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PSYCHODYNAMICS OF THE JUDICIAL PROCESS……… Sahand Shaibani

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YELLOW JUSTICE: MEDIA PORTRAYAL OF CRIMINAL

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Letter from the Founders

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The separation of the professional schools of law, business, and medicine from the rest of the academic community has perhaps carried over to the realm of intellectual discourse. To address this problem, the *Journal* was formed to bridge the gap between the study of law and other academic disciplines. The cross-pollination of different academic perspectives furthers a broader and deeper understanding of the relevant problems, questions, and interpretations facing modern society and human existence. Indeed, approaching an issue from different analytical and substantive frameworks is vital to a more total understanding. Accordingly, the *Journal* selects publications based on their interdisciplinary contribution to the study of law as well as their appeal to scholars in the social sciences and the humanities.

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*Sahand Shaibani*

*Laura Engelhardt*  
*Carl Flink*

*Ryan Fortson*  
*Derek Roberti*
ESSAY

PSYCHODYNAMICS OF THE JUDICIAL PROCESS

Sahand Shaibani*

In this essay, Sahand Shaibani employs a Freudian psychoanalytic approach to discuss the influence of irrational and emotive forces in the American judicial process. He argues that the adversarial legal process serves the important psychological function of sublimating aggression, and that trial courts present a forum for the recreation of the Oedipal triangle, wherein the judge is unconsciously perceived as a symbolic father-figure onto whom emotional reactions are projected. Mr. Shaibani further argues that judges manipulate the language of precedent to rationalize their inherently irrational decision-making which is often based upon an emotional reaction to a given set of facts. Mr. Shaibani concludes that the psychoanalysis of the American judicial system is likely to stir a sense of chaos in society, but that the pursuit is, nonetheless, worthwhile.

INTRODUCTION

And you, red judge, if you were to tell out loud all that you have already done in thought, everyone would cry, “Away with this filth and this poisonous worm!”¹

Lawyers, judges, and legal scholars have traditionally presumed that humans are rational beings, at least insofar as the law is concerned, and that judicial decision-making is a determinate process characterized by the application of precedent to existing facts in a deductive and logical manner. The presupposition of law’s inherent rationality has led to the eclipse of another dimension of law – the mysterious emotive forces lying beneath conscious awareness that often influence the life of the law without manifesting themselves explicitly. Is it possible that humans are primarily governed by irrational instinctual² impulses, and that the law is a necessary external element that must regulate

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* J.D. Candidate, Stanford Law School, 2000; B.A. Boston University, 1997. The author would like to dedicate this essay to Stanford Law School for its support in creating the Stanford Journal of Legal Studies.

¹ FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 38 (Walter Kaufmann trans., The Modern Library 1995).

² See SIGMUND FREUD, BEYOND THE PLEASURE PRINCIPLE 43 (James Strachey ed., 1961) [hereinafter PLEASURE PRINCIPLE], for Freud’s definition of instinct. Freud writes:
their behavior in order for civilization to persist? Could it be that the law is inherently illogical, although it exists under the pretense of rationality? What of the proposition that judicial decision-making is the fulfillment of personal prejudices of judges rather than the product of ‘legal reasoning based on precedent’? What is the consequence of validating such subversive queries?

This essay uses a Freudian psychoanalytic perspective to introduce a discussion of the influence of irrational and emotive forces in the judicial process. This inquiry is based on the premise that human personality is shaped by the psychodynamics of conscious and unconscious, rational and irrational, as well as the ambivalent emotional and instinctual impulses which interact to determine the outcome of human behavior. This discussion of the judicial process is limited to cases that are likely to stir emotional and idiosyncratic reactions in the participants; adjudication of criminal, tort, family, and constitutional law cases fall within this category.

In Part One, I will discuss the psychoanalytic significance of law’s function as a social mechanism designed to regulate and institutionalize the otherwise violent means of dispute resolution among members of society. In Part Two, the discussion will shift to the psychodynamics of trial court litigation. In Part Three, I will discuss the nature of appellate-level judicial decision-making from a Freudian psychoanalytic view.

I. PSYCHOANALYTIC FUNCTION OF THE ADVERSARIAL LEGAL PROCESS

The idea that law serves the social purpose of regulating the resolution of disputes among members of society in a peaceful and orderly manner is rather obvious. One can imagine the chaos that would ensue in a state where citizens did not have access to an institutional mechanism for resolving their disputes with one another. The parties would have to resort to private vengeance; the stronger party would likely humiliate, extort, and/or physically harm the other. Soon society would revert back to the Hobbesian “state of nature,” characterized by utter lawlessness, absence of justice or ethics, and “such a war as is of every man against every man” wherein “the life of man [is] solitary, poor, nasty, brutish, and short.” Thus, law brings peace and order to society by mandating appropriate forms of action, prescribing punishment for disobedience, and institutionalizing the means for dispute resolution.

Perhaps less obvious is the psychological function served by choosing law as the social mechanism for adjudication. The adversarial legal process serves a very important

But how is the predicate of being ‘instinctual’ related to the compulsion to repeat? . . . It seems, then, that an instinct is an urge inherent in organic life to restore an earlier state of things which the living entity has been obliged to abandon under the pressure of external forces . . . . [T]o put it another way, [an instinct is] the expression of the inertia inherent in organic life.

Id.

psychological function insofar as it results in the sublimation of the aggressive instinct, thereby curbing the path for the expression of the litigants’ hostility towards each other. Before commencing litigation, parties have often reached a point where no other means of resolution seem to exist. They are frustrated, enraged, and filled with “combat feelings” that seek some form of expression. The adversarial legal process allows litigants to express their aggression without resorting to physical violence: “That clients ... try to use litigation as a ‘channel for ... hostile and aggressive impulses’ ... is, of course, hardly surprising, since lawsuits are historically, and even presently, substitutes for private brawls, blood-feuds and the like.” Furthermore, litigation allows the parties’ lawyers to “fight” for their clients—assuming they empathize with their client’s cause—and in this way, the lawyers themselves release aggressive impulses, albeit in sublimated form.

In return for the apparent peaceful solution that the law brings to dispute resolution, there is a corresponding disadvantage bestowed upon citizens by the rule of law: namely, neurosis and unhappiness. From a psychoanalytic view, the renunciation of instincts (in the sense of suppressing innate sexual and aggressive urges) is a necessary prerequisite for joining civilization and upholding lawful society. This repression of instinctual urges increases the unpleasant experience of guilt when one fails to repress fully such unacceptable unconscious tendencies. The renunciation of instincts leads to some degree of neurosis, which in turn results in unhappiness for civilized humanity. Indeed, by becoming members of lawful society, citizens exchange a portion of their happiness—formerly fulfilled through direct instinctual gratification—for the degree of security brought about by the law.

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5 See id. (explaining the “combat feelings” that may motivate attorneys); see also id. at 17 (asserting that “trials not only provide opportunities to express hostility, conscious and unconscious, but may also be instigated at times by this hostility.”).

6 See generally SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey ed., 1961) [hereinafter FREUD, CIVILIZATION].

7 See id. at 84. (noting that, just as the law is the external mechanism employed by civilization for regulation of aggression, the sense of guilt is the internal mechanism employed by the Super-Ego to prevent the fulfillment of the Id’s aggressive impulses, both in fantasy and reality). Freud explains:

His aggressiveness is introjected, internalized; it is, in point of fact, sent back to where it came from—that is, it is directed towards his own ego. There it is taken over by a portion of the ego, which sets itself over against the rest of the ego as super-ego, and which now, in the form of 'conscience', is ready to put into action against the ego the same harsh aggressiveness that the ego would have liked to satisfy upon other, extraneous individuals. The tension between the harsh super-ego and the ego that is subjected to it, is called by us the sense of guilt; it expresses itself as a need for punishment. Civilization therefore, obtains mastery over the individual’s dangerous desire for aggression by weakening and disarming it and by setting up an agency within him to watch over it, like a garrison in a conquered city.

Id. (citation omitted).
Thus, the law forbids members of society to engage in private vengeance, and in its place allows people to release their sublimated aggression through the adversarial litigation process:

This replacement of the power of the individual by the power of a community constitutes the decisive step of civilization. The essence of it lies in the fact that the members of the community restrict themselves in their possibilities of satisfaction, whereas the individual knew no such restrictions. The first requisite of civilization, therefore, is that of justice—that is, the assurance that a law once made will not be broken in favor of an individual . . . The further course of cultural development seems to tend towards making the law no longer an expression of the will of a small community . . . . The final outcome should be a rule of law to which all . . . have contributed by a sacrifice of their instincts, and which leaves no one . . . at the mercy of brute force.\(^8\)

However, this subordinated form of instinctual gratification is not adequate to the Id,\(^9\) whose impulses must be continuously repressed by the Ego\(^10\) in order to obey the internal and external rules of law.

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\(^8\) *Id.* at 49.

\(^9\) The Id is the great reservoir of instinctual energy, containing the passions emanating from the two instincts of sexuality and aggression. The Id is mostly unconscious, though its impulses often emerge to conscious awareness. The Id is governed by the “pleasure principle,” which may be characterized by the assertion “act in the manner which will bring you the most pleasure immediately regardless of the consequences.” See *id.* at 29–30, for Freud’s comments on sublimation. Freud explains:

The task here [in sublimation] is that of shifting the instinctual aims in such a way that they cannot come up against frustration from the external world. In this, sublimation of the instincts lends its assistance. One gains the most if one can sufficiently heighten the yield of pleasure from the sources of psychical and intellectual work. . . . A satisfaction of this kind, such as an artist’s joy in creating, in giving his fantasies body, or a scientist’s in solving problems or discovering truths, has a special quality. . . . But their intensity is mild as compared with that derived from the sating of crude and primary instinctual impulses.

*Id.* Freud further notes: “Sublimation of instinct is an especially conspicuous feature of cultural development; it is what makes it possible for higher psychical activities, scientific, artistic or ideological, to play such an important part in civilized life.” *Id.* at 51.

\(^10\) Freud describes the Ego in the following way:

It is easy to see that the ego is that part of the id which has been modified by the direct influence of the external world . . . [The ego] endeavors to substitute the reality principle for the pleasure principle which reigns unrestrictedly in the id. . . . The ego represents what may be called reason and common sense, in contrast to the id, which contains the passions. . . . Thus in its relation to the id it is like a man on horseback, who has to hold in check the superior strength of the horse; with this difference, that the rider tries to do so with his own strength while the ego uses borrowed forces.
The Ego finds itself in a very difficult position, since it must mediate between the Id’s demand for instinctual gratification, and the Super-Ego’s opposing demand for the renunciation of morally questionable and unacceptable unconscious desires emanating from the Id. In order to protect itself, the Ego employs various defense mechanisms, and simultaneously uses the law as an external instrument for regulating irrational tendencies. The outcome of creating such a complex psycho-legal regulatory network is that judicial processes are inevitably influenced by irrational emotive factors. Indeed, one may speak of the “psychodynamic judicial process,” where chaos is disguised as order, and irrationality disguised as reason. The next section will discuss some of the emotive forces at play during trial.

II. PSYCHODYNAMICS OF TRIAL-COURT LITIGATION

Trial provides various opportunities for all participants to express unconscious parent-oriented emotions that have been repressed since childhood. These emotions are repressed in childhood primarily due to the fact that they are extremely ambivalent, eliciting punishment from the Super-Ego. From a psychoanalytic view, the trial judge can be viewed as a symbolic father figure, who may arouse in the litigants parent-oriented feelings. If the judge is perceived as an unconscious symbolic father-substitute, the litigants may unconsciously displace their parent-oriented feelings onto him. This may take the form of an unconscious wish to physically harm the judge, manifesting itself in conscious hostility toward the judge, particularly if he is ruling against one’s case. A trial judge who uses his discretion to limit a litigant’s chances of winning the case may be perceived as a father who sought to limit the child’s desire for having intimate relations with the mother, thereby evoking the child’s Oedipal feelings of hatred. As Shoenfeld asserts:


11 The Super-Ego is the psyche’s moral agency, comprised of the Ego-Ideal (the agency declaring how I ought to be) and conscience (the agency prescribing moral codes and punishments for violations thereof). See id at 22–36. The Super-Ego is “heir to the Oedipus complex,” created after repression of Oedipal wishes and identification with the same-sex parent. See id.

12 Defense mechanisms are techniques employed by the Ego to reduce anxiety originating from the threat of Super-Ego punishment or the dread of being overwhelmed by the strength of the instincts. Examples include repression, denial, sublimation, projection, and rationalization. See generally ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENSE (rev. ed., 1966) (describing the ways by which the Ego fend off anxiety and assumes control over instinctive impulses).

13 “[D]isplacement is a defense mechanism involves a purposeful unconscious shifting from one object to another in the interest of solving a conflict. Although the object is changed, the instinctual nature of the impulse and its aim remain the same.” JAY KATZ ET AL., PSYCHOANALYSIS PSYCHIATRY AND LAW 157 (1967).

14 For a description of the Oedipus Complex, see FREUD, EGO supra note 10, at 26–27. Freud writes:

In its simplified form the case of a male child may be described as follows. At a very early age the little boy develops an object-cathexis for his mother, which originally
Persons who may serve as unconscious parent symbols (kings, judges, employers and so on) often have displaced onto them repressed parent-oriented feelings that have remained in the unconscious since early childhood; and because . . . a child’s early feelings towards his parents usually range from primitive love to savage hatred, the repressed emotions of early childhood displaced onto parent substitutes are frequently not only affectionate and loving but also angry and hostile . . . . [I]t is conceivable that judges and the courts on which they sit may well constitute the law’s most important unconscious parent symbols.\textsuperscript{15}

In a sense, a child’s parents are his first judges, constructing the family “tribunal” wherein the father’s “law” adjudicates whether the child’s actions are right or wrong, and mandates appropriate rewards and punishments.\textsuperscript{16} If someone had experienced frequent “injustice” in the parental tribunal, then it is not inconceivable that he or she would later view all courts and laws as instruments of oppression designed to perpetuate injustice. Such a litigant would tend to displace feelings of hostility—originating from childhood—onto the judge and the court.

Likewise, someone who has experienced violent abuse during childhood may later perceive all instruments of the law—the police, the judge, and the criminal law—as extensions of the unjust father figure who will forever pursue him to inflict further harm. From this point of view, it is not surprising to observe an uncooperative attitude in criminal defendants toward the criminal justice system. These ideas may shed light on the proposition that an abusive family environment in childhood may be a significant cause of adult criminality.

Furthermore, trial provides an atmosphere where not only litigants but also their lawyers can displace family-oriented feelings onto the judge and opposing counsel. A lawyer who identifies with his client, or at least empathizes with his client’s cause, will often perceive the other side’s counsel as a threat. This rivalry is not simply limited to

\begin{quote}
related to the mother’s breast and is the prototype of an object-choice on the anaclitic model; the boy deals with his father by identifying himself with him. For a time these two relationships proceed side by side, until the boy’s sexual wishes in regard to his mother become more intense and his father is perceived as an obstacle to them; from this the Oedipus complex originates. His identification with his father then takes on a hostile colouring and changes into a wish to get rid of his father in order to take his place with his mother. Henceforward his relation to his father is ambivalent; it seems as if the ambivalence inherent in the identification from the beginning had become manifest. An ambivalent attitude to his father and an object-relation of a solely affectionate kind to his mother make up the content of the simple positive Oedipus complex in a boy.
\textit{Id.} (citations omitted).
\end{quote}

\textsuperscript{15} \textsc{S}HO\textsc{E}NFELD, \textit{supra} note 4, at 35, 40 (citation omitted).

\textsuperscript{16} \textit{See id.} at 42.
the purpose of winning the case, for it may have its origins beyond the immediate court action. The lawyer’s rivalry may be motivated by subconscious tendencies that have been repressed in childhood, turning his case into a personal matter. Specifically, the opposition between each side’s counsel may have its underlying origin in a childhood experience of sibling rivalry that significantly influenced the development of the lawyer’s personality. In such a situation, the trial judge may be a symbolic parental figure for lawyers who subconsciously perceive each other as rival siblings reliving a childhood experience. The lawyers could project parental feelings onto the judge, and depending on which side he favored in the litigation, the projections could range from severe hostility to intense liking. Accordingly, sibling rivalry may be a valid explanation for why opposing counsel at times scream at each other and express hostility toward one another in the courtroom:

A lawyer . . . may on an unconscious level equate the counsel who opposes him with the brother or sister who once competed with him for parental love during childhood. If so, then the likelihood is that angry and hostile feelings of sibling rivalry concerning this brother or sister that he may have repressed during childhood will be displaced onto the opposing counsel; and as a result, he may provoke and actively engage in undignified and unnecessary squabbles with this counsel.\textsuperscript{17}

In addition to litigants and their lawyers, the judge may also subconsciously displace family-oriented emotions onto the trial participants. A trial judge who subconsciously perceives a litigant or lawyer as a symbolic daughter or son would likely displace parental emotions onto the symbolic child-figure. Depending on how the judge views his or her own child and what sort of emotions he or she feels toward the child, the litigant or lawyer who symbolically represents the judge’s child would be subject to familial emotional reactions—ranging from intense like to dislike—from the judge. These ideas could explain a situation where a judge seems to favor one of the litigants over the other, even though the disfavored party has a better argument. Thus, none of the trial participants is immune to the everlasting recreation of the Oedipal triangle,\textsuperscript{18} and the resulting emotional reactions generated therefrom.

### III. Psychodynamics of Appellate-Level Judicial Decision-Making

The legal profession has traditionally held dear the notion that judicial decision-making is a rational and objective process in which the judge applies precedent to existing facts. Indeed, the immense focus on “precedent” and “legal reasoning” within the legal profession has rendered these concepts irrefutable and unquestionable. One may even speak of the propaganda of the American legal culture, which holds all legal processes to be driven by logic, order, and reason. Why has this culture so seldom

\textsuperscript{17} Id. at 44 (citation omitted).

\textsuperscript{18} The everlasting recreation of the Oedipal triangle is due to “repetition compulsion,” an instinctual characteristic which seeks to recreate an original instance of great emotional intensity. \textit{See} \textsc{Freud}, \textsc{Civilization} \textsc{supra} note 6, at 77–78. \textit{See also} \textsc{Freud}, \textsc{Pleasure Principle} \textsc{supra} note 2, at 43.
questioned the presupposition of rational decision-making which all of law seems to be based upon? Could there be another explanation for the process of judicial decision-making?

Judge Jerome Frank offered one in early 20th century:

Lawyers and judges purport to make large use of precedents . . . . But since what was actually decided in the earlier cases is seldom revealed, it is impossible, in a real sense, to rely on these precedents. What the courts in fact do is to manipulate the language of former decisions. They could approximate a system of real precedents only if the judges, in rendering those former decisions, had reported with fidelity the precise steps by which they arrived at their decisions . . . . “Of the many things which have been said of the mystery of the judicial process . . . the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part.”

Jerome Frank’s insight is that judges make their decisions primarily based upon emotional reactions to the facts presented to them in a case, and then use precedent to rationalize their decision. Law’s indeterminacy and contingency lie in the fact that precedent can be interpreted in numerous ways, and that it is often used as justification for a position held by the judge long before he even considers precedent.

Accordingly, from a psychoanalytic point of view, judicial decisions are often made based on the personal prejudices and emotional reactions of judges with respect to a set of facts, and the process of “legal reasoning” is merely a mechanism employed by the Ego to rationalize20 the Id’s irrational prejudices. But why is there such a need for rationalization? Two possibilities present themselves. First, the legal profession and society as a whole idealize the law as the perfect father-figure, and in their search for stability, demand that the law be a coherent and logical set of rules derived from reason. In other words, the Ego seeks to use the law as a further means of bringing order to the chaotic and passionate world of the Id. Second, the legal profession engages in endless rationalization as a means for alleviating the threat of punishment imposed on the Ego for its failure to incorporate the commands of the Super-Ego’s “inward court of law” in laws governing members of society. In other words, if the Ego were to acknowledge explicitly that judicial decision-making is primarily an Id-driven process, then it would be subject to severe punishment from the Super-Ego for allowing instinctual impulses to reach conscious awareness, and worst of all, be the basis for law.


20 Rationalization is a commonly used Ego defense mechanism—the purpose of which is to alleviate the anxiety placed upon the Ego from the threat of Super-Ego punishment—through the justification of morally unacceptable attitudes, beliefs, and desires by the “incorrect application of a truth, or the invention of a convincing fallacy.” Id. at 157.

If judicial opinion-writing is merely a linguistic practice of rationalizing pre-existing attitudes, then a judge engaged in such activity may plausibly be called a sophist. Just as the sophist can make the worse cause appear the better through the use of oratorical skills, a judge engaged in sophistry can make the worse argument appear the better by arguing that it “more accurately conforms to precedent,” and by presenting it as “the law.” As Stanley Fish says, “[opinion writing] is not a mechanism by which decisions are generated, but the complex of rhetorical gestures to which one has recourse when a decision, already made, must be put into presentable form.”

This would lead one to say that judicial opinions codify the perpetuation of a tradition that disguises prejudice as “precedent,” forever passing down arbitrary rules from one judicial generation to the next. In this light, the history of law may be viewed as the history of evolving subjective and socio-cultural prejudices that find verbal expression in legal opinions, “rules of law,” and social reactions thereto formulated in new legislation.

IV. CHAOS & TRUTH V. ORDER & SELF-DECEIT

If law is merely an arbitrary set of rules based on judicial prejudices and emotional reactions, presented under the guise of “legal reasoning based on precedent,” where does that leave us? Should we acknowledge such a subversive psychoanalytic discovery, at the expense of disturbing the normal functioning of the Ego and diminishing our sense of stability in the world? Should we simply disobey whatever law is contrary

Sophism is defined in the following way:

A sophism is a type of fallacy that is not just an error of reasoning, or an invalid argument, but a kind of tactic of argumentation used unfairly to try to get the best of a speech partner. . . . [Sophists were] able to ‘make the weaker argument the stronger’, a claim apparently based on the view that to every thesis there was opposed an equipollent contrary thesis. If all these have equal evidentiary support . . . then it is an appropriate task for the technique of persuasion to devise arguments on either side sufficient for their political or forensic function. . . . Plato is therefore at pains to depict the Sophists as bogus practitioners of philosophy . . . [who] pretended to knowledge that they did not possess, and . . . sought popularity and success by dressing up popular prejudices with a specious appearance of novelty.

Id. See also Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 STAN. L. REV. 871, 888–89 (1989). (describing the skeptic’s view on judicial interpretation of precedent). As professor Moore explains:

[T]he skeptic finds both legal texts (statutes, constitutions) and prior case decisions woefully indeterminate. His judge ‘interprets’ legal texts by finding what he wants in them—for neither nature nor convention binds his interpretive efforts, the words of legal texts becoming mere chameleons in his hands. Because past cases exemplify an infinite number of rules, any choice of rules can be consistent with precedent—so long as one denies, as does the skeptic, that there are any natural kinds or conventional categories that would limit the rules he might choose.

Id. (citations omitted).

Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773, 1790 (1987).
to our liking? Should we set sail in search for truth upon the tumultuous ocean of uncertainty? Or should we rather immure ourselves forever in self-deceit, so that we may live under the shadow of illusory images depicting “law,” “order,” and “justice”?

Auden’s poem brilliantly expresses this paradox:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I’ve told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

Yet law abiding scholars write;
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Goodmorning and Goodnight . . . .

If therefore thinking it absurd
To identify Law with some other word,
Unlike so many men
I cannot say Law is again,
No more than they can we suppress
The universal wish to guess
Or slip out of our own position
Into an unconcerned condition.
Although I can at least confine
Your vanity and mine
To stating timidly
A timid similarity,
We shall boast anyway:
Like love I say.

Like love we don’t know where or why,
Like love we can’t compel or fly,
Like love we often weep,
Like love we seldom keep. 24

Hegel remarks somewhere that all facts and personages of great importance in world history occur, as it were, twice. He forgot to add: the first time as tragedy, the second time as farce. . . . Men make their own history but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past.¹

What does it mean to make a farce of history? A farce occurs when a commonly accepted story or situation is twisted in such a way as to make it appear ridiculous. To suggest that history can be mocked, then, requires that there be some way of distinguishing between valid and invalid interpretations of history. In attempting to make this distinction, however, one runs into the problem of all interpretations necessarily containing a large subjective element, thus calling any supposed validity they may have into question.² In law, this problem is compounded by the fact that when addressing legal precedence, one interprets cases, which are themselves interpretations of events. In other words, the judge is forced to provide an interpretation of an interpretation. In a cultural milieu in which even scientific inquiry is thought by some to be historically contingent and socially conditioned,³ is it possible to come to a common understanding of history


² There is a large debate within historiography over the validity of historical inquiry. I will not delve into this debate here except to the extent that it bears upon the questions of jurisprudence raised by Posner’s talk.

³ See Thomas S. Kuhn, The Structure of Scientific Revolutions 160–173 (3d ed. 1996) (arguing for an “evolutionary view of science” which conceives science as evolving from “primitive beginnings” to a more refined and detailed understanding of nature and an efficient research methodology through shifts in...
against which a farcical interpretation can be constructed? Should one even be concerned about the validity of history as a necessary component of legal decision-making?

Richard Posner answers these questions in the negative in his talk “Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship” by taking the position that history is just a database and contains no normative value in and of itself. There can be no agreement upon a common understanding of history because history contains no internal coherence other than what is provided by its later interpreters. “History in the narrow sense of what happened does not reveal meaning.”

Because the interpreters of history cannot escape their own biases, they use history as a mask to justify their own ideological positions. As such, history, in the form of legal precedence, should not be determinative of the decisions that judges make but only one factor among many that judges should consider. This position must be viewed against Posner’s claim that law has traditionally been “the most historically oriented” of all professions. By rejecting the determinative weight of history, Posner argues for a jurisprudence radically different from that which predominates today. The jurisprudence Posner advocates continues his project of advancing a pragmatist theory of adjudication.

Posner begins his talk by discussing Friedrich Nietzsche’s essay “On the Uses and Disadvantages of History for Life,” which Posner calls one of the founding documents of pragmatism. Nietzsche distinguishes between history as a simple chronology of events and history as a way of relating to and interpreting past events. It is this second sense in which Nietzsche and Posner are interested. In order to introduce the pragmatic view of history, Posner outlines three main points of Nietzsche’s critique of an over-reliance on history: 1) A scientific study of history is disillusions because it creates a false sense of the nobleness of past events, giving the impression that the greatness of the past can be replicated in the present when in fact this almost invariably ignores the contingency and unpredictability of all history:

Scientific “paradigms,” but as not evolving toward anything, nor becoming closer to the truth: “We may, to be more precise, have to relinquish the notion, explicit or implicit, that changes of paradigm carry scientists and those who learn from them closer and closer to the truth.”) Id. at 170.


5 Id. at 1.

6 In making this assessment, Posner overlooks Nietzsche’s discussion of time as “eternal recurrence,” in which one wishes for the perpetual repetition of the past as a way of affirming the path that one has chosen in life. See generally ALEXANDER NEHamas, Nietzsche: Life as Literature (1985). However, there is a great deal of dispute as to what Nietzsche’s eternal recurrence means, and given that Posner interprets Nietzsche as putting the past at the service of the present, it is not entirely clear that the assessment just given would be inconsistent with the one offered by Posner. See Posner, Past-Dependency, supra note 4, at 6.

As long as the soul of historiography lies in the great *stimuli* that a man of power derives from it, as long as the past has to be described as worthy of imitation, as imitable and possible for a second time, it of course incurs the danger of becoming somewhat distorted, beautified and coming close to free poetic invention.\textsuperscript{8}

In its stead, Nietzsche proposes a “critical”\textsuperscript{9} mode of regarding the past “in the service of life,”\textsuperscript{10} namely, a historiography that “scrupulously”\textsuperscript{11} examines the past for the purpose of tearing it down and revealing its inadequacies. 2) History breeds complacency by convincing the historian that her current age is better than all previous ages.\textsuperscript{12} Nietzsche rejects this notion of moral progress in favor of a historicism that does not seek to find transcendence in its purely local circumstances, noting that objectivity does not arise from judging the opinions and deeds of the past according to standards of the present.\textsuperscript{13} 3) A “lively consciousness of the past”\textsuperscript{14} creates a sense of “belatedness”\textsuperscript{15} among people of the present because the view that everything in the present is an outgrowth of the past under-appreciates the role of genius in initiating change. This problem is exacerbated by the increasing specialization of those in academia. A lack of breadth among scholars, even within their own field, makes it difficult to see the underlying relations and interconnections upon which radical change is based.\textsuperscript{16}

Posner then translates Nietzsche’s view of history into his own assessment of adjudication in American courts. Clearly, Posner is against history repeating itself. Indeed, attempts to repeat history often turn out farcically, though more because of the fundamental disconnect between the past and the present than because of the inability to agree upon a determinative interpretation of the past. In order for the past to have any informative value whatsoever for the present, it must be possible to draw an analogy between past events and current circumstances. The question then becomes how close such an analogy can reasonably be drawn; the closer the analogy, the more informative is

\textsuperscript{8} Id. at 70.

