



# PENN UNDERGRADUATE LAW JOURNAL

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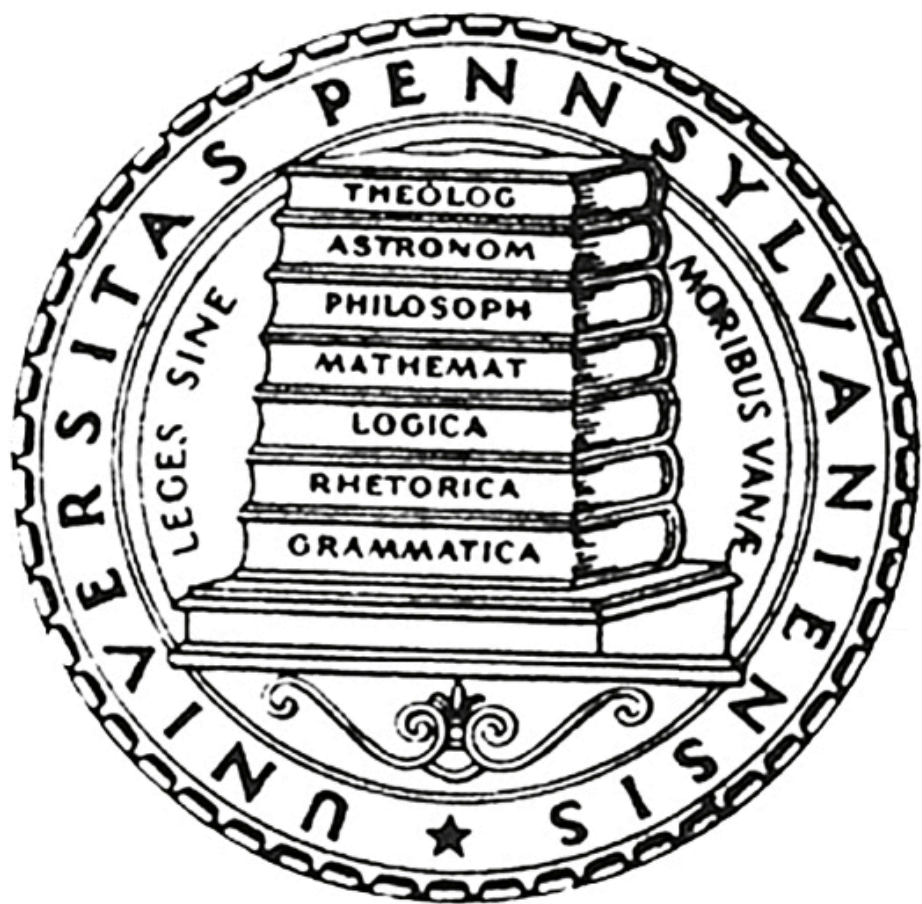
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## ARTICLE

# FINDING A WAY THROUGH: THE POSSIBLE INCLUSION OF LABOUR TRAFFICKING AS AN ‘OTHER INHUMANE ACT’ UNDER THE ROME STATUTE

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### Abstract

Trafficking, beyond the attachment of ownership and similar deprivations of autonomy, has not found its way into the Rome Statute. Its differing definitions leads us to the question of whether it ought to meet the threshold under article 7(1)(c) or at least assume a “severe form” before it is prosecuted before the ICC. The Appellate chamber in the Brima case had favorably held the possibility of additionally characterizing the same acts under different provisions, as in the case of rape, torture or even forced marriage. Similar judgments passed by the ad-hoc chambers leave open the possibility of the ICC exercising its jurisdiction over acts of trafficking simpliciter. Trafficking for labor purposes involves numerous actors who are either concerned with the profits or are simply unwilling to object to powerful forces, making it possible for the crime to occur on a massive level. Prosecuting such instances of trafficking would fulfill the Statute’s intent to prosecute only the most serious crimes of concern to the community. Previous studies have mostly emphasized the issue of sex trafficking and drug trafficking. However, the present paper illustrates how trafficking fulfills the chapeau elements under Article 7(1) (k), especially with a focus on labour abuses, by rebutting arguments that treaty crimes like Trafficking are not to be included under the Statute and the notion that it does not exist outside the ambit of Article 7(1)(c).

### Introduction

The proposal made by several nations during the Rome Conference to give the International Criminal Court [‘ICC’] subject-matter jurisdiction over treaty crimes, including human trafficking, failed after a comparative analysis against core crimes. The reason given was that the latter supposedly suffer from a greater level of impunity as compared to the former.<sup>1</sup> The ICC intends to exercise its contentious jurisdiction only with respect to the “most serious crimes of concern to the international community as a whole,” an affirmation seen both within its preambular provisions, as well as under the jurisdiction provision under Article 5.

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<sup>1</sup> Findlay, M., Kuo, L. B., & Wei, L. S., *International and Comparative Criminal Justice: a Critical Introduction*, 88-89 (Routledge 2013).

Thus, the jurisdiction of the Court is limited to the core crimes mentioned under articles 5(1) (a)-(d) including Genocide, Crime Against Humanity [‘CAH’], War Crimes and Aggression.

Even though, the term “Trafficking in Persons” finds an explicit mention as a CAH under the ‘Enslavement’ provision within the confines of the Rome Statute,<sup>2</sup> the Statute fails to provide for a definition. The definition then, must be gathered from other enacted treaties and conventions. The Palermo Protocol provides that Trafficking would include the “recruitment, transport, transfer, harboring, or receipt of persons through means of threat, force, fraud, coercion, deception, payment, abduction, or abuses of power or vulnerabilities, for the purpose of exploitation,” including “forced labor, slavery or practices similar to slavery, child begging, servitude, sexual exploitation, removal of organs....”<sup>3</sup> In the alternative, the TVPA includes force, fraud or coercion, but lacks the other means elements.<sup>4</sup> The absence of a concrete definition understandably might lead to either narrowing or broadening the scope of the Statute. It is likely though that the former definition would prevail since the adoption of a definition similar to TVPA by other states might likely be an attempt to avert sanctions imposed by the US where a state’s trafficking laws do not mirror the provisions of the TVPA. On the contrary, the Palermo definition by its wide usage can form a part of customary law that mirrors the opinio juris and state practice of the adopting nations.<sup>5</sup> Thus, it is preferable that the Statute should adopt the same definition, should it decide to exercise its jurisdiction over crimes of trafficking. This paper seeks to examine the possibility of the inclusion of trafficking for labor abuses as a CAH under Article 7(1)(k), especially in the context of labor abuses since enough literature is already available on trafficking in women and children.

### Justifying the Inclusion of the Offence of Human Trafficking Under ‘Other Inhumane Acts’

The travaux préparatoires reveal that the Drafting Committee had not contemplated a trafficking simpliciter and the Statute intended to prosecute trafficking as a form of modern day slavery.<sup>6</sup> However, this terminology must not sway us

2 Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90 (referred as ‘the Statute’).

3 Article 3(a), *United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 Nov. 2000 U.N.T.S. 209, (entered into force, Sep. 29, 2003) [‘Palermo’].

4 *United States of America: Victims of Trafficking and Violence Protection Act 2000* [United States of America], Public Law 106-386 [H.R. 3244], 28 Oct. 2000 [‘TVPA’].

5 J. Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 Mich. J. Int’l L. 437, 465 (2006).

6 J. Kim, *Prosecuting Human Trafficking as a Crime against Humanity under the Rome Statute*, Blogs Law Harvard, (2011) available at <http://blogs.law.harvard.edu/janekim/2011/03/08/prosecuting-human-trafficking-as-a-crime-against-humanity-under-the-romestatute/> (accessed: 12 Feb. 2018); United Nations Office on Drugs and Crime and UN Global Initiative to fight Human Trafficking, *Global Report on Trafficking in*

towards adopting a mechanical approach towards the inclusion of trafficking as a separate CAH under Article 7(1)(k) as an “Other Inhumane Act.” It is widely accepted that the Court does not function as a “panacea for all ills” and the enforcement of treaty crimes is left to the State’s law-enforcement agencies.<sup>7</sup> The reason cited for leaving them to State enforcement is that these treaty crimes have not yet found their way into customary international law and in case such jurisdiction is to be permitted, only crimes committed on the territory of contracting parties would be made punishable.<sup>8</sup>

The reason here seems fallacious for a few reasons. Firstly, the ICC is supposed to primarily rely on its own Statute and draw on externalities on “clear methodological grounds.” Thus, the application of principles of customary international law which have developed over a considerable period of time may be used only if it is fitting the court’s own jurisprudence.<sup>9</sup> For instance, the Statute differs from its ad-hoc counterparts in the inclusion of phrases such as “for the purpose of facilitating” as a precursor to liability under aiding and abetting, which otherwise requires only knowledge.<sup>10</sup> Similarly, while the ad-hoc tribunals dismiss any policy requirements as part of their chapeau elements, the Rome Statute mandates a state or organizational policy to convert ordinary crimes into CAH.<sup>11</sup> Also, it has been previously observed that even though the ICC Statute might reflect state’s opinio juris, Article 7(1)(h) (the crime of persecution) does not find place in customary international law. Though the definitions of crimes under the Statute may vary with the existing definitions under international law, Article 10 of the same statute emphasises the intention of the drafters to not affect, prejudice or limit the existing definitions.<sup>12</sup>

Secondly, an interpretation of Article 7(1)(k) reveals that “other inhumane acts” is an international crime by itself, and its specific categories need not be separately criminalized.<sup>13</sup> Article 7(1)(k) keeps the possibility of adapting the Statute to new forms of cruelty, by focusing on actions and not substances.<sup>14</sup> One of the most

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*Persons*, February 2009, available at <http://www.refworld.org/docid/49997ae45.html> (accessed: 22 Feb. 2018).

7 P. Gaeta, *International Criminalization of Prohibited Conducts* in Antonio Cassese (ed.), *The Oxford Companion of International Criminal Justice*, 63 (Oxford University Press 2009).

8 K. Ambos, and O. Triffterer, *The Rome Statute of the International Criminal Court: a commentary*, 113 (2016).

9 V. Nerlich, *The Status of ICTY and ICTR Precedent in Proceedings Before the ICC*, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 325 (Martinus Nijhoff Publishers, 2009).

10 S. Finnin, *Mental Elements under Article 30 of the Rome Statute of the International Criminal Court: A Comparative Analysis*, 61 *Int'l and Comp. L. Q.* 325, 354 (2012).

11 The ad-hoc tribunals believe, that such policy is not a requirement under customary international law. See, *Prosecutor v. Kunarac et al.*, 12 June 2002, IT-96-23/1-A, at ¶ 98; *Prosecutor v. Blaskic*, 29 July 2004, IT-95-14-A, at ¶ 120; *Prosecutor v. Kordić*, 17 Dec. 2004, IT-95-14/2-A, at ¶ 98.

12 *Prosecutor v. Kupreskic et al.*, 14 Jan. 2000, IT-95- 16-T, at ¶¶ 580-581.

13 *Prosecutor v. Nuon Chea*, 7 Aug. 2014, 002/19-09-2007/ECCC-E313, at ¶ 436.

14 J. Sainz-Borgo, *The International Criminal Court, Drug Trafficking and Crimes against Humanity: A Local Interpretation of the Rome Statute*, 15 *J. Juris* 373-388, 378 (2012).

important developments in the ICC in this regard came with the case of Dominic Ongwen, in which forced marriage was charged as a CAH under Article 7(1)(k) of the Statute.<sup>15</sup>

Thirdly, there exist treaty crimes which have found their way into the Rome Statute under different nomenclatures, either as a CAH or as a War Crime, such as Apartheid. Some jurists are of the opinion that the ICC is in favour of thematic prosecutions with regards to offences that have been under enforced, such as those relating to sexual violence or the use of child soldiers in conflicts.<sup>16</sup> Another jurist argues that the ICC's structure allows it to prosecute crimes which may not be universally regarded as such but equally deserve to be condemned.<sup>17</sup> Examples of such crimes might be those where the State through its own complicity or because of lack of competency or indifference to the situation has failed to take effective steps to stop further perpetration of crimes.<sup>18</sup>

Fourthly, the ICC in its previous decisions has adopted a cautioned approach towards excessive reliance on the travaux, especially where the provisions were purposely formulated to avoid too much precision.<sup>19</sup> The travaux particularly fails with regards to subject matters that were dropped, likely because of the lack of time, such as issues regarding the liability of legal persons. Thus, this cannot be cited as a reason to justify its non-inclusion.

Finally, the means element in Palermo, which shifts the evidentiary burden from the prosecution to the accused, has already been accepted as part of customary international law.<sup>20</sup> This implies that the consent or non-consent of individuals has to be inferred from the objective facts and circumstances, since Human Trafficking as an act is inherently exploitative. In the case of Labour Trafficking for instance, when the choice is between leading a life of unemployment and starvation on the one hand and some source of income on the other, there cannot be said to exist, reasonable alternatives.<sup>21</sup> Coercive circumstances give rise to power-inequalities between the traffickers and the victims and render the latter's consent meaningless.<sup>22</sup> This approach is consistent with the notion that one

15 K. Sarah Kihika, *Evaluating the Deterrent Effect of the International Criminal Court in Uganda*, in Jennifer Schense and Linda Carter (eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, 287 (Torkel Opsahl Academic EPublisher 2017).

16 M. DeGuzman, *An Expressive Rationale for the Thematic Prosecution of Sex Crimes*, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, 35-41 (Torkel Opsahl Academic EPublisher 2012).

17 N. Jain, *Going Beyond Prosecutorial Discretion: Institutional Factors Influencing Thematic Prosecution*, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, 226 (Torkel Opsahl Academic EPublisher 2012).

18 *USA v. Ohlendorff (Einsatzgruppen Case)*, 10 Apr. 1948, 414–416.

19 I. M. Sinclair, *The Vienna Convention on the Law of Treaties*. 142 (Manchester University Press 1984); *Prosecutor v. Uhuru Kenyatta*, 18 Oct. 2013, ICC-01/09-02/11-830, Majority Decision of Judge Fremr and Judge Eboe-Osuji, at ¶¶ 76–80 (1984).

20 *Prosecutor v. Kunarac*, 22 Feb. 2001, ICTY-96-23-T, at ¶¶ 537-542.

21 D. Herzog, *Happy Slaves: a Critique of Consent Theory*, 223-225 (University of Chicago Press 1989).

22 *Prosecutor v. Kunarac et al.*, 12 June 2002, ICTY-96-23 and ICTY-96-23/1-A, at ¶ 125; *State v.*

cannot consent to suffer harm in criminal law, which equates individual interests with that of the society.<sup>23</sup> Traffickers cannot take the plea that they were not responsible for the lack of alternatives available to the victims to justify their crime.

### ‘Trafficking’ Can Also Fall Outside the Purview of ‘Enslavement’ (Article 7(1)(c))

The Statute defines enslavement as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.”<sup>24</sup> The Kunarac Chamber had specifically held trafficking as a CAH to be included within the crime of enslavement.<sup>25</sup> The International Criminal Tribunal, as well as the ICC, have maintained that the acts, already mentioned under Articles 7(1)(a) – (j), cannot simultaneously be considered as an ‘other inhumane act’ under Article 7(1)(k).<sup>26</sup> It is in light of this stance that this sub-section assumes importance.

Human Trafficking possesses transnational implications and has also been described as ‘delictajuris gentium.’ The very definition of ‘enslavement’ seems to be inadequate, however. Article 7(1)(c) of the Statute extracts the definition of enslavement from the 1926 Slavery Convention, which defines ‘Enslavement’ as “the exercise of any or all the powers attaching to the right of ownership over a person.”<sup>27</sup> Though the Convention has moved beyond its traditional confines to include acts of exploitation that fall short of ownership,<sup>28</sup> the Statute’s definition of enslavement has not. The definition identifies itself with slavery or the presence of slave-like conditions amounting to slavery along with elements of legal ownership.<sup>29</sup> The definition fails to understand that trafficking is a process, an act in itself, while slavery can be one of the end results.<sup>30</sup>

Trafficking would further require a degree of control almost synonymous with possession, or at least a complete lack of autonomy, to amount to slavery.<sup>31</sup>

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*Martin*, 17 May 1990, 561 A.2d 631, 636 (Supreme Court of New Jersey 1990); Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter*, 45 Ind. L. Rev. 483-512, 510 (2012).

23 G. Halevi, *The Matrix of Derivative Criminal Liability*, 252 (Heidelberg, Springer 2012)

24 Rome Statute of the International Criminal Court § 7(1)(c)

25 *Prosecutor v. Kunarac et al.*, 2001 IT-96-23-T, 193 at ¶ 542.

26 *Prosecutor v. Katanga & Chui*, 2008 ICC-01/04-01/07, 151 at ¶ 452.

27 D. Robinson, *The Elements for Crimes Against Humanity*, in Roy S. Lee and Hakan Friman (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* 57, 84-85 (Transnational 2001); League of Nations, *Convention to Suppress the Slave Trade and Slavery*, Article 1, 1926, 60 LNTS 253, Registered No. 1414.

28 K. Bales, *Expendable People: Slavery in the Age of Globalization*, 53 J Intl Affairs 461, 462-66 (2000).

29 J. Allain and R. Hickey, *Property and the Definition of Slavery*, 61 Intl & Comp L Q 915, 917 (2012); see W. Schabas, *The International Criminal Court: a commentary on the Rome Statute* (Oxford 2016); J. Kim, *Prosecuting Human Trafficking as a Crime against Humanity under the Rome Statute* (Columbia Law School Gender and Sexuality Online 2011).

30 A. T. Gallagher, *The International Law of Human Trafficking* 189 (Cambridge University Press 2010).

31 R. Hickey, *Seeking to Understand the Definition of Slavery*, in Jean Allain (ed.), *The Slavery Conventions: The travaux préparatoires of the 1926 League of Nations Convention and the 1956 United Nations*

The victims must be trapped in a situation in which they are unable to amend or modify their situations.<sup>32</sup> The Palermo protocol too supports the argument that trafficking is not synonymous with slavery. Rather, slavery is one of the examples of exploitation. Trafficking may or may not lead to slavery.<sup>33</sup> It follows that although trafficking is mentioned under article 7(1)(c), it can also be prosecuted under article 7(1)(k) of the Statute when it lacks the elements that give rise to slavery. Even for purposes of cumulative or alternative charging, both practices followed by the chambers, there needs to be a distinct element present in the elements of crimes, i.e. they must be materially distinct.<sup>34</sup> Previously, a proposal to include a crime of mass starvation in the list of crimes against humanity was dropped because this conduct would most likely fall under the existing crimes of murder and extermination.<sup>35</sup> It is not denied that trafficking may exist as a CAH independent of the enslavement provision as in the case of forcible transfer, but an additional basis must be then sought.<sup>36</sup> Otherwise, it would only appear to be a case of subversion of the provisions of the Statute. For this reason, acts of persecution cannot be simultaneously prosecuted under the provision for “other inhumane acts,” as the elements of these offences are similar.<sup>37</sup>

While Article 7(1)(c) dwells on legal ownership amounting to slavery and slave-like conditions, the residual clause looks to the existence of acts that cause “great suffering, serious injury to body or physical or mental health.” The ad-hoc tribunals had made use of this provision for the inclusion of offences such as the forcible transfer of population, enforced disappearances, and acts of sexual violence other than rape, although these crimes have already been independently instituted as offences under the Rome Statute.<sup>38</sup> For instance, the Stakic Chamber held that there exists a distinction between deportation and forcible transfers, where deportation involves involuntary and unlawful movement across state borders and a forcible transfer presumes movements within the same state.<sup>39</sup> The Statute then can recognise offences which qualify the elements of article 7(1)(k) as separate offences, too.

Another instance can be drawn from the jurisprudence of the Special Court

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*Convention* 226-231 (Martinus Nijhoff 2008); *Prosecutor v. Katanga*, 7 Mar. 2014, ICC-01/04-01/07, ¶ 975.

32 *Prosecutor v. Katanga*, 7 Mar. 2014, ICC-01/04-01/07, ¶¶ 961–84.

33 J. Allain, *The Law and Slavery: Prohibiting Human Exploitation* 204 (Brill 2015); Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, Preamble, 2005, CETS 197.

34 *Prosecutor v. Ruto et al.*, 2011 ICC-1/09-01/11-336, at ¶¶ 280–81; *Prosecutor v. Kordić*, 2004 IT-95-14/2-A, 281-282 at ¶¶ 1040–42; *Prosecutor v. Blagojevic and Jokic*, 2005 IT-02-60-T, 289-290 at ¶¶ 807–10.

35 R. S. K. Lee, *The International Criminal Court: the Making of the Rome Statute-issues, negotiations, results* 103 (Martinus Nijhoff Publishers 1999).

36 T. Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 *Intl & Comp L Q* 445, 450 (2005).

37 *Prosecutor v. Simic et al.*, 2003 IT-95-9-T, 25 at ¶ 74.

38 Triffterer and Ambos, *Rome Statute of the International Criminal Court* at 236 (cited in note 8).

39 *Prosecutor v. Stakic*, 2003 IT-97-24, 190 at ¶ 671.

for Sierra Leone ('SCSL'), in which cases were argued in which the victims were forced to enter into marriage and conjugal relationships under coercion. The Appeals Chamber went on to distinguish between the sexual and non-sexual elements of forced marriage for the classification of such conduct as an offence under "other inhumane acts" as opposed to "sexual slavery." The chamber's reasoning was that the acts went against the very institution of marriage and thus the charges under the "other inhumane acts" provision was not 'redundant.'<sup>40</sup> This reasoning was further used by the Extraordinary Chambers in the Courts of Cambodia ('ECCC') under similar circumstances during the Khmer Rouge regime.<sup>41</sup>

Similarly, when the women and girls in the Katanga case were forced into marriage, subjected to servitude, forced labor, repeated rapes by their captors, and treatment amounting to their use as chattel, prosecutions were made under the offense of "sexual slavery."<sup>42</sup> However, this would not preclude prosecution as an "other inhumane act" when the acts go beyond sexual slavery and ownership. The International Criminal Tribunal for Yugoslavia ('ICTY') chambers also went on to state that, even though the violations have been set forth separately under the ICC Statute, sexual slavery can still amount to enslavement. This separation merely illustrates the intention of the drafters to group acts of sexual violence together.<sup>43</sup> Sexual violence can also be prosecuted as an act of torture since it necessarily gives rise to pain and suffering, either physical or mental.<sup>44</sup>

Even the International Criminal Tribunal for Rwanda ('ICTR') has discussed the difference in scope of the offences of rape and torture. While both serve the same purpose of violating personal dignity by causing humiliation, degradation, discrimination, intimidation and control over persons, the essence of rape is that it constitutes invasion of sexual integrity under circumstances of coercion.<sup>45</sup> To this extent, the chamber has proposed a conceptual, rather than a mechanical, definition of rape, distinguishing it from torture to assimilate "the evolving norms of justice."<sup>46</sup>

Several states that have gone on to transcribe the Rome Statute into their domestic legislations have used the provision for "other inhumane acts" to prosecute offences such as drug trafficking and terrorism which have not been included in the Statute.<sup>47</sup> After a closer analysis, one may see that Article 7(1)(k) has de-

40 *Prosecutor v. Brima et al.*, 2008 SCSL-2004-16-A, 61-64 at ¶¶ 188-95; *Prosecutor v. Brima et al.*, 2007 SCSL-2004-16-T.

41 *Prosecutor v. Nuom Chea et al.*, (Closing Order Case 002), 2010 002/19-09-2007-ECCC-OCIJ, 355 at ¶¶ 1442-43; *Prosecutor v. Nuon Chea and Khieu Samphan* (Case 002/01 and Decision on Additional Severance of Case 002 and Scope of Case 002/02), 2014 002/19-09-2007- ECCCITC, at ¶ 33.

42 *Prosecutor v. Katanga and Chui*, 2008 ICC-01/04-01/07-717, 144-45 at ¶ 431.

43 *Prosecutor v. Kvočka*, 2001 IT-98-30/1-T, 152 at ¶ 541.

44 *Prosecutor v. Kunarac et al.*, 2002 IT-96-23 and IT-96-23/1-A, 46 at ¶ 150; *Prosecutor v. Semanza*, 2003 ICTR-97-20-T, 12 at ¶ 45; *Prosecutor v. Kamuhanda*, 2004 ICTR-95-54A-T, 121 at ¶ 710.

45 *Prosecutor v. Akayesu*, 1998 ICTR-96-4-T, 149 at ¶¶ 597-98.

46 *Prosecutor v. Musema*, 27 Jan. 2000, ICTR-96-13, 73 and 76-77 at ¶¶ 220 and 226-29.

47 W. Schabas, *The International Criminal Court: a Commentary on the Rome Statute* 185 (Oxford

parted from the use of wordings such as “acts causing severe damage to physical and mental integrity, health and human dignity” which were contemplated under the provision “other inhumane acts” in the 1996 Draft Code. Article 7(1)(k) bears close resemblance to the grave breach of Geneva Conventions of ‘willfully causing great suffering or serious injury to body or health’.<sup>48</sup> The terms “intentionally” under Article 7(1)(k) and “willfully” under the war crimes provisions are synonymous. In fact, the ad-hoc tribunals have applied the same standards of war crime to the crimes of “other inhumane acts.”<sup>49</sup> However, while both provisions could also include moral suffering,<sup>50</sup> the war crime of inhumane treatment also extends to the violation of human dignity.<sup>51</sup> This could give rise to the notion that when a violation of human dignity takes place in the course of trafficking, it can be used as an additional element to classify the act as an offence under Article 7(1)(k).

