experience as a practitioner to provide context and perspective (see discussion of war stories infra Part III.B.8). Because you are intellectually curious, you will see legal and non-legal theory that you want to try to convey to your students; sometimes it will work and sometimes it won’t. My two complete disasters in contracts were trying to teach Hohfeldian correlatives and to explain a particular case by way of the logical structure of modus

ponens. Both have long since been expunged from my class notes. I do teach some Coase Theorem on default rules, but I have had much better success (in part because it’s easier to see the relevance) in my LLC & Partnership class than in first year contracts.

B. Thoughts on Pedagogy

This may seem funny to some, but the pedagogy in my contracts class in the fall of 1976 consisted of Jack Getman sitting at a desk with the Dawson and Harvey casebook open in front of him. Paul Goldstein teaching property the next semester may have been a little more energetic because he paced around a lot, but the only new tool I can recall him employing was the blackboard. Gerald Gunther leaned against the desk and talked about First Amendment cases. Let’s call that the minimalist approach. With a couple small exceptions, it’s the one I took with me into my first classes in 2005. Oy, what a disaster! I survived the very first contracts section I taught largely because the students didn’t know any better and cut me some slack, but the upper-level class in sales was an unmitigated disaster. I viewed the fact that I disclosed the student evaluations to later employers of my teaching as a mark of my integrity.
I am not qualified to and won’t give an extended treatment of modern pedagogy. What I offer here are some practical suggestions (in no particular order) from my own process of discovery that I wasn’t in a position to offer the first time around. Let me note that in teaching as I was in practice, I am a demon for preparation, even though I improvise, wander around, trade snappy repartee with the students, and come up with multiple ways of getting the point across. It comes from believing that effective improvisation favors the well prepared.

1. Syllabi and unit outlines

The ability to appear to your students that you are totally organized and in control of the big picture is a major asset. (I view little snafus, like the technology going on the fritz or screwing up a PowerPoint, as a chance for self-deprecating humor, sort of like a comedian—Johnny Carson in my era or David Letterman today—deliberately blowing a joke to get a laugh about blowing the joke.) There are three potential problems with publishing your syllabus, which is the standard organizing tool. First, until you’ve done this a whole bunch of times, and even then; there’s no way to organize classes down to the minute so that you can say when you are going to do, for example, promissory estoppel on October 3 and bilateral contracts on November 17. Second, if you publish your whole syllabus and then don’t get to it all, the students will complain in evaluations that you didn’t cover everything. Third, if you don’t publish your whole syllabus, the students will complain because you didn’t tell them where you were going.

My technique is to publish a complete syllabus on TWEN at the outset of the semester but only showing the broad unit topics and the reading assignments.

83. I just saw a list of tips for new professors teaching their first classes, almost all of which I agree with. Lyrissa Lidsky, Ten (No, Make That Nineteen) Tips for New Law Professors, PRAWFSBLAWG (July 29, 2013, 9:48 AM), http://prawfsblawg.blogs.com/prawfsblawg/2013/07/ten-no-make-that-nineteen-tips-for-new-law-professors.html. The comments following the post are also helpful.

84. When I was a litigator, I followed the style of one of my mentors at Dykema Gossett, Don Young, in preparing cross-examination questions on 8.5 x 11 inch three hole punched paper, with the questions (a) organized topically by page so they could be shuffled around depending on how the examination went, (b) if really important, written out so that I would ask them correctly, and (c) typed on only the right half of the page and triple-spaced to be able to take notes and jot down follow up questions. Rarely did I actually follow the outline to the letter, but it was always there as a checklist and a security blanket. To give a sense of my obsessiveness, even today when I give a talk, even though I will ad lib, I write the whole thing out in full sentences. One advantage is knowing that if I speak somewhere between 100 and 150 words a minute, I can know by dividing that into the Word Count tool just how long the talk is.

85. Mike Madison told me he thought my approach sounded very structured rather than improvisational. Yes and no. The strange thing is that I have received student evaluations saying that I am very, very organized, and others that call me “scattered” in lecture. So who knows?

86. TWEN, Registration No. 2,302,482 (TWEN is an online academic tool that gives students access to course materials, discussion boards, etc.).
I then publish “unit outlines” for each topical unit sometime much closer to the actual class. This allows me to modulate the amount of content. In class, I follow the unit outline religiously; indeed, I publish it in Microsoft Word, post it on TWEN, and tell students they should consider downloading it and using it to organize their notes.

2. PowerPoint

I resisted PowerPoint for several years. I had spent more than a decade in corporate life and if I had not experienced “death by PowerPoint,” I had been administered several overdoses. I liked visuals, but insisted on doing it on the whiteboard. I also liked having the unit outline in front of the students, so I’d waste a lot of time writing it in one corner of the board at the beginning of each class. One of my colleagues, Andy Beckerman-Rodau, assigned to observe me in the Wonder Years (ages fifty-five to fifty-eight) when I was completing ninety percent of my tenure requirements, suggested that PowerPoint could do anything that I needed to write or draw on the board. I’m stubborn and didn’t take his advice for a couple years. I insisted there was more immediacy in writing or drawing the stuff in real time.

I have completely reversed my view on this. Andy was right. My rules of thumb on PowerPoint are (a) never put anything on it that you might read, (b) never actually turn to look at it, (c) rarely be cute (i.e. pictures and attempts at humor), and (d) never use a PowerPoint slide that I haven’t made available to the students before class on TWEN. But now I use lots and lots of diagrams to illustrate complex cases and transactions, just like I did in practice, and I can achieve the immediacy of writing by using the animation function in the PowerPoint. I embed a picture of the diagram in my notes, precisely so that I don’t have to turn around, just like I have embedded an example here in Figure 1 (this illustrates Bloomgarden v. Coyer, a case used to teach quasi-contract).

87. The corporate style of abuse is different than the academic. Corporate PowerPoint abuse is a slide divided into eight quadrants, each with multiple pie charts and bar graphs, and in total holding more bits of information than the British Library. Academic abuse is a series of bullet-pointed sentences all of which the presenter insists on reading.

88. The one exception to this I can recall offhand is the slide with a picture of Benjamin Cardozo, which allows me to observe that Conan O’Brien is his illegitimate grandson.


Also, I’m anal enough to key my class notes to the animation, with a reminder to “CLICK” at each point I need to advance the diagram.

The other thing I do with PowerPoint is to have the unit outline (discussed above) always in front of the students so that they always know where we are. If you have ever watched *SportsCenter* or *Pardon the Interruption* on ESPN, you will see that there is a “rundown” graphic scrolling up the side of the screen advising you which topic they are on, which they have just done, and those coming up. I do a very low-tech version of that with the unit outline on each slide.

3. Recordings

A couple years ago, I decided to have the media services department record all my classes and post them on our curriculum management system for the students. This is extremely popular. I tell the students it frees them from the perceived obligation of taking verbatim notes. It lets them go back and listen again if they were confused.

The natural question (or objection) is that students might not come to class (notwithstanding ABA and school rules about attendance). The first answer is most of them still do. The second answer (and don’t tell the ABA) is: I don’t care. I start each first year course with the same comment: “nobody in this school will work harder at leading you to water and nobody will care less if you drink;

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91. *Sportscenter* (ESPN) is a cable broadcast show that features sports news and highlights.
92. *Pardon The Interruption* (ESPN) is a cable broadcast show that features sports journalists debating current topics in sports.
it’s your life and your tuition money, and you’ll get out of it what you put into it.”

4. Seating charts and laptops

I have other reactions to the paternalism (or is it maternalism?) that pervades law school pedagogy, and these are reflected in my attitudes towards seating charts and the “laptop in the classroom” issue.

Seating charts with students’ names and pictures are ubiquitous; I stopped using them even in my first year classes a couple years ago. It strikes me as an anachronism, an assertion of power over the students that I find uncomfortable. In our first year classes, students have name cards that they can carry from class to class and my preference is that I see the actual student with a name in front of him or her rather than rely on a seating chart. I have mixed feelings about cold calling, another Kingsfieldian tradition, and my employment of it usually peters out near the end of the first semester of our two-semester contracts class. (I never cold call in upper-level classes.) At the beginning of each semester in all classes, I ask the students to fill out an index card with name, hometown, undergraduate, and a sentence that tells me something interesting about them. In the first year class, I add to each card a thumbnail picture from the student directory. I establish “on call panels,” published in advance, of about ten students per class. I take the ten cards for those students, spend a minute at the beginning of the class tracking down where they are in the room, shuffle them, and use them to call on people if I do at all.

As to laptops, I just don’t care. I make it clear that if they want to surf, text, watch porn, or whatever, it’s their time and money they are wasting. I do note that such activities could be distracting to others nearby, but I recommend the distractee exercise self-help in those circumstances.

5. Parking lots

This is a concept I imported from meetings in the corporate world (I think it started during the “total quality management” mania of the early 1990s.) Students want structure in the class, but they also want to participate. They don’t mind when others are responding on point, but they greatly resent the gunners who sidetrack what they are in the class to learn. I had (or still have) a reputation

93. THE PAPER CHASE (Twentieth Century Fox Film Corp. 1973).
94. See id. (Professor Charles W. Kingsfield, Jr., is a character in The Paper Chase with a penchant for using the Socratic method of cold-calling on students).
95. The card-shuffling trick was an idea I took from my colleague Stephen Hicks.
96. I might consider revising this view if faculty members (myself included) are barred from bringing smartphones, tablets, articles to read, or papers to grade into faculty meetings.
for being pretty abrupt about cutting off student digressions. This past year I instituted the “parking lot.”

I describe it on the first day as follows. We have a lot to cover in the course. There are many, many issues and sometimes there are digressions that you may think are relevant or helpful, but I know that they aren’t. When that happens, I am going to say something like, “that’s an interesting point, but I’d like to put it in the parking lot.” There is a TWEN forum set up called “Parking Lot.” I invite you to post the issue or the question there, and I promise to respond to it. Also, sometimes you are going to ask me a question or raise an issue that stumps me. I may ask your indulgence at that point to put the issue in the parking lot so that I can think about it.

My reading of the student evaluations was that this was a popular technique.

6. Practice questions and exams

You cannot underestimate the paranoia about exams. I remember approaching the first exams in my first semester of law school with the same fear and trepidation I would have about jumping out of an airplane as a parachutist. I want to give students a sense of my exam style and a chance to practice, but I really don’t want to grade 100 practice essays. Besides posting prior exams, I have two primary techniques.

The first is that I use ResponseWare® interactive technology in many different ways, typically in the first-year class, but particularly to display multiple choice questions at the end of each topical unit.97 The advantage is that the students can answer the question, which is typical of my exam style, without being identified, but I can immediately show the results for the entire class and then deal with what made the answers right or wrong.

The second is that I give an in-class timed “issue-spotting” practice essay that is pretty close to the difficulty of the real exam. Because I don’t want to grade them, but because I don’t want them to rely on their own often self-deceived self-assessment, I have them print their exam answers, put pseudonyms on them, and bring them to class. We then exchange among the students, and they grade each other based on the rubric and the points I walk through with them. The rubric is exactly like the one I use to grade their real exams. We use the ResponseWare® to tally scores (in ranges) to each issue on the rubric and to the total. Invariably, we end up with a curve, created in real time, which is very similar to the curve in absolute scores that I see on the actual exams. The system

97. ResponseWare®, Registration No. 3667473 (ResponseWare® is software and hardware system for instant electronic polling). This technology is also referred to as “clickers,” although it has advanced over the last few years. I borrowed this technique from my colleague Andy Perlman, who was the pioneer at our school (as he is in many areas of classroom technology).
isn’t perfect because the students are doing the grading, but I tell any student who thinks there has been a significant anomaly in the grade to come see me.

7. Responsiveness to students

If you are coming out of law firm practice or the corporate world, you are probably light-years quicker in responding to phone calls and e-mail than the average professor. Students seem to have come to expect being ignored. Somebody who worked for me once described me as “hyper-reactive,” but it’s absolutely clear that responding quickly, regardless of the substance of the response, demonstrates a respect for the other. I put my cell phone on the syllabus and recite it on the first day of class. No student has yet had the cojones to call me.

8. War stories

If you have been practicing for a long time, you come in with a ton of street credibility. Students will love your ability to put seem abstract into real-world context. But students also know they are being cheated if all they get are war stories. I use a bunch of techniques for putting the point in context, including war stories and things like film clips from Shakespeare in Love (partnership versus debtor-creditor relationship), Ronin (conditions), and Bleak House (termination of power of acceptance). But I think they need to be spice rather than the entrée.

C. Counseling and Mentoring

Something that doesn’t get a lot of attention in the professor’s tripartite obligations of scholarship, teaching, and service; but is likely in the background of the “retire and teach” sentiment is the time you spend with students counseling and mentoring them about careers and life. It can be frustrating; what students want most are jobs, and in the current market what you are able to say is often cold comfort at best, even to the students with good grades.

98. When I was in the law firm and in business, pink phone message slips were still used. I had a theory about returning calls. I would come back from a meeting to a stack of them. I suspect most people would return them in the order they came in, sort of a first-in, first-out system. I always reversed the order, using a last-in, first-out system. My theory was that once you hadn’t returned a call in several hours, several more hours wouldn’t make a difference. But at least I would return some of the calls almost instantaneously.

100. Ronin (FGM Entertainment 1998).
101. Bleak House (BBC Television) is a television series about the English legal system.
I can’t compare the amount of this I do relative to my colleagues, and I know the students prize many of them for their knowledge and experience in areas that are either completely foreign to me (e.g., criminal prosecution and defense) or out of my area (e.g., government service or patent and trademark). But it was clear very soon after I started teaching that they wanted to learn from my experience both in law firms and in-house, as a litigator and as a transactional lawyer, and as somebody who had seen most of the career ladder, from new associate to partner to general counsel.  

IV. WALKING AND CHEWING GUM: CONCLUDING THOUGHTS

I conclude with some thoughts about the future of legal education and how seasoned lawyer-professors might play a role in it.

A. The Polarities That Need to Be Managed

Here is the short version of my 50,000-foot view of the tension between the motivations that caused me, like others, to want to be a law professor and the realities of teaching in a professional school (even Yale) in which the vast majority of students do not aspire to careers similar to their professors. Legal academia is unique and became that way not as the result of a logical exercise, but as a matter of historical happenstance. Law schools are able to maintain relatively large and well-paid faculties because they have the leverage of large numbers of professional students who do not aspire to academic jobs. In other words, training professionals with no interest in being academics has subsidized those of us who wanted to argue policy, solve long-term problems, or ponder mysteries in the same manner as our sisters and brothers in the arts, humanities, and sciences.  


103. This has been particularly true after what Larry Solum described as the “normative turn.” Solum, supra note 55, at xi. From Langdell forward for many years, it’s fair to say that law professors saw themselves engaged in a scientific and descriptive endeavor, reducing the law in different subjects to its essential principles and organizing them in treatises and compendia like the American Law Institute’s Restatements of the Law. One of the resources to which I turned most frequently in my ten years as a litigator was the massive treatise on the Federal Rules of Civil Procedure written originally by Charles Alan Wright and Arthur Miller. See CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE (1969). The “normative turn” and even more the interdisciplinary or empirical turns mark what you hear today in substantive presentations at events like the Annual Meetings of the AALS or the Law and Society Association. It is certainly
departmental peers with the social sciences and humanities in first-tier research universities has pushed the scholarship interest of most faculties away from “mere” professional training and into sophisticated doctrine, theory, and policy. Most of us don’t teach at Yale, and our students care even less about the “law and . . .” than Yale students (assuming they do!). But as much as we’d like to focus on teaching, (a) there is institutional pressure otherwise because U.S. News rankings rely in part on peer reputation which is in turn a measure of a faculty’s collective prominence in the academic community, and (b) individually, a law professor moves up in professional standing (for better or worse) even far down the food chain from Harvard, Yale, or Stanford not as much by teaching ability as by reputation as a theorist, empiricist, or social scientist.

The “Great Retrenchment” of the legal profession exposed the leverage between professional training and university-level scholarship. There was a law school bubble and it burst. In the post-bubble world of legal education, there just isn’t enough leverage from satisfied professional students to fund the amount of legal scholarship that academics want to produce when almost every professor in every law school from the top to the bottom needs to “contribute to the literature” to succeed. Something has to give.

For most schools, it means we are going to have to walk and chew gum at the same time. The first step is to stop trying to reconcile what professors want to write about in law reviews and what students want to learn about in class. We can’t solve the problem, but we can manage it by acknowledging this is a unique academic environment. There is an intractable polarity between the most theoretical scholarship, at one end, and the most practical professional training, at the other. What occurs at the poles of theoretical scholarship and practical professional training doesn’t necessarily have to be related. No rule of nature that says it had to evolve this way, but it did. Law school professors writing articles


104. I pick on Yale because historically there are twenty to twenty-five new law professors each year who went to law school there, meaning that a substantial minority of the student body is interested in all that professor stuff.


that don’t impact the work-a-day lawyer don’t have to exist at all, much less coexist with more practice- or teaching-oriented colleagues. They can, just as in the case of many other polarities, continue to coexist. But to coexist, faculties are going to need to accommodate the concerns and needs of students or their raison d’être is going to disappear; students and alumni are going to have to acknowledge the driving forces of academic prestige and advancement or they are going to lose the patina that comes with having attended a highly ranked law school.

B. Opportunities?

The financial crisis and the Great Recession were the most significant economic setbacks of our generation, and they triggered the Great Retrenchment both in Big Law and legal education. Nevertheless, my moderately uninformed guess is that we are less likely to see fundamental institutional changes in legal education than the following: a shakeout (perhaps even a major shakeout) with a new equilibrium of schools, faculty, and students; significant changes in curriculum; efforts to reduce the cost of legal education; and more diversity among schools in what they offer. It is possible that those shifts—greater focus on “experiential learning,” MOOCs, other forms of digital education—will give senior lawyers, particularly those who don’t want to be scholars, increased opportunities to teach. Almost certainly for the next year or more, the 150+ per year opportunities that existed in 2005 and 2006 for seasoned lawyers to compete with the more typical entry-level tenure track candidates will not be there. My reading from the inside of the faculty, however, is that barring any more significant change than a new equilibrium, the present model of full-time tenure track scholar-teacher is not going away. Perhaps, in the new and downsized but more practice-attentive environment, a seasoned lawyer with some scholarly chops becomes more attractive.

I will review how well I predicted all of this in my forthcoming 2019 essay with the working title “Retire and Teach Twelve Years On.”

CHANGE: A CONSTANT VARIABLY DEFINED—
LAW AND ANTHROPOLOGY PERSPECTIVES ON
HISTORICAL CHANGES TO THE RULE OF LAW

Dylan Oliver Malagrinò*

“It is perfectly proper to regard and study the law simply as a great anthropological document.”
- Oliver Wendell Holmes

ABSTRACT: History has shown many periods of legal change dramatically transforming law in society. Although anthropology and law might have a wide area of interdisciplinarity, these two disciplines’ treatments of legal change are still quite different. For example, lawyers read legal change as new concepts from within a legal tradition continually evolving over time, but anthropologists, analyzing the social relations between persons and abstract personae, see legal change as a significant break to a social history. In what follows here, I have examined instances of significant legal change in societies very different from the presumptions of our own modern-state, capitalist-commercial societies: societies of entirely oral culture without state government; societies with scriptural writing systems; and societies with very different forms of government to our common understandings of the “modern state.” In this paper, I present conclusions based on specific instances of historical legal change in the Ottoman 19th century, North Yemen, Turkey in 1926 and Syria. These conclusions demonstrate that, although anthropology considers legal change in terms of rupture from the social past, the law must treat legal change as a categorical redefinition from what it was before.

I. INTRODUCTION

In the 19th century, the Ottoman Empire had a strong centralizing imperial tradition. There were changes to Ottoman legal theory and administrative practice in the 18th and 19th centuries that signaled the emergence of a unified legal status for citizens. Furthermore, the Ottoman state sought to change law to Islamic jurisprudential terms. Specifically, one major historical matter of legal

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change was the transformation that marked Ottoman agrarian property relations in the 19th century. The 19th century Ottoman reform law effectively changed individual property rights by gradually redefining the long-established legal language that governed different types of property. By applying a historical analysis approach, anthropologists have seen such legal change in property relations as a rupture away from past power relationships, thus revealing an era of new power relations. On the other hand, lawyers see this legal change as a categorical redefinition of rights that already existed but merely underwent a gradual change.

Any period of significant legal change, even when the transition arguably is toward the better, often is accompanied by discomfort and uneasiness, making legal change a focus of research and debate for experts from many disciplines. Although it is beyond the scope of this essay, such periods of legal change are common in the international arena and are deserving of analysis. Yet, the

1. See generally Elizabeth Colson, TRADITION AND CONTRACT: THE PROBLEMS OF ORDER (Aldine Press, 1974). Colson examines how the Native Americans, who at one time enjoyed life as an egalitarian community before American colonization, were denied their sovereign autonomy in their struggle against the United States policy of cultural assimilation because Indian tribes and institutions were seen as a barrier to American assimilation. Thus, the period of legal change within Native American communities that occurred during the aftermath of United States colonization forced the Native Americans to witness the erosion of their cultural autonomy as the native peoples' nations were reduced in their rights to self-government by United States' incremental control and policy that eventually lead to the relocation and termination of Native American nations. Colson draws upon her fieldwork among Native American societies whose members believed, at one time, that they were part of a society where the members enjoy equal access to resources and share decision-making power, most commonly referred to as an egalitarian community. Colson illustrates that such societies do not have a formalized government, and therefore require its members to place constraints on their own actions and conduct in order to maintain harmony in their society. A shift in the struggle for social and cultural power occurs once the society members accept formalized methods of government. The members of these societies no longer have to place self-controls on their actions and the actions of other members, but face a new struggle to protect their own freedom from encroachment by centralized government and multiplying external controls. Colson’s book examines how the Native Americans faced this shift in power struggles as the tribal communities tried to protect their sovereign autonomy.

perspective of any analysis will depend on the expert’s academic slant. For example, anthropologists, like historians, consider legal change in terms of rupture, whereas lawyers instead must treat legal change as a categorical redefinition.

Why?

In this paper, I will begin with a brief legal anthropology primer that describes the three main periods of legal anthropology processes and current trends in anthropological contributions today. Also, I will describe the historical analysis approach that some legal anthropologists will favor over the current anthropological trends. Then, I will contrast the two academic disciplines - anthropology and law - and their differing perspectives on significant legal change. Next, I will introduce and explain my observations regarding how and why anthropologists characterize significant legal change as rupture, whereas lawyers treat such change as a categorical redefinition. Finally, I conclude this paper by surveying a few illustrative examples of historical periods of significant legal change and by examining the differing perspectives of such change.

This paper aims to contrast legal and anthropological analyses of legal change by looking at changing legal institutions and rules of law in polities far removed from our Western, Euro-American understandings of law and legal institutions. This paper also seeks to contribute to developing methodologies to direct future research about historical instances of legal change, which might weigh in on the import of change to the rule of law in any society.

II. LEGAL ANTHROPOLOGY PRIMER FOR LAWYERS

The history of legal anthropology can be divided into three main periods of processes. First, prior to the mid-1960s, most empirical monographs had seven common characteristics. These characteristics were: 1) historical; 2) ethnographic descriptions; 3) based on inductive empiricism; 4) using some form of the case method; 5) to study a single ethnic group; 6) relatively homogenous; and 7) capable of being isolated as a society for the purpose of analysis. Also,
most empirical monographs 1) relied on Western conceptions of law; 2) considered disputes as the main index of law or its primary locus; 3) abstracted from the processes of colonial domination and from the profound economic and social changes during the colonial period; 4) were functionalist in orientation and concerned the maintenance of social order; and 5) considered law primarily as a framework rather than a process.  

Historically, legal anthropology compared legal institutions and focused on non-state societies and their systems of social control. Anthropologists examining customary dispute settlement procedures showed the regulation of social life; thus, dispute settlement analysis revealed the forms of social control in different societies. Therefore, the object of study for legal anthropologists became “dispute resolution processes.”

After 1965, there was a shift in the study of anthropology, especially in the United States, toward dispute settlement and law as process. Laura Nader and her Berkeley Village Law Project from 1965–1975 defined this period. Nader argued that anthropologists should place legal processes in their social context and “aim at empirical and explanatory generalizations.” She emphasized dispute settlement and dispute processes as the central themes of legal anthropological study, which was a shift from social organization to processes and from groups to networks of individuals. At the time, most anthropologists focused on the characteristics of disputes and the process of handling them.