\textsuperscript{9} Id. at 75.

\textsuperscript{10} Id.

\textsuperscript{11} Id. at 76.

\textsuperscript{12} Posner admits that this position is somewhat inconsistent with the previous one. However, he argues that both share the similarity of failing to address current problems on their own merits. See Posner, *Past-Dependency*, supra note 4, at 3.

\textsuperscript{13} NIETZSCHE, supra note 7, at 89–91.


\textsuperscript{15} Id.

\textsuperscript{16} Id. at 4–5.
the historical example. Consequently, past cases can serve as precedents for current cases “only if the present resembles the past very closely.” Posner argues, though, that originalists, those who seek to find historical justification for their interpretation of cases and statutes, too often twist history almost beyond recognition in order to get precedential cases to apply to current legal disputes. This can be seen, for example, in *Griswold v. Connecticut* which appealed to the Fourteenth Amendment to find a “zone of privacy” basis for the right to procreate and hence to use contraception even though this logic could hardly have been on the minds of those ratifying the Fourteenth Amendment. This amendment was ratified in 1868 in an attempt to reverse the vestiges of slavery. Even if one were to concede that there was a commonly accepted interpretation of the Fourteenth Amendment at the time of its passage, the interpretation offered in *Griswold v. Connecticut* is clearly not it. Such a strained analogy, one could argue, makes a farce of the Fourteenth Amendment. According to Posner, such an interpretation of the Fourteenth Amendment amounts to the judicial practice of using history as a mask to disguise judicial discretion.

So why do judges persist in relying upon precedent to decide cases? Posner is not entirely sure they do. As I have stated earlier, Posner believes that judges often use history as a mask to cover up other reasons for deciding a case a particular way. In the question and answer period following his talk, Posner elaborated upon this position by asserting that judges had to put "something" in their opinions and that it was neither dishonest nor disreputable to provide historical justifications for pragmatic decisions,

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17 *Id.* at 7.

18 381 U.S. 479 (1965). The court held:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand . . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

*Id.* at 485–86. (citations omitted)

19 *Id.* at 485.

20 See Posner, *Past-Dependency*, *supra* note 4, at 8–11. In Posner’s words:

The legal profession’s use of history is a disguise that allows the profession to innovate without violating judicial etiquette, which deplores both novelty and a frank acknowledgment of judicial discretion and likes to pretend that decisions by non-neglected judges can be legitimated by being shown to have democratic roots in some past legislative or constitutional enactment.

*Id.* at 10.
especially since few people beyond academics ever actually read the opinions.\textsuperscript{21} This position can be reconciled with his earlier criticisms of originalism as misusing history by making a distinction between the actual decision-making process that judges go through in deciding a case and the reasons that they offer to the public for their decision. Judges can appear to be originalists even when they are not actually originalists. Posner dismisses the idea that judges should be bound to precedent because that is what the public expects of them mainly because he believes that the public is rather casual in its belief that decisions must be based in “authoritative sources of law.”\textsuperscript{22} Furthermore, the public’s general lack of knowledge about history makes historical justifications even less meaningful.\textsuperscript{23} Posner does, though, suggest that if judges were not allowed to use history so freely as a mask, they would have to be more open and thoughtful about their reasoning process in deciding cases.

Despite his many criticisms, Posner does not completely dismiss the importance of precedent for his theory of adjudication. While Posner rejects the idea that there is a principled reason for deferring to precedence, he finds pragmatic reasons for providing at least limited authority to past cases. The public relies upon past judicial decisions in order to shape their actions in the future. Thus, if the facts of a case closely resemble those of a previous decision, then, absent other overriding reasons, the courts cannot ignore precedential cases. This, though, does not place any moral significance or sanctity on the past. Rather, Posner argues, it shows how the past is itself subject to pragmatic concerns in questions of adjudication. “The court must have a reason to ignore [a past case], just as it must have a reason to ignore any source of possible guidance to deciding the present case.”\textsuperscript{24} In other words, history and past cases are just data to factor into a judge’s decisions. Presumably, if there is a dispute over the meaning of a particular case or historical event, that dispute is itself something to be considered by the judge. When history is not meant to be definitive, different interpretations can be weighed against each other not according to how well they reflect the “original” understanding of the case or event but rather for the way in which they illuminate current circumstances. Law is a social servant and needs to adapt to different situations rather than worry so much about fidelity to its own internal logic. This emphasis on weighing factors as they influence current circumstances is the credo of the pragmatic judge:

\begin{quote}
The historically oriented judge wants to decide cases in a way that will display their pedigree, their continuity with earlier cases, statutes, or constitutional provisions. The pragmatic judge wants to decide cases in
\end{quote}

\textsuperscript{21} In response to a different question, Posner did criticize the use of history to “puff up” opinions lacking substance.

\textsuperscript{22} See Posner, \textit{Past-Dependency}, \textit{supra} note 4, at 20. Posner argues that if the public did in fact care about consistency with “ancient texts and precedents,” Robert Bork would have been confirmed as a Supreme Court Justice.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 18.
the way that will best promote, within the constraints of the judicial role, the goals of society. He uses history as a resource but does not venerate the past or believe that it ought to have a “special power” over the present.\footnote{Id. at 23.}

One of the main pragmatic concerns that causes a judge to defer to precedence is path dependence.\footnote{See id. at 12. The title of the conference, “Past Dependencies,” is a somewhat accidental play on the concept of path dependency. In a meeting to discuss possible future conference topics, one of the organizers, Hans Ulrich Gumbrecht, misheard “path dependency” as “past dependency.” The rest is, as they say, history.} Path dependence refers to the idea that our decision on how to act in a particular situation is largely determined by our starting point, even were it not for having started there, a different decision would have served us better now. The classic example is that of the typewriter keyboard: The original QWERTY keyboard design was meant to slow down typing speeds so that early typewriters would not malfunction.\footnote{See id.} However, once typewriter technology improved, it was too late to switch to a more efficient keyboard design because too many people had been trained to use the old keyboard design. The transition costs would have been too high. Similarly in law, legal regimes may have arisen surrounding past decisions that discourage overruling those past cases even if one would have decided the case differently were it not for this past history. Truly, as Marx said, people cannot make decisions unfettered by the traditions in which they find themselves, but must actively confront the past. \textit{Stare decisis} serves as a pragmatic principle for judges to keep in mind when determining what the best possible outcome of a case is in light of the effects a particular decision will have on the public. Thus, even though certain inefficiencies may exist in the legal system and the legal doctrines that judges have handed down, these inefficiencies need to be tolerated because the transition costs in creating a new legal regime would be prohibitive.\footnote{See id. at 12–13. It is not clear here if Posner is talking purely in terms of economic efficiency or also in terms of the political opposition that may arise were one to abandon what many in the public view as commonly held rights. For instance, Posner elsewhere critiques the rise in the criminal rights of the accused under the Warren Court for contributing to an increase in crime rates. He contends that limiting resources for public defenders would force them to choose those cases in which the accused are most likely to be acquitted. This narrowing of focus would lead to far more effective counsel than the current legal regime where the requirement that everyone receive counsel leads to ineffective counsel for all. \textit{See Richard A. Posner, The Problematics of Moral and Legal Theory} 160–64 (1999) [hereinafter Posner, Problematics].} Along these lines, Posner, borrowing from Holmes, reasserts his position that law is and must be a combination of various internal and external factors that contribute to the determination that judges make as to how a case can be decided in a way that is most beneficial for the public as a whole.\footnote{See Posner, \textit{Past-Dependency}, supra note 4, at 16. Posner, who is quite a prolific writer and is known as one of the founders of the law and economics school of thought, delves in many other places into how a judge is to make decisions as to what the goals of a society are and what constraints exist on the judge.} This impetus overrides any search for supposed truths or principles...
contained in laws or legal precedent. “The pragmatist’s real interest is not in truth at all but in belief justified by social need.” The pragmatist judge, then, decides a case based on what the impact of that decision will be on the general public; the past, including judicial precedent, is merely one of these many factors that goes into this decision.

However, the past and path dependency may play a very great role in issues of adjudication. As Erika Frick, a lawyer with the United States Department of Justice, points out, law is a very risk-averse profession, especially since judges know that their decisions will have an impact not only on the present, but on the future as well. While one might question whether this sentiment would have as much pull were a majority of judges to decide cases along the pragmatic lines that Posner sketches by giving less deference to precedent, it is doubtful that judges will ever become adventurous and experimental because of the general belief that the role of judges is not to be overtly political. Richard Rorty, a comparative literature professor at Stanford University and himself a prominent pragmatist, agrees with Posner that history is only valuable to the extent that it offers hope to the future. Rorty, though, finds Posner to be too dismissive of the Romantic element of much of history and what it reveals about the human spirit that can then be taken to illuminate current situations and understandings. Rorty characterizes Posner’s philosophical issue as whether the imagination rather than reason should be the instrument and guide for the creation of moral philosophy. Furthermore, Rorty notes that Nietzsche is correct in saying that, at times, forgetfulness of the past may be empowering and good by aiding in the shaping of a new identity. For example, in order for the Serbs to progress further towards peace, it may be necessary for them to forget certain aspects of their past.

More stringent criticisms of Posner come from Jack Rakove, a professor of history, American studies, and political science at Stanford University, and Hayden White, a comparative literature professor at Stanford University. Rakove argues that historians are essentially problem-solvers and not wedded to a particular methodological approach. In this sense, historians already are to some degree pragmatists, though this pragmatism is somewhat tempered by their view of themselves as custodians of the past. As such, they try to distinguish between valid and invalid interpretations, an approach that would allow judges to determine which uses of history are farcical and which are not. White criticizes Posner for making an undeveloped distinction between proper and improper uses of history and, more specifically, for labeling improper uses of history as

See, e.g., POSNER, PROBLEMATICS, supra note 28. It is beyond the scope of this commentary to address these issues except as they relate to the importance of the past in adjudication. The basic principle is that Posner seeks to look at the law in terms of the economic effects it has on the general public. See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). Indeed, Posner argues that judges should be limited largely to economic considerations and not base their decisions on questions of morality.

30 RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 464 (1990) [hereinafter POSNER, PROBLEMS OF JURISPRUDENCE].

31 At one point during the talk, Rorty light-heartedly accused Posner of having a “phobia for romance.” Despite the possibility for a definitive response, this question was not directed at Posner’s wife, who was sitting in the audience at the time.
“rhetoric.” White argues that the study of history has always claimed to be a matter of interpretation and not of science. As such, there can be no unrhetorical discourse on history because historians are quite aware that they cannot escape their own biases. Indeed, Posner’s attempt to label some uses of history as improper is itself a rhetorical move. White asserts that philosophers from Plato and Aristotle to Kant have tried to eliminate rhetoric from philosophy, but that this is an endeavor that is bound to fail. To the extent that Posner attempts to eliminate rhetoric from law, I would argue, he is also bound to fail.

This brings us to the question of how history can be a tragedy the first time it transpires, let alone its farcical repetition. Certainly, Marx was not saying that all important decisions in history have necessarily been bad decisions. Marx believed himself to be providing an explanation of the development of socioeconomic relations in history and their impact on the individual and social consciousness. In this sense, historical decisions can be neither good nor bad. Rather, by looking to history for greatness, we fall into the mistaken belief that men move history when in fact it is history that moves men. This mistaken belief, critiqued by Marx, leads to the view that history is something to be repeated rather than learned from and moved beyond. The tragedy, then, arises from what we choose to study in history, not from the study of history itself.

Posner may be correct in his claim that there is a fundamental disconnect between the events of the past and the circumstances of the present and in his subsequent claim that because of this precedent should not possess a sanctity that determines all future decisions, but he is wrong to conclude that by relegating history to a data source for judges he can derive a pragmatic theory of adjudication that is value-neutral. Posner happily admits that his view of pragmatism is deeply embedded in the local circumstances of the judge’s culture, yet he ignores the tie between culture and its own history. History does contain meaning, it is just that this meaning cannot be definitively fixed, which is why all interpretations, whether of history or of economic efficiency, are necessarily rhetoric. As Marx suggests, the meaning of history comes not from “facts and personages of great importance,” but from cultural forces and relations of power that underlie these events. If Posner wants to understand what is best for society in his


33 See POSNER, PROBLEMS OF JURISPRUDENCE, supra note 30, at 465.

34 MARX, EIGHTEENTH BRUMAIRE, supra note 1, at 15.
role as a pragmatic judge, he must come to grips with these cultural forces and power relations. In order to do this, he must not only study history but also use it as an integral part of his theory of adjudication, even if this involves bringing his own biases and beliefs to the table.
Beleaguered Families:
Identity Ascription and the Politics of Adoption

A Commentary on a Panel Discussion by
Richard Banks and Joan Hollinger*

Sean Jaquez

The first half of the twentieth century introduced images of a “Leave It to Beaver” version of the ideal adoptive family. Storybooks such as *The Chosen Baby*, which presented the adoptive family version of the stork mythology, portrayed the typical adoption as a baggage-free white newborn swooped up by the nurturing arms of a white man and his wife.[1] The complexities witnessed in adoptions today were unimaginable. Consequently, the contemporary battles over the semantics of the word “couple,” intraracial minority adoption, interracial adoption, and the emergence of links attaching the biological parents to the newly formed adoptive family, did not yet exist. This was not due to a lack of challengers, but rather because heightened governmental intervention in adoption cemented into place specific definitions and assumptions that came to dominate the discourse surrounding adoption politics. It is this intervention that forms the heart of the current debate surrounding adoption practices in the United States. At one end of the intervention spectrum is the position described by Professor Joan Hollinger, who questions the ever-increasing role government plays in the movement from closed to open adoption records. On the other end of the spectrum, Professor Richard Banks expresses skepticism towards the position that less governmental intervention can adequately respond to the modern complexities of adoption. He asserts that because adoption is a legally defined family relationship, it necessarily requires governmental regulations for efficient and proper functioning.

In the last thirty years, adoption policy in the United States has shifted from closed to open adoption records. The previously dominant closed adoption record policy rested on the theory that adoptive families are a “complete substitute” for biologically based families. In order to make a successful substitution, policy-makers believed that an adopted child needed all connections with her biological past severed to allow the adoptive family to raise the child without competition from her biological past. Adoptive parents were to replicate the biological parent/child relationship. This assertive-

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* This commentary was written in response to a panel discussion moderated by Michael Wald, Professor, Stanford Law School, featuring Richard Banks, Associate Professor, Stanford Law School, and Joan Hollinger, Visiting Professor, University of California at Berkeley School of Law. The presentation, entitled “Beleaguered Families: Identity Ascription and the Politics of Adoption,” was given on November 10, 1999, at Stanford Law School. The event was sponsored by the *Stanford Journal of Legal Studies* as the finale to a series of family law activities sponsored by Stanford Law School students.

equivalence model of adoption prevailed among child welfare experts and the common law, contending that the only way to create a “complete substitution” was to insist on anonymity and strict separation between biological and adoptive parents.  

However in the final quarter of the twentieth century, the closed records view came under greater challenge from many participants in the adoption process; it was criticized by adoptees, birth parents, and an increasing number of neutral and adoptive families.  Rather than denial, the acknowledgment and acceptance of difference became a new incantation in contemporary adoption practice.  Adoptive families were no longer considered “complete substitutes” but as “distinctive” in their own right. This new approach began dismantling the old closed records view, and the government started to embrace openness in records as a sort of panacea to guarantee successful adoptions. For example, it was no longer considered pathological for an adopted child to search for his biological parents, as was the case in the days of closed records. In fact, the new openness orthodoxy came to see it as pathological for an adopted child not to seek out his or her biological history.

Adoption law became reactive to this emerging majority. Statutory changes were enacted to guarantee access to birth certificates and records. Within the last eight to ten years at least sixteen states have enacted statutes recognizing post-adoption contact agreements between the biological and adoptive families, provided that the parties understand that the adoption cannot be challenged. States have even gone so far as to enforce such contracts in court. Open adoption was touted as enabling birth mothers to reduce their sense of loss, adopted children to treasure a piece of their past, and adoptive parents to gain access to information potentially critical to caring for their adopted child’s developmental, medical, and emotional needs.

While the trend towards open adoption excited many interested individuals and groups, it intimidated and raised the concerns of others. Today, it is typical for adoptive parents to be informed, prior to adoption, that the hope of getting a child like them is linked with accepting the openness principal and the importance of biological continuity for their adopted child’s development, usually in the form of a contact agreement with the biological parents. As a result, potential adoptive parents who do not wish to share what they consider to be their own child are now focusing their child searches abroad in countries where they can bring back to the United States a child with less likelihood of

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5 See HOLLINGER, supra note 2, § 13-A.04.
6 See Id. § 13-B.01.
8 See HOLLINGER, supra note 2, § 13.02.
future involvement with the child’s biological ties. Moreover, some adoptive parents who receive a child from a single mother also fear that under the openness principal, the birth father will eventually be able to force the adoptive parents to share the child with him. As a result of increasing enforcement of post-adoption agreements in the court system, many older children adopted by foster parents also must embrace these adoption agreements, even though burdensome problems with their biological families might have existed in the past.\(^9\)

While Hollinger points out both the pros and cons of such agreements, she does not attempt to resolve the issues; instead, she challenges the involvement of the law in adoption practices altogether. Although Hollinger acknowledges the importance of the law in creating the adoptive parent/child relationship, she believes that post-involvement may be unnecessary, or at the least could be less intrusive. She explains that not long ago social workers vigorously supported the policy of completely severing adopted children from their biological pasts; yet they now contend that complete openness is the only acceptable approach to healthy adoption. This abrupt about-face in social policy requires increased skepticism of the actual value of openness and increased government intervention in adoption. Hollinger criticizes the courts’ and legislatures’ haste to establish a policy of complete open adoption in the post-adoption world, when significant questions regarding the actual structure of adoptive families and the benefits to them of an openness policy remain unanswered. In many ways, she would rather see society defer to the laissez-faire custom of trade rather than black letter law in determining how eligible children will be adopted. With an expanding range of individuals now entering the adoption system (i.e. gays, lesbians, single parents, and interracial parents), adoption is still in a state of metamorphosis. Enacting strict standards might distort or inhibit the more organic process of a less regulated system.

On the other hand, Professor Richard Banks contends that even stricter government standards are needed in the regulation of adoptive relationships. He believes that adoption law focuses too much on the notion of choice. Birth parents have the choice of the “type” of parent they want to raise their child. Adoptive parents have the choice of the “type” of child they want to bring into their household. Government has the ultimate choice of the “type” of family it permits to be created. Banks suggests that this frames the question poorly, since such choice has an inherent exclusionary element to it. Instead, Banks proposes that we look to a normative vision which focuses on individuals, rather than to the paradigm of choice when creating adoption policy.

Racial adoption patterns has been a key concern surrounding choice. Until recently, race matching was an acceptable form of adoption placement.\(^{10}\) Race matching policies require that adoptive parents be matched to children on the basis of race. For example, it would be impossible under these policies for a white parent to adopt an

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9 See Id. § 13.02[3][2].

African-American child. Proponents reason that race matching is important because it benefits the child and furthers her best interests by: (a) strengthening her sense of identity, (b) promoting her cultural development and growth, and (c) providing her with necessary coping skills for relating to the world as a member of a particular race. This presupposes that a child can only understand her heritage through an intraracial family. Interestingly, both Hollinger and Banks contend that recent studies on the development of adopted children have revealed no compelling evidence that children raised in interracial families are more likely to experience problems than adopted children raised in intraracial families.

In 1994, with the passage of the Multiethnic Placement Act, race matching fell into disfavor. Race matching was no longer permitted in federally funded adoption agencies, because statistical analysis showed that it produced racial inequality in adoption. In California, African-American children are four times less likely to be adopted than any other race—even less likely to be adopted than drug exposed babies. These statistics are even more troubling since African-American children are disproportionately represented in adoption agencies. But the question is: has the elimination of race matching solved the problem?

According to Banks, it has been unsuccessful. Through the elimination of race matching, the government took the choice away from adoption agencies; however choice by adoptive parents remains. This policy, termed “facilitative accommodation,” allows adoptive parents to specify a racial preference for potential adoptees. Studies show that a majority of adoptive parents are white, and that white parents are more likely to adopt a child who is severely disabled than a child of a different race. This leads to the conclusion that racial inequality in adoption practices will persist so long as parents can select their adopted children based on race. Banks asserts that facilitative accommodation should be treated by the courts as a racial classification and subjected to strict scrutiny. Although facilitative accommodation policies are intended to further the best interest of the child by discouraging placement with adoptive parents who do not want them on account of their race, Banks states that there is little evidence that facilitative accommodation is necessary to avoid inappropriate placement. He argues that matching individual children with parents, rather than excluding an entire group of children on the basis of race, most efficiently achieves the best interests of the child. He

11 See id. at 879 n.11.
12 See id. at 900 n.105.
13 See id. at 881 n.20.
14 See id.
15 See id. at 908 n.146.
16 See id. at 909.
further suggests that adoption agencies should allow prospective parents to spend time with a child before adoption in order to determine whether a good match exists.  

Ultimately, Banks would like to see a strict nonaccommodation policy put into effect. Through this policy, race-blind adoption would take place within federally funded adoption agencies. He makes clear however, that the goal of this policy is not to promote multiracial families per se, but instead to override the mechanisms of racial inequalities embedded in the current system. His policy attempts to facilitate the adoption of children who are not currently being adopted—in this case, minority children form the largest group in the adoption pool, and are not being adopted at the same rate as other children. Banks argues that our society needs to start focusing on the rights of the children rather than the rights of parents and others.

From Banks to Hollinger, it becomes evident that the debate over the present metamorphosis of adoption law and policy is still in its cocooning stage. Both offer very different, potentially conflicting pictures of the proper role of government in its development, and the path government should take in erecting a sound adoption policy. Although considerable distance remains to be covered, the adoption system in the United States has evolved considerably from the narrow, storybook image of the adoptive family portrayed in *The Chosen Baby*. Today, the story might tell of an Asian mother and father telling the tale of the stork to their ten month African-American boy who visits his biological mother every other Saturday. But is this story complete? Or, is a third edition already in the making? History indicates that the answer is yes. Gay and lesbian advocates, single parent households, and other combinations of suitable, loving parents hold the pen to the next chapter in adoption policy making.

17 See id.

18 See id. at 943.

19 See id. at 942.
The Problem with Eyewitness Testimony

Commentary on a talk by

George Fisher and Barbara Tversky* 

Laura Engelhardt

The bedrock of the American judicial process is the honesty of witnesses in trial. Eyewitness testimony can make a deep impression on a jury, which is often exclusively assigned the role of sorting out credibility issues and making judgments about the truth of witness statements.\(^1\) Perjury is a crime, because lying under oath can subvert the integrity of a trial and the legitimacy of the judicial system. However, perjury is defined as \textit{knowingly} making a false statement—merely misremembering is not a crime.\(^2\) Moreover, the jury makes its determinations of witness credibility and veracity in secret, without revealing the reason for its final judgement.\(^3\) Recognizing the fallibility of witness memories, then, is especially important to participants in the judicial process, since many trials revolve around factual determinations of whom to believe. Rarely will a factual question result in a successful appeal—effectively giving many parties only one chance at justice. Arriving at a just result and a correct determination of truth is difficult

\* This commentary was written in response to a talk given by George Fisher, Professor, Stanford Law School, and Barbara Tversky, Professor of Psychology, Stanford University. The presentation was given on April 5, 1999 and was sponsored by the Stanford Journal of Legal Studies. In this presentation, George Fisher placed Barbara Tversky’s research on memory fallibility into the context of police investigations and jury verdicts, discussing the relevance of such research to our system of justice.


\(^2\) See 18 USC §1623(a) (1998):

\begin{quote}
Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.
\end{quote}

The statute then goes on to list an affirmative defense: “It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.” \textit{Id.}, §1623(c).

enough without the added possibility that witnesses themselves may not be aware of inaccuracies in their testimony.

Several studies have been conducted on human memory and on subjects’ propensity to remember erroneously events and details that did not occur. Elizabeth Loftus performed experiments in the mid-seventies demonstrating the effect of a third party’s introducing false facts into memory. Subjects were shown a slide of a car at an intersection with either a yield sign or a stop sign. Experimenters asked participants questions, falsely introducing the term “stop sign” into the question instead of referring to the yield sign participants had actually seen. Similarly, experimenters falsely substituted the term “yield sign” in questions directed to participants who had actually seen the stop sign slide. The results indicated that subjects remembered seeing the false image. In the initial part of the experiment, subjects also viewed a slide showing a car accident. Some subjects were later asked how fast the cars were traveling when they “hit” each other, others were asked how fast the cars were traveling when they “smashed” into each other. Those subjects questioned using the word “smashed” were more likely to report having seen broken glass in the original slide. The introduction of false cues altered participants’ memories.

Courts, lawyers and police officers are now aware of the ability of third parties to introduce false memories to witnesses. For this reason, lawyers closely question witnesses regarding the accuracy of their memories and about any possible “assistance” from others in the formation of their present memories. However, psychologists have long recognized that gap filling and reliance on assumptions are necessary to function in our society. For example, if we did not assume that mail will be delivered, or that the supermarkets will continue to stock bread, we would behave quite differently than we do. We are constantly filling in the gaps in our recollection and interpreting things we hear. For instance, while on the subway we might hear garbled words like “next,” “transfer,” and “train.” Building on our assumptions and knowledge, we may put together the actual

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5 See Krist v. Eli Lilly and Co., 897 F.2d 293, 297 (7th Cir. 1990), (listing the findings of various psychological studies):

Accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a highly distorting effect on recollection); accuracy of recollection is not highly correlated with the recollector's confidence; and memory is highly suggestible – people are easily ‘reminded’ of events that never happened, and having been ‘reminded’ may thereafter hold the false recollection as tenaciously as they would a true one.

statement: “Next stop 53rd Street, transfer available to the E train.” Indeed, we may even remember having heard the full statement.

So what is an “original memory”? The process of interpretation occurs at the very formation of memory—thus introducing distortion from the beginning. Furthermore, witnesses can distort their own memories without the help of examiners, police officers or lawyers. Rarely do we tell a story or recount events without a purpose. Every act of telling and retelling is tailored to a particular listener; we would not expect someone to listen to every detail of our morning commute, so we edit out extraneous material. The act of telling a story adds another layer of distortion, which in turn affects the underlying memory of the event. This is why a fish story, which grows with each retelling, can eventually lead the teller to believe it.

Once witnesses state facts in a particular way or identify a particular person as the perpetrator, they are unwilling or even unable—due to the reconstruction of their memory—to reconsider their initial understanding. When a witness identifies a person in a line-up, he is likely to identify that same person in later line-ups, even when the person identified is not the perpetrator. Although juries and decision-makers place great reliance on eyewitness identification, they are often unaware of the danger of false memories.

Experiments conducted by Barbara Tversky and Elizabeth Marsh corroborate the vulnerability of human memory to bias. In one group of studies, participants were given the “Roommate Story,” a description of incidents involving his or her two fictitious roommates. The incidents were categorized as annoying, neutral, or socially “cool.” Later, participants were asked to neutrally recount the incidents with one roommate, to write a letter of recommendation for one roommate’s application to a fraternity or sorority, or to write a letter to the office of student housing requesting the removal of one of the roommates. When later asked to recount the original story, participants who had written biased letters recalled more of the annoying or “cool” incidents associated with their letters. They also included more elaborations consistent with their bias. These participants made judgements based upon the annoying or social events they discussed in their letters. Neutral participants made few elaborations, and they also made fewer errors in their retelling, such as attributing events to the wrong roommate. The study also showed that participants writing biased letters recalled more biased information for the character they wrote about, whereas the other roommate was viewed neutrally.

Memory is affected by retelling, and we rarely tell a story in a neutral fashion. By tailoring our stories to our listeners, our bias distorts the very formation of memory—even without the introduction of misinformation by a third party. The protections of the judicial system against prosecutors and police “assisting” a witness’s memory may not

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6 See, e.g., James Marshall, Evidence, Psychology, and the Trial: Some Challenges to the Law, 63 COLUM. L. REV. 197, 197 (1963) (“For the law, the basic problem of ascertaining truth does not arise so much from the villainy of perjurers and suborners of perjury as from the unreliability of personal observation.”).

