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Volume 60 | Issue 3

Article 2

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11-1-2015

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### Recommended Citation

Peter Goodrich, *Mos Americanus or Common Law in Partibus Infidelium*, 60 Vill. L. Rev. 521 (2015).

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## Symposium Articles

### *MOS AMERICANUS OR COMMON LAW IN PARTIBUS INFIDELIUM*

PETER GOODRICH\*

PETHER and I, Penelope and me, knew each other quite well. Emphasis is due here to the adverbial and tenebrous *quite*, which in English diction means hardly at all, while in an American idiom it means extremely well. This ambiguity, this precarious proximity, both marks and relays the lines of power, the amicable and inimical, the *oikonomic* and administrative, in sum, *praxis* within the academy and by extension and effect in the profession as well. The covert and uncertain visibility of affect defines the law of amity, the shadow realm of *lex amicitiae*, as elaborated most often by humanistic jurists in the course of mustering and defending their various doctrinal and disciplinary schools, orthodoxy and heresy, liturgy and anathema, glory and abomination in the literary genres and the classrooms of knowledge. How does our intellectual kinship, tribal membership, and theoretical intimacy or in Baudelaire's terms, "*l'idéal fraternel*," the archipelago of group attraction and affinity, impact upon and discreetly inform our work?<sup>1</sup> More specifically, how does this unspoken *amicitia* define our relations to, interactions with, and scholarly exchanges between the variable groups and mobile identities that tenuously form the momentary collocation of the common law tradition in the U.S.A. which I will here both explicate and castigate, and first off call by its proper name, *mos americanus*.

My point of entry to this stolidly denied topic is votive and *in memoriam*. In the venerable tradition of humanism and law, I will start by addressing myself to a conversation with the departed, the lawyer turned *mulier academicus litterarius* that travelled under the alliterative nomination Professor Penny Pether, and under cover of the palindrome formed by the trinitarian acronym P.P.P. We shared a sense of settling upon foreign ground and equally espoused a sense of the strangeness of the alien jurisdiction, common and yet unfamiliar, that we had landed upon. It brought us together, provided an elective affinity, and allows me to share a species of secret, a covert transmission, a common and yet generally hidden mode of scholarly exchange. An email on November 11, 2011, from Profes-

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\* Professor of Law and Director of the Program in Law and Humanities, Cardozo School of Law, New York. This Paper was delivered at a Symposium in Honor of Professor Penelope J. Pether (1957–2013) at Villanova University School of Law. The plethora of Christological and other Catholic insignia have persuaded me that some use of (Anglican) Latin will not be too unfamiliar to the venue.

1. JEAN-PIERRE MARTIN, *LES ÉCRIVAINS FACE À LA DOXA, OU DU GÉNIE HÉRÉTIQUE DE LA LITTÉRATURE* 184 (2011).

sor P.P. I had recently written a letter of recommendation in support of a job application that she had made, and her email thanks me and continues, “I did one for your friendship book the other day.” Then she says that she likes the university in question and also that she would like to have me come and speak. A common enough transmission in the shoals of academic review and then later, November 29, an e-message that responds to a request that I had made for a copy of her comments that states, “I am attaching my review, with suggestions for development, for what they are worth.” I thanked her by return for “the wonderful review” and proffered “deep felt gratitude.” Trivial, commonplace, staccato, and stochastic as the exchange may be, I am taking her suggestions from back then as my starting point now. That is to say, the review made radical demands on a text that I have, to this day, despite the contract that arrived from the publisher on the strength, *inter alia*, of P.P. Pether’s letter, still to publish.

The issue, initially, is that of the “old word *friendship*.” It is a question of what she calls my “easiness in an intellectual skin that is not quite at home.” A matter, I think, of shared foreign ground, which leads her, in the name of amicable attachment to her first and pointed suggestion, which is, in her words:

I would be particularly interested in seeing the author emphasize his own situatedness as at once observer and subject in the project. I would also be interested to see more attention paid to the domesticated danger and estoppel of friendship, the recognition of the risks of confrontation of its transformative potential into the realm of the erotic, and the reasons why and the manner in which such risks are to be evaded.

These *desiderata* contain a multitude, a host of ideas from the beauty of the concept of an estoppel of friendship, that first we are precluded from leaving the *oikonomia*, to the brilliant admission that one must evade the risks of the erotic, by which I take her to mean the risks of the flesh, of contact, of infidelity, when one engages with the practice of friendship, with the circulation of the “immense rumor.”<sup>2</sup> But that is both implicit in and contradicted by her emphatic acknowledgment that the politics of amity must start with the “situatedness” of the self, the observer as subject, the body in question, the corporeography of a gendered presence and its articulation.

She was laying bare, I suspect, her feelings about my lack of expression of feelings, my Englishness, the Olympian stance of Latinate prose. And that view is expanded when she states that she would “like to see an account of the practices of friendship.” What is needed, according to Pether, *crux* and *fulcrum*,

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2. JACQUES DERRIDA, POLITICS OF FRIENDSHIP 27 (George Collins trans., 1997); see also JACQUES DERRIDA, NEGOTIATIONS: INTERVENTIONS AND INTERVIEWS, 1971–2001, at 147 (Elizabeth Rottenberg ed. & trans., 2002).

is some accounting for the cases where it does not lapse into what the proposal suggests it often is, banal, bound to be tested and broken, marginalized and forgotten. Friendship beyond the star footnote, the inscription, the web of influence; unlikely friendships, and the possibility of radical love that the relation offers . . . .

Then, via the unquiet skin, and a few comparisons to other texts and figures, she offers her strong recommendation of publication. Familiar territory, an instance of how professors think, is part of the genre of amicable scholarly review.<sup>3</sup>

It is worth taking a moment, even if it means delaying responding to her pointed suggestions, to examine the genre of these remarks, of this familiar epistle, this Penny post. It is interesting and telling that in her initial emissive, Pether equates her letter to the publisher, to an editor who was also a friend, supporting publication, with the letter of recommendation that I had written in furtherance of her application for a job. The slippage between the two is rhetorically very telling. The letter of recommendation belongs classically to the genre of eulogy and, as Waquet studies its early modern variations in *Respublica academica*, it has “from its outset, also played a key part in a dynamic of amity.”<sup>4</sup> That said, the recommendation slips easily and perhaps rather obviously into the genre of letters of reference and review. It is the work of friendship to praise, support, proselytize, and promulgate the work of the clan, the group, *doxa* and school, the texts of “our” teachers as also the proposals of our fellow travelers, students, and disciples. By inverse token, academic enemies are to be anathematized, their work excoriated and dismissed, their flaws exposed and their inimical attitudes effectively and affectively punished. There is also the space in between, that of tough love or laudatory and essentially supportive critique which, as here, pushes the author of the proposal to enact what they advocate and, in effect, to perform the theory of amity that is proposed. It is towards practice, *amicitia in actu*, the corporeography and bodily inscription of affect that Penny was increasingly drawn in her latter years. Thus the suggestion of looking at the transformative opportunities, the fissure points, the unlikely friendships, the radical loves, and evasions of the erotic that she simultaneously propounds. To this end, I believe that her dictate of materialization, the injunction to adumbrate a *praxis* of amity, as she elsewhere puts it, comes to the fore. It is a dictate that I took sufficiently seriously to delay completion of the work for what now approaches half a decade. And finally, here, I

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3. See generally FRANÇOISE WAQUET, *LES ENFANTS DE SOCRATE: FILIATION INTELLECTUELLE ET TRANSMISSION DU SAVOIR, XVIIIE–XXIE SIECLE* (Albin Michel ed., 2008). Though, ironically enough, Waquet is mentioned hardly at all in Michèle Lamont’s empirical study. See generally MICHÈLE LAMONT, *HOW PROFESSORS THINK: INSIDE THE CURIOUS WORLD OF ACADEMIC JUDGMENT* (2010).

4. FRANÇOISE WAQUET, *RESPUBLICA ACADEMICA: RITUELS UNIVERSITAIRES ET GENRES DU SAVOIR (XVIIIE–XXIE SIECLE)* 142 (2010).

will sketch an outline of *praxis*, a response to her insistence on the situatedness and practices of friendship, and then shift, if desire sustains the cause sufficiently, to address their critical product, the unlikely friendship, the radical love, the unquiet skin that surprises and simultaneously evades the realm of the erotic in the predominantly homosocial mode of *mos americanus*.