Since the mid-1970s, the focus of legal anthropologists has shifted to access to justice and informal alternatives to courts, due in part to less money available
for anthropological research and fewer opportunities for research in developing countries.\textsuperscript{15} Anthropological contributions now concern: 1) the influence of social organization on dispute processing and informal alternatives to courts, and 2) the individual perceptions of justice and the means of expressing complaints.\textsuperscript{16}

Also, since the 1970s, there have been many different approaches to anthropological research, all more concerned with theory and the role of the state.\textsuperscript{17} Recent trends include: 1) anthropologists today are more concerned with the study of legal processes in advanced capitalist societies; 2) anthropological approaches have increasingly sought to place legal processes in their broader national and international contexts; 3) renewed concern with law as a subject of study; and 4) movement toward use of macro-sociological theory as a source of research questions, working hypotheses, and potential explanations.\textsuperscript{18} There has been an increased emphasis in legal anthropology regarding the ways in which people conceive, create, and sustain definitions of situations, especially though the use of language.\textsuperscript{19} Also, there has been an emphasis on economic bases of political and legal institutions, the relationship of law to class formation, and the connections between changes in legal processes and the development of capitalism as a distinct historical form, including Marxist themes regarding the relationship between the development of capitalism and processes of legal change.\textsuperscript{20}

In contrast to the current focus on dispute processes and settlement, June Starr and Jane F. Collier suggest in their report, \textit{Historical Studies of Legal Change}, that many anthropological researchers have abandoned the dispute paradigm because it was too normative and positivistic; instead, anthropological researchers are using a historical analysis approach to understand legal change.\textsuperscript{21}

They wrote:

\begin{quote}
To focus directly on legal change meant using analytical strategies that differed from those of the earlier community or regional studies. Now, instead of focusing on disputes and attempts at settlement of problems, new objects of study surfaced: how culture mediated legal ideas, the legal strategies of a ruling or a minority group, the
\end{quote}

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\bibitem{15} \textit{Id.} at 73.
\bibitem{16} Synder, \textit{supra} note 3, at 74. Two critical claims of this movement towards access and informal alternatives are that access will lead to political struggles and informal mechanisms will lead to greater state control. \textit{Id.} at 75.
\bibitem{17} \textit{Id.} at 68.
\bibitem{18} \textit{Id.} at 76-77. Additionally, Snyder identifies some recent legal anthropological themes, including: 1) rules and processes; 2) legal pluralism; and, 3) the political economy of law. \textit{Id.} at 77-81.
\bibitem{19} \textit{Id.} at 78.
\bibitem{20} See Synder, \textit{supra} note 3, at 81-83.
\end{thebibliography}
negotiation of a dispute across international boundaries, the creation by legislation of new “redistributive” networks, how state-enacted law changed rural agrarian hierarchies, or how less powerful groups struggled to obtain law representing their interests.22

Thus, Starr and Collier observed that the focus of legal anthropologists in examining legal change had transitioned to viewing law as that which was negotiated over time between colonial rulers and those they ruled.23 Under this approach, legal anthropologists examine historical research and asymmetrical power relationships to conclude that legal change is a change in power relationships of the past.24 This approach is in harmony with the theme formulated by Sally Falk Moore, that legal change is a change in power relationships.25

III. THE AREA OF INTERDISCIPLINARITY BETWEEN LAW AND ANTHROPOLOGY

Although the relationship between anthropology and law might be difficult to define, the demarcation line between them is sometimes not obvious because both disciplines originate in Western thought and in particular worldviews.26

Also, the work of the lawyer and the work of the anthropologist inform each other. For example, lawyers contribute to the ethnography of law by responding to anthropologists’ inquiries about comparative law and the legal problems associated with cultural subjectivity.27 Both disciplines confront power

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22. Id at 105-106.
23. Id at 106.
24. See id.
25. Id at 106; see generally SALLY FALK MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH (James Curry Publishers, 2000) (arguing that “semi-autonomous groups” everywhere elaborate their own rules and common ways of doing things; hence, “legal pluralism” is a fact of life).
26. LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 73 (Univ. of Cal. Press, 2002) (providing an overview of the history of legal anthropology and considering the rise of the alternative dispute resolution movement). Nader links the increasing popularity of the alternative dispute resolution movement, and its profound impact on the U.S. judicial system since the 1960’s, with the erosion of the plaintiff’s power and suggests that mediation as an approach to conflict resolution is structured to favor the interests of those in power. Id. at 14. In this article, when comparing the two disciplines of law and anthropology, I build on the significant work, observations, and taxonomy of Prof. Nader, provided throughout the cited text.
27. Id at 74. For examples of discussion relating to comparative law and the cultural subjectivity, see generally Mabo & Ors v. State of Queensland, 175 CLR 1 (1992) (recognizing the validity of traditional Aboriginal common law), Milpurruru v. Indofurn Pty. Ltd. 130 ALR 659, 19 (1995) (protecting the Aboriginal common law in the context of copyright laws), and John Bulun Bulun & Milpurruru v. R & T Textiles Pty Ltd., (1998) 3 ALR 547 (considering whether the circumstances in which the artist’s work was created gave rise to equitable interests in the Ganagingu People; claim for equitable relief dismissed).
relationships, and tradition looms large in both disciplines, as when facing class and gender conflicts and debating kinship regimes.

Further, the work of lawyers and the work of anthropologists often overlap. Anthropological knowledge often is used to inform political initiatives, and anthropological methods are used to gauge the human response to legal policy; at the same time, law and legal categories are becoming increasingly global and multicultural. New configurations of knowledge and practice regarding law and anthropology are emerging continually to discern the engagement between these two disciplines. Anthropologists Martha Mundy and Tobias Kelly have said: “law is itself a series of techniques of knowledge and governance the forms of which . . . anthropologists have taken care to document.”

However, more than one hundred years of interdisciplinarity demonstrates that these two disciplines use different paradigms when examining legal change. Such differing paradigms have been used to examine many significant changes such as: the development of evolutionary theories of rights in property that provide the authority for ownership rights to have vested absolutely in the sovereign state in connection with the Euro-American notions of colonization;

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29. Id. See generally Sally Falk Moore, History and Redefinition of Custom on Kilimanjaro, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 277–302 (June Starr & Jane F. Collier eds., 1989) (examining the one hundred years of legal change among the Chagga of Mount Kilimanjaro in an attempt to convey the facts and significance of a historical instance of shifting traditions even as familiar customs are repeated for different reasons); see also DIVORCE: IRANIAN STYLE (Kim Longinotto & Ziba Mir-Hosseini 1998) (examining the divorce process in Iran and the lost political saliency and sociality of Iranian women, via a video documentary).
31. Id. (discussing the frequent intersection between the two disciplines and explaining that both disciplines examine power in the relationships between the dominant and subordinate groups in a society, and that anthropology examines this in greater detail because “tradition” and law have commonly been used as political stratagems in colonial settings).
32. Id.
34. See generally Snyder, supra note 10 (discussing the history and evolution of research regarding the interdisciplinarity of law and anthropology); Riles, supra note 5 (same).
36. Nader, supra note 26, at 10. Since the 1970’s, several academic movements that involved law and anthropology have flourished; examples include the Law and Society Movement, the Critical Legal Studies movement, and the Law in Economics movement. See Christopher Fennell, SOURCES ON ANTHROPOLOGY AND LAW, http://www.anthro.illinois.edu/faculty/cfennell/syllabus/anth560/anthlawbib.htm (last visited Jan. 10, 2014). This history of interdisciplinarity shows the various and different legal paradigms used as a tool to effectuate legal change.
37. Nader, supra note 26, at 10; see, e.g., Johnson v. M’Intosh, 21 U.S. 543, 591–603 (1823) (holding that, when the Europeans discovered the aboriginal-occupied land in the Americas, that discovery vested title in the discovering nation because the sovereign power determines which physical relation to land qualifies for the purpose of “first in time” to possession, thus rendering the Native
to interpret the rights of minorities in ways that enhance Western notions of position and place; to hold that the law responds to changing social conditions rather than performs the social conditioning itself; and “to fight to reverse the burden of proof in a highly industrialized world.”

Yet, despite clear scholarly arguments supporting each paradigm’s vision, neither lawyers nor anthropologists have adequately recognized a commonality in their analyses of legal change—notably, significant historical changes to the rule of law in a society.

So what?

When we examine issues concerning how legal institutions and legal processes reach into, shape, and are shaped by daily affairs in the lives of American occupants incapable of transferring title as original owners because the sovereign held exclusive, absolute title, not the Native Americans.

38. Nader, supra note 26, at 10; see e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that it was unconstitutional to criminalize same-sex sexual activity among consenting adults).


40. Nader, supra note 26, at 10; see, e.g., N. Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (holding that a public official can only recover damages for a false defamatory statement relating to his conduct as a public official if he or she can satisfy the burden of proving the statement was made with “actual malice,” or actual knowledge that the statement was false or with reckless disregard of whether it was false or not); MacPherson v. Buick Motor Co., 138 N.Y.S. 224, 227–28 (1912) (holding that, when a manufacturer is selling goods that could cause danger and harm to a subsequent purchaser if made defectively, the manufacturer owes a duty of care to the consumer, even if that consumer is not the immediate purchaser). An action for negligence arises when the manufacturer fails to observe this duty by manufacturing a defective product; here, the defendant car manufacturer was found liable for damages because he failed to inspect the wheels before selling the car to the public, and it was foreseeable that defective wheels would be very likely to cause injury to the consumer plaintiff. Macpherson, 138 N.Y.S. at 227–28. This decision marks a significant legal change in which the burden of care and vigilance is placed on the powerful corporate defendant in order to protect the less powerful individual consumer.

communities and individuals, we must consider questions of power and meaning, and above all, their historical interplay.42

IV. THE POWER AND MEANING OF LAW AND LEGAL CHANGE

When we study the relationship between law and anthropology with respect to legal change, there are two reasons to investigate power and meaning: the central considerations in contemporary law-in-society and legal-anthropological interpretive analyses.43

The first reason is that the forms laws take and their impact on the socio-micro level are shaped by struggle, which can be understood in terms of historically-located class or gender/sex or race/aboriginal relations. At the same time, law shapes the context and trajectory of such struggle.44

The second reason is that the significance of legal change is often greater than the meaning intended for it.45 Legal change never speaks for itself. Its meaning is a matter of interpretation and contention. It must be understood by the cultural terms with which individuals interpret and experience it in relation to their goals and objective interests.46

Law is power: legal change accompanies political hegemonic shift; when the perspectives differ on its occurrence, the legal change becomes even more significant because it is often assumed, quite incorrectly, to be a natural or harmless or inexplicable end, accomplished through means within an institutional framework.47 Moreover, entwined in legal hegemonies is great potential for social and cultural controls, so any change to the rule of law requires thorough understanding from the differing perspectives.

As Laura Nader consistently shows throughout her work, power must be a consideration when analyzing legal change because the forms that laws take and the impact of those laws at the local level are each shaped by struggle that is constantly in tension and in flux.48 A change to the rule of law will be the

43. See generally id.
44. See generally id.
45. Nader, supra note 26, at 10 (describing that when the significance of legal controls, or hegemonies, is not recognized, they actually become more powerful than intended because they are incorrectly assumed to be natural or harmless).
46. Id. at 11-13 (explaining that sources of power and social controls are in constant flux because they are defined and redefined by various persons and institutions within diverse social, cultural, and political contexts). Once anthropological studies began to emphasize process models during the 1950s, anthropologists began to conclude that law is not autonomous. OXFORD UNIVERSITY PRESS, THE OXFORD COMPANION TO AMERICAN LAW 28 (Kermit L. Hall ed., 2002)
47. Nader, supra note 26, at 11-13.
48. Id.
outcome of struggle, and sometimes it will even result from contention for control of the state itself.\footnote{49} However, laws also can shape the context and trajectory of struggle, creating within the legal order new space over which old parties may contend and within which new interests may emerge.\footnote{50} The social spaces, asymmetrically embedded as they often are in the larger fields of power relations, experience the consequences of the power flux that ensues from legal change, and sometimes contribute to it,\footnote{51} resulting in altered socialities and revealing new relationship status quos.\footnote{52}

Law is meaning: law and culture are embedded in one another, so much so that even as culture shapes different legal forms, law redefines social issues and restructures the relationships among groups in society.\footnote{53} When particular emphasis is placed on the cultural modalities, the concept of controlling processes is useful in delineating differing paradigms of legal change, with particular emphasis on who uses the law and for what—an inquiry relevant to both disciplines.\footnote{54}

Meaning must be a consideration because signification always exceeds intention, in the legal arena as in any other.\footnote{55} What struggle for legal change means to individuals differs in relation to each person’s goals and objective interests according to the contextually and culturally specific terms in which they interpret their experience. The meaning of legal change in local communities may diverge substantially from what the change agents intended, especially insofar as signification will reflect the situationally specific terms in which those in local spaces interpret the law.\footnote{56}

In sum, power and meaning must be considered in the context of law and legal change. Power must be considered because legal change is normally associated with a shift in past power relationships, and the form and impact of

\footnotesize{49. Id.}  
\footnotesize{50. Id.}  
\footnotesize{51. Starr & Collier, supra note 21, at 368. In discussing the analysis of change in power relationships among groups over time and the insight into legal change it might provide, Sally Falk Moore formulated the concept of “the anthropology of sequences of asymmetrical relations.”}  
\footnotesize{52. Id.}  
\footnotesize{53. See Collier, supra note 42.}  
\footnotesize{54. Nader, supra note 26, at 11. Of course, here, I define law firmly within this more general category of social and cultural control, or at least the controlling of processes more specifically, instead of our Western presumptions that law implies police and courts and judges for its existence.}  
\footnotesize{55. See id.}  
\footnotesize{56. Id.; at 15. For a similar discussion, see Paul Bohannan, Justice and Judgment Among the Tiv 57 (1957), in which Bohannan asserts that the “Tiv have laws, but do not have law” because the Tiv legal system lacks any codification or systematization of rules or laws. Bohannan’s description of the Nigerian court system illustrates that the notion of “law” is very different from our own Western understandings of “law”. When settling disputes, the Tiv do not follow any established laws or guidelines because they do not exist; instead, they resolve disputes according to their own cultural understanding of law and justice.}
such legal change is shaped by a struggle for control between the powerful and the powerless. The meaning of a law must be considered because the true meaning of a legal change is understood differently according to how each individual experiences it in relation to their own goals and interests. Anthropologists who use the historical analysis approach when examining legal change give significant consideration to power and meaning because they must consider the asymmetrical power relationships and historical context in place when the legal change occurred.

V. CONTRAST WITHIN THE AREA OF INTERDISCIPLINARITY REGARDING LEGAL CHANGE

Despite the common understandings that power and meaning are rooted in law, what remains dissimilar is the handling of changes to the rule of law. Through the anthropologic lens, legal change is a rupture from the social past, whereas law sees such change as a redefinition, emerging from legal evolution.

This difference is, in part, because anthropologists focus their research on social relationships and the resolution of disputes and conflicts. Anthropologists see legal change as some defining point between polemic fractions within a society and very telling of how social relationships operate and disintegrate. Lawyers focus on classifications in explaining away legal change as progress/regress or evolution/devolution from within the established institution. Lawyers describe legal change as a potential threat to the consistency and dependability of the rules that have governed different power relationships in a society. Perhaps the best explanation lies in the purposes of each discipline.

Lawyers systematize, elaborate, and interpret doctrine and technique within (or at least with reference to) some national legal traditions. Anthropology, on the other hand, analyzes social relations and practice without such specific reference.

Anthropologists weave together law as a symbolic system, an encoding of asymmetrical power relationships, to allow for comparison across cultures, societies, and time periods. Anthropology documents the complex interface between individuals or and the plural personæ of written law, which represent the individual. And, more specifically, anthropological approaches to legal change tend to reduce law to dispute settlement and to view legal and social processes as not simply inseparable, but identical. Anthropologists, in examining law, view

57. Mundy & Kelly, supra note 35, at xv.
58. See e.g., CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983).
59. Mundy & Kelly, supra note 35, at xix. Historically, anthropology, as the sociology of the non-European world, had been engaged with the systems of European colonialism and now is engaged with systems of post-European colonialism; the discipline has examined critically its long association with imperial rule, and accordingly analyzes social relations and practice.
legal change as the culmination of a shift in the power relationships of social life.60

Ideas about culture are interwoven with notions of control and the dynamics of power.61 Thus, the study of structures and activities crossing boundaries illuminate places where power is being reconfigured and reconstituted. Anthropologists of law know that dispute resolution ideologies have long been used for the transmission of hegemonic ideas, but this knowledge has yet to be extended beyond those who study disputing processes.

Anthropological studies of law had developed rich descriptions of how social order was maintained in tribal and peasant societies that lacked police, a Western-style judiciary, or prisons and jails. In fact, most anthropologists studying legal change avoid using a lawyer’s sense of what “law” is,62 and instead see law firmly within the more general category of social and cultural control, or at least the controlling of processes more specifically.63

When the anthropology of law is infused with history, anthropologists studying legal processes avoid simplistic ideas of legal evolution, a bastion of progress and legitimacy for lawyers, rooted in the recognized importance of precedent, stare decisis, and legal stability. However, anthropologists seem to see the embeddedness of law in culture and of culture in law yielding information too rich to meet the criteria of evolutionary explanation. Instead, committed to searching for a better understanding of how law changes within particular societies through time, anthropologists have come to recognize that legal forms differ by place and time and cannot be correlated with stages in societal evolution or state development—an evolution required for lawyers operating within legal institutions and seeing the foundational legitimacy of continuity and predetermination as essential substance to their discipline.64

Instead, focusing on how law changes without using unidirectional evolutionary notions, anthropologists take stock of what comparative frameworks and ideas might be used in discussing similarities across a range of cultures and societies.65 And, this difference is one possible explanation for the differing paradigms and different understandings of legal change.

60. See generally Nader, supra note 26, at 11–167.
61. Id. at 118.
62. Id. at 47.
63. Id.
64. See id. at 12-16.
65. See generally Laura Nader, The Disputing Process: Law in Ten Societies (Harry F. Todd ed., Columbia University Press 1978) [hereinafter The Disputing Process]. The author examined the different ways that people of various cultures resolve their disputes. Anthropologists applied Nader’s ethnography-of-law approach to dispute processes in very different communities. This work illustrates the growing anthropological focus on the cultural and social foundations of an ordered life when examining the dispute processes that make such a life possible.

For another example, consult Oscar G. Chase, Law, Culture, and Ritual: Disputing Systems
VI. PERSPECTIVES ON CHANGE TO THE RULE OF LAW

Significant changes to the rule of law pose unique problems concerning the relationship between law and ideology, and the changing social structure of power and meaning for anthropologists. First, lawyers themselves know full well legal change cannot be understood completely by reading the case opinion rationales or arguments in the preparatory reports preceding the passage of a new statute. The reasons given and the theories on which they rest must often be seen as legitimation for the achievement of other goals and policies favored for the furtherance of interests that are not often expressed clearly. The second result, related to the first, is that as a result, there will often be a discrepancy between the law on the books and the law in action. This disconnect does not mean that such laws, although they might fail in relation to their stated goals, are inconsequential. The resulting legal changes often set the stage for more profound reforms, to which anthropologists take note.

In seeking explanations for legal change, legal anthropologists have acknowledged the boundaries between law in society and legal anthropology. Furthermore, some legal anthropologists have found that the modern dispute processes paradigm does not provide an adequate understanding of the role and significance of legal change because the focus is limited to disputes and alternative ways to access courts. Such a narrowed scope of analysis does not take into consideration the power and temporal dimensions that contributed to legal change in a society. Thus, some legal anthropologists favor the historical analysis approach described by Starr and Collier because, rather than merely focusing on settling disputes, it focuses on the power relations and historical

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In Cross-Cultural Context (New York University Press, 2005) (focusing on the different dispute processes that are imbedded in various communities, the author argues that culture and social relationships are only possible if there is in place a dispute process system that allows members to peacefully resolve disputes so that an ordered life is maintained within the community). The fact that different cultures have discovered different ways of resolving disputes while sustaining an organized and consistent life highlights to importance of studying dispute processes in the social and cultural context. Id.

Over the course of twenty years, a group of anthropologists studied disputes that arose in communities like Turkey, New Guinea, and Lebanon. These studies mainly focused on the context and conditions under which different methods of dispute resolution were applied. The unique social context of each community revealed why there were differences between the dispute processes that were applied by the several communities. See JUNE STARR, LAW AS METAPHOR: FROM ISLAMIC COURTS TO THE PALACE OF JUSTICE (State University of New York Press, Albany 1992); KLUS-FRIEDRICH KOCH, WAR AND PEACE IN JALEMO: THE MANAGEMENT OF CONFLICT IN HIGHLAND NEW GUINEA (Harvard University Press 1974); CATHY WITTY, MEDIATION AND SOCIETY: CONFLICT MANAGEMENT IN LEBANON (New York: Academic Press 1980).


67. See id. at 1-2.
context that led up to the legal change.68 Often, by making asymmetrical power relations and the historical context essential to their analyses, the conclusions of legal anthropologists are quite different from those of academic lawyers working without temporal or power dimensions to their research.69

Under the historical analysis approach, as Starr and Collier observed, legal anthropologists view the law as that which was negotiated, or brought about, by power struggles between the rulers and those who were ruled.70 As such, legal change under the historical analysis approach is described as a change in power relationships. Because it focuses on power relations and the world historical times, historical analysis thus becomes a dynamic aid in understanding the role legal change plays in altering asymmetrical power relationships among social groups, and how that role is observed. Instead of treating legal change and power differences as variables that amend a structural or structural-functional analysis of dispute management, legal anthropologists focus on power differentials to understand both the impact of legal change and the persistence of certain legal ideas and processes through time. Rather than simply asking how societies achieve the peaceful resolution of disputes under the dispute processes approach, legal anthropologists ask how individuals and groups in particular times and places have used legal resources to achieve their instrumental ends. Instead of focusing on either normative systems or dispute processes, legal anthropologists who use the historical analysis approach examine the relationship of law to wider systems of social relations.

Law is beyond the confines of a system dominated by courts and judges and police, and legal change is change in the way power and privilege are distributed through legal means. Law and anthropology share the assumption that social order invariably creates inequality.71 Thus, any changes in asymmetrical power relations among social groups are the defining features of legal change.72

Some anthropologists have focused on actual changes in legal rules or procedures, observing that such changes are the cause of dramatic change in power relations, or signal an approaching change in power relations.73 Lawyers focus on discontinuities with the legal system that are apparent or actual.74

68. See id. at 1-3.
69. Id at 1-2.
70. See id.
72. Id.
73. Id; see also Anton Blok, The Symbolic Vocabulary of Public Executions, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 31-54 (Starr & Collier eds., 1989). Anton Blok studied the outlaw Bokkrjiders as a way of understanding the 18th century transition from public executions to imprisonment, which was a hugely significant shift in European legal practices. Blok examined historical records and texts to understand how those in power used public dismemberment, burning, and hanging as a horrifying symbol to communicate the state’s awesome power. The historical records showed a steady decline in the theatricality of if executions, but offered
Because lawyers focus on both change and continuity, they tend to choose processes, rather than entities defined in space and time, as the units of their analyses. Instead of focusing on “societies,” communities, or institutions abstracted from time, they tend to choose a process, an extended case, or a set of concepts to follow across spatial and temporal boundaries.

Some anthropologists focus on specific historical events, others on the historical processes themselves, presenting legal changes as historical ruptures revealing a new era of power relations.

few clues as to the reason for it. Blok speculated that the resistance to public executions was part of a wider movement among both the illiterate town dwellers and the literate elite class that protested against theatricality in general as promoting idleness and disorder among the low class. See also Starr & Collier, supra note 21, at 370 ("Blok suggests that the change from theatrical punishments to imprisonment in 18th century Europe indicated an increase in the power of elites to control the population"); see generally Collier, supra note 42. In the 1930’s, Spanish national land reform laws unexpectedly led to two opposing groups, “workers” and “owners.” The two groups struggled for control over the municipal government in order to implement or suppress these new national laws. Id. Collier’s study shows that legislation at the government level can produce unexpected results at the local level. Starr & Collier, supra note 21, at 369 (“Collier discusses a situation in which previously deprived groups in a Spanish Village were empowered by new legislation.”).

Snyder’s study of negotiation tactics used by France over sheep meat production and distribution illustrates the role of law in such a context. See Francis G. Snyder, Thinking about “Interests”: Legislative Process in the European Community, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 168-200 (Starr & Collier eds., 1989). France, after failing to secure its goals in negotiations over sheep meat quotas, successfully forced another round of bargaining when it resorted to the tactic of “stonewalling” by refusing to accept a ruling from the European high court. Id. Snyder suggests that the study of how power arises from such tactics must be included in an analysis of general power relations in order to understand the politics that lead to lawmaking. See Starr & Collier, supra note 21, at 368 (“Cohn and Arjomand write about elites who created new legal orders giving controlling power to their groups. Vincent and Snyder, by contrast, focus less on how legal changes empower already recognized groups and more on the role of law in structuring interests and in organizing the alignments of groups and individuals.”).

74. Dialogues in Legal Anthropology, supra note 66, at 13 (“For example, Aubert, Starr, and Moore argue that apparent continuities in key legal concepts—such as “rule of law” in Norway, or the early occurrence of “private property” under Roman Law, or “customary law” in Tanzania—can in fact mask changes both in power relations and in the substance of legal rules.”). For example, see Vilhelm Aubert, Law and Social Change in Nineteenth-Century Norway, in History and Power in the Study of Law: New Directions in Legal Anthropology 55-80 (Starr & Collier eds., 1989), June Starr, The “Invention” of Early Legal Ideals: Sir Henry Maine and the Perpetual Tutelage of Women, in History and Power in the Study of Law: New Directions in Legal Anthropology 345-68 (Starr & Collier eds., 1989) and Dialogues in Legal Anthropology, supra note 66, at 13 (“Starr and Collier note that Nash, Nader, and Boissevain and Grotenbreg are less concerned with changes than with analyzing struggles for power within existing frameworks. Rosen and Greenhouse focus on continuities. They write about those central cultural concepts that people continue to invoke despite historical changes in power relations.”).

75. Dialogues in Legal Anthropology, supra note 66, at 13

76. Id.

77. Id. at 14 (“Cohn, Arjomand, Blok, and George Collier, for example, take particular happenings, such as the writing of constitutions, the passing of legislation, or specific trials, as points of entry for studying ongoing processes . . . . Finally, Greenhouse, Boissevain and Grotenbreg, Rosen, and Starr refer to specific historical events, but treat them less as points of entry than as evidence of ongoing processes.”).
Lawyers and anthropologists emphasize differing aspects of law and legal systems. Although there is considerable overlap between them, there are three different approaches to defining legal change: the interactional, the cultural, and the institutional. The anthropologists who adopt an interactional approach focus on individuals and groups who use laws and legal processes for pursuing their own ends. They take an instrumental perspective and tend to examine particular behaviors. Legal change is the culmination of the instrumental ends.

The anthropologists who use a cultural approach tend to treat laws and legal systems as elements of a discourse. They focus on the communicative dimension of law; recognizing that a new rule of law is ushered into social space through dramatic communicative change.

78. *Id.* ("Aubert, Vincent, Moore, Nader, and Nash seldom mention specific historical events, preferring instead to chart ongoing processes.").