### Realizing the Elements of Crime under Article 7(1)(k)

The residual clause in the form of Article 7(1)(k) exists to prevent any undue restraint on the exercise of jurisdiction by the court, and the inclusion of acts under this provision must be such that they provide a sufficient notice to individuals of the criminality of the behavior.<sup>52</sup>

### Infliction of ‘Great Suffering and Serious Bodily and Mental Injuries’ on Victims

The ad-hoc tribunals have held that any serious physical or mental injury, with the exclusion of murder, would undoubtedly be an “other inhumane act.” If it fit into a widespread and systematic context, it would go on to assume the characterization of a CAH.<sup>53</sup> Article 7(1)(k) includes acts that are cruel and inhumane, intentional acts or omissions which result in serious mental harm, physical suffering or injury, or a violation of personal dignity. They include violations of the basic set of rights appertaining to all human beings and draw from the sphere of human rights laws,<sup>54</sup> including the right to life, health, liberty and human dignity. Although the Stakic chamber has described this as an “unbridled use of human rights” to identify criminal norms,<sup>55</sup> one can hardly deny that the aforementioned

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2016); Articles 13 and 14, *The African Union Model Law on Universal Jurisdiction distinguishes these offences from crimes against humanity*, 9-13 July 2012, see African Union, ‘Decision on African Union Model Law on Universal Jurisdiction’ EX.CL/731(XXI).

48 Triffterer and Ambos, *Rome Statute of the International Criminal Court* at 240 (cited in note 8).

49 *Prosecutor v. Krnojelac*, 2002 IT-97-25-T, 60-61 at ¶ 130; *Prosecutor v. Gotovina et al.*, 2011 IT-06-90-T, 934-35 at ¶ 1791.

50 *Prosecutor v. Delalic et al. (Celebic ‘i)*, 1998 IT-96-21-T, 182 at ¶ 509; *Prosecutor v. Akayesu*, 1998 ICTR-96-4-T, 235 at ¶ 578.

51 *Prosecutor v. Delalic et al. (Celebic ‘i)*, 1998 IT-96-21-T, 181-220 at ¶¶ 442-544.

52 *Prosecutor v. Blagojevic and Jokic*, 2005 IT-02-60-T, 232 at ¶ 625.

53 *Prosecutor v. Blaskic*, 2000 IT-95-14-T, 80-81 at ¶¶ 239-42.

54 *Prosecutor v. Blagojevic and Jokic*, 2005 IT-02-60-T, 218 at ¶ 586; *Prosecutor v. Kupreskic et al.*, 2000 IT-95-16-T, 226 at ¶ 566; *Prosecutor v. Katanga & Chui*, 2008 ICC-01/04-01/07-717, 149-51 at ¶¶ 445-52.

55 *Prosecutor v. Stakic*, 2003 IT-97-24, 202-04 at ¶¶ 716-22.



rights qualify as preemptory norms and principles of customary international law.<sup>56</sup> Moreover, the Statute itself empowers the ICC to base its decisions on internationally recognised human rights. In the context of human trafficking, where exploitation is meted out in the form of labour abuses, several principles of customary international law that have been reduced to ILO core conventions are also violated.<sup>57</sup>

Those who are trafficked may be forced to travel in overcrowded conditions and suffer from exhaustion and malnutrition. They may also be abandoned, abducted, or coerced into travelling during the course of their journey.<sup>58</sup> Holding individuals under deplorable conditions of detention where they are not provided with adequate means of food, space, hygiene, or healthcare has been previously classified as an “other inhumane act.”<sup>59</sup> Even with the absence of physical injuries, victims may suffer from mental illnesses and live under a constant state of fear or depression, as these crimes prey on the most susceptible—generally people of third-world countries.

Often, individuals are lured by the prospects of a steady income.<sup>60</sup> They readily consent to deplorable conditions, excessively long work hours, meagre wages, and situations akin to debt bondage and involuntary labor in the pretense of work or the repayment of an ill-conceived debt from recruitment fees, transportation, and visa expenses. The wages shown on paper are equivalent to the legal minimum wage, but a substantial amount may be withheld and the remaining may never be enough to discharge these expenses and debts. Further, psychological abuse is often meted out when, in the case of legal migrants, passports and identification documents are confiscated so as to prevent them from taking recourse to law enforcement agencies in the host country. Despite their desire to leave, they possess no recourse but to continue with the work. They are further victimised when they are kept in conditions where they are completely dependent on their traffickers or employers for even their basic necessities.<sup>61</sup>

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56 K. J. Greenberg, and J. L. Dratel, *The Torture Memos: The Road to Abu Ghraib* 598 (Cambridge University Press 2005); J. E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Human Rights Council, A/HRC/25/60 (April 10, 2014).

57 *Right to Organise and Collective Bargaining Convention, 1949*, International Labor Organization C98 (July 1, 1949); *Convention Concerning Forced or Compulsory Labor, 1930*, International Labor Organization C029 (June 28, 1930); *Worst Forms of Child Labour Convention, 1999*, International Labor Organization C82 (June 17, 1999); *Discrimination (Employment and Occupation) Convention, 1958*, International Labor Organization C111 (June 25, 1958).

58 G. Rodriguez, *Report of the Special Rapporteur on Migrants: Mission to the Border between Mexico and the United States of America*, UN Economics and Social Council E/CN.4/2003/85/Add 3 (Oct 30, 2002).

59 *Prosecutor v. Duch*, 2010 001/18-07-2007/ECCC/TC, 129 at ¶ 372; *Prosecutor v. Gouveia Leite*, 2002 UN-ETTA Dist. Ct. Dili 04b/2001, 38 at ¶ 161.

60 K. Bales and S. Lize, *Trafficking in Persons in the United States* (National Institute of Justice 2005) 2001-IJ-CX-0027, archived at <https://perma.cc/YYQ7-R7AE>.

61 *David v. Signal International*, 37 F Supp 3d 822, 832, U.S. District Court (E.D. Louisiana 2014); *Roe v. Bridgestone Corporation*, 492 F Supp 2d 988, 1014, U.S. District Court (S.D. Indiana 2007); G. A. Haugen, and V. Boutros. *The locust effect: why the end of poverty requires the end of violence*, pp. 70, 71 (2014); S. Kara, *Bonded labor: tackling the system of slavery in South Asia*. New York, Columbia University Press, (2012); A. M. Detefano, *The war on human trafficking: U.S. policy assessed*. New Brunswick, N.J., Rutgers

In legal terms, these employment contracts would be rendered invalid and unlawful for lack of consent, including under circumstances where advantage is taken of their conditions of economic hardship.<sup>62</sup> The courts can infer non-consent from background circumstances including conditions of detention. Show of physical force is not required, coercion, duress, fraud, intimation and fear suffices, and maybe inherent under certain situations.<sup>63</sup> Since there are no cases of trafficking, labour or otherwise, prosecuted under Article 7(1)(k), resort may be had to cases of domestic trafficking to show what constitutes trafficking.

### What Could Constitute Trafficking Based on National Court Decisions?

In *R v. Tang*,<sup>64</sup> the complainants were prostitutes and were brought into a brothel where they had to work for 6 days a week to pay off their contracted debts, were forced to meet unreasonable standards in serving customers over long duration and their passports and documents were confiscated. The Court recognised that there had been trafficking but refused to extend such exploitation to slavery, which requires intention on the part of the respondents to exercise powers relating to ownership with respect to each complainant. A combination of two or more of the elements such as action, means and exploitation gives rise to trafficking where the victims are detained by threats of violence and their passports confiscated with the intention of exploiting them for prostitution.<sup>65</sup> In another case, *R v Makai (Atilla)*,<sup>66</sup> the respondent was charged on the count of conspiracy to traffic Hungarian women into UK. The court merely reduced the respondent's sentence on grounds of limited role in the conspiracy and the women's knowledge that prostitution was legal in UK but did not preclude the imposition of a higher punishment in case there were a direct involvement. This case shows that the court accepted that consent to suffer a criminal act, cannot be termed as a valid consent.

Human trafficking as an act is known to specifically target women, victims from underdeveloped or developing economies and those with reduced capacities to form judgments. The seriousness of these acts need to be adjudged on the basis of factors including, nature of act or omission, personal conditions of the victims, duration of suffering and their physical and mental effects. It suffices if the effects

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University Press, p. 73 (2007); K. Bales and S. Lize, *Trafficking in Persons in the United States*, National Institute of Justice, Nov. 2005, 2001-IJ-CX-0027, p. 43 available at <http://www.ncjrs.gov/pdffiles1/nij/grants/211980.pdf> (accessed: 27 Mar. 2018); See Human Rights Center, *Freedom Denied: Forced Labor in California*, 2005, pp. 10-11, available at <http://www.oas.org/atip/country%20specific/forced%20labor%20in%20california.pdf> (accessed: 20 Feb. 2018).

62 LA Malone, *Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organized Crime Elements* 25 Fordham International Law Journal 54, 89-90 (2001).

63 *Prosecutor v. Akayesu*, 2 Sep. 1998, ICTR-96-4-T, ¶ 688; *Prosecutor v. Gacumbitsi*, 7 July 2006, ICTR-2001-64-A, ¶ 155-157.

64 Case No. M5/2008, 28 Aug. 2008, [2008] HCA 39, 237 CLR 1.

65 *Michael Frudenthal v. The State of Israel*, Appeals Judgment, 3 Aug. 2003, CA 11196/02.

66 [2008] 1 Cr App R (S) 73.

are more than short-term and temporary, though long term or permanent harm may help in an analysis of the seriousness of the harm.<sup>67</sup>

The harm caused extends to the victims' family members also, who may be classified as indirect victims of the inhumane acts. The ICC has itself taken note of indirect victims where emotional, physical or even economic harm is caused to another individual within relations of kinship, due to the suffering borne by the direct victim.<sup>68</sup> The victims are taken away from their families and kept in unhealthy conditions. The traumatic experiences suffered by the victims affects their interpersonal relationships leading to dysfunctional families. The families' collective dreams for economic upliftment is violated. In cases where the trafficked migrants return, they and their families face stigma and threats in their home countries.<sup>69</sup>

However, it is necessary to mark off trafficking and subsequent exploitation from genuine debts incurred by poor migrant laborers and this has to be assessed by the specifics of the contractual arrangements, labor conditions in similar or allied employments and consequences of non-repayment of debts.<sup>70</sup> For example, there still exists practices in certain nations where passports are retained for security purposes.<sup>71</sup>

### The Gravity Threshold of 'As Comparable To Other Acts'

The elements of crime under Article 7(1)(k) require the acts to be of a 'similar character' as those of acts mentioned elsewhere under Article 7. Thus, despite its unduly strict provisions, the Statute itself permits the drawing of analogies since the 'similarity' has to be assessed by drawing analogies with the other acts.<sup>72</sup> Gravity is assessed through factors including, the scale, nature, manner of commission and impact of the acts committed.<sup>73</sup>

67 *Prosecutor v. Blagojevic and Jokic*, 17 Jan. 2005, ICTY-02-60-T, ¶ 586; *Prosecutor v. Simic et al.*, 17 Oct. 2003, ICTY-95-9, ¶ 75.

68 *Prosecutor v. Lubanga*, 11 July 2008, ICC-01/04-01/06-1432 OA 9 OA 10, ¶¶ 32-92; *Prosecutor v. Bemba*, 18 Nov. 2010, ICC-01/05-01/08-1017, ¶ 43.

69 Amnesty Int'l, Kosovo (Serbia & Montenegro): 'So Does It Mean We Have The Rights?' Protecting The Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo, AI Index: EUR 70/010/2004, 6 May 2004, at <https://www.amnesty.org/en/documents/eur70/010/2004/en/> (accessed: 22 Feb. 2018).

70 J. Busza, *Sex Work and Migration: The Dangers of Oversimplification: A Case Study of Vietnamese Women in Cambodia*, 7 Health and Human Rights 231-49, 232 (2004); L. Sandy, 'Behind Closed Doors': *Debt-Bonded Sex Workers in Sihanoukville, Cambodia*, 10 The Asia Pacific Journal of Anthropology 216-230, 227 (2009).

71 Institute of Human Rights and Business, *Fees and IDs: Tackling recruitment fees and confiscation of workers' passports*, at [https://www.ihrb.org/pdf/2013-09-06\\_IHRB\\_Fees-and-IDs-Report.pdf](https://www.ihrb.org/pdf/2013-09-06_IHRB_Fees-and-IDs-Report.pdf) (accessed 22 Feb. 2018); US Department of State, *Trafficking in Persons Report 2012*, available at <http://www.state.gov/documents/organization/192596.pdf> (accessed 22 Feb. 2018).

72 K. Ambos, *Treatise on international criminal law*, p. 91 (2013).

73 ICC, Office of The Prosecutor, *Policy Paper on Case Selection And Prioritization*, 15 Sep. 2016, at 32, available at [https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf) (accessed: 10 Feb. 2018); International Criminal Court, The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, November 2013, at 59-66, available at <https://www.legal-tools.org/doc/acb906/pdf/> (accessed: 18 Feb. 2018).

In its Kenya decision, the ICC had challenged the defense's contention of recognition of post-election violence acts as a "gradual downscaling of seriousness" while authorizing investigations into the Kenya case. The court reasoned that the acts committed by an association of individuals such as businessmen, politicians and local leaders, could not be classified as isolated acts or incidences of sporadic violence.<sup>74</sup> Similarly, the PTC had gone on to authorise investigations in Darfur, Sudan, which passed the gravity test wherein the defendant, through his attack, had killed about twelve peacekeepers and wounded eight other victims, a comparatively low number of direct victims. The authorization would show the intention of the court to engage on a qualitative analysis, rather than a quantitative analysis of gravity, often ambiguous.<sup>75</sup> An alternative is to evaluate the entire context of the act, whether the acts meet the standards of "situational gravity" and as a whole give rise to social alarm in a community. The acts which otherwise fulfill the requirements of systematism or organizational policy must not be left unscrutinised merely because an identified perpetrator's acts may lack the specific threshold.<sup>76</sup> Trafficking operates as an industry where it is ensured that the number of victims will not be exhausted due to several reasons, the most important being poverty and unemployment. Traffickers share a common purpose or plan that is economic, programmatic, and political to exploit and profit from the endless supply, showing that there exists an equally large demand and those engaging in the acts are executing market demands.<sup>77</sup>

Moreover, trafficking is aggravated in most of the cases since governments are either unwilling or unable to take measures. Often law enforcement officials are bribed in cases where the victims are smuggled or forcibly taken across borders or the government looks the other way. In other instances, the government though enthusiastic about combating the menace may not possess adequate resources to take any action.<sup>78</sup> Usually trafficked into nations with market-developed economies, victims are usually those from states with vulnerable economies or from

<sup>74</sup> *Situation in the Republic of Kenya* (PTC Authorization of Investigation), 31 March 2010, ICC-01/09, ¶¶ 116-118.

<sup>75</sup> *Situation in Georgia* (PTC Authorization of Investigation), 27 Jan. 2016, ICC-01/15-12, ¶ 26; Margaret M DeGuzman, *The International Criminal Court's gravity jurisprudence at ten*, 12 Washington University Global Studies Law Review (2013), available at [https://openscholarship.wustl.edu/law\\_globalstudies/vol12/iss3/9](https://openscholarship.wustl.edu/law_globalstudies/vol12/iss3/9) (accessed: 28 Mar. 2018).

<sup>76</sup> K.J. Heller, *Situational gravity under the Rome Statute*, in C. Stahn & L. van den Herik (Eds.), *Future perspectives on international criminal justice*. The Hague: TMC Asser Press, (2009); G. Waschefort, *Gravity as a requirement in international criminal prosecutions: Implications for South African courts*, 47 Comparative and International Law Journal of Southern Africa 38 (2014); W. Schabas, *An introduction to the International Criminal Court*. Cambridge, UK, Cambridge University Press, pp. 240-241. (2007).

<sup>77</sup> J. Kim, *Prosecuting Human Trafficking as a Crime against Humanity under the Rome Statute*, Columbia Law School Gender and Sexuality Online, 2011, available at [http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim\\_GSL\\_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf](http://blogs.law.columbia.edu/gslonline/files/2011/02/Jane-Kim_GSL_Prosecuting-Human-Trafficking-as-a-Crime-Against-Humanity-Under-the-Rome-Statute-2011.pdf) (accessed: 14 Feb. 2018).

<sup>78</sup> S. Mathews, *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 Houston Journal of International Law 649, 663 (2005); G. King, *Woman, child for sale: the new slave trade in the 21st century*. New York, Chamberlain Bros, p. 20. (2004).

states with low rates of enforcement. The former may not possess jurisdiction in the events the latter does not take actions, insufficiently investigates or summarily dismisses the case,<sup>79</sup> or awards a lesser punishment than that which should be ordinarily meted out.<sup>80</sup> This would only give rise to a culture of impunity.

### ‘Widespread and Systematic Attacks’

The widespread nature of any act is evaluated on the basis of the cumulative effects of a number of consecutive attacks or a single attack bearing an extraordinary magnitude. The widespread criterion operates on a quantitative basis and also looks at the reach of such acts; they must be more than mere isolated incidents.<sup>81</sup> On the other hand, systematism implies an organised nature of acts that cause violence, or one pursuant to a plan or policy.<sup>82</sup> In fact, a few Chambers have concluded that a widespread and systematic attack itself maybe enough to show a covert plan or policy.<sup>83</sup>

Before the court can take cognizance of any crime, it is necessary that the same is perpetrated as a “widespread” or “systematic attack.” The perpetration of trafficking can be said to comprise an attack on the civilian population since the individuals are targeted on the basis of their belonging to a targeted population – marginalised groups, and the unemployed in the case of labour trafficking.<sup>84</sup> The effects of these acts pervade into developing and underdeveloped economies and also involve a number of victims over small-scale operations. Trafficking for any purpose requires highly organised actions including the identification, recruitment, manipulation, coercion, monitoring, exploitation, and finally disposal of trafficked persons once they are no longer profitable.<sup>85</sup>

The Article 7 policy requirement does not limit itself to State policy but includes more than mere isolated incidents, implying that even non-state actors

79 ECHR, *Rantsev v. Cyprus and Russia*, 7 Jan. 2010, Application no. 25965/04; BASS, G. J. (2000). *Stay the hand of vengeance: the politics of war crimes tribunals*. Princeton, N.J., Princeton University Press, p. 81; UNITED NATIONS WAR CRIMES COMMISSION. (1948). *History of the United Nations War Crimes Commission and the development of the laws of war*. London, H.M.S.O., p. 47.

80 The former country may lack jurisdiction owing to non-extraterritorial application of their own statutes or with respect to the subject matter (*ratione loci* and *ratione materiae*).

81 ILC, *Commentary of the International Law Commission in relation to the Draft Code of Crimes against Peace and Security of Mankind*, Report of the International Law Commission on the Work of its Forty-Eighth Session (1996) GAOR, 51st Sess., Supp No. 10, UNDocA/51/10, 94-5; *Prosecutor v. Blaskic*, 3 Mar. 2000, IT-95-14-T, ¶ 206; TRIFFTERER, O., & AMBOS, K. (2016). *Rome Statute of the International Criminal Court: a commentary*, p. 243; WERLE, G., & JESSBERGER, F. (2014). *Principles of international criminal law*, pp. 120-28.

82 *Prosecutor v. Tadic*, 14 July 1997, IT-94-1-T, ¶ 648; *Prosecutor v. Blaskic*, 3 Mar. 2000, IT-95-14-T, ¶ 245; *Prosecutor v. Akayesu*, 2 Sep. 1998, ICTR-96-4-T, ¶ 580; *Prosecutor v. Kayishema & Ruzindana*, 21 May 1999, ICTR-95-I-T, ¶ 123.

83 *Prosecutor v. Blaskic*, 3 Mar. 2000, IT-95-14-T, ¶ 204; *Prosecutor v. Kunarac*, 22 Feb. 2001, IT-96-23-T, ¶ 98.

84 *Prosecutor v. Tadic*, 7 May 1997, IT-94-1-T, ¶ 644.

85 J. Kim, *Prosecuting Human Trafficking as a Crime Against Humanity under the Rome Statute*, 6 Mar. 2011, p. 27, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1779263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1779263) (accessed: 14 Jan. 2018).

may commit such crimes.<sup>86</sup> It has been proposed that, unlike Article 7(2)(i) which explicitly mentions a “political organization,” Article 7(2)(a) mentions a “state or organizational policy,” which implies that the organization need not bear any state like structure or be affiliated with it.<sup>87</sup> The International Law Commission has opined that individuals with de facto power and organised criminal gangs are equally capable of perpetrating such acts, and this view is in consonance with state practice.<sup>88</sup> Further, the Court’s lenient criteria of organization such as a hierarchy, control over territory, committing criminal acts against civilians, or being a part of a larger group that commits such attacks is enough to address incidences of trafficking which exist in the form of an enterprise that lures the victims, the middlemen and recruiters, and the end users.<sup>89</sup>

One might argue that this stand is incorrect since the trafficking organizations might, at a maximum, fulfill the definition under the Convention Against Transnational Organized Crime (‘UNTOC’) but would never be capable of engaging in mass atrocities.<sup>90</sup> However, the international criminal tribunals have been witnesses to non-state actors such as corporations’ involvement in the commission of international crimes. Cases such as Van Anraat, Flick, Farben, Krupp, and Unocal have shown how corporations and their officials can both commit and be complicit in perpetrating large scale inhumane acts due to the organizational resources at their disposal.<sup>91</sup> In the context of labor abuses, the involvement of corporations is particularly significant, since they stand to gain from trafficked labor. Many developing states seem to be unwilling or unable to contain the activities of these corporations; they attempt to portray themselves as ideal investment hubs to dismiss the possibility of their relocation elsewhere, or they genuinely lack resources to curb their activities.<sup>92</sup> The case of United States v. Kil Soo Keehas been one of the most infamous cases with regards to corporate involvement in

86 D. Robinson, *Defining “Crimes against Humanity” at the Rome Conference*, 93 American Journal of International Law 43, 50 (1999).

87 J. M. Smith, *An International Hit Job: Prosecuting Organized Crime as Crimes Against Humanity*, 97 The Georgetown Law Journal 1111, 1124 (2009).

88 ILC, Opinion of the International Law Commission (ILC) on the work of its 43rd Session, ILC Report (1991), 266; *Prosecutor v. Tadic*, 7 May 1997, IT-94-1-T, ¶ 655; *Prosecutor v. Blaskic*, 3 Mar. 2000, IT-95-14-T, ¶ 205; T. Obokata, *Trafficking of Human Beings as a Crime Against Humanity: Some Implications for the International Legal System*, 54 International and Comparative Law Quarterly 445, 453 (2005); J. S. Abrams, and S. R. Ratner, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*. Oxford, Clarendon Press, p. 66 (1997).

89 *Situation in Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya), 31 Mar. 2010, ICC-01/09-19-Corr, ¶ 93.

90 C. V. D. Wyngaert, and S. Dewulf, *International Criminal Law: A Collection of International and Regional Instruments*. Boston, Martinus Nijhoff Publishers, p. 1025 (2011).

91 *Prosecutor v. Van Anraat*, 23 Dec. 2005, The Hague District Court, LJN AX6406; *USA v. Friedrich Flick, et al. (Flick Case)*, 22 Dec. 1947; *USA v. Karl Crauch, et al. (I.G. Farben Case)*, 30 July 1948; *USA v. Alfred Krupp, et al. (Krupp Case)*, 31 July 1948; *Doe v. Unocal Corporation*, 395 F.3d 932 (9th Circuit 2002).

92 O. K. Fauchald and J. Stigent, *Corporate Responsibility before International Institutions*, 50 The George Washington International Law Review 1028 (2009).

trafficking because of the large number of victims.<sup>93</sup> The case involved the defendants holding the victims under guard by confiscating their identification documents and forcing them to work under threats of false arrest in garment factories. The defendants who operated the industry were convicted on almost all the counts.

### How the Participants In Labour Trafficking Fulfill the Subjective Elements

The very concept of trafficking is per se inhumane, which means that it is highly unlikely that those engaging in the act of trafficking will be unaware of the factual circumstances. The traffickers participate in various levels of identification, deception, and recruitment and stand to gain from the profits involved in the transaction.

The requisite mental elements under Article 7(1)(k) are similar to those of other acts under the Statute--the intention or awareness of the acts. The words “intentionally cause suffering” do not reflect a higher standard than that already present under Article 30(2) of the Statute. Similarly, awareness that the consequence will follow in the ordinary course of events is enough. It is not necessary for the perpetrators to know of the exact details of an attack; a broader context suffices. Awareness can be gathered from circumstantial evidence and of the conditions that led to such an attack.<sup>94</sup> The very fact that the attack is large-scale and systematic could lead to the inference that the participants in such acts possessed knowledge.<sup>95</sup> The Galic tribunal had inferred the defendant’s knowledge of the attack from its widespread and systematic nature, reasoning that those residing in Sarajevo during the shelling and sniping incidents would have known about the attacks.<sup>96</sup> Similarly, each participant in the act does the act purely for their own commercial motives, and it becomes evident that either intention or awareness will be present. In the case of corporations, even if the acts of human trafficking have been perpetrated not within their own workforce but in their supply chain, knowledge can be inferred from the economics of the deal or from several red flags and media reports.<sup>97</sup> Likewise, the TVPA has acknowledged corporate crimes, the civil and criminal penalties of which applied to corporations that “knowingly benefit, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by means of force, threats, or abuse when the party knew or recklessly disregarded how the labor was

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93 *United States v. Kil Soo Lee*, 472 F.3d 638, 639-40 (9th Cir. 2006).

94 *Prosecutor v. Gbagbo*, 12 June 2014, ICC-02/11-01/11, ¶¶ 235-236; *Prosecutor v. Lubanga Dyilo*, 1 Dec. 2014, ICC-01/04-01/06-3121-Conf A5, ¶ 447.

95 *Prosecutor v. Vasiljevic*, 25 Feb. 2004, IT-98-32-A, ¶ 30.

96 *Prosecutor v. Galic*, 5 Dec. 2003, IT-98-29-T, ¶ 598.