7 See Barbara Tversky & Elizabeth J. Marsh, Biased Retellings of Events Yield Biased Memories (forthcoming). [Hereinafter Tversky-Marsh study].
sufficiently ensure the accuracy of those memories. Even though prosecutors refrain from “refreshing” witness A’s memory by showing her witness B’s testimony, the mere act of telling prosecutors what happened may bias and distort the witness’ memory. Eyewitness testimony, then, is innately suspect.

Lawyers place great import on testimony by the other side’s witness that favors their own side’s case. For example, defense attorneys make much of prosecution witnesses’ recollection of exonerating details. In light of psychological studies demonstrating the effect of bias on memory, the reliance and weight placed on such “admissions” may be appropriate, since witnesses are more apt to tailor their stories—and thus their memories—to the interests of the first listeners. An eyewitness to a crime is more inclined to recount, and thus remember incriminating details, when speaking to a police officer intent on solving the crime. If later the eyewitness still remembers details that throw doubt on the culpability of the suspect, such doubts should hold greater weight than the remembrance of incriminating details.

In another part of the Tversky-March study, participants were asked to play prosecutors presenting a summation to the jury. Participants first read a murder story, where two men were suspects. Participants were then asked either to prepare a neutral recounting of all they remembered about one suspect, or to prepare a summation to the jury about one suspect. Later, participants were asked to recall the original story. Participants who wrote summations recalled more incriminating details and wrongly attributed details among suspects more often than participants who originally wrote a neutral recounting.

Bias creeps into memory without our knowledge, without our awareness. While confidence and accuracy are generally correlated, when misleading information is given, witness confidence is often higher for the incorrect information than for the correct information. This leads many to question the competence of the average person to determine credibility issues. Juries are the fact-finders, and credibility issues are to be determined by juries. The issue then arises whether juries are equipped to make these determinations. Expert testimony may not be helpful. Indeed, since the very act of forming a memory creates distortion, how can anyone uncover the “truth” behind a person’s statements? Perhaps it is the terrible truth that in many cases we are simply not capable of determining what happened, yet are duty-bound to so determine. Maybe this is why we cling to the sanctity of the jury and the secrecy of jury findings:

We can put such questions before the jury entirely without fear of embarrassment, because the way the jury resolves the questions and, in all likelihood, the soundness of its answers will remain forever hidden. Perhaps the allure of the black box as a means toward apparent certainty in

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8 See Tversky, supra note 7 at 22–28.
an uncertain world has tempted us to entrust the jury with more and harder questions than it has the power to answer.9

The courts’ reliance on witnesses is built into the common-law judicial system, a reliance that is placed in check by the opposing counsel’s right to cross-examination—an important component of the adversarial legal process—and the law’s trust of the jury’s common sense. The fixation on witnesses reflects the weight given to personal testimony. As shown by recent studies, this weight must be balanced by an awareness that it is not necessary for a witness to lie or be coaxed by prosecutorial error to inaccurately state the facts—the mere fault of being human results in distorted memory and inaccurate testimony.

Three Roles for a Theory of Behavior in a Theory of Law

A Commentary on a talk by Lewis Kornhauser

Ryan Fortson

Professor Kornhauser has laid out a taxonomy for instrumental approaches to the law, in order to create a better framework for analysis and criticism. The three types of instrumentalism that comprise Professor Kornhauser’s conception of the law are systemic instrumentalism, institutional instrumentalism, and rule instrumentalism.

Instrumentalism assumes that law is created with a particular result or goal in mind. If the particular goal is not achieved, then the legal rules and institutions designed to forward that result are not effective. Instrumentalism assumes that legal rules and institutions can shape the behavior of private individuals, which in turn assumes that these private individuals will react in a predictable way to the incentives created. A common form of instrumentalism is the economic analysis of law, which uses economic theory to describe how people behave in response to the law. This does not necessarily mean that people will try to obtain the most wealth, only that they will try to maximize their subjective preferences. For example, people who value the environment may go out of their way to use recycled goods, even if these cost more than non-recycled goods. Instrumentalism tries to determine what preferences people have in order to create laws that shape their preference-maximizing behavior in a way that achieves the laws’ goals. Thus one main question instrumentalists ask is what theory of behavior should the instrumental designer of legal rules and institutions use in order to create effective laws.

The behavioral theory that one employs varies according to the desired goal. Kornhauser argues that this goal can be directed through differing legal structures operating at different levels of the legal system. These different levels of the legal system comprise his taxonomy. As will become clear, one can be instrumental at one level and unconcerned about the result at the other two levels. Moreover the different levels are not hierarchical, in that the existence of instrumentality at one level does not imply that there is instrumentality at another level. However, this does not mean that one cannot be instrumental at a combination of two levels or even at all three levels. In order to achieve one’s goal, one must first know at which level that goal is directed towards and then must choose an appropriate behavioral theory so that the law can be shaped to achieve the desired result.

Systemic instrumentalism focuses on the legal system as a whole. Different legal systems can promote different goals and may therefore need to be structured differently.

* This commentary was written in response to a presentation by Lewis Kornhauser, Professor to the Stanford Law School faculty on February 24, 1999 and the paper accompanying his talk.
For example, if one believes that the purpose of government is to promote stability at all costs, then one might endorse an authoritarian form of government as necessary to keep the unruly masses in check. The goal of stability at all costs might lead to the creation of a system in which the military both legislates and enforces the law, with the courts being an afterthought at best. If one sees the purpose of government as enabling people to pursue self-selected ends in a democratic fashion, then one might design a system containing an elected legislature held in check by a separately elected executive and a relatively independent system of courts meant to protect individual rights. Alternately, one might design a parliamentary system with a combined legislature and executive to promote public ends. These same presidential and parliamentary systems may not be created to achieve democratic goals, but instead because accommodating public desires and tensions is seen as the best way of promoting stability. Both the goals of a legal system and the means to achieve it may change, but the instrumentalist tries to design a legal system that best fits the desired goals.

Legal institutions, and for that matter legal rules, operate within an overall legal system, but they need not share the same goals as that legal system. Institutional instrumentalism addresses the goals of particular legal institutions and designs these institutions specifically to fulfill those particular goals. The motivation behind the formation of an institution does not have to be shared by the people within the institution. For example, Kornhauser describes Ronald Dworkin’s theory of adjudication, which argues that the purpose of courts is to promote integrity in the law, as an instrumental approach to a particular view of justice, even though Dworkin expects judges to act formalistically, not instrumentally. Kornhauser sees these two positions as being consistent with each other despite their seeming contradiction. Formalism is the opposite of instrumentalism because it presumes that one will interpret the law “in its best light” independently of one’s own personal goals. The institution of the courts may be designed with the instrumental purpose of promoting the integrity of the law; however, judges promote the integrity of the law only when they interpret the law in a formalist way. In other institutions, such as the Internal Revenue Service, the purpose of the institution may be more synchronous with the personal goals of its participants—but this only proves that the behavioral approach of those who execute the functions of the institution must be taken into account when the institution is first designed.

Rule instrumentalism operates similarly to institutional instrumentalism, but only at the level of specific rules or laws. It is therefore not surprising that the rulemakers’ purpose in designing a rule may be different from the motivations driving compliance with it. For example, a law may be passed for the purpose of protecting the environment by controlling factory emissions. This law might achieve its goal, though, by providing financial incentives to those corporations that meet certain standards, or alternately, by imposing financial penalties on those who do not. It does not matter in this case if owners of the company care about the environment, only that they care enough about corporate profits to comply with regulations. Some corporations may care about the environment enough that they would comply with recommended standards regardless of related financial incentives, but presumably those passing the law do not believe that

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1 See generally RONALD DWORIN, LAW’S EMPIRE (1986).
there are enough corporations with such motivation, otherwise there would not have been the need to include the financial incentives in the law. Additionally, institutional and systematic restraints inhibiting the passage of certain laws may exist. If no institution could enforce environmental protection laws, such as through monitoring factory emissions, then it would be pointless to pass the law in the first place. This would be an institutional restraint on legislative power. A systemic restraint would be the refusal of American legislative bodies to pass laws which they believe violated the U.S. Constitution, for example, by creating an “environmental czar” with absolute powers.

We see that the analysis of systems, institutions, and rules can take place at different levels, even though these levels may at times interact with each other. Furthermore, when designing legal systems, institutions, and rules, one must be aware that the goals one has in mind for the legal entity that one is designing may not be the same as the motivations of the participants who implement this design. Indeed, it is often necessary to assume different purposes on the part of the participants and shape one’s design accordingly to take this into account. In as much as one is being instrumental in designing laws, the evaluation of the effectiveness of one’s design accordingly depends upon whether it achieves the desired goal.

In this respect, it is important to distinguish between regular and institutional legal designs. Each type of legal design faces different constraints. Regular designs consist of rules that directly command or prohibit a certain action by the general population. For example, a state legislature may pass a law making it illegal to sell pornography within five miles of a school. This is a direct prohibition applying to everyone in the state. This law is then enforced through the police and the courts. The decision that a judge makes in a particular case is likewise an example of a regular design, though of a different nature than the one passed by the legislature. Adjudicatively, the judge may have some discretion in deciding what is pornography, though the judge’s discretion is likely constrained within limits set by past judicial decisions. Furthermore, if a judge decides that the accused is in fact selling pornography, the judge cannot say that a distance of one mile away from a school is “good enough” to avoid punishment. The judge is constrained by what the law actually says. Institutional designs consist of the structures that establish the framework by which regular designs can be created and enforced. In this example, the institutional design would examine the state legislative body itself and the various rules that govern its procedure when passing such laws. The judge might also look to see if the proper institutional procedures were in fact followed, and invalidate the law if they were not. More broadly, the judge may look to the Constitution of the United States to see if the anti-pornography law violates the principles on which the legal system

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2 Kornhauser sees that problems arise when one considers that most often legal systems, institutions, and rules are designed not by a solitary individual but by political bodies consisting of many members, often with competing purposes and goals. Certainly, though, such motivations could be found to exist in individual lawmakers, and Kornhauser seems to assume that they are identifiable in the aggregate as well.

3 Even if one adopts a non-instrumental view of adjudication, it would be misleading to speak of the judge as engaging in regular design. However, this inability to engage in design of any sort is further proof of the constraints that the judge faces.
as a whole was founded. Yet the judge may not strike down the law because of personal opposition to it; the legislature, however, may change its mind and pass a contrary law at will. To this extent, those who make the law are less constrained than those who interpret it because the latter are always constrained by existing law, as elaborated in both regular and institutional designs, whereas the former can make whatever regular designs they desire, constrained only by existing institutional designs.

The distinction between regular and institutional designs allows Kornhauser to turn to the question of the type of behavior that the instrumental designer of laws should choose in order to create effective laws. We have already seen suggestions of how this may differ according to the level—system, institution, or rule—at which one’s legal design is directed. The distinction between regular and institutional designs elaborates upon the earlier taxonomy by describing how different legal designs may be appropriate for different levels of the taxonomy. Systematic instrumentalists focus, quite obviously, on institutional design, whereas rule instrumentalists operate through regular designs. Institutional instrumentalists combine regular and institutional designs. The different designs that one uses and the correspondingly different intended targets may require different assumed behavioral theories to achieve the desired result.

Kornhauser outlines three different theories of behavior that the instrumental designer may employ. In the “best behavior theory,” one assumes that people will do their jobs to the best of their ability, either morally or efficiently. The “worst behavior theory” rests on the assumption that people either will try to take advantage of the situation or that they will be incompetent. Finally, the “best predictive theory” adopts the theory of behavior which most accurately predicts how most people would behave in a particular situation.

The best behavior theory seems overly optimistic, as it would create the danger that those who wanted to take advantage of the rule, institution, or system could do so without much fear of reprisal. At the same time, though, one may want to design systems, institutions, and rules that reward those who do act for the good of the whole. Public officials often choose their career out of a desire to further the public good. Therefore, it may be appropriate to use a best behavior approach when engaged in institutional design, though with the assumption that this approach might not necessarily apply to the laws created as part of regular designs because the general public may not share the same motivations as public officials. In designing rules for the general public as part of a regular design, it may be appropriate to adopt the best predictive approach, as this would most closely accommodate how the general public as a whole would respond to the law. The best predictive theory approach, as well as the best behavior approach, though, runs the risk of creating a system of laws that allow single individuals to take advantage of the situation. However, assuming the worst from people may lead to laws that are so over-protective as to accomplish little. Furthermore, it is unclear what exactly “worst” would mean. At first glance, one may assume it means that people will act in a

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4 Kornhauser admitted in the talk that this portion of his project is still tentative and may be revised prior to publication. It is presented here as one possibility.
self-interested fashion. Yet, instrumentalism is based on this very assumption. As far as instrumentalism is concerned, the “worst behavior” would be behavior that is irrational and random. However laws that attempt to counteract randomness are likely to fail because it is impossible to know what to counteract. In the end, the decision as to which theory of behavior to adopt is highly contextual. An understanding of Kornhauser’s taxonomies will help guide us in choosing the appropriate theory of behavior to create the most effective laws possible.
ARTICLES

Temporary Permanence:
The Constitutional Entrenchment of Emergency Legislation

Dr. Laura K. Donohue*

Why have anti-terrorism laws governing Northern Ireland, laws expressly claiming to be “temporary,” become permanently entrenched in the British legal system? What is it about these laws that make Parliament willing to accept a restriction of liberties and human rights for its own citizens? Laura K. Donohue argues that once anti-terrorist legislation is passed it becomes hard to rescind because to do so would create the impression of giving in to terrorists. Dr. Donohue reaches this conclusion by examining both the political and cultural history surrounding anti-terrorist legislation in Northern Ireland over the last 120 years, with a special emphasis on legislation passed within the last few decades. From there, Dr. Donohue moves on to a discussion of the uniqueness of Northern Ireland in British political history. This discussion sheds light on why England is able to accept for its own subjects in Northern Ireland the “hierarchy of rights” inherent in emergency legislation. The article concludes by framing the discussion of the restriction of liberties in Northern Ireland in terms of a broader analysis of human rights in general and as perceived, or often misperceived by international treaties and organizations.

INTRODUCTION

Throughout the nineteenth and twentieth centuries, the United Kingdom has maintained extensive emergency legislation to counter Irish and Northern Irish political violence. Early in the twentieth century, the 1914 Defence of the Realm Acts1 and 1920

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1 See Defence of the Realm Act, 1914, 4 & 5 Geo. 5, ch. 29 (Eng.); Defence of the Realm (No. 2) Act, 1914, 4 & 5 Geo. 6, ch. 63 (Eng.); and Defence of the Realm Consolidation Act, 1914, 4 & 5 Geo. 5, ch. 8 (1914) (Eng.).
Restoration of Order in Ireland Acts\(^2\) were incorporated into the 1922–1943 Civil Authorities (Special Powers) Acts (collectively the “SPAs”)\(^3\) and later subsumed into the 1973 Northern Ireland (Emergency Provisions) Act (the “1973 EPA”)\(^4\) and 1974 Prevention of Terrorism (Temporary Provisions) Act (the “1974 PTA”),\(^5\) which continue to be in operation today.\(^6\) In spite of the longevity of these measures, Parliamentarians repeatedly hail these statutes as “temporary measures” designed to meet the needs of a “passing emergency.”\(^7\)

The sweeping nature of these statutes, and the severe incursion into civil liberties that accompanies their operation give rise to serious concern. The SPAs empowered the Northern Ireland parliament to impose curfew, proscribe organizations, censor printed, audio, and visual materials, ban meetings, processions, and gatherings, and detain and intern without charge. The statutes authorized extensive powers of entry, search, and seizure, altered the court system, and empowered the Civil Authority, “[t]o take all such steps and issue all such orders as may be necessary for preserving the peace and maintaining order.”\(^8\) More than 100 regulations were introduced and exercised under this clause. As enforced by the Stormont government from 1922 to 1972, the 1922 SPA weighed most heavily on the Catholic population. This statute became one of the central grievances addressed by the civil rights marches of the late 1960s and ultimately led to the downfall of the Northern Ireland parliament. However the legislation was only intended to be temporary in nature. Initially unionists defended their enactment by claiming its use as a distinctly provisional measure necessary to secure law and order. Section 12 of the 1922 SPA limited the duration of the statute to one year, unless otherwise determined by the northern parliament.\(^9\) Within a few years however, the

\(^2\) See Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. 5, ch. 31 (Eng.); and Defence of the Realm (Acquisition of Land) Act, 1920, 10 & 11 Geo. 5, ch. 79 (Eng.).

\(^3\) See Civil Authorities (Special Powers) Act, 1922, 12 & 13 Geo. 5 (N. Ir.); Civil Authorities (Special Powers) Act, 1933, 23 & 24 Geo. 5, ch. 12 (N. Ir.); and Civil Authorities (Special Powers) Act, 1943, 7 & 8 Geo. 6, ch. 2 (N. Ir.) [collectively hereinafter SPAs].


\(^7\) See infra Part I(A).

\(^8\) See 1922 SPA, supra note 3.

\(^9\) See id. §12.
government’s rationale for maintaining the legislation shifted. Originally an interim means to establish peace, the statute became a necessity for maintaining Northern Ireland’s constitutional status. In April 1928, the government called for its permanent entrenchment,\(^{10}\) and in 1933 the Northern Ireland Parliament made the statute’s tenure indefinite.\(^ {11}\)

Following the demise of the Northern Ireland Parliament, direct rule by Britain did little to eliminate the continued use of emergency legislation. Although the British government claimed to replace the SPAs with the 1973 EPA, the latter statute simply renamed the vast majority of the special powers regulations. The 1973 EPA retained extensive powers of detention, proscription, entry, search and seizure, vehicle restriction, the stopping of roads, the closing of licensed premises, and the collection of information by security forces. The statute established certain crimes as “scheduled” offenses, regardless of their motivation, and eliminated juries from the process of adjudicating those offenses. It also retained the powers previously allocated to the Civil Authority, authorizing the Secretary of State for Northern Ireland to make by regulations “provisions additional to the foregoing provisions of this Act for promoting the preservation of the peace and the maintenance of order.”\(^ {12}\) At its inception, the 1973 EPA was intended as a temporary measure. In 1974, the Secretary of State for Northern Ireland claimed, “The [1973 EPA] makes emergency provisions and is by its nature temporary, to cover the period of an emergency.”\(^ {13}\) However, this legislation has remained in force for the past twenty-six years.\(^ {14}\) As with the justification for the SPAs, the rationale behind the retention of the EPAs subtly changed during the period from 1973 to 1996, until the EPAs were utilized as a critical part of the ongoing fight against terrorism.

Not only did emergency legislation become a permanent feature of the Northern Irish legal system, but for fifty-seven years Westminster retained emergency provisions aimed at countering Northern Irish violence in Great Britain. The 1939 Prevention of Violence (Temporary Provisions) Act (the “1939 PVA”)\(^ {15}\) introduced powers of expulsion, prohibition, arrest and detention. It too was intended only as an interim statute. As one Member of Parliament said, “[w]e have tried to make it clear . . . that the Bill . . . is a temporary measure to meet a passing emergency. We have expressly

\(^{10}\) Memorandum to the Parliamentary Secretary and Minister of Home Affairs, (Feb. 7, 1928) (Ref. S. 153/26).

\(^{11}\) See 15 SENATE DEB. 161–70 (1933) (N. Ir.).

\(^{12}\) See generally 1973 EPA, supra note 4.


\(^{15}\) Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. 4, ch. 50 (Eng.).
restricted the duration of the Bill to a period of two years.” 16 Although the IRA’s mainland bombing campaign ceased within a year of the statute’s introduction, the 1939 Act was not allowed to expire until 1953, and it was not repealed until 1973. Largely in response to the Birmingham bombings, in 1974 Westminster reintroduced powers contained in the 1939 PVA, with the addition of proscription, a provision employed under the SPAs and the 1973 EPA. Again, this legislation was intended to be in place for a limited period. During his introduction of the 1974 Prevention of Terrorism Bill, Home Secretary Roy Jenkins asserted, “I do not think that anyone would wish these exceptional powers to remain in force a moment longer than is necessary.” 17 Mechanisms were built into the statute to prevent it from remaining on the books simply as a result of inertia. The 1974 Prevention of Terrorism (Temporary Provisions) Act (the “1974 PTA”), however, belied its title, as not only did it reintroduce measures in place from 1939 to 1973, but it is still enforced over a quarter of a century after its initial introduction. 18 Roy Jenkins later wrote:

I think that the Terrorism Act helped to both steady opinion and to provide some additional protection. I do not regret having introduced it. But I would have been horrified to have been told at the time that it would still be law nearly two decades later . . . it should teach one to be careful about justifying something on the ground that it is only for a short time. 19

Why has emergency law, although consistently intended as temporary, become firmly entrenched in the British constitution? These wide-sweeping measures alienated a significant portion of the population, exacerbated the conflict, and led to the suspension of the Northern Ireland Parliament. Yet they still remain on the books. What are the lessons that can be drawn from this for other liberal, democratic countries faced by terrorist challenge? Is there something about emergency law that, once introduced, leads to its entrenchment? What role has international law played in the maintenance of such measures? This article examines these questions and proposes that a confluence of factors—many of which are common to liberal, democratic states—perpetuated twentieth century emergency measures introduced in the United Kingdom beyond their intended life. Part I examines the nature of emergency legislation, suggesting that its formal structure, duplication of existing criminal offenses, symbolic importance and perceived effectiveness contributed to the retention of the special powers. Part II highlights the persistence of the Northern Irish conflict, which is reinforced by deep divisions in the province and sporadic resurgences of paramilitary activity. Part III focuses on Britain’s previous use of emergency law in Ireland and the continued perception in Westminster of Northern Ireland as a place apart. Finally, Part IV suggests that the context within which the British state operated, while mitigating the more extreme aspects of emergency law,

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supported the establishment and operation of emergency measures. This was partly possible through a mistaken application of a “hierarchy of rights,” and partly due to confusion in the international arena, and particularly in international law, over how to handle terrorist violence.

I. EMERGENCY LEGISLATION

A. Formal Considerations

One factor that encouraged the continuation of the emergency measures—though it did not actively encourage the extension of them—was the formal impeccability of the legislation. Had the provisions represented a significant departure from established, accepted norms, more pressure might have existed on the government to withdraw the statutes. However, the formal consistency of the emergency statutes created a legitimacy they otherwise might have lacked and bolstered their acceptability as a means to counter Northern Irish violence.

Emergency legislation provided sets of general rules to govern affairs within the states. Instead of arising on an ad hoc basis, the legislation both supplied and made provision for the further introduction of legal codes. For example, the Northern Ireland government introduced numerous regulations tailored to prevent particular events from occurring, yet once enacted they often remained “permanent” law and became a standard that the government later applied to similar cases.

Both the Northern Irish and British governments ensured that all emergency measures were clearly promulgated to the affected parties. All statutory instruments introduced under the SPAs were regularly published in the Belfast Gazette and the four main northern newspapers. Additionally the Ministry of Home Affairs frequently directed that the information be issued to provincial radio stations. The government also issued copies of the statutory instruments to local papers in order to publicize orders relating to the prohibition of meetings or assemblies in a particular area. All regulations made under the legislation had to be laid before both Houses of Parliament soon after their creation. The publication of regulations was subject to both section 1(4) of the 1922 SPA and to section 4(1) of the 1925 Rules Publication Act (Northern Ireland). The northern government also periodically ordered reprints of the SPAs and all regulations issued under the Acts. Similarly, the British government ensured that emergency measures were clearly promulgated. HMSO published the acts, and the London Gazette carried notice of any statutory instruments introduced under their auspices.

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20 For instance in 1954 the Minister of Home Affairs directed that two newspapers, THE UNITED IRISHMAN and RESURGENT ULSTER be banned. In the absence of any measure specifically authorizing such prohibition, the Ministry issued Regulation 8 under the SPAs. See S.R. & O. 179/1954, 21.12.54.

21 See LON FULLER, THE MORALITY OF LAW 46 (1964) (explaining how these rules and regulations met the “requirement of generality”).

22 See 1922 SPA, supra note 3 §1(4); Rules Publication Act, 1925, 15 & 16 Geo. 5, ch. 6, §4(1) (N. Ir.).
Britain’s efforts to publicize emergency law fell short, however, of those exerted by the unionist government. A few explanations exist. For instance, many of the regulations issued by the northern executive branch (particularly after the civil disorder had abated) were aimed at preventing specific acts from occurring. Some examples of such acts are republican assemblies, the circulation of printed material, and the construction of monuments to republican heroes or events. Since the unionist government’s goal was to prevent the occurrence of the events themselves, it lay in their best interests to ensure that those involved be adequately informed of the law. In order to accomplish this, the government made use of a variety of media and official sources.²³

A second explanation revolves around the extremity of the measures themselves. As Lon Fuller suggests, the need for the publication of the laws depends in part on the degree to which the requirements of the rules depart from generally agreed perceptions of right and wrong. “[T]o the extent that law merely brings to explicit expression conceptions of right and wrong shared in the community, the need that the enacted law be publicized and clearly stated diminishes in importance.”²⁴ Certainly the perception within the nationalist and republican communities regarding the moral acceptance of commemorating nationalist or republican holidays, rallying for a united Ireland and disseminating literature, radically differed from commonly held standards within the unionist block. It was not obvious that such activities should be banned. In contrast, provisions such as those in the 1973 EPA relating to murder or attempted murder would have fallen more clearly within the understood moral norms of the various communities.

A third explanation relates to the principle of marginal utility, which limited the extent to which the publicizing requirement could apply. As Fuller writes, “It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him.”²⁵ The United Kingdom’s size in relation to Northern Ireland plays a role here, but the relatively marginal status of legislation relating to Northern Irish affairs in relation to the other daily concerns of individuals in Great Britain was also of relevance. Northern Irish legislation—along with the exercise of British legislation relating to Northern Irish affairs—was concentrated on a minority of the overall population in the United Kingdom. Moreover, the relative constancy of the 1973–1996 EPAs and 1974–1996 PTAs suggests that there was very little new about which the population had to be informed. Neither government made a secret of the emergency provisions adopted, as the laws were generally available to the population in both Northern Ireland and Great Britain.

Emergency legislation introduced in the Northern Ireland context avoided retroactive application. For the most part, emergency law also met the requirements of clarity by maintaining accepted norms relating to legislative drafting and language. The

²³ By ensuring that the regulations were clearly promulgated, the northern government could demonstrate its strength in contrast to the vacillation seen to characterize previous British rule of Ireland.

²⁴ FULLER, supra note 21, at 92.

²⁵ Id. at 49.
one measure that challenged this formal criterion was the 1922 SPA, which provided that an individual would violate the statute “if any person does any act of such a nature as to be calculated to be prejudicial to the preservation of peace or maintenance of order in Northern Ireland.” This wording implied unpredictability and the possibility of inconsistent law. It failed to clearly indicate particular instances in which an individual could be found in violation of the statute. Although in this respect the provision was open to challenge under a principle of fairness, its formal qualities nevertheless met Fuller’s standards. The unionist government refrained from acting on this provision, preferring instead to issue regulations and to establish precedent through the codification and retention of statutory instruments. As a result, this clause received minimal attention and did not become a target for opponents of the statute. Instead, attention tended to be drawn towards the discretionary power of the Minister of Home Affairs to issue regulations—a power frequently employed during the tenure of the northern parliament.

Emergency measures met the criterion of non-contradictoriness. The legislation refrained from placing unreasonable demands on the population. Special powers were employed as practical means to achieve the governments’ goals, such as the defense of the Northern Irish constitutional structure and the protection of citizens and property within the United Kingdom. The specific requirements of the provisions themselves—proscription or otherwise—were not beyond reach. In addition, emergency enactments did not represent a frequent departure from the previous state of affairs. The 1920 Restoration of Order in Ireland Act, 1914–1915 Defense of the Realm Acts, and the nineteenth century Coercion Acts predated the introduction of Northern Irish emergency law. Many of the initial regulations in the 1922 SPA were taken directly from these statutes and subsequently incorporated into the 1973 EPA. Even the 1974 PTA found precedent in the 1939 PVA, which itself had been on the statute book for thirty-four years. There was also a fairly high degree of constancy within the provisions themselves. For example, the 1922 SPA sustained very few changes to its original design, despite the fact that shortly after its enactment, numerous regulations were introduced under it. The additional measures served to clarify the original intent of the government in protecting the constitutional status of Northern Ireland. From 1972 until 1996 the amendments to the 1973 EPA and 1974 PTA largely centered on cosmetic alterations to the existing statutes, leaving the vast majority of their provisions still intact in 1996. Few new powers were introduced, and even fewer existing powers were relinquished.