80. *Id.*

81. *Id.* Anthropologists who adopt this approach emphasize the ordering dimension of law and focus on ways in which groups hold power seek to create or oppose governmental structures. Starr & Collier, supra note 21, at 369. One example of the interactional approach is Robert Hayden’s study of Yugoslav workers who resisted proposed court reform is one example of a group using legal processes to achieve their instrumental ends. Oppressed workers sought a legal forum that was free of control by factory managers. In 1982, the government proposed to reform the overloaded labor courts by moving them inside factories. The workers’ trade union representatives succeeded in defeating the proposed reform and the courts remained free of management control. ROBERT M. HAYDEN, SOCIAL COURTS IN THEORY AND PRACTICE: YUGOSLAV WORKERS’ COURTS IN COMPARATIVE PERSPECTIVE (1990).

82. *Dialogues in Legal Anthropology*, supra note 66, at 21; see also Starr & Collier, supra note 21, at 369. For an example, see Nader, supra note 36, at 122–24. Nader introduces the concept of “harmony ideology,” which is a form of pacification by means antagonistic to legal centralism. Harmony ideology is a policy position that may seem, on the surface, to be considered natural and compatible with the needs of the multinational organizations of global economics. However, there is no consideration of whether this ideology is compatible with the values of human freedom and justice. To illustrate, Nader discusses Native American groups in the Americas who were denied local autonomy because the United States used harmony ideology in its pursuit of cultural assimilation, and Indian institutions were seen as a barrier to cultural assimilation.

For further reading, see Jeremy and Boissevain & Hanneke Grotenberg, *Entrepreneurs and the Law: Self-Employed Surinamese In Amsterdam*, in *History and Power in the Study of Law: New Directions in Legal Anthropology* 223–51 (Starr & Collier eds., 1989) where Boissevain and Grotenbreg write about how Surinamese entrepreneurs in Holland have either avoided or used Dutch laws regulating small businesses. Surinamese entrepreneurs founded a Federation of Muslim Organizations to speak for all Muslim butchers in the Netherlands in order to subvert a law prohibiting ritual slaughter. Although the organization was able to have the prohibition against ritual slaughter repealed, the Surinamese entrepreneurs had to increase compliance with other Dutch regulations in order to secure the legal change. Thus, Dutch regulatory agencies were granted more power over their lives and activities.


84. *Id.* at 21, 370. For an example, see Lawrence, Rosen, *Islamic “Case Law” and the Logic of Consequence*, in *History and Power in the Study of Law: New Directions in Legal Anthropology* 302-319 (Starr & Collier eds., 1989), where Rosen discusses how the concepts and procedures used in Moroccan courts inform and reinforce the common-sense understandings that Moroccans draw on in everyday life. Rosen stated that Islamic law as practiced in Morocco does not attempt to build up a body of doctrine that is distinct from local custom. The methods employed by Islamic courts to conduct fact-
The institutional approach is the main paradigm for lawyers explaining legal change. This approach leads to a focus on economic and political processes, treating individuals as representatives of particular economic interests or social groups, and laws as representing particular ideological positions. Thus, the lawyers focus on the ordering dimension of law, emphasizing the role of legal processes in preserving or changing established power asymmetries within the established legal institution.

Finding and the forms of judicial reasoning used are not very different from the ways in which a person’s credibility and truthfulness are judged in business transactions conducted in the bazaar. Thus, Islamic court decisions in Morocco encourage litigants to return to society so they will resume negotiations with one another within the broad boundaries established by the canons of Islamic law. For further discussion, see Carol Greenhouse, *Interpreting American Litigiousness, in History and Power in the Study of Law: New Directions in Legal Anthropology* 252-276 (Starr & Collier eds., 1989), discussing Greenhouse treats the North American cultural concepts as resources that people use in their conversation with others to communicate their intentions and positions. Greenhouse showed that in the town of Hopewell, Virginia, the current Baptist avoidance of state courts could be traced to the period just before the Civil War when conflicts over important issues such as states’ rights and the abolition of slavery threatened to destroy the community. Baptist leaders were able to save their diminished church by preaching that conflict was un-Christian and that litigiousness was the undoing of God’s order. Greenhouse, who studied the Baptists as a way to understand wider North American attitudes towards litigiousness, argued that in experiencing a need for social distance from local populists, the Baptists in Hopewell elaborated the ideal of nonlitigiousness, a resource available in the wider culture.


86. *Id.* at 21-22, 368. For an example, see Sally Falk Moore, *History and the Redefinition of Custom on Kilimanjaro, in History and Power in the Study of Law: New Directions in Legal Anthropology* 277-301 (Starr & Collier eds., 1989). Moore and Joan Vincent argued that, when placed in historical context, “customary law” is not a “folk system” in the consciousness of the people themselves, but rather the outcome of historical struggles between native elites and their colonial and postcolonial rulers. Based on investigation of legal change among the Chagga of Tanzania, Moore carefully identifies the institutional and class forces affecting Chagga use of “customary law.” Moore showed that among the Chagga, several different power groups like the Christian church, the colonial administration, the Tanzanian national government, and the local coffee-marketing cooperative all affected notions of “customary law” by altering the character of struggles between the Chagga and their overlords. The underlying issue of these struggles was determining which areas of life would be treated as within Chagga control-in other words, which areas of life would be governed by “customary law.”

For further discussion, see Joan Vincent, *Contours of Change: Agrarian Law in Colonial Uganda, 1895-1962, in History and Power in the Study of Law: New Directions in Legal Anthropology* 153–67 (Starr & Collier eds., 1989), where Vincent (and Snyder) tried to identify the interest groups that both create and are created by legislation. Based on her analysis of laws passed in Uganda, Vincent recognized that a wide geographic area and an institutional framework that goes beyond local interests must be included in analyzing how certain interests coalesced in shaping legal change within a region over time. Vincent recognized that many of the laws passed in Uganda do not reflect local interests but the interests of dominant groups such as Manchester manufacturers, missionary societies, and planters in Kenya. Thus, any given state is the outcome of a historically specific set of conflicting interests among groups whose reconciliations have been recognized in law. See also *Dialogues in Legal Anthropology*, supra note 66, at 21-22 (“Blok identifies the class positions of the 18th-century bandits he studied and of their victims and prosecutors”); Anton Blok, *The Symbolic Vocabulary of Public Executions, in History and Power in the Study of Law: New Directions in Legal Anthropology* 31–54 (Starr & Collier eds., 1989).

87. *Dialogues in Legal Anthropology*, supra note 66, at 22.
Lawyers and anthropologists also define their problems differently. Some lawyers try to understand major legal turning points, or watersheds. These lawyers are concerned less with analyzing particular historical shifts or continuities and more with building theoretical frameworks to understand legal processes. When law and legal forms are viewed as historical products, anthropologists no longer assume essential comparability of law per se. Anthropologists analyze law and law-like forms as embedded in and created both by particular historical circumstances and by interrelationships between local, national, and international events. From local tribal law to the law of modern industrial states, anthropologists express concern with understanding the specific historical form, which is shaped by cultural and interest-group configurations.

Anthropologists recognize that law has a tendency to intrude into all kinds of relationships, from those of economic production to those of philosophical treatises where it hides in the guise of ideology. Although superordinates may exercise a disproportionate influence on the forms that go into the making of legal relationships, “the forms are manufacture[d], reproduced, and modified for special purposes by everyone, at every level, all the time.”

To which it is now useful to examine some examples of periods of legal change.

VII. HISTORICAL EXAMPLES OF LEGAL CHANGE

The first example is a deeper examination of the Islamic legal tradition in the Ottoman Empire, which incidentally was a strong and modernizing polity. Then, there is the example of the 19th century shari’a reform, followed by a look at the anthropological work regarding the legal tradition in North Yemen, where a dynastic state met strong rural political organization well into the 20th century. Further examples mentioned infra include legal change in Syria and Turkey.

VIII. OTTOMAN 19TH CENTURY

The most cursory inspection of the legal situation of any modern nation at the beginning of the 19th century reveals great legal changes. The Ottoman Empire in the 19th century was a very different polity from North Yemen. While North

88. Id.
89. Id.
90. Id.
91. Id. at 24.
92. Id.
93. Dialogues in Legal Anthropology, supra note 66, at 22.
Yemen was an area with a weak central state government, the Ottoman Empire had a strong centralizing imperial tradition.94

There were changes to Ottoman legal theory and administrative practice in the 18th and 19th centuries that signaled the emergence of a unified legal status for citizens.95 It had greater state legal plurality than in Yemen, where legal plurality was primarily in the social traditions recognized as outside the government. The Ottoman state also sought to change law to Islamic jurisprudential terms.96

Yet, even in the Ottoman Empire there were certain limits to this legal change to Islamic jurisprudential terms.97 Part of the challenge was to see how the Ottoman institutions reformed themselves from the inside, not under immediate colonial dictate. For example, one major historical problem was the transformation that marked Ottoman agrarian property relations in the 19th century. In the Ottoman Empire, the recasting of property law was linked intimately to changes in administrative government; for instance, the techniques of registration and the separation of “person” and “thing” by separating the objects of property from their tax potential.98 The 19th century Ottoman reform law changed individual property rights by gradually redefining the long-established legal language that governed different types of property.99

In GOVERNING PROPERTY, 100 Mundy and Saumarez Smith describe the legal change in this polity regarding the legal framing of property rights in Syrian agricultural land as rupture.

*Fiqh*, or Islamic jurisprudence, has almost 1000 years of history; and, over this span of time, the Islamic tradition underwent fundamental change.101 For example, there were important and interrelated shifts under the Mamluks of the 13th and 14th centuries; the doctrine of state ownership of land and the

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94. Id.
95. Similarly, in Western Europe, modernity signaled the emergence of a unified legal status for citizens.
97. Id.
98. MARTHA MUNDY & RICHARD SAUMAREZ SMITH, GOVERNING PROPERTY, MAKING THE MODERN STATE: LAW, ADMINISTRATION AND PRODUCTION IN OTTOMAN SYRIA 2 (2007) (noting that anthropological analyses consider property a social relation between persons and both material and immaterial things) [hereinafter GOVERNING PROPERTY].
100. Id. at 94.
101. Id. at 150–51 (explaining that Fiqh was a jurists’ law; it remained part of an Islamic tradition in which ethical arguments of fundamental principles competed with jurists’ justifications of the necessity of legal change.).
theoretical legitimizing of the resulting hierarchically disposed rights to the taxes and the land’s potential.

Lawyers describe the historical legal change in property relations as having not required doctrinal rupture because it was legitimated by the earlier owners’ gradual dying out and their land escheating to the state treasury. However, legitimizing the emerging hierarchically disposed rights over taxes and the land’s potential proved more problematic and significant. This legitimation involved: 1) adapting contractual categories such as lease and rent; 2) analogizing the changes with other models of split rights over taxes and land potential, such as use-right to a slave; and, 3) arguing for the changes on the basis of social interest, necessity, and reason of state.

For example, historically, Hanafite jurisprudence had distinguished between ownership of land by Muslims and non-Muslims. Like Muslims, non-Muslims were recognized as the proprietors of land, and they acknowledged Muslim sovereignty through payment of taxes. New forms of taxation reflected Muslim sovereignty, but property was not in itself seen as created thereby, it merely was recognized legally. As such, the lawyers’ accounts of the Hanafite tradition’s legal history of property rights in land entailed no fundamental rupture in property itself. From the 14th century, fundamentally different ideas of property rights in land emerged, where the state eventually replaced the individual as the owner of agricultural land.

However, anthropologists view this legal change differently. The doctrine of escheat was ancient, but its extension to all the lands of the Mamluks was a radical departure from the interpretation of the doctrine in earlier centuries. “The earlier doctrine was not formally rejected nor was it forgotten; rather, history—in the form of the gradual death without heirs of tax-paying owners—had simply rendered it obsolete.” It is necessary to analyze legal concepts from inside a legal tradition evolving over time. As such, historical depth is necessary to examine the legal changes of the 19th century and to understand how the Hanafite legal tradition responded to change.

Anthropologist Baber Johansen classifies the legal change regarding the interpretation of the doctrine of escheat in the Hanafite legal tradition among a

103. See generally, Mundy, supra note 99; see also GOVERNING PROPERTY, supra note 98.
105. Id. at 58.
106. GOVERNING PROPERTY, supra note 98, at 12.
107. Id.
series of Hanafite doctrinal ruptures regarding agricultural contracts. For example, Johansen documents how from the 8th century the potential use-value of land in a lease contract and the exchange of the use of land for a share of the cultivated produce, instead of a clearly defined quantity, were doctrinal changes in the Hanafite tradition that reflected the peasants’ complete loss of property rights by the 15th century. Johansen’s account shows that change in a basic theory of property rights in land fundamentally changed individual property rights to land, so much so that under the 15th century Hanafite legal tradition, ownership of all agricultural land was vested in the treasury.

However, lawyers view this legal change as a categorical redefinition. That the legal change to the property laws in the Ottoman 19th century was more gradual than in earlier centuries; thus, reflecting the slow reworking of legal vocabularies. For example, Dina Khoury observed that as early as 1840 there were gradual changes to the land tenure system. The first and most important change concerned the succession to miri land, land to which rights are based on cultivation. The old law excluded female children from rights of inheritance, whereas now they partake in the right of inheritance of land because the new law granted daughters’ rights to sons and, in the absence of a son, a daughter could receive all the estate. How was this legal change legitimated?

Although women do not cultivate the miri land, they do form an agricultural family and, thusly, contribute to the cultivation of the land to which they should succeed. The elaboration of rights to miri land is evidence of “the justice, concern and compassion of the sultan and the splendid effect of his imperial presence working for an age of equity.”

As another example of change in the Ottoman 19th century, the Land Code and the tapu laws of the 1850s and 1860s introduced modifications within the existing vocabulary of the legal regulation of miri property. The interpretations of which are varied. On the one hand, adopting a highly restricted form of private property asserted central governmental control in the Ottoman state. Yet, on the other hand, the Land Code modifications redefined the legal expression of

110. Governing Property, supra note 98, at 12.
111. Id. (citing Dina Khoury, State and Provincial Society in the Ottoman Empire: Mosul, 1540-1834, at 150 (1997)).
112. Id. at 45.
113. Id.
114. Id.
115. Id. at 48.
prior developments regarding private property in land, documenting a history of gradual legal change.116

IX. FROM THE SHARI'A TO THE MAJALLA IN NORTH YEMEN

Max Weber noted that the rationalization of sacred law is substantive in character because there is no interest in separating law and ethics. 117 Therefore, the theocratic influence produces legal systems that are combinations of legal rules and ethical demands. The result is a specific non-formal type of legal system.118 Islamic law is a good example.

It is not only in the modern European state that we observe dialectic between forms of state and domestic rule. True, the forms change: from litigation to discipline, from the state as legal authority (before which members of domestic units fight out their contests) to regulatory agencies that knit the domestic domain to the project of the state’s discipline. But a unity in the diverse forms of rule, from state to family, is not unique to modernity.119

The ideal character of Islamic law predominated over its practical aspect from its very inception in the eighth century of the Common Era. Islamic legal traditions are derived from the same Roman and Semitic legal cultures as Western European legal traditions. In his book The Calligraphic State, Brinkley Messick analyzes the Islamic shari’a as a general societal discourse.120 The legal analysis of the shari’a is particularly useful in observing the Islamic legal tradition of North Yemen because North Yemen remained, as did pre-conquest Tibet,121 one of the few countries in the world that did not fall under European

116. Id. at 234.
117. 2 WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 810-11 (Guenther Roth & Claus Wittich eds., 1978).
118. Id.
121. See generally REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1995). There is a commonality in colonial history of North Yemen and in Tibet: perhaps the differing interpretations of legal change can be attributed to each discipline’s handling of communication. Anthropology, as the study of humanity, is a first-level or primary-level communicative system; it looks to understand a deeper communality of human cognition and communicative mode, whereas in secondary-level communicative systems like law, differing technologies, such as scriptural forms, are indications of one culture from the next. For example, the Tibetan “law” must be read against the background of the wider scriptural tradition. Thus, Tibetan “law” must be read against the background of the wider scriptural tradition. In THE GOLDEN YOKE, Professor French explores how the Tibetan legal system is a form of political society intimately bound up with particular forms of scriptural tradition; thus in pre-conquest Tibet, law must be read against the background of the wider scriptural tradition. Id. at 59.
colonial rule; North Yemen was a part of the Islamic world where local
governance remained strong and where the great Islamic empires of the early
modern period did not really rule.122

The term *shari’a* refers to the body of Islamic law. In the 19th century, the
shari’a was contained in a new type of authoritative textual form, the legislated
code. This shift to a written code of Islamic law is an example of significant
legal change that even changed the legal personalities within the Yemeni legal
tradition. For instance, the idea that this new digest of laws would be accessible
to anyone was quite revolutionary, and it directly threatened the exclusive roles
of the shari’a jurists.123 Prior to this change in form, the shari’a had been a
jurist’s law, which had been developed and had retained its vitality through
exercises of interpretive *ijtihad*, through commentary and opinion giving.124

Western law models were used in various ways with newly formalized
shari’a materials.125 Western law models were used during this period of legal
change because the shari’a was seen as immutable; and, as such, largely
irrelevant, because law that did not adapt to changing social circumstances must
be increasingly out of touch.126 This was in contrast to Western law, which was
seen as, “respond[ing] . . . to the ever changing patterns of social and economic
life.”127 It was with the *Majalla*, the name given to the product of codifying the
shari’a, this reworking of the shari’a began.128

Where Muslim populations were under direct Western rule, local versions of
the shari’a changed in several characteristic directions. For example, in
Algeria129 and Tunisia, colonial French jurists fused elements of the shari’a with
aspects of the Continental legal tradition; while in India, the law that appeared
was a combination of the shari’a and English law. Further, in an extreme

This entailed: 1) the transmission of ancient texts of religious learning (the starting point of which
was viewed as the writing down of the Buddha’s words in the form of the 258 rules for monks in
the Vinaya); 2) the recitation of this ancient text (a text in a dead language, something
inconceivable without writing) where it is embodied and issued in oral form by literate specialists,
who turn the divine signs into sound and hence mediate with the non-literate; 3) the elaboration and
articulation of this script tradition alongside iconic representations of centrality and cosmic-moral
order; and, 4) an intellectual tradition that stressed memorization, training of the hand and aesthetic
representation of script and disputation of the particular, the development of logic of the case.

122. *Id.*
123. *Id.*
124. Messick, supra note 120, at 56-57.
125. *Id.* at 58 (citing Herbert J. Liebesny, *The Law of the Near and Middle East* 93
(1975)).
126. *Id.* at 59.
127. *Id.* (citing J.N.D. Anderson, *Islamic Law in the Modern World* 81 (1959)).
128. *Id.* at 58.
129. *Id.* at 62 (noting that Algeria recognized that milk, the shari’a category of individually help
property, was extremely important in the local land regime and very similar to the Western notion
of private property).
resolution to adopting a rule of law, Turkey, in 1926 fully accepted assimilation with Western law models by rejecting the shari’a and replacing it with the Swiss Civil Code.\textsuperscript{130} Perhaps the shari’a was viewed as backwards as a religious-based code embodied in the \textit{Majalla}, and the modernizing framers of the Turkish Civil Code wished to show Turkey as having emerged from its former, primitive state to a modern form of civilization. However, this radical example of a period of legal change begs the question: is a true change in the rule of law possible without a rupture from its former embodiment?

Another type of change, especially in short-term areas or areas under partial colonial rule was the relation of the shari’a to local custom. From the point of view of the colonizers, custom had to be either standardized and incorporated or abolished in favor of a unified legal system.\textsuperscript{131} Although the shari’a was considered a “disorderly” relative to Western law, when compared with custom it appeared orderly.\textsuperscript{132} Consequently, the colonizers and local elites, in seeking to suppress local custom, extended the application of the shari’a.\textsuperscript{133}

In Yemen, in the absence of colonial rule, imams and town-based scholars long felt it was necessary to spread the shari’a to remote “tribal” districts where ignorance of Islam and pagan customs were thought to prevail.\textsuperscript{134} Yet, in Yemen, it has appeared possible, as the Preamble to the Yemeni Constitution says, to “preserve . . . character, customs, and heritage” while adapting to the standards of the community of “interlocked” nations.\textsuperscript{135} In fact, in Yemen, where there was no colonial rupture with the past because of the absence of prior colonial rule, legal change involved critiques of the old regime and systematic installations of new institutions made possible by revolution.\textsuperscript{136}

In 1975, a commission of shari’a jurists produced two types of legislation, one of which is explicitly shari’a based.\textsuperscript{137} Also, the commission was associated with the Civil Code,\textsuperscript{138} which actually has the double title of the “Civil Code” and the “Shari’a Transactions”, involving both the Western law model of civil legislation and the \textit{fiqh} model of the \textit{mu’amalat}, which is explicitly shari’a derived legislation.\textsuperscript{139} In fact, the first article refers to the law as “taken from…Islamic shari’a principles”.\textsuperscript{140} Messick notes, “whereas shari’a

\begin{itemize}
  \item \textsuperscript{130} MESSICK, \textit{supra} note 120, at 58-65.
  \item \textsuperscript{131} \textit{Id.} at 65.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.} at 71.
  \item \textsuperscript{136} MESSICK, \textit{supra} note 137, at 72.
  \item \textsuperscript{137} \textit{Id.} at 68.
  \item \textsuperscript{138} \textit{Id.} at 69.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.}
\end{itemize}
jurisprudence once drew on ‘sources,’ it now has become the source drawn upon.”

Further, in contrast to rejections of religious law as immutable, reflected by the Turkish choice to adopt the Swiss Code, the Yemeni Constitution states, “Islam, with its instructions, magnanimity, and breadth, is synonymous with development, marches with the times, and does not stand as an obstacle in the path of progress in life.”

Messick gives a unique account of legal transformation in Yemen, which is not the usual legal anthropological analysis. The standard anthropological and historical look at the rupture that led to change in Yemeni society usually begins with Yemeni students in the mid-1930s, who studied at the Iraqi military academy in Baghdad, and continues with students trained in the 1940s in Yemen by Iraqi military missions and then trained in Yemen and Egypt by Egyptian officers after 1952. Having accepted the revolutionary ideas of their foreign trainers, these former cadets participated in several attempted coups and eventually launched the Revolution of 1962. By contrast, Messick offers a different analysis; he emphasizes shifts in organization and techniques. He states that, “where the sword served to threaten or coerce, the authority of the pen concerned the conveyance of ruling ideas.”

Messick characterizes the shari’a as a “general societal discourse” rather than as “Islamic law”. This formulation places the emphasis of analysis on a historical transition to the codified and legislated form of law. The move from old manuals to legislation, from open to closed shari’a texts, represents both an instance of discursive transformation and a foundation for the legal changes that have occurred in other institutions. Messick shows that alteration in the form of

141. Id. at 69-70 (explaining that in its new status as a source, the drafters ideally treated shari’a jurisprudence as a “whole corpus” to quell divisive concerns).
143. Id. at 54-71 (discussing many local changes that led to new notions concerning the concept of “law,” which is beyond the scope of this essay regarding the concept of “change”). Specifically, Messick discusses educational reform, new methods of instruction, changes in court proceedings, and legal document registration. Id. Additionally, Messick notes that dichotomies, such as opposed epistemes a la Michel Foucault, have heuristic importance of succinctly summarizing the scope of change. All of these changes, according to Messick, were expressions of a fundamental reordering Yemeni society that was not the result of rupture.
144. Id. at 107.
145. Id. at 107 (citing MANFRED W. WENNER, MODERN YEMEN, 1918-1966 58, 94 (1967); ROBERT W. STOOKY, YEMEN 210-11 (1978); J.E. PETERSON, YEMEN: THE SEARCH FOR A MODERN STATE 86-87 (1982)).
146. Messick, supra note 120, at 107–08, 251.
147. Id. at 253.
the shari’a has changed the nature not only of legal interpretation, but also of administration of law.  

The legal transformation was part of a larger historical event—a gradual incorporation of North Yemen into the world system. However, in a world influenced by the colonial West, North Yemen represents a situation at one end of the spectrum of possibility, where legal change occurred without rupture at a pace marked by an absence of imperial intervention, but which is traditionally written as revolutionary by anthropologists.  

X. CONCLUSION

In summary, history has shown many periods of legal change dramatically transforming that which is law in society. And, although anthropology and law might have a wide area of interdisciplinarity, these two disciplines’ treatments of change are still quite different. The discipline of anthropology considers change in terms of rupture, whereas law must treat change as categorical redefinition. Whether examining significant, historical changes to the rule of law in North Yemen, the Ottoman 19th century, Turkey in 1926 and Syria, or any other society, academic lawyers will read legal concepts from inside a legal tradition evolving over time, and anthropologists will continue to analyze the social relations between persons, and view such change as a rupture.

148. Id.
149. Id. at 254.
RAMBO COP: IS HE A SOLDIER UNDER THE THIRD AMENDMENT?

Sandra Eismann-Harpen*

I. INTRODUCTION

The Third Amendment to the United States’ Constitution is one of its least litigated provisions.1 Some commentators believe that the lack of litigation is due to the effectiveness of the amendment.2 Others find it obsolete.3 But, there are a few commentators who contend that the amendment is under-utilized.4 Despite the Third Amendment’s dearth of application, it received national attention in July 2013 when several citizens filed a section 1983 complaint against the City of Henderson, Nevada, City of North Las Vegas, Nevada, and various police officers.5

In Mitchell v. City of Henderson, while responding to a domestic violence complaint at a home in the plaintiffs’ neighborhood, police allegedly committed several constitutional rights violations.6 According to the complaint, a police officer called one of the plaintiffs and requested “to occupy his home in order to gain a ‘tactical advantage’ against the occupant of the neighboring house.”7 After

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1. See Adam M. Samaha, Originalism’s Expiration Date, 30 CARDOZO L. REV. 1295, 1310 (2008).
7. Id. at 5.
being denied permission to use the plaintiff's residence for their stakeout, police smashed open the plaintiff's door with a metal ram, aimed firearms at him, and shot pepper balls at him and his dog. Then, police arrested him for obstructing a police officer. The complaint further alleges that police occupied his home, searched his rooms, and moved his furniture without consent, probable cause, or a warrant. His parents are also plaintiffs, and they received similar treatment from police after refusing to grant permission for the police to use their residence during the stakeout. His mother was forced from her home after she told police that they could not enter her home without a warrant. His father reluctantly accompanied the police to their command center, but he was ultimately arrested when he attempted to leave the command center. When his parents returned to their home, they found that “the cabinets and closet doors throughout the house had been left open and their contents moved about. Water had been consumed from their water dispenser. Even the refrigerator door had been left ajar, and mustard and mayonnaise had been left on their kitchen floor.”