97 International Commission of Jurists (2008) *Corporate Complicity And Legal Accountability, Report Of The International Commission Of Jurists Expert Legal Panel On Corporate Complicity In International Crimes Vol. 2*, p. 26, available at <https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf> (accessed: 19 Feb. 2018).

obtained.” In other words, a corporation’s commitment of a crime is not absolved on answers of whether such corporations possessed knowledge of illicit activity or whether they acted in reckless disregard of such information.<sup>98</sup>

### Conclusion

It is imperative to interpret Article 7(1)(k) in favour of the inclusion of trafficking, including labour trafficking into the Rome Statute and the ICC, must not abstain from exercising its jurisdiction merely on the status of grounds of trafficking as a treaty crime. Where prosecution under Article 7(1)(c) fails, human trafficking simpliciter would still find its enforcement under article 7(1)(k), since the very reason for allowing this provision was to prosecute acts which, even though do not find mention under Article 7, fulfill the chapeau elements. To allay any fears of injustice, it has to be mentioned that doing so would not be bad since the act can be reasonably inferred from the elements of crime of the Statute provision and the actor is warned of the criminality of the act. The definition for the purpose of exercise of jurisdiction over trafficking can be drawn from the aforementioned Palermo protocol and domestic cases. National systems are prone to violence, intimidation, and bribery from organised groups who profit from the trafficking. The ICC could always attempt to strike a balance between removal of this impunity and any concerns about unduly encroaching the sovereignty of any state by taking recourse to principles of ‘positive complementarity.’ For example, the situation in Guinea was overseen by the ICC to analyze if the investigations and prosecutions that were being carried on by the national courts were compliant with internationally recognised standards.<sup>99</sup> This way, the opposition from the states could also be reduced on the exercise of its jurisdiction.

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<sup>98</sup> Sections 1589, 1595, United States Code, 2006 Edition, Supplement 5, Title 18 - CRIMES AND CRIMINAL PROCEDURE, 2012; Polaris Project, *Trafficking Victims’ Protection Act (TVPA)-Fact Sheet*, 2008, available at <http://humantrafficking.ohio.gov/links/TVPA%20Fact%20Sheet,%20Polaris%20Project.pdf> (accessed: 1 Mar. 2018).

<sup>99</sup> J. Lam, *Contrasting Complementarity: Assessing the International Criminal Court’s Support for Domestic Prosecution*, in ICJ Kenya, *International Criminal Justice: The ICC and Complementarity*, 2014, p. 23, available at [http://www.iccnw.org/documents/complementarity\\_journal.pdf](http://www.iccnw.org/documents/complementarity_journal.pdf) (accessed: 25 Mar. 2018).



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| <b>ARTICLE</b> |
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## **PROTECTING A FOREIGN TRADER’S GOODWILL IN PASSING OFF: REFLECTING ON THE AUSTRALIAN APPROACH AFTER BRITISH SKY BROADCASTING**

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### I. Introduction

The Supreme Court of the United Kingdom’s 2015 decision in *Starbucks (Hong Kong) Ltd v British Sky Broadcasting Group* (“*British Sky Broadcasting*”)<sup>1</sup> found that, in order to have protectable goodwill in a passing off action, a foreign plaintiff must have and do business with customers in the local jurisdiction. This approach to goodwill is conservative and imposes a clear requirement of locality. Commentators have been critical of the missed opportunity to bring the United Kingdom in step with other common law jurisdictions, such as Australia, New Zealand, Canada, Hong Kong and Singapore, who have taken a more liberal and commercially aware approach to goodwill.<sup>2</sup>

This essay will examine the Australian approach to goodwill as put forth in the Federal Court of Australia decision of *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (“*ConAgra*”),<sup>3</sup> having particular regard to Lord Neuberger’s warnings in *British Sky Broadcasting* about the effects of the globalising world and the risk of an imbalance between protection and competition. I will begin in Part II by discussing the outcome of *British Sky Broadcasting* and its place among English authorities with respect to goodwill. In Part III, I will argue that goodwill is not subject to the requirement of locality as a matter of principle, practical application or policy. Finally, in Part IV, I will consider whether a more liberal approach to goodwill would lead to the protection of mere reputation.

### II. UK’s Treatment of the Locality of Goodwill

The recent decision of *British Sky Broadcasting Group* involved a passing

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<sup>1</sup> *Starbucks (HK) Limited and another v British Sky Broadcasting Group PLC and others*, (2015) UKSC 31, (2015) 3 All ER 469.

<sup>2</sup> See D. Llewellyn et al, *Kerly’s Law of Trade Marks and Trade Names*. 16th edition, (2018).

<sup>3</sup> *ConAgra Inc v McCain Foods (Aust) Pty Ltd*, (1992) 106 ALR 465.

off action brought by a Hong Kong television provider against a United Kingdom media company. Since 2006, the foreign plaintiff had delivered a paid subscription service under the name “NOW TV” in Hong Kong. In 2012, the defendant launched a television service under the same name in the United Kingdom.

Whilst the plaintiff’s service was only available in Hong Kong by subscription, NOW TV had gained some reputation in the United Kingdom among Chinese-speaking residents. At trial, it was found that this had been achieved in three ways: Chinese-speaking residents who visited Hong Kong were exposed to the plaintiff’s name; the plaintiff’s content was also available on its website and YouTube (a video sharing platform) which was accessible by any internet user; and the plaintiff’s content was also available on some international flights between Hong Kong and the United Kingdom.<sup>4</sup> Despite that reputation acquired among United Kingdom residents, Lord Neuberger found that the Hong Kong plaintiff had no protectable goodwill and that decision is consistent with previous English authorities.<sup>5</sup>

In *Star Industrial Co Ltd v Yap Kwee Kor*,<sup>6</sup> the Privy Council heard an appeal from the Court of Appeal of Singapore. A Hong Kong company brought a passing off action against a Singapore company for copying the name and get-up of its “Ace Brand” toothbrushes. Lord Diplock found that goodwill can have “no independent existence apart from” the business carried on in the local forum. Therefore, the plaintiff failed because at the time of the action it had ceased trade relations with Singapore for five years.<sup>7</sup> *The Athlete’s Foot Marketing Associates Inc v Cobra Sports Ltd*<sup>8</sup> is another example where the foreign plaintiff had no business activities in the local forum. Consequently, it was found that the United States footwear company could have no customers in England and therefore it had no actionable goodwill.<sup>9</sup>

English authorities take this requirement of local customers even further. In *Sheraton Corporation of America v Sheraton Motels*<sup>10</sup> the foreign plaintiff owned a chain of hotels in the United States but had no hotels in England, where they sought to establish passing off. Known as the “bookings rule,” Buckley J. found that, for the purpose of having customers in the local forum, it would be sufficient if local customers made bookings through the hotel’s local office or a travel agent in the forum.<sup>11</sup> The general principle that arises is that it is not enough for a foreign business to have English customers, the foreign plaintiff must do business

4 3 All ER 469 at 473 paras. 4–5.

5 D. Brophy, *The Supreme Court Decision in Starbucks (HK) v British Sky Broadcasting Group: Is That Crazy Horse Still Running?* 37 *European Intellectual Property Review* 661, 667, (2015).

6 *Star Industrial Co Ltd v Yap Kwee Kor*, (1976) FSR 256.

7 *Id.* at 269.

8 *The Athlete’s Foot Marketing Associates Inc v Cobra Sports Ltd*, (1980) RPC 343.

9 *Id.* at 350.

10 *Sheraton Corporation of America v Sheraton Motels Ltd*, (1964) RPC 202.

11 *Id.* at 205.

with those English customers whilst they are in England.

*British Sky Broadcasting* followed these authorities and unfortunately for the Hong Kong plaintiff, it had yet to expand its subscription services into the United Kingdom. So, it was impossible for any English resident to be a paying customer whilst they were in the United Kingdom. Lord Neuberger points out that “in so far as they are customers of [the plaintiff], they are customers in Hong Kong, and not in the UK” and therefore the plaintiff has no actionable goodwill.<sup>12</sup> Despite making the concession that the foreign trader’s place of business need not be in the jurisdiction,<sup>13</sup> *British Sky Broadcasting* maintains the position that the customers and the sale transaction itself must occur within jurisdiction:<sup>14</sup>

[A] claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant’s business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad.

### III. Is Goodwill Subject to Locality?

Lord Neuberger’s decision directly contradicts *ConAgra*, in which Lockhart and Gummow JJ<sup>15</sup> adopted the words of O’Byrne AJ in *Ramsay v Nicol*<sup>16</sup> that “it is immaterial that the plaintiff is, for the time being, not within jurisdiction, or has no business being conducted at the relevant time within jurisdiction.”<sup>17</sup> The fundamental difference between *British Sky Broadcasting* and *ConAgra* is the treatment of the locality of goodwill.

Pursuant to the first of three requirements in the tort of passing off, the plaintiff must “establish goodwill or reputation attached to [his business] . . . in the mind of the purchasing public.”<sup>18</sup> There is no reference to locality, but it is clearly an integral consideration for the English courts. Having regard to legal principle, practical application and policy, to what extent is goodwill subject to locality?

#### Goodwill is Proprietary and Hence Territorial

As a legal principle, it is not in dispute that the right protected by intellectual property is a proprietary one and the law of unregistered trademarks specifi-

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12 3 All ER 469 at 488 para. 67.

13 Cf. *Alain Bernardin et Cie v Pavilion Properties Ltd*, (1967) FSR 341.

14 3 All ER 469 at 483 para. 47 (emphasis added).

15 *ConAgra Inc v McCain Foods (Aust) Pty Ltd*, (1992) 106 ALR 465. The facts of *ConAgra* are discussed in Part IV.

16 *Ramsay v Nicol*, (1939) VLR 330.

17 *Id.* at 342–343.

18 *Reckitt & Coleman Products Ltd v Borden Inc*, (1990) 17 IPR 1 at 7.

cally protects “[t]he property in the business or goodwill likely to be injured by... misrepresentation.”<sup>19</sup> As Lockhart J in *ConAgra* pointed out, this characterisation of goodwill as a proprietary right has led to the assumption that goodwill is territorial and therefore its existence is limited to a specific geographic area.<sup>20</sup>

This was the assumption that Lord Neuberger made, relying on these words from Professor Wadlow: “[t]he reason why goodwill is territorial is that it is a legal proprietary right.”<sup>21</sup> However, the use of “territorial” may be interpreted in two ways: first, goodwill is territorial because it has a precise physical location; second, in the alternative, goodwill is territorial because its recognition as a proprietary right depends on whether the laws of the local jurisdiction will vindicate that right.<sup>22</sup>

The first interpretation may have been correct in the 19th century and earlier, where the goodwill of a business necessarily “took the color of the place” it was geographically situated, and it was fanciful to think that the goodwill of a business could exist without a physical premise from which the trader sells their goods or services.<sup>23</sup> This historic understanding of territoriality was applied in the *Crazy Horse* case,<sup>24</sup> where Pennycuik J found that a foreign plaintiff had no actionable goodwill unless they had a place of business in the forum. However, the concept of goodwill has “evolved and continue[s] to evolve,”<sup>25</sup> and it is the second understanding of “territorial” that must be adopted today.

According to Professor Wadlow, Lord Macnaghten’s decision in *Inland Revenue Commissioners v Muller & Co’s Margarine*<sup>26</sup> marked a fundamental transformation in the treatment of the territoriality of goodwill. No longer an “appendant or appurtenant to land,” goodwill has transitioned into “an independent sui generis property right in gross.”<sup>27</sup> The significance of goodwill as a form of property is that “in the legal sense, [it] can only exist by reference to a particular system of municipal law.”<sup>28</sup> In principle, goodwill is thus not limited by locality.<sup>29</sup>

19 *AC Spalding & Bros v A W Gamage Ltd*, (1915) 32 RPC 273. See also *Blofeld v Payne*, (1833) 110 ER 509 at 285; C. Wadlow, *The Law of Passing-Off: Unfair Competition by Misrepresentations*. 188–189, 4th edition, (2011).

20 106 ALR 465 at 484.

21 3 All ER 469 at 486 para. 59 (citing Wadlow, *supra* note 19, at 188–189).

22 C. Wadlow, *Hotel Cipriana srl v Cipriani (Grosvenor Street) Ltd* [2010] EWCA Civ 110; [2010] RPC 16: *the Court of Appeal draws the line on whether a foreign business has an English goodwill or not*. 33 *European Intellectual Property Rev.* 54, 56 (2011).

23 *Id.*

24 *Alain Bernardin et Cie v Pavilion Properties Ltd*, (1967) FSR 341.

25 A. Roughton, C. Morcom, and T. St Quintin, *The Modern Law of Trade Marks*. 400, 4th edition, (2012).

26 *Inland Revenue Commissioners v Muller & Co’s Margarine*, (1901) AC 217 (see Lord Macnaghten’s decision).

27 Wadlow, *supra* note 22, at 56.

28 *Id.* at 59.

29 See W. M. C. Gummow, *Carrying on Passing off*. 7 *Sydney Law Review* 224, 231–232 (1974).



### Locality is but One Relevant Consideration

Lord Macnaghten's oft-cited formulation of goodwill defines it as the "attractive force which brings in custom."<sup>30</sup> The emphasis is placed on that attractive force because "the goodwill of a business must emanate from a particular centre or source," and "[h]owever widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."<sup>31</sup>

The locality of the foreign trader's business is necessarily a relevant consideration, as Lord Macnaghten pointed out,<sup>32</sup> but there are other considerations which impact a foreign trader's commercial relevance and its ability to attract local customers. These considerations include the ease of access for the local customer; the nature and quality of the trader's goods or services; and the international nature of the trader's industry.<sup>33</sup>

The first consideration is the physical distance between a foreign trader and the local customers, and it gives most significance to locality. When the plaintiff is a foreign entity, ease of access is the most obvious obstacle which could dilute its attractive force. For example, the close trade relations between Australia and New Zealand makes it more likely that a New Zealand business, compared to other overseas traders, will be known among Australian consumers.<sup>34</sup> Similarly, it is easier for a local customer to do business with a foreign trader across bordering jurisdictions, such as the United States and Canada,<sup>35</sup> England and Scotland,<sup>36</sup> and Hong Kong and Shenzhen.<sup>37</sup>

This salience of this physical distance has been diminished by the increased movement of people by air, land, and sea travel. Over the past decade, we also have seen the rise of online shopping,<sup>38</sup> facilitated by the worldwide web and international delivery. Consequently, almost any corner of the world is accessible, and a vendor can do business with any customer regardless of their physical location.

The second consideration asks: what is the trader selling? Professor Wadlow makes a distinction between goods or services that are "expensive, prestigious or without a satisfactory local substitute" and those that are "relatively common-

30 AC 217 at 223–224.

31 *Id.*

32 *Id.*

33 See C. L. Saw, *Goodwill hunting in passing off: time to jettison the strict "hard line" approach in England?* 8 *Journal of Business Law* 645, 666–667, (2010); Wadlow, *supra* note 19, at 167; M. J. Davidson, *Shanahan's Australia Law of Trade Marks and Passing Off*. 771 6th edition, (2016).

34 See, e.g., *Chase Manhattan Overseas Corp v Chase Corp Ltd*, (1985) 6 IPR 59 at 70.

35 See 106 ALR 465, 504; Wadlow, *supra* note 19, at 166.

36 See C. W. Ng, *Goodwill without borders*. 134 *Law Quarterly Review* 285, 291–292, (2018).

37 See *Harbour Fit International v Tan Kwai Seafood Restaurant*, (2002) HKSC 487.

38 See Ng, *supra* note 36, at 291.

place and or low value.<sup>39</sup> Whilst customers may be willing to cross an ocean to purchase goods from Selfridge's<sup>40</sup> or a haute couture gown made by a famous fashion house,<sup>41</sup> they would be less willing to do so for mass-produced footwear.<sup>42</sup>

There is also a qualitative difference between vendors of goods and service providers.<sup>43</sup> Professor Wadlow argues that the principle<sup>44</sup> that there is no actionable goodwill unless there are actual local customers should only extend to consumer goods and not to service businesses.<sup>45</sup> Even the purchase of some goods comes with a luxury experience as well as the goods itself. Whilst ease of access to goods can be improved by physical proximity or the offer of worldwide delivery, it often does not inherently compel the customer to travel great distances to go to its source. On the other hand, in the case of *Maxim's Ltd v Dye*,<sup>46</sup> a Paris restaurant with unique interiors and a museum could compel a substantial English clientele. In *Pete Waterman*,<sup>47</sup> the plaintiff's business was based New York and sells records known for their distinctive style. It has gained an industry-wide reputation that extended far beyond its physical location. The attractive force of a unique or expensive item or experience will necessarily outweigh that of a mass-produced item or fast food restaurant.

The third consideration is whether the business inherently commands an international clientele. In the example of a car rental service, the very object of that industry is to provide visitors from another state or country transportation services during their stay in a foreign place.<sup>48</sup> The same rationale applies to the hotel industry. In *Hotel Cipriana srl v Cipriani (Grosvenor Street) Ltd*,<sup>49</sup> the hotel was in Venice, but English travellers made up 30 percent of its clientele. Consequently, the fact that English customers did business with the plaintiff outside of England could not be a bar to protectable goodwill.

Having regard to the aforementioned considerations, the locality of a business or its customers cannot be determinative of the existence of a business' goodwill. Commentators have found *British Sky Broadcasting's* requirement that foreign traders must do business with local customers whilst they are in the local forum too stringent and perpetuates an "insularity inappropriate in a modern com-

39 Wadlow, *supra* note 19, at 165.

40 *Selfridge's Ltd v Selfridge's (Australasia) Ltd*, *Sydney Morning Herald* (Unreported, Supreme Court of New South Wales, Harvey CJ in Equity, 6 and 7 April 1933).

41 See *Globelegance v Sarkissian*, (1974) RPC 603; *Poiret v Jules Poiret*, (1920) 37 RPC 177.

42 RPC 343.

43 See Wadlow, *supra* note 19, at 167–168.

44 *Anheuser-Busch Inc v Budejovicky Budwar*, (1984) 4 IPR 260 at 271.

45 Wadlow, *supra* note 22, at 58.

46 *Maxim's Ltd v Dye*, (1978) 2 All ER 55.

47 *Peter Waterman Ltd v CBS United Kingdom Ltd*, (1990) 20 IPR 185.

48 See *B M Auto sales Pty Ltd v Budget Rent A Car System Pty Ltd*, (1976) 12 ALR 363; *Dominion Rent A Car Ltd v Budget Rent A Car System Pty Ltd*, (1987) 2 NZLR 395.

49 *Hotel Cipriana srl v Cipriani (Grosvenor Street) Ltd*, (2010) RPC 16.

mercial world.”<sup>50</sup> It is no longer “practical or realistic to draw dividing lines at national frontiers.”<sup>51</sup>

Whilst Lord Neuberger felt bound by previous authority, it must be noted that more liberal approaches have been taken in the United Kingdom by Lord Browne-Wilkinson in *Pete Waterman*<sup>52</sup> and Graham J in *Baskin-Robbins Ice Cream Co v Gutman*<sup>53</sup> and *Maxim's*.<sup>54</sup> Specifically in *Baskin-Robbins*, Graham J found that the law of passing off should not lay down “artificial limits as to the geographical areas over which reputation and goodwill can or cannot extend” because the question is ultimately “one of fact,” and “being questions of fact the court must be guided, and guided only, by what the proved facts establish.”<sup>55</sup>

Similarly Lockhart J in *ConAgra* stated that “[i]t is no longer valid, if it ever was, to speak of a business having goodwill or reputation only where the business it carried on.”<sup>56</sup> Goodwill is necessarily a question of fact and the relevant question is, “does the plaintiff have the necessary reputation?” rather than “does the plaintiff itself carry on business here?”<sup>57</sup> Locality is but one of several considerations which determine the existence of goodwill. This position has support in the courts of Singapore,<sup>58</sup> New Zealand,<sup>59</sup> Canada,<sup>60</sup> and Hong Kong.<sup>61</sup>

### Is Locality a Necessary Limitation in a Globalising World?

Accepting that locality is not inherent to or determinative of goodwill, a third and alternative argument was made in *British Sky Broadcasting*. Lord Neuberger reasoned that, as a matter of policy, territorial boundaries should nonetheless be imposed in order to mitigate the effects of globalisation and maintain the balance between competition and protection.<sup>62</sup>

Today’s technologies, online communication platforms and mobility of people has the result that every corner of world is accessible. On the one hand, as Lockhart J in *ConAgra* noted, this “engenders an increasing and more instantaneous awareness of international commodities . . . [g]oods and services are often preceded by their reputation abroad.”<sup>63</sup> On the other hand, Lord Neuberger points

50 See, *supra* note 33, at 662 (quoting A. Coleman, *Protection of foreign business names and marks under the tort of passing off*, 6 Legal Studies 70, 77 (1986)).

51 See, *supra* note 33, at 662; see also Ng, *supra* note 36.

52 *Peter Waterman Ltd v CBS United Kingdom Ltd*, (1990) 20 IPR 185.

53 *BaskinRobbins Ice Cream Co v Gutman*, (1977) FSR 545.

54 2 All ER 55.

55 FSR 545 at 547; see also 2 All ER 55 at 59; D. Llewelyn, T. Aplin, and W. Cornish, *Intellectual Property: Patents, Copyrights, Trademarks & Allied Rights*, 672 8th edition, (2013).

56 106 ALR 465 at 504.

57 *Fletcher Challenge Ltd v Fletcher Challenge Pty Ltd*, (1989) 1 NSWLR 196 at 205.

58 *Jet Aviation (Singapore) v Pty Ltd v Jet Maintenance Pty Ltd*, (1998) 3 SLR 287 at 297.

59 *Dominion Rent A Car Ltd v Budget Rent A Car System Pty Ltd*, (1987) 2 NZLR 395 at 405–406.

60 *Orkin Exterminating Co Inc v Pestco Co of Canada Ltd*, (1985) 19 DLR 90.

61 *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide Inc*, (2013) SGCA 65.

62 3 All ER 469 at 487 para 63.

63 106 ALR 465 at 504.

to the dangers of this absolute breakdown of sovereign boundaries. Online platforms and mass advertisement have made it “so easy to penetrate into the minds of people almost anywhere in the world so as to be able to lay claim to some reputation within virtually every jurisdiction.”<sup>64</sup>

Lord Neuberger’s warnings about the slippery slope towards perceiving our world as a homogenous whole with a single international market, where businesses can have a “single international goodwill,”<sup>65</sup> should be heeded. Cooke P in *Dominion Rent A Car Ltd v Budget Rent A Car System Pty Ltd*, held that “international business may have one individual goodwill.”<sup>66</sup> Graham J in *Baskin Robbins* also commented that certain businesses may be “truly international in character and the reputation and goodwill attaching to them cannot in fact help being international also.”<sup>67</sup> These statements are a recognition of the internationalisation of trade and today’s global commercial reality, but they should not be interpreted to suggest that a general international reputation is sufficient.

In the case of *Wienerwald Holding AG v Kwan*,<sup>68</sup> the foreign plaintiff operated a restaurant chain in continental Europe, the United States, and Japan. It would be hard to argue that the plaintiff was not an “international” business, but the court rejected that this alone could prove the plaintiffs had sufficient goodwill in Hong Kong, the local forum where the passing off action was brought.<sup>69</sup> As Cooke P later clarifies, goodwill is necessarily always a question of fact.<sup>70</sup>

Whilst heeding Lord Neuberger’s warnings, the effects of globalisation should not be overstated. The imbalance between protection of the foreign trader and local competition that would supposedly result is unlikely to materialise because of the other limbs of passing off.<sup>71</sup> The requirements to establish the tort of passing off, known as the “classic trinity,” are goodwill, misrepresentation, and damage.<sup>72</sup> If a foreign trader only has “some reputation” in a forum, under the misrepresentation limb, the foreign plaintiff would struggle to demonstrate that a substantial number of persons were misled by the defendant’s competing goods or services. Further, turning to the damage limb, even if the foreign trader has a substantial reputation, it cannot show that its goodwill and business has suffered damage unless they are or intend to carry on business within the local market.<sup>73</sup> Therefore, all three limbs inform each other and “act in concert to complete the tort and limit its reach.”<sup>74</sup>

64 3 All ER 46 at 487 para. 63.

65 *Id.*

66 2 NZLR 395; 9 IPR 367 at 379.

67 FSR 545 at 548.

68 *Wienerwald Holding AG v Kwan, Wong, Tang and Fong*, (1979) FSR 381.

69 *Id.* at 396–397.

70 2 NZLR 395; 9 IPR 367 at 379.

71 Ng, *supra* note 36, at 292.

72 *Reckitt & Coleman Products Ltd v Borden Inc.*, (1990) 17 IPR 1 at 7.

73 See Part IV.

74 Gummow, *supra* note 29, at 230–231; see also 106 ALR 465 at 505 (Lockhart J); Ng, *supra* note 36,

The pitfalls of globalisation of which Lord Neuberger warned, where a foreign trader could lay claim to protectable goodwill anywhere, is therefore somewhat exaggerated<sup>75</sup> and cannot justify the imposition of territorial limits on goodwill as matter of policy.

#### IV. Potential Customers or “Mere Reputation”?

In the Australian case of *ConAgra*, the foreign plaintiff, a United States frozen food company sought to protect its goodwill from being exploited by the local defendant. In 1989, the plaintiff launched a product in the United States called “Healthy Choice,” which was marketed to be healthy but still pleasant tasting. The defendant company was the Australian frozen food counterpart, McCain Foods. Whilst in the United States, one of its marketing directors saw the plaintiff’s product and was impressed by the packaging. In 1991, after market research revealed a demand for healthy meals, “McCain’s Healthy Choice” was launched in Australia.

The court considered the geographical requirements of a foreign plaintiff’s protectable goodwill and found that the foreign trader does not need to have a place of business in Australia<sup>76</sup> nor does the trader need do business here.<sup>77</sup> The Australian position goes further to protect a trader’s reputation among *potential* customers:<sup>78</sup>

In my view, the plaintiff, by reason of business operations conducted outside the jurisdiction, has acquired a reputation with a substantial number of persons who would be potential customers were it to commence business within the jurisdiction, the plaintiff has in the real sense a commercial position or advantage which it may turn to account.