Finally, discrepancies between the law as written and the law as administered were not apparent. Congruence was maintained between official action and the rules. Although the judicial procedure was altered under the measures, procedural due process and rights of appeal were followed in accordance with legislative requirements. The ability of official action to relate directly to the declared legal standard was further ensured by the enforceability of the statutes. From 1922 to 1972, the Royal Ulster Constabulary Inspector General repeatedly emphasized that regulations that could not be

26 See 1922 SPA, supra note 3.

27 See generally Restoration of Order in Ireland Act, supra note 2; Defence of the Realm Act, supra note 1.
administered by the police force should not be introduced. This rationale prevented the enactment of provisions relating to renderings of “A Soldier's Song,” wearing of the Easter Lily, and the prohibition of various meetings and assemblies. After 1972 the vast majority of rules issued by the British government were constructed to enable the police force to enforce them effectively.\(^{28}\)

In sum, the structure of emergency measures suggests that in fact the SPAs, EPAs, and PTAs demonstrated a significant degree of formal legitimacy. The extent to which these principles were satisfied by emergency law may have varied slightly, but for the most part emergency legislation met these legitimacy standards. In addition to satisfying these criteria, the procedures through which emergency measures were enacted were generally consistent with the manner in which other statutes passed into law. The powers enshrined in the legislation did deviate from other standards, however this distinguishes them as emergency law. The statutes were enacted through proper parliamentary procedure, and this adherence to legislative formality engendered a reassuring sense of legitimacy, which in turn contributed to the retention of special powers long beyond their temporary invocation. Had the emergency measures violated these principles, their acceptance within Northern Ireland and Great Britain might have come under greater scrutiny.

B. Criminal Law and Emergency Measures

The emergency legislation introduced in the Northern Irish context (particularly by Westminster after 1972) did violate some civil rights otherwise protected, however many of the acts prohibited by the statutes were already forbidden under criminal law. This reflected the nature of republican strategy. Acts were orchestrated to undermine law and order, thus increasing the insecurity of the citizens and moving the state towards ungovernability. As a result, offenses tended already to be covered by criminal statutes. What made these undertakings “terrorist” was the motivation and organization of entities using them for political or ideological ends. In this respect, emergency legislation was employed to reject the use of violence for political means by (a) highlighting the aims of individuals engaging in such behavior, (b) increasing the penalties associated with otherwise ordinary criminal activity, and (c) altering the manner in which the state addressed transgressions of the law. Scheduled offenses under the 1973 EPA included violations of common law, such as murder, manslaughter, arson, riot, and infringements

\(^{28}\) C.f. 1996 PTA, supra note 6, under which the Northern Ireland (Emergency Provisions) Regulation (1975) was promulgated. It required drivers to lock and immobilize unattended vehicles. Parliament explicitly recognized that the provision would be difficult, if not impossible, to enforce. See 902 PARL. DEB., H.C. (5th ser.) 742–90 (1975). It was justified however, by the responsibility borne by drivers to ensure that their vehicles were not employed to the detriment of third parties. While this provision did not hold individuals accountable for conditions beyond their control, it did border on a parliamentary enactment not entirely enforceable. This regulation is as an anomaly though, since the vast majority of emergency measures could be implemented by the civil authorities. This contributed to the consistency between statutory form and official action.
of already existing criminal statutes. What caused these acts to be incorporated into emergency legislation was the aim of the government to defeat terrorism (particularly republican terrorism), defined in the 1973 EPA as “the use of violence for political ends [including] any use of violence for the purpose of putting the public or any section of the public in fear.” Under the 1973 EPA, summary conviction or conviction on indictment carried stiffer penalties than could otherwise be levied under ordinary law. In addition, the pursuit of charges for crimes scheduled under the 1973 EPA was conducted within a specially constructed judicial setting. Cases relating to scheduled offenses were adjudicated in special Diplock courts, and both the 1973 EPA and the 1978 EPA required that indictment trials of a scheduled offense be held only at the Belfast City Commission or the Belfast Recorder’s Court. From 1973 through 1996, the government altered provisions of the EPAs relating to scheduled offenses on only one occasion, the 1985 Northern Ireland (Emergency Provisions) Act 1978 (Amendment) Order. This granted the Attorney General greater discretion to exempt cases relating to kidnaping, false imprisonment, and offenses carrying less than a five year penalty. This order was subsequently incorporated into the 1987 EPA. (The government rejected Sir George Baker’s other proposals to exempt robbery or aggravated burglary, or to extend to the Director of Public Prosecutions the ability to deschedule certain cases.) Although this alteration allowed the Attorney General to exempt specific cases after the formation of the 1973 EPA, none of the scheduled offenses was actually removed from the statute.

Not only were offenses already cited in other statutes appended to emergency legislation, but some of the measures introduced under the SPAs, EPAs and PTAs gradually influenced ordinary law. For instance, Regulation 4 of the 1922 SPA empowered the civil authority to ban meetings, assemblies and processions. At its repeal in 1951, the Public Order Act was introduced and became the primary vehicle through which marches and processions were prohibited. This statute, amended in 1963 and again in 1970, was employed largely in the same way in which Regulation 4 previously operated. Regulation 24C of the SPAs prohibited the display of the Tricolour. Responding to widespread support from the unionist population, in 1954 the government

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29 See, e.g., the Malicious Damage Act, 1861, 24 & 25 Vict., ch. 97 (Eng.), the Prison Act, 1953, 2 Eliz. 2, ch. 18 (N. Ir.); Firearms Act, 1969, 2. Eliz. 18, ch. 12 (N. Ir.), the Theft Act, 1969, 2. Eliz. 18, ch. 16 (N. Ir.), and the Protection of the Person and Property Act, 1969, 2. Eliz. 18, ch. 29 (N. Ir.).

30 1973 EPA, supra note 4, at Part IV, para. 28.

31 In accordance with Sir George Baker’s recommendations, in 1987 section 6 of the 1978 EPA was amended to allow scheduled offenses to be tried at Crown courts outside of Belfast. See 1987 EPA, supra note 6, §6.


33 See Public Order Act, 14 & 15 Geo. 6, ch. 19 (1951) (N. Ir.).

incorporated the measure into the Flags and Emblems (Display) Act (Northern Ireland).\(^{35}\) As the Republic of Ireland had been recognized in the interim, the new statute did not follow Regulation 24C in banning the Tricolour outright. Instead, it forbade interference with the flying of the Union Jack and empowered the security forces to ban any flags or emblems likely to lead to a breach of the peace.\(^{36}\) More recently the Criminal Evidence (Northern Ireland) Order 1988 limited an individual's right to silence.\(^{37}\) “The Order was prompted primarily by the need to encourage those who were suspected of terrorist activity to answer questions when there was not enough evidence to convict them,”\(^{38}\) and it reflected the widespread belief among the security forces that maintaining silence was evidence of training in “anti-interrogation techniques.”\(^{39}\) The provision was aimed at individuals suspected of involvement in terrorist activity or paramilitary financial affairs.\(^{40}\) It was enacted through the Order in Council procedure, and applied to all criminal suspects in Northern Ireland. The impact of emergency measures can also be seen in the powers incorporated into the 1984 Police and Criminal Evidence Act.\(^{41}\) Reflecting on steps taken by Westminster to counter republican violence in Great Britain, Joe Sim and Phillip Thomas observed in 1983 that “[t]he widely increased police powers within the police and Criminal Evidence Bill suggest that the emergency nature of the [PTA] will to an even greater extent be subsumed within everyday police practice.” As a result, “what was abnormal in 1982 becomes normal in 1983; likewise emergency measures become standard and unexceptional.”\(^{42}\) In Northern Ireland the norms shifted so as to incorporate into ordinary law what had hitherto been emergency measures.

In brief, the gradual impact of emergency measures on ordinary legislation was accentuated by the incorporation of already existing statutes into emergency measures. Because many of the crimes cited in the 1973 and subsequent EPAs were permanent

\(^{35}\) See Flags and Emblems (Display) Act, 2 & 3 Eliz. 2, ch. 10 (1953) (N. Ir.).

\(^{36}\) See Public Order Act, supra note 34.


\(^{41}\) See Police and Criminal Evidence Act, ch. 60 (1984) (Eng.).

features of ordinary criminal legislation, their inclusion did not represent a significant point of departure. What was unusual about their appearance was: (a) the focus of the measures on the political intent behind the actions themselves, (b) the alteration in penalties associated with engaging in such activities with terrorist intent, and (c) the court system within which such offenses were tried. These elements recognized the unique nature of the challenge being mounted against the state, indicated a rejection of the use of violence for political ends, and served to entrench the emergency measures.

C. Import of Emergency Legislation

As disorder increased in the period after 1972, broad support within Britain for more stringent measures grew. Terrorist legislation became a statement that violence would not be tolerated. In urging fellow Members to pass the 1974 Prevention of Terrorism Bill Lord Hailsham stated:

Apart from [the Bill’s] practical value, . . . its moral impact is hardly less important and would, I fear, be considerably blunted if we did not accede to the Government’s request to enable the Bill to receive the Royal Assent so as to place it on the Statute Book tomorrow . . . . [I] would suggest . . . to pass it without amendment.”

He later added, “If one yields to terrorism of this kind other terrorists in Britain will draw the obvious moral that the gun and the bomb pay off because the British do not have the courage to resist them.” Statements supporting the use of emergency measures to demonstrate Britain’s rejection of terrorism were frequently voiced in both Houses of Parliament. Against this backdrop, any repeal or repudiation of the measures enacted assumed new import; in the absence of a cessation in terrorist activity repeal might have indicated a level of acceptance either of some degree of violence or of the use of violence for political ends. Furthermore, no real indication was given in any of the statutes as to what circumstances would have to change in order to justify their repeal. This made it unclear as to when the legislation could be rescinded without altering the initial connotation entailed in its enactment. The Birmingham bombings provided the main impetus behind the enactment of the 1974 PTA. The need to appear to respond to this event—and indeed, to the slew of terrorist incidents in Britain immediately preceding Birmingham—was as important as the specific aspects of the statute itself. The government’s first duty was to protect the life and property of its citizens; it had to be


seen as acting in accordance with this aim. Under the 1974 PTA, proscription served primarily in this capacity.

The primary purpose underlying the introduction of proscription in Great Britain was to reduce the affront caused to the public by seeing overt support for republican organizations. The Jellicoe Report emphasized this point, noting that proscription bore both a practical and presentational value: “At the least practical level it enshrines in legislation public aversion to organizations which use, and espouse, violence as a means to a political end.” If public displays in support of proscribed organizations were prohibited, public outrage and disorder might likewise be avoided. Commenting on the PTA, Lord Shackleton juxtaposed considerations of civil liberties with the moral disapprobation assigned republican paramilitary activity. While freedoms should not be lightly infringed, the great offense caused by seeing support for the IRA outweighed other considerations. Similar sentiments were also expressed in examinations of the EPAs. For instance Earl Jellicoe stated: “Proscription is an expression of the outrage of the ordinary citizen, who comprise the overwhelming majority, at the barbarous acts of these organizations, and at the revolting glee with which they claim responsibility for the organization, usually with personal anonymity, together with their public displays in particular areas.” From 1974 to 1996, only ten charges were brought under the provisions of the PTAs governing proscription. This contrasts sharply with the number of similar charges brought during this period in Northern Ireland under the EPAs. The variance can be understood more clearly in the context of the Northern Irish government’s goals. From 1922 to 1972 any expression of republicanism represented an attack on the constitutional position of Northern Ireland. In defense of this position, a significant number of charges were brought for violations of the provisions related to proscription. In Britain, by contrast, proscription was used sparingly, serving instead as an indicator of public outrage and a possible inhibitor of civil disorder stemming from the outrage. Because of the moral aversion demonstrated in Britain by the use of such measures, once in place they became difficult to rescind. Although Colville noted the limited use made of the measure within the bounds of the legal system, he recoiled from recommending its repeal. He was afraid that it would be perceived as “a recognition . . . that the leading merchants of Irish terrorism were no longer disapproved.”

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50 See id., para. 412 (stating that between June 1978 and the end of 1983, some 537 charges were brought under section 21 of the 1978 EPA).

Britain's failure to include loyalist paramilitaries in provisions relating to proscription further emphasized that the primary function of the provision was to express public outrage at republican terrorism, and also to avoid civil disorder caused by it. Numerous cases of loyalist paramilitary activity occurred in Britain from 1972 through 1996. Their existence challenged Shackleton's insistence that, “the Protestant extremist groups are not engaged in violence against the community in Great Britain and . . . their activities are not in any way comparable to those of the IRA.” Clive Walker noted in 1992 the dubious basis of this reasoning and concluded that:

The true basis for proscription under Part I is the prevention of public offense and disorder. Thus, it is not the paramilitary activity in Britain simpliciter which justifies listing but the degree of resultant public outrage. In fact, loyalist criminality in Britain has not provoked public condemnation to the same degree as republican misdeeds.

The inability to rescind emergency measures once enacted was tied to the moral import assumed in their enactment. Withdrawing it would have been akin to surrendering to terrorism. As Ian Paisley declared, “I welcome the legislation because it is a signal to the men of violence that the Government will not weaken in their fight.” From “emergency provisions” the statutes became “anti-terrorist legislation.” This verbiage demonstrated a rejection of terrorism, which became inextricably linked to the renewal of emergency measures. In the annual debates on the Prevention of Terrorism Act, the opposition went out of its way to indicate that by opposing the legislation, it was by no means going soft on terrorism. Likewise any demand for an inquiry into the operation

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54 WALKER, supra note 39, at 57–58.


57 See 38 PARL. DEB., H.C. (5th ser.) 569 (1983):

I hope that our debate today will be conducted on the understanding that, whatever our disagreements, we all occupy . . . common ground. Certainly I do not propose . . . to accuse the Home Secretary of being negligent in the cause of civil liberties, and I suspect that neither he nor his Minister will want to accuse us of being irresponsible in the face of terrorism.
of the emergency measures risked being viewed as retreating from the fight against terrorism. In suggesting that the government institute a review of the emergency measures, the opposition stated:

My right hon. and hon. Friends [sic] supported the motion calling for an inquiry, but there should be no misunderstanding about our reasons. We do not believe that there should be any lowering of our guards against terrorist activity and the continuing threat of it. Our vote did not signify any complacency or moral weakness, faced as we are by deadly, clandestine groups in our midst.58

Britain’s Labour Party’s later decision in 1996 not to oppose the renewal of the Prevention of Terrorism Act primarily rested on the party’s decision that it could not be seen as tolerant of terrorism. During discussions of the 1996 EPA, Labour announced that primarily due to the retention of provisions relating to internment, it would oppose the Bill on the second reading but would not divide the House on the third reading, as some sort of emergency legislation was necessary. The implication of this position was immediately made clear by Barry Porter, “I do not believe that many people in Northern Ireland, certainly in terrorist organizations, will read the details of the opposition's reasoned amendment . . . the headline will be, ‘Labour Party votes against anti-terrorist legislation.’”59 Nick Hawkins put the point in an even more partisan fashion:

Unless and until [the Labour Party] support the Government on every piece of anti-terrorist legislation, the voters of Britain will never take seriously any of the weasel words of Labour spokesmen from the leader downwards on the strength of the Labour Party’s policy on crime. If the Opposition will not support us on measures against terrorism, they cannot be taken seriously.60

With the import carried by the enactment of emergency measures, their repeal might have been interpreted as meaning either that rejection of paramilitary violence had altered, or that the threat was no longer relevant.61 From 1973 to 1996 however, there were no sustained breaks in paramilitary activity in either Northern Ireland or Great Britain. Punishment beatings, arms’ movements and racketeering continued even after

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60 269 PARL. DEB., (5th ser.) 75 (1996).

61 Fear that paramilitary interpretation of the withdrawal of emergency legislation would be to see it as a concession or as an “invitation” to intensify the armed struggle further discouraged the relaxation of the statutes. See Bruce Dickson, Northern Ireland’s Emergency Legislation—The Wrong Medicine?, PUB. L. 594, 597 (1992).
the 1994 cease-fires, which suggests that paramilitary activity was not so much ended as funneled into other channels. Either violence still existed within society (in which case the moral import of the enactment of emergency measures proved a stumbling block to removing them) or a cessation in violence had occurred. In the latter case the onus was on those opposing emergency legislation to demonstrate that the threat no longer remained. This transferred the burden of responsibility from those seeking to extend anti-terrorist law to those seeking to repeal it.

This transfer guaranteed the survival of emergency measures beyond their temporary intent. The situation was reinforced by the fact that the British government made the repeal of the Prevention of Terrorism Act dependent on a solution to the Northern Irish political situation; as one Member of Parliament asserted: “Until it is resolved and until there is an end to the threat, we must be able to look for the protection that the [PTA] provides.” Indeed Members of Parliament repeatedly cited this principle as a reason for voting for renewal of emergency legislation. For instance, one Member stated during consideration of the 1996 EPA: “I [support the Bill] for one clear and simple reason—the conditions that originally made the emergency powers necessary have still not gone away . . . . [I]n Northern Ireland, there is still no universal renouncement of violence for political ends.” The cease-fires during the 1994–1996 period did not diminish this threat; as one Member of Parliament declared: “The PTA will remain necessary even if the temporary cease-fire is reinstated.” Similarly others stated that “[e]ven if the cease-fire were continuing, we would have to keep in place some emergency measures for quite some time,” and that “[i]t is important that we do not lose the protection that the Prevention of Terrorism Act and the Northern Ireland (Emergency Provisions) Act provide with regard to terrorist acts. It is not wise to leave the United Kingdom without some permanent protection.” Why? Because, “[t]here is always a need to be cautious when dealing with terrorism . . . it is, to a great extent, unpredictable. There is always a danger of resurgence.” Not only did the danger exist, but no politician would want to be seen as responsible for any violence that might occur after the statute had been repealed.

The extension of the 1984 Prevention of Terrorism Act to international terrorism made the statute’s repeal even more remote. Between 1984 and 1996 more than twenty-one percent of those detained under either the 1984 or the 1989 PTA and subsequently


charged with an offense were involved in international terrorism. In 1995 the number rose to fifty percent. This led one Member of Parliament to comment that it was vital for Britain to “continue to have on the statute book legislation which will enable a democratic society to respond to the ever-present threat of international terrorism, regardless of the situation in Northern Ireland.”\(^{68}\) During his introduction in the renewal debates in 1996 the Home Secretary agreed that, “there is always likely to be terrorism of an international kind . . . the manifestations of it are increasing; and . . . the need for the [PTA] in order to counter them therefore remains.”\(^{69}\) Basing the withdrawal of a temporary statute on the cessation of international terrorism undermined the Act’s claim to transient status and placed repeal even further beyond reach. As long as violence continued, either in relation to Northern Ireland or to international disputes, the use of emergency legislation as a condemnation of terrorist techniques added to the propensity of such legislation to remain in force.

D. Impact on Violence

Not only did emergency legislation carry with it a moral import, but the partial effectiveness of the measures also lent itself to encouraging the continued use of the legislation. The 1922 SPA, 1973 EPA and 1974 PTA were immediately followed by declining levels of violence: a high of 80 murders and 58 attempted murders in April 1922 plummeted to 1 murder and 11 attempted murders by September of that year. These numbers continued to fall throughout the balance of 1922 and into 1923.\(^{70}\) Similarly, immediately following the introduction of the 1973 EPA the number of deaths and injuries in Northern Ireland decreased. From a high of 467 deaths in 1972, the number dropped to 250 in 1973, and 216 in 1974; injuries correspondingly decreased from 4876 in 1972 to 2651 in 1973 and 2398 in 1974.\(^{71}\) In 1974 there was a similar drop in terrorist incidents in Great Britain.

There is some question as to what degree special powers were responsible for these decreases. All of the following may have played significant roles in helping to reduce and focus the violence under direct rule by Britain: (a) increased effectiveness of the security forces, (b) improved intelligence, (c) growing rejection by the communities in Northern Ireland of the use of violence for political ends, (d) the 1974 IRA cease-fire, (e) the drying up of IRA funding from the United States, (f) greater selectivity of terrorists in choosing targets, (g) greater cross-border cooperation with the Republic, and (h) increased media attention. However, statistics available on the operation of the 1973 EPA and 1974 PTA do suggest that wide use was made of provisions relating to the


\(^{70}\) See Letter from the Imperial Secretary to the Under Secretary of State, Home Affairs, June 21, 1923, PRO HA 267/362.

\(^{71}\) See generally NORTHERN IRELAND ANNUAL ABSTRACT OF STATISTICS and IRISH INFORMATION PARTNERSHIP.
collection of information during the first few years of the statutes’ operation. Under the 1973 EPA 4141 people were arrested in 1975, 8321 in 1976, and 5878 in 1977.72 Pari passu, the armed forces utilized the 1974 PTA to detain 1067 people in 1975, 1066 in 1976, and 853 in 1977.73 This brought to well over 21,000 the number of people held for questioning over the three-year period under powers provided by emergency legislation. From its introduction in 1974 until its renewal in 1996, more than 27,000 people were detained under the PTA alone. Although less than fifteen percent of these detainees were subsequently charged with a crime,74 the information gathered from such techniques most likely had a significant impact on levels of violence in both Northern Ireland and Great Britain.

Northern Ireland suffered significantly less in terms of statistical eruptions of violence under the SPAs, which were considerably more far-reaching than their post-1972 counterparts. This fact was highlighted in Westminster;75 indeed, the effectiveness of the SPAs from 1922-1943 became the basis for the shift in the justification of the measures. They came to be defended as a means of maintaining the status quo rather than as a means to establish law and order. This same alteration marked British defense of emergency measures—their efficaciousness became a reason for their retention. The security forces also tended to support the extension of such measures as part of their arsenal in the fight against terrorism. Once the powers had been gained, those wielding them were unwilling to see them diminished. This was picked up in Parliament during the 1981 renewal of the PTA. One Member of Parliament said: “It is my impression that once a government have these powers in their control they are very reluctant to give them up.”76 As time passed and security forces became more familiar with the operation of the statute, significant alterations might have been viewed as inconvenient.

In summary, a number of Northern Ireland emergency legislation characteristics likely contributed to the longevity of the measures. First, emergency legislation was formally consistent with other types of legislation. Second, many of the offenses introduced under the statutes were already in place under ordinary law. Third, in light of the moral disgust articulated through the enactment of emergency laws, it became politically undesirable (against a background of continuing violence) to repeal them. Fourth, the perceived effectiveness of the legislation lent itself to justification for the


entrenchment of emergency measures in the Northern Irish and British constitutions. Finally, whenever a lull in violence occurred, opponents of the legislation had to prove that a threat no longer existed. As discussed below, both the nature of the Northern Irish situation and the nature of terrorism made it difficult to demonstrate the absence of a threat.

II. INTERNAL DIVISIONS AND THE PHYSICAL FORCE TRADITION

Was there something about the nature of the Northern Ireland conflict—the contrary demands of the two dominant ethnic groups and the intractable nature of the violence—that created a situation leading to the permanence of emergency legislation? While this paper focuses on the underlying legal elements contributing to the retention of emergency law, the political situation into which the legislation was introduced is quite relevant. Certainly Northern Irish politics from 1922 through the present have been built around deep ethnic divisions and divergent political aspirations. Housing distribution, employment patterns, education, inter-personal relationships and social activities all cut along ethnic lines.\textsuperscript{77} Divergent constitutional aspirations further underlay the Catholic-Protestant divide. In this context historical events have served to legitimize one side against the other. For instance, the twelfth century Norman invasions, sixteenth century surrender and re-grant treaties and Nine Years’ War, as well as the seventeenth and eighteenth century plantations and penal laws provided grounds for the republican struggle. The sixteenth century uprisings by the Irish Catholics, the 1689 Siege of Derry, the 1690 Battle of the Boyne, as well as the agrarian uprisings throughout the eighteenth century provided the basis for loyalist claims. Repeated reference to past events served to justify not just the republican view of the British government as an outside force, but physical force organizations as a “legitimate” means to rid the country of British presence. From Theobold Wolfe Tone and the 1791 Society of United Irishmen to the Young Ireland movement, Fenian Brotherhood, Irish Republican Brotherhood and the Defenders, republican violence was directed against the state and its institutions. In turn, the counter-revolutionary tradition sought to uphold the authority of the state. The Planters’ home guards in the 1780s, the Rifle clubs and Young Ulster at the end of the nineteenth century professed devotion to the British Crown. These physical force organizations both emphasized and further entrenched divisions between the communities. By the time of partition and throughout the unionist government of the North two very different histories had been constructed, further reinforcing divisions within the province.

The entrenched ideologies of the two dominant ethnic groups, and in particular the two extremes, lent its own dynamic to the maintenance of emergency law from 1922 through 1972. Because the central issue at stake rested on the constitutional status of the

North, minority aspirations threatened the foundation of the state. Any attempt on the part of nationalists or republicans to gain power or to garner support for a united Ireland was perceived as an attack on the Northern Irish constitution. As defenders of the state, unionists immediately exercised their authority to secure the northern government. They hailed emergency legislation as a critical to maintaining control of the province. To lose control, particularly at the time of partition, would have meant not just civil disorder, but a change in the government’s structure. Because of the political aspirations of both nationalism and republicanism, the threat to the constitutional position of the North remained long after the violence had subsided. Unionists were reminded of the threat in their midst by the protracted history of the physical force tradition, and the possibility of its return (which was openly advocated by republicanism). The occasional, actual revival of violent attacks, put even greater pressure on unionists to maintain the emergency measures.

Following World War II the unionist government slightly relaxed provisions introduced under the SPAs. This was the first and only time that the government withdrew emergency powers, and they were swiftly re-enacted. Prior to this time unionists perceived the North to be under siege, and following partition, violence erupted both north and south. Even after unionists restored civil order in the province, there were sporadic outbreaks of republican violence. Just over the border a distinctively Irish, Catholic state was being formed. In the 1932 Free State general election, Eamonn deValera and Fianna Fáil gained control of the southern parliament. The northern executive branch maintained and expanded its emergency powers between 1922 and 1949 by issuing statutory instruments which adjusted more than 50 regulations.

Even when Britain assumed direct rule in the 1970s the conflicting aims of nationalists, republicans, unionists and loyalists continued to influence the existence of emergency law. Just as a threat had existed during the operation of the Northern Irish Parliament, Britain now faced violent opposition. While Westminster did not share unionists’ immediacy in terms of the impact on the survival of the British (versus Northern Irish) state, Britain too became caught in the deep provincial divisions. The long history of republicanism and loyalism and their surrounding ideologies made it difficult for Westminster to address the situation via ordinary legislation. The Diplock

78 See S.R. & O. 147/1949 and S.R. & O. 187/1951 (repealing a number of regulations under the SPAs). Although many of these were re-introduced by S.R. & O. 176/1955 and S.R. & O. 199/1956, and others incorporated into more mainstream statutes, what was significant was the overall (temporary) repeal of these measures. One explanation for this lay in the impact of World War II: having demonstrated loyalty in contrast to the South’s neutrality, northern unionists could look upon their continued links with Britain with increased confidence. With Winston Churchill in power their position was even more secure. Moreover, the 1949 Ireland Act reaffirmed that Northern Ireland would remain part of the United Kingdom until a majority in the northern parliament decreed otherwise. Unionists had established such a clear hold on the political machinery that the possibility of losing a majority in parliament looked further off than ever. The newly found confidence gained by these circumstances, together with the relative calm in Northern Ireland and the lack of immediate threat from the IRA, contributed to the repeal of emergency provisions. So while divisions were still present in the Northern Irish society, unionists felt more secure with respect to the constitutional threat wielded by nationalism and republicanism. However the advent of the 1956–1962 IRA campaign swiftly resulted in the reenactment of emergency measures.
courts, the withdrawal of special category status, the advent of supergrass trials, and the media ban were all attempts to isolate “terrorists,” to remove them from communities steeped in a history of conflict. Attempts to bridge the ideological divide met with little success. Emergency legislation became hailed as a necessity in the distinctively Northern Irish context.

III. EMERGENCY PRECEDENT AND BRITISH PERCEPTIONS

A. Prior Emergency Measures

Not only was there a history of division and a physical force tradition, but there was also a long history of Britain enacting emergency measures in Ireland. On the state side this precedent played a role in influencing the acceptability of employing emergency legislation in Northern Irish affairs. Between 1800 and 1921 more than 100 Coercion Acts were deployed in Ireland.\(^\text{79}\) These were designed to minimize violence and to establish law and order. For instance, “An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same,”\(^\text{80}\) was followed in 1803 by “An Act for the Suppression of Rebellion in Ireland, and for the Protection of the Persons and Property of His Majesty’s Faithful Subjects there.”\(^\text{81}\) These were succeeded by “An Act for the More Effectual Suppression of Local Disturbances and Dangerous Associations in Ireland,”\(^\text{82}\) and “The Protection of Life and Property in Certain Parts of Ireland Act.”\(^\text{83}\)

In response to the land war agitation of the late nineteenth century, the British government enacted the Protection of Person and Property (Ireland) Act in 1881,\(^\text{84}\) and in the following year the Prevention of Crime (Ireland) Act.\(^\text{85}\) The preamble of the latter


\(^{80}\) See An Act for the Suppression of the Rebellion which still unhappily exists within this Kingdom, and for the Protection of the Persons and Properties of His Majesty’s faithful subjects within the same, 1799, 39 Geo. 3, ch. 11 (Eng.).