Appalling as the alleged misconduct in Mitchell appears, without more, it does not warrant national attention. But, by ignoring this type of misconduct, Americans are implicitly condoning the underlying behavior. If situations like this go unnoticed, police may gain unrestrained access to citizens’ homes. While the circumstances in Mitchell may be unique, the police misconduct or error is not. In fact, errors during police raids are so commonplace that the Cato Institute published an interactive map of botched police raids on its website. So why did this complaint garner national attention within days of its filing? The inclusion of a Third Amendment claim distinguishes Mitchell from similar cases. Regardless of whether plaintiffs succeed on their Third Amendment

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8. Id. at 5–6.
9. Id. at 7.
10. Id.
11. Id. at 8–9.
12. Complaint, supra note 6, at 8–9.
13. Id.
14. Id. at 9.
15. See Rogers, supra note 4, at 750.
16. See id.
17. Radley Balko, Overkill: The Rise of Paramilitary Police Raids in America 43–82 (2006) (providing a list of 132 botched police raids between 1995 and April 2006). “Criminologist Peter Kraska says his research shows that between 1989 and 2001, at least 780 cases of flawed paramilitary raids reached the appellate level, a dramatic increase over the 1980s, where such cases were rare, or earlier when they were practically nonexistent.” Id. at 43.
19. Complaint, supra note 6, at 4.
claim,\textsuperscript{20} this case poses an interesting issue. Do today’s police fall within the meaning of soldier under the Third Amendment?

Part II of this Comment provides background on the Third Amendment. Part III analyzes the meaning of soldier at the time the Third Amendment was ratified. Part IV analyzes today’s police within the context of the Third Amendment. Finally, Part V provides concluding remarks.

II. THE THIRD AMENDMENT TO THE UNITED STATES’ CONSTITUTION

The Third Amendment states: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”\textsuperscript{21} With the exception of a few “far-fetched, metaphorical applications,” there is very little case law on the Third Amendment.\textsuperscript{22} Although the Supreme Court has referenced the Third Amendment as a privacy guarantee on multiple occasions,\textsuperscript{23} the Court has yet to interpret its meaning, and there are very few lower court decisions regarding it.\textsuperscript{24} As such, the constitutional meanings of soldier, quartering, and house have yet to be determined. Furthermore, it is unclear whether a specific duration is required for an act to be considered quartering.\textsuperscript{25}

\textit{Engblom v. Carey} is perhaps the only case to factually analyze the Third Amendment.\textsuperscript{26} In \textit{Engblom}, prison correction officers were repeatedly denied access to their apartments during a prison strike.\textsuperscript{27} Although the correction officers’ apartments were located on the grounds of the prison facility and

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item U.S. Const. amend. III.
\item Engblom v. Carey, 677 F.2d 957, 959 n.1 (2d Cir. 1982) (“Aside from the lower court’s opinion in this case . . . there are no reported opinions involving the literal application of the Third Amendment. Several far-fetched, metaphorical applications have been urged and summarily rejected.”). See, e.g., Jones v. U.S. Sec’y of Def., 346 F. Supp. 97, 100 (D. Minn. 1972) (denying an injunction when soldiers in the Army Reserve claimed that forced participation in a parade violated the Third Amendment).
\item See, e.g., Custer Cnty. Action Ass’n v. Garvey, 256 F.3d 1024, 1043 (10th Cir. 2001) (“Judicial interpretation of the Third Amendment is nearly nonexistent.”).
\item But see Estate of Bennett v. Wainwright, No. 06-28 PC, 2007 WL 1576744, at *7 (D. Me. May 30, 2007), aff’d, 548 F.3d 155 (1st Cir. 2008) (“There is no sense in which a single state trooper and several deputy sheriffs can be considered ‘soldiers’ within the meaning of that word as it is used in the amendment nor in which the use of a house presumably owned by one of the plaintiffs for a period of fewer than 24 hours could be construed as ‘quartering’ within the scope of the amendment.”).
\item Engblom v. Carey, 677 F.2d 957, 966 (2d Cir. 1982) (“For the first time a federal court is asked to invalidate as violative of the Third Amendment the peacetime quartering of troops ‘in any house, without the consent of the Owner.’”).
\item Id. at 960.
\end{enumerate}
\end{footnotesize}
operated by the prison, the correction officers paid rent and were subject to many of the normal landlord-tenant responsibilities. Ultimately, the prison administration emptied the correction officers’ apartments and used their apartments to house National Guardsmen. Although Guardsmen can be federalized, the Guardsmen were acting under state authority during the strike. Nonetheless, the court did not allow the Guardsmen’s position as state actors to control its analysis. Instead, the court incorporated the Third Amendment into the Fourteenth Amendment and held that the Third Amendment applied to state action. The court also decided that the Guardsmen were soldiers within the meaning and context of the Third Amendment.

The court in Engblom focused much of its analysis on whether the plaintiffs’ property interests were sufficient under the Third Amendment. The court held that the “property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of fee simple ownership but extend to those recognized and permitted by society as founded on lawful occupation or possession with a legal right to exclude others.” Because the correction officers paid rent, furnished their rooms, and lacked a separate residence, the Third Amendment protected their legitimate expectation of privacy.

The Supreme Court has never analyzed the Third Amendment, thus it has never held that the Third Amendment applies or fails to apply to state action. Despite the lack of Supreme Court guidance, the Second Circuit incorporated the Third Amendment and applied it to state action. According to Justice Kaufman, “[t]he Third Amendment embraces aspects of liberty and privacy that have justified the application of the Fourth Amendment’s prohibition against unreasonable searches and seizures to the states. The notion that the home is a privileged place whose privacy may not be disrupted by governmental intrusions is basic in a free and democratic society.” The Second Circuit’s decision to incorporate the Third Amendment aligns with the Supreme Court’s current

28. Id. at 959–60, 963.
29. Id. at 960–61.
30. Id. at 961 (National Guardsmen are, “except perhaps when ‘federalized’ by unit under 10 U.S.C. ss 331, 332, 672, state employees under the control of the Governor.”).
31. Id. at 960.
32. Engblom, 677 F.2d at 961.
33. Id.
34. Id.
35. Id. at 962–64.
36. Id. at 962.
37. Id. at 963–64.
38. See, e.g., Engblom, 677 F.2d at 962 (“The absence of any case law directly construing this provision presents a serious interpretive problem . . . .”).
39. Id. at 961.
40. Id. at 967 (Kaufman, J., concurring and dissenting).
outlook on incorporation in general. 41 McDonald v. City of Chicago is the most recent case heard by the Supreme Court on incorporation. 42 In McDonald, the Supreme Court stated, “If a Bill of Rights guarantee is fundamental from an American perspective, then, unless stare decisis counsels otherwise, that guarantee is fully binding on the States and thus limits (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values.” 43

III. THE FOUNDERS’ VIEW OF SOLDIERS, MILITIA, AND LAW ENFORCEMENT

The Third Amendment is a cornerstone of American history, 44 enacted in “reaction to the British custom of using private homes for military purposes of quartering soldiers.” 45 While Great Britain eventually prohibited the quartering of soldiers in private homes in the Mutiny Act, this prohibition did not apply to the American colonies. 46 Furthermore, when the British Parliament passed the Quartering Act of 1774, 47 it authorized the quartering of soldiers in private homes in the American colonies. 48 The founders despised the forced quartering of soldiers and included it among the intolerable acts enumerated in the Declaration of Independence. 49

The founders’ aversion to forced quartering remained evident during the drafting of the Bill of Rights, and provisions against forced quartering were among the most common submissions from the states. 50 By ratifying the Third Amendment, the founders sought to ensure “the sanctity of the home from

42. Id. at 3050.
43. Id. at 3046.
44. Fields, supra note 2, at 195 (“Of the rights embodied in the United States Constitution, perhaps none was of greater importance to the revolutionary generation than the third amendment’s prohibition against the involuntary quartering of soldiers in private homes.”).
49. The Declaration of Independence (U.S. 1776); see also Tom W. Bell, The Third Amendment: Forgotten But Not Gone, 2 WM. & MARY BILL RTS. J. 117, 126 (1993); Fields & Hardy, supra note 48, at 416.
50. Bell, supra note 49, at 129 (citing Edward Dumbauld, The Bill of Rights and What It Means Today 161–65 (1957)) (“Of the ninety distinct types of provisions forwarded to Congress among all the states proposals, only seven appeared more often than provisions that addressed quartering.”).
oppressive governmental intrusion.”\(^{51}\) Despite the founders’ aversion to forced quartering in the United States, commentators have argued that unlawful quartering of soldiers occurred in the United States during the War of 1812,\(^{52}\) in the Aleutian Islands in 1942,\(^{53}\) and in Louisiana after Hurricane Katrina.\(^{54}\)

The founders also viewed armed, standing government forces as dangerous.\(^{55}\) This is evidenced by the inclusion of standing armies as an intolerable act in the Declaration of Independence – Great Britain “has kept among us, in times of peace, standing armies, without the consent of our legislatures.”\(^{56}\) The founders’ aversion to standing armies was due to Great Britain’s use of soldiers to intimidate the colonists\(^{57}\) and to enforce British law.\(^{58}\) Not only did the colonists dislike the use of soldiers for law enforcement purposes, but they also believed that many of the British laws were arbitrary.\(^{59}\) As colonist opposition to British laws increased,\(^{60}\) British soldiers moved into colonial cities to assist in law enforcement.\(^{61}\) Colonists resented soldiers enforcing laws with military weapons,\(^{62}\) and soldiers became the “object of colonial hostility.”\(^{63}\) The tension


\(^{52}\) Bell, supra note 49, at 137 (citing James K. Polk et al., References to Acts Authorizing the Payment for Property Lost, Captured, or Destroyed by the Enemy While in Military Service, Etc. (1914)).

\(^{53}\) Bell, supra note 4, at 1275.

\(^{54}\) Rogers, supra note 4, at 750.


\(^{56}\) The Declaration of Independence (U.S. 1776).

\(^{57}\) See, e.g., Frederic Kidder, History of the Boston Massacre, Mar. 5, at 1 (1870) (“The military forces were to be largely increased so as to completely overawe and subjugate the people, particularly in and around Boston.”).

\(^{58}\) Fields, supra note 2, at 200–01 (citing Hardy, A Free People’s Intolerable Grievance – The Quartering of Troops and the Third Amendment, 33 Va. Cavalcade 126, 129 (1984)).

\(^{59}\) See the Declaration of Independence (U.S. 1776) (“For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies . . . .”).

\(^{60}\) Kidder, supra note 57, at 1 (“The passage by parliament of the law known as the stamp act, and the attempt to carry it into effect, had raised a feeling throughout the colonies that was found to be so injurious to the trade of England as to cause its repeal in March, 1766.”).

\(^{61}\) Fields, supra note 2, at 200–01 (citing Hardy, A Free People’s Intolerable Grievance – The Quartering of Troops and the Third Amendment, 33 Va. Cavalcade 126, 129 (1984)).

\(^{62}\) Josh Dugan, Note, When Is a Search Not a Search? When It’s a Quarter: The Third Amendment, Originalism, and NSA Wiretapping, 97 Geo. L.J. 555, 562–63 (2009) (The colonists had “a large-scale concern about a centralized executive power imposing its will at gunpoint, regardless of the underlying legitimacy of the law, a concern that ultimately resulted in a proscription against soldiers enforcing the law, except in the most extreme circumstances.”).

\(^{63}\) Fields, supra note 2, at 200–01 (citing Hardy, A Free People’s Intolerable Grievance – The Quartering of Troops and the Third Amendment, 33 Va. Cavalcade 126, 129 (1984)).
between soldiers and colonists continued to grow until it culminated in the Boston Massacre, when British soldiers, stationed in Boston for primarily law enforcement purposes, fired on unarmed colonists.64

The founders considered the militia critical in securing the new nation’s freedom.65 They disliked standing armies, and believed “that adequate defense of country and laws could be secured through the Militia-civilians primarily, soldiers on occasion.”66 They did not view the militia as equivalent to the military.67 Moreover, the founders viewed militia as consisting of all able-bodied males.68 “[W]hen called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”69 As such, the Militia Act of 1792 enumerated specific weapons and ammunitions that men were required to provide when called into service.70 This early view of the militia aligns with the founders’ experience during the Revolutionary War when colonists banded together to fight the British, and many supplied their own weapons and equipment.71

During the 1700s and early 1800s, citizens were responsible for law enforcement, and a formalized governmental police body did not exist.72 Instead, citizens volunteered to participate in watch groups.73 Members of the watch groups also provided other social services, such as, lighting streetlamps, feeding

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64. KIDDER, supra note 57, at 3 (“From the landing of the troops there seems to have been a constant feeling of irritation kept up between them and the people . . . . This naturally culminated at last in their wantonly firing upon the citizens on the night of March 5th, 1770 . . . .”); see also Fields & Hardy, supra note 48, at 416.

65. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).


67. Id. at 178–79 (“The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress.”).

68. Id. at 179 (“The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. ‘A body of citizens enrolled for military discipline.’”); Dist. of Columbia v. Heller, 554 U.S. 570, 595–96 (2008).

69. Miller, 307 U.S. at 179.

70. Militia Act of 1792, ch. 33, 1 Stat. 271 (“That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear, so armed, accoutered and provided, when called out to exercise, or into service . . . .”).


73. Id. at 3.
the poor, and capturing runaway animals.  

Although the watch groups broadly served as law enforcement, sheriffs or constables were typically elected or appointed to serve executive legal functions. “Sheriffs were responsible for catching criminals, working with the courts, and collecting taxes; law enforcement was not a top priority for sheriffs, as they could make more money by collecting taxes within the community.” There was not a strong law enforcement presence in the new nation, and “[f]or the first 50 years or so after the ratification of the Constitution, military troops were rarely, if ever, used for routine law enforcement.” Instead, most law enforcement issues were handled by the citizens. Moreover, the founders believed that as part of the militia, the citizens were responsible for defending and enforcing the laws of the nation.

IV. TODAY’S POLICE, ARE THEY SOLDIERS?

Police departments began to form in the mid-1800s in major American cities. At the time, there was some debate as to “whether police officers should be armed and wear uniforms and to what extent physical force should be used during interactions with citizens.” In the mid-1800s, police carried non-lethal weapons, such as wood clubs. But, by the late 1800s police began carrying firearms. Notably, most police in Great Britain continue to carry non-lethal weapons.

There is “a traditional and strong resistance of Americans to any military intrusion into civilian affairs.” Americans have historically opposed the use of military in law enforcement functions. This opposition is evidenced by the Posse Comitatus Act’s proscription on the use of military for law enforcement purposes unless the Constitution or Congress expressly authorizes the action.

74. Id.
75. Roots, supra note 4, at 687.
76. ARCHBOLD, supra note 72, at 3.
78. ARCHBOLD, supra note 72, at 2–3.
80. ARCHBOLD, supra note 72, at 5 (“[T]he New York City Police Department was unified in 1845, the St. Louis Metropolitan Police Department in 1846, the Chicago Police Department in 1854, and the Los Angeles Police Department in 1869 . . . .”).
81. Id.
83. Id.
87. Id. (This portion of the act is often referred to as the Posse Comitatus Act).
Although the act remains largely unchanged, its effectiveness has been greatly reduced as the result of recent exceptions made for drug enforcement, homeland security, and emergency response activities.

Until the 1980s, the military was very cautious about assisting with law enforcement efforts due to the military’s fear of violating the Posse Comitatus Act. This changed in the 1980s when Congress passed the Posse Comitatus Act Amendment and created a drug enforcement exception to the Posse Comitatus Act. At the time, Congress believed that “all possible resources should be utilized to combat narcotics trafficking . . .” As such, the amendment allowed the military to “make available any equipment . . . base facility, or research facility . . . to any Federal, State, or local civilian law enforcement official for law enforcement purposes.” Furthermore, it allowed the military to provide training, advice, and information to federal, state, and local law enforcement for law enforcement purposes.

The Posse Comitatus Act Amendment opened the door for joint military and law enforcement activities. Within less than two years of its enactment, military aircraft and helicopters were used in domestic drug interdiction efforts. Congress subsequently authorized the National Guard to help state and local agencies with drug enforcement. In addition, Congress passed the Patriot Act to promote cooperation between agencies to deter terrorism and to enhance law enforcement. This resulted in the creation of centralized information sharing systems between agencies.

88. See generally 18 U.S.C. § 1385 (2012) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”).
93. Military Cooperation, supra note 91, at 3.
95. §§ 371, 373.
96. See generally §§ 371–373, 2576.
97. Military Cooperation, supra note 91, at 4 (referencing several initiatives where the military provided assistance to domestic law enforcement for drug interdiction purposes through the use of aircraft, helicopters, and radar).
Congress also promoted providing military tools to law enforcement. Congress granted the Department of Defense authority to provide funding101 and to transfer excess arms, ammunition, and other equipment to federal, state, and local agencies for drug enforcement.102 Furthermore, Congress provided that transfers could occur without charge to the receiving agency, so long as the receiving agency covers any costs associated with the transfer of property.103 To further streamline the transfer of surplus military equipment, Congress required the establishment of “procedures for State and local governments to buy law enforcement equipment suitable for counter-drug activities through the Department of Defense.”104 Then, Congress created the 1033 Program to aid in the transfer of surplus weapons, ammunition, protective devices, and other equipment from the military to state and local law enforcement.105

Today, the Law Enforcement Support Office of the Defense Logistics Agency (“LESO”) administers the 1033 Program and manages the transfer of the Department of Defense’s surplus property to law enforcement agencies.106 Since 1990, LESO estimates that more than $4.2 billion worth of surplus property has been transferred.107 From 1996 to 1998, about $72 million worth of surplus equipment was transferred.108 The total value of equipment transferred steadily increased, and, in 2011, LESO reported the transfer of military equipment originally valued at $498 million, including 15,496 weapons and 31 aircraft.109 This figure was surpassed in 2012 when the acquisition value of transferred property increased to $546 million.110

With the quantity of military weapons and equipment possessed by police, the line between the police and the military is becoming blurred.111 Police have

103. § 2576a(2)(b).
107. Id.
110. Id. (including 11,062 weapons and 8 aircraft). In 2013, the pace of transferred equipment has not slowed with July year-to-date transferred equipment originally valued at $269 million. Id.
“more sophisticated tactical equipment: automatic weapons with laser sights and sound suppressors, surveillance equipment such as Laser Bugs that can detect sounds inside a building by bouncing a laser beam off a window, pinhole cameras, flash and noise grenades, rubber bullets, bulletproof apparel, battering rams, and more.” 112 The equipment used by police resembles the military’s inventory of tools for modern war. 113 For example, the Los Angeles police department’s list of equipment includes helicopters, combat assault rifles, submachine guns, semi-automatic pistols, dispersion agents, grenades, pole cameras, infrared equipment, body armor, and gas masks. 114 Standard tools for SWAT teams include “battering rams, ballistic shields, ‘flashbang’ grenades, smoke grenades, pepper spray, and tear gas.” 115 Furthermore, assault rifles have become a standard weapon for police. 116 Interestingly, while Congress promoted the use of assault rifles, machine guns, and similar weapons by police, at the same time, it passed legislation to limit the availability of similar weapons to citizens. 117 Meanwhile, “the overwhelming weight of evidence from gun recovery and survey studies indicates that [assault weapons] are used in a small percentage of gun crimes overall.” 118

The movement to more heavily arm police began in the 1960s with the creation of SWAT teams in police departments. 119 Until the 1980s, police limited the use of SWAT teams to volatile, high-risk situations, 120 but today heavily armed SWAT teams are used for routine policing. 121 SWAT teams conduct raids, execute warrants, and perform searches. 122 In some cities, SWAT teams even

112. Id. at 7.
114. Id.
115. BALKO, supra note 17, at 4.
119. BALKO, supra note 17, at 4.
120. Id.
121. Id. at 3, 12; Weber, supra note 111, at 8.
122. BALKO, supra note 17, at 3, 5.
perform routine patrols. Similar to the plaintiffs’ experience in Mitchell, SWAT teams often use a battering ram or explosives to create an entryway into the home. Then, SWAT teams may deploy a disorientation tactic, such as the detonation of a flashbang grenade. The SWAT team executing a search warrant with the suspect held at gunpoint typically follows this.

Not only do police carry the same weapons as the military, but they also dress in similar attire and participate in military-style training. "The typical SWAT team carries out its missions in battle fatigues: Lace-up, combat-style boots; black, camouflage, or olive-colored pants and shirts, sometimes with ‘ninja-style’ or balaclava hoods; Kevlar helmets and vests; gas masks, knee pads, gloves, communication devices, and boot knives, and military-grade weapons, such as the Heckler and Koch MP5 submachine gun, the preferred model of the U.S. Navy Seals." Furthermore, some police use armored personnel carriers, helicopters, tanks, and Humvees. With military vehicles, weapons, and attire, today’s police appear more prepared for war than they do for keeping the peace.

With campaigns entitled the “War on Drugs,” “War on Crime,” and “War against Terror,” crime has become increasingly hyperbolized as war, and the role of police has changed from serving and protecting citizens to battling crime. While the choice of language may be merely semantics, it may also reflect a change in paradigm. A peace-keeping function is very different from war. Unlike the military acting abroad, police have an ongoing relationship with the community. While innocent human casualties are an inherent side effect of war, this type of casualty should not be taken lightly when it results from domestic law enforcement activities.

123. Id. at 12 (referencing Indianapolis and San Francisco).
124. Complaint, supra note 6, at 5–6.
125. BALKO, supra note 17, at 5.
126. Id.
127. Id.
129. Id.
130. BALKO, supra note 17, at 5.
132. See M. Chris Fabricant, War Crimes and Misdemeanors: Understanding ‘Zero-Tolerance’ Policing As A Form of Collective Punishment and Human Rights Violation, 3 DREXEL L. REV. 373, 378 (2011) (“War metaphors are routinely invoked to describe the deployment of broad-scale law enforcement initiatives aimed at eradicating complex social problems (such as violent crime) with monolithic ‘law and order’ solutions. The war on crime spawned additional campaigns, including the war on drugs and the war on terror.”)
133. Id. at 378–79 (“A consequence of both the use of war rhetoric and the warlike approach to addressing societal problems is the dehumanization of citizens as ‘enemies.’ This, in turn, breeds abuse and justifies harsh and often indiscriminate military-style tactics to “combat” the wrongdoers, typically poor people of color.”).
There is very little distinction between today’s police and the military. Not only are the police emulating the military’s tactics in law enforcement, but they are also taking on the mentality of the military. "Given that civilian police now tote military equipment, get military training, and embrace military culture and values, it shouldn’t be surprising when officers begin to act like soldiers, treat civilians like combatants, and tread on private property as if it were part of a battlefield." The Third Amendment was ratified to protect the sanctity of the home from governmental intrusion, and this protection should apply to actions taken by police.

V. CONCLUSION

It is noteworthy that the Constitution makes minimal references to criminal law enforcement and no reference to a governmental policing body. This is largely because the modern concept of law enforcement did not exist during the colonial and revolutionary periods. Instead, “[t]he Framers contemplated law enforcement as the duty of mostly private citizens, along with a few constables and sheriffs who could be called upon when necessary.” One commentator has even questioned the overall constitutionality of police.

The founders ratified the Third Amendment to protect citizens from the abuse of government authority. Militarized police present the same fundamental risk to American civil liberties that they posed several centuries ago. Samuel Adams summarized these risks when he stated:

Soldiers are not govern’d properly by the laws of their country, but by a law made for them only: This may in time make them look upon themselves as a body of men different from the rest of the people; and as they and they only have the sword in their hands, they may sooner or later begin to look upon themselves as the LORDS and not the SERVANTS of the people: Instead of enforcing the execution of law, which by the way is far from being the original intent of soldiers, they

134. Weber, supra note 111, at 5 (“Not only is the military directly involved in law enforcement; police departments are increasingly emulating the tactics of the armed forces in their everyday activities.”).
135. Id. at 9 (“Because of their close collaboration with the military, SWAT units are taking on the warrior mentality of our military’s special forces.”).
136. Balko, supra note 17, at 15.
137. See Roots, supra note 4, at 727.
138. Archbold, supra note 72, at 5.
139. Roots, supra note 4, at 685.
140. Id. at 688. “The ‘police state’ known by modern Americans would be seen as quite tyrannical to the Framers who ratified the Constitution.” Id. at 728.
may refuse to obey it themselves: Nay, they may even make laws for themselves, and enforce them by the power of the sword!\textsuperscript{141}

Because of the similarities between the police and the military, the definition of soldier under the Third Amendment should include federal, state, and local law enforcement. Furthermore, the judiciary should embrace the \textit{Engblom} court’s approach to the Third Amendment\textsuperscript{142} and apply the Third Amendment to both federal and state action.