Contrary to *ConAgra*, Lord Neuberger in *British Sky Broadcasting* raised three concerns. First, Lord Neuberger found that the protection of goodwill derived from potential customers would be to protect reputation acquired from advertising alone, which is tantamount to protecting “mere reputation.”<sup>79</sup> Further, such a liberal approach to goodwill grants the foreign trader an “effective monopoly” for simply advertising in a local forum, and therefore tips the balance between competition and protection in favor of the latter.<sup>80</sup> Finally, Lord Neuberger raised an alternate argument that, even if the Australian position is accepted, a foreign plaintiff has no relief unless their marketing efforts directly target local consumers.<sup>81</sup>

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at 290.

<sup>75</sup> K.H.F Kwok, *Protection of a Reputable Foreign Trader’s Legitimate Interests under the Law of Passing-off*. 132 Law Quarterly Review 186, 191, (2016).

<sup>76</sup> Cf. FSR 341.

<sup>77</sup> Cf. 3 All ER 469; *Star Industrial Co Ltd v Yap Kwee Kor*, (1976) FSR 256.

<sup>78</sup> 106 ALR 465 at 534 (emphasis added); see also 106 ALR 465 at 506.

<sup>79</sup> 3 All ER 469 at 486 para. 61.

<sup>80</sup> *Id.* at 487 para. 62.

<sup>81</sup> 3 All ER 469 at 488 paras. 66–67.

### Intention to Expand, Not Mere Reputation

Lord Neuberger found that *Anheuser-Busch Inc v Budejovicky Budwar*<sup>82</sup> stands as authority that mere reputation is insufficient. In that case, the plaintiffs were the United States beer company that sold “Budweiser.” The product had a reputation in England from spill-over advertisements, and a substantial amount was sold in England—around 150,000 to 250,000 cases each year. However, it was fatal to the plaintiff’s action that all those cases were only sold and available to buy within the United States’ embassy and military establishments in England.<sup>83</sup> The court found, and Lord Neuberger concurred, that the plaintiff’s reputation existed only in a “vacuum” because English consumers could not actually buy the plaintiff’s beer.<sup>84</sup>

Mere reputation is not sufficient because it is the “desire to become a customer of the plaintiff without the ability to actually be one.”<sup>85</sup> Without the means and intention to eventually do business in that jurisdiction, in the words of Gummow J in *ConAgra*, the plaintiff has no “commercial position or advantage which it may turn to account” and so no protectable goodwill. Therefore, the requirement in *ConAgra* that a foreign trader must have “undoubted”<sup>86</sup> or unequivocal<sup>87</sup> intention to commence trade in the local forum distinguishes the Australian approach from the protection of “mere reputation.”

The lack of actual customers is no bar to an action of passing off, and Gummow J points to the principles governing temporality of goodwill. A trader who has ceased business activities has no *actual* customers, but the reputation it had acquired still has value, and the trader’s interest in exploiting that reputation at a later time—by resuming trade—is a protectable interest.<sup>88</sup>

Similarly, *ConAgra* recognised a foreign trader’s interest in exploiting its reputation in the local forum by commencing trade there in the future. Both Lockhart and Gummow JJ acknowledged the problem of the commercial pit, and a trader should be protected from the “pirate” who “digs a pit in a path along which he has reason to believe another man will shortly travel.”<sup>89</sup> Precisely, the head of damage is the loss of business opportunity,<sup>90</sup> which corresponds to the loss of po-

<sup>82</sup> FSR 413; 4 IPR 260.

<sup>83</sup> *Anheuser-Busch Inc v Budejovicky Budwar*, (1984) 4 IPR 260 at 270–271.

<sup>84</sup> *Id.* at 277–278; RPC 343 at 350.

<sup>85</sup> *Novelty Pty Ltd v Amanresorts Ltd*, (2009) FSR 20 para. 62.

<sup>86</sup> *Turner v General Motors (Australia) Pty Ltd*, (1929) 42 CLR 352 at 364; 106 ALR 465 at 505, 522; see also Davidson, *supra* note 33, at 783.

<sup>87</sup> *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide Inc*, (2013) SGCA 65 para. 142.

<sup>88</sup> 106 ALR 465 at 534–535 (citing *Ballarat Products Ltd v Farmers Smallgoods Co Pty Ltd*, (1957) VR 104 at 108).

<sup>89</sup> *Turner v General Motors (Australia) Pty Ltd*, (1929) 42 CLR 352 at 364.

<sup>90</sup> See Wadlow, *supra* note 19, at 281–3; Kwok, *supra* note 75, at 189–190.

tential customers.

The case of *Ten-Ichi v Jancar Ltd*<sup>91</sup> is a useful illustration of this head of damage. The foreign plaintiffs operated a successful chain of restaurants in Japan called “Ten-Ichi.” They had plans to bring their chain to Hong Kong in the immediate future, but they were narrowly beaten by the defendants, who were well aware of the plaintiff’s reputation. Sears J found that the plaintiffs had “los[t] the opportunity to control and develop the impact of their reputation [in Hong Kong] and thus los[t] potential customers.”<sup>92</sup>

In Australia, the case of *Westinghouse Electric Corp v Thermopart Pty Ltd*<sup>93</sup> involved a plaintiff who was an American manufacturer of washing machines. The plaintiff’s “vigorous” advertisement efforts internationally, including in Australia, and its negotiations to enter the Western Australian market was sufficient to establish goodwill, which passing off protected.<sup>94</sup> Similarly in *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide Inc*<sup>95</sup> the Court of Appeal of Singapore found that it was “common-sense” and “in line with commercial reality” to protect a foreign trader’s interest where they have evinced “unequivocal intention” to trade in the local market through extensive pre-trade advertisement.<sup>96</sup> The English Court of Appeal, in *Chelsea Man Menswear Ltd v Chelsea Girl Ltd*,<sup>97</sup> has also recognised passing off when the plaintiff wished to geographically expand its business, albeit in a domestic context.<sup>98</sup> The plaintiff sold apparel under the name “Chelsea Man” and was awarded a nationwide injunction, even though it only had three stores in London.

### Sufficient Renown

In *British Sky Broadcasting*, Lord Neuberger also argued that the liberal position adopted by Australia, where a foreign trader’s future business opportunities are protectable, would lead to an imbalance between competition and protection. However, the protection of a foreign trader’s future business opportunity in the local forum is premised on the fact that the trader does in fact make out the existence of its reputation.<sup>99</sup> The foreign plaintiff must have potential customers locally such that a “substantial number of persons are aware of the plaintiff’s product.”<sup>100</sup>

Gummow J in *ConAgra* also considered the balance of interests and found

91 *Ten-Ichi v Jancar Ltd*, (1990) FSR 151.

92 *Id.* at 155.

93 *Westinghouse Electric Corp v Thermopart Pty Ltd*, (1968) WAR 39.

94 *Id.* at 40.

95 *Staywell Hospitality Group Pty Ltd v Starwood Hotels & Resorts Worldwide Inc*, (2013) SGCA 65.

96 SGCA 65 paras. 136, 141–145; see also *CDL Hotels International Ltd v Pontiac Marina Pte Ltd*, (1998) FSR 839, 861.

97 RPC 189.

98 *Id.* at 204–205; see also *Brestian v Try*, (1958) RPC 262.

99 106 ALR 465 at 517.

100 42 CLR 352 at 364; 106 ALR 465 at 507, 522.

that it would not be disturbed by the court's decision.<sup>101</sup> The *ConAgra* principle acknowledges the plaintiff trader's interest in protecting the commercial advantages that flow from its reputation. The requirement of awareness among a substantial number of people also ensures that the plaintiff is not granted an undeserved monopoly, thereby balancing the trader's interests with the defendant and consumer's interests in maintaining a competitive market.

This balance is apparent in the outcome of *ConAgra*, where the foreign plaintiff had no protectable goodwill because it failed to establish a local reputation, despite its intention to introduce "Healthy Choice" into Australia. Whilst *ConAgra* had supported the product in the United States with considerable advertising, the plaintiff had difficulty pointing to sufficient advertising within Australian, either direct and indirect.

The plaintiff tendered evidence of advertisements United States magazines which were sold in Australia. In 1990 and 1991, there were only around 2500 sales, which was insubstantial when compared to the *Australian Woman's Day's* almost one million sales each week.<sup>102</sup> The plaintiff also sought to argue a spill-over effect from the frequent air traffic between the two countries. Lockhart J rejected this as an adequate source of indirect advertising, finding that Australians travelling to the United States are generally short-term visitors and unlikely to purchase frozen foods.<sup>103</sup> Therefore, the plaintiff did not have sufficient local reputation.

#### How Reputation is Acquired

Extraordinarily, and contrary to the outcome, Lord Neuberger in *British Sky Broadcasting* seemingly left open the question of whether a foreign plaintiff has relief if they have "launched a substantial advertising campaign within the UK making it clear that it will imminently be marketing its goods or services within the UK."<sup>104</sup> However, even accepting the Australia position, Lord Neuberger rejected the Hong Kong plaintiff's "well advanced" plans to introduce its services in the United Kingdom because those plans were "not in the public domain."<sup>105</sup>

This raised an incidental question of how a foreign trader must acquire its reputation. According to Lord Neuberger, the local customers must be directly targeted by advertisements. However, the purpose is to acquire brand recognition, and it should not matter whether reputation is achieved through direct or indirect forms of advertising. In *Hansen Beverage Company v Bickfords (Australia) Pty Ltd*,<sup>106</sup> Finkelstein J found that indirect forms of advertising can be just as effective

101 106 ALR 465 at 517.

102 106 ALR 465 at 508–509.

103 *Id.* at 510.

104 3 All ER 469 at 488 paras. 66–67.

105 *Id.* at 488 para. 66.

106 171 FCR 579.



as, if not more than, direct forms to establish a trader's reputation.<sup>107</sup> In the context of today's social media and communication platforms, advertising is "multidirectional."<sup>108</sup> Products are not only marketed from trader to prospective customers, but they are also marketed from celebrities to prospective customers and from peer consumers to other customers.<sup>109</sup>

## V. Conclusion

Although *British Sky Broadcasting* is consistent with previous English authorities, considerations of locality need not be determinative of goodwill. Goodwill is a proprietary right, but it does not follow in principle that goodwill is therefore limited to a certain geographical location. Location is undoubtedly a relevant consideration, but other factors such as globalisation, the quality of the goods, and the nature of the trader's industry may also impact the attractive force of a business. Even having regard to the effects of our globalising world, it is not necessary as a matter of policy to impose geographical limits on goodwill.

In the facts of *British Sky Broadcasting*, whether the Hong Kong service provider had passing off action should have depended on the extent of their reputation in the United Kingdom and whether it genuinely intended to introduce its services there. That is the Australian position in *ConAgra*, which acknowledges commercial reality and also maintains the balance between protecting a trader's business opportunities and local competition.

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107 171 FCR 579 at 593–594 paras. 62–64.

108 Ng, *supra* note 36, at 300–301.

109 *Id.*

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## **DUELING IDEAS OF HONOR AND ANTI-DUELING NETWORKS: MORAL REFORM IN ANTEBELLUM CHARLESTON AND SAVANNAH**

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### Introduction

American generals Christopher Gadsden and Robert Howe faced off in a duel in 1778 near Charleston, South Carolina. Both emerged unscathed. Upon hearing of the dispute, a British major, John André, used the story in a satirical song set to the tune of "Yankey Doodle."<sup>1</sup> His lyrics reflect the hold that duty and

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<sup>1</sup> John André, *Duel between General Howe and General Gadsden: song*, ca.1851. (n.d.). South Carolina Historical Society. Charleston, SC. Major André, a British spy, was executed by Washington's Army in 1780.

honor exerted on gentlemen of that era (emphasis added):

They met, and in the usual way,  
 With hat in hand saluted,  
 Which was, no doubt, to show how they,  
 Like Gentlemen, disputed.

And then they both together made,  
 This honest declaration,—  
*That they came there by honor led,  
 And not by inclination.*

That is, they fought, 'twas not because  
 Of rancor, sprite or passion,  
*But only to obey the laws  
 Of Custom and the fashion.*

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For much of the nineteenth century, if a Southern gentleman took offense at another's remark, he was expected to seek recourse through a deal, known as a "satisfaction." However, by the century's end, virtually no one of genteel or any social status considered formal dueling a suitable, let alone required, way to answer an insult. Historians point to impersonal historical forces, such as the mass reaction against the gore of the Civil War, to explain the shift in public mores against dueling.<sup>2</sup> But that is an incomplete assessment. The shift was also due to the determined efforts of anti-dueling activists, who worked to suppress dueling in Charleston, South Carolina, and Savannah, Georgia decades before the Civil War.

Clergymen launched the Charleston Anti-Duelling Association in late 1826 after realizing that their sermons against the immorality of dueling failed to reduce its frequency.<sup>3</sup> They had known for some time that eliminating dueling would require political action beyond the pulpit. To do so, they allied with well-known political figures to encourage reform in Charleston and to export their cause elsewhere. Several months later, like-minded reformers created the Savannah Anti-Duelling Association, where they read aloud the constitution of the Charleston Anti-Duelling Association in their first meeting<sup>4</sup>

Charleston's anti-duelists were dissatisfied with their state's legislative

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He had been caught aiding Benedict Arnold in the latter's betrayal of the Patriots at West Point.

2 Jack K. Williams, *Dueling in the Old South: Vignettes of Social History*, Texas A&M University Press, 81-82 (1980).

3 "Duelling" is the antiquated spelling of "dueling." I will use the latter except in quotations and when referring to titles like the Savannah Anti-Duelling Association. (This recalls Ogden Nash's "The Lama": "The one-l lama, / He's a priest. / The two-l llama, / He's a beast. / And I will bet / A silk pajama / There isn't any / Three-l llama.")

4 "Anti-Duelling Association" (broadside), Savannah Anti-Duelling Association Constitution and Minutes, 1827-1838, MS 680, Vol. I, Georgia Historical Society, Savannah, Georgia. Hereafter, SAA Minutes.

and executive branch suppression efforts. Though South Carolina criminalized dueling in the 1810s, the Charleston authorities rarely interfered in such duels. When they did get involved, the disputants saw their intervention as an assault on the code of honor used to resolve disputes. Juries also sometimes saw it that way.<sup>5</sup> The Anti-Duelling Association made no headway in the legal realm during its five years of operation. Its leaders felt frustrated that effective anti-dueling legislation failed to garner support in the state house, and the authorities continued to shirk their enforcement duties in the face of the association's advocacy.

In Savannah, where the authorities administered anti-dueling laws just as poorly as in Charleston, anti-duelists used personal interventions to prevent duels. In these interventions, Savannah's anti-duelists appealed to the code of honor, not to the legal code. Members of the Savannah Anti-Duelling Association's standing committee contacted potential duelists and offered arbitration services within the *code duello* or dueling code. They discovered early on that personal intervention was more effective than law enforcement in permanently resolving disputes and averting duels. Arrests might have postponed or even prevented a duel but only while the men were confined. Mediation according to the *code duello* could resolve the question of honor, thereby permanently ending the dispute. Through personal interventions and only occasional collaboration with the authorities, Savannah's anti-duelists worked within the honor culture that governed Southern gentlemen's behavior. They suppressed dueling by incremental and indirect tactics. Their techniques teach us lessons about how moral suasion, laws, and personal relationships contributed to moral reform efforts in the antebellum South.

Though historians understand dueling as part of "Southern honor," as Bertram Wyatt-Brown entitled his study, they view anti-dueling work through a different prism.<sup>6</sup> Thomas J. Carmody considers opposition to dueling as an element of the political activity of clergymen.<sup>7</sup> Others write off anti-duelists as entirely ineffective and instead attribute dueling's disappearance to the Civil War.<sup>8</sup> Meanwhile legal thinkers C.A. Harwell Wells and Lawrence Lessig emphasize that laws against dueling influenced social norms.<sup>9</sup> None of these approaches treats Southern culture, moral suasion and public policy as elements of a single discussion of anti-dueling as a moral reform issue within a larger civil society. Elizabeth Fox-Genovese observes that politically influential Southerners viewed reform ef-

5 See Williams, *Dueling in the Old South*, 9, and Ryan Chamberlain, *Pistols, Politics, and the Press: Dueling in 19th Century American Journalism*, McFarland & Company Inc., 92 (2009).

6 See Bertram Wyatt-Brown, *Southern Honor: Ethics & Behavior in the Old South*, Oxford University Press, 350-361 (2007).

7 See Thomas J. Carmody, "'Arise and Stand Forth': A Fantasy Theme Analysis of American Clergy and Their Calls for Social Action in the Nineteenth Century Anti-Dueling Movement, 1804-1856" (Ph.D. diss., Regent University, 2004).

8 Williams, *supra* note 2 at 81-82.

9 See C.A. Harwell Wells, "The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America," *Vanderbilt Law Review* 54, no. 4, 2001: 1805-1847 and Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review* 62, no. 943, 1995: 944-1045.

forts as a threat to the maintenance of the plantation economy and planters' social and economic power.<sup>10</sup> Anti-duelists nevertheless coalesced into voluntary associations to reform gentlemen's behavior despite the Slave South's mistrust of civil society reformers. This essay examines how those opponents of dueling developed and adapted tactics to achieve their reform goals without undermining the honor culture of the South's dominant class.

### A Picture of Ritual Violence

Dueling was a gentleman's ritual. The 1777 Irish Code of Honor dictated the duel's many steps for most participants on both sides of the Atlantic.<sup>11</sup> South Carolina Governor John Lyde Wilson's more detailed Code of Honor replaced the Irish regulations among Southerners in 1838.<sup>12</sup> The codes standardized the ritual from insult to satisfaction. They required each participant (or principal) to deputize a "second" to take "custody of [his] honor" and represent him in all interactions with the other party.<sup>13</sup> Once the offended party issued a challenge, it was the seconds' prerogative to negotiate a settlement, usually involving an apology for the initial offense and sometimes a public retraction; if they could not come to terms, seconds would agree on behalf of their principals to the time and place of the meeting, the distance from which the duelists would fire, and the choice of weapon — all to ensure "perfect equality." Once on the dueling ground, with principals and surgeons present, the seconds would again attempt to negotiate a resolution. Failing that, they loaded the guns and positioned and armed their principals. At the agreed upon signal, the duelists fired their weapons. Any wound ended the duel and achieved satisfaction. Most of the time, though, neither would be wounded, and the challenger or his second would announce that he had gained satisfaction. Then the principals would shake hands and part, sometimes even as friends. In more heated disputes, the challenger would order the guns reloaded and they would repeat the shooting till he felt satisfied or someone was hit. Many minutiae accompanied each of the above steps, but this was the broad outline of the ritual in the antebellum South with only slight variations.<sup>14</sup>

A gentleman would duel only with his social equal, so a man's eligibility to defend his honor in this manner reflected his social standing. Who was eligible was not always clear. Though most common among the upper class, the practice

10 Elizabeth Fox-Genovese, *Within the Plantation Household: Black and White Women of the Old South*, The University of North Carolina Press, 248-249 (1988).

11 See the complete Irish Code in the Appendix to John Lyde Wilson, *The Code of Honor, or, Rules for the Government of Principals and Seconds in Duelling*, as printed in Williams, *supra* note 2 at 100-104.

12 See Wilson, *The Code of Honor*, as printed in Williams, *Dueling in the Old South*, 91-99. Wilson's Code of Honor comprises eight chapters, each with anywhere between two and seventeen instructions to account for the various paths a dispute could take. Lin-Manuel Miranda provides a concise lyrical tutorial of the Code's key components in his Broadway hit "Ten Duel Commandments," *Hamilton: An American Musical* (Atlantic Records 2015).

13 Wilson, *The Code of Honor*, as printed in Williams, *supra* note 2 at 91.

14 For more on dueling methods, see Williams, *supra* note 2 at 3-4.

was not only for the planter class, the society's highest level. "The duel was not an aristocratic custom that was learned at 'mother's knee,'" Wyatt-Brown writes. Rather, "dueling was a means to demonstrate status and manliness among those calling themselves gentlemen, whether born of noble blood or not."<sup>15</sup> The dueling class comprised men from a variety of economic, cultural, religious, and professional backgrounds. Jack K. Williams observes that the category of gentlemen included planters (though there were varying degrees of status within the planter community), bankers, military officers, newspaper editors, lawyers, and college professors and students. In rare instances, doctors and preachers duelled, too.<sup>16</sup>

The specter of dueling hovered over politics. The Nullification Crisis in South Carolina precipitated at least one dueling death, and some South Carolinian legislators gained notoriety for challenging their political critics to duels.<sup>17</sup> In 1802, Savannah's recently retired mayor, David B. Mitchell, killed a rival in an "affair of honor."<sup>18</sup> The following year, a Republican state legislator dueled a Federalist alderman.<sup>19</sup> The Republican's second, George Troup, was a sitting member of the Georgia legislature and later a United States congressman, senator, and Georgia governor.<sup>20</sup> Savannah gentlemen served as seconds in two of the highest profile duels in the United States. For his 1804 duel against Aaron Burr, Alexander Hamilton selected as his second Savannah's Nathaniel Pendleton, a Georgia delegate to the Constitutional Convention (though he did not attend) and George Washington's appointee as Georgia's first federal judge.<sup>21</sup> Two decades later, U.S. congressman Edward Fenwick Tatnall from Savannah accompanied Senator John Randolph as he faced his colleague Henry Clay in a duel in Virginia.<sup>22</sup> Neither was wounded, and the disputants reconciled. "Randolph's pistol had failed to prove that Clay was a 'blackguard' and Clay's pistol had also failed to prove that Randolph was a 'calumniator'; but according to the mysterious process of reasoning which makes the pistol the arbiter of honor, the honor of each was satisfied," wrote a biographer of Clay.<sup>23</sup>

Dueling needed interested publics — in other words, cities — to make social sense. Hence, the practice thrived not on the Southern frontier but along the region's coastal plains, where slaveholders projected what Williams calls a

15 Wyatt-Brown, *supra note 6* at 355.

16 Williams, *supra note 2* at 27-35, 74.

17 Jack Kenny Williams, "The Code of Honor in Ante-Bellum South Carolina," *The South Carolina Historical Magazine* 54, no. 3, 114 (1953).

18 Thomas Gamble, *Savannah Duels and Duellists: 1733-1877*, Review Publishing & Printing Company, 111-112 (1923).

19 *Ibid.*, 114-118.

20 *Ibid.*, 115.

21 *Ibid.*, 124-129.

22 *Ibid.*, 172-176. Having participated in duels himself, Tatnall was a wise choice for second. Georgia Governor George R. Gilmer commented on Tatnall upon his death: "His spirit was the essence of chivalry. He preferred death to the slightest coloring of dishonor. He risked his life, and was near losing it several times, that he might be considered above wrongdoing," quoted in Gamble, *supra note 18* at 180-181.

23 Carl Schurz, as quoted in Gamble, *supra note 18* at 176.



“romanticized aristocracy” for the rest of society.<sup>24</sup> Charleston and Savannah anchored that region economically and socially. Though Charleston’s population was triple that of Savannah’s, they were the two most populous cities between Louisiana and Virginia and were separated by only one day’s travel by steam. (By comparison, it took about a week to go from Savannah to New York.)<sup>25</sup> Men duelled to protect their reputations as honorable gentlemen, something only necessary in a place where they cared about — and depended on — how others perceived them.

Gentlemen believed that personal and familial honor could not be resolved through the judicial system. That is why personal insults often precipitated duels. Wyatt-Brown calls the dueling ground a “repository of self-pity.”<sup>26</sup> Being deemed a wretch, coward, poltroon or liar aggravated gentlemen’s insecurity about their manliness.<sup>27</sup> Such insults could be remedied only through gentlemanly behavior, which called not for bringing libel suits in court but for physically defending one’s honor on the “field of honor.” According to Wells, libel laws were an ineffective substitute for duels as a gentleman’s recourse against defamation. In Virginia, expanded libel laws did not reduce the incidence of dueling, and when juries faced defamation suits, they agreed “with the general view that a gentleman should defend his honor outside of the courtroom.”<sup>28</sup> Georgia, too, sought to substitute libel suits for duels, though to unknown effect. The state’s 1816 penal code defined libel and its punishments immediately following the sections criminalizing dueling.<sup>29</sup> In rejecting the notion of prosecuting duelists, the local chapter of the Society of the Cincinnati — comprising the officers of the American Revolution and their descendants, including notable Savannah residents — bridged the divide between the honor and law codes, stating, “All the decisions in the courts of justice [should turn] wholly on the fairness with which the duel was conducted.”<sup>30</sup> In other words, participants should be protected from prosecution so long as they abided by the duel’s ritual demands.

The grip of the *code duello* on political debate restricted newspaper editors’ freedom to express their beliefs. Editors exposed themselves daily to accusations of defamation and libel that could only be resolved by a duel.<sup>31</sup> Sometimes

24 Williams, *supra* note 2 at 7.

25 The implications of the difference between Charleston’s population (25,000) and Savannah’s (7,500) will be discussed below; see “Table 5. Population of the 61 Urban Places: 1820,” June 15, 1998, <https://www.census.gov/population/www/documentation/twps0027/tab05.txt>; newspapers announced ship arrivals and departures daily.

26 Wyatt-Brown, *supra* note 6 at 360.

27 Wyatt-Brown, *supra* note 6 at 358-361.

28 Wells, *supra* note 9 at 1829. Note 208 adds that after dueling disappeared in the 1880s, the number of libel suits rose.

29 *Acts of the General Assembly of the State of Georgia, 090 § 4-11 Ninth Division* (1816), <http://metis.galib.uga.edu/ssp/cgi-bin/legis-idx.pl?sessionid=836745db-260b16d391-1063&type=law&byte=3778540&lawcnt=90&filt=doc>. Hereafter General Assembly Acts.