### I. AMICITIA IN SITU ET IN ACTU

By the dynamics of amity, the practices of friendship *in situ*, I think that Penelope P. is referencing something akin to Bordieu's lines of power; but here it is their backface, their feminine side, affect and effect, that she invokes most distinctively in her essay on critical *praxis* in law. *On Foreign Ground* begins with the report of a conversation: "I went shopping with a scholar who was then a colleague of Stanley Fish. This was in the days before Fish became a kind of Martha Stewart of the U.S. humanities academy."<sup>5</sup> Fish, which is to say literary criticism, is Pether's mode of entry into the absence of *praxis* in critical theory and law. It is a question of a diagnosis for the shared malaise of irreality, obsessive focus upon the abstract, the designer accessories of theory, high status appellate court opinions, the superficialities of institutional and disciplinary status, and the removal of analysis from any recognizable situation or, as she puts it, specificity. She concludes, "Fish's account of subject-formation had no place for the body. . . . 'Stanley's just terrified of the body.'"<sup>6</sup> It is in relation to this evasion of the subject as corpus, the flight from corporeography, that Pether designates a politics of engagement, a pedagogy of the face to face, and a rhetoric grounded in gender and relationship. A "sexed subjectivity" is the reality of encounter.<sup>7</sup>

What Selden in *Mare clausum* termed the "imaginarie lines of amitie" are in this view relays of engendered affect and effect, courses of power and influence within an imaginal politics which is also, inevitably, a politics of the visage, of the image, of the face to face. *Foreign Ground* indeed refers to Fish as a "lifestyle icon" and the point, I think, is to get at the ruses and masks, the vacuity of the persona, and the seemingly ineluctable denial of body and amity, of affect and influence that the academy and the theory boys bring.<sup>8</sup> The absence of context, body, situation, and contact,

5. Penny Pether, *On Foreign Ground: Grand Narratives, Situated Specificities, and the Praxis of Critical Theory and Law*, 10 LAW & CRITIQUE 211, 212 (1999) [hereinafter Pether, *On Foreign Ground*].

6. *Id.* at 213.

7. *Id.*

8. *Id.* at 212. In addition to Stanley Fish, Pether points to Duncan Kennedy, Pierre Schlag, and Jack Balkin, with brief mention of Sandy Levinson and Paul Campos. See *id.* at 217–35. I cannot here refrain from an anecdote, a recollection of *praxis*. Upon reading this passage in *On Foreign Ground*, I walked down the corridor to Stanley Fish's office and straight up said "Stanley, would you like a hug." To my surprise he said "yes" and stood up. I thought that the Penny post was about to be proved wrong, our thesis in tatters, but Stanley walked over to me and



FIGURE 1: STANELY REGINALD BALDWIN FISH CORPOREOGRAPHICALLY SHOOING AWAY ICONS.

the abandonment of the personal archive and its commitments, is in other words the norm from which she starts, the familiarity that being on foreign ground, the ontology of peregrination, will challenge. I will do so in terms first of the habitus, the situation and institution that generates the norm, the juridically derived *lex amicitiae*, and then the corporeography of the unquiet skin, the personal archive, the wounds and disbursements of the juridical theology of the friend.

The situation is legal, which is to say nomic, gnomonic, and academic. The bulk of treatises on *amicitia* are the legislations, the *lex* of lawyers. From Aristotle to Cicero, Montaigne to Francis Bacon, and I could name numerous others, including Jacques Derrida—who was on the visiting faculty at Cardozo School of Law by the time he wrote *Politics of Friendship* and devoted much of the book to the scholastically posed relation of friendship to justice—law is not only the discipline of the authors, but is also most usually the context of the discussion.<sup>9</sup> If it is a question of place, however, the starting point is the site or sites of amity in the founding text

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presented his shoulder, thus allowing only a species of non-hug, a limbic grappling. It was a lateral and metaphorical cold shoulder. What can I say, but good for Stanley Reginald Baldwin Fish, old Piscator.

9. A history reviewed in Peter Goodrich, *Laws of Friendship*, 15 *LAW & LITERATURE* 23 (2003); Peter Goodrich, *The Immense Rumor*, 16 *YALE J.L. & HUMAN.* 199 (2004) and in the yet-to-be published manuscript which P.P.P. reviewed.

of Western law, the *Corpus iuris civilis*. Glossatorial sources point to several references, although two are key. The principal citation is to Book 50, on the meaning of words (*De verborum significatione*) and clause 223 extracted from Book 2 of Paul's *Sententiarum*:

The definition of *lata culpa* is not to realize what everyone realizes. 1. We ought to describe as "friends" not those who are joined to us by slight acquaintance but those who have bonds of familiarity with the head of the household acquired by honest means.<sup>10</sup>

Here we find the root, I suspect, of Vico's useful etymology of interpretation as *interpretari* from *interpatrari*, "that is, 'to enter into the fathers,' as the gods were at first called."<sup>11</sup> Retaining such a key point for subsequent evaluation, I will note here only that the gloss emphasizes that the friend is honorable and rational, that the relation is made at leisure, through hospitality and society, in the judgment and with the authority of the father. Finally, glossing *quaesita rationibus*, with reason, *dicitur amicus, quasi amici custos*—a friend is said to be the guardian of the friend.<sup>12</sup> This gloss, in turn, is taken from much earlier theology in which *amicitia* is care of the soul of the friend or in Isidore of Seville, *custos animi*.<sup>13</sup> The friend is one who nurtures and protects the spirit, a custodian thus of an unseen force which Isidore links directly to an etymology of *amicus* from *hamus* or hook, "that is, from the chain of charity" (*catena caritatis*).<sup>14</sup>

Predicated, as I insist, upon the juridical theology of the friend, with sources that silently underpin and imagine the legal tradition, the *ius commune* that forms both structure and institution, we have a definition of friendship that in multiple forms binds amity to law. The key lies in the unbroken chain that derives from Homer (*catena Homeri*) and is figured most frequently as a law passing from Jove, via the great classical lawgivers, Moses, Dracon, Solon all the way to the underworld and to Minos, the son of Jove, who was judge of souls in hell.<sup>15</sup> The friend is law and his face is

10. 4 THE DIGEST OF JUSTINIAN 467 (Alan Watson trans., Univ. Pa. Press 1985).

11. GAMBASTTISTA VICO, THE NEW SCIENCE OF GIAMBATTISTA VICO 343 (Thomas Goddard Bergin & Max Harold Fisch trans., Cornell Univ. Press 1984) (1744) (citation omitted).

12. FRANCISCUS ACCURSIUS, GLOSSA ORDINARIA, gloss e to 223. The gloss references Cicero, but the ecclesiastical and patristic sources are St. Ambrose and Gregory the Great.

13. See ISIDORE OF SEVILLE, THE ETYMOLOGIES OF ISIDORE OF SEVILLE 213 (Stephen A. Barney, W. J. Lewis, J. A. Beach & Oliver Berghof trans., Cambridge Univ. Press 2006). The gloss, incidentally, is probably a slip and intended *animi* rather than *amici custos*. Daoyz indeed lists the latter. See STEPHANO DAOYZ, JURIS CIVILIS SUMMA, SEU INDEX COPIOSUS, NON SOLUM EA QUAE IN GLOSSIS, SED ET TEXTUUM OMNIUM VEROSSENSUS CONTINENS, MAXIMAM DISTINCTIONE CONTEXTUS (Milan, Jo. Baptistæ Cetti ed. 1742).

14. ISIDORE OF SEVILLE, *supra* note 13, at 213.

15. As, for example, in the title page of the Senneton edition of the CODIX TO CORPUS JURIS CIVILIS (Lyon, Jaques, Jean & Claude Senneton eds., 1548–1550). See

that of the divinity or more specifically of the gods, spiritual and temporal, celestial and vicarious, in whose image we are formed. The face of the friend is the face of the law and in being such it is itself the image of a prior law, the mask though which we glimpse the unseen cause. The lawful friend is rapidly an abstraction, a structure, a link in a chain that binds the subject to an invisible and non-existent spirituality or in contemporary terms, used by Pether, to the omnipresent but disembodied and unapproachable icons of commerce and theory, Martha Stewart and Stanley Fish, after whom she believes the theory boys are constantly chasing or, I would add, sagging in sloth and depression upon the occasions when they realize that they cannot catch and so will never be them.

That the juridical theology of the friend is of someone who is *quasi animi custos* has a further juristic ring. The duty and role of the friend is that of guardian, custodian, lawyer, keeper of *animus* as *amicus*, and vice versa. That the friend is the soul, and the soul is the friend disembodies the other and abstracts both subject and affect. The custodian draws the friend into the unbroken chain of the law. These are the *vinculae iuris*, the bonds of the law which, according to the next extract, section 224, immediately following the definition of *amicus*, taken from Book 7 of Venuleius's *Stipulations*—meaning binding promises, namely contracts—we learn that the term *vinculorum*—meaning of bonds and by extension obligations, “means private or public chains, but the true meaning of custody (*custodiae*) is public custody.”<sup>16</sup> The friend through reason, *quaesita rationibus*, as Paulus defines this institution, is a friend through *ratio iuris* and thence through *ratio scripta*. The glossators picked this up in depicting the friend as *licitus* and also as *in scholis*, meaning in learning, and, to use the most common *exemplum*, in learned conversation (*colloquio*).