\(^{81}\) See Act for the Suppression of the Rebellion in Ireland, and for the Protection of the Person and Property of His Majesty’s Faithful Subjects there, 1803, 43 Geo. 3, ch. 117 (Eng.).

\(^{82}\) See An Act for the more effectual Suppression of local Disturbances and dangerous Associations in Ireland, 1833, 3 Will. 4, ch. 4 (Eng.).

\(^{83}\) See Protection of Life and Property in certain Parts of Ireland Act, 1871, 34 & 35 Vict., ch. 25 (Eng.).

\(^{84}\) See Protection of Person and Property Act, 1881, 44 & 45 Vict., ch. 4 (Eng.).

\(^{85}\) See Prevention of Crime Act, 1882, 45 & 46 Vict., ch. 25 (Ir.).
The 1887 Criminal Law and Procedure (Ireland) Act (the “1887 Act”), which drew on previous coercion measures, granted powers of inquisition to magistrates, and empowered the Attorney General to conduct interrogation in private. Stating in relevant part: “Whereas it is expedient to amend the law relating to the place of trial of offenses committed in Ireland, for securing more fair and impartial trials, and for relieving jurors from danger to their lives, property, and business,” trials could be transferred to different counties where a “more fair and impartial trial” could be held with or without a special jury. The same concerns addressed by Lord Diplock in 1972 were at issue in the nineteenth century. The 1887 Act also allowed the Lord Lieutenant and Privy Council to proscribe organizations. Various Peace Preservation (Ireland) Acts were passed throughout the nineteenth century, as were adjustments to the judicial procedure and tightening of explosives and firearms measures. In sum, the unrest punctuating rule of Ireland was addressed historically through the introduction of special powers. This created an internal legitimacy in the continued use of similar measures immediately following partition and through direct rule. Britain's application of similar measures from 1972 through 1996 was further bolstered by the perception in Westminster of Ireland as a place apart.

86 See id. at Preamble.

87 See id. See also 1973 EPA, supra note 6.

88 See Criminal Law and Procedure Act, 1887, 50 & 51 Vict., ch. 20 (Ir.). This statute was not repealed until the 1973 EPA.

89 See id.

90 See, e.g., the Peace Preservation Act, 33 & 34 Vict., ch. 9 (1870) (Ir.); the Peace Preservation Acts Continuance Act, 1873, 36 & 37 Vict., ch. 24 (Ir.); the Peace Preservation Act, 1875, 38 & 39 Vict., ch. 14 (Ir.); the Peace Preservation Act, 1881, 44 & 45 Vict., ch. 5 (Ir.); and the Peace Preservation Continuance Act, 1886, 49 & 50 Vict., ch. 24 (Ir.).
B. Perceptions from Westminster

The view that Northern Ireland bears a unique history within which special powers are acceptable or even necessary played a role in annual consideration of emergency legislation. In 1972 one Member of Parliament commented: “I have great sympathy with those who have protested in this debate that the order provides for internment in another and more sophisticated form. But internment has been one of the facts of Irish history and one of the means for securing the State in Ireland, north or south.”91 Another Member asserted: “We have never been able to maintain a Northern Ireland state, since its very inception, without some kind of repressive law.”92

Northern Ireland was different from the rest of the United Kingdom. It was a place apart. In 1979, the Secretary of State for Northern Ireland stated: “Northern Ireland, for reasons that cannot be undone, is not like any other part of the United Kingdom. New structures of government must be based on a recognition of that fact.”93 Humphrey Atkins later added: “I hope that it will be clear to the House that the Government are, and will continue to be, sensitive to the special problems of Northern Ireland.”94 In response to protestations that the powers in the 1975 EPA would not be accepted in England, the Minister of State for Northern Ireland replied, “[o]f course, but the same situation does not apply in England.”95 During the committee stage of the 1973 EPA Bill one Member asserted that “the . . . impression I got . . . was that [the elimination of juries] would never be taken here but that it was good enough for Northern Ireland.”96 More than two decades later similar sentiments were still being voiced.97 Commenting later about the government’s decision to introduce the Prevention of Terrorism (Temporary Provisions) Bill, Roy Jenkins wrote:

I always believed in keeping as much as possible of the contagion of Northern Irish terrorism out of Great Britain. I thought we had responsibilities in Northern Ireland, both to uphold security and to assuage the conflict, but I did not think they extended to absorbing any more than we had to of the results of many generations of mutual intolerance.98

91 848 PARL. DEB., H.C. (5th ser.) 80 (1972).
93 969 PARL. DEB., H.C. (5th ser.) 928 (1979) (statement by M.P. Humphrey Atkins).
94 Id. at 930.
95 959 PARL. DEB., H.C. (5th ser.) 1580 (1978) (statement by M.P. J. D. Concannon).
97 See 272 PARL. DEB., H.C. (5th ser.) 61 (1996) (statement of M.P. Kevin McNamara) (stating that “no one in Britain will undergo the [EPA] procedures that apply in Northern Ireland.”).
98 JENKINS, supra, note 19, at 377.
Member of Parliament Tom Litterick commented: “I view with trepidation the prospect of discussing the internal affairs of a foreign country. Ulster is a foreign country. I have been there and it is, in every sense, unmistakably a foreign country.” Northern Ireland was alien territory with its own ingrained history. “We should remember that we cannot allow ourselves to be swayed too much by our sometimes frantic considerations of present events because, as the House should know, present events are very similar in Ireland to what has gone on before. There is nothing exceptional about them.”

Reflecting the perception of emergency legislation as somehow acceptable in the Northern Irish context were the brevity and perfunctoriness of the renewal procedure. In the House of Commons, debates tended to be held late at night, rarely lasting more than ninety minutes. In Lords they were even shorter and less detailed. Not only was the time allocated to the consideration of emergency legislation limited, but after the introduction of the 1973 EPA Parliament appended the renewal of other statutes to the debates surrounding emergency measures. Within a few years their renewal, the 1974 Northern Ireland (Young Persons) Act and the 1974 Northern Ireland Act were being considered concurrently with retention of the EPAs from 1973 through 1975. This allowed for even less direct discussion of the emergency measures at hand. In addition attendance at the annual renewals steadily eroded in the years following the introduction of emergency law. The form and manner of debate on the EPA and PTA, combined with the substance of their provisions reflected the generally held view in Westminster that applying emergency law to Northern Ireland was acceptable.

IV. CONTEXT OF THE BRITISH STATE

A. Limitations and Dilution

Although arising from disparate modes of justification, to some extent the types of emergency measures introduced by the unionist government and by Westminster overlapped. This may have been due to the common origins of the measures. For example, the 1922 SPA was drawn directly from British legislation previously employed in Ireland. Immediately following partition, with a civil war just over the border, it was unlikely that Westminster would censure unionist imitation of previous British policy. The introduction of the 1972 Detention of Terrorists Order immediately following imposition of direct rule confirmed that Britain was still ready and willing to employ such measures with regard to Northern Ireland. Why did Britain continue to support this legislation after 1972? Aside from the formal consistency and moral import borne by

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emergency law and considerations relating to the Northern Irish political situation, as
discussed above, was there something about the structure of the British state which lent
itself to entrenching emergency law?

The options available to the northern government and to Westminster were more
limited within the United Kingdom than they might have been in totalitarian regimes. To
whatever degree the minority community was isolated from the nucleus of political
power, the structure of the northern parliament still reflected that of a democratic state.
The majority community had to be satisfied, and this limited what the Northern Irish and
British governments could do. Parliament recognized that the Northern Irish conflict was
“an extremely difficult war for a democracy such as [Britain] to fight.” What separated
acts of terrorism from those of mere criminality was that the former were distinguished
precisely by the political or ideological motivation of those engaging in the acts.
Terrorist motivation, unlike other criminal motivations, led to acts challenging the state
itself. In attempting to meet the challenge, the northern government enacted broad,
sweeping legislation. While Britain sought to demonstrate that the government would
not tolerate terrorist acts, it walked a fine line between allowing what it saw as too much
leeway for subversive organizations and violating rights otherwise protected in a liberal,
democratic state.

Largely as a result of the lack of clarity between acceptable measures and
unacceptable provisions, Britain’s use of emergency law after 1972 underwent some
alteration. Thus while the basic measures remained the same, the specific provisions
metamorphosed in response to internal demands, internal reviews and international
attention. For instance, the interrogation techniques introduced in the early 1970s were
drawn directly from British operations in Palestine, Malaya, Kenya, Cyprus, and
elsewhere. However it was not until they were employed within the United Kingdom
that they received widespread attention and condemnation. After the international
attention, they were dropped. Such techniques proved unacceptable within the
democratic structure of the United Kingdom. By contrast, seven-day detention and its
disparate application to the minority community in Northern Ireland continued well into
the next decade. Even though interrogation and detention were challenged, these
techniques achieved a borderline acceptability, possibly due to the mitigating measures
already in place.

Exclusion also underwent dilution after 1972 throughout the tenure of direct rule.
In response to unionist agitation, Britain included the principle of reciprocity via the 1974
Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order.
This instrument was incorporated with some alterations into the 1976 PTA. Two years


104 See 1976 EPA, supra note 6. The time limit for making representations against an exclusion order after
being served with notice was increased from 48 hours to 96 hours, and in the event that the individual had
not already been consensually removed from the United Kingdom, the right to a meeting with an advisor
was made absolute, rather than being dependent on whether the Secretary of State determined the request to
be “frivolous.”
later, in response to Lord Shackleton’s recommendation that a survey of exclusion orders be conducted to determine possible revocation, Westminster announced that it would implement a standard review of exclusion orders to be instituted three years after the making of the initial order. In 1982 Lord Jellicoe proposed that exclusion orders be retained with some modifications. The government accepted his findings and altered the appropriate provisions in the 1984 Prevention of Terrorism (Temporary Provisions) Act. Exclusion was limited to a period of three years, after which time the Secretary of State could renew the order. Any British citizen resident in Great Britain three or more years prior to consideration of exclusion was exempted from the 1984 Prevention of Terrorism (Temporary Provisions) Act. Westminster’s later introduction of the 1996 Draft Prevention of Terrorism (Temporary Provisions) Regulations further modified the provisions in accordance with the European Covenant on Human Rights.

These changes gradually reduced the more severe effects of exclusion, making the presence of the measure, while still exceptional, more palatable than before. Other alterations, such as the extension of the requirement of reasonable suspicion for the exercise of various powers, and the extension to detainees of certain rights they otherwise would hold under the Police and Criminal Evidence Act, demonstrated the “normalization” of emergency law. These alterations brought the formal statutes and regulations of Northern Ireland closer to England’s perception of liberal democratic law, thereby reducing the persuasiveness of any dissent. Similar dilution of emergency measures contributed to the entrenchment of the legislation. This normalization, along with the growing acceptance of emergency legislation throughout the 1980s and into the 1990s is clear in parliamentary scrutiny of the measures. Following the 1976 general review of the PTA, the terms of reference for these measures in independent reports consistently included “the continuing need for legislation against terrorism.” The government analyzed the functional operation of the statute, but did not examine whether the legislation itself was necessary or appropriate. By the mid-1970s, the framework within which only minor, technical adjustments would be made had been established.

B. International Attention to Domestic Concerns of United Kingdom

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105 See JELLICOE REPORT, supra note 48, at para. 188.


107 See id. at ch. 8. Similarly, an individual resident in Northern Ireland three or more years could not be excluded from the province. Clause 7 created an absolute right of appeal for individuals to meet with an adviser to make representations protesting the issuance of exclusion orders. The length of time within which such meetings were arranged was extended from 96 hours to 7 days after the initial order was made.

108 See id.

109 While many of the measures were diluted, others, such as those relating to financial support of proscribed organizations, grew more strict.

110 See generally SHACKLETON REPORT, supra note 53.
The British state operated not only within certain limitations imposed by its governmental structure (which resulted in the dilution of some of the more extreme measures), but also within the expectations and allowances of the international community. These international pressures influenced Britain’s alteration—and retention—of emergency law. As a result of Northern Ireland’s structural subservience to Westminster, measures enacted by the unionist government from 1922 to 1972 were largely considered internal to the United Kingdom. Certainly during the post-World War I rebuilding period, World War II, and the immediate aftermath of the World War II, minimal attention was drawn to the operation of the SPAs. With the advent of the civil rights marches in the 1960s, however, and the increased international attention placed on civil rights issues, the Northern Ireland situation gained prominence. Aided by the rapidly expanding media industry and highlighted by Westminster’s assumption of direct rule, more attention was placed on Northern Ireland and Britain’s response to events there. The Republic became increasingly involved via the Anglo-Irish intergovernmental talks. These changes brought into sharp relief the international agreements into which the United Kingdom had entered, and the related issues arising under the introduction and operation of emergency measures in Northern Ireland.

C. **Various Treaties Protecting Ability of Contracting States to Introduce Emergency Legislation**

Various treaties to which the United Kingdom was a signatory protected the ability of contracting states to introduce emergency measures in times of need. For instance, Article 4 of the International Covenant on Civil and Political Rights ("International Covenant") allowed for derogation from obligations under the treaty in times of public emergency.\(^{111}\) Upon ratification of the covenant in 1976, the British government reserved derogation in respect to Northern Ireland. Britain withdrew the derogation in 1984 only to reinstate it in 1988.\(^{112}\) Like Article 4 of the International Covenant, Article 15 of the European Convention on Human Rights (the “European Convention”) allowed that:

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\text{[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.}^{113}\]

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\(^{111}\) See International Covenant on Civil and Political Rights 1966, reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 127 (Ian Brownlie ed., 3rd ed. 1994). Although some articles were exempted from derogations, such as those relating to the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right not to be enslaved or held in servitude, a general derogation could be established.

\(^{112}\) For the text of this subsequent derogation see <http://www.law.qub.ac.uk> (visited Nov. 25, 1999).

During the introduction of emergency measures, Members of Parliament appealed to the derogations provided by these agreements. One Member of Parliament stated, “We know that even the human rights convention admits of some circumstances in which ordinary principles may be set aside . . . . the principle [of derogation from the normally accepted principles of the judicial process] is well recognized in the European Convention of Human Rights.”\(^{114}\) In its exercise of emergency powers after 1972, the United Kingdom government chose to avail itself of the right to derogate from the standards when it was brought before the European Court for violations of the covenant.\(^{115}\) In *Brogan and Others v. United Kingdom*, four people, detained between four and seven days under the PTA on suspicion of involvement in Northern Irish terrorism, submitted complaints to the European Commission on Human Rights that the United Kingdom’s actions had violated the European Convention.\(^{116}\) Article 5, paragraph 3 of the European Convention demanded that anyone arrested “be brought promptly before a judge or other officer authorized by law to exercise judicial power and . . . be entitled to trial within a reasonable time or to release pending trial.”\(^{117}\) In November 1988 the European Court ruled that even the shortest period for which one of the four individuals had been held (four days and six hours) violated the convention.\(^{118}\) Because no provisions existed in the United Kingdom by which the government could compensate the individuals, the country was also found in violation of Article 5, paragraph 5, which stipulated that anyone who had been the victim of arrest or detention should have an enforceable right to compensation.\(^{119}\) The British government insisted that seven-day detention was required and examined two possible courses of action.\(^{120}\) Either a judicial element could be inserted into the procedure through which the seven-day detention was extended, or else the United Kingdom could derogate under Article 15.\(^{121}\) In December 1988, Britain announced that it would pursue the latter route, and a year later it

\(^{114}\) 859 PARL. DEB., H.C. (5th ser.) 812 and 843 (1973). *See also* PARL. DEB., H.C. (5th ser.) 298 (1973) (acknowledging the United Kingdom’s right under the European Convention on Human Rights, to intern those who shoot and kill but still seeking external investigation of the established tribunal system to ensure compliance with the protections guaranteed under the Convention).

\(^{115}\) *See* JACkSON, *supra* note 37, at 507–35 (discussing multiple cases under consideration by the European court of Human Rights).


\(^{119}\) *See id.*


\(^{121}\) The derogation was an option in *Brogan and Others v. UK*; derogation had not been possible in the first case to come before the court, *Ireland v. UK* (1978) 2 Eur. H.R. Rep. 25, because the breach established in that case was non–derogable under Article 3.
reaffirmed the derogation, stating that it would be maintained as long as deemed necessary. Although Brannigan & McBride v. United Kingdom subsequently challenged the validity of this derogation, once again in the context of detention, the court found in the United Kingdom’s favor. According to the preconditions for derogation there must be a “war or other public emergency threatening the life of the nation,” the derogation must be “strictly required by the exigencies of the situation,” and that measures must be consistent with the state’s other international obligations. These conditions were satisfied and the court held that the derogation was valid. Simultaneously, the court noted its concern about the long-term, apparently unexceptional character of the “emergency” in Northern Ireland.

These international agreements became a yardstick by which Britain could measure its incursions into civil rights. In 1972 Lord Diplock sought to adjust existing

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The Jurisprudence of the Commission and Court of Human Rights has established the following characteristics of an emergency where article 15 of the Convention is invoked: (i) the emergency must be actual or imminent; (ii) its effects must involve the whole nation; (iii) the continuance of the organized life of the community must be threatened; and (iv) the crisis or danger must be exceptional in that the normal measures or restrictions, permitted by the convention for the maintenance of public safety, health, and order, are plainly inadequate.


criminal procedures in a manner consistent with Article 6 of the European Convention. In his 1975 review of the 1973 EPA Lord Gardiner wrote: “The British Government has acted legitimately, and consistently with the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in restricting certain fundamental liberties in Northern Ireland.” 127 These findings followed on concerns voiced in the House of Commons that emergency measures introduced by Westminster, and particularly with respect to the Diplock Court system, would lower the United Kingdom’s standing in the international arena. 128 Powers under the EPAs and PTAs frequently were examined against findings by the European Court. 129 Colville's 1987 review cited the damaging effects of these exclusionary measures on the British government's civil rights reputation in the eyes of the international community. This provision’s presence prevented the United Kingdom from ratifying protocol four of the European convention on Human Rights which declared the right to move freely and to choose where to live within one’s own country. The international community’s allowance of the United Kingdom’s derogation led the United Kingdom to dilute, rather than eliminate, these emergency measures, creating an “acceptable level” of suspension of human rights.

The international arena also had influence over Britain’s counter-terrorism legislation via the European Convention for the Suppression of Terrorism. In May 1973 the Consultative Assembly of the Council of Europe adopted Recommendation 703, which condemned international terrorist attacks. It invited governments of member states “to establish a common definition for the notion of ‘political offense’ in order to be able to refute any ‘political’ justification whenever an act of terrorism endanger[ed] the life of innocent persons.” 130 The underlying rationale was that some crimes were so odious in terms of the methods adopted to obtain certain results, that they should no longer be classified as political offenses, and thus exempted from extradition. 131 Upon recommendation of the ministers of justice of its member states, the Council of Europe drafted the European Convention on the Suppression of Terrorism. This document

127 REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1975, Cmnd. 5847, ch. 7, n. 4.

128 See 855 PARL. DEB., H.C. (5th ser.) 315 (1973) (“When we sit in and observe trials in [other] countries, our position and the respect in which British law is held in those countries will be severely diminished and hampered.”).


removed certain offenses from consideration as political offenses. Others listed in article 2 could be removed from classification as political offenses, notwithstanding their political content or motivation. In expediting extradition, member states relied on the operation of mechanisms that already had been established. This reliance overtly supported member states’ measures, and depended on the mechanisms of the European Commission on Human Rights and Fundamental Freedoms to address any deviation. This allowed politically motivated terrorism to be made subject to ordinary rules governing extradition until and unless the European Commission ruled otherwise.

The United Kingdom ratified the European Convention on the Suppression of Terrorism on July 24, 1978, and installed it as domestic law on June 30, 1978. Although the first article technically eliminated the possibility for a requested state to invoke the political nature of a terrorist offense in order to oppose an extradition request, article 13 allowed contracting states to make exceptions with regard to the application of article 1. Seven of the eighteen initial signatories (Denmark, France, Germany, Italy, Norway, Portugal, and Sweden) chose to avail themselves of this option. However, in its derogation France asserted the need to tighten legislation to combat terrorism: “This signature is the logical consequence of the action we have been taking for several years and which has caused us on several occasions to strengthen our internal legislation . . . .” At the time the statement was made, Britain was implementing its policy of Ulsterization and criminalization. Both the international support for the criminalization of terrorist acts, such as that signified by the European Convention on the Suppression of Terrorism, and the concurrent tightening of counter-terrorist measures within other member states, created a context within which the adoption of emergency law reflected an accepted, international norm.

132 See European Convention on the Suppression of Terrorism, supra note 130. This included any offenses under the Convention for the Suppression of Unlawful Seizure of Aircraft, 1972 Gr. Brit. T.S. No. 39 (Cmnd. 4956), or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1974 Gr. Brit. T.S. No. 10 (Cmnd. 5524), any serious offense against internationally protected persons, kidnapping, the taking of hostages, or serious unlawful detention, an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if individuals are so endangered, or acting as an accomplice in any of the above offenses.

133 See European Convention on the Suppression of Terrorism, supra note 130, at art. 2. These offenses included acts of violence not covered by article 1, such as acts against property, offenses creating a collective danger to persons, or accomplices in the aforementioned acts.

134 See Suppression of Terrorism Act, 1978, ch. 26 (Eng.).

135 See Explanatory Note, supra note 130, at para. 31.

136 See id.

Any state may, at the time of signature or when depositing its instrument or ratification . . . declare that it reserves the right to refuse extradition in respect of any offense mentioned in Article 1 which it considers to be a political offense, an offense connected with a political offense or an offense inspired by political motives . . . .

Id., at art. 13.

137 See id., at 8.
D. Contradictions in International Law Regarding Counter-Terrorist Provisions

Aside from general curtailment of some of the worst human rights’ abuses employed by states, general support in the international arena for the introduction of some sort of domestic counter-terrorist legislation, and overall acknowledgment of the right of states to derogate from their responsibilities in times of “great need,” the international community said very little about the specific issue of counter-terrorist law. In part this silence stems from the failure of the international community to agree to a common definition of “terrorism.”\(^{138}\) The aims, structures, targets, strategies and tactics of terrorist organizations vary widely. Cultural and historical considerations may provide a certain amount of concurrence within a particular region, such as Western Europe or South America, as to the elements of a terrorist act; however cultural, ethnic, or religious connections between nation-states and sub-national movements often blur the distinction between “terrorism” and “liberation.”

The very characterization of terrorist acts as “grave breaches” or war crimes assumes that acts of terrorism during liberation struggles can be distinguished from individual acts of international terrorism, yet the success of attempting to make such a distinction is not apparent. Failure to grasp a common definition of terrorism limits the international community’s ability to direct the scope and direction of counter-terrorist statutes. The lack of clarity in determining what constitutes a terrorist act also reflects jurisprudential disputes over whether terrorism constitutes its own formal branch of international law, or whether it is simply a manifestation of acts conducted within the auspices of other areas: the Law of the Seas, Air and Space Law, etc. It is not the intent of this article to delve into these and other factors influencing international treatment of terrorism and counter-terrorist domestic and international law.\(^{139}\) Some aspects of the principles which underlie the structure of the United Nations and the international community do bear mention however, as their resulting lack of guidance on domestic counter-terrorist law has to some extent perpetuated the use of emergency measures in the United Kingdom.

The principle of equal rights and the self-determination of a “people” are at the heart of the United Nations’ Charter.\(^{140}\) This document presupposes a vision of state sovereignty, territorial integrity, and political independence. As the scope of “self-determination” has expanded—particularly in the post-1945 period—these principles

\(^{138}\) See INTERNATIONAL TERRORISM: NATIONAL, REGIONAL, AND GLOBAL PERSPECTIVES, (Yonah Alexander ed., 1976); In 1937 the world community agreed in principle as to what constitutes international terrorism. Since then however, states have failed to accept a common definition.

\(^{139}\) See generally LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION (1997); TERRORISM AND INTERNATIONAL LAW (Rosalyn Higgins & Maurice Flory eds., 1997).

\(^{140}\) See generally ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1996) (discussing the definition of a “peoples” and the conflict between self-determination and state sovereignty).
have come into frequent conflict concurrent within a nation-state. A “people” often exhibits a transboundary or transborder existence, but the context of ethnic nationality must operate through traditional mechanisms of sovereign state administration. Thus while most states in the world agree with the principle of self-determination, the exercise of the right to self-determination is seen as being subject to participation in democratic processes.\textsuperscript{141} Yet the majority/minority mechanisms present in liberal democratic states often reduce the possibility of minority self-determination. Furthermore, it has never been made clear exactly what rights entitlements are involved in self-determination. How can international law determine which “peoples” can exercise these entitlements? How can self-determination be achieved? The concept of a “people” was originally tied to ethnically and/or culturally distinct groups within a particular territory. Stemming in large part from the successful use of armed conflict by various “peoples” after 1945, the concept of a “people” has gradually been expanded to include certain minorities who lack self-determination within recognized geopolitical boundaries. It is now understood to include groups living in a situation of colonial domination, alien occupation and/or under a racist regime.\textsuperscript{142} It is unclear, however, how far the concept of a “people” can be applied, or what should occur if claims of competing peoples come into conflict.

In addition to the vagueness and contradiction inherent in the right to self-determination of a people, the principle of self-determination, if enforced at an international level, contradicts the principles of state sovereignty and territorial integrity for the existing state. The principle of non-intervention both encourages and recognizes the rights of states to handle domestic disputes independent of any international customary law. Yet self-determination suggests that nationalist movements are themselves legitimate actors in the international arena, and thus subject to protection under international norms. To address this issue, the 1977 Protocol to the Geneva Conventions of August 1949 addressed the Protection of Victims of International Armed Conflicts, while the International Humanitarian Law of Armed Conflict extended protection to wards of self-determination.\textsuperscript{143} The 1977 extensions of international humanitarian law suggest that the actions of the states when dealing with domestic armed conflicts may no longer be beyond the scope of international inquiry. Further, acts of terrorism perpetuated by or on behalf of people struggling for their rights to self-determination present a potentially separable and different phenomenon subject to prosecution under international humanitarian law. However the United Nations only regulates states in their use of force.

\textsuperscript{141} Id. at 3.

\textsuperscript{142} See id. at 17, n. 9 (discussing the Protocol additional to the four Geneva Conventions of Aug. 12, 1949, 75 U.N.T.S. 31, and relating to the protection of victims of international armed conflicts (Protocol 1) Article 1(4). June 8, 1977). This new scope evolved after the United Nations admitted various new states that formerly were colonial territories that had been subjected to human right abuses.

International humanitarian law generally applies between signatory states. For example, the 1949 Geneva Conventions could apply to domestic liberation conflict. Reflecting the aim of states to deny any challenge to state political legitimacy posed by nationalist terrorist movements, ruling governments have stopped short of advocating the application of international humanitarian law to subnational terrorist organizations. Governments prefer to deal with terrorism as a criminal activity and to prosecute it within a sovereign, domestic framework of penal law. Certainly in the case of the United Kingdom, the government made every effort to address the violence through domestic statutes. It repeatedly denied the Republic or the international arena any role in what it claimed were the “internal workings” of the United Kingdom. It was not until the mid-1980s, with the signing of the Anglo-Irish Agreement, that the United Kingdom recognized any role an external party might have vis-à-vis Northern Ireland.144 By handling the violence as a matter internal to the United Kingdom, the state sought to deny legitimacy to the terrorist organizations.

This refusal of states to “elevate” terrorist organizations to equal status in the international arena prevents international humanitarian norms relating to conduct in war from being applied to the actions of either the terrorist organizations or the states themselves. If the states were to involve international humanitarian law in wars of self-determination, it would imply that the manner in which the state ensures its own legitimacy no longer lies within domestic jurisdiction. Of course this violates the principle of state sovereignty. So while most states are prepared to allow the right to self-determination as a principle of the United Nations and of international customary law, they are not prepared to accept the practical impact of such a concession on the “internal workings” of their own nation-state. This impact could include legitimization of anti-state terrorist organizations, possible fragmentation of state territory, the erosion of state sovereignty, and limitations on the state’s right to self-defense.