30 As quoted in Gamble, *supra* note 18 at 135.

31 Clement Eaton, *Freedom of Thought in the Old South*, Duke University Press, 163 (1940).

they lobbed insults at one another or at political figures; other times they published offensive remarks made by others. Clement Eaton argues that Southerners' proclivity towards violence — ritual or otherwise — contributed to near unanimity on slavery in newspapers, though not many editors opposed slavery to start with.<sup>32</sup>

Duelling took place within a widespread culture of Southern violence. A common Northern taunt at the time was that society was lawless below the Mason-Dixon line, and not just because of slavery. As the winner of the Savannah Anti-Duelling Association's 1829 essay competition, William Jay of New York, argued, "If . . . we compare the state of society in New-England, with that in some other sections of the Union, we shall be disposed to doubt whether duelling does really exert that soothing influence over human passions, that has been ascribed to it."<sup>33</sup> That observation was not confined to Northerners. Upper-class white Southerners were trained "from youth to the unrestrained exercise of will," an Englishman visiting the South in 1857 reported. "When justice is so lamely administered . . . men naturally take the law into their own hands. This wild justice easily degenerates into lawless violence, and a bloodthirsty ferocity is developed among the ruder members of the community."<sup>34</sup> Dickson D. Bruce, Jr., argues that many Southerners considered violence unavoidable and therefore something to regulate rather than eradicate.<sup>35</sup> Such debate as occurred challenged not the morality of violence, but its proper application in a class-based social order, he notes.<sup>36</sup> Though white Southerners overlooked it, violence was ubiquitous wherever they exploited slaves — on plantations, in domestic labor, and in the cities.

Advocates and opponents of dueling viewed "passion" as a moral danger. Many held the Enlightenment belief in the need for a social order that restrained passion, an inherent component of human nature.<sup>37</sup> Defenders of dueling claimed that the *code duello* curbed gentlemen's natural inclination to offend or insult.<sup>38</sup> When someone failed to suppress that inclination, Bruce argues, it was often while criticizing another gentleman for indulging his passionate nature by putting himself over the public good.<sup>39</sup> And when a gentleman suffered offense, the honor code forbade him to act on it right away. Adherence to the *code duello* required the restraint of passion. The code "attempted to reduce the level of spontaneity" and

32 *Ibid.*, 162-195.

33 William Jay, "A Prize Essay on Duelling. To Which Was Awarded a Gold Medal, By The Savannah Anti-Duelling Association," *The New World; a Weekly Family Journal of Popular Literature, Science, Art and News (1840-1845)*, New York (1842).

34 As quoted in Stephen West, "From Yeoman to Redneck in Upstate South Carolina, 1850-1915" (Ph.D. diss, Columbia University, 1998): 99. The Englishman, James Stirling, was commenting not just on dueling, but also on the practice of brawling among the lower classes.

35 Dickson D. Bruce, Jr., *Violence and Culture in the Antebellum South*, University of Texas Press, 7 (1979).

36 *Ibid.*, 6.

37 *Ibid.*, 8-12.

38 *Ibid.*, 29.

39 Dickson D. Bruce, *Violence and Culture in the Antebellum South*, 31 (1979)

called for gentlemen to reflect on the consequences of their words before taking steps towards a duel.<sup>40</sup> Hence the instruction in Governor Wilson's Code to "be silent on the subject" when "you believe yourself aggrieved."<sup>41</sup>

Opponents similarly emphasized the importance of restraint, condemning, as the prize-winner Jay did, "the passions indulged by the duellist." According to Jay, the violence of the antediluvian world was one of the reasons for the flood.<sup>42</sup> While dueling may have been more respectable than whipping, caning, or stabbing a rival upon receiving an insult (as Southern men of the lower classes tended to do, and as gentlemen did only to adversaries considered beneath them), it still reflected the gentleman's capitulation to his passion for honor derived from a display of physical courage. Anti-dueling clergymen beseeched the public, and especially women, to urge restraint among their pugnacious men and to reject physical courage as a source of honor.

There are no reliable statistics on dueling. Most duelists met in seclusion. The lack of will to prosecute duelists — a topic further discussed below — means there are few police and court records. Newspapers did not report on all duels, instead highlighting those that ended with wounds or death. (Most ended without injury.)<sup>43</sup> One nineteenth-century writer identified nearly fifty duels by citizens of Charleston between 1800 and 1860.<sup>44</sup> Thomas Gamble, a journalist and historian who served as Savannah's mayor in the mid-twentieth century, argues that "no picture of the Savannah of the past can be complete without including the *code duello* within its scope."<sup>45</sup> Williams reports non-Southerners' surprise at meeting numerous men who boasted about their dueling triumphs and the visitors' shock at the general public's apathy towards — and in some cases support for — the whole enterprise.<sup>46</sup>

### The Tactics of Reform

Convening in autumn 1826 at the home of a local state senator with a number of political leaders, Charleston's clergy announced the intention of the newly-founded Charleston Anti-Duelling Association: "the suppression to the utmost that may be effected, of the practice of duelling."<sup>47</sup> Its founders directed members of the standing committee to intervene in disputes with or without support from the local authorities; disseminate anti-dueling literature; and "adopt all prudent,

40 Dickson D. Bruce, *Violence and Culture in the Antebellum South*, 32 (1979)

41 John Lyde Wilson, *The Code of Honor* (1838)(As cited in Jack K. Williams, *Dueling in the Old South: Vignettes of Social History*, 91 (2000))

42 Jay, *supra* note 33

43 Williams, *supra* note 17 at 121

44 William L. King, *The Newspaper Press of Charleston, S.C.: A Chronological and Biographical History, Embracing a Period of One Hundred and Forty Years*, (Lucas & Richardson, 1882) 164-167. Williams cited this course, albeit incompletely, in "The Code of Honor in Ante-Bellum South Carolina," 113-114.

45 Gamble, *supra* note 18 at 302

46 Williams, *supra* note 17 at 114

47 *United States Catholic Miscellany* (1822-1835): Charleston, Oct. 7, 1826, p. 94, Hereafter *USCM*.

honourable, and legal measures, for lessening as much as possible the frequency of the practice in this Community; and gradually effecting its entire suppression.” Its leadership reflected the association’s political strength: General Thomas Pinckney, former governor of South Carolina and hero of two wars, sat as President; of the three vice-presidents, one was the state senator who hosted the gathering, and another was a federal judge.<sup>48</sup>

Thanks to encouragement from the Charleston Anti-Duelling Association, Savannah had an anti-dueling society with similar goals by January 1827. Its president, George Jones, was a long-time public servant, former mayor and, for just a few months, U.S. senator. Its two vice-presidents had also been mayors; one served a brief stint in the U.S. Senate, and the other had been a federal judge.<sup>49</sup> The Savannah Anti-Duelling Association also included prominent local merchants and future jurists. James Moore Wayne, an early recruit, served six years in the U.S. Congress before his appointment to the U.S. Supreme Court in 1835 (where he served till his death in 1867).<sup>50</sup>

Charleston and Savannah’s anti-duelists employed incremental and indirect tactics to discourage dueling and change public opinion. Rather than frontally assault citizens’ belief that physical courage was a crucial element of a gentleman’s honor, they worked within the existing honor system to dissuade men from dueling. Their aim as stated in their constitutions was modest and limited: suppressing the frequency of duels in their cities. When they did take far-reaching initiatives, they suffered public rebukes. They were most effective when volunteering arbitration services to reconcile disputants within the framework of the *code duello*. The Savannah Anti-Duelling Association employed arbitration better than its Charleston counterpart, though the latter’s scanty historical record precludes a thorough assessment of its effectiveness. William Jay captured the Savannah organization’s approach to public relations: “Public opinion in a free country must ever be omnipotent, and when rightly directed, will prove more efficacious in correcting erroneous practices and opinions, than all the penalties that law can inflict.”<sup>51</sup> To show the public that there were in fact honorable people proud to oppose dueling, the associations relied on the influence of their well-known and well-respected leaders.

Before the associations’ founding, principled opposition to dueling came mainly from the pulpit. Citing Scripture and deploying moralistic arguments, preachers condemned the bloody ritual, implored male congregants to avoid it and

48 *Ibid.*

49 *Savannah Georgian*, Jan. 17, 1827, p. 2. For more on George Jones, see Gamble, *Savannah Duels and Duellists*, 186-187; for more on Vice-President William B. Bulloch, see Gamble, *Savannah Duels and Duellists*, 85, and “Bulloch Family Papers, 1784-1929,” The Southern Historical Collection, <http://finding-aids.lib.unc.edu/02750/>; for more on Vice-President William Davies, see “Davies, William,” *Federal Judicial Center*, <https://www.fjc.gov/node/1379801>.

50 For a biography of James Moore Wayne by a successor of his on the Court, see Sandra Day O’Connor, “Supreme Court Justices from Georgia,” *Georgia Journal of Southern Legal History* 2, 395-406 (1991).

51 Jay, *supra note 33*

asked female congregants to shun men who embraced it. By the mid-1820s, the direct “Thou shall not duel” instruction had proven ineffective, and Charleston’s clergymen turned to political leaders for a different approach. Coming from within the dueling class, such leaders wielded more clout in the eyes of members of that class than did the clergymen, who were considered exempt from the code of honor.

It helped that opponents of dueling socialized in the same circles as men who dueled. Anti-duelists were in the upper class and most were born and reared in Georgia and South Carolina. By contrast, the temperance movement, which blossomed in the North in the same years as the Charleston and Savannah anti-dueling societies, struggled to gain steam in the South, partly owing to the lack of upper-class support.<sup>52</sup> In addition to the lack of interest in, and resistance to, temperance among the Southern upper class, the teetotalers’ movement in the South suffered from its New England origins and its coalescence into a single national organization dominated by Northerners with antislavery views.<sup>53</sup> Anti-duelists, in contrast, had little need for a national organization — the practice had disappeared from the North soon after the Hamilton-Burr affair. Sectional politics and concerns appeared in some anti-dueling rhetoric, but the Northern anti-dueling movement’s irrelevance to its Southern successor served the latter well.

Though no national anti-dueling organization emerged from the South, both duels and anti-dueling associations attracted national attention in the press.<sup>54</sup> William Jay, the winner of the Savannah Anti-Duelling Association’s anti-dueling essay competition, hailed from Bedford, New York.<sup>55</sup> New York had its own anti-dueling group, dating back to 1809, which developed out of anti-dueling sentiment that swelled after the Hamilton-Burr duel.<sup>56</sup> While duels virtually disappeared north of the Mason-Dixon line, their frequency increased in the South, and in Charleston especially in the 1830s (though reasons for that spike are unknown).<sup>57</sup>

Already for some time, gentlemen had shown unease about dueling’s main source of drama — death. Duelists had been known to fire in the air or otherwise throw away their shot. Common enough in previous generations to be banned by the 1777 Irish Code of Honor, dumb-shooting (known also as deloping) was a

52 The American Temperance Society formed in Boston within months of the anti-dueling associations see Eugene O. Porter, *An Outline of the Temperance Movement*, *The Historian* 7, 55-56 (1944); Ian R. Tyrrell explains the class divide in the Southern temperance debate in “Drink and Temperance in the Antebellum South: An Overview and Interpretation,” *The Journal of Southern History* 48, no. 4. 509 (1982): <https://doi.org/10.2307/2207850>.

53 Tyrrell, “Drink and Temperance in the Antebellum South,” 487.

54 For some examples of anti-dueling news reaching beyond the South, see “Domestic Summary: Duelling in Georgia,” *Christian Register* (Boston), Jan. 17, 1829, p. 11; *Western Recorder* (Utica, NY), Feb. 3 1829, p. 19; *Saturday Evening Post* (Philadelphia), Feb. 7, 1829, p.2; “Anti-Duelling Association,” *Religious Intelligencer* (New Haven), Feb. 21, 1829, p. 618.

55 Minutes, January 8, 1829, SAA Minutes, MS 680, Vol. I.

56 William S. Cossen, *Blood, Honor, Reform, and God: Anti-Dueling Associations and Moral Reform in the Old South*, *American Nineteenth Century History*, 3-4 (2017).

57 Williams, *supra note 17* at 122

practice among duelists who did not want to injure, let alone kill, their opponents.<sup>58</sup> It reflected a moral qualm. Like British Major John André, many believed that it was honorable enough to show up to the dueling ground and face down one's opponent, even without trying to "win" the duel. Plenty of men were content to miss the opponent; a gentleman's honor and reputation did not depend on killing the adversary, but rather on facing him in the ritual as his equal. André praised General Christopher Gadsden for deloping:

Then, G[adsden]., to show he meant no harm,  
But hated jars and jangles,  
His pistol fired across his arm,  
From H[owe]., almost at angles. ....

Such honor did they both display,  
They highly were commended,  
And thus, in short, this gallant fray,  
Without mischance was ended.

André did not ridicule Gadsden for missing his opponent. Rather, he mocked the ritual while acknowledging the participants' honorable behavior in the otherwise foolish exercise.

Anti-duelists appeared to recognize duelists' moral insecurity — a step in the right direction, as they saw it. The next step was to strengthen Southern gentlemen's faith in arbitration, in the law, and, more generally, in the chances of reconciliation. Their sermons and editorials acknowledged many duelists' reluctance to kill and concluded that they might as well not let themselves get to the point where they had to decide whether to shoot at their opponent or the sky. The anti-dueling associations sought to make obsolete the practice of deloping by cultivating an honor-based environment in which no one headed to the dueling ground in the first place.

Many Charlestonians valued dueling, however, as a show of physical courage, and this trumped the anti-duelists' efforts. The Charleston Anti-Duelling Association appears to have ceased its activities within five years of its founding.<sup>59</sup> On the other hand, Savannah's organization worked for over a decade, during which time the number of local duels declined — a fact celebrated in the association's minutes and cautiously attributed to its deterrence and arbitration efforts.<sup>60</sup> Though members of the Savannah Anti-Duelling Association last gathered in 1838 (possibly because that year its president, George Jones, died), its legacy lived on

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58 Williams, *supra* note 2 at 102

59 Cossen, *supra* note 56 at 8

60 See SAA Minutes, MS 680, Vols. I and II.

despite the endurance of dueling.

Six years after the group's dissolution, a veteran of the anti-dueling association helped avert a duel between Savannah's two most prominent newspaper editors. In their battling editorials over the merits of presidential candidates Henry Clay and James K. Polk, the editors had flung "charges of lying and cowardice" at one another.<sup>61</sup> To prevent the duel, the editors' seconds approached George Schley and the Anti-Duelling Association veteran Robert Habersham. In a subsequent newspaper column, Schley and Habersham reviewed each editor's perceived offenses. They concluded, with little supplementary explanation, that the offenses did not necessitate a duel because "the peculiar expressions which we have designated, and all others personal in character, shall be deemed by the parties as recalled, and all personal unkindness as remitted."<sup>62</sup> Habersham probably planned all along to advise against a duel. After all, his rationale that the insults were inflicted without consideration is unconvincing, considering that they were written down and published, not shouted across a room in a fit of passion. But like the Association's arbiters before him, Habersham knew that he needed to operate within the *code duello* to be effective. There was no duel in Savannah that autumn.

Habersham and Schley's success was the outcome of two decades of anti-dueling agitation in Savannah. Southern anti-dueling efforts had reached a turning point twenty years earlier, when a collection of clergymen disturbed by the increase in dueling in and around Charleston determined to approach the city's political and social elites to suppress the practice. Those ministers took an obscure topic of moral suasion and turned it into a political reform issue. Over the next decade, the Charleston Anti-Duelling Association and its successor in Savannah experimented with various legislative, judicial, and extra-judicial means to rid society of dueling.

### Preachers of Honor

The Charleston Anti-Duelling Association had operated for over a year by 1828, when its members gathered in the small "dwelling house" that served as the cathedral of the local Roman Catholic diocese.<sup>63</sup> There they listened to Bishop John England, the Irishman who had founded the diocese upon his arrival in America eight years before.<sup>64</sup> After delivering a discourse on the history of duels in Europe and America, the bishop tried to allay his audience's apprehensions. "It has been said that our society has done mischief, since no period has been more marked in this city for quarrels than that year which has witnessed our union," he acknowledged. "[O]f course it is assumed that since they have occurred at this time

61 *Savannah Republican*, Oct. 24, 1844, p. 2.

62 *Ibid.*

63 "Cathedral of St. John the Baptist | History," accessed Jan. 21, 2018, <https://charlestoncathedral.com/history/>.

64 *Ibid.* Bishop England named the chapel St. Finbar, after the patron saint of his native Cork, Ireland.

they must have been produced by the formation of our body,” he continued, though he denied that the Association had been the cause of the increase. He reassured his listeners as to the efficacy of their efforts: “The year just elapsed has presented in this city a novel feature” — that is, “unusual attention was paid” to events that otherwise “would have been unnoticed or disregarded.”<sup>65</sup>

Bishop England was probably alluding to the public debate kindled the previous summer, when the Charleston Anti-Duelling Association announced its intent to prosecute newspaper editors who published “the private disputes of individuals.”<sup>66</sup> In late July, the *Charleston Courier* and *City Gazette and Commercial Daily Advertiser* printed a call for satisfaction issued by G.P. Cohen against the “bigot and coward” Dr. Edward Chisolm.<sup>67</sup> Four days later, the anti-dueling society’s standing committee (composed of no clergy and almost exclusively of lawyers) turned to those same papers to condemn not Cohen and Chisolm, but the newspapers’ bosses. “[B]y making the private disputes of individuals the subjects of public discussion and public interest,” the newspapers were increasing the likelihood of a duel, the anti-duelists argued.<sup>68</sup> In doing so, the papers impeded the Association’s goal of relegating duels to the status of a shameful activity that would have to be done covertly or not at all.

The standing committee also attacked the editors’ legal rights. They asserted that “the right to insert such publications has no more to do with the liberty of the press, than the right to violate the security or happiness of individuals in any other mode, has with the enjoyment of civil liberty.” That is why they would “institute a prosecution for the offence against the Editor of the Paper” that publishes any future call for satisfaction.

Though it does not appear that the anti-duelists ever successfully brought such a case, the anger at the threat cost them potential allies in the press and among the general public. The *City Gazette*’s editors acknowledged that it had been unwise to publish Cohen’s challenge and clarified that they were “anxious for the suppression of duelling, a practice as absurd as it barbarous.”<sup>69</sup> At the same time, however, they refused to submit to an “angry menace or injudicious interference. Such a course can do nothing but provoke our indignation and resentment.” After Bishop England used his diocese’s *United States Catholic Miscellany* to further criticize the newspapers for complicity in duels, the *City Gazette*’s editors reiterated their “contempt and defiance” of the Anti-Duelling Association’s “injudicious

65 John England, *The Works of the Right Reverend John England, First Bishop of Charleston*, ed. Ignatius Aloysius Reynolds, vol. V, 77 (Baltimore: John Murphey & Company, 1849). Hereafter England, *Works*.

66 *City Gazette and Commercial Daily Advertiser*, July 31, 1827, p. 2; *Charleston Courier*, July 31, 1827, p. 2.

67 *City Gazette*, July 26, 1827, p. 3; *Charleston Courier*, July 26, 1827, p. 3. Emphasis in the original text.

68 *City Gazette*, July 31, 1827, p. 2; *Charleston Courier*, July 31, 1827, p. 2.

69 *City Gazette*, Aug. 1, 1827, p. 2.



and insulting implication of our professional character, and invasion of our professional independence.”<sup>70</sup> The editors’ vitriol might have increased as a result of England’s Roman Catholic background, though England appears to have maintained a positive reputation among members of all denominations and faiths throughout his two decades in Charleston.<sup>71</sup>

That same week, anonymous author M. wrote in the *City Gazette* that “Duelling would be seldom heard of but for defect in the laws against injuries inflicted on private character.” Pointing to a gentleman’s right to protect himself against defamation, he blamed the need for dueling on the lack of “healing balm in our courts of justice for wounded honor.” Society would descend into anarchy with neither a strong judiciary nor the ritual of dueling, and “assassination will triumph here, as in the Havana or Venice.”<sup>72</sup> Bishop England had this theory in mind when he addressed the Anti-Duelling Association’s annual gathering. The bishop countered that, unlike dueling, assassination was not celebrated by the public. “[T]hat which excites more detestation will be more seldom engaged in, and more speedily suppressed,” he said. “The assassin is not received into society; — he who has slain his adversary in a duel too frequently is.”<sup>73</sup> England was alerting his audience to the essential function of public opinion in their moral suasion campaign. The challenge lay not in convincing the public of dueling’s immorality, but “in destroying the fatal delusion, that honor sometimes made this crime necessary.”<sup>74</sup>

Bishop England and the other clergymen organized the Anti-Duelling Association but did not serve as its officers. After two decades of advocating against dueling from the pulpit, the clergymen combined in 1826 to “procure the aid of men of influence and virtue” — lay political and social leaders — in establishing the association.<sup>75</sup> In a climate of public support for dueling in the first quarter of the century — or at least a lack of opposition — men of God were among the few who could speak out against it without fear of retribution, being immune to challenges.<sup>76</sup> Thomas J. Carmody ties preachers’ anti-dueling rhetoric to the Second Great Awakening of Protestantism. During the late-eighteenth and early-nineteenth centuries, preachers “began to incorporate egalitarian and constitutional principles into their sermonic rhetoric when they addressed social issues from their pulpits,” Carmody explains. God’s law needed to be the foundation of human law, but clergymen employed an argumentative style “based on the need to persuade

70 *City Gazette*, Aug. 6, 1827, p. 2. Emphasis in the original text.

71 For Catholic-Protestant relations in Charleston, see Andrew Stern, “Southern Harmony: Catholic-Protestant Relations in the Antebellum South,” 17 *Religion and American Culture: A Journal of Interpretation* no. 2, 165-90 (2007) <https://doi.org/10.1525/rac.2007.17.2.165>; and Joseph Kelly, “Charleston’s Bishop John England and American Slavery,” 5 *New Hibernia Review* no. 4, 48-56 (Winter 2001) <https://doi.org/10.1353/nhr.2001.0063>.

72 *City Gazette*, Aug. 2, 1827, p. 2.

73 England, *supra* note 65 at 76

74 *USCM*, *supra* note 47 at 94

75 *Ibid.*

76 Carmody, *supra* note 7 at 58.

individuals to use their democratic influence to shape society.<sup>77</sup> Clergy repeatedly called on their congregations to change public opinion. The founding of the Charleston Anti-Duelling Association took the impulse Carmody identified a step further, towards clerical activism. The association's story reveals the Charleston clergy's evolution from deliverers of limited-audience anti-dueling sermons, based in religious and moralistic language, to organizers of a moral reform society with strategic aims and creative political techniques.

Unsurprisingly, preachers tended to deliver anti-dueling sermons following fatal duels. Alexander Hamilton's 1804 dueling death precipitated a series of denunciations of the practice in Northern states.<sup>78</sup> A few years later in Charleston, Episcopalian bishop Nathaniel D. Bowen used his pulpit at the influential St. Michael's Church to denounce the scourge after three men from prominent families died in duels.<sup>79</sup> The Lutheran John Bachman condemned the practice in St. John's Church in an undated speech most likely delivered between 1813 and the mid-1820s following "occurrences which have recently harrowed up our own feelings."<sup>80</sup> And when a well-known young lawyer and state senator died in 1823, the Charleston Bar Association published a eulogy by the Unitarian minister Samuel Gilman, alongside his appendix expounding on the need — and means — to eradicate dueling.<sup>81</sup>

Most of the activities of the Charleston and Savannah anti-dueling organizations fell within the existing honor framework. The organizations did not seek to "supplant" the grasp of honor on society, according to the historian William S. Cossen, but rather to realign it to a noble, Christian calling.<sup>82</sup> The anti-duelists did not challenge the manhood of Southern duelists, as Cossen maintains.<sup>83</sup> They had nothing against manhood. They celebrated "highminded honour," "manly fortitude," and the virtue of "genuine courage" not in the context of self-serving physical sacrifice like dueling but in that of military service and the preservation of Christian principles.<sup>84</sup> Nor did the anti-duelists oppose the "honor-mastery paradigm" prevalent among slaveholders — the associations' lay leaders owned slaves.<sup>85</sup> Among the clergy, only the Catholic bishop John England opposed slavery, though he relented in his opposition to protect Charleston's Catholic commu-

77 Carmody, *supra* note 7 at 148.

78 Carmody, *supra* note 7 at 71.

79 Walter J. Fraser, Jr., *Charleston! Charleston!: The History of a Southern City*, University of South Carolina Press, 191 (1989).

80 See John Bachman, *Sermon on Duelling by John Bachman*, CR 4585.B32 Rare Pamphlet Collection, Georgia Historical Society, Savannah, Georgia, 3.

81 Samuel Gilman, Funeral address at the Second Independent Church at the interment of Edward Peter Simons. ... Published at the request of the Charleston Bar. Accompanied with other testimonials of respect, 1823, SCHS Pamphlet 920 Simons 1823, South Carolina Historical Society, Charleston, SC.

82 Cossen, *supra* note 56 at 2.

83 Cossen, *supra* note 56 at 3.

84 Gilman, *supra* note 81 at 17.

85 See Cossen, *supra* note 56 at 3, which notes that the "honor-mastery paradigm" originates in Craig Thompson Friend and Lorri Glover's "Rethinking Southern Masculinity."

nity from pro-slavery Protestant rioting in 1835.<sup>86</sup> Notwithstanding their position on dueling, the other clergymen were complicit in or supportive of slavery. Episcopalian bishop Bowen advocated a system in which masters and clergy collaborated to teach slaves the Gospel; the Massachusetts-born Gilman used slaves for domestic labor; while Bachman, originally a New Yorker, was the era's leading Lutheran proponent of slavery.<sup>87</sup>

The clergy believed that the ostensible necessity to duel was a perversion of the otherwise admirable pursuit of honor. As they saw it, honor was derived from obedience to God. It produced dignity and social order (notions meant to benefit the slaveholding master class).<sup>88</sup> By 1826, those ministers' inability to influence public opinion to any significant degree led to their reaching out to "men of influence" to form the Charleston Anti-Duelling Association. Thus their religious moralism gave way to pragmatic steps that shaped the tactics of the anti-dueling association they founded.

### Smashing the Modern Moloch<sup>89</sup>

Clerical arguments against dueling had not changed substantially in the decades before the Charleston Anti-Duelling Association's founding in 1826. In 1807, Episcopalian bishop Nathaniel D. Bowen pleaded with fathers to warn their sons about the temptations of dueling. "Let them hear from you, no other language on it, than that of abhorrence; let them witness no other conduct with respect to it, than that of aversion," he admonished. Parents should teach their children "to despise the folly, abhor the guilt, and deplore the wretchedness of the duelist."<sup>90</sup> John Bachman, a Lutheran minister, instructed: "*Christian parents*, let the duelist be made to know that he is not the associate you would select for the society of

<sup>86</sup> See Kelly, *supra* note 71 at 53-56. Kelly describes England's education initiative for free black youth and poor white girls, which he shut down in exchange for government recognition of a different Catholic school.