The friend is at root a learned friend, a humanist if we accept that the humanists were primarily lawyers, *utrumque ius*, of one law and the other. To expatiate on this, following the text, the friends are familiars, known to the father, friends in conversation with the head of the family. The friend here is drawn into the kin group, the Christian brotherhood, the city, the polity, and later, the nation. The relation is here made into an *exemplum*, a chain, bond, and office. In sum, these are legally constructed designations, and in Pether's critique of their latter day emblems, these are vacant, disembodied, faceless, or at least unilateral didactic forms. The bonds band and generate institutions, such as the critical legal conference, the archipelago of theory, the painfully inhabited and just as viscerally denied listings and rankings, the status hierarchy, the obsession with the father as institution, as priest and leader that she encounters in the texts and non-practices of theory, in Duncan Kennedy, Pierre Schlag, and Jack Balkin—to name but three of her disappointments—three of what

PETER GOODRICH, *LEGAL EMBLEMS AND THE ART OF LAW: OBITER DEPICTA AS THE VISION OF GOVERNANCE* 151 (2014); see also ALEXANDER ROSS, *MYSTAGOGUS POETICUS, OR THE MUSES INTERPRETER* 292–93 (London, 1672) (discussing Minos).

16. VENULEIUS, *STIPULATIONS* (book 7).



she considered the ambulant norms of a banal and often broken amity that comprised critical theory in law on the foreign ground that she came to occupy.

The situation, the context of amity, is thus historically juristic and, for us contemporaries, that law is the institution, the *aeconomy* of the interior of the public sphere. The juridical theology of the friend is that of belonging, of membership of the group or collectivity predicated originally, as Benveniste traces it, upon kinship and the exigency of tribal survival, and latterly upon the brotherhood of faith or the equally fantasmatic fraternity of the constitution and nation.<sup>17</sup> Translated into the contemporary, the norm of friendship is that of the institutional hierarchy compacted by the homosociality of competitive career trajectories, and the insistent drive to reproduce the self, single and several, image and corpus, as the pinnacle of the convocation, the ascendant order of the sub-polity, the conference, school or network to which the subject as status hero, as pontiff, power-monger and *vicarius Christi*, belongs. There is then, in this amicable legal theology, an innate distancing—the pinnacle cannot be present in the base, but must rather perform its mirror image semblances of collectivity from afar, by means of a certain disengagement and with a degree of what is at its best *amour lointain*. Yet distance protects and shields the subject. A degree of stasis, a slow boring similitude sets in and thus, as the flip side and contemporary expression of this historical drive toward kinship and similarity, this morphology of an interior legalism, there is an institutionalization of a petty hierarchy within the archipelago of the alternative school, the critical legal conference, the summer symposium, and various networks and courses, from psychoanalysis to law and economics. The question then is that of our institutional investiture, our encounter with law, our place in the text, and in setting this out, I will begin to address the second of Pether's questions, that of unlikely friendships, transformative moments, occasions of risk, the exposures of an unquiet skin on foreign ground, and in its encounter with the *mos americanus* theme to which I will now turn.

## II. *MOS AMERICANUS*

The question of the definition and character of the *mos americanus*, the U.S. tradition of common law, its particularities and peculiarities, its national distinctiveness, has not really been addressed directly to date. The question needs first to be framed. All the traditions of Western law are more or less distant descendants of the Roman law, and specifically of the reception of Justinian's *Corpus iuris civilis*, which was rediscovered circa 1190 in Bologna during the early phases of the Renaissance by which term of course we refer to the reception of classical learning. This Latin law swept Europe and provided the conceptual structure and language of le-

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17. See ÉMILE BENVENISTE, *LE VOCABULAIRE DES INSTITUTIONS INDO-EUROPÉENES* 108, 325, 337, 367 (1969).

gality, both secular and spiritual, for centuries to come. The initial point to make, however, is simply that the basic lexicon of law, the Latin and cognate terms of persons, things, and actions, the maxims and rules or *regulae* that all Western legal traditions have in varying degrees in common, are expressions of *mos italicus*, of the Renaissance reception of Roman law, as method, as scripture, as *ratio iuris*.

The matter of the distinctiveness of English common law, established in the main in political rebellion against that “tincture of Normanism” which the infinite glosses and supposed sophistry of the Roman glossatorial casuistry represented, has to be understood in context and effect. What method English common law, *mos britannicus*, aspired to was inherited via Bracton and the other early treatise writers from the continental tradition, as the language and conceptual lexicon of the method and textual form of *ius civile*. Dictated in Latin, revived by the Norman conquest, and recovered again in the humanist writings of the early modern sages of the common law, of the Anglican tradition of what was paradoxically termed *ius non scriptum*, was nonetheless in distinctly civilian fashion to proceed according to analogy, *procedere ad similia*, and was, as Bracton was first to relay it, to address the classical trinity of persons, things, and actions. It is useful to draw on Selden’s treatise on tithes to borrow the observation that all of the distinct traditions have their local *modus* and parochial law or *ius proprium*.<sup>18</sup> The French tradition, the *mos gallicus*, introduced historical method and specifically philology—the Queen of the Sciences, according to Selden—into the Roman reception.<sup>19</sup> The *mos hispanicus* was distinct for its use of literary and historical sources, the mingling of fiction and law so as to formulate a distinctively Spanish amalgam of local codes and Roman law.<sup>20</sup> The *mos britannicus*, as I have argued elsewhere and will not repeat, is distinctive principally for its paucity of method and distance from scholarship and the university curriculum.<sup>21</sup> But, that said, there was no shortage of treatments of method, and no lack of civilian learning in the various competing Anglican jurisdictions, as between equity and law, between common and canon law, admiralty and international law. As Selden puts it “for every State in Christendom is

18. See JOHN SELDEN, *HISTORIE OF TITHES* xix, 361–62 (1617) [hereinafter SELDEN, *HISTORIE OF TITHES*].

19. On the classical division between *mos italicus*, *mos gallicus*, see DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 128, 201 (1990); ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 71–73 (1981).

20. See SUSAN BYRNE, *LAW AND HISTORY IN CERVANTES’ DON QUIXOTE* 19 (2012) (“The Spanish voice in those movements studying history in conjunction with jurisprudence and philosophy has not been granted its own named tradition in those debates, and the *mos italicus* and *mos gallicus* have never been joined by a *mos hispanicus*.”).

21. See Peter Goodrich, *Intellection and Indiscipline*, 36 J.L. & SOC’Y 460, 463–65 (2009). For a thorough and brilliant conspectus of common law’s relation to other disciplines in the early modern period, see BRADIN CORMACK, *A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW, 1509–1625* (2008).

governed by its own . . . *common Lawiers*,” and these properly share the necessity of philology or, as Selden puts it, “I have never heard that shee [this great Lady of Learning] was engaged alone to any beside *Mercurie*.”<sup>22</sup>

Philology and hermeneutics, the latter represented by the figure of Mercury, are aspects of the “rich and most select Stores and Cabinets of *Civil Learning*” that constitute the humanist tradition of legal studies to which Selden and many other antiquarians and scholars contemporary with him in the Inns of Court belonged.<sup>23</sup> If the *mos britannicus* had a failing, it was that of insularity, of too great an obsession with national distinctiveness and the illogicality of precedent, the “poor illiterate reason” that Wiseman and others, civilian and common, remarked.<sup>24</sup> It is essential for Selden to look to the continent, the humanists, the *mos gallicus*, and thus escape the blandishments of “the common [e]nemy [i]gnorance” by way of reference to the *mens emblematica*, the jewels and cabinets of Roman law.<sup>25</sup> It is a sad fate, he concludes, to stay confined to the law and learning of a single state. There is no reason to remain bound to a solitary and solipsistic “beaten rode” and the plethora of references to the continental humanists, quite apart from the continuing presence of civilian jurisdictions within the common law tradition, supported by the teaching and scholarship of the two universities and the civilian commons. This is enough, I believe, to make the point that common law, even in its Druidic roots, was a variant upon the *mos gallicus* and, thence, distinctive because of the idiosyncrasy of its relation to Roman law and learning.<sup>26</sup>

The relevance of the *mos britannicus* via the tradition of gallic method and Roman law to the *mos americanus* needs now to be adumbrated. The impact of the Renaissance, humanism, philology, and method, upon Anglican law lies in the development of a rather peculiar and polyglot system of precedent, of proceeding *ad similia*, according to the maxim, fond to Plowden and to Coke, *semblable reason semblable ley*. There are sufficient early modern treatises on law, constitution, and precedent to allow for the summary or conclusory statement that, while it might be mixed and at times muddled, common law was a distinctive and distinctively textual tradition. As Selden points out, philology, the patient and scholarly reconstruction of texts, the study of the morphology of the “words of our profession” (*verba artis nostrae*) bases the legal curriculum squarely within the history of the legal text. If it is law, no less an authority than Coke opines, then it is in the books. If it is not in the books, it is not law. Time

22. SELDEN, *HISTORIE OF TITHES*, *supra* note 18, at xix.

23. JOHN SELDEN, *Epistle*, in *TITLES OF HONOR* iv (London, 3d ed. 1672).

24. ROBERT WISEMAN, *THE LAW OF LAWS: OR THE EXCELLENCY OF THE CIVIL LAW, ABOVE ALL OTHER HUMAN LAWS* 147 (London, R. Royston ed., 1666).