\textsuperscript{142} Engblom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982).
THE 2015 PROPOSALS TO THE FEDERAL
RULES OF CIVIL PROCEDURE:
PREPARING FOR THE FUTURE OF DISCOVERY

Brian Morris*

I. INTRODUCTION

How many attorneys can cite the first rule of the Federal Rules of Civil Procedure? As the “scope and purpose” behind the Rules, Rule 1 demands that the Federal Rules govern and administer “the just, speedy, and inexpensive determination of every action and proceeding.”1 However, the current state of discovery in American litigation is the “number one cost-driver and there isn’t a close second.”2 Discovery costs increase five percent for every additional non-expert deposition and increase another five percent for each additional type of discovery.3 Such costs jump another eleven percent for every expert witness deposition.4

For years, the various Judicial Rules Committees5 have received complaints about the abundant costs, burdens, and delays of litigating in the federal court system.6 Attorneys and judges over analyze and meticulously discuss the costs associated with discovery, with over 2,500 law review articles citing the topic.7 These persistent problems led to the Judicial Committees hosting the 2010

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1. FED. R. CIV. P. 1.
3. Id.
4. Id.
7. A simple connector search of “discovery /s cost” on Westlaw returned 2,719 law review articles on the topic.
Conference on Civil Litigation at the Duke University School of Law. The Conference recognized that discovery generally works well for litigants, yet the rapid growth of e-discovery in high profile cases continues to balloon discovery costs.

The Duke Conference welcomed judges, big firms, public interest groups, defense counsel, and plaintiffs’ attorneys to discuss different perspectives on the current frustrations with the rules. After numerous Advisory Committee meetings and years of discussion, the Standing Committee approved a package of rule changes to the Federal Rules that encompasses the Duke Conference’s founding principles.

The Duke Conference reduced participants’ concerns to three themes: (1) early and active judicial case management, (2) proportionality in discovery, and (3) cooperation among lawyers. These themes are the crux of the new proposals that the Standing Committee approved for public comment. These proposals attempt to refocus both the Federal Rules and litigators on the mandate set forth in Rule 1 for the “just, speedy, and inexpensive determination” of federal civil litigation.

Part II of this note discusses the three sets of proposed rules that encompass the Duke Conference themes: (1) improving early and effective judicial case management, (2) enhancing the means of keeping discovery proportional, and (3) advancing cooperation among lawyers. Some of the proposals make new

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8. Duke Committee, supra note 6, at 1.
9. Id. at 7 (“Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases.”).
10. See Id. at 3 (reporting that cases where both parties request electronic discovery account for the most expensive litigation, “the 95th percentile was $850,000 for plaintiffs and $991,900 for defendants”).
15. Id.
16. See Duke Committee, supra note 6, at 12.
17. Report to Standing Committee, supra note 6, at 4 (naming these three sets the “Duke Rules Package”).
additions to the Federal Rules. Other proposals do not fully depart from the current rules, but rather refocus the established language of the current rules to promote the more efficient use of these rules.

Part III of this note addresses the anticipated controversy and contested debate on the proposals. Public comment on the proposed amendments will begin in August of 2013, but the “rulemaking labyrinth” will continue for several years as the proposals must be approved and reapproved through committees, Congress, and the Supreme Court. At the earliest, the proposed amendments to the rules would become effective in December 2015. While supporters began developing the changes over three years ago, some opponents call the changes “radical” because the proposals challenge the established discovery system in American litigation. The proposals create the biggest divide between attorneys who generally represent plaintiffs and attorneys who represent defendants in civil litigation.

Part IV of this note focuses on the new discovery rules that will have the greatest impact on the day-to-day workings of litigators. Specifically, these proposals will require “the responsible use of discovery proportional to the needs of the case.” The most significant changes will address Rule 26 (b)(1), objections to Rule 34 requests for production, and several limits on discovery...
devices.\textsuperscript{26} The new language of the proposals is examined while cross-referencing case law and pilot programs from other jurisdictions to predict and prepare for the impact these new rules will have on federal litigators.

Regardless of whether these proposals become rules by 2015, the underlying concern of costs, burdens, and delays in discovery will persist.\textsuperscript{27} These concerns encourage judges to evolve their case management in an effort to realize the mandate set forth in Rule 1 of the Federal Rules.\textsuperscript{28} While discovery continues to work well in most cases,\textsuperscript{29} the overall landscape of American discovery has begun to change.\textsuperscript{30} Litigators must adapt and effectively use the new proposals to best serve their clients to obtain a “just, speedy, and inexpensive” resolution.\textsuperscript{31}

II. PROPOSED SET OF RULES

The process to change the current Federal Rules starts when the Advisory Committee evaluates suggestions and recommendations for rule changes in the first instance.\textsuperscript{32} If the Advisory Committee decides that a specific proposal has merit and is worth pursuing, the Advisory Committee can then send the proposal the Standing Committee.\textsuperscript{33} The Standing Committee may then authorize the proposal for public comment.\textsuperscript{34}

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\textsuperscript{26} Favro, supra note 18.

\textsuperscript{27} See O’Neill, supra note 21; see also John H. Beisner, Discovering a Better Way: The Need for Effective Civil Litigation Reform, 60 DUKE L.J. 547, 549 (2010) (“[D]iscovery costs now comprise between 50 and 90 percent of the total litigation costs in a case.”); but see Milberg LLP & Hausfeld LLP, E-Discovery Today: The Fault Lies Not in Our Rules . . . , 4 FED. CTS. L. REV. 131 (2011) (advocating that the current rules are working and more time is needed to allow e-discovery costs to be reduced).

\textsuperscript{28} See O’Neill, supra note 21.

\textsuperscript{29} DUKE COMMITTEE, supra note 6, at 7.


\textsuperscript{31} FED. R. CIV. P. 1.


\textsuperscript{33} How to Suggest a Change to the Rules of Practice and Procedure, supra note 32.

\textsuperscript{34} Id.
This year, the Advisory Committee decided to recommend the “Duke Rules Package” for publication to the Standing Committee. The Standing Committee then approved the full package for public comment after the June conference in Washington, D.C. The proposals maintain the three grouping system established at the Duke Conference, and the Advisory Committee expects the proposals to generate a high level of debate during the public comment period.

A. Improve early and effective judicial case management

The first group of proposals begins with changes aimed at speeding up the beginning stages of litigation. As delays and scheduling problems begin to accumulate and the first stages of a case take longer and longer, the more and more case costs also accumulate. According to figures from the Administrative Office of the U.S. Courts, the median time interval in months for U.S. District Courts cases from filing to pretrial is six and half months. The proposals address these delays by amending the following three Rules: 4, 16, and 26.

First, litigators would have half the time to serve the summons and complaint under Rule 4(m), down to 60 days from the current 120 days. The Department of Justice noted that such a change to the service timetable would only exacerbate current problems. For example, litigators may see an increase in dismissals for failing to properly serve summons within the shortened period.

35. Report to Standing Committee, supra note 12, at 1 (“[T]his Report [from the Advisory Committee to the Standing Committee] presents for action a proposal recommending publication for comment of revisions to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37.”).
40. See Okla. Committee, supra note 37, at 141.
42. Report to Standing Committee, supra note 12, at 4.
43. Okla. Committee, supra note 37, at 141.
44. Id. (“The Department of Justice has reacted to this proposal by suggesting that, by shortening the time to serve, it will exacerbate a problem it now encounters in condemnation actions.”).
Extensions that require a showing of “good cause” before a judge can grant a motion requesting more time to complete service may also become more prevalent.45

Second, Rule 16(b)(2) would shorten the timeframe to issue a scheduling order by thirty days.46 This provision would also be subject to a “good cause” extension from the judge.47 This change can be seen in “rocket docket” courts already in place, such as the Eastern District of Virginia.48 A rocket docket sets early and firm trial dates.49 Judges enforce the firm trial dates and minimize extensions and continuances to narrow “good cause” exceptions.50

Third, changes to Rule 26(d) quicken the early pace of litigation by allowing early delivery of Rule 34 requests for production.51 This change would allow Rule 34 requests to be delivered before the first scheduling conference.52 Allowing the delivery of early requests for documents will prepare parties for the discovery conversation and to “begin talking” earlier.53

The Advisory Committee expressed disappointment with the need to micro-manage cases due to many litigators’ inability to move cases along more efficiently.54 A judge responded to this disappointment by stating, “lawyers will do things only what they have to.”55 Early case management may frustrate lawyers with shorter deadlines and a greater presence from the court, but such management will please clients as courts resolve cases with greater efficiency.56

45. Fed. R. Civ. P. 4(m) (“But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.”); see, e.g., Lepone-Dempsey v. Carroll Cnty. Comm’rs, 476 F.3d 1277, 1281 (11th Cir. 2007) (“Good cause exists ‘only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service.’”); but see Baruch v. United States, No. 12-CV-767CCC-JAD, 2013 WL 2359473, at *2 (D.N.J. May 29, 2013) (noting that “ignorance of the law” cannot be characterized as “good cause”).

46. Okla. Committee, supra note 37, at 142.

47. Id.

48. Id.


51. Okla. Committee, supra note 37, at 144.

52. Id. See also Fed. R. Civ. P. 26(f).

53. Okla. Committee, supra note 37, at 144 (“[L]awyers who generally represent plaintiffs are enthusiastic about this proposal . . . [and] some lawyers who generally represent defendants thought this practice would be useful ‘so we can begin talking.’”).

54. Id. at 142, 145.

55. Id. at 142 (internal quotation marks omitted).

56. Id. at 145.
Overall, the quicker start to cases will attract Plaintiffs enticed by the reduced cost and time.\(^{57}\)

### B. Enhancing the Means of Keeping Discovery Proportional

The second group of changes seeks to reduce the cost, burden, and delays of discovery.\(^{58}\) This group creates the greatest divide between plaintiff and defense oriented litigators.\(^{59}\) Plaintiffs complain about defense delay tactics that either “dump” too many documents on plaintiffs or “stonewall” any documents by using boilerplate objections.\(^{60}\) In contrast, defendants contend that plaintiffs create the problems by employing overbroad discovery requests.\(^{61}\)

The Advisory Committee addressed discovery concerns by proposing a number of changes to Rules 26 through 37.\(^{62}\) The most significant of the proposed changes are to Rules 26, 30, 31, 32, and 34.\(^{63}\) Rule 26(b) explicitly requires proportionality in discovery, objections to Rule 34 requests to produce must be specific, and presumptive limits on discovery devices are reduced in number.\(^{64}\) “Good cause” exceptions apply here as well.\(^{65}\)

Debate is expected to be “lively” on these discovery changes.\(^{66}\) The proposals depart from the traditional American system as the Advisory

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57. See Cognitronics Imaging Sys., Inc. v. Recognition Research Inc., 83 F. Supp. 2d 689, 699 (E.D. Va. 2000) (recognizing that the faster “rocket docket” attracts plaintiffs to the district), see also OKLA. COMMITTEE, supra note 6, at 6.
58. DUKE COMMITTEE, supra note 6, at 7.
60. DUKE COMMITTEE, supra note 6, at 7 (“While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as ‘stonewalling’ and the paper and electronic versions of ‘document dumps,’ accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.”).
61. Id.
64. See infra pp. 143-47.
65. See O’Neill, supra note 21; see, e.g., supra note 45 and accompanying text.
Committee seeks a more efficient solution to the current state of the Federal Rules and discovery process.67 Because the proposals bring change, parties with different interests significantly disagree on what that change should look like and what changes will best fulfill the requirements of Rule 1.68

C. Advancing Cooperation

The last group of changes creates an explicit duty of cooperation between parties.69 The Advisory Committee noted that cooperation is crucial to the success of litigation.70 Both defense and plaintiffs’ attorneys at the Duke Conference agreed that requiring early and on-going case management is a necessity to foster a more efficient discovery process.71 Both the “group one”72 proposals aimed at speeding-up litigation and the re-drafting of Rule 1 reflects the Advisory Committee’s priority of ensuring cooperation and early case management.73

The proposed change to Rule 1 would mandate that the Federal Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.”74 For the first time, Rule 1 would explicitly name “parties.”75 The Advisory Committee hopes that this “modest,”76 yet explicit, change will “prompt litigants and their lawyers to engage in more cooperative conduct.”77

Litigants will be urged to curtail “hyper-adversary behavior” while encouraged to work directly with opposing counsel.78 The Advisory Committee pointed out that cooperation supports effective advocacy to the benefit of clients as attorneys avoid unnecessary quarrels that mitigate costs and delays.79 Such cooperation “does not . . . mean [an attorney has] to tell [an adversary] where the

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67. See DUKE COMMITTEE, supra note 6, at 9.
68. See infra pp. 141-45.
69. OKLA. COMMITTEE, supra note 37, at 153.
70. REPORT TO STANDING COMMITTEE, supra note 12, at 16.
71. See DUKE COMMITTEE, supra note 6, at 10.
72. See supra Part II.A.
73. See OKLA. COMMITTEE, supra note 37, at 153.
74. Id.
75. See id.; FED. R. CIV. P. 1.
76. REPORT TO STANDING COMMITTEE, supra note 12, at 16.
78. See REPORT TO STANDING COMMITTEE, supra note 12, at 16.
79. OKLA. COMMITTEE, supra note 37, at 153 (noting that the change should not result in “collateral litigation” or problems with professional responsibility); see, e.g., FED. R. CIV. P. 11 advisory committee’s notes (1993).
really bad document is” but rather, cooperation is about sharing basic information so that the exchange of discovery brings comfort and security to both parties.80

Litigants must be aware of the duty to cooperate because the proposal will “provide useful support for judicial efforts to elicit [and enforce] better cooperation” between parties when the lawyers fail to cooperate amongst themselves.81 For example, judges can sanction attorneys for failing to cooperate and follow court orders; and, in extreme cases, judges can dismiss a plaintiff’s claim altogether.82

D. Overall

The Advisory Committee drafted the proposed amendments to the Federal Rules as a balanced attempt to address (1) early and active judicial case management, (2) proportionality in discovery, and (3) cooperation among lawyers.83 Some of the rules favor defendants, while others favor plaintiffs.84 Despite the anticipated debate, the proposals reflect judges’ current state of mind and indicate the direction of federal litigation.85 Litigators must take notice of the three goals and begin adapting to more “Kumbaya” litigation tactics, which involve greater levels of cooperation.86 The Advisory Committee was clear: “If we don’t figure out ways to address cooperation, proportionality, and increased management . . . we [are all] in trouble.”87

III. CONTROVERSY OVER THE PROPOSED RULES

The first hurdle for this package of proposals is the six-month period of public comment that experts anticipate will run from August 15, 2013 through

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81. DUKE COMMITTEE, supra note 6, at 16.
83. OKLA. COMMITTEE, supra note 37, at 153.
84. See id. at 154-55
85. See O’Neill, supra note 21 (“The Sedona Conference Cooperation Proclamation, along with the judges who have signed on to it, has been preaching the cooperation gospel for years.”).
86. See id. (“Although some practitioners have been reluctant to abandon their obstreperous, ‘Rambo’ litigation tactics, they soon may have no choice. Amendments or not, more and more judges are demanding that parties play nice. You may not be singing ‘Kumbaya’ just yet, but it might be wise to learn the tune now.”).
87. OKLA. COMMITTEE, supra note 37, at 154-55.
February 15, 2014. The Standing Committee will post the proposals online and circulate copies to the bench, bar, and public for comment. The Advisory Committee accepts and processes comments through both email and standard mail form. The Advisory Committee also holds public hearings for the proposals where the public can discuss and debate the proposed changes. The first public hearing for the proposals is scheduled for November 7th and 8th of this year with two subsequent hearings to follow.

After the six months expire, the Advisory Committee will review the comments and testimony to submit the approved proposals to the Standing Committee. Assuming the Standing Committee reapproves the proposals as changed or updated, the proposals would move through the Judicial Conference, the United States Supreme Court, and Congress before any the proposals would actually become adopted Federal Rules.

The official comment period has not started, yet the public has already submitted an unusually high number of early comments. Plaintiffs’ attorneys and civil rights advocates authored the majority of the 250 comments already submitted for review. The emerging theme from plaintiffs’ attorneys is that “the system is not broken, and [it] does not need to be fixed.” The Advisory Committee’s own empirical data supports this contention. Over sixty percent of respondents in a survey targeted at federal litigators reported that cases generated the “right amount” of discovery.

88. Federal Judiciary Proposes Radical Limitations on Discovery and Preservation of Evidence, supra note 23.
90. Id.
93. Federal Judiciary Proposes Radical Limitations on Discovery, supra note 23.
96. See OKLA. COMMITTEE, supra note 37, at 153.
97. See id.
98. Id. at 154.
99. Koeltl, supra note 11, at 539.
100. Id.; see also Emery G. Lee III & Thomas E. Willging, Defining the Problem of Cost in Federal Civil Litigation, 60 DUKE L.J. 765 (2010) (summarizing the research).
discovery was generally the “right amount” in proportion to the amount in controversy with the median cost of discovery being “very modest.”\textsuperscript{101}

The one exception, which can be properly characterized as “broken discovery,” was the cost of discovery in high-stakes litigation, which was “unsurprisingly, very high.”\textsuperscript{102} The potential discovery costs in complex litigation remain limitless, and the proposed amendments directly combat this twenty-first century problem of e-discovery.\textsuperscript{103} Experts in the field of e-discovery anticipate that the proposals will likely gain broad support from larger law firms.\textsuperscript{104} Further, experts point directly at e-discovery costs, in that any party that engages in e-discovery will benefit from the proportionality requirement.\textsuperscript{105}

However, the very same discovery experts identified the opposition’s theory towards the proposals: “The only people that . . . could . . . [benefit] from the more expansive discovery are the smaller plaintiffs that have no electronic records to speak of going against big companies.”\textsuperscript{106} Plaintiffs’ attorneys contend that the impetus behind the proposals is the Advisory Committee and federal courts’ historic tendency to restrict plaintiffs’ rights in litigation.\textsuperscript{107} Plaintiffs’ attorneys fear that the proposals will restrict the scope of discovery and limit access to documents and information, which large companies and defendants exclusively possess.\textsuperscript{108} Plaintiffs’ attorneys argue that the proposals arm large corporations with more restrictive discovery tools, which reward companies for spending money in an attempt to stonewall discovery.\textsuperscript{109}

Furthering the worries of plaintiffs’ attorneys, the proposals will have the effect of shifting the discovery burden to plaintiffs while defendants remain in control of the needed information.\textsuperscript{110} Plaintiffs will have to show proportionality

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101. Koeltl, supra note 11, at 539.
102. Id.
103. But see CAMBRIDGE COMMITTEE, supra note 39, at 64 (“Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.”).
104. Pierson, supra note 95, at 3.
105. Id.
106. Id. at 4. (quoting Jonathan Lupkin of Rakower Lupkin, a boutique law firm for complex commercial disputes).
108. See Kennerly, supra note 107.
109. See id.
110. The Burg Simpson Team, supra note 59.
\end{footnotes}
in discovery requests and show good cause to obtain more depositions, interrogatories, or other discovery devices.\textsuperscript{111} This burden will require plaintiffs seeking additional discovery to “make a particularized showing of why the discovery is necessary.”\textsuperscript{112} This showing must be consistent with the requirements of Rule 26.\textsuperscript{113} While plaintiffs currently can request “any information possibly leading to admissible evidence,”\textsuperscript{114} the burden shift may prevent or restrict a plaintiff’s ability to access information once a court labels the information as “somehow out of proportion or otherwise burdensome.”\textsuperscript{115}

This burden also requires plaintiffs to first exhaust the limits of discovery before a plaintiff can file a motion requesting additional discovery from the court.\textsuperscript{116} Courts will deny generalized requests for additional depositions such as: “numerous individuals [in the suit] . . . necessitate the greater number of depositions,” or “[plaintiffs] should not have to face these trial witnesses or declarants without having had the opportunity to depose them.”\textsuperscript{117}

The Advisory Committee welcomed the challenges and ensured that the proposals attempt to reduce cost and delays in good faith.\textsuperscript{118} The Advisory Committee was even quoted as saying “[b]ring the comments on!”\textsuperscript{119} Experts anticipate plaintiffs’ attorneys to cast doubt on the proposals by pointing to the Advisory Committee’s own language and lack of a clear definition for “out of proportion.”

\begin{thebibliography}{100}
\bibitem{111} Id.
\bibitem{113} Fed. R. Civ. P. 30(a)(2)(A)(i); C&C Jewelry Mfg., Inc. v. West, No. C09-01303JF(HRL), 2011 WL 767839, at *1 (N.D. Cal. Feb. 28, 2011) (“A court must limit the extent or frequency of discovery if it finds that (a) the discovery sought is unreasonably cumulative or duplicative or can be obtained from a source that is more convenient, less burdensome or less expensive, (b) the party seeking discovery has had ample opportunity to obtain the information through discovery; or (c) the burden or expense of the discovery sought outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake, and the importance of the discovery in resolving those issues.”).
\bibitem{115} The Burg Simpson Team, supra note 59.
\bibitem{116} Finazzo v. Hawaiian Airlines, No. 05-00524 JMS-LEK, 2007 WL 1425241, at *3 (D. Haw. May 10, 2007); see also Schiller Am., Inc. v. Welch Allyn, Inc., No. 06-21439-CIV, 2007 WL 2702247, at *2 (S.D. Fla. Sept. 14, 2007) (“[T]he Court should not and will not entertain a premature motion to exceed the standard number of depositions based upon speculation and conjecture, even if it is reasonably informed and asserted in good faith as is the case here.”).
\bibitem{117} Finazzo, 2007 WL 1425241, at *3; see also Aristocrat Techs. v. Int’l Game Tech., No. C-06-03717 RMW, 2010 WL 3060162 (N.D. Cal. Aug. 3, 2010) (denying plaintiff’s motion requesting additional depositions where plaintiffs failed to seek additional depositions at the scheduling conference and did not file the motion until a month before the close of discovery).
\bibitem{118} See OKLA. COMMITTEE, supra note 37, at 154.
\bibitem{119} Id.
\end{thebibliography}
control discovery”\textsuperscript{120} or what “strong reasons” the Advisory Committee has for the changes.\textsuperscript{121} Plaintiffs further contend that under the Advisory Committee’s own proportionality argument, high-stakes litigation that accounts for the majority of costs and delays in litigation should have significantly higher discovery costs.\textsuperscript{122} Complex cases with higher stakes potentially pay out or cost more money than normal cases, and thus the larger judgments justify the higher costs during discovery and create natural proportionality.\textsuperscript{123}

Supporters of the proposals concede that “the cost of discovery in the median case may be reasonable and indeed low,” yet the costs in more complex litigation disproportionally increase with enormous and unlimited potential discovery costs.\textsuperscript{124} The Advisory Committee will face the challenge of reassuring litigants that the system will continue to work for the majority of cases while also building confidence that high-stakes cases will become more manageable.\textsuperscript{125}

The Advisory Committee expects that the public will submit thousands of comments because “[e]veryone will have a dog in this [discovery] race.”\textsuperscript{126} The Advisory Committee will have to spend a substantial amount of time reviewing comments once the “dust settles” and the initial backlash to the proposals winds down.\textsuperscript{127} In the end, Advisory Committee members agree that moving forward with the package “provides a real, practical outcome, admirably advancing the pragmatic hopes” established at the Duke Conference.\textsuperscript{128}

The earliest that the Supreme Court would adopt the proposals and promulgate the rules is December of 2015.\textsuperscript{129} Yet litigators must begin to take notice of the changing trends in discovery, even if they rarely find themselves in federal court.\textsuperscript{130} Discovery problems have prompted Judges to begin thinking about discovery problems on their own and have prepared Judges for the anticipated change.\textsuperscript{131} As the Federal Rules change, state courts often follow the federal court’s lead and the amendments eventually filter themselves down into

\textsuperscript{120} Kennerly, supra note 107.
\textsuperscript{121} The Burg Simpson Team, supra note 59.
\textsuperscript{122} See Kennerly, supra note 107.
\textsuperscript{123} \textit{Report to Standing Committee}, supra note 12, at 10 (“discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior”).
\textsuperscript{124} Koeltl, supra note 11, at 540.
\textsuperscript{125} \textit{Id}.
\textsuperscript{126} \textit{Okla. Committee}, supra note 37, at 155.
\textsuperscript{127} See id. (“Extensive public comments can be expected on the package . . . [i]nitial reactions may be overblown. It will be important to allow the dust to settle to provide a better picture.”).
\textsuperscript{128} \textit{Id} at 156.
\textsuperscript{129} O’Neill, supra note 21.
\textsuperscript{130} See Pierson, supra note 95, at 5.
\textsuperscript{131} See id.
the various state rules. Litigators must be prepared to adapt and effectively use the new rules to best serve clients.

IV. PENDING IMPACT ON DISCOVERY

The proposals that will carry the greatest impact on litigators are the ones that directly address discovery. Specifically, these proposals will require the “responsible use of discovery proportional to the needs of the case.” Fortunately for litigators, the current rules already reflect many of these changes. Further, several jurisdictions have already started to experiment with pilot programs that implement similar rule changes.

Thus, as the pending changes loom over the Federal Rules, litigators can anticipate the impact of the proposals on discovery through the examination of sister jurisdictions, which have already adopted the same or similarly amended rules, and through a scrutinized look at various court interpretations of current rules. If parties adapt discovery plans to show that the attorneys have considered and evaluated proportionality and specificity before filing discovery, the parties may likely save time and money during the discovery process.

A. Proportionality under Rule 26(B)(1)

Attorneys and judges characterize the changes to Rule 26 as limiting the broad scope of discovery. The driving change to limit the scope of discovery explicitly requires proportionality in Rule 26 rather than burying the cost-benefit analysis under rule 26(b)(2)(C)(iii). “Proportionality” allows the court to “limit discovery if it determines that the burden of the discovery outweighs its benefit” as seen in the proposed changes to the Rule:

26(B)(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed

132. CTR. FOR CONSTITUTIONAL LITIG., supra note 23.
133. Kelston, supra note 20.
134. REPORT TO STANDING COMMITTEE, supra note 12, at 9.
135. See CAMBRIDGE COMMITTEE, supra note 39, at 63.
136. See, e.g., Cohen, supra note 114 (emphasis).
discovery outweighs its likely benefit. Information within this scope of
discovery need not be admissible in evidence to be discoverable. The
underlined portion will replace the current text:

[I]ncluding the existence, description, nature, custody, condition, and
location of any documents or other tangible things and the identity and
location of persons who know of any discoverable matter. For good
cause, the court may order discovery of any matter relevant to the
subject matter involved in the action. Relevant information need not be
admissible at the trial if the discovery appears reasonably calculated to
lead to the discovery of admissible evidence. All discovery is subject to
the limitations imposed by Rule 26(b)(2)(C).