<sup>87</sup> For Bowen's advocacy of Christian instruction for slaves, see Christa Dierksheide, *Amelioration and Empire: Progress and Slavery in the Plantation Americas* (University of Virginia Press, 2014), <https://muse.jhu.edu/book/35067>, 145-146; for Gilman's relationship to slavery, see Daniel Walker Howe, "A Massachusetts Yankee in Senator Calhoun's Court: Samuel Gilman in South Carolina," *The New England Quarterly* 44, no. 2 (1971): 205, <https://doi.org/10.2307/364526>; on Bachman's promulgation of pro-slavery ideology, see Randall M. Miller and John David Smith, *Dictionary of Afro-American Slavery* (Greenwood Publishing Group, 1997), 426. Bowen and Bachman believed it was in the slaveholders' interest to teach slaves Christianity and to maintain what Eugene Genovese calls a "paternalistic" attitude towards their slaves, a topic beyond this essay's scope. See Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1972).

<sup>88</sup> South Carolina Governor James Henry Hammond presents a pro-slavery view of the slaveholder's responsibility to God, his community, and the law in *Gov. Hammond's Letters on Southern Slavery: Addressed to Thomas Clarkson, the English Abolitionist*, (Charleston, Walker & Burke Printers: 1845), 11.

<sup>89</sup> "But is there not now, in the very heart of civilization and refinement ... a modern Moloch, worshipped as a god, and, by rites as barbarous and bloody as any that characterized the ancient idolatry?" quoted in W. C. Dana, *The Sense of Honor: A Discourse Delivered in the Central Presbyterian Church*, 8, (1857). Emphasis in the original text.

<sup>90</sup> As quoted in Carmody, *supra* note 7 at 170.

your innocent and virtuous families.”<sup>91</sup>

Bachman added an appeal to women to pressure their beloved men. “Females are more deeply interested in the results than men,” he explained. “The actors in these bloody scenes are their fathers, their husbands, their brothers, or their lovers. In either case their happiness is in danger of being wrecked on the bloody code of false honour.”<sup>92</sup> The Catholic bishop John England concluded his remarks to the 1828 gathering of the Charleston Anti-Duelling Association, “May we not hope for powerful aid from the daughters of Carolina in the cause of virtue and of honour?” He continued:

In the day of trial, then, mothers were found faithful to their country and its rights; they encouraged their husbands, their brothers, and their sons to exhibit their prowess, not in disgraceful domestic feuds, but in deeds of valour for the defence of their homes and the vindication of their freedom; they were proud to see them marshalled under the command of Washington, who was too intrepid to accept a challenge [to a duel]. . . . Daughters of such mothers! are our arguments founded upon true principles and glaring facts? Are you satisfied that the practice of duelling is one of the worst remnants of pagan barbarity? Do you believe it to be unnecessary for preserving the refinement of our southern society? Then be you our leaders in the sacred effort to identify law and honour, reason and the deportment of the gentleman, and to establish a wide distinction between the assertion of dignity and the indulgence of passion.<sup>93</sup>

By appealing to women, Bachman and England cut to the core of the honor culture that pervaded the South. As Elizabeth Fox-Genovese and Eugene Genovese observe, “Edward Gibbon’s *Decline and Fall of the Roman Empire*, widely read in the South, included a word of apt advice: The first qualification of a rebel is to despise life. That message came from Southern women: ‘Better dead than a coward.’ Sarah Morgan wrote from Baton Rouge, ‘Courage is what women admire above all things.’ . . . ‘Ladies are natural hero worshippers.’”<sup>94</sup> Women composed the majority of churchgoers in the antebellum South and would have heard anti-dueling sermons.<sup>95</sup> Though there is no record of women as dues-paying members of the anti-dueling groups in Charleston and Savannah, they did attend some annual meetings.<sup>96</sup>

The most significant trope of anti-dueling sermons was an attempt to rec-

91 Bachman, *supra* note 80 at 12. Emphasis in the original text.

92 Bachman, *supra* note 80 at 12.

93 England, *supra* note 65 at 77.

94 Elizabeth Fox-Genovese and Eugene D. Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview*, Cambridge University Press, 101 (2005).

95 For women’s church attendance, see Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South*, Harvard University Press, 171, (2010).

96 Minutes, Jan. 15, 1835, SAA Minutes, MS 680, Vol. II, and Cossen, *supra* note 56 at 8.

tify “the notion of honor, by adjusting it to the standard of eternal truth,” in the words of the Presbyterian minister W.C. Dana.<sup>97</sup> The clergy wanted to use their congregants’ dedication to honor to redirect them away from the path that led to dueling. Reverend Dana observed that it would be a mistake to do away with honor completely just because duelists had corrupted it. “Instead of lessening the value, impairing the dignity, limiting the sphere of honor, as a principle of action, what the moralist has to do is to guard the sentiment of honor from perversion,” he told his flock at Charleston’s Central Presbyterian Church<sup>98</sup> “[I]t may have seemed a badge of dignity, a *brave* and *chivalrous* thing, in honor of [the idol] Moloch, to run the risk of being burned,” Dana warned, using the pagan Ammonites as an allegory for duelists who worship a false god. “But what fascination these cruel rites of idolatrous worship could have for an Israelite, acquainted with the true God, familiar with the laws distinguished by the value which they set on human life . . . — what there was to be said in favor of *his* joining in these barbarous rites to a fictitious deity, is not so easily imagined.”<sup>99</sup> Bachman similarly ascribed “false principles of honour” to a recent duel.<sup>100</sup> Bowen identified “the business of life, and the various service of their country,” as true sources for honor.<sup>101</sup>

England said that “the man of honour abides by the law of God, reveres the statutes of his country, and is respectful and amenable to its authorities.”<sup>102</sup> Conscious of the Charleston Anti-Duelling Association’s legal and political efforts, the bishop wove constitutional and legal principles into his religious thinking:

Is not the pride of the American the predominance of the law? Is not law itself the emanation of the public will, and is not submission to the public will the first principle of genuine republicanism? . . . Shall we proclaim to the world, that we in South Carolina are brought back to that state of dereliction as that our public tribunals, the institutions of the country, the government itself cannot protect us from insult, and that we are thus reduced to the necessity of trusting to ourselves?

Though a Catholic, England conformed to Carmody’s characterization of the Protestant Second Great Awakening, in which preachers appealed to “egalitarian and constitutional principles” when addressing social issues.<sup>103</sup> In those few lines, the immigrant bishop invoked the individual’s thirst for honor; a broad American reverence for the general will and rule of law; and a particularistic concern for how fellow Americans perceived South Carolina.

As with honor, the clerics sought to realign society’s conception of brav-

97 Dana, *supra* note 89 at 19.

98 Dana, *supra* note 89 at 10.

99 Dana, *supra* note 89 at 6. Emphasis in the original text.

100 Bachman, *supra* note 80 at 3.

101 As quoted in Carmody, *supra* note 7 at 170.

102 England, *supra* note 65 at 75.

103 Carmody, *supra* note 7 at 148.

ery away from physical courage and towards the moral courage necessary to avert duels. Bachman argued that “the man who conscientiously refuses a challenge in the face of public opinion, exhibits more real courage than all the duellists in the land. He shows that he fears God, but he fears nothing else. He has the courage to look public opinion in the face and proclaim, ‘I am not your slave.’”<sup>104</sup> Bishop England and the Unitarian clergyman Samuel Gilman combined courage and honor. Gilman beseeched God to “enforce the conviction that

highminded honour, and manly fortitude, and genuine courage, are perfectly compatible with the bloodless triumphs of the gospel, and that every thing gallant, public-spirited, and godlike in the human character, would not necessarily be abolished from the world, although the wife could still embrace her husband, and the child its father, and the friend his friend, and although talent, usefulness, and promise should be allowed to descend to the grave with the fresh, though venerable honours of old age[.]”<sup>105</sup>

The Catholic bishop reiterated his friend’s sentiment five years later. “No species of moral courage exceeds that of a man who follows the dictates of his judgment or conscience, amidst the taunts and reproaches of the world,” England said. “[T]he principles of his Gospel are the foundation of the most heroic fortitude, the purest honour, and the most unbending courage.”<sup>106</sup>

Bachman and Gilman understood that their fundamental limitation was their inadequate reach from the pulpit. It was not enough to instruct male congregants to “exhibit . . . real courage” and reject “a challenge in the face of public opinion,” as Bachman advised. Accordingly, he laid out in his sermon several remedies for “the evil of duelling.” He told his congregants that “public sentiment must be enlightened and reformed.”<sup>107</sup> Or as Gilman put it, society needed to “rectify this perverted tone of public opinion.”<sup>108</sup> The two also suggested encouraging the public to pressure the legislature to strengthen anti-dueling laws and their enforcement. In the appendix to his published funeral address, Gilman called for an “external apparatus” to contribute to correcting public opinion by way of “*a tribunal of honor—social combinations—and legislative interference.*”<sup>109</sup> Those principles formed the groundwork of the Charleston Anti-Duelling Association and, by extension, the Savannah Anti-Duelling Association.

### Organizing for Reform

Years of ineffective preaching and a spate of dueling violence in the 1820s

104 Bachman, *supra* note 80 at 10.

105 Gilman, *supra* note 81 at 17-18.

106 England, *supra* note 65 at 71.

107 Bachman, *supra* note 80 at 10-11.

108 Gilman, *supra* note 81 at 20.

109 Gilman, *supra* note 81 at 21. Emphasis in the original text.

spurred the clergymen into political action. Fourteen churchmen signed a letter asking Charleston's leading figures to convene a meeting on the topic. At the gathering in a state senator's Charleston home, Bishop Bowen moved the first resolution: "That there be now formed an association, having for its objects to lessen the frequency of dueling, in this community, and the gradual suppression of the practice."<sup>110</sup> With unanimous consent, the chairman appointed nine men to draft a constitution, which they did that very day. A similar scene would play out two months later in the Long Room of Savannah's City Exchange, with the Constitution of the Charleston Anti-Duelling Association serving as the model mission statement for Savannah's anti-duelists.<sup>111</sup>

Despite confronting what they believed to be an "evil" that "flagrantly violates the express law of God," Bowen and his fellow parsons did not set a grandiose goal.<sup>112</sup> Rather, they sought "gradual suppression." Nor did they pursue widespread change; the constitution's preamble limited their mission to "this community" of Charleston. The Savannah constitution incorporated the same narrow language.<sup>113</sup> The founders' local vision may have originated in the belief that they could be effective only where they could exercise their personal influence. One needed to be trustworthy to be invited to arbitrate among disputants or to be heeded in calls for a revised moral system. The societies' success depended on their members maintaining good reputations and social standing. They also needed to be viewed as moderate — the most effective suasion came from within the dueling classes in conversations and editorials, not from pulpits.

For that reason, the clergy designed an association for others to lead. The Charleston Anti-Duelling Association maintained a divide between its clerical and lay members. Four of the nine drafters of the constitution of the Charleston Anti-Duelling Association were ordained ministers. None served as officers. Instead, the clergymen formed their own committee that reported to the society's elected officers, all of whom were lawyers and military officers. The absence of clergymen among the officers lent the Association the appearance — consistent with its actual character — of a group of moderates, not one that would demand an overhaul in social mores. Men of the cloth were expected to be moralistic, sermonizing about Good and Evil and not tolerating any form of the latter. They could influence congregations and perhaps lobby legislators, but their moral opposition to dueling under any condition precluded them from mediating disputes — the main task of the standing committee — because arbiters were expected to abide by the *code duello*, which permitted a duel when the disputants exhausted all alternatives.<sup>114</sup>

110 *USCM*, *supra* note 47 at 94.

111 Gamble, *supra* note 18 at 183; *Savannah Republican*, Jan. 19, 1827.

112 *USCM*, *supra* note 47 at 94.

113 See *Savannah Georgian*, *supra* note 49 at 2.

114 See *USCM*, *supra* note 47 at 94. The standing committee worked "to endeavour by seasonable interposition, with the aid of the civil magistracy, or otherwise, as may seem to them most expedient, to prevent the occurrence of any contemplated or appointed duel."

In the limited number of arbitrations recorded in Savannah and Charleston, I have not come across any carried out by a clergyman (they were probably excluded for the same reason that they were not subject to challenges, a tacit acknowledgment that their dedication to God was moral and respectable and that dueling was not).

Another explanation for the religious leaders' circumscribed place in the new association can be found in the clergy's desire to form a political, rather than religious, organization. The political leaders with whom they teamed up had contacts in the state legislature and the U.S. Congress. They also provided social and political clout that the clergymen probably lacked. At least one, secretary and treasurer Colonel Matthew Irvine Keith, had dueled previously — a fact that may have increased the Charleston Anti-Duelling Association's credibility.<sup>115</sup> The laity led the formal anti-dueling groups in Charleston and Savannah for the rest of their existence.

#### Arbiters of Honor<sup>116</sup>

With lay political leaders in charge, the Charleston Anti-Duelling Association began its social and political work. As suggested in the constitution, ministers "of all denominations" sent letters to clergymen throughout North Carolina and Georgia to encourage the establishment of similar anti-dueling societies.<sup>117</sup> Meanwhile General Thomas Pinckney, a veteran of the War of 1812 and the American Revolution, and president of the Association, collaborated with a standing committee member to solicit the state senate's support for stronger anti-dueling legislation.

Pinckney and the Charleston anti-duelists prioritized legislative efforts and editorial-writing. By contrast, the Savannah Anti-Duelling Association did not lobby for new laws, choosing instead to intervene personally in private disputes. Savannah had only a third of the population of Charleston. The relatively small community of gentlemen in Savannah probably contributed to its anti-duelists' successes in averting duels through personal intercessions. The manpower necessary to do the same in a bigger city may be why Charleston's anti-duelists first looked to strengthen state law.

Pinckney's letter to state legislators repeated the themes common to anti-dueling arguments, though with more emphasis on the ritual's costliness to

<sup>115</sup> This was reported in the *Savannah Georgian*, Nov. 11, 1826, p. 2. John Belton O'Neill confirms the rumor, recalling Keith telling him, "Duelling is now deliberate murder. ... I will have no more to do with it" — *and he never did*" (his emphasis), *Biographical Sketches of the Bench and Bar of South Carolina: To Which Is Added the Original Fee Bill of 1791 ... the Rolls of Attorneys Admitted to Practice from the Records at Charleston and Columbia, Etc., Etc.*, S.G. Courtenay & Company, 320, (1859).

<sup>116</sup> See Gamble, *supra* note 18 at 176. Carl Schurz, in his biography of Henry Clay, recalled a duel between the Kentucky senator and Senator John Randolph of Virginia: "Randolph's pistol had failed to prove that Clay was a 'blackguard' and Clay's pistol had also failed to prove that Randolph was a 'calumniator'; but according to the mysterious process of reasoning which makes the pistol the arbiter of honor, the honor of each was satisfied."

<sup>117</sup> *USCM*, *supra* note 47 at 94.



a tranquil society and rule of law than on its immorality. “Have we not had to commiserate wives and children who grieve for the loss of husbands and fathers, upon whose industry and talents they materially depended for maintenance, education, and advancement?” he asked. He blamed editors for publishing the details of disagreements and lamented citizens’ lack of “common humanity” to report the disputants to the authorities. He then observed that members of the press (“the palladium of freedom”) felt compelled to censor themselves “especially when questions of great public interest excite more than proportionate zeal.”<sup>118</sup> Citing the Bill of Rights, Pinckney raised the threat that dueling posed to speech. He alluded to members of Congress and other legislatures who had been challenged by colleagues for matters brought up in their official capacities. Earlier that same year, Senator John Randolph of Virginia dueled Kentucky’s Henry Clay after Clay took offense at some of Randolph’s comments on the Senate floor.<sup>119</sup> After refuting traditional pro-dueling arguments — that spontaneous assassination would replace the ritual practice, and that the duel made citizens behave cordially to one another — Pinckney arrived at the legislators’ opportunity, and duty, to help his cause.

Pinckney told the legislators that laws appealing specifically to Southern gentlemen’s sense of honor would help deter them from dueling. The Charleston Anti-Duelling Association would then have more to work with when seeking recourse in the “civil magistracy.” Pinckney wrote to the state senators that “our most strenuous and persevering exertions will [not] be efficacious . . . unless the legislature shall in its wisdom pass a law more suitable to the nature of the offence, and more certain of execution, than any now existing.” He raised duelists’ motivations, explaining why France’s capital punishment for duelists was shoddy law. Considering the “quality” of the type of persons who dueled, “the fear of death would be less efficacious than degradation or disgrace, or even than a pretty high fine or forfeiture.”<sup>120</sup> After all, someone ready to duel had proven a willingness to die for honor. Embarrassment would be a more effective deterrent than the threat of death.

Asserting that logic, the Association requested two laws. The first would ban dueling and place violators “in a state of degradation, and infamy, particularly by disqualifying and rendering them incapable of having or holding any office of trust, honor or emolument.” Disqualification from public office was meant to give the challenged party the opportunity to invoke his duty to public service as an honorable way to decline a duel (employing a legislative tactic, discussed further

118 *USCM*, *supra* note 47 at 155.

119 See *Bowen’s Boston News – Letter, and City Record*, Jan.-July 1826, p. 155. Reflecting on the event, the senators’ colleague Thomas Hart Benton revealed how some in the upper class thought about the law and its loopholes: “There was a statute of Virginia against duelling within her limits, but, as he merely went out to receive a fire without returning it, Randolph deemed that no fighting, and consequently no breach of her statute,” as quoted in Gamble, *Savannah Duels and Duellists*, 173.

120 *USCM*, *supra* note 47 at 162.

below, called “ambiguation”). The second law would “afford more suitable and sufficient redress or reparation, than may now be obtained in our courts for insults and injuries, that affect the honour and reputation of men of nice sensibility and high spirit” — in other words, a stronger libel law that would encourage men to sue rather than “resort to the sword or pistol.”<sup>121</sup> Pinckney did not mention South Carolina’s 1812 law that ordered all duelists fined, jailed, and banned from holding public office and jobs in medicine and law and that considered dueling deaths murder.<sup>122</sup> The government enforced that law for a brief period and convicted two men under its authority.<sup>123</sup> The law lost its effectiveness, however, when a judge ruled in 1819 that seconds were excused from testifying as witnesses because they were protected from self-incrimination. No witnesses meant no prosecution. That ruling held until the state passed a law in 1823 to give participants immunity in exchange for testimony, a fact unmentioned in Pinckney’s 1826 correspondence.<sup>124</sup>

Pinckney and his colleagues did not get their wish. A bill drafted in accordance with their request failed to garner the requisite votes.<sup>125</sup> With that disappointment, the association shifted its attention away from the political sphere and towards the newspaper industry. That effort also failed: many editors reasserted their right to print challenges and to cover duels after casting the association’s criticisms of the *Courier* and *City Gazette* as affronts to the free press.

The Charleston Anti-Duelling Association ceased functioning at the start of the 1830s.<sup>126</sup> The demise of the Charleston association coincided with the rise of the Savannah Anti-Duelling Association, which, unlike its predecessor, turned its back on both the legislative and judicial branches, choosing instead to capitalize on the social status of many of its members and the relatively small city in which it operated.

At the time of the Savannah Anti-Duelling Association’s founding, dueling had been against the law in Georgia for over a decade. In 1809, Governor David B. Mitchell signed a law prohibiting anyone who had participated in a duel — either as a principal or a second — from holding “any office of honor, trust, or profit” in the state.<sup>127</sup> Fortunately for the governor, the law did not apply retroactively. “What a strange sequel, the scene in the Governor’s office in Milledgeville on that winter day when Mitchell appended his name to this act,” Thomas Gamble writes in his history of dueling in Savannah, “to the picture presented that mid-summer day seven years before” when Mitchell looked down at the body of a dueling op-

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121 *USCM*, *supra* note 47 at 163.

122 Thomas Cooper, ed., *The Statutes at Large of South Carolina*, vol. V, 9 vols. (Columbia, S.C.: A.S. Johnston, 1839).

123 Williams, *supra* note 17 at 123-124.

124 Williams, *supra* note 17 at 124.; David J. McCord, ed., *The Statutes at Large of South Carolina*, vol. VI, 9 vols. (Columbia, S.C.: A.S. Johnston, 1839).

125 Cossen, *supra* note 56 at 5.

126 Cossen, *supra* note 56 at 8.

127 *Savannah Republican and Savannah Evening Ledger*, Jan. 4, 1810, p. 3.

ponent he had just struck down in Savannah's old Jewish cemetery.<sup>128</sup> As in South Carolina, dueling did not subside with a stroke of the governor's pen. The legislature strengthened the law in 1816, assessing a fine and imposing between three and twelve months of prison time for issuing, accepting, or carrying a "challenge by word or writing . . . to fight at sword, pistol, or other deadly weapon."<sup>129</sup> With Mitchell serving his third term, the same hand that had killed his political rival in a duel once more signed anti-dueling legislation into law.

It was a dead letter from the start. As duelists saw it, the duel was not subject to the judicial system. Rather, it was a part of the unwritten moral code that was in no way inferior to the body of state statutes. Charles S. Sydnor observes four sets of governing laws in the antebellum South: the U.S. Constitution and federal statutes; divine law as stated in the Bible; state laws meant to maintain social order; and the "unwritten laws of society."<sup>130</sup> Southerners — especially the planter class — engaged from a young age with those four sets of law. They internalized the relationship between the unwritten and codified laws in a way that would look strange to any outsider, all the while rejecting "higher law" arguments when espoused by abolitionists.<sup>131</sup> When it came to dueling, Sydnor writes, Southerners "professed to see no contradiction between their code of honor, with its appeal to extralegal personal force, and a respect for the law itself."<sup>132</sup> By their logic, unwritten laws stood on equal footing with legislation, and it was the job of gentlemen to discern when and how each applied to daily life. Having adopted the same views on divine law as the clergy, the anti-duelists contemplated the relationship between the last two categories: state law and the unwritten law.

The Savannah Anti-Duelling Association maneuvered between the tacitly understood honor code and the written law by respecting the former and using the latter only when necessary. Aside from the infrequent lament of a jury foreman that the law was not being enforced, few people cared about prosecuting duelists.<sup>133</sup> In their first attempt at arbitration, members of the Anti-Duelling Association recognized that appealing to legal authority was not just ineffective but potentially

128 Gamble, *supra* note 18 at 113.

129 General Assembly Acts, 090 § 4 Ninth Division (1816).

130 Charles S. Sydnor, "The Southerner and the Laws," *The Journal of Southern History* 6, no. 1, 4 (1940).

131 Neil Brody Miller, "Higher Law and Antislavery," ed. Peter P. Hinks and John McKivigan, *Encyclopedia of Antislavery and Abolition* (Westport, CT: Greenwood Press, 2007), 327-330.

132 As quoted in Eugene D. Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1972), 44.

133 Gamble *supra* note 18 at 132. Gamble quotes an unusual statement by an 1819 Grand Jury: "The frequent violations of the law to prevent duelling have made the practice fashionable and almost meritorious among its chivalrous advocates. We will express it as our opinion that the law has been violated in repeated instances with impunity, when a knowledge of the cases were, or have been, known to its constituted guardians, and in the next instance the character of our city was wantonly disregarded, the laws of social order and of the state unblushingly set at defiance. Viewing the subject, as we do, of such magnitude, we deem it our duty to present the negligence and indifference of the officers whose duty it is to take cognizance of such matters as proper subjects of which to make examples," *Savannah Duels and Duellists*, 135.

detrimental to their cause. Unleashing officers of the law against potential duelists was not just an affront to those who engaged in dueling; it risked violating the unwritten obligation to balance law and honor.

The standing committee's first arbitration tested its willingness to compromise its legal positions in order to preserve the honor of the disputants. When it came to press coverage, no news was good news for the Association — its successful interventions usually went unreported. Such was the case when, in May 1827, the standing committee caught wind of discord between a Savannah tax collector (and later sheriff), George Millen, and Robert W. Pooler, a clerk for Chatham County's Superior and Inferior Courts and a member of a powerful Savannah family.<sup>134</sup> The substance of the disagreement is unknown, but the organization's secretary, Charles W. Rockwell, recorded the details of the intervention in the Association's minutes.<sup>135</sup> The committee drafted letters to the disputants. "It has been intimated that there exists a difference between yourself and Mr. George Millen, which it is apprehended may lead to serious results," its members wrote to Pooler. "As members of that committee, Joseph Cumming, Anthony Barclay and Alexander Telfair, Esqs., beg leave to propose to you that any differences which may exist be submitted to an amicable reference." In the language of the time, any resolution short of violence was deemed "amicable."

The committee then offered two paths forward. Pooler and Millen might choose "gentlemen either in or out" of the Anti-Duelling Association to mediate between them. Not overlooking the importance of reputation, the committee reassured Pooler that he could have "entire confidence" in the "integrity and honor" of the members of the organization. In consideration of the *code duello*, which dictates the fair treatment of both parties in any attempt at arbitration, the committee members added that they would not open Pooler's response unless Millen sent one, as well. Pooler's reputation (and, therefore, honor) would thus be preserved if he acceded to the Anti-Duelling Association's request while Millen ignored it. They left ambiguous what they would do if one accepted their mediation offer and the other demurred. "We believe you will receive this in the spirit which dictates it, and not as an officious interference," the committee members added, in a display of deference to the disputants that would disappear from future letters as they grew accustomed to, and more confident in, sending such notes.<sup>136</sup>

Pooler and Millen complied with the organization, but on the condition that the anti-duelists promise not to take legal action against them.<sup>137</sup> That caveat indicates that Pooler and Millen knew of Georgia's anti-dueling laws. It was reasonable for Pooler and Millen to fear that the Savannah Anti-Duelling Association

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<sup>134</sup> *Savannah Georgian*, Jan. 8, 1828, p. 2.