25. JOHN SELDEN, *Dedicatory* to *TITLES OF HONOR* a2 (London, 3d ed. 1672).

26. See PETER GOODRICH, *OEDIPUS LEX: PSYCHOANALYSIS, HISTORY, LAW* 85–89 (1995) (discussing *mos gallicus*). See generally CLAUDE FLEURY, *HISTOIRE DU DROIT FRANÇAIS* (1674), translated in J. BEAVER, *THE HISTORY OF THE ORIGIN OF THE FRENCH LAWS* (London, Browne ed., 1724); WILLIAM HARRISON, *AN HISTORICAL DESCRIPTION OF THE ISLAND OF BRITAIN* (London, 1586).

immemorial, custom and use practiced out of mind, are rhetorical figures that reference early records, the common law writs or properly *leges actiones*, the textual memory of a legal tradition that in its more imaginative moments looks also to those greater texts comprised of the statuary, buildings, monuments, and inscriptions, the *notitia dignitatum* and other plastic imagery that make up the plenitude and panoply of *Jani Anglorum* our English Janus of juridical transmission.

Simple though it may seem, the predicate of textual method and sources, the philological leanings of the early modern antiquaries of law, generated the common lawyers' logic—to coin a phrase—and is key to the scholarly status and distinct position of the *mos britannicus* within the history and chorography of the so-called universal law. There is, in other words, a hermeneutic methodology of common law that begins with the meaning of words—*de verborum significatione*—and proceeds to the maxims and other *regulae* that constitute the forms of speech, the mode, and means of legal study. To this essentially scriptural base of common law scholarship must be added the development of a tradition of institutional writings, which again, though the theme may be protested too much, is a Roman tradition and practice. The various national *mores* of law, and here the *mos britannicus* refers to a Latinate legal tradition stemming originally from Justinian's *Institutes*, though these, in turn, had their roots in the *Institutes* of Gaius, or, as he came to be termed, *Gaius noster*. The classical form of the institute is that of inscribing, systematizing, and teaching the ironically termed *ius non scriptum*, or the *mores*, the customs and uses, patterns and practices of territories and vicinities. Age, as Selden notes, had priority and so precedent was initially the representation of what was oldest, of what came first, and the according of honor and authority to that priority.<sup>27</sup> Yet Selden is here borrowing from the glossators of the *corpus iuris* for whom and explicitly *mores antiquorum servandi sunt*, the customs of the ancients must be adhered to and followed.<sup>28</sup>

Institutional writings relay *verò praeceptiones*, true precepts of law, by means of which they institute and teach humanity.<sup>29</sup> In its strongest sense, to institute is to invest, to bring to life and inscribe in the text of law, thus giving a place and role to persons, the representatives of a locale and office. Inscription in a text—the investiture ceremony of legal personality—is the tacit message of institutional writings, while the explicit purpose is that of instruction of students of law in the rudiments of their discipline or, in Selden's metaphor, in the jewels of learning drawn from the cabinets of the universal law. The common lawyers, the practitioners of the *mos britannicus*, taught method and instructed through institutional writings, starting with John Cowell's *Institutes of the Laws of England*, originally

27. See JOHN SELDEN, *TITLES OF HONOR* 740 (London, 3d ed. 1672).

28. See DAOYZ, *supra* note 13, at 161 col.1, s.v. *mores*.

29. See JOHANNES BORCHOLTEN, *COMMENTARIUM IN QUATUOR INSTITUTIONUM JURIS CIVILIS LIBROS I* (Geneva, 1610) (*quibus instituuntur atque docentur homines*, including, interestingly, *et reliquii Graeci Interpretes, verum etiam Justinianus ipse*).

published in 1605, in Latin, and thoroughly civilian in its conceptual frame and leanings. He starts archly by claiming that “what we call our common law are nothing other than a mingling of the Roman and feudal.”<sup>30</sup> He goes on to add that the first purpose of bringing the *Institutes* to the light of day is to tutor, which is to say, to teach. This, for Cowell, is a scholarly endeavor, and while Coke’s *Institutes* focus more on propounding the infinite particulars of common, which is to say, for him, national law, the purpose is no less historical and textual, didactic and moralizing. The common law is the best inheritance that a man can have. It has to be purveyed by the *iuris periti*, the learned in law, as *vocabula artis*, and it is precisely the records of custom and use, the antiquarian origins and continuing practices of an esoteric tradition that is the focus of his explicitly didactic and glossatorial method that is adopted in the first volume of his *Institutes* by way of explication, systematization, translation, and transmission of Littleton’s *Tenures*.<sup>31</sup> Aside from works explicitly concerned with teaching legal method to common lawyers—principal among which are Fulbecke’s *Preparative* and Doderidge’s *English Lawyer*, but must also include Fortescue’s *De laudibus*, and St. German’s *Doctor and Student*—the complement of institutional writings must also include works such as Fraunce’s *Lawiers Logike*, Bacon’s writings on the *Elements of Law*, expounding the *regulae* and *maximae* of the Anglican tradition, and the slightly later Henry Finch’s *Law, or, a Discourse Thereof*.<sup>32</sup>

The U.S. common lawyers, of course, inherited the Anglican tradition, primarily, it must be said, via Blackstone’s *Commentaries*, but even here with a hint of nationalism and jejune modernism.<sup>33</sup> The *mos ameri-*

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30. JOHN COWELL, INSTITUTIONES IURIS ANGLICANI AD METHODUM ET SERIEM INSTITUTIONUM IMPERIALIUM COMPOSITAE ET DIGESTAE A2–A4 (Cambridge, 1605). The long subtitle of the work indicates that it is not simply an exposition of the Anglican Roman law studied in the kingdom but of all the customs and uses through which the Imperial tradition is adapted (*accommodatum*) to our context.

31. See EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON: NOT THE NAME OF THE AUTHOR ONELY, BUT OF THE LAW IT SELFE (London, 1628). The glossatorial style of the work has been inadequately digested. See generally A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981) (discussing later tradition of treatise writing and its decline in United States).

32. See FRANCIS BACON, THE ELEMENTS OF THE COMMON LAW OF ENGLAND (London, More 1630) (1610); HENRY FINCH, LAW, OR, A DISCOURSE THEREOF (London, 1627); JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLLÆ (1470); ABRAHAM FRAUNCE, THE LAWIERS LOGIKE EXEMPLIFYING THE PRÆCEPTS OF LOGIKE BY THE PRACTISE OF THE COMMON LAWE (London, 1588) [hereinafter LAWIERS LOGIKE]; WILLIAM FULBECK, DIRECTION, OR PREPARATIVE TO THE STUDY OF THE LAW (Aldershot, 1987) (1599); CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT (J.L. Barton & T.F.T. Plucknett eds., 1974) (1530). The point is simply that there was a discourse of method and an exposition of the methodology of common law and that this, in substantive scope and theoretical range, greatly exceeds and so also underpins the later and short-lived indigenous tradition of treatise writing in the U.S.

33. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Thomas McIntyre Cooley, ed., Lawbook Exch. Ltd., reprt. rev. 3d ed. 2003)

*canus*, in other words, comes on to the scene late and somewhat haphazardly. It inherits an institutional tradition, rather than having devised one of its own. The first substantial point to make is thus that it does not have a scriptural text, a tradition of “books,” of writs and instruments of law that revert to time out of mind or to universal, which is to say, Roman law. The founding text of U.S. law, the Constitution, dates only to 1789, and is a short and, in significant part, political text. What is lacking, the lacuna in historical relay, is any expansive tradition of institutional writings and, more specifically, of those patterns of investiture of person and office, of inscription of *mores* and “true precepts” that ground a tradition of law in a *nomos* that exceeds the contemporary and impermanent individuality of policy by virtue of the prior temporality of a community that both precedes and escapes the immediate and its interests. The absence of institutional writings goes also to the lack of a coherent methodology or disciplinary distinctiveness. What is different about law is its inheritance of a text and the subordination of the discipline to the unraveling and interpretation, the exegesis and hermeneutics of a specific scripture and the tradition that accompanies it. The Renaissance was a scriptural affair, and even the English common law adopted a glossatorial stance to its sources, to Littleton’s *Tenures*, for sure, but more broadly to the writs and instruments, the symbolaeography, and other books of law. For Coke is quite clear that if it is law, it is in the books, and if it is not in the books, it is not law. The *mos americanus*, however, is a post-Renaissance affair. It has no scripture, it lacks a text, it is missing any inscribed and instantiated tradition of institutional writings. It is, to coin a phrase, *mos* without *mores*.