E. A Hierarchy of Rights

The international legal system also contributed to the retention of emergency measures through the rights discourse inherent in liberal, democratic thought. The British government’s propensity to appeal to this discourse served to further entrench emergency law in the United Kingdom. A comparison of the justification of emergency law developed by the Northern Ireland Parliament with that pronounced by Westminster illustrates the efficacy, or lack thereof, of appeals to this discourse. In Northern Ireland, the justification for the 1922 SPA rested in part on the claim that such measures in no way infringed the freedom of those who did not challenge the state:

One great feature about this Act which we now propose to continue is that while it places great powers in the hands of the government in regard to

144 See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, 1985, Cmnd. 9657.
dealing with disorder and the disorderly elements in our midst, it does not
tend in any way to infringe on the liberty of any law-abiding subject.\textsuperscript{145}

This assertion reflected the unionists’ belief that the measure would not be applied to
those individuals supporting the constitutional position of the northern state, and also
ignored the dangers of legislation which violated, in any measure, the rights of any
citizens in the state.

In contrast, Westminster recognized that both the 1973 EPA and the 1974 PTA
violated the rights of the citizens. However, the government bore a justifiable duty to
protect its citizens. As one Member of Parliament asserted:

\begin{quote}
If the Government are not to forfeit their right to be called a Government,
if the rule of law is to be anything other than a hollow mockery, if the
Government are to be entitled to the regard and obedience of their citizens,
it is their solemn duty to consider how these murders can be ended.\textsuperscript{146}
\end{quote}

This implied that the citizens bore a right to be protected by the government, a right that
in turn placed a correlative duty on the government to create and enforce measures
protecting the citizens. This right was clearly a derivative of the most fundamental right
of all: the right to life—which imposed a duty on citizens to abstain from causing death.
The state’s obligation to enforce the duty corresponded with a separate right of the
citizens of protection from the government, creating a duty for officials to pursue and
effectuate individuals’ rights.\textsuperscript{147} Not only were the right to life and the duty of others to
abstain from taking that life recognized in the international covenants to which the United
Kingdom was a signatory, but the entitlement of the citizen to expect protection from the
government was implicit in the articles delineating derogations. Further, the primacy of
the right to life as the most fundamental right within a state, along with the ability of the
state to suspend other rights in order to protect that entitlement, was widely recognized as
well.

With this rationale driving Parliament, and reflected in its international
agreements, a hierarchy of rights emerged in Westminster in which the government was
called on to protect the most basic of individual entitlements. Those that were of lesser
importance had to be sacrificed in order to protect the more basic rights of the citizenry:

Where there is a terrorist situation in any country, the rights of the
individual in the community have to be surrendered to a degree in order

\textsuperscript{145} See PRONI HA/32/1/619 (1928).

\textsuperscript{146} See 969 PARL. DEB., H.C. (5th ser.) 948 (1979) (statement of M.P. John McQuade).

\textsuperscript{147} The concurrence of these two rights was a matter of practicality and not logic, as one did not necessarily
entail the other. The right of the citizen to be protected against other citizens could be simply a nominal
right. However, in any operative legal system, the officials will be under a moral duty and perhaps also a
legal duty to take all reasonable steps to avert and rectify violations of basic rights.
that his real rights may be defended and eventually maintained. We must keep that principle before us. We have to surrender certain rights in Northern Ireland for the greater welfare of the whole community, so that the rights of the individual may be defended.\textsuperscript{148}

It was again emphasized in Parliament, that “[the PTA] infringe[s] our shared concept of civil liberties. But that is the price which the House has always accepted must be paid for protecting the most fundamental liberty of all—the liberty not to be killed or maimed when going about one’s lawful business.”\textsuperscript{149} The basic right to life and protection from physical harm was placed even above the right to self-determination; “[m]ore important to most people than the right of self-determination is the right to stay alive—which is why we must accept the necessity, however regretfully, of these emergency powers . . .”\textsuperscript{150}

In its protection of the most basic right—the right to life—the Northern Irish parliament and Westminster violated what they considered to be the lesser rights or freedoms of the citizens. To act in this manner however, was to risk further alienating the population. In the case of Northern Ireland, where the aim of republican paramilitarism was to draw an ever sharper distinction between the state and the citizens, this was a route of maximum possible risk. For instance, it was recognized in Westminster that the introduction of internment had done more harm than good. “[I] feel that the key is internment. Whoever one talks to in the minority group in Ulster, one can be in no doubt that since internment the political situation has changed radically. Internment has hardened attitudes.”\textsuperscript{151}

Not only was this a risky approach for Westminster to adopt, but the hierarchical claim made in parliament was simply wrong. The legislation did not, in fact, establish that the right to life and property were the two most important rights and thus all lesser rights could be suspended, rather it established that the most important right that a citizen bore was the \textit{right not to be afraid}. The actual impact that terrorism had on life and property in the United Kingdom was much less than other acts. For example, each year more people are killed in driving accidents in Northern Ireland than have been killed by terrorist violence in thirty years of the Troubles. Yet the government has not suspended all civil rights with counter-accident legislation in order to protect the life and property of citizens. The main function of counter-terrorist law is to respond to the fear engendered by terrorism. Secondly, it attempts to control the risk associated with the loss of

\textsuperscript{148} 940 \textsc{parl. deb.}, H.C. (5th ser.) 1737 (1977) (statement of M. P. Ian Paisley).

\textsuperscript{149} 1 \textsc{parl. deb.}, H.C. (5th ser.) 341 (1981) (statement of M.P. William Whitelaw).

\textsuperscript{150} 940 \textsc{parl. deb.}, H.C. (5th ser.) 1748 (1977) (statement of M.P. John Biggs-Davison).

\textsuperscript{151} 826 \textsc{parl. deb.}, H.C. 6th ser.) 1661 (1971), \textit{reprinted in} 902 \textsc{parl. deb.}, H.C. (5th ser.) 762 (1975) (statement of M.P. Merlyn Rees). \textit{See also} 855 \textsc{parl. deb.}, H.C. (5th ser.) 354 (1973).
property and/or life. Terrorism, by its very nature, however, is not a controllable event.

By introducing emergency law, some sense of control over a situation in which one would otherwise be afraid is gained. This is a very different claim than that put forth in parliament; rather than life and property as the first concerns, the right not to be afraid in fact played a central role in the adoption and maintenance of emergency legislation. It is the fear of losing life and property, and not the actual loss thereof that provided the ultimate justification for Westminster’s introduction—and retention—of emergency law.

CONCLUSION

There is very little either new or temporary about emergency measures enacted to combat political violence in the United Kingdom. The SPAs from 1922 through 1943 and the EPAs from 1973 through 1996 developed out of a common history and incorporate similar measures to address the Northern Irish situation. The 1939 PVA and PTAs from 1974 through 1996 also significantly overlap in the provisions contained in the statutes and in their entrenchment in British policy towards Northern Ireland. This article suggests a number of factors which contributed to the longevity of such measures. Ultimately the use of special powers depended upon the Northern Irish and British governments’ ability to justify their use. In Northern Ireland this took the form of protection of sovereignty: preventing the North from being incorporated into a united Ireland. In contrast, Westminster claimed to be protecting the lives and property of individuals within the state. In both cases, emergency measures initially intended as a temporary solutions became constitutionally entrenched, and inextricably linked to the politics of Northern Ireland.

To a great extent, the elements that contributed to the “temporary permanence” of emergency law in the United Kingdom may be at work in other liberal, democratic regimes. The formal consistency of the measures, the tendency of counter-terrorist law to replicate and influence criminal law, and the import borne by emergency legislation could all be common to other states introducing similar measures. In particular, the transfer of the burden of proof to those seeking to repeal the legislation to prove that the threat no longer exists, would be similar in any liberal state once such measures have been introduced. Although the circumstances of the Northern Ireland conflict are unique to the United Kingdom, the propensity of states to attach counter-terrorist law to international terrorism creates the opportunity for “temporary” measures to become institutionalized in other states as well. Certainly the general support within the international arena for the erection of some sort of counter-terrorist legislation, and the simultaneous lack of real direction on what form it should take, could lead other states to retain their own measures just as Britain retained its domestic legislation. Further, it is unlikely that the international arena will be able to provide more detailed guidance until such a time as fundamental principles, such as self-determination, state sovereignty, territorial integrity, and a state’s right to self-defense, are reconciled. Possible

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152 When an individual gets into a car, s/he perceives some sort of control over whether s/he will get into an accident and/or be hurt. S/he can wear a seat belt, drive more carefully, come to a full halt at four-way stops, and so forth. There is some sense that the risk associated with this behavior can be controlled.
application of international humanitarian law and the construction of a common
definition or understanding of terrorism likewise would need to be derived. Regardless,
liberal states’ adherence to the discourse of rights, and the tendency of British
parliamentarians in particular to view counter-terrorist legislation as reinforcing a
hierarchy of rights wherein the right to life and property assume dominance, is likely to
be reflected in other liberal, democratic states. The right not to be afraid deserves
particular attention in the possible introduction and operation of emergency legislation in
other states, as it is this entitlement which justifies the suspension of “lesser” rights and
the retention of emergency law.
Yellow Justice:
Media Portrayal of Criminal Trials in the Progressive Era

Shannon Petersen

\textit{In Yellow Justice, Shannon Petersen rediscovers a number of once famous and distinctly American headline news stories that shed light on the influence of the media on public opinion regarding criminal justice in early twentieth century America. He argues that newspapers engaged in yellow journalism during the Progressive Era through sensationalist reporting of instances of murder, bigamy, and other criminal trials capturing the public’s interest, and in the process reinforced and often contributed to the creation of “existing social perceptions” regarding gender and racial stereotypes, class differences, and societal moral ideals that the newspapers purported to merely “report.” Mr. Petersen further argues that media portrayal of criminal trials during the Progressive Era may have actually influenced the outcome of those trials by diminishing the objectivity of juries and judges. He discusses the views of criminologists from the time period who, distrustful of the jury’s capacity for objectivity, sought to eliminate this problem primarily by recommending policies that curtailed the freedom of expression in the name of justice. Mr. Petersen concludes that yellow journalism led to yellow justice during the early years of the twentieth century.}

INTRODUCTION

Early in 1905, the \textit{New York Times} reported that city police had arrested Josephine Noble for killing her husband, Paton Noble. The very same day the police came to her door, the grand jury indicted Josephine for murder in the second degree. Mrs. Noble, the reporter wrote, “wept bitterly over her arrest.”\textsuperscript{1} She “seemed more shaken than at any other time after the shooting.”\textsuperscript{2} How the journalist was able to comment on Josephine’s state of mind since the shooting two months earlier is unclear.

The \textit{New York Times} followed Josephine’s trial to its conclusion. District Attorney Gregg attempted to show that on November 12, 1904, Josephine and Paton fought, and that Josephine eventually became so angry she drew a pistol and shot her

\textsuperscript{1} \textit{Mrs. Noble Is Indicted}, N.Y. TIMES, Jan. 12, 1905, at 1.

\textsuperscript{2} \textit{Id}. 

\footnote{\textsuperscript{1} J.D. Candidate, Stanford Law School, 2000; Ph.D. Candidate (History), University of Wisconsin, 2000; M.A. University of Montana, 1995. The author would like to thank Professor Lawrence Friedman for his assistance with this article. The author would also like to thank the editors of the \textit{Stanford Journal of Legal Studies} for their input and editing.}

\footnote{\textsuperscript{2} Id.}
husband twice in the chest. After the state rested, Josephine took the stand in her own defense. “She was calm at first,” wrote the reporter, “but broke down when she came to tell how her husband met his death.”

She said that on the night of the shooting she was unpacking a trunk, as she and her husband had recently returned from a visit to the Maine woods. In the trunk she found a revolver, which she laid upon a table. Later on, she said, she picked up the revolver and “playfully” aimed it at her husband. He warned her that it was loaded, but she laughed at him. Josephine and Paton then “playfully” struggled for possession of the gun, when it suddenly discharged and her husband fell to the floor.

On cross-examination, District Attorney Gregg asked Josephine to explain how two bullets were found in her husband’s body. She replied that after the first accidental shot, she threw herself upon her husband and in her grief the revolver discharged again. The District Attorney then asked Josephine to show the court how she had been holding the pistol when it was discharged, but “Mrs. Noble recoiled with a scream and refused to touch the revolver.” After twelve minutes of deliberation, the jury returned a verdict of not guilty. The New York Times reporter wrote, “[t]he defendant’s own story and her manner of telling it seemed to convince the jury that she was innocent.”

This may have been true, but the New York Times and its manner of telling Josephine’s story also helped acquit her. Her jury was not sequestered. After a long day of listening to testimony, members of the jury were allowed to go home where they could have read the papers and discussed the case with their friends and family. The New York newspapers in 1905, like papers around the country, loved sensational stories. If the story was not sensational to begin with, it would be by the time the reporter and the editor were through with it. In the age of yellow journalism, little excited the press and titillated the public more than a good trial.

News stories like Josephine’s reveal much about the criminal justice system and society in general during the Progressive Era. Of course, one need look no further than the case of O.J. Simpson to conclude that the media today still covers criminal trials with enthusiasm. Yet the reporting of criminal trials today differs significantly from what it

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4 Id.

5 See id.

6 Id.

7 Id.


was nearly a hundred years ago. News reporters early in the twentieth century regularly employed blatant racial and gender stereotypes to color their articles. “Negroes,” for example, were “giant” and invariably guilty.\textsuperscript{10} Women wept, wailed, and frequently fainted.\textsuperscript{11}

In addition, newspapers during the Progressive Era reported about different kinds of crimes than would be reported about today. Cases of bigamy frequently made news, due, in part, to the fact that bigamy was more common in an age when divorce was difficult to obtain, desertion was frequent, and anonymity was easier to achieve. The media was also more interested in reporting matters of family and sex than newspapers are today. One hundred years ago, marriages, divorces, and adultery made headlines daily. Moreover, while a ground for divorce could not be considered a crime, cases of divorce often went to trial, where squabbling spouses were motivated to bring criminal accusations if they could.\textsuperscript{12} The yellow press followed such trials closely.

During the first decade of this century, the media also reported on another kind of crime that would not likely be considered newsworthy today: automobile speeding. Early in the twentieth century, speeding drivers were at times subject to arrest, trial, and conviction with a jail sentence. The media paid attention not only because of the public’s fascination with this new innovation, but because the automobile, for nearly two decades, remained little more than a toy for the wealthy.\textsuperscript{13} Hence, trials over traffic violations dramatically encapsulated many of the economic and social tensions of the industrial age.

Media coverage of criminal trials early this century provides more than just a mirror of Progressive Era society. Like the contemporary media, its early twentieth-century counterpart acted as an intermediary between the criminal justice system and the public, teaching the American people about the law and the rights of the accused.\textsuperscript{14} However, by reporting crimes and cases selectively, the media also reinforced certain biases in the minds of citizens. Tension has always existed between the First Amendment guarantee of freedom of the press and the Sixth Amendment right to a fair trial.\textsuperscript{15} However, the risk of undermining a defendant’s right to a fair and impartial jury was perhaps greatest during the first decade of the twentieth century.

\textsuperscript{10} See, e.g., Negro Giant Guilty, N.Y. TIMES, July 28, 1905, at 4.

\textsuperscript{11} See, e.g., Caused Uproar in Court, N.Y. TIMES, May 1, 1905, at 2.

\textsuperscript{12} See, e.g., Mrs. Madden’s Accusations, N.Y. TIMES, Sept. 13, 1905, at 1.

\textsuperscript{13} See James West Davidson et al., Nation of Nations: A Concise Narrative of the American Republic 658 (1996).


\textsuperscript{15} See Jonathan Remshak, Comment, Truth, Justice, and the Media: An Analysis of the Public Criminal Trial, 6 SETON HALL CONST. L.J. 1083 (1996); see U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech or of the press”); see also U.S. Const. amend. VI (“In all criminal
Historians have characterized the age of yellow journalism as a time when crime news was “shril and sensational” and the press frequently jumped to conclusions about guilt or innocence long before a jury returned its verdict. One historian characterizes yellow journalism by its use of bold headlines that “screamed excitement . . . about comparatively unimportant news,” lavish pictures, and “faked” interviews, as well as an “ostentatious sympathy with the underdog.” Yellow journalism “began with William Randolph Hearst’s New York Journal and the New York World in 1896, spread rapidly among other papers throughout the nation in 1898, and reached its height at the turn of the century.” It then felt a slow decline. Near the end of the first decade of the twentieth century, there were not many yellow papers still in print.

Although attacked by many critics past and present, yellow journalism contributed to the success of news print. The period of yellow journalism coincided with the dramatic rise in the circulation of the major newspapers. For example, during the decades before and after the turn of the century, the New York World became a flag-bearer for yellow journalism as well as America’s largest newspaper, with a total circulation of one million in March of 1897. Greater New York City was incorporated the next year with a population of 3.4 million. By the turn of the century, the nation’s leading yellow paper reached nearly a third of the nation’s largest city. The growing circulation of the yellow newspapers increased the risk that the jury pool would be contaminated with prejudice, diminishing the probability of an impartial jury.

In addition, because the criminal justice system had not yet taken measures to sequester juries, the risk of an unfair trial was perhaps greatest during the first decade of the twentieth century. Sensational media coverage of trials was only one of the many challenges that the criminal justice system faced during the beginning of the twentieth century.

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .”)


18 Id.

19 Id.

20 Id. at 539.

21 See id. at 540–41.

22 See id. at 519.

23 See id. at 546.

The criminal justice system responded in a typically progressive fashion by adhering to principles of professionalism, rational administration, and efficiency. Slowly, bureaucratic institutions like the professional police force, district attorneys, and a reorganized judiciary displaced “traditional means of securing social stability through family, friends, and church.”25 By 1900, however, only the general framework of the modern criminal justice system had appeared.26

Along with the coverage of the impact of yellow journalism on the criminal justice system in early twentieth century, this survey also addresses criminologists’ conception of the problems the mass media imposed on the administration of justice and how they attempted to address these problems. Criminologists certainly feared that the yellow press subverted the Sixth Amendment right to a fair and impartial jury. However, they were more concerned that news reports of crimes and criminal trials actually incited crime. Future President of the United States and Supreme Court Chief Justice William Taft proposed that judges receive more power over juries in criminal cases.27 However, the consensus was that the solution to these problems was to limit the freedom of the press.28 I have found no contemporary commentator proposing that juries be rigorously screened for bias during voir dire or sequestered during trial.

To explore the media portrayal of criminal trials early in the twentieth century, one can examine relevant articles from the New York Times in 1905. By focusing comprehensively on a single year, one can obtain a more accurate picture of newspaper reporting than by selecting articles from, for instance, a decade of reporting. A problem with this approach, however, is that there were few criminal cases in 1905 that generated more than just one or two newspaper stories. While this article will draw from less prominent stories of the period as well as more notable ones, more attention will be paid to the two cases that generated the largest press coverage: the trial of Nan Patterson for murder and the court martial of Midshipman Meriwether Lewis for manslaughter. This survey does not focus on trials reported in the New York Times in 1905 that were for corruption, fraud, anti-trust violation, or abuse of political office. Instead, it concentrates on the coverage of sensational crimes of the period, such as, murder, bigamy and traffic violations.

The choice of the New York Times as the ideal newspaper for the analysis of media portrayal of criminal trials in early twentieth century requires some additional commentary. One hundred years ago, the New York Times was not the news leader that it is today. When Adolph S. Ochs took over the management of the paper in 1896, the

26 See id. at 189.
28 See, e.g., Editorial, Trial by Newspapers, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 849, 850 (1910) [hereinafter Editorial, Trial by Newspapers].
paper had a circulation of only 9,000. By 1900, however, circulation had expanded exponentially to 100,000, doubling to 200,000 by 1910. Mr. Ochs created a conservative but enterprising paper that quickly became one of the most widely read in the nation. On January 1, 1905, the \textit{New York Times} marked its success by moving into a new building in Times Square.

Ironically, however, the \textit{New York Times} presents a good example of the impact of the media on the criminal justice system precisely because it professed to reject yellow journalism. In 1896, Ochs committed his paper to publishing “All the News That’s Fit to Print.” By adopting this slogan, he expressed his disdain for the “sensational newspaper indulging in coarse, vulgar and inane features.” Instead, Ochs deliberately set his paper apart from the more lurid \textit{New York Journal} and \textit{New York World} by attempting to not engage in yellow journalism. Most historians agree that the \textit{New York Times} trafficked relatively little in yellow journalism. Nonetheless, news articles from the \textit{New York Times} in 1905 reveal that even such a conservative newspaper employed many techniques of the yellow press. Its influence over the New York jury pool, therefore, was insidious and increasingly significant as circulation grew.

I. \textsc{Popular Subjects of Progressive Era Yellow Journalism}

Newspaper reports of criminal trials from the first decade of the twentieth century tell us as much about Progressive Era society as they do about journalism and justice. For example, racial and gender stereotypes reflected in newspaper reports and jury verdicts provide further evidence that “equal protection of the laws” remained elusive decades after the passage of the Fourteenth Amendment. In addition, the kinds of crimes tried and reported expose the concerns and problems particular to early twentieth-century Americans. In this way, trials served as “social barometers.”

\begin{itemize}
\item \textsuperscript{29} \textit{See} MOTT, \textsc{American Journalism, supra} note 17, at 549.
\item \textit{See} ELMER DAVIS, \textsc{History of the New York Times, 1851–1921} 310 (Greenwood Publishing Group 1970) (1921).
\item \textit{See} GEORGE HENRY PAYNE, \textsc{History of Journalism in the United States} 342 (Greenwood Publishing Group 1970) (1920).
\item \textit{See} MEYER BERGER, \textsc{The Story of the New York Times, 1851–1951} 156–57 (1951).
\item \textit{Id.} at xvi.
\item \textit{See, e.g.}, MOTT, \textsc{American Journalism, supra} note 17, at 540; \textit{See also} KOBRE, \textsc{supra} note 24, at 99.
\item U.S. CONST. amend. XIV, § 1.
\item \textit{The Press on Trial, supra} note 9, at 208.
\end{itemize}
A. **Portrayal of Gender Stereotypes**

Henry Weitz’s case typifies the way that women were reported to behave in the courtroom. On May 1, 1905, in the Essex Market Court, Magistrate Barlow imposed a $3 fine on Henry Weitz for disorderly conduct. His wife, identified only as “Mrs. Henry Weitz,” then approached the rail to give her husband the money with which to pay the fine and obtain his release. But “a court officer roughly threw her aside.” The police then dragged Henry from behind the rail, from where he had gone to get the money. “Mrs. Weitz screamed” and clung to her husband as police dragged Henry to the court prison. Henry then either fell or was pushed down a flight of stairs, tumbling into the courtyard. As the story goes: “‘They are murdering my husband!’ screamed Mrs. Weitz. ‘Won’t some one help me?’ Then she fainted.” The reporting of emotional outbursts by women was common and certainly influenced public perception of criminal defendants.

Sometimes, early twentieth-century notions of true womanhood and marriage may have earned defendants’ acquittals despite evidence and law to the contrary. One headline almost speaks for itself: “She Shot Her Husband, But Court Says Go Free: And Judge, Jury, Prosecutor Give Money to Distraught Wife: Hiss Man Who Scorned Her: A Case in General Sessions Which the Court Clerk Says Was Never Equaled for Its Sadness.” The headline refers to the felony assault case of Mrs. Elizabeth Wilson, formerly Elizabeth Ludwig. For the reporter it was significant that Elizabeth came from a “respectable German family.” She and Edward Wilson met at a dance and married in 1903 when she was twenty-two and he was twenty-seven.

Only a few weeks after the marriage, however, Edward left his wife and refused to support her. “She was too proud to let her family know” of her husband’s desertion. For a time, she managed to support herself as a stenographer, but then she bore a child. She appealed to the courts, and Edward was ordered to pay her $5 a week to support her and her baby. Edward refused, despite the court order.

On September 14, 1905, Elizabeth went to speak with her husband at Sillson & Co., where Edward worked as a printer and bookbinder. “She begged him to give her

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38 *Caused Uproar in Court*, N.Y. *Times*, May 1, 1905, at 2.

39 *Id.*

40 *Id.*

41 *Id.*

42 *She Shot Her Husband, But Court Says Go Free*, N.Y. *Times*, Dec. 22, 1905, at 4.

43 *Id.*

44 *Id.*
some money for her support. He refused.”45 As he turned to walk away from her she pulled a revolver and shot him in the back, seriously injuring him. She then “calmly waited for a policeman to arrest her. She made no attempt to deny what she had done.”46

After an investigation of the case by Assistant District Attorney Hart, “an attempt was made”47 to release Elizabeth without a trial, but the request was denied. The state then charged Elizabeth with felony assault.

At the trial, the defense argued that Elizabeth was not guilty by reason of temporary insanity. Without leaving the courtroom, the jury found Mrs. Wilson not guilty. Her husband, however, “was hissed out of court.”48 One of the members of the jury asked the judge that Mr. Edward be charged with some crime and sent to prison. The court clerk even attempted to collect cash for Elizabeth. The entire jury, all the court clerks and attendants, several of the witnesses, the judge, and even the two assistant district attorneys contributed. All told, $41.55 was collected and given to Elizabeth. “In all the eleven years I have been in this court,”49 said Clerk Brophy afterward, “I have seen much that was heart-rending, but nothing that was worse than the case of that woman.”50

Mrs. Hattie Munckton walked away from an even more serious crime, the murder of her husband. While on the witness stand, she testified that her husband made her work “hard and long”51 in the fields and that he kicked and beat her if she failed to work to his standard. She also testified that he accused her of being lazy and unfaithful. On several occasions when she was ill she said he required her to get up and work until she dropped from exhaustion. She further declared that her husband “brutally ill-used”52 her the night before the killing, and that the next morning he was trying to kill her with an axe when she fired at him with a shotgun, intending only to maim him. After two hours of testimony, Hattie fainted, and the court had to suspend while she was revived. Wrote the reporter, “[t]ears were in the jurors’ eyes, and it was a dramatic scene.”53 It was also a dramatic and effective defense.

45 Id.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id.
51 Woman’s Story Moves Jury, N.Y. TIMES, Dec. 16, 1905, at 1.
52 Id.
53 Id.
After four days of trial, the jury acquitted Hattie from the charge of murdering her husband. The jurors deliberated through the night for ten hours, coming into court three times to ask questions from the judge. Ultimately, the jury agreed with the defense theory of justifiable homicide. After three-and-a-half months in jail, Hattie was released. Upon the news, she was “almost overcome.”\footnote{54} She managed to collect herself, shook hands with each juror and thanked them.

Journalists, of course, not only stereotyped female defendants, but frequently described female victims in ways that might have unduly prejudiced juries against male defendants. For example, early in January of 1905 the \textit{New York Times} reported about the double murder of Mrs. Clara Klopman and George Fricke, which, the newspaper concluded, had been “long planned.”\footnote{55} The \textit{New York Times} described Mrs. Klopman as thirty-nine-years old and “good looking, but far from beautiful. She was not remarkable for intellect, but she seemed to exercise wonderful power over the other persons concerned in the tragedy.”\footnote{56} Interestingly, the \textit{New York Times} ignored the male victim except to identify him as a baker.

B. \textit{Portrayal of Racial Stereotypes}

Gender stereotypes often overlapped with racial stereotypes in news articles charged with sexual undertones. For example, in June of 1905, the \textit{New York Times} reported on a case recently decided in Waco, Texas. After only twelve minutes of deliberation, a jury convicted Lee Robertson, “a negro,”\footnote{57} of “attempting to attack a white woman.”\footnote{58} The man was sentenced to 1,001 years in jail and transferred away from Waco to avoid lynching. In such cases, journalists of the \textit{New York Times} would often not specifically mention “rape” or “sexual” assault.

In another case taking place in Bloomington, Indiana, the \textit{New York Times} reported that a “negro”\footnote{59} attacked Mrs. Frank Mulky, “a well-known member of clubs,”\footnote{60} in her home. According to the \textit{New York Times}, the defendant, Leasy Johnson, gained entrance to Mrs. Mulky’s bedroom by climbing a veranda, but she “fought the man so desperately that he fled.”\footnote{61} Mrs. Mulky then called the police, and the “entire police

\footnote{54}See \textit{Mrs. Munckton Acquitted}, N.Y. T\textsc{imes}, Dec. 18, 1905, at 1.


\footnote{56}Id.

\footnote{57}\textit{Negro Gets 1,001 Years}, N.Y. T\textsc{imes}, June 24, 1905, at 2.

\footnote{58}Id.


\footnote{60}Id.

\footnote{61}Id.
force started on a hunt.” The police found “a negro with his face and hands badly scratched” and took him before Mrs. Mulkny, who identified him as her attacker. However, when indicted by the Grand Jury for attempted criminal assault, “he refused to plead guilty.” The New York Times reported that the case had aroused “much excitement” in Bloomington and that the defendant was being closely guarded.