<sup>135</sup> Gamble, *supra* note 18 at 190.

<sup>136</sup> Minutes, May 5, 1827, SAA Minutes, MS 680, Vol. II.

<sup>137</sup> Minutes, May 5, 1827, SAA Minutes, MS 680, Vol. II.

might invite the courts into the dispute. After all, the Association's constitution, published just five months prior in the local *Republican*, warned that the standing committee would try to stop any potential duel "with or without the aid of civil magistracy." The committee accepted the conditions and contacted Pooler and Millen's seconds. It appears that they preferred arbiters from outside the Anti-Duelling Association, so W.C. Daniell and William Bee were credited with reaching the "amicable settlement."<sup>138</sup> Both later joined the Savannah Anti-Duelling Association, and Bee succeeded Rockwell as secretary and treasurer in June 1831.<sup>139</sup>

The successful end to the Pooler-Millen affair boded well for the future of the Savannah Anti-Duelling Association. The standing committee wrote in its first annual report that no duels had been fought since its founding the year before. "The committee has reason to believe that this is partly owing to the influence of the association." Its members also reported a fair amount of public receptiveness to the anti-duelists: "No opposition has been manifested in any quarter and the Committee entertain the belief that by judicious management great good will be accomplished."<sup>140</sup> The committee's optimism contrasted with Bishop England's measured tone when addressing the Charleston Anti-Duelling Association the same year. They then resolved to offer fifty dollars for the best essay on the topic of dueling. A special review committee selected the winner, William Jay, in time for the next annual meeting, in 1829.

The Association probably gleaned valuable lessons from the Pooler-Millen dispute. Although the law was rarely enforced, people feared prosecution, and therefore had reason to doubt the Association's intentions. A cozy relationship with the authorities would hurt the group's primary goal, the "restraining, and if possible the suppressing by all lawful and honorable means, the practice of duelling."<sup>141</sup> Its members instead relied on their social connections and on direct mediation. In doing so, they mobilized against an important component of Savannah's culture — the duel to defend personal honor — while still employing "honorable means" and operating within the same framework as their fellow citizens.

### Anti-Dueling Legislation in the South's Dual Legal System

Several realities affected how upper-class citizens in Savannah applied law to their everyday practices. According to Sydnor, the unwritten law pervaded plantation life as much as it shaped relationships among free Southerners. It "operated ... to restrict the power of ordinary law and to enlarge the area of life in which man acts without reference to legal guidance." The strength of the unwritten law in the plantation regions of the Carolina low country (and by extension, Georgia's

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138 Minutes, May 5, 1827, SAA Minutes, MS 680, Vol. II.

139 Minutes, June 3, 1831, SAA Minutes, MS 680, Vol. I.

140 Minutes, Jan. 7, 1828, SAA Minutes, MS 680, Vol. II.

141 "Anti-Duelling Association" (broadside), SAA Minutes, MS 680, Vol. I.

coastal plain) rested on the nature of the plantation system, which comprised a network of semi-autonomous estates far from town centers and law enforcement officials. “This is to say that the segment of life that was controlled by law was reduced in these dominant regions of the Old South; it is not equivalent to saying that law, within its restricted zone, was held in disrespect,” Sydnor writes. Yet, a Northerner “could fall into the error of thinking that law was held in disrespect because its jurisdiction was not as large as he was accustomed to in his own community.”<sup>142</sup>

A gentleman’s status as household head and slave master instilled in him a sense of authority and autonomy. Sydnor argues that slavery “must have” had an impact on the planter’s outlook on the law. He had the ultimate say over all features of his slaves’ lives, and he was a substitute for the state when it came to “slander, assault and battery, larceny, and burglary.”<sup>143</sup> Imbued with that power, the planter felt free to exercise the same legal authority beyond his plantation. When the written and unwritten codes conflicted, as they did in any potential duel, the plantation culture allowed — and perhaps encouraged — the planter to choose which prevailed.

It is logical that the non-planter upper class — professionals in law and medicine, newspaper editors, and military officers — would share the planter’s approach to the law. Not all slave-owners were planters, and even those who were not would have shared the sense of legal autonomy that accompanied participation in the slave system. With the planters’ control of the state legislature and city council came influence over culture. Their behavior was not insulated from the rest of society, and a practice that in Europe was strictly for nobility broadened as it developed in the American South. As Williams observes, members of the upper class who were not planters regarded themselves — and were regarded by planters — as gentlemen.<sup>144</sup> As with honor, a person’s status as a gentleman depended largely on how others perceived him.

Anti-dueling legislation failed to override the unwritten laws of the gentlemen’s class. Why then did Georgia and South Carolina legislators make numerous attempts to ban dueling? Their lack of will to enforce anti-dueling laws suggests a half-heartedness induced by a lack of popular support for the acts. On the other hand, the presence of laws on the books might have reflected the office holders’ vague desire to urge the public towards a certain end. Modern legal thinkers discuss the power of laws to affect social norms.<sup>145</sup> C.A. Harwell Wells defines a “norm” not merely as a social regularity, which is what is commonly practiced in society, but as “what society holds that people *should* do” — and if not all of

142 Sydnor, *supra* note 130 at 8.

143 Sydnor, *supra* note 130 at 10.

144 Williams, *supra* note 2 at 27-29.

145 See Wells, “The End of the Affair?” and Lessig, “The Regulation of Social Meaning.”

“society,” then the government, one may add.<sup>146</sup> Wells and Lawrence Lessig look to anti-dueling legislation as a case study for how government can influence social norms — in other words, how laws condition behavior and determine not just what people do, but what they should do. As Wells and Lessig present it, the government influences, or conditions, its constituents by passing laws to bring them in line with a desired practice.

Though outright bans on dueling were usually ineffective, Lessig observes that a benefit of such laws was to tie the ritual to illegality. That is, laws were a first step in the formation of a stigma against such behavior. When Pooler and Millen, both holders of public office, agreed to arbitration by the Savannah Anti-Duelling Association, they did so on the condition that the committee pledge not to pursue legal consequences. Under the 1809 law, they could have been expelled from their public work and, under the 1816 law, they could have been fined and imprisoned.<sup>147</sup> Those statutes gave the standing committee a strong hand when offering arbitration to Pooler and Millen — implicit in the offer was the threat to go to the authorities if the disputants refused arbitration.

The fear of prosecution, coupled with the duelist’s desire to comply with the law to some extent, led to numerous duels fought in one state by citizens of another. William Bee logged a letter sent to the standing committee by “a highly respectable gentleman in Charleston, South Carolina,” who warned of two colonels heading off to duel in Savannah (perhaps on Tybee Island, a common dueling ground that straddled the border — and therefore the jurisdictions — of Georgia and South Carolina) after all attempts at reconciliation failed. On that man’s advice, the committee alerted the Savannah authorities, who in turn issued warrants to the sheriff. The principals hid, and the following day “a number of gentlemen interfer’d, the warrants were dispended, and a friendly settlement ended the matter.”<sup>148</sup> The threat of arrest and prosecution sufficed to reconcile the disputants. Law enforcement, however, was not always successful in stopping duels, as will be discussed below.

Lessig terms another legislative technique “ambiguation,” a tactic at play in Georgia and South Carolina’s 1809 and 1812 laws banning duelists from holding public office, which was a duty of the elite.<sup>149</sup> Lawmakers intended to give a potential combatant a respectable, honorable reason to refuse a duel — what Wells calls “a way to defect from the prevailing norm.”<sup>150</sup> Clergy and markedly religious lay people could cite their piety in refusing a duel, but most planters and

146 Wells, *supra note 9* at 1809. Emphasis added.

147 Bond Almand, “Code Duello in Georgia 1740-1889,” *Georgia Bar Journal (Macon)* 13, 160 (1950).

148 Minutes, Sept. 4, 1833, SAA Minutes, MS 680, Vol. I.

149 Lessig, *supra note 9* at 971.

150 Wells, *supra note 9* at 1811.

professionals who did so risked a public imputation of cowardice.<sup>151</sup> What was a gentleman to do when defending his reputation endangered his ability to honorably serve the public? The law relied on the consideration of public service as a higher calling than the defense of personal honor. Lessig argues that lawmakers meant for the statute to redefine “the social meaning of dueling” and to force gentlemen to consider it an impediment to necessary public service.<sup>152</sup>

American general James Screven employed a form of ambiguation long before any prohibitions on dueling entered the Georgia penal code. On the eve of the British capture of Savannah in 1778, Screven adhered to what Lessig calls the “elite’s rhetorical structure,” appealing to the officers’ sense of service to their nascent nation. “If you cannot extend to each other the hand of confidence and friendship, for your country’s sake do not destroy each other’s lives,” Screven told his men.<sup>153</sup> Putting their duty to the nation above personal honor, the officers reconciled.

South Carolina’s legislators abandoned “ambiguation” as an anti-dueling tactic in 1834. That year, the state repealed the 1812 provision that banned participants in duels from public office.<sup>154</sup> However, it does not seem that the legislature found a better deterrent than “ambiguation.” Williams understands that what remained of the original law — the sentence of twelve months in prison and a large fine for dueling or issuing or carrying a challenge — represented a merely symbolic concession to dueling’s opponents. Dueling did not receive legislative attention in South Carolina again till 1868.<sup>155</sup>

### The Law Courts and the Court of Public Opinion

Unlike the era’s more prominent reform movements, anti-dueling work consisted of local campaigns. Anti-duelists in both Charleston and Savannah limited the scope of their work to their own cities, choosing to reform morals in their immediate vicinity and avoiding mention of a broader campaign.

For that reason, the Savannah Anti-Duelling Association did not consider it a setback when, a week after its 1828 annual meeting, Georgia’s attorney general, George W. Crawford, shot and killed Thomas E. Burnside, a member of a rival political faction in the state house. The duel took place in Creek Indian territory and developed out of a dispute that originated far from Savannah. Burnside had claimed credit for a series of editorials and statements that defamed Crawford’s father, state senator Peter Crawford.<sup>156</sup> The senior Crawford denounced the claims

151 *Ibid.*, 1824.

152 Lessig, *supra* note 9 at 972.

153 Gamble, *supra* note 18 at 18.

154 McCord, *supra* note 124 at 515.

155 Williams, *supra* note 17 at 124.

156 Len G. Cleveland, “The Crawford-Burnside Affair and the Movement to Abolish Dueling in Georgia,” *Washington State University*, no. 4, 242-44 (1976).



as “*shameful garbling, misrepresentations, and falsehoods,*” that made their author “liable to a prosecution for libel” — a threat he never followed through on, perhaps because of his son’s actions.<sup>157</sup> Crawford *files* sought satisfaction on the field of honor. Burnside refused to apologize and recant after the first and second rounds of firing ended with no injuries. In the third, Crawford’s bullet pierced his heart.<sup>158</sup> Burnside died in front of the white and Creek spectators — the duelists’ seconds having agreed to fight in Creek Indian territory to avoid breaking the laws of Georgia and Alabama.<sup>159</sup> The widespread press coverage of the duel spread George Crawford’s name through the state. Len G. Cleveland speculates that Crawford’s reputation for courage contributed to his November election to a full term as attorney general, six election victories in the state legislature, part of a term in the U.S. House, and two terms as governor of Georgia from 1843-1847. He became secretary of war in 1849 before returning to chair Georgia’s secession convention in 1861.<sup>160</sup> According to Cleveland, the duel had proven a political asset despite laws across the country that aimed to discredit the practice.

Starting in Georgia’s capital, Milledgeville, and ending in the Creek territory, the dispute was entirely outside the association’s jurisdiction. Cleveland erroneously argues that the Crawford-Burnside duel “sparked a new effort in Georgia to abolish” the practice.<sup>161</sup> He cites the Association’s essay competition as evidence of a new push in its public awareness campaign — but according to the Association’s minutes, the competition had been arranged on January 7, a week before the Crawford-Burnside event.<sup>162</sup> The anti-duelists had been operating and successfully intervening in disputes for a year already. The duel was far enough removed from Savannah that the standing committee’s next annual report said that it was “enabled to repeat that ‘no duel has been fought in this vicinity since the formation of the society’ and that they found their dutiez [sic] gradually diminishing.”<sup>163</sup> The Association was sticking to a limited mission — to stop duels in Savannah and its immediate surroundings.

Few duels occurred in Savannah during the following years, possibly owing to the Savannah Anti-Duelling Association’s successes, though causation is impossible to prove. It is unclear what role the organization played in Georgia’s 1828 law requiring all future government officers to swear that they had not been principals nor seconds in any duel since January 1, 1829.<sup>164</sup> That may have also contributed to the local absence of duels. In August 1832, however, two disputes

157 Len G. Cleveland, “The Crawford-Burnside Affair,” 243 (1976). Emphasis in the original text.

158 Len G. Cleveland, “The Crawford-Burnside Affair,” 244 (1976)

159 Len G. Cleveland, “The Crawford-Burnside Affair,” 243 (1976)

160 Len G. Cleveland, “The Crawford-Burnside Affair,” 245 (1976)

161 *Ibid.*

162 Minutes, Jan. 7, 1828, SAA Minutes, MS 680, Vol. II.

163 Minutes, Jan. 8, 1829, SAA Minutes, MS 680, Vol. II.

164 Len G. Cleveland, “The Crawford-Burnside Affair,” 246 (1976)

found their way to the standing committee. The first was resolved soon after the secretary contacted one of the seconds.<sup>165</sup> Four days later, he learned of a more bellicose duo, state legislator James Jones Stark and Dr. Philip Minis.

The Stark-Minis affair reveals the limits of the personal intervention strategy that had previously been successful for the Savannah Anti-Duelling Association. According to the diary of Minis's friend, newspaper editor Richard D. Arnold (who later, as mayor, surrendered Savannah to William Tecumseh Sherman), the dispute dragged on for months before its fatal end.<sup>166</sup> In a bar in the spring of 1832, Stark, with Minis not present and without any provocation "cursed Minis for a 'damned Jew' or 'damned Israelite,'" adding, "he 'ought to be pissed upon,' 'he was not worth the powder & lead it would take to kill him' & abuse of a similar character." When alerted to these insults, Minis entered the bar to confront Stark, who said nothing about him to his face. Arnold's diary then cast light on how many Southerners viewed affronts to honor: "When Minis asked me what Stark had said about him I refused to tell him, observing that he, Stark, had had an opportunity of saying it that night before his face and as he had not done it I thought that what he had said ought to be a matter of indifference." A friend of Minis then spoke with Stark and received an explanation that the friend considered satisfactory. Minis took it as an apology and seemed to move on. In July, however, one of Stark's friends denied that Stark had begged pardon, saying, according to Arnold, "that Stark had told him that what he had said was in justice to himself but not as an apology to Minis." Word spread that, when Stark refused to apologize, Minis dishonorably dropped his grievance without demanding satisfaction. Arnold records as follows: Stark confirmed in writing that "he had done an unnecessary injustice" to Minis, "but still did not mean it as an apology to him." Minis "wrote to Stark saying that as he S[tark] had admitted to doing an unnecessary injustice to him, M[inis], he demanded an apology or that satisfaction wich [sic] one gentlemen [sic] should afford another."<sup>167</sup> In response, Stark said he would grant Minis satisfaction.

The seconds could not agree on a time and place to duel, but Stark and his second went to Scriven's Ferry, a common dueling site, made a show of their opponents' absence, and spread the word that Stark and Minis agreed to fight but the latter forgot the meeting time. This further embarrassed Minis. Later, as he was walking down the street, Stark taunted him and threatened to attack him right there. Arnold heard Stark shout, "Let me go whip the damned rascal," implying that Minis was not even a gentleman who qualified for a duel and instead deserved to be whipped like a member of a lower class. Arnold added, "I have heard it said

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165 Minutes, Aug. 6, 1832, SAA Minutes, MS 680, Vol. I.

166 "Richard D. Arnold Papers, 1849-1876 (bulk 1875-1876)." <http://finding-aids.lib.unc.edu/01261/>.

167 Richard D. Arnold, *Colligere: Richard Dennis Arnold Papers*, Georgia Historical Society, MS 27, Item 3 (1832-1838).

that Minis was openly laughed at as a coward by Stark's bodyguards."

The affair reached its climax on August 10, the same day that the anti-duelling association's William Bee learned about the quarrel. "Information was given to the Secretary this day, at about 11, O'clock that an affair of Honour, existed between Mr. James Jones Stark, and Dr. Philip Minis," Bee recorded in his organization's minutes (it appears from Arnold's diary that William Law, a superior court judge and member of the Anti-Duelling Association, transmitted Arnold's news of the dispute to Bee).<sup>168</sup> With insufficient time to summon the entire standing committee, Bee acted on his own, addressing letters to both men's seconds, to no avail.<sup>169</sup> That morning, Minis entered the City Hotel, where Stark was present with several companions, and according to Arnold, declared, "I pronounce James Jones Stark a coward." At this point the details are murky. Arnold reports that Stark rose from his seat and approached Minis with his hand in his pocket, and that Minis fired only after seeing Stark withdraw what Minis assumed was a pistol. Any gun on Stark was lost in the scramble immediately following Minis's shot. Stark's second, Thomas Wayne, reported in his affidavit that Stark in fact was reaching for a pistol when Minis fired. But Wayne told another person that he had been facing Minis, not Stark, so he could not determine who drew first.<sup>170</sup>

Whatever the details, the Minis shooting itself was not a duel. It lacked the formalities designed to give each party a fair chance at self-defense. The events leading up to the City Hotel shooting, however, followed the path that traditionally led to a duel. It therefore fell within the Savannah Anti-Duelling Association's jurisdiction. By arriving to the City Hotel armed and prepared to shoot, Minis breached the honor code — though his supporters might argue that Stark's threat to whip him was the first breach and that Minis could not be expected to do nothing while at risk of being jumped in the street and lashed.

William Bee reported that Stark was preparing a reply to his letter when he fell victim to Minis's pistol.<sup>171</sup> As with previous incidents, Bee and the Anti-Duelling Association wanted to resolve the Stark-Minis dispute by mediation rather than law enforcement. Bee lamented his failure to stop the murder: "This record is made lest it should ever be enquired; where was the Anti-Duelling Association and its standing committee on this occasion?"<sup>172</sup>

That did not end the Anti-Duelling Association's involvement in this affair. Its members served on both sides of the trial. Police arrested Minis forty-five

<sup>168</sup> Minutes, Aug. 10, 1832, SAA Minutes, MS 680, Vol. I, and August 14, RDA Diary Excerpts, MS 27, Item 3. Emphasis in the original text.

<sup>169</sup> Minutes, Aug. 10, 1832, SAA Minutes, MS 680, Vol. I.

<sup>170</sup> Arnold, *supra* note 167

<sup>171</sup> Minutes, Aug. 10, 1832, SAA Minutes, MS 680, Vol. I.

<sup>172</sup> Minutes, Aug. 10, 1832, SAA Minutes, MS 680, Vol. I.

minutes after the shooting.<sup>173</sup> He was indicted on charges of murder. Courts rarely tried people for violating the anti-dueling laws, and Minis's crime would not have fallen under that rubric anyway, because of the non-ritual nature of the showdown in the City Hotel. Solicitor General Colonel Joseph W. Jackson, who oversaw the prosecution, had joined the Savannah Anti-Duelling Association five years prior, in 1827. One of Minis's defense attorneys, Robert M. Charlton, would go on to deliver an "impressive and eloquent" oration at the Association's eighth anniversary meeting in 1835.<sup>174</sup> Judge William Law recused himself from the case, probably because he was related by marriage to Stark.<sup>175</sup> Gamble does not mention Law's relation to Stark, but speculates that the disqualification was due to Law's membership in the Savannah Anti-Duelling Association, whose constitution he had helped to draft.<sup>176</sup> Minis finally stood trial four months after the shooting. After just two hours of deliberation, the jury acquitted him, perhaps because of the possibility that Stark had drawn his pistol first, making Minis fire in self-defense.<sup>177</sup>

The Savannah Anti-Duelling Association operated for six years before it resorted to the "aid of the civil magistracy," as it did when two unnamed duelists traveled to Georgia from Charleston in September 1833. The association's minutes provide no other information about that duel, nor any discussion of the costs and benefits of having sought help from the sheriff and his constables. Still, that decision proved the Savannah Anti-Duelling Association's adaptable policies towards the law. When involving the authorities would have impeded its arbitration work, as with Pooler and Millen, the association acted without them. And when the association did involve the authorities, it appears to have done so effectively but only as a last resort.

Considering the different tactics employed by the Savannah Anti-Duelling Association, one can assume that the Charlestonians' unsuccessful techniques influenced the work of the Savannahians. Though each group worked only in its own city, the Charleston association adopted a long-term strategy, while Savannah's association preferred incremental, gradual tactics. Charleston's anti-duelists attempted to pass legislation that, unlike past laws, aimed to stop dueling forever. That measure died in the legislature for lack of political support. Furthermore, past anti-dueling laws had gone unenforced, making the government look impotent in the face of dueling. (Williams speculates that South Carolina repealed the law that banned duelists from public office in 1834 because it was exclusively "honored in

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173 Arnold, *supra note 167*

174 Gamble, *supra note 18* at 194-195; Jackson's dues payments to the Savannah Anti-Duelling Association are recorded in Subscribers Names Savh. Anti-Duelling Association, SAA Minutes, MS 680, Vol. III; a brief account of Charlton's remarks is in Minutes, Jan. 15, 1835, SAA Minutes, MS 680, Vol. I.

175 Arnold, *supra note 167*

176 Gamble, *supra note 18* at 195

177 Gamble, *supra note 18* at 195

the breach.”)<sup>178</sup> At the same time, the Charleston anti-duelists’ assaults on the press backfired when newspaper editors and contributors perceived them as illiberal and unreasonable.

Savannah’s anti-duelists recognized the government’s inability to enforce anti-dueling laws. Rather than address that weakness by advocating sweeping legislation, they intervened directly to prevent duels. Consciously choosing a limited approach, Savannah’s anti-duelists suppressed dueling through private arbitration rather than government intervention. In doing so, they worked within the *code duello*. The result in Savannah was that potential duelists maintained their sense of honor but did not actually duel.

### Conclusion

The Savannah Anti-Duelling Association held its final meeting in January 1838.<sup>179</sup> Attendance had dwindled in recent years despite, or perhaps because of, the association’s repeated successes. Secretary William Bee counted just one duel (with no injuries) within the Association’s jurisdiction in 1834, which was “so silently conducted” that the committee did not learn of it till after the fact.<sup>180</sup> The next year, on the Fourth of July, Bee had two disputants arrested for preparing to duel. As the “deluded young men” sat in jail, representatives of the Anti-Duelling Association implored the seconds to reconcile. In Bee’s judgment, the anti-duelists acted in line with the *code duello* while one of the seconds shirked his duty under the code by being “unwilling to be approached on the subject” and “repulsive & impolite.” The principals dueled soon after their release from jail — demonstrating that arrests merely postponed, rather than prevented, duels. Noting that one had died at the first fire, Bee lamented the “false notions of honour,” “bad passions,” and “disregard of all laws whether human or divine” that drove the young men across the Savannah River and onto the dueling ground in South Carolina.

That was the last duel in or around Savannah while the Anti-Duelling Association operated. The standing committee’s decision to involve the authorities did not damage its credibility in future arbitrations. Within months of that fatal affair, the association’s vice president and a former Savannah mayor deterred two men from dueling.<sup>181</sup> The next year, the standing committee returned to the practice of using non-members of the association as arbiters to “prevent a *fashionable murder*,” as it had done in the Pooler-Millen affair in its first year of work.<sup>182</sup> Bee celebrated that nobody fought a duel in 1836 and 1837 while also regretting the

178 Williams, *supra* note 17 at 124

179 Minutes, Jan. 8, 1838, SAA Minutes, MS 680, Vol. I.

180 Minutes, Dec. 31, 1834, SAA Minutes, MS 680, Vol. I.

181 Minutes, July 4, 1835, SAA Minutes, MS 680, Vol. I.

182 Minutes, [undated] 1835, SAA Minutes, MS 680, Vol. I.

lack of attendance at the association's annual meetings.<sup>183</sup> He triumphantly recorded his last entry to the Savannah Anti-Duelling Association's minutes book: "This degrading relic of barbarism has fallen into disrepute and almost into disuse."<sup>184</sup>

Bee was only somewhat correct. While his association had successfully reduced dueling's incidence over ten years, its effects were temporary. The practice revived in the 1840s, soon after the Savannah Anti-Duelling Association faded into memory.<sup>185</sup> As much as he may have intended to prevent duels, South Carolina Governor John Lyde Wilson's Code of Honor, printed in 1838, interested enough readers to earn a reprinting two decades later.<sup>186</sup> Dueling continued to trouble clergymen, who carried on preaching against that moral crime without the backing of a community body like the Charleston or Savannah anti-dueling societies.<sup>187</sup>

Dueling persisted in Savannah until the late 1870s; South Carolina's final recorded duel occurred in 1880.<sup>188</sup> In neither Georgia nor South Carolina did dueling end because of a piece of legislation or a substantial increase in enforcement. Historians, however, overlook the deliberate actions of anti-duelists in the half-century before the practice disappeared from society. Dickson D. Bruce, Jr., argues that dueling faded in the postbellum South because the Civil War had destroyed the hierarchical order that revered honor by fire.<sup>189</sup> Jack K. Williams attributes the demise of dueling to the yeomanry's opposition to the privileged status of gentlemen (especially slaveholding planters), to the carnage of the Civil War, and to postwar democratization and economic modernization.<sup>190</sup> Though largely correct, those analyses do not consider the end of dueling in a moral reform context, one which accounts for anti-duelists' various techniques of changing society's perception of honor and establishing new social norms.