Returning to the Penny post, we shared a sense of foreign ground, of the alien manners of an exiled institution. I from the *mos britannicus*, and she from *mos austriaciacus*, which latter has been in many respects more faithful to English common law than even the natives of the tradition. We both sensed a dislocation, a lack of depth, an academy, to borrow from Roberto Unger, of smart, and not so smart, alecks. To be on foreign ground, to be exiled from a tradition, and so *in partibus infidelium*, in the classical diction, is the difference and the similarity that Pether and I most obviously shared. Her persistent questions, her comments on my manuscript, her own most passionate elaborations, all converged on the question of teaching law on foreign ground, the distinctiveness and the idiosyncrasies of the *mos americanus*, of U.S. common law. Corporeography is necessarily joined to chorography, the description of places and persons. *On Foreign Ground* and *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, two of the articles that I am most concerned with, are addressed to the institutional and academic habitus and the lines of legal power, and in my view, also best

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(1871); see also John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 OXFORD J. LEGAL STUD. 318 (1984) (discussing later institutional tradition).

reflect the Penny post to the U.S. legal academy, her rage, and her passion.<sup>34</sup> This duo of articles is both a critique of U.S. legal education and by extension, taken together with her book-length article on the *Scandal of Private Judging in U.S. Courts*, of the *mos americanus*.<sup>35</sup> The lines of power, the amities and enmities, the institutional *locus* and *modus dictandi*, are to be characterized according to three axes.

The first devolves from the structural role played by Roman law in the formation of the Western legal tradition and its somewhat distant and derivative impact upon U.S. common law. I will ask the surprising and largely untested question of how U.S. law relates to Roman law and what is it that is distinctive about this relatively recent tradition of parochial common law, this nationalistic mode of juristic custom and use—*lex ex facto oritur*—constituting precedent and rule. The paradox is that of understanding *fides historiarum in partibus infidelium*—faith in law in a jurisdiction without faith in law. Second, the largely pragmatic and somewhat unfaithful or politically motivated methodology of the *mos americanus* leads to a greater reliance upon criteria of status and affiliation, than upon scholarship and method, research, and job-specific qualifications. There is a sense of anything goes, either in the name of political freedom or in that of the glittering prize of status, which allows for a rather porous or policy-driven sense of justifying legal judgments. The *mos americanus* is law without breaks, and such, from a classical disciplinary perspective, is no law at all. It is pragmatism, policy, decisionism. Finally, to complete the circle, to offer the third element in the triunity, there is the impact of the first axis, the lack of text and method upon scholarship, and what that means for the practice of law, which here means precedent, reason, and judgment.

The *mos americanus* is the child of the *mos britannicus*, of English common law, and more distantly—denial plays an important role in reception—and because dissimulation is the key figure of legal rhetoric, of the *mos gallicus*, or the historical school of reception of Roman law.<sup>36</sup> The *mos americanus* is a distant progeny of anglophone Roman law and suffers a double denial: first, that of Anglican common lawyers' early modern, nationalistic refusal to acknowledge the Roman sources of a law still recorded at that time in Latin, and second, the U.S. lawyer's tendency to claim exceptionalism and refuse to recognize the pervasively European

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34. See Penelope Pether, *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, 10 GRIFFITH L. REV. 101 (2001) [hereinafter Pether, *Despatches*]; Pether, *On Foreign Ground*, *supra* note 5.

35. See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004) [hereinafter Pether, *Inequitable Injunctions*]; see also Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014). Does it bear mention that Lazarus's eighty-seven-page piece occupies that extensive real estate in *Harvard Law Review*, his home school?

36. See generally DONALD R. KELLEY, *FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP: LANGUAGE, LAW AND HISTORY IN THE FRENCH RENAISSANCE* (1970); PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (1999).

history that the structures and categories of law necessarily convey.<sup>37</sup> The U.S., as one scholar put it, is Europe without brakes, a vehicle that is seemingly out of control, a plethora of jurisdictions headed in wildly different directions under the uncertain banner of pragmatism. A national juristic tradition is aptly defined as the specific literary tradition of reception of classical law in relation to local history and precedent.<sup>38</sup> The *mos americanus* is thus defined as the combination, the *coniunctio*, of disciplines—specifically of philosophy, literature, and jurisprudence—whereby the local *ius commune* establishes its particular theory and practice in relation to received structures and categories of the legal institutions that U.S. law inherits, via the *mos britannicus*, from the classical tradition. What, then, on *this* foreign ground, are the practices and counter-practices, the critical *contropiano*, the literary form, style, and substance that define the exceptional character of U.S. law? I will offer, in large part mimicking Pether, a critical theory of the relatively familiar tripartite character of the U.S. legal tradition: the pedagogy of the case method, the distinctive form of scholarship and its by and large private circulation, and the mode of practice, of judgment, and precedent.

The narrative begins with the emergence of the case method at Harvard Law School in the 1870s by the aptly named Dean, Christopher Columbus Langdell. This, according to the standard histories, was the moment of emergence of a distinctive legal science, a method and profile that would come in myriad ways to distinguish U.S. law.<sup>39</sup> If there is a *mos americanus*, it is surely one that devolves from the notion of a legal science developed from pedagogy, a juristic method that grows out of the hot-house of the classroom and the relative autonomy of the law report. I will not, however, discuss this primal *lapsus*, the case as portal and fall, in conventional terms. The superficial patterns of U.S. jurisprudence have been traced, and the cyclical flow from formalism to realism and back are well remarked and not so useful. What is interesting is that the notion of Langdell founding a legal science, an autonomous methodology peculiar to law, is a purely rhetorical, if highly successful, didactic translation of European techniques of pedagogy.<sup>40</sup>

37. See generally Judith Resnik, *Constructing the 'Foreign': American Law's Relationship to Non-domestic Sources*, in COURTS AND COMPARATIVE LAW (Duncan Fairgrieve & Mads Andenas eds., forthcoming 2015) (Yale Law Sch., Pub. Law Research Paper No. 517, 2014), available at <http://dx.doi.org/10.2139/ssrn.2474123>.

38. See BYRNE, *supra* note 20, at 15 (noting “Baeza’s view of history—it is epic (*Aeneid*), philosophy (Plutarch), saint’s lives, law—is impressively inclusive, and his point, that jurisprudence demands prudence, which one learns from history, is reflected in Cervantes’ views on readers and writers”).

39. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 1–19 (1995); ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, at 50–57 (1981).

40. This point has been made before, if elliptically in the title, in John H. Wigmore, *Nova Methodus Discendae Donandaeque Jurisprudentiae*, 30 HARV. L. REV. 312 (1916). The title is from Leibniz, and means “A New Method for Teaching and Learning Law.”



At its best, it could be argued that the case method introduced what Sartre coined as the “unhappy consciousness” of the singular universal into the study of law.<sup>41</sup> This particular version of Hegelian idealism—translated into a didactically formulated *melancholia juridica*—hardly qualifies as an epistemology of law, but it does provide an extremely economically efficient mode of subject formation and so of investiture into the institution of law. The rituals of the J.D. curriculum, and the competitive terrors of the Socratic classroom, are rhetorical peculiarities, though they are hardly the inventions of U.S. law. The model and exemplar of the case method is European forensic rhetoric as translated and inherited from the English Inns of Court, the Third University—where the training of advocates took the form of subjection *in bello*, and the young barrister would argue imaginary, fanciful, and implausible cases before senior members of the Bar and often before judges.

The rhetorical form of the Socratic method, in its elaboration and popularization, most particularly by Ames, is borrowed from the adversarial training of the barrister and specifically from the *causa turpis*—the argument against common opinion and often contrary to common sense.<sup>42</sup> The Darwinian machismo of the Harvard classroom is graphically captured in the *Centennial History of the Harvard Law School* where it is suggested that the student

“is the invitee upon the case-system premise, who, like the invitee in the reported cases, soon finds himself fallen into a pit. He is given no map carefully charting and laying out all the byways and corners of the legal field, but is left, to a certain extent, to find his way by himself.”<sup>43</sup>

The Socratic method, in its purest form, extracts from the student a proposition derived from a case. The teacher then proves the opposite to the satisfaction of the student, and once convinced of the contrary, then proves that the original proposition is correct. The student is broken down and reassembled in a mode that parallels that of theatrical training,

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41. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 140 (Hazel E. Barnes trans., 1993) (1943).

42. See THOMAS WILSON, THE ARTE OF RHETORIQUE 8 (Oxford, 1909) (1553) (“1. That is called an honest matter, when either we take in hande such a cause that all men would maintayne, or els gainsaie such a cause, that no man can well like. 2. Then doe we holde and defend a filthie matter, when either we speake against our owne conscience in an euill matter, or els withstand an upright trueth. 3. The cause then is doubtful, when the matter is halfe honest, and halfe vn honest.”).