During 1905, the New York Times frequently reported about lynching or the threat of lynching faced by African-American suspects and defendants elsewhere in the country. In another example, the New York Times reported that James Fowlkes, a “colored” man, had been charged with “assault on a white woman” in Clinton, Kentucky. According to the New York Times, Fowlkes’ trial was held in a baggage car on an Illinois Central train because authorities feared that he would be lynched if tried in a Clinton courthouse. Although Fowlkes avoided lynching, the jury promptly convicted him.

While emotion, raised by prejudice and stereotype, operated unfairly against defendants in these kinds of cases, it worked to the advantage of the prosecution. For example, the New York Times reported that, according to supposed “indications,” Miss Daisy Wilkinson would not be arrested for shooting and killing Herman Nolan, “a negro” who allegedly attacked her. Miss Wilkinson, a schoolteacher, was walking to work through some woods near the Guyandotte River in West Virginia when she was “overtaken by the negro.” Since she boarded half a mile from her school, friends had advised her to carry a pistol to protect herself during her commute. According to the New York Times, “[h]e attacked her, and Miss Wilkinson drew a pistol and sent a bullet through his brain.” After fleeing to a nearby farmhouse, Miss Wilkinson told her story and a group of men went in search of Herman’s body. After finding it, these “citizens”

62 Id.
63 Id.
64 Id.
65 Id.
66 Sentenced Negro on Train, N.Y. TIMES, Oct. 8, 1905, at 3.
67 Id.
68 See id.
69 Girl Kills Her Assailant, N.Y. TIMES, Dec. 17, 1905, at 3.
70 Id.
71 See id.
72 Id.
73 Id.
threw it into the Guyandotte River. The *New York Times* described Miss Wilkinson as twenty-years old.

These are but a few examples of the gender and racial stereotypes that permeated the reports of criminal trials early in the twentieth century. Such reports both mirrored and reinforced societal norms. In turn, these values and prejudices reflected themselves in the administration of criminal justice—through judges, attorneys, and jurors.

C. Portrayal of Bigamy

Cases of bigamy reveal more specific concerns of Progressive Era society, namely, how the criminal justice system attempted to preserve traditional ideals of marriage and family, using the law as an instrument in the pursuit of social morality. In a time when divorce was difficult if not impossible to obtain, and anonymity easier to achieve, desertion and bigamy were far more widespread than now. Bigamy cases were also peppered with gender stereotypes. Most significantly, however, these cases reveal a media and a criminal justice system that scrutinized certain areas of private life more closely and eagerly than today.

Before examining some specific cases of bigamy, however, a word or two more should be said about divorce during the Progressive Era. Contemporary no-fault divorce was not available to married couples during the early years of the twentieth-century. A plaintiff, in that era, had to prove grounds for divorce with evidence of, for example, extreme cruelty, habitual intemperance, or a commitment to an insane asylum. In New York, the only ground for divorce was adultery. While a study of family law is beyond the scope of this paper, it is interesting to note that the *New York Times* in 1905 frequently reported divorce cases, often on the front page and in bold headlines. Divorce proceedings in 1905 were not only rarer than today, but were considered more scandalous and, therefore, more newsworthy.

Divorce proceedings in 1905 were not criminal cases *per se*, but sometimes divorce trials produced incriminating testimony of one spouse against another that would lead to a criminal trial. Media reporting of divorce cases would overshadow any criminal case arising from a divorce proceeding. The case of *Madden v. Madden* is a good example of this phenomenon. In September of 1905, the *New York Times* reported on the divorce of Anna Louise Madden from her husband, John Madden, a “well-known turfman,” a horse breeder and racer. While on the stand, Anna testified that John had forced her to make false entries about his horses, change entries in his books, and make false reports to the Jockey Club. For example, Anna alleged that her husband ordered her to make a report to the Jockey Club that one of his horses was recorded as a foal when the animal was really a yearling, which allowed John Madden to race the horse a

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74 99 N.Y.S. 1142 (1906).

75 *Mrs. Madden’s Accusations*, N.Y. TIMES, Sept. 13, 1905, at 1.
According to the reporter, attorneys and spectators in the courtroom were “astounded.”

Reporting of the Madden divorce case focused on whether Anna’s accusation against her husband was credible. Counsel for John questioned the validity of Anna’s accusation through character evidence testimony. For example, on cross-examination John’s attorney asked Anna,

“Haven’t you a habit of using profanity at time?”
“I don’t think so,” the witness answered, her lips quivering.
“Haven’t you often called your husband a d—d liar?”
“Certainly not. I have said he was a liar and I say so right now,” was the reply. Later, the defense called a witness who testified that he had heard Anna exclaim, “Oh, I know he won’t give me the children, so let him take the brats and go.”

The reporter also noted that “Mrs. Madden shook her head emphatically and frowned when she heard this, as she sat beside her attorneys.”

Finally, John Madden took the stand in his own defense. According to the reporter, he “said nothing harsh about his wife, and often alluded to her in a kindly way.” On the stand, he denied the allegations made by his wife that he had told her to falsify entries and misrepresent the condition of his horses. He further testified that he had been away from home a great deal in order to make money because his wife said that she would leave him if he lost his money. John claimed that he had never been a prizefighter, although he had boxed a good deal and played baseball in his younger years. He also testified that “he swore a little, never using any stronger oaths than damn; drank only an occasional drink, and never smoked.”

The reporting of this divorce proceeding must certainly have influenced any subsequent trial against John Madden for fraud.

Bigamy cases attracted more media attention than divorce proceedings. The criminal justice system had little sympathy for alleged bigamists. Indeed, it sometimes seemed to treat bigamists with inordinate harshness. The case of Francis Fritz provides a good example. Francis lived with his first wife for twenty-three years, with whom he had six children. He then deserted her and remarried. When charged with bigamy, he claimed, unsuccessfully, that since “no legal ceremony had tied him to the first wife, he

76 See id.
78 Called by Mrs. Madden, Testifies for Husband, N.Y. TIMES, Sept. 16, 1905, at 4.
79 Id.
81 Id.
did not see what could prevent him from contracting a legal marriage." After the jury convicted him, however, Judge Newburger remarked that it was only the third time in his judicial career when he felt regret at not having the power to inflict a more severe punishment than the law prescribed: "‘You are about the most contemptible specimen I have ever had to sentence,’ he remarked to the prisoner, and the man cowered under the words as if in fear of a blow. The Judge then sentenced Fritz to five years in state prison.

Interestingly, female bigamists seemed to be treated with equal harshness by the judicial system. For example, Florence Ferrest was arrested for bigamy after admitting to having several husbands in New York City and elsewhere. According to the reporter, she was "not very chastened in spirit when seen at the jail today." The New York Times noted that Mrs. Florence wept after saying the following:

“Just think . . . here I am under $1,000 bail for doing nothing more than trying to establish a home for myself. I told Ferrest I was divorced from Chabbenou, and thought the other marriages not important enough to count. And to think I shall have to stay in jail just for trying to make myself happy.”

Eventually, Florence was charged with having four living husbands, “one of them being a negro.” The jury convicted her on all four counts of bigamy. In sentencing her, Judge Scott commented: ‘You seem to be a professional husband gatherer, and have a peculiar idea of the marriage vow.’ He then sentenced her to hard labor in the state prison for four years, “one year for each husband.”

As these cases illustrate, the Progressive Era public perceived bigamy as a moral crime against not just the spouse of the accused, but against society itself. In the eyes of the public, bigamists undermined social structure by breaking the sacred vow of marriage that tied the family and the greater community together. Judges and juries were outraged by instances of bigamy, at times reacting as though it was their spouse that had been unfaithful to them. In search of greater profits, newspapers found bigamy to be an ideal subject of yellow journalism, and through their sensational reporting, reinforced existing social perceptions regarding bigamy and in certain ways contributed to the creation of the

82 Court Rebukes Bigamist, N.Y. TIMES, Sept. 30, 1905, at 6.
83 Id.
84 Mrs. Ferrest Weeps, N.Y. TIMES, Sept. 4, 1905, at 3.
85 Id.
86 See Woman Bigamist Sentenced, N.Y. TIMES, Sept. 9, 1905, at 5.
87 Id.
88 Id.
moral ideals that they purported to merely “report.” Finding themselves in this atmosphere, juries and judges were undoubtedly influenced by the newspapers’ articulation of “existing social perceptions,” thereby finding it more justifiable and “legal” to inflict severe punishments on lecherous bigamists, regardless of their gender.

D. Portrayal of Traffic Violations

Today, although less common of an offense, bigamy remains a crime punishable by imprisonment. In contrast, minor traffic infractions are treated far more leniently today than during the early years of this century. A cursory look at media portrayal of traffic crimes reveals how the criminal justice system attempted to cope with a dramatic technological innovation that held both promise and peril. Because automobiles in 1905 remained little more than toys for the wealthy, media reports of traffic crimes and their prosecution expose the particular class tensions inherent in the industrial age. The combination of technological curiosity, class conflict, and criminal prosecution attracted the press to traffic violations nearly to the same degree as the scandal of bigamy.

The case of William G. McAdoo is a good example of the class tensions associated with traffic crimes early in the twentieth century. William McAdoo, cousin of Police Commissioner McAdoo, was arraigned for violating the speed limit by driving twenty-five miles an hour. McAdoo admitted he was guilty but complained that the officer was “insolent in making the arrest, and I will complain of him.”

“No you don’t,” interrupted Magistrate Crane, saying in outrage:

You rich men think you can abuse the police. . . . They have enough to contend with. You people are sane before you get in an automobile, but the very minute you get in one you become insane. You forget everything. You forget that you are still on earth. Some don’t care for the men, women, and children on the streets.

Magistrate Crane then complained about how rich men in these traffic cases have been abusing the police, and how it was a wonder to him that the police do not “resent it by thrashing some of them.”

Jurors, too, seemed to share Magistrate Crane’s anger toward the insolence of wealthy traffic offenders. Dr. J.R. Jacoby of New York, for example, found it difficult to obtain an impartial jury among residents of Babylon, Long Island, in his traffic case. He was charged with violating the speed limit, but the court had to adjourn twice before being able to empanel an impartial jury. All jurors were asked if they entertained a

89 See Frees McAdoo’s Cousin, N.Y. TIMES, Oct. 16, 1905, at 1.

90 Id.

91 See id.
prejudice against automobiles. One, for example, replied: “Automobiles? I wish they was [sic] all swamped ten miles off Fire Island.”92 Another juror, responding to the same question, replied, “I would like to see all them [sic] red devils sent back.”93

As the above cases illustrate, wealth differences between owners of vehicles and the general public in the Progressive Era, underscore the tension in which juries and judges decided cases of traffic violations. The media’s choice of subject matter and method of coverage of such incidents reinforced existing social dynamics that had resulted in the perception of drivers as irresponsible individuals subject to punishment. Furthermore, such yellow journalism arguably contributed to the creation of the public disdain for wealthy automobile drivers and the resulting biased jury pool that decided traffic cases.

At least in one case, however, judicial sympathy toward women trumped class resentment against traffic offenders. In September of 1905, the New York Times wrote an article with the headline, “Wife’s Plea Freed Cheever.”94 Therein, the New York Times reported that Durant Cheever had been tried for violating the automobile laws of Connecticut. According to testimony during the trial, Durant and his wife were traveling up Greenwich Avenue on Saturday morning when they turned to pass a carriage and hit a rubber tire on an adjacent funeral coach, knocking the driver off his seat. The police faulted Durant for the accident, claiming that he had been speeding. Durant, however, blamed the accident on the wet pavement. The testimony of Mrs. Cheever proved pivotal. According to the reporter, Mrs. Cheever, “in smiles,”95 took the stand to explain how the accident occurred. “She was extremely nervous, she said, having been in two automobile accidents in New York due to wet roads, and kept warning her husband to be careful.”96 At this point in her testimony she began to weep. “In a twinkling,”97 Judge Burnes dismissed the case. This case suggests that the media portrayal of gender stereotypes may have been more influential in shaping public perceptions and juror belief sets than portrayal of class conflicts.

Aside from raising issues of class and, at least in the previous case, gender, traffic crimes also posed unique problems of proof. The New York Times noted in the summer of 1905 that during the past year or so there had been many arrests for violations of the new automobile speeding law. It commented that in most of these cases the offender pled guilty and paid a fine, unless it was a repeat offense, in which case the defendant spent a few days in jail. In one case, however, Warner Van Norden pled not guilty to a charge of

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92 Hard to Get Auto Jury, N.Y. TIMES, June 24, 1905, at 1.
93 Id.
94 Wife’s Plea Freed Cheever, N.Y. TIMES, Sept. 6, 1905, at 1.
95 Id.
96 Id.
97 Id.
speeding and demanded a trial. Van Norden argued that the prosecution had no means to prove beyond a reasonable doubt that he had been speeding. Justice Wakefield agreed and dismissed the case.\footnote{See Autoists Illegally Fined, N.Y. Times, July 10, 1905, at 2.} Needless to say, such deference to the driver would be unlikely in courts today.

\section*{II. \textsc{Press and Prejudice}}

I argue that aside from reinforcing and at times contributing to the creation of public perceptions regarding gender and racial stereotypes as well as moral outrage for certain crimes, media portrayal of criminal trials early in the twentieth century may also have influenced the outcome of those trials. This occurred through the prejudicing of the jury pool and at times the sitting jury itself, which, in 1905, was neither sequestered nor prohibited from reading newspapers or talking with others about the case. The longer a trial, the greater the potential that the media would prejudice a sitting jury. Newspaper reports probably prejudiced jurors in a number of ways. Frequently, reports of crimes asserted as fact issues that were in dispute at trial. Reporters also created prejudice with their depiction of the character of the defendant, the victim, important witnesses, and even the prosecuting and defending attorneys. This was frequently done through racial or gender stereotypes. Finally, newspapers often reported what they believed to be the general public’s view of the guilt or innocence of a particular defendant.

It is, of course, impossible to point to any particular case in 1905 and conclude with assurance that the jury reached its verdict as a result of newspaper reports. Nevertheless, the risk of prejudice from media portrayal of criminal trials was pervasive in Progressive Era society. The pervasiveness of this prejudice seemingly operated to undermine the Sixth Amendment guarantee of an impartial jury.

The following cases provide a good introduction to the ways in which media reports could affect jury deliberations. In July of 1905, the \textit{New York Times} reported that Mrs. Annie Gades was arraigned for the murder of her child. According to the \textit{New York Times}, “\textit{[e]xciting scenes marked the arraignment in the Manhattan Avenue Court, Williamsburg, yesterday of Mrs. Annie Gades, who a week ago yesterday in her home at 49 Driggs Avenue, Williamsburg, in a fit of insane jealousy, stabbed to death her nineteen-month-old child Hans.}\footnote{Woman Violent in Court, N.Y. Times, July 27, 1905, at 2.} Well before the trial, the \textit{New York Times} informed its readership of its view that Annie was guilty. The \textit{New York Times} also reported that while Annie was being arraigned, she spied her husband in the courtroom and rushed toward him screaming for her lost child. As she was led out of the courtroom, she “dashed past the policemen guarding her and ran up a flight of stairs to the second floor. Two policemen seized her just as she ran into a room where there was an open window. Mrs. Gades fought desperately again, and she had to be dragged down the stairs.”\footnote{Id.} Not only did the \textit{New York Times} decide Gades was guilty, it implied she was insane, and, by
mentioning that she ran into a room with an open window, it further implied that she was suicidal. Any juror who had read this article would struggle to remain impartial.

In another case, the New York Times reported that Dr. Oliver Hart of Chicago was charged with the murder of ten-year-old Irene Klokow. The article presented the prosecution theory that Dr. Hart killed the girl when he recklessly administered bomidia-chloral to her after she had swallowed a large number of sugar-coated morphine pills believing them to be saccharine pills. But the article did more than just report the prosecution’s theory, it substantiated it. The doctor, the New York Times reported, was “said to be addicted to morphine.” According to the reporter, during the arraignment, the doctor “gazed stupidly at the walls of the courtroom . . . and did not speak.” It probably did not help the defendant in winning sympathy from the public when the New York Times reported that the drug-addicted doctor was represented by an “eminent lawyer.”

A. The Trial of Nan Patterson

No case in 1905 generated more press than the murder trial of the notorious dancer and actress, Nan Patterson. Nan Patterson’s case had all the elements of a sensational story—sex, adultery, bribery, murder, and uncertainty about what really happened. Early in the trial, the New York Times lost its objectivity and subtly attempted to convince most of its readers that Nan was innocent. Intrigued by news reports about the case, New Yorkers filled the courtroom daily, packed the streets to be the first to hear the latest news, and, during jury deliberations, chanted for Nan’s freedom. The jury, too, had access to these news reports and interacted daily with the public as it made its way to and from the courtroom—coming from home, going out for meals, and returning home at the day’s end. When the jury eventually became hung and Nan Patterson was set free, the District Attorney blamed the press for a miscarriage of justice.

Nan Patterson, a nineteen-year-old actress, was accused of killing her former lover Caesar Young, a wealthy New York bookmaker. Both were married, but they soon began an adulterous relationship. Caesar eventually paid for Nan to divorce her husband, after which she lived “on Young’s bounty.” According to the prosecution’s theory, Caesar also promised Nan that he would divorce his wife. On June 4, 1904, Caesar Young planned to board a steamship and depart for an extended trip overseas with his wife. That same day, he was traveling with Nan in a carriage down Broadway toward the

101 Dr. Hart Held for Murder, N.Y. TIMES, Oct. 8, 1905, at 6.
102 Id.
103 Id.
104 See Disagreement in Patterson Case, N.Y. TIMES, May 4, 1905, at 1.
105 See Nan Patterson Free; Jerome Blames Press, N.Y. TIMES, May 13, at 3.
port to meet his wife. Caesar never left the carriage alive. He died from a gunshot wound.¹⁰⁷

Soon after, police arrested Nan Patterson and the state prosecuted her for the premeditated murder of Caesar Young. Her first trial, in 1904, ended in a hung jury. Undeterred, the District Attorney tried her a second time in the late spring of 1905. The prosecution had a strong case. It was undisputed that Caesar died of a gunshot wound while in a moving carriage with Nan. Therefore, there seemed to be only three reasonable explanations for Caesar’s death: Nan shot him intentionally, Caesar was shot accidentally in a struggle over the gun, or Caesar killed himself.

The State argued that Nan shot Caesar to death with malice and premeditation. It proposed two possible motives: either Nan murdered out of jealous anger because Caesar refused to divorce his wife, or she killed him when she realized her attempts at blackmail were futile.¹⁰⁸ To prove its case, the prosecution first sought to show that the gun that killed Caesar belonged to Nan. According to the prosecution, Nan obtained the gun from her sister and brother-in-law, Julia and Morgan Smith. Assistant District Attorney Rand placed into evidence receipts that showed Morgan Smith had pawned his wife’s jewelry to Hyman Stern, a pawnbroker, on June 3, the day before Caesar died. Rand then offered evidence to show that the very same day, Hyman Stern sold the gun that was identified as the weapon that killed Caesar. Rand argued that it had to be more than just coincidence for the pawnbroker to sell the gun that killed Young on the same day Nan’s brother-in-law pawned his wife’s jewelry. According to the news reporter, Rand’s testimony “created a stir in the court.”¹⁰⁹

Rand also called Julia Smith to the stand. According to the reporter, “she looked worn and pale, and was evidently ill at ease.”¹¹⁰ She testified that on the morning of May 2, her sister Nan was very upset because she had just learned that Caesar did not intend to carry out his promise to divorce his wife and marry Nan. Julia also testified that on June 3, she, her husband, and her sister Nan went to the racetrack, where they met Caesar. On the morning of June 4, the day Caesar died, Caesar telephoned the Smiths, where Nan lived, three times. The first two times, Julia told him that she could not awaken Nan. The third time he called, Julia informed Caesar that Nan had already risen, dressed, and was on her way to meet him. District Attorney Rand, hoping to implicate Julia and her husband in a bribery conspiracy, then asked Julia whether she and her husband traveled to Hoboken on the night of June 8 and registered in a hotel there under assumed names. Julia refused to answer, invoking her Fifth Amendment right against self-incrimination.

¹⁰⁷ See id.

¹⁰⁸ See id.

¹⁰⁹ See Will Make No Defense in Nan Patterson Case, N.Y. TIMES, Apr. 29, 1905, at 1.

¹¹⁰ Id.
Rand offered to drop the indictment against her in exchange for her testimony, but Julia declined, saying, “I refuse to answer the question, I must stick to my sister.”

Following the last of the State’s witnesses, the defense rose and moved to dismiss the case. The defense argued that the prosecution failed to show that a crime had been committed, and that the State’s own evidence tended to show that Caesar had committed suicide. Recorder Goff, however, denied the motion. Abraham Levy, lead counsel for the defense, then announced that the defense would call no witnesses and that it was prepared for the case to go to the jury. Both the prosecution’s evidence and the defense’s trial strategy impressed the New York Times. The next day it ran the following headline: “Will Make No Defense in Nan Patterson Case: Decision After Prosecution Offers Striking Evidence: Smith in Pawnshop June 3: Pledged Wife’s Jewelry on Day Before Young’s Death With Man Who Sold Pistol.” In this article, the New York Times also informed its readers, which most likely included the jury, that Nan’s first trial ended in a hung jury.

On May 1, 1905, the defense presented its closing arguments. According to the reporter, “Nan Patterson, who was dressed in black, plainly realized that the critical moment in the trial was approaching.” Continuing its bold tactics, the defense urged the jury to acquit or to return a verdict of murder in the first degree, but not to settle on a lesser-included offense. “She is either guilty or not guilty. We want no compromise,” said defense attorney Levy. He also offered two alternative explanations for Caesar’s death: either he committed suicide or he died accidentally in a struggle over a weapon he brandished to frighten Nan.

Levy also sought to discredit the methods employed by Assistant District Attorney Rand:

Mr. Rand sought to impress upon you that the pawn tickets submitted in evidence were dated June 3. As a matter of fact, they bore the date of October. I had them put in evidence as an object lesson of the unfair tactics to which the prosecutor has resorted. He also told you about $50,000 which he says was lavished by Young on the defendant when he knew the case was barren of any such evidence.

111 Id.
112 Id.
113 See id.
115 Id.
116 Id.
Levy then sought to generate sympathy for the defendant. “What is there against this girl? She went on the stage, but it was to make an honest living. She met Young when she was but nineteen years old. Who was the stronger?” Levy argued that there was no evidence to show that Nan was disloyal to Caesar, and pointed out the grief Nan displayed when she learned of Caesar’s death.

Levy also contested the prosecutor’s assertion that Morgan Smith, Patterson’s brother-in-law, had purchased the murder weapon. He criticized the prosecution for calling pawnbroker Hyman Stern to the stand, but not calling Stern’s clerk. Levy also emphasized Stern’s inability to identify Morgan Smith as the man who bought the pistol. He scoffed at the idea that the Smiths, being known to Stern, would go to his shop to buy a weapon with which to do murder. “They would have been driveling idiots to go together to a shop where they were known and make such a purchase. It is just as likely that Young bought it himself.” Levy also reminded the jury that on the morning Caesar died, he called three times to speak with Nan. According to Levy, this demonstrated that Caesar wanted to see Nan that day, providing evidence against premeditated murder. Finally, Levy argued that if Nan had plotted murder she would not have planned to commit it in a moving carriage on the street in broad daylight.

Interestingly, the New York Times article the following day included elements prejudicial to both the prosecution and the defense. On the one hand, the headline read: “Nan Patterson Case May Go to Jury To-Day: Defense, In Summing Up, Suggests that Young Bought Pistol.” While the headline presented a crucial defense argument, it mentioned nothing regarding the prosecution’s opposing argument. In addition, the article appeared to regurgitate most of the defense’s most important points made during closing arguments. However, one remarkable detail of the report stands out as deeply prejudicial to the defense. According to the New York Times article, Levy argued there was no evidence that Nan threatened Caesar, “except the Julia Smith letter, which was excluded.” Levy must have made a monumental mistake in referring to a piece of excluded evidence harmful to Patterson’s case, unless the reporter edited this particular bit of information.

The article also remarked that the “closing scenes” of the Nan Patterson trial were “arousing public interest to a degree almost unprecedented in the history of criminal cases in New York.” According to the reporter, an hour before the doors were opened for closing arguments, the court building was “besieged by a throng which numbered

117 Id.
118 Id.
119 Id.
120 See id.
121 Id.
That morning, Recorder Goff ordered the courtroom cleared of all spectators who were without seats. In the afternoon, the recorder ejected a score of women who were taking “undue interest” in the proceedings. According to the reporter, as these women moved toward the door “their faces were crimson with mortification.”

On May 2, Assistant District Attorney Rand took more than five hours to deliver his closing arguments against Nan Patterson. He first attacked Julia and Morgan Smith for hiding behind the Fifth Amendment. He claimed that the worst witness against Nan was her brother-in-law, Morgan, who refused to take the witness stand for fear of self-incrimination: “come up, Smith, and clear your sister-in-law of murder if you can. You hold the key to the situation.” Rand also concluded that Julia Smith’s refusal to answer certain questions proved that her husband purchased the murder weapon. Rand further alluded to how Levy had successfully kept both the Smiths from testifying during Nan’s first trial.

In addition, Rand refuted the defense’s theory that Caesar committed suicide. First, he argued that the trajectory of the bullet did not reflect the “natural sort of way” someone would shoot oneself. A suicidal Caesar, Rand argued, “would not have held the weapon upside down when he fired the shot and sent the bullet through the apex of the left lung on its way to strike the fourth dorsal vertebra.” Rand also reminded the jury that witnesses described Caesar as being happy that morning before he died and that the police found the revolver in Caesar’s pocket. Rand argued that the latter fact alone provided conclusive evidence that Caesar did not kill himself.

Rand also sought to attack Nan’s character, describing her in his closing argument as an angry blackmailer rather than a scorned lover. According to the reporter, Rand stated, “I don’t believe the story that Young told Nan Patterson he was going to get a divorce from his wife. It is too new.” Rand reiterated that Caesar, on the eve of his departure, demanded that Nan return the letters he had written her: “Did the defendant render them? No. Was that the conduct of a woman madly in love or of a mercenary creature who wanted to keep them in her possession for blackmail purposes?” Rand asked the jury not to forget that the defendant threatened Caesar the night before the

122 Id.
123 Id.
125 See id.
126 Id.
127 See id.
128 Id.
129 Id.
tragedy: “Did she not say, you’ll never sail on that boat because I’ll be there to stop you? And did she not keep repeating that threat until Young slapped her and put her in a cab?” Rand continued:

And now as to the morning of the tragedy. . . . What were the reflections passing through this defendant’s mind as beside him she rode in a cab on the day that he was to leave her? The murder in her heart flamed into action, and she shot and killed. A little crack, a puff of smoke, and a dead man lay prostrate on this woman’s lap.

False to her husband, false to her lover, and false to her oath the defendant would have you believe by her story told at the previous trial that Young shot himself rather than be separated from her. A silly story—a lie she does not now dare attempt to support.

According to the reporter, the Assistant District Attorney’s “final effort was a strong one,” during which the defendant “cowered in her chair, and at times evidently controlled herself with difficulty.” Yet, Rand’s direct attack on Nan may have backfired, as the New York Times and the public seemed to regard her sympathetically. In addition, the reporter noted that Rand’s closing had drawn the largest crowd yet to the courthouse. Despite the presence of seventy-five policemen, efforts to keep the corridors open were vain, so the police cleared the entire floor. Even when driven away, the curious men and women refused to leave the neighborhood. The street outside the courthouse was blocked the entire day. Many offered money for admission to the court. As the jury began its deliberations, the New York Times reported that the jury would not soon arrive at a verdict, and those familiar with the case expected a long wait.

The jury began deliberating just after noon on June 3. They took a break for dinner later that day, and while on their way to and from a nearby restaurant, the jury was “dogged and jostled by the crowd that packed the streets. All the way to the restaurant the jurymen heard yells of: ‘Free Nan Patterson! Set her free! Nan’s all right! She’s done nothing! You let her loose, that’s the best you can do!’” After dinner, the jury returned to the courtroom and deliberated until 1:30 a.m.

According to the reporter, “everybody was on tiptoe” as the jury filed back into the courtroom. Before hearing from the jury, however, Recorder Goff sent for the

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130 Id.