This change expressly limits discovery to “proportional” measures. While
the Court already has the power to limit discovery under a proportional
analysis, the Advisory Committee noted that judges and litigants rarely use the
provision. The proposed change is intended to provoke both defendants and
plaintiffs to use proportional arguments offensively and defensively to control the
cost, delay, and burden of over-broad discovery requests.

Because proportionality is not a novel idea, litigators have a better
opportunity to research and borrow established techniques. Utah adopted
“proportionality” language in the state rules of civil procedure. Utah’s Rule 26
allows for any discovery provided that the request “satisfies the standards of
proportionality set forth below.” The proportional factors for discovery
requests mirror those set forth in the Federal Rules, but the Utah Rule also
specifically adds that the “party seeking discovery always has the burden of
showing proportionality and relevance.”

138. REPORT TO STANDING COMMITTEE, supra note 12, at 19-20 (proposed changes underlined).
141. See Fed. R. Civ. P. 26(b)(2)(C)(iii) (“On motion or on its own, the court must limit the
frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines
that . . . the burden or expense of the proposed discovery outweighs its likely benefit . . . .”)
(referencing the 2012 edition of the Federal Rules).
142. See O’Neill, supra note 21.
143. See id.
144. See Utah R. Civ. P. 26(b)(1) – (b)(3).
145. Id. at 26(b)(1).
146. Id. at 26(b)(2) (listing factors of reasonableness, cost benefit analysis, consistency with
case management, not unreasonably cumulative or duplicative, and whether there has already been
the opportunity to obtain the information).
147. Id. at 26(b)(3).
The different practices of proportionality that attorneys currently employ may become more prevalent under the new proposals. Proportionality has gained traction as producing parties use proportionality as a defensive tool used against motions to compel or motions to produce documents. A producing party may also move for a protective order that can preclude a specific discovery request.

Currently under the Federal Rules, the producing party remains on the defensive and has to show that the discovery request is disproportionate and that the request should be denied. Through this process, the burden remains on the producing party to make a “particular and specific demonstration of fact” supporting any contention that discovery is disproportionate. The party seeking a protective order “has the burden of demonstrating good cause” and must offer specific support for its motion beyond mere conclusory statements.

However, under the example in Utah, the burden shifts to the requesting party to demonstrate proportionality. This is true for protective orders and motions to compel. These tools become more powerful where the burden shifts from the old standard where the producing party must show that a discovery request is disproportionate, to the new rule where the requesting party has the burden to show proportionality in requests.

For example, the current Rule 26 requires the producing party trying to prevent discovery to “present details sufficient to allow the requesting party to evaluate the costs and benefits of searching and producing the identified...”
Parties opposing discovery requests cannot use “bald generalizations” or broad statements to oppose requests. Objections, such as “producing the information would affect our profitability and ability to serve our clients,” are insufficient to show good cause for the Court to reject a discovery request.

The proposed Rule 26(b) may create a role reversal for parties. The requesting party may be unable to rely on broad and general requests for discovery because “the proponent of discovery must prove the requests are proportionate in order to be entitled to discovery.” This may prove troublesome for individual plaintiffs seeking discovery from large entities. Courts may require requesting parties to prove proportionality in the same way courts currently require requesting parties to support overly broad and burdensome requests.

For example, attorneys have shown that a request was overly broad and burdensome by producing affidavits from associates at the firm. The affidavits walked through the process in which the firm’s staff captured documents and identified potential electronic discovery that amounted to more than thirty-three million pages. The firm calculated that the expansive volume of documents would require 16,111 hours of labor to review the documents for responsiveness or privilege.

Just as attorneys have used evidentiary support to show the burden of the discovery request; under the proposals, plaintiffs must use evidentiary support to show the proportionality of a request. This support would help satisfy the proportionality burden as it shifts to the requesting party. Litigators must have real support demonstrating proportionality, as courts will no longer presume that the producing party has an obligation to comply with discovery requests.

Courts also reject broad language in discovery requests, such as “relating to” or “regarding” with respect to general categories or types of documents.

158. Id.
159. Id.
160. OKLA. COMMITTEE, supra note 37, at 147.
161. See id.
162. See id.
164. Id.
165. Id.
166. See OKLA. COMMITTEE, supra note 37, at 147.
167. See id.
168. See Netzorg, supra note 152, at 519.
169. E.g., Moss v. Blue Cross & Blue Shield of Kansas, Inc., 241 F.R.D. 683, 694 (D. Kan. 2007) (“Any and all documents from the previous 5 years to the present date relating to any legal action, civil or criminal, in which defendant has been involved . . . .”)


Similarly, courts may begin rejecting large and expensive discovery requests that fail to demonstrate case specific proportionality in requests. For example, Courts require the requesting party to rework requests that fail to properly limit the time frame of requested discovery:

[Plaintiff] requests that Defendant identify all regions and/or districts designated by Defendant company in which a [payment plan] similar to that utilized in the Shawnee, Kansas store has been used by Defendant and identification of any states, sales districts, or sales regions that are not currently using a [payment plan] similar to that utilized in Defendant’s Shawnee, Kansas store. If the plaintiffs had properly limited the discovery request to the relevant time period of the case, the parties could have saved discovery time and costs which the parties spent fighting the request. Litigators should prepare to adapt discovery requests accordingly.

The Seventh Circuit’s electronic discovery pilot program already requires litigators to adapt discovery requests. Through the Seventh Circuit’s pilot program, sixty-seven percent of judges indicated that proportionality played a significant role in the development of discovery plans. Further, attorneys and judges indicated that parties were forced to discuss e-discovery at the beginning of cases. Litigators in the pilot program identified the “need to ensure proportionality” because the costs of producing e-discovery fall almost exclusively on defendants. To offset this financial burden on defendants, plaintiffs will almost exclusively shoulder the burden of showing proportionality in discovery requests.

Plaintiffs, or parties requesting discovery, will save time and money when attorneys and staff write original discovery requests with sufficient clarity to

170. See Cohen, supra note 114 (“The amendments to Rule[] 26(b)(1) . . . would provide a framework for reasonable, proportional preservation, reasonable remedies . . . [and] can help to . . . refocus the litigation process back to where the focus should be—on the merits of the claims and defenses rather than on any discovery sideshows or unfair leverage due to the sheer costs and burdens of unrestricted discovery.”).
172. See id.
174. Id.
175. Id. at 39.
176. Id. at 41.
show that the attorneys considered and evaluated proportionality in the request.\textsuperscript{177} Requesting parties should shape discovery requests to show the importance of the issues at stake in the litigation, the importance of the particular discovery being requested, how the specific discovery process should work, and explain how any benefit from the discovery outweighs any potential burden on the responding party.\textsuperscript{178}

B. Specificity of Objections Under Rule 34 Requests for Production

The Advisory Committee balances the new burden placed on the requesting party to show proportionality with a new requirement on the producing party to use “specificity” in objections to Rule 34 requests to produce documents.\textsuperscript{179} Under the proposal, the party objecting to a request must (1) do so with specificity, and (2) state whether any materials are being withheld under the objection.\textsuperscript{180} Both sides will be required to do a better job writing more specific requests for discovery and by responding with more specific objections to those requests.\textsuperscript{181} As the Seventh Circuit noted, “generic demands lead to generic objections” which must be overcome by parties working together to specifically identify sources of evidence.\textsuperscript{182} The Committee hopes that such practice may finally lead to a more “straightforward and less evasive” discovery process:\textsuperscript{183}

34(b)(2)(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state the grounds for objecting to the request with specificity, including the reasons. If the responding party states that it will produce copies of documents or of electronically stored information instead of permitting inspection, the production must be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response.

\begin{footnotesize}
\textsuperscript{177} See Duke Committee, supra note 6, at 12 (noting that educating litigators and judges on the discovery standards will help address the current problems with discovery).
\textsuperscript{179} See Okla. Committee, supra note 37, at 151 (“Rule 34 proposals address widespread perceptions of abuses in responding [to discovery requests].”); see generally Matthew L. Jarvey, Boilerplate Objections: How They Are Used, Why They Are Wrong, And What We Can Do About Them, 61 Drake L. Rev. 913 (2013) (discussing the problem of boilerplate objections and the effects on litigation).
\textsuperscript{180} Favro, supra note 18.
\textsuperscript{181} See Okla. Committee, supra note 37, at 153 (“These proposals form a package greater than the sum of the parts. Some parts appeal more to plaintiffs than to defendants, while others appeal more to defendants than to plaintiffs.”).
\textsuperscript{182} 7th Cir. Pilot Program, supra note 176, at 18.
\textsuperscript{183} Favro, supra note 18.
\end{footnotesize}
(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.  

These changes may lead courts to waive objections where a party fails to object with specificity. Boilerplate objections have been considered prima facie evidence of a Rule 26 violation, which causes the objecting party to waive any legitimate objections that they may or may not have had. Non-specific objections to discovery have been considered “worthless” and amounting to a meaningless effort by the objecting party’s counsel to delay and increase the costs of discovery.

Boilerplate objections, such as “to the extent not objected to, any relevant documents will be produced,” leave the requesting party wondering what the objection actually refers to and whether or not the objecting party actually withheld any documents. The Advisory Committee recognized this disconnect and offered practical advice on meeting the burden of a “specific objection.” For example, an objecting party may simply identify the scope of the search that it conducted or name the limitations of the search by date or sources.

This specificity allows both parties to be on the same page when it comes to the discovery process and what has or has not been produced. This cooperation is in line with the “spirit and purposes” of the Federal Rules, which do not require parties to do all of the discovery work and just directly hand over incriminating documents to opposing counsel, but will reduce cost and time for

184. REPORT TO STANDING COMMITTEE, supra note 12, at 26 (proposed changes underlined).
185. See Manica v. Mayflower Textile Servs., 253 F.R.D. 354, 359 (D. Md. 2008) (citing Sonnino v. Univ. of Kansas Hosp. Auth., 221 F.R.D. 661, 666 (D. Kan. 2004)) (“This Court has characterized these types of objections as worthless . . . where the objecting party makes no meaningful effort to show . . . [any] objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.”).
186. BLACK’S LAW DICTIONARY 136 (7th ed. 2000) (“Ready-made or all-purpose language that will fit in a variety of documents.”).
187. See Manica, 253 F.R.D. at 359 (holding that objections were “boilerplate” when counsel failed to make a reasonable inquiry to discover specific facts which counsel could then use to support the objection).
188. Id.
189. OKLA. COMMITTEE, supra note 37, at 151.
190. See id.
191. See id. (“If an objection is made, it must state whether any responsive materials are being withheld on the basis of the objection.”).
192. See id. at 152.
193. Manica v. Mayflower Textile Servs., 253 F.R.D. 354, 358 (D. Md. 2008) (“Compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation.”).
194. See Tadler, supra note 80.
parties by either having to produce less discovery or by having more efficient access to relevant discovery.\textsuperscript{195}

Objecting parties must adapt accordingly, and can no longer continue to cut and paste the same generic responses and objections to discovery, such as: “Objections: This request is overly broad and seeks production of documents protected by the attorney client privilege and attorney work product doctrine. Not waiving the objections and subject thereto, [responding party] agrees to produce documents responsive to this request.”\textsuperscript{196} Such boilerplate objections, with a failure to follow-up or produce any discovery documents, are precisely the confusion and delay that the proposals seek to abolish.\textsuperscript{197}

Litigators can look to Rule 33 objections for guidance in the level of specificity courts require.\textsuperscript{198} Courts reject “generic” responses while mandating that objections must “be specific to each interrogatory and explain or demonstrate precisely why or how the party is entitled to withhold from answering.”\textsuperscript{199} For example, a producing party was forced to produce documents even after the discovery cutoff had expired because the objections provided were insufficient: “Subject to and without waiver of its General Objections ... Plaintiff responds that, pursuant to FRCP 33(d), it has produced and/or will produce documents responsive to this Request.”\textsuperscript{200}

Further, an objection must specify the records from which the answer can be obtained.\textsuperscript{201} This must be more than “simply point[ing] the requesting party to a room full of boxes.”\textsuperscript{202} To satisfy the “specificity” requirement, an objection “shall be in sufficient detail to permit the [requesting] party to locate and to identify . . . the records from which the answer may be ascertained.”\textsuperscript{203}

\textsuperscript{195} Manica, 253 F.R.D. at 365.
\textsuperscript{196} Trial Motion, Memorandum and Affidavit for Plaintiff at 18, Gracie v. Black Silver Enters., Inc. No. CV 09-8273-GW(JEMx), 2011 WL 991686 (C.D. Cal. Jan. 4, 2011) (providing an example of the Advisory Committee’s frustration with uncertain and confusing objections, where here the moving party received no documents yet no information on whether any documents were actually withheld, thus causing the moving party to sit and wait for a response which was never provided).
\textsuperscript{197} See Report to Standing Committee, supra note 12, at 27.
\textsuperscript{198} F. R. Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity.”).
\textsuperscript{200} M2 Software, Inc. v. M2 Comme’ns, L.L.C., 217 F.R.D. 499, 500 (C.D. Cal. 2003) (“[P]laintiff’s General Objections are not sufficient to raise any substantial, meaningful or enforceable objections to any particular discovery request.”).
\textsuperscript{202} Id.
\textsuperscript{203} Id.
Ideally, the requesting party and the objecting party can work together to satisfy the requirements of the new proposals when requesting and objecting to discovery. A middle ground is preferable where the requests refrain from asking for all documents related to a general source and the producing party will specify the exact documents produced and identify the documents subject to objections.

Rather than turning over boxes and boxes of documents which inflates cost and time for both parties, the proposals require cooperation to identify the “most readily available documents” that will best answer specific discovery requests. Working together within the concepts of “proportionality” and “specificity” allows litigators the opportunity to adhere to the “just, speedy, and inexpensive” Rule 1 mandate.

C. New Limitations on Discovery Requests

Discovery will be further limited by the proposals that reduce several presumptive limits for discovery tools. Litigators must use the limits more efficiently or be prepared to communicate and agree with opposing counsel that the limits need to be increased. As a last resort, the requesting party would require leave from the court to increase the presumptive limits. For the first time, Rule 36 places a limit of twenty-five requests for admission that a party can ask for, not including document verification:

36(a)(2) Number. Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) on any other party, including all discrete subparts. The court may grant leave to serve additional requests to the extent consistent with Rule 26(b)(1) and (2).

The presumptive number of depositions will also be cut in half while litigators have less time to conduct such depositions:

204. See id.
205. See id.
206. See id. (“The plaintiff’s interrogatories requested exceptionally broad information and made it difficult for the defendant to provide an appropriate specification of records. At the same time, simply providing hundreds of boxes with hundreds of thousands of pages of documents does not meet the defendant’s responsibility to provide a specification . . . The parties agree that a document known as [the Report] is the most readily available summary of admittedly imperfect data.”).
207. Kelston, supra note 63.
208. See OKLA. COMMITTEE, supra note 37, at 149.
209. Id.
210. Id. at 151.
211. REPORT TO STANDING COMMITTEE, supra note 12, at 27 (proposed changes underlined).
212. Id. at 24.
30(a) [and Rule 31] When A Deposition May Be Taken

(2) With Leave. A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(1) and (2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants; . . .

(d) Duration; Sanction; Motion To Terminate Or Limit.

(1) Duration. Unless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7.6 hours. The court must allow additional time consistent with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.213

Finally, the presumptive limit of written interrogatories is significantly reduced:

33(a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than 25 interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1) and (2).214

Any of these lower presumptive limits can still be modified if the parties stipulate to a higher number at the beginning of discovery.215 The lower numbers recognize the need for litigators to carefully think about a discovery plan while reflecting the requirement for early communication and cooperation between adversaries.216 Litigators on both sides will be forced to use discovery devices efficiently while adhering to the requirements of proportionality.217

The reduced limit on depositions creates fear in plaintiffs’ attorneys that five depositions will be insufficient in many cases.218 This problem is compounded with judges who refuse to negotiate upwards and will not allow more than five

213. Id.
214. Id. at 25.
215. OKLA. COMMITTEE, supra note 37, at 149.
216. REPORT TO STANDING COMMITTEE, supra note 12, at 25.
217. Id.
218. OKLA. COMMITTEE, supra note 37, at 150.
This may mean that “managing up” from lower numbers may increase costs as courts force litigators to file motions to increase the number of depositions and spend time fighting the presumptive limits. This is a contentious point; almost half of litigators cite cases with over five depositions as being “too high in relation to the stakes.”

Litigators must plan ahead and engage in early case management if they anticipate the need for more than five depositions. Generally the need for more depositions is obvious where both parties require more depositions for expert witnesses or when the case involves complex litigation. In either scenario, litigators should agree to stipulate to more depositions.

Requesting more depositions or discovery devices when leave from the court is required, however, is more difficult. Such a request would be subject to the new proportionality requirement that balances cost, burden, benefit, previous opportunity to obtain the requested information, and whether the request is duplicative or cumulative. As the case drags on and costs begin to accumulate, courts lose sympathy to grant increases in depositions where a party failed to act earlier in the litigation process.

A typical discovery plan may include the following language: “Depositions. If additional depositions are warranted, a party may apply to the Court to allow additional depositions for good cause shown. The parties agree that depositions will be completed no later than the discovery completion date.”

A showing of “good cause” may create problems for litigators who fail to agree early on the number of depositions. Courts can reject requests for more discovery if a party fails to make a “particularized showing” why the additional

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219. Id. (debating concerns with the Advisory Committee because plaintiffs are “concerned there are many judges who are literalists . . . [and] will not let us negotiate upward” and/or that “in most large cases leave is given . . . [but with] forward-looking judges . . . the lower the number, the more difficult it will be to negotiate upward”).

220. See id.

221. See id. at 149.

222. See Lehman Bros. Holdings, Inc. v. CMG Mortg., Inc., No. CV 10-0402 SC (NJV.), 2011 WL 203675 (N.D. Cal. Jan. 21, 2011) (denying Plaintiff’s full request for more depositions where Plaintiff had “ample time” to request an increase and that the increase would inflate expenses and cross-county travel).

223. See OKLA. COMMITTEE, supra note 37, at 150.

224. See id. at 150 (“[M]any judges . . . seem to view 10 depositions as a fixed limit, not a point that suggests the need for involved case management.”).


226. See id.


discovery is needed.\(^{229}\) As seen throughout most of the proposals, the changes force parties back to the reality of discussing proportionality through early case management and communication between opposing counsel.

V. CONCLUSION

The proposals will not fully cure the problems with federal litigation, but putting the word “proportional” in the rules is a starting point and a step in the right direction.\(^{230}\) Such a move hopes to put the focus back where it belongs in litigation, “on the merits of the claims and defenses rather than on any discovery sideshows.”\(^{231}\)

Yet even more than these proposed changes to the rules, what is required from litigators is “a change in paradigm and a change in thinking on both sides.”\(^{232}\) Litigators must move beyond the adversarial approach that handcuffs discovery and engage in early case management and communication, and embrace the efficient measures of proportionality.\(^{233}\)

Regardless of comments, which side litigants may represent, or the eventual timeline for these proposals; the “groundwork has been laid” to adapt new rules and to seek a more efficient discovery process.\(^{234}\) Change is coming to American discovery, and litigators must be prepared to adapt and effectively use the new rules to best serve their clients.

Preparing a game plan for the rule changes will allow litigators to hit the ground running while minimizing costs for clients due to the efficient use of the rules and proposals. Considering “proportionality” and “specificity” before filing discovery requests and objections will help prevent unnecessary motions and discovery fights while reducing the time and costs attorneys and clients must invest in the case.

Effective litigators will remember the three themes set forth at the Duke Conference: (1) early and active judicial case management, (2) proportionality in discovery, and (3) cooperation among lawyers.\(^{235}\) Rule 1 still lingers behind every case, and litigators must adapt and effectively use the new rules to best serve their clients to obtain a “just, speedy, and inexpensive” resolution.\(^{236}\)

\(^{229}\) Id. (listing the factors in Rule 26 which have become “proportionality”).


\(^{231}\) Cohen, supra note 114 (“While the fate of these proposals remains to be seen, the groundwork has been laid to reshape the state of discovery in U.S. federal litigation.”).

\(^{232}\) Mass, supra note 230.

\(^{233}\) Maureen O’Neill, supra note 66.

\(^{234}\) Cohen, supra note 114.

\(^{235}\) REPORT TO STANDING COMMITTEE, supra note 12, at 4.

\(^{236}\) F ED. R. CIV. P. 1.
I. INTRODUCTION

Risk follows speculation; and “[a]s Mark Twain once wrote, ‘there are two times in a man’s life when he should not speculate: when he can’t afford it, and when he can.’”1 Twain’s warning is still applicable today.2 In the private company context, aside from the natural risks associated with investing, investors also face additional and unknown dangers, as private issuers are not required to publicly report information.3 This gives private-company issuers ample opportunity to mislead investors about the nature of an investment - or in extreme circumstances, perpetrate a full-fledged ponzi scheme. To complicate matters, because private-venture investors frequently receive interests that are not immediately susceptible to federal securities law, prosecutors have the burden of proving that the interests are in fact securities in order to bring securities-fraud charges.4 And not surprisingly, American jurisprudence’s definition of “securities” is just as complicated as the oft-dreaded laws governing them.

Unlike stock, which is almost always a security,5 interests of a more variable nature must conform to a rigorous, three-part test for those interests to be considered a security.6 Notably, the investors must have invested in some sort of a “common enterprise” for that particular investment to be considered a security.7 But what is a “common enterprise”? A majority of courts hold that a common enterprise exists when investors’ funds are pooled and investors share in the

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1. United States v. Perksy, 520 F.2d 1388, 1399 (2d Cir. 1976) (internal citations omitted).
2. Id.
5. Landreth Timber Co. v. Landreth, 471 U.S. 681, 690 (1985) (holding that where an interest carries the traditional indicia of stock, that interest fits plainly within the definition of a security); but see United Housing Found., Inc. v. Forman, 421 U.S. 837, 859 (1975) (holding that stock is not a security where investors purchase interests in a housing cooperative in which the investors plan live).
7. Id. at 299.
profits and losses of the venture. This type of common enterprise is referred to as “horizontal commonality”. It is a narrow interpretation of common enterprise that artificially excludes transactions between a promoter and a single investor. The unfortunate drawback of such an arrangement is that it allows promoters to avoid the securities acts. And where coverage is evaded, clever promoters can escape criminal liability under the Securities Exchange Act’s central anti-fraud provision: section 10(b).

Strict vertical commonality – the common enterprise test employed by the Ninth Circuit – is also capable of producing undesirable results. Under strict vertical commonality, investor fortunes must be tied to those of the promoter. However, where the promoter receives a fixed commission that is not dependent upon the success or failure of the enterprise, a common enterprise does not exist. Thus, here too a crafty promoter could avoid securities act coverage by structuring his own payment. Concerned yet? Because if the past twelve years in securities regulation have revealed anything, it’s that America is replete with crafty promoters - perhaps devious, greedy, and sociopathic are more appropriate descriptions.

Fortunately, there exists a third option and alternative to strict vertical and horizontal commonality: broad vertical commonality. Under the broad-vertical-commonality approach, courts will find a common enterprise where investors’ profits or losses are correlative of the promoter’s efforts and expertise. And because the former approaches to defining a common enterprise possess glaring deficiencies, both standards should be rejected in favor of broad vertical commonality.

This article explores securities fraud in the context of unconventional securities, specifically focusing on federal criminal prosecutions under rule 10b-5 and section 32(a) for fraudulent sales of unconventional securities. In order to fully describe prosecutions of securities fraud, this article presents: (1) a hypothetical fact pattern with specific facts from several landmark cases; (2) a discussion of criminal securities fraud, focusing on how to build a prima facie case under section 10(b) of the Securities Exchange Act; (3) an application of the

9. Id.
11. See Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 102-103 (7th Cir. 1977) (holding that, unless horizontal commonality is satisfied, an investment contract does not exist).
14. See S.E.C. v. Cont’l Commodities Corp., 497 F.2d 516, 522 (holding that, under broad vertical commonality, a common enterprise is present if investor prospects are tied to the promoter’s efforts or expertise).
law developed under Part 2 to the facts presented; and (4) a critique of horizontal and strict vertical commonality along with an argument for broad vertical commonality.

It is important to note that: (1) this article does not provide an exhaustive list of all the possible criminal penalties that may be implicated by the fact pattern; and (2) the securities fraud analysis is limited to Rule 10b-5(b) (i.e. misrepresentations or omissions of material fact in connection with a purchase or sale of a security).

II. FACT PATTERN: THE CASE OF JAMES HARDY

After spending many years in the coal mining industry, James Hardy decided to start his own coal mining company. In order obtain the requisite funding Hardy solicited his close friend – Reynolds – to invest in his business idea. Hardy mailed Reynolds, who lived in a different state, promotional materials discussing Hardy’s proposed business venture.

The promotional materials represented that Hardy Coal Company was already up and running and had an established list of clients. In reality, the company had not yet taken off. Hardy believed that Reynolds would be reluctant to invest in a non-established business and that, once he had the money, he would have no problem in getting the business off the ground. With respect to repayment, the materials represented that Reynolds’ would receive dividends from the profits made by Hardy Coal. Hardy was to receive a fixed commission. Also, the materials contained language regarding the management of the company; Hardy was to operate as the self-designated manager.