43. STEVENS, *supra* note 39, at 54 (quoting HARVARD LAW SCHOOL ASSOCIATION, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817–1917, at 130 (1918)). The excerpt concludes by noting, “[h]is scramble out of difficulties, if successful, leaves him feeling that he has built up a knowledge of law for himself.” *Id.* It is precisely this self-made law, this agonistic practice without cartography or corporeography, without text or institutional writings, which is the object of Pether’s critique.

namely that the persona be emptied of content and then becomes a receptacle for law or in other contexts, other roles. It is perhaps no coincidence that early modern English forensic rhetorician Puttenham's discussion of paradox appears lodged between his discourse on the figure of the burden of love and that of doubt, *epimone* and *aporia*.<sup>44</sup> The juristic source of this form at the Inns of Court is to be found in the partial translation of Charles Estienne's *Paradoxes, ou sentences debatues*, by Anthony Munday, as *The Defence of Contraries*.<sup>45</sup> The form of argument was paradoxical, which is to say against *doxa*, common sense, but equally, and this is especially appealing to the U.S. pragmatist, against the liturgy, the orthodoxy, and the school. There, however, in the early modern Inns of Court, the rhetorical curriculum was only a small part of the syllabus and learning which started with a context and practice of scriptural methods and institutional patterns, sermons, lectures, archives.

I have no wish to rehearse the history of the case method or the sermons of jurists *pro et contra*, my point is much simpler and more direct. The case method introduced the *agon* of the adversarial trial, a metaphorical *bellum omnium contra omnes*, paradoxes, and an amorality of advocacy into the classroom. The lawyer was to be trained in an adversarial style, schooled in a hostile environment for bellicose purposes so as to be able, in *extrême occidant*, to advocate any cause. It is not the lyre but the sword, not harmony but conflict, which the case method came to represent and inculcate as the first-year curriculum of law school. The tide and time of the *mos americanus* has of course, no need to point it out, moved on since then, but elective courses on mediation and alternative dispute resolution, the winged cycles of pedagogic fashion which generate ameliorative courses and practicums on the periphery of the syllabus, do not change the defining *mores*, the adversarial ethos and antagonist modes of conduct, the rampant litigiousness that the didactic style ironically named after Socrates has come to instill as U.S. law schools' contribution to the tradition of the Anglophone *ius commune*.

The case method, inculcated in the Socratic style, the first distinguishing feature of that literary, and here I am suggesting distinctly didactic tradition of *mos americanus*, is ironically not a strongly scholarly as opposed to practical and practically rhetorical forensic tradition. The casebook is much more a work of editing, of exegesis and description than a normative or critical theory of the subject so cased and enclosed. If, as I have suggested, the casebook and accompanying pedagogic method is the primary identifying feature of the U.S. common law tradition as a scholarly

44. See GEORGE PUTTENHAM, THE ART OF ENGLISH POESY 310–11 (Frank Whigham & Wayne A. Rebhorn eds., 2007) (1589).

45. See CHARLES ESTIENNE, PARADOXES, OU SENTENCES, DÉBATTUES, ET ELEGAMENT DÉDUITES CONTRE LA COMMUNE OPINION (Paris, 1561); ANTHONY MUNDAY, THE DEFENCE OF CONTRARIES: PARADOXES AGAINST COMMON OPINION, DEBATED IN FORME OF DECLAMATIONS IN PLACE OF PUBLICKE CENSURE: ONLY TO EXERCISE YONG WITTES IN DIFFICULT MATTERS (London, 1593).

and distinct body, then it has to be observed that it is, by comparison to other common law jurisdictions, and for Professor Penelope Pether, the *mos australiacus*, not a tradition of any very strong or rigorous scholarly character. It is characterized best as a tradition of reliquary cases, often enough English in origin, that have only an indirect connection to instantaneous, contemporary decisions that are founded at best upon pragmatism and, at worst, upon the *hauteurs* of deracinated policies that require little more by way of reasoning than the justification of the judge's perception of the consequences of decision.

It is precisely her quality of scholarship and rigor of research that gave Professor P. her greatest critical energy and simultaneously engendered her finest rhetorical illations. The belligerent need weapons, not books, and verbal force more than tranquil reason. Penny makes the pertinent points in an unsurpassably humorous piece subtitled *Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, in which she commences by confessing the undiluted pleasure, the liberation and energy that she feels in writing a report on U.S. scholarship for an Australian journal that she is pretty sure her U.S. tenure committee will never see.



FIGURE 2: PETHER EXPOSTULATING ON THE PREPOSTEROUSNESS OF U.S. LAW REVIEW EDITORIAL PRACTICES

The legal academy, as I have already postulated, abhors such non-pedagogic and extra-doctrinal scholarship as the interdiscipline of law and literature or simple self-reflection upon the scholarly mode of the native tradition would engender. With a mixture of wonder, antipathy, and comedy, Pether makes the pertinent points quite brilliantly. First, “the vast majority of law teachers in the United States generally do not have a research degree, the route to tenurable law teaching jobs most often being via a JD taken at one of the recognised elite ‘feeder’ schools . . . and securing post-graduation elite law practice experience.”<sup>46</sup> Next, she notes that: “Published scholarship [is] not a requirement for entry-level tenure-track positions, nor is any evidence of teaching skills . . . .”<sup>47</sup> This, as Erasmus noted of earlier common lawyers trained by sojourn and ritual at the Inns of Court, is the most unlearned of learned professions—*Doctum quoddam genus indoctorum hominum*.<sup>48</sup>

Trained as forensic practitioners, as artisans of law, and with no grounding in research method or scholarly training, it is small surprise that there is little systematic, critical, theoretical, or interdisciplinary work emanating from the U.S. legal academy. What is surprising and engenders a gale force of the Penny post is the fact that the forum of supposed scholarly production in law is the student-run and edited law review which, as she puts it, “do[es] not use either blind reviewing or peer refereeing as a basis for article selection. I understand from conversations with law review staffs and editors . . . that . . . the most significant influence on whether an article is accepted for publication is the status of its author.”<sup>49</sup> To this, we can add that the number of law reviews runs to the level of grains of sand on the beach. Every student, good, bad, or indifferent in scholarship can work on some law review and select articles. We can also add that a very significant proportion of the articles selected are written by the students themselves and the bizarre and girthless character of the system becomes more apparent. Add to this, cream upon cream, that the students are clinically depressed or, as Pether observes, “I cannot recall ever having worked with students as acutely distressed and reflexively angry as the first-year JD students I teach in the United States.”<sup>50</sup> Supported by such a non-scholarly apparatus, by innumerable law reviews publishing themselves and

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46. Pether, *Despatches*, *supra* note 34, at 113.

47. *Id.*

48. See JOHN DODDERIDGE, *THE ENGLISH LAWYER* 33 (London, 1631). I am fond also of Abraham Fraunce’s castigation of the upstart *rabulae forenses* in *Lawiers Logike* preface. He continues in fine fashion: “under a pretence of Lawe, [they] became altogeather lawless . . . [they] run immediately to the Inns of Court, and having in seven years space met with six French woordes, home they ryde lyke brave Magnificoes, and dashe their poore neighbours children quyte out of countenance, with Villen in gros, Villen regardant, and Tenant per le curtesie . . . .” *LAWIERS LOGIKE*, *supra* note 32; see also PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 22–23 (1990).

49. Pether, *Despatches*, *supra* note 34, at 120.

50. *Id.* at 104.

their faculty at unbearable length, in unreadably prolix prose and the declining emphasis upon scholarship, the humanities, *ars iuris*, and the simple confusion and not infrequent self-contradiction of legal discourse within the *mos americanus* comes into plainer view.

Scholarship within this system means that anything goes, that any student is qualified to select articles, that the untutored are best suited to determining scholarly merit, and so, grasping for the evident, the students latch on to what their teachers deem important, which is status and doctrine, in roughly that order. With no sure footing in methodology, with no epistemology to guide them, the best or only security for the student editors is the iron law of the citation manual. This, they believe, is the best guide to the scholarly form of publication, this is the best proof of veracity, and, thus, does the footnote come to be perceived in neophyte eyes as the only real thing, the only necessary truth of the text. Scholarship is something to be endured and after tenure discarded except insofar as it serves status purposes, and so it is eventually, upon seasoned review, small surprise that the undiluted morass of published legal articles, “scholarship amok,” is relatively insignificant in any systematic sense to the exposition of the disciplines or the development of precedent. This leads to the last point, the Holy Ghost, the *Deus ex machina*, the lawlessness of the courts and of trials in the U.S. system.

Combining the above two themes, the U.S. legal scholar’s autodidacticism, with a wholly unregulated and peer-review-free forum of publication, the third element, the impact of such scholarly insouciance, of academic nonchalance on the judiciary and courts, is but a short step. Pether made such an inference most clearly in her critique of unpublished and de-published decisions. The fact of the judiciary retroactively revising, adding to, cleaning up, or otherwise altering precedents was to her scandalous because it infringed the basic principle of the rule of law: that the *regulae iuris* be public, visible, and known prior to implementation. The point, after all, of *ratio scripta*—as the Romans termed written law—is that it is there and knowable, settled, and permanent in its very black letter form. Yet there is a broader point to be made, which is that there is a significant lack of methodology, a scholarly lacuna, quite apart from the *lèse majesté* or simple cutting adrift from the confines of precedent and law that such constantly incomplete judicial texts reflect.