131 Id.

132 Id.

133 Id.

134 See id.

135 Disagreement in Patterson Case. N.Y. TIMES, May 4, 1905, at 1.
When Nan entered the courtroom ten minutes later, “[s]he was on the verge of collapse, and could hardly drag one foot after the other. An attendant on each side fairly lifted her into her place.”137 The recorder announced that if there was any disturbance upon announcing the verdict he would charge contempt of court. He then asked the foreman if the jury had been able to agree. “‘We have not,’ the foreman replied. ‘I am convinced that there is no hope of an agreement.’”138 The recorder then lectured the jury on the expense of the trial and sent them back to reconsider.

According to the reporter, Nan was now in “a fainting condition”139 as she was led back to her cell. When the jury returned an hour later, the judge again sent for Nan. She was brought into the courtroom “in a weakened condition and had to be supported to a chair.”140 The foreman again reported that the jury could not agree on a verdict. The recorder then asked that the question be put to each juror separately. Each juror replied that there was no hope of an agreement. The recorder then dismissed the jury. “As the jury started out Nan Patterson fell from her chair in a faint. Her counsel and the guards picked her up and bore her back to the Tombs”141 where she was to be held until the State decided whether or not to pursue a third trial.

The New York Times reported that as soon as the news reached the waiting crowd there were cheers. When the jury got outside “it was all but mobbed.”142 While responding to questions from the press, the jury revealed that it had stood eight to four for manslaughter in the first degree. The counsel for the defense said they were convinced that there would not be another trial.143

Five days later, however, Nan still remained in jail. District Attorney Jerome continued to deliberate over whether or not to try her before a third jury. Jerome is quoted in the New York Times as saying that the decision whether to try Nan a third time was a difficult one, and that he would “not permit the newspapers to decide for him.”144 Meanwhile, Nan received scores of letters and postcards daily, most of them congratulating her. One, however, signed by Armedi Beauparler, threatened to avenge

136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
142 Id.
143 Id.
144 Nan Patterson Trial Question Not Settled, N.Y. TIMES, May 9, 1905, at 2.
Caesar Young’s death: “If the jury acquitted Nan,” he wrote, “I would have shot her as she left the Tombs.”

On May 13, Nan Patterson was set free after eleven months and eight days in prison. District Attorney Jerome announced that his office would not try Nan Patterson for a third time. Jerome asserted that although the evidence against Nan was overwhelming, the jury reached their decision based on newspaper reports sympathetic to the defendant. Jerome called the outcome of the trial a “miscarriage of justice of the most serious kind [attributable] to the attitude of the press of this city toward the accused woman.” He continued:

I feel sure . . . that a serious result has come from this trial in so far as one more step has been made in this city to substitute trial by newspapers for trial by jury. There has been a continual misrepresentation in the press of the facts and circumstances connected with this case—not on the part of those who had occasion to report the facts. But those sapient wiseacres who, in the solitude of the editorial sanctum, assume, for the benefit of the counting room end of the establishment, to conduct public affairs, have dealt with this case in a way that has aroused a feeling in this community that, in my opinion, has resulted in a miscarriage of justice.

Within a short time after she had been freed, Recorder Goff warned, “[t]his indictment, charging you with murder in the first degree, still stands against you.” He further admonished her, saying, “these trials must have been terrible ordeals for you to pass through, and I hope that in your future life the memory of them will tend to chasten you, and to remind you of the terrible experience you have undergone.”

Just minutes after Recorder Goff’s statement, a squad of policemen led Nan Patterson from the Criminal Courts Building. The events immediately following her release, reported by the New York Times, provide telling evidence of the press’ influence on early twentieth-century trials:

In the street a great crowd stood waiting and the mob cheered her and yelled at her as she entered her carriage and was driven to the office of her lawyer, Abraham Levy, in the World Building. They pursued her again when she departed for an uptown hotel, and dropped behind only as the increased speed of the vehicle made it impossible for them to follow.

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145 Id.

146 Nan Patterson Free; Jerome Blames Press, supra note 105, at 3.

147 Id.

148 Id.

149 Id.
Nan Patterson and her sister went on a shopping tour in an automobile along Sixth Avenue. Then she posed for a score of photographers, and told reporters how happy she was to be free, as well as how eager she was to please them because the papers had been “so awfully nice” to her.150

The New York Times published a final article on the Nan Patterson case several days later. New York Supreme Court Justice Vernon M. Davis, who presided over Nan’s first trial, addressed the Phi Delta Phi Club, a group of city lawyers, about his opinion of the second trial. In his address, Davis expressed his belief that most people were convinced that Nan had ended Young’s life. He said Nan’s story of the events of the morning of the murder was not consistent and accused her of lying when she took the stand during her first trial. Davis did not, however, believe that Nan killed Caesar with premeditation. Instead, he believed that Nan threatened Caesar with the gun, an argument followed, and in an ensuing struggle the gun went off. According to Justice Davis, had Nan told the jury this story on the witness stand, they would have acquitted her. In any event, he believed that because of her youth it was natural that the press and the public sympathized with her.151

The portrayal of Nan Patterson’s trial by the New York Times underscores the media’s impact upon the administration of criminal justice during the Progressive Era. Nan Patterson, during her trial, flourished in the limelight provided by the press. The jurors in her two trials may have been anything but impartial to her general disposition. As exemplified by the Patterson case, news reporting played a role in the outcome of sensational criminal matters. Media coverage, in this sense, perhaps helped to determine the events it presumably only sought to report.

B. The Court Martial of Midshipman Minor Meriwether

A few months after the Nan Patterson trial concluded, the New York Times turned its attention to the manslaughter case of Midshipman Minor Meriwether. Although, Meriwether’s case may not be an ideal example of the impact of media coverage on early twentieth century trials due to the fact that it was a court martial proceeding decided by a panel of military judges and reviewed by the Secretary of the Navy, thereby differing significantly from standard non-military criminal trials, the case is, nonetheless, noteworthy for several reasons. First, there were very few cases in 1905 that the New York Times covered in more than one or two articles. The Meriwether case generated nine articles and therefore provides the only example other than the Nan Patterson case of extended press coverage of a criminal trial in 1905. Second, although the procedure for a court martial differs in significant ways from a standard criminal trial, the court martial is still subject to influence and prejudice from the media. Finally, reporting about the case

150 Id.

from the *New York Times* provides an excellent example of how the media would choose sides in an on-going case.

On November 12, 1905, the *New York Times* reported that at the Naval Academy in Annapolis, Maryland, military police arrested Midshipman Minor Meriwether for a fistfight that killed Midshipman James Branch. After the altercation, Meriwether was confined to his quarters under military arrest until he could be court martialed. In this article, the *New York Times* did more than report the facts of the case by noting that “evidence will be adduced before the court that will place Meriwether’s case in a better light than has been indicated.”

The *New York Times*, therefore, took a sympathetic view of the defendant’s situation from the onset of the trial.

In its next article on the Meriwether case, the *New York Times* reported on the medical testimony offered during Meriwether’s court martial. According to several experts, Branch died as a result of blows received in his fight with Meriwether. The physicians contended that no treatment could have saved Branch’s life. The *New York Times* reported, however, that during cross examination, “the defense sought to prove that the death might have been due to organic weakness in Branch or to the unskilled treatment he received from his friends after the fight, and the delay in giving him into the care of physicians.”

Meriwether’s lawyer also emphasized the fact that no autopsy was done because Branch’s father refused permission.

Midshipman A.W. Fitch, who refereed the fight, also testified. Reporting on his testimony, the *New York Times*, for the first of many instances, used the Meriwether case to criticize the tradition of hazing at the Naval Academy. Fitch, the *New York Times* reported, admitted to having acted as a referee in nineteen similar fights. He testified that Meriwether used gloves during the fight to protect his hands. According to Fitch, these were the same kind of gloves used on punching bags, but he had never seen them so used in a fistfight at the Academy. The article also suggested that the prosecution would close its case the next day. More significantly, however, the *New York Times* summarized the arguments that the defense would likely present, and concluded that Branch died as a result of “organic weakness” and poor handling after the fight.

The *New York Times*’ next article on Meriwether’s case contained a lead sentence that reflected the sensationalism typical of yellow journalism. The sentence read, “[o]ne of the most remarkable incidents in the history of naval courts-martial in this country marked to-day’s session of the court which is trying Midshipman Meriwether in connection with the fight between himself and the late Midshipman Branch.” The “incident,” however, proved not to be so remarkable. The Judge Advocate Prosecutor,

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152 *See Fighting Middy Arrested, N.Y. TIMES*, Nov. 13, 1905, at 1.


154 Id.

155 *Admiral Challenged at Annapolis Trial, N.Y. TIMES*, Nov. 25, 1905, at 5.
Marix, challenged Rear Admiral Alexander McCormick, one member from the panel of judges sitting on the case. He requested that Judge McCormick be removed from the case because McCormick had consulted with outside medical experts, and because “he had by his repeated and continued cross-examination of the prosecution’s witnesses practically taken the place of counsel, for the accused.”\footnote{156} Presiding Chief Judge Admiral Ramsey, however, dismissed the challenge and allowed Judge McCormick to remain on the bench.\footnote{157}  

The \textit{New York Times} also gave detailed reports on the testimony of the two defense witnesses. One of those witnesses, Midshipman Herbert Labhardt, a classmate and former roommate of Meriwether, testified that Branch, an upperclassman, had repeatedly harassed Meriwether. Labhardt testified that “on one occasion Branch went to their room and made Meriwether hold a book in his mouth and on another occasion Branch had spoken harshly to Meriwether. When an upperclassmen imposed upon a junior, the only possible way of mending matters, Labhardt said, was to fight.”\footnote{158}  

Midshipman Norman Smith also testified on behalf of the defense. The \textit{New York Times} described him as “a very trim little first-class man.”\footnote{159} According to the \textit{New York Times}, Smith “brought out very clearly that the Midshipmen were still compelled to do silly things and obey ridiculous rules” imposed by the upperclassmen.\footnote{160} If the Midshipman refused, they had to either fight or leave the Academy. Here again, both the defense and the \textit{New York Times} used the Meriwether case as a platform to criticize training at the Naval Academy.  

During the court martial, the \textit{New York Times} demonstrated its support for the defendant when it published a telegram sent to Meriwether by his “aged” cousin. Caroline Meriwether Goodlett, “Honorary President and Founder of the Daughters of the Confederacy,”\footnote{161} had sent a telegram to Midshipman Meriwether supporting what he had done. Meriwether, gave the telegram to the press, suggesting that he was aware of the media’s potential influence on the trial. Mrs. Goodlett was then nearly eighty years old, but, according to the \textit{New York Times}, was “still active to the point of riding horseback every day the weather permit[ed].”\footnote{162} She wrote, and the \textit{New York Times} reprinted:

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\begin{itemize}
  \item \footnote{156} Id.
  \item \footnote{157} See id.
  \item \footnote{158} Id.
  \item \footnote{159} Id.
  \item \footnote{160} Id.
  \item \footnote{161} \textit{Praises Middy’s Fight}, \textit{N.Y. Times}, Nov. 24, 1905, at 1.
  \item \footnote{162} Id.
\end{itemize}
“The blood of your revolutionary ancestors would have risen up against you had you done otherwise than accept the challenge of Midshipman Branch.”

Eventually, Meriwether himself took the stand in his own defense against the manslaughter charge. He gave a detailed account of the events leading up to the fight and of the fight itself. He said that he first met Midshipman Branch early in the school year aboard the Santee, a training ship for lower-classmen. Branch, an upper-classman, had been assigned there for misconduct. According to Meriwether, Branch “made himself generally unpleasant” during the four days he was on board. Soon after classes began at the Academy, Meriwether discovered that Branch lived just a few doors away from him. “Branch began to run me,” Meriwether said. According to Meriwether, “running” was worse than hazing, because “running” involved harassment and insult rather than just “physical persecution.” Meriwether testified further that Branch had frequently threatened to “bilge” him, namely, to drive him away from the Academy.

Meriewether then recounted a number of incidents that eventually provoked him into challenging Branch to a fight. On one occasion, Branch threatened to report Meriwether for another fight and for sneaking into town without permission. Another time, Branch harassed him, eventually provoking Meriwether to insult Branch. Branch then reported Meriwether for insubordination and disrespect. Branch also threatened to report Meriwether for having civilian clothing in his room, even though Meriwether informed him that the clothes belonged to his roommate. Finally, Meriwether testified that he had heard that Branch was asking other upperclassmen to report Meriwether for misconduct.

Eventually, Meriwether had had enough. One night, after consulting with some of his friends, he went to Branch’s room. He was accompanied by his roommate and friend, Midshipman Jaeger. Meriwether testified that they confronted Branch in his room where the following conversation ensued:

Branch said: “You are a damn fool to come to see me. You know that my class hates you.”
Meriewether replied: “That is not so, you are the only one who does.”
Branch then asked: “What if I do?”

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163 Id.
164 Had to Fight or Quit, Meriwether Declares, N.Y. TIMES, Nov. 30, 1905, at 3.
165 Id.
166 Id.
167 Id.
168 See id.
Meriwether replied: “Then you are a damn sneaking coward and I will fight you though I am not in fighting condition. If you get up I will lick you.”

Branch said: “You mean you will try.”

“That’s what I will,” [Meriwether] said, “and if you get up I will show you.”

He did not get up and after a little further conversation Jaeger and [Meriwether] left the room. 169

Meriwether then explained that he had approached Branch because he had learned at the Academy that a fight would resolve his dispute with Branch. “Branch had told me he was going to bilge me, that is, make me fail, and I wanted to fight and end the matter.” 170 After he left Branch’s room, Meriwether said that he no longer intended to fight Branch. But this changed when, according to Meriwether, Branch told him once more that he intended to bilge him.

Branch and Meriwether then planned a fight according to Academy tradition. Midshipman McKittrick was appointed Branch’s “second,” and Meriwether selected Jaeger as his. As “seconds,” McKittrick and Jaeger were responsible for arranging the details of the fight, including its time and location. It was also their job to oversee the fight, keep track of the rounds, and make sure certain rules were followed, keep others from becoming involved, and tend to the fighters as necessary. In reporting their testimony, the New York Times made it clear that fighting at the Academy was both common and ritualized. 171

Meriwether gave the following testimony about the fight itself:

During the fight we first fell under the blinds. About the twelfth round I rushed Branch, and both fell sideways through the door. The next round Branch hit a terrific uppercut that stunned me for some rounds. I returned to his jaw. He threw his head back, and I returned but swung my arm around his neck. We fell in that position, his head striking the floor. We were lifted up. My arm could not be used for the next two rounds. My left arm was crushed in a football game about three years ago. I had a severe operation. The arm is still weaker than the other. 172

Meriwether then showed a deep scar on the wrist of his left arm, where a plate had been inserted. After this, the defense counsel asked Meriwether why he had restrained from hitting Branch when Branch was on his knees during the fight, even

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169 Id.
170 Id.
171 See id.
172 Id.
though the rules of the fight allowed him to strike in such situations. Meriwether explained that he did not believe any blows should be struck when men were not on their feet. He also described how he had unintentionally fouled during the fight. Meriwether had attempted to end the fight for this reason but did not do so because “the seconds would not allow it.”

Meriwether testified that the fight ended at the conclusion of the twenty-third round when Branch came across the room “and we both apologized.” Meriwether said Branch was conscious, appeared okay, and that the two “parted as friends.” When he learned that Branch died shortly afterward, Meriwether said he “was hurt and grieved beyond expression.” He added, however, that Branch was more fortunate than he in having peace through an honorable death rather than having to live “after this sad and deplorable affair.” Meriwether also testified, however, that had he not stood up to Branch he would have been ostracized and, eventually, forced to leave the Academy. “Under [such] circumstances I would have to resign, and could never hold up my head again,” the New York Times quoted him as saying.

The prosecution then began its cross-examination. Interestingly, the New York Times reported little of this except where Meriwether attempted to describe the difference between running and hazing. Meriwether explained that hazing consisted of physical exercise, but that running was much worse because it involved mean-spirited intimidation and harassment designed to force the midshipman to resign and leave the Academy. The prosecution then asked Meriwether to describe particular instances of running, but Meriwether declined to respond. After whispering to the Judge Advocate, the question was withdrawn. According to the New York Times, it “was evident that Meriwether hesitated to mention certain things before the women in the courtroom.”

The headline of the New York Times’ article reporting Meriwether’s testimony revealed much about that paper’s opinion of the case: “Had To Fight Or Quit, Meriwether Declares: He Testifies Of His Troubles With Midshipman Branch: Parted As Friends, He Says: Describes Fierce Fight That Led To Opponent’s Death—Running Worse Than Hazing.” The headline encapsulated the New York Times’ support for the defendant and its use of the case to criticize the Naval Academy.

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173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 Id.
The New York Times continued its seemingly biased reporting in its next article headlined: “Court Hears Argument In Meriwether Trial . . . Counsel Blames System: Defense Says Meriwether Had to Fight Under the Custom or Leave the Academy.” The article purported to describe both of the closing arguments in the case, but placed far more attention to the defense’s argument than that of the prosecution. The New York Times quoted the defense attorney as saying, “[i]f Meriwether is convicted of anything further than disorder, he will be made a sacrifice for a system and for the sins of generations.” The attorney then repeated an argument that the New York Times itself seemed to make in its earlier reports, saying that the “traditions” and “attitude” of the Academy authorities toward fighting were as much responsible for Branch’s death as Meriwether’s blows.

The next day, the New York Times reported that the court martial had reached its verdict in the Meriwether case, but that the verdict would not be made public until the Secretary of the Navy reviewed it. Over a week later, on December 13, 1905, the Department of the Navy announced that Meriwether was acquitted of the charge of manslaughter. He was, however, found guilty of the relatively minor offenses of conduct prejudicial to good order and military discipline. For these infractions, the court martial confined him to the limits of the Naval Academy for one year. The Department of the Navy, however, mitigated this punishment to allow Meriwether to participate in training cruises that would enable him to leave the Academy grounds. In essence, Meriwether escaped with little more than a slap on the wrist.

In the same article, the New York Times noted that the Meriwether case had forced the Department of the Navy to consider “drastic measures” to halt hazing and fighting at the Academy, but that nothing yet had been done about this matter, and that fights at the Academy “[were still] of no less frequent occurrence than before the death of young Branch.” According to the New York Times, there was a fight on the very night of Branch’s funeral, and there had since then been at least five other fights.

180 Id.
181 Court Hears Arguments In Meriwether Trial, N.Y. TIMES, Dec. 1, 1905, at 5.
182 See id.
183 See id.
186 Id.
187 Id.
188 See id.
The next day, the New York Times continued its scrutiny of the Naval Academy, reporting that another occurrence of “brutal hazing had been discovered at the Naval Academy notwithstanding sworn testimony of midshipmen witnesses before the Meriwether court martial that the practice did not exist at the Academy.”\textsuperscript{189} Roommates discovered the victim of the hazing, Midshipman Jerdone Kimbough, in a coma. According to them, the coma resulted after upperclassmen repeatedly forced Midshipman Kimbough to stand on his head.\textsuperscript{190}

III. CRIMINOLOGISTS’ PERCEPTION OF YELLOW JOURNALISM

Early in the twentieth century, criminologists and others worried about the influence of the yellow press on the criminal justice system. Interestingly, however, they seemed more concerned about the potential of the press to incite crime. This is perhaps not surprising considering that early in the century newspapers, especially sensational newspapers, were a source of news as well as entertainment. The concerns of early twentieth century criminologists, therefore, are somewhat analogous to current concerns about television and its influence on violence. These criminologists, furthermore, were worried that the press jeopardized impartiality in many cases. To address both of these problems, most commentators proposed that the freedom of the press be restricted.

As early as 1892, one criminologist rebuked the press as an “impediment to justice.”\textsuperscript{191} According to William Forrest, the author of an article in The Criminal Law Magazine and Reporter titled, “Trial by Newspapers,”\textsuperscript{192} the press made it difficult, if not impossible, to obtain a fair jury. Forrest asserted that by the time jurors are impaneled for high-profile criminal trials, “they have made up their minds on the material issues in the case from what they have read.”\textsuperscript{193} Forrest also worried that the papers prejudiced judges and improperly pressured prosecutors. He believed that such prejudice often worked not only to deprive the defendant the right to an impartial trial, but prejudiced the jury and judge against the defendant, shifting the judicial presumption of innocent-until-proven-guilty to guilty-until-proven-innocent.\textsuperscript{194} Forrest proposed that newspapers should exercise more self-control in reporting criminal cases before and during trials, and that if they could not do this themselves, perhaps the state should force them to do so.\textsuperscript{195}

\textsuperscript{189} Midshipman In Coma From Brutal Hazing, N.Y. TIMES, Dec. 14, 1905, at 1.

\textsuperscript{190} See id.

\textsuperscript{191} William Forrest, Trial by Newspapers, 14 CRIM. L. MAG. & REP. 550, 552 (1892).

\textsuperscript{192} Id.

\textsuperscript{193} Id.

\textsuperscript{194} See id. at 553, 556.

\textsuperscript{195} See id. at 558.
In 1905, the *New York Times* reported that William Taft, then the Secretary of War and future President and Supreme Court Chief Justice, believed the criminal justice system to be a national disgrace, pointing to the rise in felonies, lynchings, and mob rule throughout the nation. Like many commentators of the day who were elitist, Taft did not blame the newspapers directly, but blamed the jury as it was often comprised primarily of uneducated lay masses having a propensity to be swayed by irrelevant and sensational journalism. He argued that the entire justice system needed reorganization. In particular, he called for the abandonment of the jury system in civil cases and for greater power of judges over juries in criminal cases.\(^{196}\)

Five years later, in an editorial by the *Journal of the American Institute of Criminal Law and Criminology*, a commentator called the press “one of the acknowledged evils”\(^ {197}\) in the administration of criminal justice, noting in particular that an “unbridled press . . . increases a sentiment in the community as to the guilt or innocence of the accused, which makes it well nigh impossible to secure an impartial jury, and the atmosphere and sentiment thus created affect not only the jury, but the courts as well.”\(^ {198}\) This editorial repeated Forrest’s earlier conclusion that prejudice arising from yellow journalism works almost always against the defendant. Although, it is interesting to note that in the Nan Patterson and Midshipman Meriwether cases, the media attention assisted the defense. Finally, the editorial concluded that the state remedy the problem by enacting laws similar to those in England prohibiting newspapers from publishing anything concerning a case in court.\(^ {199}\)

In 1926, Robert Highfill analyzed the work of a dozen prominent criminologists and summarized their conclusions about the influence of the media on public opinion.\(^ {200}\) Highfill’s research is important insofar as it reflects the general perception of early twentieth century criminologists toward the impact of yellow journalism on the criminal justice system. The criminologists cited in Highfill’s work all agreed that the presentation of crime in news induces crime amongst potential criminals. They explained that the press induces crime by suggesting a criminal model for crime that could be easily imitated. The individual, they thought, is receptive to the influence of the press, and news incites crime mainly in those with criminal predilections.

Highfill argued that stories were likely to incite crime by describing the methods employed by criminals and presenting the criminal in a heroic light. He believed that

\(^{196}\) See *Criminal Law System National Disgrace—Taft*, supra note 27, at 5.


\(^{198}\) *Id.* at 850.

\(^{199}\) See *id.*

\(^{200}\) See Robert Highfill, *The Effects of News of Crime and Scandal Upon Public Opinion*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 40, 60 (1926). Because there is little commentary from the first decade of the twentieth century on the impact of the media on the criminal justice system, I have instead examined several articles from the late 1920s and early 1930s.
sensational reports of crime led to race prejudice and to mob violence that often culminated in lynchings. Highfill did not, however, criticize newspapers for their use of racial stereotypes, which also arguably contributed to race prejudice and mob violence. Neither Highfill nor the scholars he cited provided clear evidence showing that newspaper reports about crime had in fact caused crime.

Another concern of Highfill and other early twentieth century criminologists was the objectivity of the jury. Highfill noted that newspaper stories about sensational trials shaped the jury’s mind as to guilt or innocence, making it “exceedingly difficult, or impossible, to secure an unbiased jury for the trial of criminal cases.” He warned that news reports about the trial itself threatened to prejudice juries even after they were empanelled. He observed that newspapers often exploited criminal trials through the use of sensationalist techniques to increase circulation and, sometimes, to support editorial policies. To this end, newspapers frequently turned reporters into detectives, focusing on “trivial” human interest “stories to arouse sympathy or hostility to one side or the other.” According to Highfill, bold headlines, one-sided leads, and one-sided stories most influenced the public’s attitude about the guilt or innocence of a criminal defendant. Highfill concluded that the aforementioned editorial practices incited crime, prejudiced juries, and often necessitated changes of venue.

Highfill believed that the best way to deal with these problems would be to require the state to license and regulate journalists and their publications. In addition, he supported the adoption of state and national news organizations which would adopt a code of ethics for newspaper reporting that would be rigorously enforced. Such regulations and ethics code, he suggested, should be especially sensitive to the impact of the media on criminal activity and the outcome of criminal trials.

Three years later, in 1929, Joseph Holmes agreed with Highfill’s assertion that newspaper articles about crime incite criminal activity and generally interfere with the administration of justice. He wrote that newspapers encouraged crime by providing a “blueprint” for people who had criminal tendencies but did not have the capacity to plan a crime. Holmes also believed that newspapers incited crime by characterizing certain

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201 See id. at 73–75, 86.
202 Id. at 91.
203 This was a common perception among early twentieth century criminologists. See, e.g., Morris Gilmore Caldwell, Sensational News in the Modern Metropolitan Newspapers, 23 J. AM. INST. CRIM. L. & CRIMINOLOGY 191, 196 (1932).
204 See Highfill, supra note 200, at 91–92.
205 See id. at 67–70, 94.
206 See id. at 96, 98–99.
criminal actors as heroes, or, in some cases, celebrities. Like Highfill, Holmes warned that newspapers shape the opinions of prospective jurors, creating bias and often prompting a change of venue. The similarity between the Highfill and Holmes findings suggest that there was a consensus of opinion among criminologists early in the twentieth century regarding the impact of the media on the criminal justice system. Such critical perspectives regarding the effect of yellow journalism on American society seem to have set the stage for changes that occurred within the judicial system later in the twentieth century.

CONCLUSION

Media portrayal of criminal trials early in the twentieth century reveals a great deal about journalism, the criminal justice system, and American society in general during the Progressive Era. News from this time period was yellow—that is to say it was particularly sensational, provocative, and untrustworthy. Moreover, aspects of yellow journalism were apparent in news stories in all the nation’s major newspapers, even the comparatively conservative and reliable New York Times. Yellow journalists paid significant attention to crimes and criminal trials. Such stories, according to legal historian Lawrence Friedman, were “mighty engines for selling newspapers—better than anything else, perhaps, except war or a good execution.” These stories not only provided a “vicarious thrill” but taught the public about the law through messages of morality—showing how good and evil interacted in an increasingly complex modern criminal justice system.

In publishing these stories of crime and punishment, however, newspapers were motivated more by profit than a sense of justice. For this reason, reports about crime were often misleading and perhaps inaccurate. This was especially true during the age of yellow journalism, when newspapers rapidly expanded with industrialization, and in the absence of much internal restraint about how and what to report. Of significance is the fact that during the first decade of the twentieth century, courts had not yet adopted procedural practices like jury sequestration to limit the influence of the media in the courtroom. For these reasons, the tension between the First Amendment right to the freedom of the press and the Sixth Amendment right to an impartial jury was probably greater during this time period than in any other. One should say “probably” because, ultimately, it is impossible to prove that any particular news report directly affected the outcome of a jury trial in any particular case. Nevertheless, the news reports described herein demonstrate that circumstantial evidence for such influence is strong.

208 Id. at 259, 261–62.
209 FRIEDMAN, CRIME AND PUNISHMENT, supra note 8, at 253.
210 Id. at 398.
211 Id.
Finally, media portrayal of criminal trials during the first decade of the twentieth century teaches much about Progressive Era society. In particular, these reports show that racism and sexism infected credible newspapers such as the *New York Times*, and reinforced such tendencies in the public and the criminal justice system. Racial and gender stereotypes, inevitably, led to unequal treatment under the law. Stories about bigamy indicate a society and a criminal justice system struggling to reconcile human nature with strict divorce laws, and reveal a media unashamed to report about the most private actions of individuals. Reports about traffic violations demonstrate how the criminal justice system attempted to respond to new, society-altering technology, and expose a legal system still divided by class. Articles by criminologists and others from the time period show an educated elite distrustful of the public’s ability to resist the power of the media and surprisingly willing to sacrifice the freedom of the press in the name of justice.

Yellow newspapers reflected and propagated ideas about race, gender, and class in the particular context of the administration of criminal justice. Moreover, while historians have written much about yellow journalism and its impact on American society, little has been written about how yellow journalism might have affected the constitutional rights of criminal defendants. The foregoing reports suggest that yellow journalism seemingly led to yellow justice during the early years of the twentieth century.