In response to the materials, Reynolds decided to invest in the company. Hardy Coal was thereafter formed as a partnership. However, Hardy was still short on cash and was unable to initiate coal-mining operations. Fearing that Reynolds would learn of the company’s status and that legal complications could arise, Hardy secured several high interest loans hoping that they would be sufficient to get the company up and running. Under the debt arrangement’s

15. See Williamson v. Tucker, 645 F.2d 404, 423 (5th Cir. 1981) (discussing the relevance of the promoter’s expertise in determining investor reliance on his efforts).
16. See S.E.C. v. W.J. Howey Co., 328 U.S. 293, 296 (1946) (discussing how most of issuer’s investors were from distant locations).
17. See United States v. Tucker, 345 F.3d 320, 324 (5th Cir. 2003) (“CEO drafted a PPM with material misrepresentations”).
18. See S.E.C. v. Merchant Capital, LLC, 483 F.3d 747, 752 (11th Cir. 2007).
21. See id.
terms, Hardy Coal was required to pay back the principal if the company ceased to be operational.22

By the time Hardy Coal was operational, coal prices had dropped drastically causing the company to close, thereby tripping the debt covenant that Hardy Coal remain operational. As a result, the entirety of Reynolds’ investment vanished overnight. Hardy has now been indicted for federal securities fraud. Specifically, the indictment alleges that Hardy violated section 10(b) of the Securities Exchange Act and rule 10b-5 by making untrue statements of material facts and by omitting to state material facts.

III. PROSECUTI0NS FOR MISREPRESENTATIONS OR OMISSIONS OF A MATERIAL FACT

Section 10(b) and Rule 10b-5 of the Securities Exchange Act provide the primary cause of action for securities fraud.23 Specifically, section 10(b) prohibits the use or implementation of “any manipulative or deceptive device or contrivance” in connection with the purchase or sale of any security in violation of the securities laws.24 Rule 10b-5(b) was promulgated under section 10(b) and expressly prohibits the making of “any untrue statement of a material fact or to omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading” in connection with the purchase or sale of any security.25

Neither section 10(b) nor Rule 10b-5, standing alone, provide for criminal penalties.26 Rather, section 10(b) and Rule 10b-5 create civil causes of action for violations of the securities law.27 In a civil suit, a plaintiff must show: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”28 Criminal prosecution for securities fraud differs significantly.

In the context of criminal charges, it is best to think of section 10(b) and Rule 10b-5 as providing basis for targeting certain conduct – fraud in connection with

22. See generally David Hahn, The Roles of Acceleration, 8 DePaul Bus. & Com. L.J. 229 (2010) (discussing debt covenant and the principles relating to acceleration of debt where the debtor has tripped a debt covenant).
23. Gross, supra note 8, at 1215.
26. Gross, supra note 8, at 1215.
the purchase or sale of a security. Criminal liability attaches to violations of section 10(b) and rule 10b-5 by virtue of section 32(a), which provides the applicable mens rea, punishment, and defenses. Section 32(a) of the Securities Exchange Act reads in part as follows:

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Thus, in a prosecution for violations of section 10(b) and rule 10b-5, government is required to prove that the defendant acted willfully; proof that the defendant acted recklessly or negligently is insufficient.

By virtue of 32(a), prosecutors are saddled with the additional burden of proving that the defendant acted willfully in making a false or misleading statement – a burden not borne by private claimants, who may establish the required scienter element of section 10(b) by showing that the defendant acted recklessly. However, in another respect, prosecutors have a lesser burden; the government does not need to show that a particular investor relied on the defendant’s misrepresentations in deciding whether to invest.

Consequently, in a criminal prosecution for securities fraud against a private company (i.e. non-reporting) executive, the government must prove: (1) that the interests in question are securities falling within the purview of section 10(b)’s anti-fraud prohibition; (2) that the defendant made a misleading statement of, or an omission of, a material fact; (3) that the fraud was in connection with the sale or purchase of a security; (4) that the fraud was perpetrated through the use of interstate commerce or mails; (5) and that the defendant acted willfully.

32. United States v. O’Hagen, 139 F.3d 641, 647 (8th Cir. 1998).
33. United States v. Behrens, 713 F.3d 926, 929 (8th Cir. 2013).
34. United States v. Desantis, 238 F.3d 424 (6th Cir. 2000).
35. Farrell v. United States, 321 F.2d 409, 419 (9th Cir. 1963).
36. See generally United States v. Tucker, 345 F.3d 320, 324 (5th Cir. 2003) (laying out the elements of criminal securities fraud).
A. Definition of “Security”

To bring a federal criminal prosecution under rule 10b-5 and section 32(a), the prosecution must establish that the underlying instrument is a “security.”

Under section 3(a)(10) of the Securities Exchange Act, a security is defined as:

[*any note, stock, treasury stock, security future, security-based swap, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities.*](38)

Like the almost analogous definition of “security” located in the Exchange Act, section 3(a)(10)’s definition encompasses “the commonly known documents traded for speculation or investment” and instruments of “a more variable character, designated by such descriptive terms as ‘certificate of interest or participation in any profit-sharing agreement,’ ‘investment contract’ and ‘in general, any interest or instrument commonly known as a ‘security.’”

Where the instrument in question clearly falls within one enumerated categories, such as stock, and bears traditional characteristics of that category, the instrument is properly labeled as a security. This near per se inclusion of certain financial instruments is justified, in part, on the basis that those instruments have well-settled meanings, thereby causing purchasers to justifiably assume that the instrument is subject to federal securities laws. Conversely, where an interest arguably fits within one of the more variable

37. *See* Stenhardt Grp. Inc. v. Citicorp, 126 F.3d 144, 150 (3d Cir. 1997) (“In order to invoke the protections of the federal securities laws, an investor must, as a threshold matter, that the instrument in question is a security.”).
40. S.E.C. v. W.J. Howey Co., 328 U.S. 293, 297 (1946); *see also* Steinhardt Grp. Inc., 126 F.3d 150 (“Included in this definition are several catch-all categories which were designed to cover other securities interests no specifically enumerated in the statute.”).
41. Landreth Timber Co. v. Landreth, 471 U.S. 681, 686 (1985) (“Interpretations usually associated with common stock [are] (i) the right to receive dividends contingent upon an apportionment of profits; (ii) negotiability; (iii) the ability to be pledged or hypothecated; (iv) the conferring of voting rights in proportion to the number of shares owned; and (v) the capacity to appreciate in value.”).
42. *Id.* at 690; *see also* United Housing Found., Inc. v. Forman, 95 S. Ct. 2051, 2059 (1975) (reasoning that where an instrument bears a traditional title, such as stock, it is probably covered by the definition).
44. *See Landreth*, 471 U.S. at 692.
categories in section 3(a)(10)’s definition — such as investment contract — courts have followed the Supreme Court’s analysis in S.E.C. v. Howey to determine whether a particular interest constitutes an investment contract and thus a security.45 Notably, partnership and LLC interests do not fall within one of the enumerated categories.46 Accordingly, they are also analyzed under Howey when determining whether or not those interests constitute securities.47

Under Howey, as articulated in 1946, “an investment contract . . . means a contract, transaction or scheme [1] whereby a person invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party.”48 Over the years, Howey’s definition of investment contract has been modified, particularly the third prong. Today, the investor must be led to expect profits predominately49 from the managerial/entrepreneurial efforts of others.50 Each prong of Howey will be addressed in turn.

1. Investment of Money with Expectation of Profit

Although a literal reading of Howey requires that an investor invest money, courts have also held that the investment prong of Howey is satisfied when the investor exchanges goods and/or services or promissory notes in return for the interest in question.51 Similarly, the prong requiring that investors be attached by profit has been interpreted quite broadly; profits mean either capital appreciation through the management of the original investment52 or participation in earnings derived from use of the investors’ investment.53 Due to this broad definition of profits, perhaps it is more useful to articulate when investors are not motivated by the expectation of profits. For example, where an investor purchases an interest

46. See Williamson v. Tucker, 645 F.2d 404, 419 (5th Cir. 1981).
47. Id.
49. S.E.C. v. Life Partners, Inc., 87 F.3d 536, 545 (D.C. Cir. 1996) (“Lower courts have given the Supreme Court’s definition of a security broader sweep by requiring that profits be generated only ‘predominantly’ from the efforts of others.”); see also Williamson, 645 F.2d at 417 (“Although the Court used the word ‘solely’ in the Howey decision, it should not be interpreted in the most literal sense. The Supreme Court has repeatedly emphasized that economic reality is to govern over form and that the definition of the various types of securities should not hinge on exact and literal tests.”).
50. Williamson, 645 F.2d at 419 (defining an investment contract as “an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.”).
51. Gross, supra note 8, at 1233.
for personal use or consumption, the expectation of profits prong is not satisfied.\textsuperscript{54}

2. Common Enterprise

Under the second prong of \textit{Howey}, investor funds must have been invested in a common enterprise.\textsuperscript{55} This prong focuses on the degree to which a particular investor’s success is related to the success or failure of others in the enterprise.\textsuperscript{56} Although all require some degree of commonality, circuit courts have adopted different standards for determining whether a common enterprise exists.\textsuperscript{57}

The majority of circuit courts have applied what is referred to as “horizontal commonality.”\textsuperscript{58} Under horizontal commonality, a common enterprise exists if there is a pooling of investor funds and profits and losses are shared among investors.\textsuperscript{59} In other words, the investors share equally in the enterprise’s success or failure.\textsuperscript{60} Furthermore, horizontal commonality “is not satisfied by a transaction solely between a promoter and a single investor.”\textsuperscript{61} Consequently, the failure to show a pooling of investments by multiple investors from which profits and losses are shared will result in a finding that the investor interests in question are not securities.\textsuperscript{62} Thus, those investors do not receive the protection of the securities laws.\textsuperscript{63}

Conversely, other circuit courts only require some type of vertical commonality for \textit{Howey’s} common enterprise requirement to be met.\textsuperscript{64} Vertical

\textsuperscript{54} United Housing Found., Inc. v. Forman, 421 U.S. 837, 853 (1975) (holding that, because the plaintiffs had purchased “stock” in the housing cooperative with a view to reside in the cooperative and because the initial investment could in no way appreciate, a security did not exist).


\textsuperscript{56} Gross, \textit{supra} note 8, at 1234.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Steinhardt Group Inc. v. Citicorp, 126 F.3d 144, 151 (3d Cir. 1997); see also Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994) (“A common enterprise within the meaning of \textit{Howey} can be established by a showing of ‘horizontal commonality’: the tying of each individual investor’s fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits.”).

\textsuperscript{60} Union Planters Nat. Bank of Memphis v. Commercial Credit Bus. Loans, Inc., 651 F.2d 1174, 1183 (6th Cir. 1981) (“A horizontal common enterprise . . . requires a heightened degree of affiliation. Horizontal commonality ties the fortunes of each investor in a pool of investors to the success of the overall venture . . . a finding of horizontal commonality requires a sharing or pooling of funds.”).


\textsuperscript{62} See Hirk v. Agri-Research Council, Inc., 561 F.2d 96, 102-103 (7th Cir. 1977) (holding that, unless horizontal commonality exists, a profit sharing agreement does not constitute a security).

\textsuperscript{63} Id.

\textsuperscript{64} Gross, \textit{supra} note 8, at 1234.
commonality has been bifurcated into two categories: strict vertical commonality and broad vertical commonality. The first type – strict vertical commonality – “requires that the fortunes of investors be tied to the fortunes of the promoter.” Currently, the Ninth Circuit is the only circuit to expressly adopt strict vertical commonality. Under the strict-vertical-commonality approach, investor funds need not be pooled for a common enterprise to exist. Rather, strict vertical commonality requires only that the prospects of investors be tied to those of the promoter. However, where a promoter receives a fixed commission – one that is not dependent on investors’ success or failure – strict vertical commonality, without more, is not satisfied.

The second type – broad vertical commonality – requires that investor fortunes merely be linked to the efforts or expertise of the promoter. Investor success need not be tied to the “success” of the promoter. Rather, contrary to strict vertical commonality, a common enterprise may exist under broad vertical commonality where the promoter receives a flat fee, irrespective of investor success. Because broad vertical commonality, due to its breadth, will often categorize certain investor interests to be securities even though a common enterprise would not exist under other commonality standards, broad vertical commonality has been criticized on the basis that it “effectively eliminates

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65. Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994) (“Two distinct kinds of vertical commonality have been identified: ‘broad vertical commonality’ and ‘strict vertical commonality.’”).
66. Id. at 87-88.
67. Gross, supra note 8, at 1234.
68. Hocking v. Dobbs, 885 F.2d 1449, 1459 (9th Cir. 1989) (“The Ninth Circuit accepts either traditional horizontal commonality or, when no pooling among investors is present, a strict version of vertical commonality.”).
71. S.E.C. v. ETS Payphones, Inc., 408 F.3d 727, 732 (11th Cir. 2005); see also S.E.C. v. Cont’l Commodities Corp., 497 F.2d 516, 522 (5th Cir. 1974) (“[T]he critical inquiry is confined to whether the fortuity of the investments collectively is essentially dependent upon promoter expertise.”).
72. Id.
73. Long v. Shultz Cattle Co., Inc., 881 F.2d 129, 141 (5th Cir. 1989) (“[T]he necessary interdependence may be demonstrated by the investors’ collective reliance on the promoter’s expertise even where the promoter receives only a flat fee or commission rather than a share in the profits of the venture.”).
entirely the second prong of the Supreme Court’s three-part *Howey* test.” 74 Despite this criticism, the Fifth and Eleventh circuits continue to employ a broad-vertical-commonality standard when determining whether a common enterprise exists under *Howey*. 75

It is worth noting that simply because an investment scheme is fraudulent and investor funds were never pooled does not mean that the interest is not security. 76 Rather, “it is enough that the [parties] merely offer the essential ingredients of an investment contract.” 77

In sum, depending on the type of commonality required, if a common enterprise is found, courts will then decide if investor profits were predominately dependent upon the managerial efforts of others. 78

3. Profits to be Derived Predominately from the Efforts of Others

A literal reading of *Howey* requires that investor profits be derived solely from the efforts of others. 79 However, in order to ensure broad protection of the public under security laws, courts have deviated from the *Howey* standard of “solely” and have required that profits “be generated only ‘predominately from the efforts of others.’” 80 This departure from the language of *Howey* has been justified on the basis that a promoter could escape liability under securities acts by giving investors some modicum of control over their investment. 81

a. Definition of “Efforts”

The term “efforts,” under the third prong of *Howey*, has special meaning. First, courts have drawn a distinction between managerial/entrepreneurial efforts

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74. *Id.* at 86; *see also* Wals v. Fox Hills Dev. Corp., 24 F.3d 1016, 1018 (7th Cir. 1994) (reasoning that horizontal commonality is more consistent with the purposes of the Exchange Act of 1933 than the approach of other circuits, which require less than a pooling of assets).

75. *Id.* at 140 (noting that the Fifth and Eleventh circuits have expressly rejected horizontal commonality as the standard for determining the existence of a common enterprise and have instead analyzed the question of common enterprise under broad vertical commonality).

76. *See S.E.C. v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (“It would be a considerable paradox if the worse the securities fraud, the less applicable the securities laws.”).


80. *Life Partners, Inc.*, 87 F.3d at 545; *see also S.E.C. v. Glenn W. Turner Enters.*, Inc., 474 F.2d 476, 482 (9th Cir. 1973) (“In assessing whether the third prong of *Howey* is satisfied, the proper standard is whether the efforts made by those other than the investor are the undeniable significant ones, those essential managerial efforts which affect the failure or success of the enterprise.”).

and those that are ministerial in nature. Some courts have also distinguished between pre-purchase and post-purchase and have considered only the latter as “efforts” within the meaning of *Howey*. S.E.C. v. *Life Partners, Inc.* is the seminal case on the issue of whether efforts are managerial or ministerial and on the distinction between pre-purchase and post-purchase efforts. *Life Partners Incorporated* (“LPI”) sold interests in life insurance policies of terminally ill patients to investors at a discounted rate. LPI handled pre-purchase portions of the transaction, including locating the insured. After selling an interest in a policy, LPI offered some post-purchase services, including “holding the policy, monitoring the policy, monitoring the insured’s health, paying premiums . . . and assisting” investors conduct resales.

In assessing whether investors predominately relied on the efforts of others, the *Life Partners* court held that pre-purchase services performed by LPI were not “efforts” within the meaning of *Howey*, as those services were already calculated into the purchase price of the investment. After narrowing the analysis to LPI’s post-purchase efforts, the court considered the issue of whether those efforts were managerial or ministerial in nature.

Contrary to ministerial or clerical efforts, which are insufficient by themselves, managerial efforts are those that affect the ultimate success or failure of the enterprise. In *Life Partners*, “because the only variable affecting profits is the timing of the insured’s death” – a variable clearly outside of LPI’s control – and because the post-purchase efforts by LPI were ministerial in nature, the court held that the interests were not securities.

Although the difference between managerial and ministerial efforts is a widely accepted distinction, several courts, following Judge Wald’s dissent in

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82. *Life Partners, Inc.*, 87 F.3d at 545.
84. Id. at 538.
85. Id. at 545.
86. Id.
87. Id. at 547 (“[I]f the value of the promoter’s efforts has already been impounded into the promoter’s fees or into the purchase price of the investment, and if neither the promoter nor anyone else is expected to make further efforts that will affect the outcome of the investment, then the need for federal securities regulation is greatly diminished.”).
88. Id. at 545.
90. Id. at 545.
91. Id. at 548.
Life Partners,93 have rejected the distinction between pre-purchase and post-purchase efforts.94

b. Investor Efforts

As previously noted, under the third prong of Howey, the profits must be derived predominately from the efforts of others.95 Predominance boils down to "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise."96 Thus, nominal efforts on the part of investors will not necessarily result in a finding that the third prong of Howey has not been met, provided that investors’ efforts "have little direct effect upon receipt by the participant of the benefits promised by the promoters."97

The issue of investor control becomes important in assessing whether they have the ability to effectuate managerial decisions. In determining whether investors have sufficient control over their investment and thus do not need the protection of securities laws, courts look to amount of control that investors retain under the terms of any written agreement between investors and the promoter98 and whether investors have the practical ability to exercise such control.99 Where investors have both the legal and practical ability to control an investment, a security will not be found.100

93. Life Partners, Inc., 87 F.3d at 557 ("I believe that the majority’s position, precluding pre-purchase managerial activities of a promoter from ever satisfying the third prong of the Howey test, is unwarranted and will serve to undercut the necessary flexibility of our securities laws.").
94. See S.E.C. v. Tyler, 2002 WL 32538418 (N.D. Tex. 2002) ("Even if the investors did not know or rely upon Defendants’ post-purchase activities in creating a secondary market to provide liquidity to the investment, investors relied upon Defendants’ promises that such liquidity was available."); see also Wuliger v. Christie, 310 F. Supp. 2d 897, 903 (N.D. Ohio 2004) ("Although the issue raised in Life Partners has not had occasion to be addressed by the Sixth Circuit, this Court does not find the analysis by the D.C. Circuit to be persuasive.").
96. Steinhardt Grp., Inc. v. Citicorp, 126 F.3d 144, 152 (3d Cir. 1997).
97. Id. at 153.
98. See Albanese v. Fl. Nat. Bank of Orlando, 823 F.2d 408, 410 (11th Cir. 1987) ("[T]he crucial inquiry is the amount of control that the investors retain under their written agreements."); see also Gross, supra note 8, at 1237-38 ("To determine whether investors expected profits solely from the efforts of a promoter or third party, courts look at general partnership documents, incorporation documents, or contractual documents because these materials often elucidate whether the expectation exists that profit for all parties will be generated through the promoter’s efforts or that profit for the purchaser will be generated through the purchaser’s own efforts.").
99. Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981) ("[Investors] may have the legal right to replace the manager, but they could do so only by forfeiting the management ability on which the success of the venture is dependent.").
100. See id.
In the partnership context, general partnership interests are presumed not to be securities, whereas limited partnership interests are strongly presumed to be securities. A general partner may establish that its interest is a security if the general partner can show that:

(1) an agreement among the parties leaves so little power in the hands of the partner or venturer that the arrangement in fact distributes power as would a limited partnership; or (2) the partner or venturer is so inexperienced and unknowledgeable in business affairs that he is incapable of intelligently exercising his partnership or venture powers; or (3) the partner or venturer is so dependent on some unique entrepreneurial or managerial ability of the promoter or manager that he cannot replace the manager of the enterprise or otherwise exercise meaningful partnership or venture powers.

Unless it can be established that some agreement or circumstance has effectively stripped control away from a general partner, that partner’s interest is not a security. Conversely, a limited partnership interest will generally be a security, unless some arrangement empowers the limited partner to exercise more than nominal control.

In summary, before a successful federal prosecution for securities fraud can be undertaken, the government is required to show that securities laws apply in the first place. This requires proof that the interest in question falls within the definition of security as embodied in section 3(a)(10) and, where the interest does not fall within one of the enumerated categories, that the economic realities underlying interest warrants federal securities law application.

101. Id; see also S.E.C. v. Merchant Capital, LLC, 483 F.3d 747, 755 (11th Cir. 2007) (“A general partnership interest is presumed not to be an investment contract because a general partner typically takes an active part in managing the business and therefore does not rely solely on the efforts of others.”).

102. Stowell v. Ted. S. Finkel Inv. Servs., Inc., 489 F. Supp. 1209, 1219 (S.D. Fla. 1980); but see Goodman v. Epstein, 582 F.2d 388, 406 (7th Cir. 1978) (noting that limited partnership interest under Illinois are, as matter of law, securities).

103. Williamson, 645 F.2d at 424.

104. Id.

105. See Steinhardt Grp., Inc., v. Citicorp, 126 F.3d 144, 153-154 (3d 1997) (holding that where a limited partner has control over the business plan and ability to remove the general partner, that limited partner does not hold a security, as the limited partner is not predominately relying on the efforts of others).

106. United States v. Brown, 578 F.2d 1280, 1284 (9th Cir. 1978) (holding that government is required to prove that the interest in question is in fact a security).

B. Misrepresentation or Omission of a Material Fact

After establishing that the security acts apply through proof that the interests in question are securities, the government, in a prosecution under rule 10b-5(b), is required to prove that the defendant made an “untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading[].” A misrepresentation or omission is an act or statement that would be misleading to the reasonable investor. Thus, under the express terms of the rule, the government is required to prove that the statement or omission concerned a material fact.

1. Materiality

Materiality cannot be reduced to a formulaic standard. Rather, materiality is a fact intensive inquiry that recognizes no hard-and-fast rules. The United States Supreme Court addressed the issue of materiality in Basic, Inc. v. Levinson. In Basic, the Court considered whether the corporation violated rule 10b-5 when it had denied the existence of preliminary merger negotiations. The corporation argued that the negotiations could not be material as there was no agreement-in-principle.

The Court rejected the corporation’s proposed bright-line test and held that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable investor would consider the information important in making investment decisions.” Stated differently, materiality requires “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available.” In enunciating the test for materiality, the Court was

110. See United States v. Elliot, 711 F. Supp. 425, 432-33 (N.D. Ill. 1989); see also Basic, Inc. v. Levinson, 485 U.S. 224, 238 (1988) (“[I]n order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.”).
111. See Basic, Inc., 485 U.S. at 236 (rejecting Basic’s proposed agreement-in-principle test for determining the materiality of merger negotiations, on the basis that materiality “requires delicate assessments of the inferences a ‘reasonable shareholder; would draw from a given set of facts’”).
112. Id. (“Any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive.”).
113. Id. at 224.
114. Id. at 228.
116. Id. at 231 (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).
117. Id.
cautious not to set the threshold too low because such a standard may encourage drowning shareholders in trivial information.\(^\text{118}\)

Having articulated the proper standard for assessing the materiality of merger negotiations,\(^\text{119}\) the Court remanded the case to determine whether the company’s denial of merger negotiations constituted a misrepresentation of material fact sufficient to support liability under rule 10b-5.\(^\text{120}\)

2. Duty to Disclose Information

In situations where the defendant is charged with having made an affirmative misrepresentation of a material fact, courts do not consider whether the defendant was under a duty to disclose such information.\(^\text{121}\) Generally, in the private company context, there is no duty to disclose material information.\(^\text{122}\) As the Supreme Court indicated in *Chiarella*, “[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.”\(^\text{123}\) However, if a corporate manager voluntarily makes a statement, a duty arises to disclose other facts necessary to make the statement not misleading.\(^\text{124}\) Thus, where a defendant volunteers information and omits to state a material fact, the omission can serve as the basis for criminal liability.\(^\text{125}\)

If the government can prove that the defendant – whether the defendant is a company manager or the company itself\(^\text{126}\) – made either an affirmative misrepresentation of a material fact or omitted to state a material fact, the.