The judicial *hauteur* which finds expression in the implicit formula “I am the law,” both personalizes and vacates the discipline. It reflects a decisionism peculiar to U.S. law, an exceptionalism that, in reality, is based on a pragmatically motivated disregard of legal method and rule-bound constraint. At the root of such a credo of freedom of decision lies the shifting pattern of policy preferences. Take the example of an emergent body of law that came up for judicial determination in the heyday of law and economics. Cyber contracting and online wrap agreements were first litigated in the 1990s, in the context of what were termed “shrinkwrap”

agreements. Such at least was the litigation that came before the Seventh Circuit and Judge Easterbrook, who was, amongst other things, a former professor of law at University of Chicago Law School. The case involved an attempt by the plaintiff to impose an end user license agreement on the defendant, a consumer, who had purchased their digitized compilation of phone numbers. In the much discussed case of *ProCD, Inc. v. Zeidenberg*,<sup>51</sup> Easterbrook overruled a very thoroughly reasoned first-instance decision which held that a consumer who purchases a good, a CD, in a store cannot be bound by terms contained inside the program purchased, which could neither be accessed nor seen until after purchase.<sup>52</sup> Post-contractual notice of terms is contrary to common law and to the relevant sale of goods statute, specifically U.C.C. section 2-207. As shrink-wrapped goods cannot be opened until after purchase, a notice in smaller font at the bottom of the package generically indicating terms inside was deemed by Judge Crabb to be irrelevant because it was unavailable for review. Such terms were also contradicted by the larger font statement on the packaging that the offer—and note that it is expressly an offer—was for “unlimited access and unlimited use of all 80 million listings . . . .”<sup>53</sup>

Judge Easterbrook, in a style which has become familiar, decided the case by way of a very loose reference to an earlier decision of his own on the market policies that supposedly drive the law of contract, thereby inverting the established rules of offer and acceptance. The CD, expressly labeled an offer, on a shelf in a store—which again, according to the established law of formation of contract, means that it is an offer, on the terms manifest at the time of offering—is stated by Easterbrook to be a proposal on terms that will become knowable after contract. According to U.C.C. section 2-207, which expressly governs the imposition of additional or different terms in consumer contracts, any such post-contractual terms have to be expressly assented to or are struck out.<sup>54</sup> The details have been much rehearsed and do not need review here, suffice it to say that Easterbrook, citing Easterbrook as authority, determines that the statute is irrelevant and baldly and opaquely states that “[c]ompetition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.”<sup>55</sup> The judicial *dictat* is thus that the free market, Adam Smith’s invisible hand, is the regulatory mechanism appropriate to sale of goods. This, despite the Code, and this, despite the fact that the so-called free market, with all its taxes and tariffs, zoning require-

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51. 86 F.3d 1447 (7th Cir. 1996).

52. See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640 (W.D. Wis. 1996), *rev’d*, 86 F.3d 1447 (7th Cir. 1996).

53. Bill Whitford, *ProCD v. Zeidenberg in Context*, 2004 WIS. L. REV. 821, 822 (2004) (internal quotation marks omitted).

54. See U.C.C. § 2-207(2) (2002).

55. *ProCD*, 86 F.3d at 1453 (citing *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756 (7th Cir. 1996) (Easterbrook, J.)); see also Whitford, *supra* note 53 (providing interesting background material on *ProCD*).

ments, commerce clauses, regulatory bodies, anti-trust regulations, subsidies, and incentives, is itself at root a product of and operates through contract. The point, however—and it could be made again and again in relation to a swathe of later case law—is that policy, and specifically the largely untutored economic opinions of, in research terms, an untrained ex-law professor, Judge Easterbrook, are deemed more binding, of greater regulatory force, and in sum more lawful than the common law rules of offer and acceptance and, perhaps more surprisingly, the governing Code. The echo of Abraham Fraunce’s antique warning against the “brave Magnificoes” who “under pretence of law become almost lawless” hovers, necessarily unread, in the eaves.<sup>56</sup>

I will make the point one more time. In a later case, *Hill v. Gateway 2000, Inc.*,<sup>57</sup> the facts involved the telephone order and payment for a computer that was shipped and arrived with terms inside the box in which it had been shipped. Judge Easterbrook, basing his decision upon the ruling of Judge Easterbrook in *ProCD*—which in turn is based in some ethereal sense on the judgment of Judge Easterbrook in *Digital Equipment*—adds the gloss that:

Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. For what little it is worth, we add that the box from Gateway was crammed with software. The computer came with an operating system, without which it was useful only as a boat anchor.<sup>58</sup>

The logic of this humorous *reductio ad absurdum*—one of several in the decision—is that it is again an assertion of the judge’s perception of market-driven economic forces, neither the law of contract, nor the governing Code founds the judgment. Such a legitimation, *in extremis*, occurs later in Easterbrook’s reasoning, when we learn that in *Hill*, where the box containing a computer did not even contain a fine print reference to limiting terms, in the judge’s opinion, generic extra-contractual documents were the source of notification of terms. The court held, “Gateway’s ads state that their products come with limited warranties and lifetime support,” *ergo* the Hills should know the terms, and more surprising still, these non-contractual advertised assertions are incorporated into the contract.<sup>59</sup> The market, in sum, as conceived and interpreted by lawyers who are highly unlikely to have any training in research—let alone in the discipline and scholarship of economics—should both reign and rule, its prac-

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56. LAWIERS LOGIKE, *supra* note 32.

57. 105 F.3d 1147, 1149 (7th Cir. 1997) (Easterbrook, J.).

58. *Id.*

59. *Id.* at 1150.

tices are the root and origin of judgment, its presumed patterns are deemed to be law.

Later case law, and this fits well with my earlier two distinctive traits of the *mos americanus*, follows the professorial lead, and in *AT&T Mobility LLC v. Concepcion*,<sup>60</sup> and more recently in *Northwest, Inc. v. Ginsberg*,<sup>61</sup> the U.S. Supreme Court has ruled twice that economic policies that favor the invisible hand of the market—the de facto power of dominant corporations as expressed in adhesion contracts—is ground for the disregard, if not express dissolution, of the legal norms of contract.<sup>62</sup> In *Ginsberg*, good faith, and thence retaliatory termination from an airline miles program, was held to be an extra-contractual regulatory imposition and constituted an unwarranted constraint upon market forces that alone should govern consumer bargains.<sup>63</sup> I will not pursue the details here but simply point to a feature of Justice Alito’s judgment that merits comment. It is Alito’s use of texts, his methodology—rather than his seeming oblivion to the role of good faith as the vehicle and meaning of agreement—that is significant for understanding the contemporary excesses of *mos americanus*.

Alito selects two texts for support. The first is a citation to a U.S. Court of Appeals for the D.C. Circuit decision in the case of *Tymshare, Inc. v. Covell*.<sup>64</sup> The reference is to a well-known academic article on good faith by one Professor Summers.<sup>65</sup> The article itself is not addressed, but rather a quotation is excised from a quotation in the case and reads: “[T]he concept of good faith in the performance of contracts ‘is a phrase without general meaning (or meanings) of its own.’”<sup>66</sup> Full stop, note, included inside the quotation marks. This is shocking, as the quoted proposition is only half of the sentence which continues, without punctuation or pause, to say “and serves to exclude a wide range of heterogeneous forms of bad faith.”<sup>67</sup> The citation is inaccurate, misleading, and effectively a textual interpolation. Neither Professor Summers, nor the court in *Tymshare*, which quite properly quotes the full sentence, ever said what Justice Alito is claiming. Worse, the decision in *Tymshare* is at great pains to point out, correctly, that the doctrine of good faith is an implication of what the parties to the agreement intended and to honor the “reasonable expectations created by the autonomous expressions of the contracting parties.”<sup>68</sup> Good faith is a doctrine controlled by the intent of the parties,

60. 131 S. Ct. 1740 (2011).

61. 134 S. Ct. 1422 (2014).

62. See *id.* at 1424; *AT&T Mobility*, 131 S. Ct. at 1753.

63. See *Ginsberg*, 134 S. Ct. at 1433.

64. *Id.* at 1431 (quoting *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984)).

65. See Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968).

66. *Ginsberg*, 134 S. Ct. at 1431 (alteration in original) (quoting *Tymshare*, 727 F.2d at 1152 (quoting Summers, *supra* note 65, at 201)).

67. *Tymshare*, 727 F.2d at 1152 (quoting Summers, *supra* note 65, at 201).

68. *Id.*



and it is at best hermeneutically peculiar that Justice Alito purports to extract an opposite message from a case that required that the decision appealed be returned to the lower court for a factual determination of the parties' actual intentions.