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118. *Id.*
119. *Id.* at 239 (holding that, with respect to speculative events, such as merger negotiations, materiality depends on the probability that the event will occur and the magnitude of the event in relation to the company’s other activities).
121. *See* Deutschman v. Beneficial Corp., 841 F.2d 502, 506 (3d Cir. 1988) (holding that, contrary to a 10b-5 claim based on the omission of the material fact, where the defendant is alleged to have made affirmative misrepresentations of material facts, a duty to disclose need not exist); *see also* In re Green Tree Fin. Options Lit., 2002 WL 1752209 (D. Minn. 2002) (“[A]n action by an option holder alleging affirmative misrepresentation falls squarely within the parameters of Section 10(b).”).
123. *Id.; see also Basic, Inc.*, 485 U.S. at 239, n. 17 (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”).
124. *See* In re K-tel Intern., Inc., 300 F.3d 881, 897 (8th Cir. 2002); *see also* Sailors v. Northern States Power Co., 4 F.3d 610, 612 (8th Cir. 1993) (“A duty arises . . . if there have been inaccurate, incomplete or misleading disclosures.”).
125. *See* Chiarella, 445 U.S. at 235.
126. *See* Gross, *supra* note 8, at 1218 (discussing the ways in which a company can be held liable for statements made by insiders and those made by third parties, with whom the company has become entangled).
government is then required to prove that the misrepresentation was made in connection with the purchase or sale of a security.\textsuperscript{127}

C. \textit{In Connection with the Purchase or Sale of a Security}

In order to successfully prosecute securities fraud, a transaction must have occurred – thus, the Securities Exchange Act’s definitions of purchase and sale come into play.\textsuperscript{128} Under sections 3(a)(13) and 3(a)(14), a purchase or sale of security does not need to be for value.\textsuperscript{129} Provided that the instrument in question falls within the statutory definition of a security, courts have broadly interpreted the in connection with requirement of rule 10b-5. Under the so-called “de minimis touch test”, the alleged misrepresentation need only touch upon the purchase or sale of a security.\textsuperscript{130} In other words, the fraud employed need only “be of a sort that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation’s securities.”\textsuperscript{131}

Furthermore, the misrepresentation need not relate to the specific securities sold or purchased – rather, it is enough that the fraud and sale or purchase of a security coincide.\textsuperscript{132} Because courts have employed a broad interpretation of the in connection requirement, few prosecutions fail for not meeting the in connection requirement.\textsuperscript{133}

D. \textit{Use of Any Means or Instrumentality of Interstate Commerce or Mails}

As a predicate to pursuing an action for securities fraud, the government is required to prove that the defendant perpetrated the fraud through “use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.”\textsuperscript{134} Unlike securities registered on national

\textsuperscript{127} See 17 C.F.R. § 240.10b-5 (2013).
\textsuperscript{128} See Gross, supra note 8, at 1224.
\textsuperscript{130} Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1029 (6th Cir. 1979).
\textsuperscript{131} S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968); see also United States v. Persky, 520 F.2d 283, 288 (2d Cir. 1975) (upholding the accuracy of the district court’s jury instruction on the connection with requirement which read: “It is sufficient if the Government shows that from the period between July 1, 1970, and March 31, 1971, there were purchases or sales or both of shares of Micro, and that the device or scheme employed or act or practice was of a sort that would cause reasonable investors to rely thereon[.]”).
\textsuperscript{133} Mansbach, 598 F.2d at 1029 (“[F]ew cases . . . have been dismissed for failure to satisfy the “in connection with” requirement of s 10(b) and Rule 10b-5.”).
\textsuperscript{134} See 17 C.F.R. § 240.10b-5.
securities exchange, over which the federal government has independent jurisdiction, the government must establish that the defendant used mails or means of interstate commerce in furtherance of the fraud.

Although this jurisdictional hook may seem burdensome, courts have held that federal jurisdiction is present where “the instrumentality itself is an integral part of an interstate system” – such as intrastate telephone lines or communications via email – and where such instrumentality was used in furtherance of the fraud.

Similarly, intrastate use of mails, when such use was in furtherance of the alleged fraud, is sufficient to confer federal jurisdiction. Furthermore, “[t]he use of mails need not be in actually transmitting the fraudulent representation to establish federal jurisdiction for a Rule 10b-5 action.” Rather, the defendant must simply use mails or cause mails to be used in furtherance of the fraudulent conduct, such as mailing payments for the securities at issue.

Lastly, courts have also held that use of interstate highways or airways is sufficient to establish federal jurisdiction under section 10(b) and rule 10b-5.

E. Proof that the Defendant acted Willfully: Mechanics of Section 32(a)

Under section 32(a) of the Securities Exchange Act of 1934, criminal liability for violations of the securities laws is only imposed if the government can prove beyond a reasonable doubt that the defendant acted willfully.

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136. See Alley v. Miramon, 614 F.2d 1372, 1379 (5th Cir. 1980) (“The critical questions [is] whether Miramon used instrumentalities of interstate commerce or the mails in defrauding Alley”).
137. Id. (holding “that the intrastate use of the telephone may confer jurisdiction over a private action under Section 10(b) and Rule 10b-5.”); see also Gower v. Cohn, 643 F.2d 1146, 1151 (5th Cir. 1981) (holding that an intrastate phone call made in furtherance of scheme to defraud is sufficient to confer jurisdiction under 10(b)); S.E.C. v. Solucorp Inc., 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003) (holding that email communications are instrumentalities of interstate commerce).
140. See Alley, 614 F.2d at 1379-80 (holding that federal jurisdiction existed where the defendant prompted another to use mails in furtherance of the fraud and such use was a direct and foreseeable result of the defendant’s request).
141. Id. (citing Myzel v. Fields, 386 F.2d 718, 728 (8th Cir. 1967)).
142. United States v. Kunzman, 54 F.3d 1522, 1527 (10th Cir. 1995).
143. See 15 U.S.C. § 78ff(a); see also United States v. O’Hagan, 139 F.3d 641, 647 (8th Cir. 1998) (holding that “a negligent or reckless violation of the securities law cannot result in criminal liability; instead, the defendant must act willfully.”); Joan MacLeod Heminway, Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud under Rule 10B-5, 2 J. BUS. & TECH. 3, 5 (2007) (“[T]he burden of proof in criminal actions under the federal securities laws is the higher ‘beyond a reasonable doubt standard.’”).
Examination of what showing courts require to establish this element, as well as potential defenses to it, is instructive.

1. Definition of “Willfully”

“Willfully” has been interpreted as requiring proof that the defendant intentionally committed a wrongful act. However, in establishing that the defendant acted willfully, the government is not required prove “that the defendant knew of a particular securities law or S.E.C. rule prohibiting his actions.” Rather, the prosecution need only establish that the defendant knew that his actions were wrongful – not that the defendant knew his actions to be unlawful.

Without more, if the government can prove beyond a reasonable doubt all of elements of rule 10b-5 and that the defendant willfully violated the rule’s anti-fraud prohibition, the defendant may be fined up to five million dollars. However, criminal liability under the securities laws is limited, because section 32(a) prohibits the imprisonment of any person if they had no knowledge of the rule or regulation they are charged with violating.

2. The “No Knowledge Defense”

Under the express terms of the statute, a criminal defendant in a 10b-5 prosecution can avoid imprisonment, if he can “prove by a preponderance of the evidence that he had no knowledge of the substance of Rule 10b-5.” The “no knowledge defense” does not abrogate the general criminal law doctrine that ignorance of the law is no defense. Rather, in order to launch a successful no knowledge defense, the defendant must prove that he did not know that he was

144. United States v. Behrens, 713 F.3d 926, 929 (8th Cir. 2013) (requiring that the government prove that the defendant intentionally committed a wrongful act).
145. Id.
146. United States v. Dixon, 536 F.2d 1388, 1395 (2d Cir. 1976) (holding that willfulness only requires “that the act be wrongful under the securities laws and that the knowingly wrongful act involve a significant risk of effecting the violation that has occurred.”).
147. United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004) (“[W]illfully as it is used in § 78ff(a) means intentionally undertaking an act that one knows to be wrongful; ‘willfully’ in this context does not require that the actor know specifically that the conduct was unlawful.”).
148. See 15 U.S.C. § 78ff(a) (“Any person who willfully violates any provision . . . shall upon conviction be fined not more than $ 5,000,000); see also Gross, supra note 8, at 1257 (“A successful non knowledge defense . . . does not eliminate the possibility of a conviction or fine; proving lack of knowledge simply means that, if convicted, the defendant will not be imprisoned.”).
150. Id.
151. United States v. Behrens, 713 F.3d 926, 932 (8th Cir. 2013).
152. Id.
acting contrary to law, not merely that the defendant did not know of a particular Securities Exchange Commission ("SEC") rule of regulation.153

In essence, section 32(a)’s no knowledge provision establishes a defense that is more aptly suited for use by defendants charged with technical violations of the securities laws than for those charged with securities fraud, as the latter conduct is inherently criminal.154

United States v. Behrens presents a useful illustration of how limited the no knowledge defense often is in prosecutions for securities fraud.155 In Behrens, the defendant, an owner of a financial investment advising business, solicited clients to loan the defendant money.156 In return, the defendant promised that he would invest the funds in real estate and promised investors a fix rate of return.157 Contrary to his representations, the defendant used the money to support his other businesses and lavish lifestyle.158 Following the defendant’s conviction, the defendant admitted that he knew that it was illegal to fraudulently take money from investors.159 The Eighth Circuit held that such an admission defeated the defendant’s no knowledge defense.160

Thus, the no knowledge defense embodied in the text of section 32(a), as developed by the courts, provides a more a suitable defense to “innocent persons” charged with violating technical rules than to defendants who are shown to have perpetrated fraud.161 It reflects Congress and the courts’ appreciation of the high technicality of the securities acts – and rightfully so.

153. United States v. Knueppel, 293 F. Supp. 2d 199, 204 (E.D.N.Y. 2003) (quoting United States v. Schwartz, 464 F.2d 499, 509 (2d Cir. 1972) for the proposition that "proof of no knowledge of the rule can only mean proof of an ignorance of the substance of the rule, proof that [defendants] did not know that their conduct was contrary to law."); see also Behrens, at 930 ("[T]he no-knowledge provision . . . allow[s] individuals to avoid a sentence of imprisonment if they can establish that they did not know the substance of the SEC rule or regulation they allegedly violated, regardless of whether they understood its particular application to their conduct.").

154. Knueppel, 293 F. Supp. at 204 ("[O]nly violations of rules and regulations of the SEC, and not conduct that is inherently criminal, like the fraud committed here, which may give rise to no knowledge protections."); see also Gross, supra note 8, at 1258 ("[The no knowledge] defense has met with limited success because only the defendant who did not know her conduct was “contrary to law” may use it. The defendant cannot avoid conviction simply by claiming that she was unaware her conduct violated a specific securities regulation.").

155. See generally United States v. Behlens, 713 F.3d 926 (8th Cir. 2013).

156. Id. at 927-28.

157. Id. at 928.

158. Id.

159. Id. at 932.

160. Id. at 931-32 (rejecting the defendant’s theory that “only those with a specific intent to violate a particular SEC rule or regulation are eligible for imprisonment.").

161. See United States v. Knueppel, 293 F. Supp. 2d 199, 204 (E.D.N.Y. 2003) (rejecting the defendants’ no knowledge argument on the basis “that none of [the] defendants is “a totally innocent person” who committed a mere technical violation of an SEC rule or regulation . . . the misappropriation theory of securities fraud liability does not involve the technical violation of a rule.").
F. Prima Facie Case for Criminal Securities Fraud

With respect to prosecutions of securities fraud where the defendant issued unconventional securities, the government is required to prove several elements. First, the government must establish that the interests in question were in fact securities. Because investor interests often do not neatly fall within one of the enumerated categories of securities under section 3(a)(10), the government must show the existence of a security via a Howey analysis. Second, the government must prove that the defendant made an affirmative misrepresentation or omission of a material fact. Third, the fraud must have been perpetrated in connection with the purchase or sale of a security; this requirement is satisfied if the misrepresentation coincided with the sale or purchase or a security. Fourth, the government must prove that the defendant employed means or instrumentalities of interstate commerce. Fifth, the government must prove that the defendant acted willfully - that he intentionally committed a wrongful act.

IV. The Prosecution of James Hardy

Keeping the foregoing legal doctrines in mind, we now return to the prosecution against James Hardy. Federal prosecutors will be able to prove every element of securities fraud, except for the existence of a common enterprise in jurisdictions following horizontal or strict vertical commonality.

A. Investor Interests

In prosecuting Hardy for securities fraud in connection with defrauding Reynolds – the sole investor of Hardy Coal – the government must first prove that Reynolds received a “security” within the meaning of section 3(a)(10). Because the interest in question does not readily fall within one of enumerated categories, the government must show that the interest constitutes a security under Howey.

The first prong of Howey – an investment of money with the expectation of profit – is satisfied, because Reynolds was motivated to invest by the lure of

162. Steinhardt Group, Inc. v. Citicorp, 126 F.3d 144, 150 (3d Cir. 1997).
163. Id. at 151.
166. See Alley v. Miramon, 614 F.2d 1372, 1379 (5th Cir. 1980).
168. See Steinhardt Group, Inc. v. Citicorp, 126 F.3d 144, 150 (3d Cir. 1997).
169. See id. at 151.
Conversely, the prosecution will have a difficult time in proving existence of a common enterprise – the second prong of Howey – in a jurisdiction following horizontal commonality. As noted earlier, under horizontal commonality, the common enterprise requirement of Howey is not satisfied where there is a transaction solely between a promoter and a single investor. Consequently, because horizontal commonality artificially excludes one-on-one transactions, Reynolds did not invest a common enterprise. The absence of horizontal commonality would be fatal to any prosecution against Hardy for securities fraud in most jurisdictions.

Similarly, because Hardy received a fixed commission, strict vertical commonality is not present, as Reynolds’ success or failure was not tied to Hardy’s fortunes. Nevertheless, the common enterprise requirement is satisfied in a jurisdiction following broad vertical commonality, because Reynolds’ profits or losses were linked to Hardy’s expertise in the coal industry and his efforts in running Hardy Coal. Thus, broad vertical commonality is present.

Under the third prong of Howey – profits to be derived predominately from the efforts of others – the prosecution is required to establish that Reynolds’ expectation of profit was dependent upon the managerial efforts of Hardy. Here, Hardy was tasked with running Hardy Coal – a responsibility involving essential managerial efforts that affected “the failure of success of the enterprise.”

However, because Hardy Coal was organized as a partnership – not as a limited partnership or a limit liability company – the law strongly presumes that Reynolds is a general partner in the company and that he did not hold a security. In effect, as a general partner, the law presumes that Reynolds has sufficient control over his investment, and thus does not need the protection of

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170. See Tcherepnin v. Knight, 389 U.S. 332, 339 (1967) (holding that participation in earnings fits within the term profits as used in Howey).
172. See id.
176. See id.
177. See S.E.C. v. Life Partners, Inc., 87 F.3d 536, 545 (11th Cir. 1999).
178. See Steinhardt Grp., Inc. v. Citicorp, 126 F.3d 144, 152 (3d Cir. 1997) (discussing managerial efforts under the third prong of Howey).
179. See Uniform Partnership Act, § 202(a) (1997) (“[T]he association of two or more persons to carry on as co-owners a business for profit forms a [general] partnership, whether or not the persons intend to form a partnership.”).
180. See Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981); see also S.E.C. v. Merchant Capital, LLC, 483 F.3d 747, 755 (11th Cir. 2007) (stating the proposition that general partnership interests are strongly presumed not be securities within the meaning of Howey).
the securities laws. To rebut this presumption, the prosecution would be required to establish the existence of some unique arrangement, which effectively stripped Reynolds of his managerial power, or that Reynolds was somehow particularly dependent upon Hardy. The question becomes “whether the powers possessed by the [general partners] in the [partnership agreement] were so significant that, regardless of the degree to which such powers were exercised, the investments could not have been premised on a reasonable expectation of profits to be derived from the management efforts of others.”

Reynolds did not possess the “legal” ability to remove Hardy as the manager of Hardy Coal or the power to alter the business model of Hardy Coal. Furthermore, Reynolds’ practical ability to replace Hardy was extremely diminished because Reynolds was geographically removed and reliant on Hardy’s particular expertise in the coal mining industry. Thus, the prosecution could rebut the presumption that Reynolds’ general partnership was not a security, as the business arrangement stripped Reynolds of exercising powers typically associated with being a general partner.

In sum, Reynolds’ interest in Hardy Coal possesses all of the attributes of a security, with the exception that Reynolds did not invest in a common enterprise in jurisdictions employing either horizontal or strict vertical commonality. Assuming broad vertical commonality applies, Reynolds’ interest is a security, pursuant to the Howey investment contract standard and therefore the securities acts apply.

B. Material Untrue Statement or Omission

Having demonstrated that Reynolds held a security, the prosecution would then be required to prove that Hardy made an untrue statement regarding, or omitted to state, a material fact. In other words, the prosecution must show that Hardy’s untrue statement to Reynolds that Hardy Coal was operational would have been considered important by a reasonable investor in making the

181. See Merchant Capital, LLC, 483 F.3d at 755.
182. See Williamson, 645 F.2d at 424 (listing the ways in which to rebut the presumption that general partners do not hold securities).
183. Id. at 419.
184. But see Steinhardt Grp., Inc. v. Citigroup, 126 F.3d 144, 154 (3d Cir. 1997) (holding that the plaintiff, a limited partner, did not hold a security, because the plaintiff had the power to approve business plans and veto those from other partners).
185. See Williamson v. Tucker, 645 F.2d 404, 424 (5th Cir. 1981) (holding that investors may be particularly reliant upon a promoter when the promoter has unique expertise).
186. See id. at 424.
187. See Steinhardt Grp., Inc., 126 F.3d at 150.
188. See 17 C.F.R. § 240.10b-5.
The prosecution is not required to establish that Hardy came under a duty to disclose because Hardy’s representations to Reynolds in the promotional materials affirmatively misrepresented the status of Hardy Coal. Hardy’s reluctance to disclose Hardy Coal’s nonoperational status for fear that he would be unable secure Reynolds’ investment is strong evidence that Hardy considered the information important. Moreover, the materiality of Hardy’s untrue statement cannot be persuasively disputed as “reasonable minds cannot differ on the question of materiality” when the misrepresentation concerned core business operations.

C. In Connection with Purchase or Sale of Security Interests in Hardy Coal

After establishing the materiality of Hardy’s untrue statements, the prosecution must show that the untrue statements were made in connection with Reynolds’ purchase of Hardy Coal’s interests. Because reasonable investors would have relied on Hardy’s statement in making their decision to purchase interests in Hardy Coal, and the misrepresentation coincided with the purchase or sale of interests in Hardy Coal, the prosecution will have little difficulty in satisfying “the connection with” requirement.

D. Hardy’s use of Mails in Furtherance of Fraud

This element is straightforward and deserving of short shrift. The prosecution will bear a relatively light burden in showing that federal jurisdiction is present, as Hardy mailed promotional material to Reynolds, who lived in a different state. Thus, because the promotional materials contained the fraudulent statements at

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189. See Basic v. Levinson, 485 U.S. 224, 231 (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 439, 449 (1976) for the proposition that the materiality of a fact depends on whether there was a substantial likelihood that a reasonable investor would have considered the information important).
191. See Abrams & Wofsy v. Renaissance Inv. Corp., 1991 WL 319034 (N.D. Ga. 1991) (holding that the defendant’s failure to disclose the issuer’s general partner’s financial instability was indisputably an untrue statement).
192. See 17 C.F.R. § 240.10b-5.
193. See S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 860 (2d Cir. 1968); see also Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1029 (6th Cir. 1979) (articulating the “de minimis touch” standard used in determining whether fraud was in connection with a purchase or sale of a security).
194. See S.E.C. v. Zanbach, 535 U.S. 813, 822 (2002) (holding that the fraud perpetrated need only coincide with the purchase or sale of a security and that the in connection requirement of 10(b) does not require that the defendant made misrepresentations about the nature of the securities offered or sold).
195. See Mansbach, 598 F.2d at 1029 (asserting the proposition that dismissal is unlikely for failure to satisfy the in connection with requirement, due to the requirement’s broad interpretation).
issue and were mailed to Reynolds, the jurisdictional requirement of 10b-5 is readily met.\textsuperscript{196}

E. Hardy’s State of Mind

The last element that the prosecution is required to prove is that Hardy “willfully” made material misrepresentations.\textsuperscript{197} Willfully requires only that the defendant knowingly committed a wrongful act. It is not necessary that the defendant specifically knew that his conduct was unlawful.\textsuperscript{198} Arguably, Hardy knew that he had acted unlawfully when making the untrue statements regarding Hardy Coal’s operational status; in the facts presented, Hardy’s decision to borrow additional money was prompted by his fear that Reynolds would learn that Hardy Coal was nonoperational and that legal complications could arise. Hardy’s decision to secure additional financing via the high interest loans and conceal the nonoperational status of Hardy Coal from Reynolds “demonstrate[s] his consciousness of guilt”\textsuperscript{199} and is evidence that Hardy realized his acts were wrongful.\textsuperscript{200}

Hardy’s own concerns about the illegality of his actions and attempt to cover up the falsity of his initial representations are evidence that Hardy acted willfully.\textsuperscript{201} Although direct evidence would be damning, the circumstantial evidence of his willful state of mind is ample.

F. Hardy’s “No Knowledge” Defense

Hardy will be convicted and fined if the prosecution can establish the foregoing elements; he may, however, avoid imprisonment if he can “prove by a preponderance of the evidence that he had no knowledge of the substance of Rule

\textsuperscript{196} See Rude v. Cambell Square, Inc., 411 F. Supp. 1040, 1045 (D. S.D. 1976) (citing Boone v. Baugh, 308 F.2d 711 (8th Cir. 1972) for the proposition that, although not required, the transmission of materials containing fraudulent representations via mails is sufficient to confer federal jurisdiction).


\textsuperscript{198} See United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004); see also United States v. Peltz, 433 F.2d 48, 54 (2d Cir. 1970) (“A person can willfully violate an SEC rule even if he does not know of its existence.”); United States v. Brown, 578 F.2d 1280, 1283 (9th Cir. 1978) (holding that willfulness does not require that the defendant had knowledge that specific financial interests at issue were in fact securities within the meaning of the securities acts).

\textsuperscript{199} See United States v. Cassese, 428 F.3d 92, 99 (2d Cir. 2005).

\textsuperscript{200} See United States v. Charnay, 537 F.2d 341, 352 (9th Cir. 1976).

\textsuperscript{201} See Metromedia Co. v. Fugazy, 983 F.2d 350, 364 (2d Cir. 1992) (“[W]illfulness may be established by a showing (1) that the defendant either (a) knowingly made false or materially incomplete misleading statements or (b) made false or materially incomplete misleading statements with respect to facts to which he had deliberately closed his eyes but which he had a duty to see, and (2) that he knew that his statements significantly increased the possibility of a sale of the securities in question.”).
10b-5." But as noted earlier, this defense is limited to situations where the defendant did not know he was acting contrary to law and is more likely to be applicable where the defendant is charged to have violated a highly technical securities rule.

If he asserted a “no knowledge” defense, Hardy would have the burden of proving that he did not know he was acting contrary to law when he made the material misrepresentations – a burden that will difficult for Hardy to overcome, as Hardy’s awareness of impending legal complications tends to suggest that Hardy knew that his actions were illegal. His success in putting forth this defense is doubtful.

F. Summary

Assuming that Hardy is prosecuted in a jurisdiction that only requires broad vertical commonality, the federal prosecutors will have little difficulty in establishing a prima facie case for securities fraud. Yet, due to the lack of horizontal and strict vertical commonality, Hardy would escape criminal liability in a majority of jurisdictions.

V. A CRITIQUE OF HORIZONTAL AND STRICT VERTICAL COMMONALITY

As the above analysis indicates, notwithstanding the common enterprise requirement, all elements of a criminal 10b-5 action are present in the case of James Hardy. Because a majority of jurisdictions require that either horizontal or strict vertical commonality exist for there to be a common enterprise, any federal prosecution against Hardy in those jurisdictions would fail. This result is undesirable and predicated upon an artificial distinction between enumerated securities and variable securities listed in section 3(a)(10).

To illustrate the discrepancy in how the security laws treat investor interests, consider Landreth Timber Co. v. Landreth. In Landreth, the plaintiff purchased the outstanding stock of a timber company, which had been damaged by a fire. The defendant seller represented that the repair costs would be minimal. After the costs of repairing the timber operation exceeded the defendant’s predications, the plaintiff brought suit under 10b-5. The defendant countered that the

204. See Behrens, 713 F.3d at 932 (rejecting the defendant’s no knowledge argument as his own admissions suggested that he knew that it was unlawful to make material misrepresentations in connection with the disposition of a security).
206. Id. at 683.
207. Id.
208. Id. at 684.
security acts were inapplicable.209 Essentially, the defendant argued that, because the plaintiff had complete control over the enterprise, the plaintiff was not dependent upon the managerial efforts of others within the meaning of Howey.210

The Supreme Court rejected the defendant’s contention that the security acts did not apply.211 According to the Court, because the interests in question were labeled stock and possessed the traditional indicia of stock, the interests were securities.212

Suppose, however, that the defendant had sold the outstanding interests in a partnership. In such a case, the security laws would not apply. Under Howey, a common enterprise would not exist, as horizontal commonality “is not satisfied by a transaction solely between a promoter and a single investor.”213 Contradictorily, a single investor receives the protection of the security laws if he purchased stock.214 Thus, the applicability of the security acts often turns on the nature of the investment instrument used rather on an investor’s relation to the issuer/promoter. As we saw in the case of James Hardy, this distinction and the use of demanding standards – such as horizontal commonality – can defeat an otherwise justified federal prosecution for securities fraud.

Courts can partially remedy this deficiency by adopting broad vertical commonality as the standard for determining whether a common enterprise exists under Howey. First, broad vertical commonality will allow for federal prosecution in cases where a promoter defrauded a single investor – a possibility that is precluded in jurisdictions following horizontal commonality.215 Second, broad vertical commonality will destroy the ability of promoters to include a fixed management fee and thereby defeat a finding of common enterprise – a tactic apparently allowed for under strict vertical commonality.216

VI. CONCLUSION

A single investor holding unconventional securities (i.e. interests subject to Howey) deserves the same level of protection against promoter fraud as afforded to purchasers of privately-placed stock. Rather than focusing on the degree to which an investor’s investment is dependent upon the promoter, horizontal commonality seemingly focuses on the multiplicity of investors. This approach allows fraudulent promoters to skirt the securities laws by targeting a single

209. Id.
210. Id.
212. Id. at 687.
innocent investor. Similarly, strict vertical commonality also facilitates the ability of promoters to bypass securities laws; a promoter can merely employ a fixed management fee arrangement and thereby defeat a finding of common enterprise. Neither of these standards produce desirable results, as they preclude the possibility of prosecuting promoters who defrauded one investor.

Accordingly, the current securities landscape would undoubtedly benefit from rejection of horizontal and strict vertical commonality as common enterprise standards. Courts should move toward adopting broad vertical commonality. This movement can equalize the securities laws’ protection of investors and remove avenues through which promoters can evade the law. In such a vulnerable area of the American economy, the need for such protection is evident.