Not content with flagrantly rewriting the decision in *Tymshare* and misquoting Professor Summers, Alito proceeds to elicit support from Professor Corbin—that icon of U.S. contract law, whose treatise is updated to the present day. Does Professor Corbin fare better? Is his text honored in the interpretation? The answer is no. Justice Alito again resorts to truncating the passage quoted. Corbin is cited for the proposition that “‘unwillingness to allow people to disclaim the obligation of good faith . . . shows that the obligation cannot be implied, but is law imposed.’”<sup>69</sup> Note first that this quotation is not actually from Corbin, but rather from the editors of the 1994 *Supplement* to Corbin. The passage is a comment on current case law relating to the Uniform Commercial Code and so has no direct application to the case in question, which involves services, and so is governed by common law. The context of the quotation is not provided, and so the insidious suggestion is that the principle of good faith is somehow a legislative creation or regulatory imposition independent of the parties' intentions or the meaning of the agreement. The modern editors are noted in parentheses, one of their names spelled wrongly, but the actual source of the point being made in the Code is not given. More than that, and in hermeneutic terms worse, Corbin, in the text to which the *Supplement* refers, is unequivocal in his view that the implication of a condition is “for the reason that the parties have so agreed; but their intention to make it so has not been expressed in definite language.”<sup>70</sup>

As Pether so lengthily elaborated in her work on unpublication, depublication, stipulated withdrawal, and revision of precedent texts, there is little rigor, and even less respect, accorded to the texts that comprise the authorized statements of prior law.<sup>71</sup> Alito's method is that of seemingly random excisions of snippets from an array of earlier texts. He proceeds by means of a hermeneutic piñata, a method of truncation and deracination that uses and misuses earlier judgments for the pragmatic ends of the instant outcome. As with Easterbrook, it is policy, and here the notion that the free market should govern without the impediment of contractual good faith or indeed, to be explicit about it, the good faith meaning of the agreement actually made. If the plaintiff, Rabbi Binyomin Ginsburg, does not like such a conclusion, his recourse is to the market and to other airlines and their miles programs. *Ipse dixit* Alito. This rather ignores the classical role of contract as the basis of the free market and is a

69. *Ginsberg*, 134 S. Ct. at 1432 (alteration in original) (quoting 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 645A (Lawrence A. Cunningham & Arthur J. Jacobsen [sic] eds., Supp. 1994)).

70. 3A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 653 (1960); *see also id.* § 620.

71. *See Pether, Inequitable Injunctions, supra* note 35, at 1484.

decision motivated much more by policy affections than legal reasons. But the point at the level of methodology is simply that the assertion—without explanation—of market remediation of legal disputes is neither a juristic basis for decision nor a reasoned explanation of the actual operation of market forces. In the latter instance, the textual underpinnings, research methodology, and empirical basis of the policy preferences manipulated in the decision are notably lacking.

It is tempting to conclude that the quality of legal reasoning is dubious, but such is hardly a helpful observation. The structural point is rather that lacking any binding tradition of textual authority and accompanying hermeneutic protocols, absent an instantiated tradition of institutional writings and so investiture in the scriptural methods of legal interpretation as a constrained philological activity, legal judgment exists in a floating and shifting world of policy. Absent constraints imposed by research methodologies, scholarly rigor, hermeneutic acumen and exactitude, pragmatism, and accession to what appears most politically pleasing, the policy *du jour* is likely to play an exorbitant role.

### III. CONCLUSION

To draw the thesis together, to honor the Penny post, we can return to Judge Easterbrook as an instance and *exemplum*. Policy, from *politeia*, from the many, the polity, police and politics, has a much broader ambit and use than does law. To what is judicial policy connected? Here, the answer overwhelmingly is that it is a reference to pre-law, to that dominion of friends and acquaintances, the experience of kinship and membership that engenders the archipelago of influence and coterie of fellow travelers that make up the lines of power, the *lex amicitiae* with which I began. Piece the formation together in the persona of the judge. Easterbrook, the case in hand, has an undergraduate degree, unspecified on the University of Chicago Law School website, from Swarthmore College.<sup>72</sup> He then did his J.D. at Chicago and subsequently clerked for the U.S. Court of Appeals for the First Circuit, before working briefly at the Office of the Solicitor General.<sup>73</sup> He returned to University of Chicago Law School in 1979, where he is still listed as a Senior Lecturer, but joined the bench in 1985.<sup>74</sup> The website states that Judge Easterbrook “is interested in antitrust law . . . and other subjects involving implicit or explicit markets.”<sup>75</sup> We can note immediately that the judge is modestly stated to be “interested” in certain subjects.<sup>76</sup> It does not state that he has studied or has any qualification for opining upon these subjects, nor is there any indication of any research

72. See Frank H. Easterbrook, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/easterbrook> (last visited Aug. 12, 2015).

73. See *id.*

74. See *id.*

75. *Id.*

76. *Id.*

training or degree in any discipline explicitly or implicitly relevant to such topics. He did receive the Order of the Coif, which is a sign of excellence in legal study, but a hairpiece or cap for student exam-taking skills is hardly a qualification for making laws on the strength of opinions about the market.

Easterbrook gained a J.D., was briefly a judge's clerk, worked briefly in government, and briefly held a named Chair at the University of Chicago Law School before becoming, lengthily, an appellate judge. It is an unusual trajectory, one that is peculiar to the *mos americanus*, in that in other common law jurisdictions, it is generally excellence and time served in the *agon* of legal practice that qualifies for appointment to the bench. In civil law countries, it is either a specific training and career path that qualifies the judge, or scholarly standing and published works. The U.S. system is here different and could benefit from attending somewhat to the force of the Penny post, her *despatches* on the scandal of unpublication, and on the pedagogic irrationality of the citation manual wars. Put it like this, our exemplary judge, our policy-driven inventor of law, has no specific qualifications for teaching law, has no research degree, but has rather been trained solely in the peculiar and distinct practices of the Socratic classroom and the case method. His basic training in law, as is common throughout the jurisdiction, is primarily in the rhetorical defense of contraries, in arguing paradoxical points, in *ex tempore* classroom elaborations of the logic of a case-based proposition, followed by proof of its opposite. Beyond that, as his *curriculum vitae* states, he has interests.

We can note as well that Easterbrook was an editor of the *Law Review*.<sup>77</sup> The definite article is interesting and indicative: “*the*” *Law Review*, not the *Chicago Law Review* or the nominate law school review, but instead a definite article that indicates status rather than directly identifying a specific review.<sup>78</sup> There, he helped select—because he was not “*the*” editor—articles that were predominantly authored either by fellow students or by members of the University of Chicago Law School faculty and faculty from schools of co-ordinate or (were such a thing conceivable at University of Chicago Law School) of higher status. The *mos americanus* is thus the common law of opportunity where the best and the brightest—and make no mistake about that—are free to engage in judicial pugilism and to make a law that fits their face and frame, their interests, and their perception of policy.

Finally, though this is by no means unique to the *mos americanus*, Easterbrook's apparent individualism, his pursuit of his interests, his seeming freedom of invention, also hides membership of a band, an *idéal fraternelle*, friendship as familiarity with the father, or in the relevant gloss *amicus amici custos*. He belongs intellectually to an interest group, a policy-based movement, the law and economics clan. There are other profes-

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77. *Id.*

78. *See id.*

sors—that is to say, pedagogues and authors of student-selected and edited works—who are equally untrained in either research or economics. Let us be fair and call them brilliant autodidacts, who together came to form the law and economics tsunami, one of the most successful, if eccentric, movements and a highly efficient archipelago of self-reproduction within the history of the U.S. law school. Ironically, perhaps, it was law professors who engendered this law fixing and law circumventing divagation and Easterbrook indeed, when he joined the University of Chicago faculty, occupied the Lee and Brena Freeman Professorship that had previously been occupied by the prolific father of U.S. law and economics, Richard A. Posner.<sup>79</sup>

And Pether, who was both a law professor and a Ph.D. in Literature, found the *mos americanus* to be confused, depressed, disorientated, random, and, in scholarly terms, anarchic or lacking both protocol and rules. I think she probably found the culture somewhat less-than-literate, obdurate in its status obsessions and its antagonistic culture, and she grew increasingly disaffected and disenchanting. She turned to the study of food, culture, and law, and in doing so began in her final years to address what Agamben has coined as *oikonomia*—meaning administration—the realm of what gets done.<sup>80</sup> What is said, the symbolic trade in ill-wrought ideas, the free play of judicial decisions and of precedents written and rewritten, published and unpublished, came to occupy her less. The role of the teacher, for her, was that of doing, that of the face-to-face encounter with law students, prisoners, colleagues in her archipelago, that of law and literature, and of the contributors to the journal that she edited. I don't mean to suggest quiescence, but rather *praxis* and a coming to terms with standing on foreign ground. And then, last word, *mot juste*, she was one of my archipelago, she was one of my likes, and in that most humanist and yet also most distanced of genres, she is a friend, she is dead but she circulates still in her multiple other selves.

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79. *Id.*; see also Richard A. Posner, U. CHI. L. SCH., <http://www.law.uchicago.edu/faculty/posner-r> (last visited Aug. 12, 2015).

80. See GIORGIO AGAMBEN, WHAT IS AN APPARATUS? 9 (David Kishik & Stefan Pedatella trans., 2009).