Examining anti-duelists' tactics and methods informs our understanding of moral reform activism in the nineteenth century and since. Having pre-dated Southern temperance groups, the anti-dueling associations became the vanguard of civil society organization in Charleston and Savannah. Their incrementalism, indirectness, and limited scope deserve consideration in light of other movements in that era, including the temperance and antislavery efforts. Proponents of each influenced public opinion and worked with legislatures and law enforcement to varying degrees. For example, while the Charleston anti-duelists lobbied the state legislature for anti-dueling laws as one of their first actions, the temperance movement organized for decades at the level of churches before pursuing prohibition

183 Minutes, Oct. 1, 1836, SAA Minutes, MS 680, Vol. I. Emphasis in the original text.

184 Minutes, Dec. 31, 1836 and Jan. 8, 1838, SAA Minutes, 680, Vol. I.

185 Minutes, Jan. 8, 1838, SAA Minutes, MS 680, Vol. I.

186 Williams, *supra* note 17 at 118

187 Dana, *supra* note 89

188 Gamble, *supra* note 18 188.

189 Williams, *supra* note 2 at 80-82

190 Bruce, Jr., *supra* note 35 at 42

legislation. Both anti-dueling clergy and Southern antislavery activists identified and amplified the incongruity of their Christian faith and the practices they sought to eliminate.<sup>191</sup> The social consequences of antislavery and anti-dueling activity may also inform an analysis of the tactics each movement used. Both faced a slave culture hostile to civil society organizations, but opponents of slavery paid a larger social cost for championing their cause than did anti-duelists. While opponents of dueling took advantage of being part of the same social classes as most duelists, antislavery evangelicals within and without the slaveholding class grappled with estrangement from others in Southern society, a reality that influenced the techniques they used in their reform campaigns.<sup>192</sup>

The same considerations of moral suasion, public policy and honor are relevant to more recent campaigns to alter ritual, honor-based practices outside the United States. In the early twentieth century, judges, lawyers, criminologists and medical professionals with a “moral mission” founded the Brazilian Council of Social Hygiene to end their society’s “sympathy” and “benevolence” towards men who killed their disloyal wives in fits of passion.<sup>193</sup> In 1999, Jordanians organized the Campaign to Eliminate So-called Crimes of Honor to punish men who murdered female relatives “in defense of their honor.”<sup>194</sup> Though the nature of politics and civil society in 1930s Brazil and present-day Jordan differ, of course, from each other and from that of the Old South, there may be useful lessons to learn about how each effort used peer-pressure (also known as social networking), indirect techniques, incrementalism and legislation to shape public opinion and change general views about honor.

In antebellum Charleston and Savannah, anti-duelists developed vehicles for reform that transformed the honor culture from within. The existing anti-dueling laws failed to discredit the unwritten honor code that Southerners often respected just as strongly as they did most official statutes. Charleston’s anti-duelists discovered that, though strong laws were difficult to enact, their group’s public opposition to dueling produced useful debates in the city’s newspapers about the morality of dueling. Learning from the flaws of the Charleston Anti-Duelling Association’s tactics, anti-duelists in Savannah fought their campaign largely outside the halls of government. They directed their efforts at duelists, and in the court of public opinion. Clergymen sought to shift public opinion by preaching about the value of life and the sin of murder. But more influential were political figures who could capitalize on their social status to stop duels by personal intervention. By

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191 James Brewer Stewart, “Evangelicalism and the Radical Strain in Southern Antislavery Thought During the 1820s,” *The Journal of Southern History* 39, no. 3, 381 (1973). <https://doi.org/10.2307/2206257>

192 Stewart, *supra* note 191 at 392

193 Susan K. Besse, *Crimes of Passion: The Campaign against Wife Killing in Brazil, 1910-1940*. *Journal of Social History* 22, no. 4 654 (1989).

194 Stefanie Eileen Nanes, *Fighting Honor Crimes: Evidence of Civil Society in Jordan*. *Middle East Journal* 57, no. 1 117 (2003).

highlighting the weaknesses of legislation and personally intervening in private disputes, anti-duelists changed the way that a substantial portion of their society's ruling class conducted their lives, enlightening common perceptions among Southern gentlemen of honor, justice and the legitimate uses of violence.



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## CHANGING COURT IN CHANGING TIMES: CONSTITUTIONALISM AND SEPARATION OF POWERS FROM BRITISH CROWN COLONY TO CHINESE SPECIAL ADMINISTRATIVE REGION

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### Introduction

On August 25, 2017, the supreme court of Hong Kong rejected an appeal from Yau Wai Ching and Sixtus “Baggio” Leung.<sup>1</sup> They had won their elections to the legislature of Hong Kong—the Legislative Council (LegCo)—but they had been disqualified from their seats because their oaths were invalidated by the secretary-general.<sup>2</sup> In a decision released on September 1, 2017, the Court of Final Appeal (CFA) determined that, since they failed to fulfill the “constitutional requirement on a member of LegCo validly to take the LegCo oath,” they disqualified themselves from the office to which they were dutifully elected.<sup>3</sup> Besides charges relating to storming the LegCo chamber, Yau Wai Ching and Sixtus “Baggio” Leung’s legal journey in the oath-taking controversy was effectively over.

The controversy, which has consumed many pages and occupied many pixels, is notable for the most recent use of Hong Kong Basic Law Article 158 power. On November 7, 2016, the National People’s Congress Standing Committee (NPCSC) exercised its Article 158 authority and issued an interpretation on the Basic Law that effectively disqualified pro-independence candidates and severely weakened Yau and Leung’s case in the Judiciary.<sup>4</sup> Under the Interpretation, “an oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read

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1 Chris Lau & Tony Cheung, “Ousted Hong Kong lawmakers Baggio Leung and Yau Wai-ching lose final bid to regain seats”, *South China Morning Post* (August 25, 2017, 11:32 PM), <https://www.scmp.com/news/hong-kong/politics/article/2108243/ousted-hong-kong-lawmakers-baggio-leung-and-yau-wai-ching>.

2 Tony Cheung et al., “Three rejections and multiple deviations mark Hong Kong Legislative Council swearing-in”, *South China Morning Post* (October 12, 2016, 11:56 PM), <https://www.scmp.com/news/hong-kong/politics/article/2027413/three-rejections-and-four-deviations-mark-hong-kong>.

3 *Yau Wai Ching v. Chief Executive of Hong Kong* (2017) 20 H.K.C.F.A.R. 390 (C.F.A.).

4 Gary Cheung et al., “China’s top body lays down law on Hong Kong oath-taking”, *South China Morning Post* (November 8, 2016, 12:12 A.M.), <https://www.scmp.com/news/hong-kong/politics/article/2043768/chinas-top-body-lays-down-law-hong-kong-oath-taking>.

out the oath prescribed by law.”<sup>5</sup> As oath taking is a legal requirement to hold the offices proscribed under Article 104, any oath taker who “intentionally reads out words which do not accord with the wording of the oath prescribed by law, or takes the oath in a manner which is not sincere or not solemn, shall be treated as declining to take the oath” and is therefore disqualified from said office.<sup>6</sup>

Under Article 104 of the Hong Kong Basic Law, members of the Legislative Council “must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”<sup>7</sup> In accordance, the Oaths and Declaration Ordinance was amended on the Handover and the Legislative Council Oath was updated to make clear the relationship of Hong Kong to China, mentioning the phrase “Hong Kong Special Administrative Region of the People’s Republic of China” three times.<sup>8</sup>

To any neutral observer, Yau Wai Ching and Sixtus Leung could not have possibly taken the oath sincerely as they, concurrently with the oath taking, draped on themselves a banner with the words “Hong Kong is NOT China.”<sup>9</sup> Indeed, no one would dispute that they were making a political statement opposing the central government in Beijing and questioning the sovereignty of Hong Kong. And yet, the interpretation by the NPCSC was stunning in and of itself because it reflected another apparent crack in the One Country, Two Systems (OCTS).

### What is Basic Law?

Under the OCTS constitutional principle, Hong Kong retains its autonomy in internal affairs. Established during the creation of the British colony of Hong Kong, its common law framework remained, as did the various established courts after nomenclature changes.<sup>10</sup> The highest court, the Judicial Committee of the Privy Council in London, was jettisoned and

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5 Interpretation of Article 104 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress. L.N. 169 of 2016, 2(2), (Accessed December 5, 2018, 6:15 P.M.), [https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext\\_doc25.pdf](https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclawtext_doc25.pdf).

6 *Id.* at 2(3)

7 Xianggang Jiben Fa art. 104 (H.K.).

8 Oaths and Declarations Ordinance, (1972) Cap. 11 (H.K.)

9 Cheung et al., *supra* note 2

10 The Supreme Court of Hong Kong was renamed the High Court and the High Court was renamed the Court of First Instance; furthermore, the High Court consists of a Court of Appeal and the Court of First Instance

replaced with a Court of Final Appeal in Hong Kong. The principle of universal suffrage was also enshrined into the politic, with the Basic Law—the mini-constitution of Hong Kong—setting out the ultimate aim of universal suffrage in the elections of Legislative Councilors and in the elections of the Chief Executive.<sup>11</sup>

British Hong Kong was acquired in three distinct agreements over a period of fifty-seven years: Treaty of Nanking 1843, Convention of Peking 1860, and the Second Convention of Peking 1898. The ninety-nine-year lease of the New Territories, signed during a time when China was in turmoil and weak, had come back to haunt London. It practically sealed the fate of the British colony when it came to British rule and Chinese resumption. To have a Chinese New Territories and a British Kowloon and Hong Kong Island would have created a maritime nightmare as the vital port facilities were based on the leased land. Hong Kong was militarily indefensible, as was attested to by the Battle of Hong Kong during World War II. Between a declining Great Britain (UK), a rising China, and an impending deadline, the Sino-British Joint Declaration was created in 1984. Once the British agreed to relinquish the whole of Hong Kong to China, discussions about the future of the city began in earnest. Great Britain agreed to handover Hong Kong to China only if China agreed to maintain the current way of life in the colony.

The Basic Law—the result of the Hong Kong Basic Law Drafting Committee—was promulgated on August 4, 1990. Its purpose was to incorporate the policies agreed to by the People's Republic of China (PRC) in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Sino-British Joint Declaration). It was drafted by fifty-nine people, of which twenty-three were from Hong Kong and the rest were from the Mainland. Several members of the Hong Kong delegation, such as pro-democrat Martin Lee, were ejected from the group after the Tiananmen Square Massacre. The Basic Law reaffirmed that Hong Kong was an inalienable part of China and incorporated the OCTS policy through Chapter 1.

There is a minority position that the authority of the Basic Law is not rooted within the structure of the Chinese Constitution but rather within the Sino-British Joint Declaration. Under this theory, the monitoring of

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11 Xianggang Jiben Fa art. 45 (H.K.)



the political and legal status of Hong Kong by the UK is an obligation.<sup>12</sup> If one believes this interpretation, then one would have been absolutely devastated by the remarks that emanated on the 20th anniversary of the Handover.<sup>13</sup> The Chinese Foreign Ministry spokesman was quoted as saying (in Chinese): “Now that Hong Kong has returned to the motherland...the Sino-British Joint Declaration, as a historical document, no longer has any practical significance.”<sup>14</sup>

## What is Hong Kong?

### From Crown Government to Executive-Led Government

The descriptors of Hong Kong spans almost the entire gamut of regime descriptions. The most conventional one is “hybrid regime.” Its official name is the Hong Kong Special Administrative Region of the People’s Republic of China (HKSAR). A politically charged description is “Chinese colony” or a “neo-colonial territory”. A survey by the Economist Intelligence Unit classified Hong Kong as a “flawed democracy.”<sup>15</sup> A recent description classifies it as a “liberal constitutional nondemocracy.”<sup>16</sup> The interesting characteristics of Hong Kong—a strong civil society, a government that allows civil liberties, and a non-democratic political system—constitute the region as “the rarest of rare birds: liberal nondemocracy.”<sup>17</sup>

The first analysis of constitutional law is to start with the text. Unfortunately, to apply that to British Hong Kong is exceedingly difficult since its governance was based on British principles. Great Britain did not—and still does not—have a written constitution. The handiwork of the British Empire made its mark on Hong Kong. Great Britain has been—and is still famous for—its unwritten constitution. It is also known for its parliamentary sovereignty and the implicitness of parliamentary supremacy.

12 See Lorenz Langer, *Out of Joint? Hong Kong’s International Status from the Sino-British Joint Declaration to the Present*, 46 *Archiv des Völkerrechts* 309, 309-344 (2008).

13 Lorenz Langer, *Out of Joint? Hong Kong’s International Status from the Sino-British Joint Declaration to the Present*, 46 *Archiv des Völkerrechts* 309, 309-344 (2008).

14 At least one commentator attempted to mitigate the statement by noting the linguistic ambiguity between Chinese and English, see Julian Ku, “Grammar Matters: Did China Really Declare that the Entire Sino-UK Joint Declaration is “Not At All Binding”? Maybe Not”, *Lawfare* (July 3, 2017, 10:00 AM), <https://www.lawfareblog.com/grammar-matters-did-china-really-declare-entire-sino-uk-joint-declaration-not-all-binding-maybe-not>.

15 The Economist Intelligence Unit, *Democracy Index 2016: Revenege of the “deplorables”*, 34 (2017) [https://www.transparency.org.nz/docs/2017/Democracy\\_Index\\_2016.pdf](https://www.transparency.org.nz/docs/2017/Democracy_Index_2016.pdf).

16 David S. Law, *Alternatives to Liberal Constitutional Democracy*, 77 *Maryland L. Rev.* 223, 223 (2017).

17 *Id.* at 236

### Crown Colony before the Battle of Hong Kong

Hong Kong was described by Lord Palmerston as “a barren Island with hardly a House upon it.”<sup>18</sup> A few thousand villagers lived on the island, separated from the rest of China by a deep-water harbor. Under the Treaty of Nanking, the island was surrendered to British possession “in perpetuity.”<sup>19</sup> According to the text, it was “to be governed by such laws and regulations as Her Majesty the Queen of Great Britain, &c. shall see fit to direct.”<sup>20</sup> Occupied by British forces during the First Opium War, the Crown Colony of Hong Kong was established on June 26, 1843.<sup>21</sup> Unlike settler colonies in North America, South Africa, and Australia, Hong Kong was a commercial entrepôt. Lord Stanley, then the Secretary of State for War and the Colonies, wrote to Sir Pottinger, the Plenipotentiary and Superintendent of Trade, explaining that there were three main purposes of Hong Kong: diplomatic, commercial, and military.<sup>22</sup> Because Hong Kong was so far away from the imperial capital in London and because communication was difficult to establish, local authorities had greater imperative to act. They had significant autonomy to rule on behalf of the Crown.

The first “constitution” was a pair of documents: the Hong Kong Charter and the Instructions.<sup>23</sup> The Charter established a Legislative and Executive Council that was tied to the Governor, who was effectively the local locus of power. He sat on the Legislative Council itself and, with the advice of the Council, could create law. The Executive Council (ExCo) was to “advise and assist” the Governor.<sup>24</sup> Laws were enacted for the “Peace, Order, and good Government” of Hong Kong subject to three limitations: (1) laws had to be in accordance with the instructions from the Secretary of State, (2) laws were subject to disallowance (equivalent of nullifying a law) by the Crown, and (3) the British Parliament retained the power to pass concurrent legislation that affected the colony.<sup>25</sup>

Between the Charter and the Instructions, the latter was far more

18 Lord Palmerston, quoted in Stephen R. Platt, *Imperial Twilight: The Opium War and the End of China's Last Golden Age*, 416 (2018).

19 Treaty of Nanking, 20276 The London Gazette 3597, 3597 (1843)

20 *Id.*

21 G.B. Endacott, *Government and People in Hong Kong, 1841-1962: A Constitutional History*, 15 (1964 edited by Steve Tsang).

22 *Id.* at 20

23 *Id.* at 22

24 *Documentary History of Hong Kong: Government and Politics*, 19 (1995, edited by Steve Tsang)

25 G.B. Endacott, *Government and People in Hong Kong, 1841-1962: A Constitutional History*, 22 (1964 edited by Steve Tsang).

illustrative of the constitutional framework. G.B. Endacott remarked that “it would only be a slight exaggeration to say that the constitution of Hong Kong must be looked for in the Instructions rather than in the Charter.”<sup>26</sup> The Instructions effectively elevated the Governor above the Legislative Council. The Governor, not the LegCo, proposes the legislation. Even if every other member of the LegCo takes a unanimous position on a policy, the Governor can overrule them.<sup>27</sup> Any policy may be proposed or passed unless it contravenes either of the two documents. Such a constitutional arrangement mirrored that of other Crown Colonies, with their Governors being similarly powerful.

By the time the Kowloon Peninsula and Stonecutter’s Island were added to the colony’s territory, the LegCo had strengthened its position in relation to the Governor. New Instructions were circulated to the Governor—now more a colonial administrator than a political appointment—on October 16, 1865.<sup>28</sup> Membership of the LegCo was redefined: the membership of the Official Members was edited and up to four Unofficial Members—those whose appointments were subject to discretion - were allowed. The Executive Council’s membership was tailored as well. In addition, while the Governor had the unilateral authority to propose the agenda, members could, for the record, ask the Governor to propose specific agenda. The most important change, however, was the removal of the Governor’s absolute legislative power to overrule the LegCo. Members could now make statements on any normal policy matter, germane or not. The 1872 Instructions also strengthened the LegCo by allowing any legislative business with the exception of finance to be discussed if any two members wished.<sup>29</sup>

The acquisition of the New Territories expanded Hong Kong further, from one twenty-nine square mile island to a colony that comprised over 200 bodies covering nearly 400 square miles of land.<sup>30</sup> Unlike Hong Kong Island, however, the New Territories was filled with Chinese. Walled villages dotted the land and Chinese clans practiced customs and rules that were not compatible to the constitutional structure and legal system of the colony. Representation in government was always a haunting shadow on the government. Though the separation of powers did not change meaning-

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<sup>26</sup> *Id.* at 23

<sup>27</sup> *Id.* at 24

<sup>28</sup> *Id.* at 81-82

<sup>29</sup> *Id.* at 84

<sup>30</sup> G.B. Endacott, *Government and People in Hong Kong, 1841-1962: A Constitutional History*, 3 (1964).

fully, some powers were devolved. For example, village elders were given judicial power.<sup>31</sup> More than anything, the acquisition of the New Territories provided a catalyst for the government to expand its administrative capacity. The last major revision of the constitutional instruments, the Letters Patent (also known as the Charter) and the Instructions, occurred in 1917. As Endacott said, they “made no change of principle and few changes of detail.”<sup>32</sup>

### Crown Colony after the Second World War

While the Imperial Japanese Navy bombed Pearl Harbor, the Imperial Japanese Army assaulted Hong Kong. Several weeks later on Christmas Day, the British garrison in Hong Kong surrendered. The Pacific War wrecked Hong Kong terribly. Lord Lawrence Kadoorie, upon returning to Hong Kong after the war, commented:

...[it was] the most looted city in the world—there wasn’t a piece of wood to be seen in Hong Kong when I got back from Shanghai where I’d been a prisoner of war. And the whole city was, well, there was one cable across the harbor, there was some light in one or two buildings on this side (Hong Kong-side) and there was some light at the Peninsula Hotel, which was the Japanese headquarters. But other than that there wasn’t any light at all in the place. And it was black. Rats all over the place and the complete and utter destruction you might say, on the Peak. There wasn’t a single house that was habitable at all. No doors, no windows. People had left their dogs and big dogs had eaten the little dogs and become so wild that they had to get police with guns to shoot these dogs because it was so dangerous.<sup>33</sup>

The “most looted city in the world” also quickly became the most important colony the British Empire had. The war had also devastated the imperial apparatus, the vast linkage that made Great Britain in charge of the largest empire in world history. Decolonization proceeded at a rapid pace after World War II and the Empire lost several important colonies to independence, including the crown jewel of India.

After the Crown Colony was reacquired at the War’s conclusion, Governor Young embarked on a failed constitutional reform plan. Like most

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<sup>31</sup> *Id.* at 131

<sup>32</sup> *Id.* at 141

<sup>33</sup> Lord Lawrence Kadoorie, quoted in Vaudine England, *The Quest of Noel Croucher*, 159-160 (1998).

constitutional contentions in colonial Hong Kong, the issue was regarding representation. The separation of powers remained unchanged, and even if the plan been implemented, it would have been untouched. A compendium of British colonial constitutions described Hong Kong's as one that has a Legislative Council with an Official Majority and an Unofficial Minority Wholly Nominated.<sup>34</sup>

By 1962, both the LegCo and the ExCo had become recognizable with the post-Handover incarnation. The ExCo represents the advisory role but it can force the Governor to set the agenda unless he explains why he refused to do so. If the Governor acts in opposition to the Council, the Council can force him to explain the reasons.

By and large, the ever-present desire of the Chinese to reacquire Hong Kong provided ample ammunition for the British authorities to resist any far-reaching effort to reorganize the structure of Hong Kong government. In addition, sought changes to the constitutional framework of the British colony revolving around the issue of representation were similarly stymied.

#### British Dependent Territory: Transition Highway

The path that led to the Handover of sovereignty resulted in numerous changes to Hong Kong, Great Britain, and China. The category of Crown Colony was eliminated and replaced with a new category: British Dependent Territory.<sup>35</sup> More than anything, the British Nationality Act of 1981 prevented British citizens of Hong Kong from acquiring the right of abode in Britain and therefore, by virtue of the European Community, the right to work in Europe.<sup>36</sup> The OCTS—first proposed in 1980 for the purposes of Taiwan—was repurposed for the acquisition of Hong Kong.<sup>37</sup> A new Chinese Constitution was ratified in 1982 and it included a curious provision: Article 31, which allowed the State to create a polity known as a Special Administrative Region (SAR) with its own special law in light of special conditions.<sup>38</sup> Failing to gain Taiwan, the PRC gained Hong Kong and Macau. Then came the drafting and promulgation of the Hong Kong Basic Law.

In 1994, just three years before the Handover, there were still three

34 Martin Wight, *British Colonial Constitutions in 1947*, 45 (1952)

35 British Nationality Act 1981, U.K. Parliament (1981)

36 Gerald Segal, *The Fate of Hong Kong*, 32 (1993)

37 Pui-Yin Lo, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997*, 20 (2014)

38 Gerald Segal, *The Fate of Hong Kong*, 36 and 39 (1993)

government officials sitting in the legislature: the Chief Secretary, the Attorney General, and the Financial Secretary.<sup>39</sup> This arrangement was vital in getting the infamous 1994 Patten electoral reforms passed, antagonizing the PRC authorities and completely destroying the prospect of a seamless transition. Upon the Handover, the LegCo was dissolved and replaced with a Provisional Legislative Council (PLC). Remarkably, the reforms polarized the electorate.

### Hong Kong-Style Separation of Powers

In the subsequent two decades since the Handover, the state of Hong Kong affairs is in disrepute. Against the backdrop of the promise of guaranteed universal suffrage, the political parties have had the dubious role of fighting over the process of democratization. And yet, amongst the sclerotic status of the political arena, the seeming unpopularity of the Government, and the identity crisis of Hong Kong, the rule of law seems to rise as a pillar above it all. The Judiciary is emblematic of this idea, and as a result, its approval and trustworthiness are among the highest of all Hong Kong institutions. For example, in a 2003 public opinion poll, the courts were given the highest confidence, eliciting 71.4% of respondents in comparison with the civil service (46.4%), the legislature (45.8%), the executive (41.8%), and the political parties (29.8%).<sup>40</sup>

At first glance, a textual analysis does indeed suggest that separation of powers exists under the Hong Kong Basic Law. Article 2 of the Basic Law lists the three conventional powers of government: legislative, executive, and judicial. Judicial independence is also guaranteed by Article 85, “the courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.”

Reference to “separation of powers” quickly evaporated during the discussions over the creation of the Basic Law after Deng Xiaoping criticized the notion of its inclusion just so it could be seen as a Western democracy.<sup>41</sup> While it may be true that the phrase “separation of powers”

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39 David Akers-Jones, *Feeling the Stones: Reminiscences*, 236 (2004)

40 Ngok Ma, *Political Development in Hong Kong: State, Political Society, and Civil Society*, 155 (2007)

41 John Cahn, “Hong Kong chief executive is not above the executive, judicial, and legislative powers - according to the Basic Law”, *South China Morning Post* (Sep. 25, 2015, 5:53pm), <https://www.scmp.com/comment/insight-opinion/article/1861340/hong-kong-chief-executive-not-above-executive-judicial-and>

does not appear in the Hong Kong Basic Law, it is also not present in the United States Constitution. Yet, all acknowledge that the principle exists in the United States federal government.

In Hong Kong, the Court of Final Appeal has also formally recognized a similar principle in several decisions, including restating its recognition most recently in *Yau Wai Ching v. Chief Executive of Hong Kong*.<sup>42</sup> As a holdover of British law and recognition of its colonial legacy, judicial decisions affecting Hong Kong made before 1997 remain binding. In fact, all colonial laws that have not been repealed by subsequent legislation nor in contravention of the Basic Law are still valid.<sup>43</sup> Common law principles, unless changed by subsequent Basic Law provisions or LegCo legislation, remain relevant. In *Leung Kwok Hung v. President of the Legislative Council*, the Court stated a portion of the separation of powers doctrine, that “[principles, doctrines, concepts and understandings which are embedded in the common law] include the doctrine of the separation of powers and, within it, the established relationship between the legislature and the courts.”<sup>44</sup> The first appearance of the phrase was in the landmark *Lau Kong Yung v. Director of Immigration*.<sup>45</sup>

The expression “in adjudicating cases” is of particular significance. In the common law world, these words would be surplusage. Interpretation of law, even of a constitution, is the business of the courts, being an incident of the adjudication of cases. In the People’s Republic of China, however, under Article 67 (4), the Standing Committee of the NPC exercises, as well as other functions and powers, the power “to interpret laws”, because the PRC Constitution does not provide for a **separation of powers** that is the same as or similar to the common law doctrine of the **separation of powers**. Article 57 of the PRC Constitution provides that the NPC is the highest organ of state power and the NPCSC is its permanent body.<sup>46</sup> (Emphasis added)

In *Director of Immigration v. Chong Fung Yuen*, the Court declared that “the interpretation of laws is a matter for the courts. This principle, which

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<sup>42</sup> *Leung Kwok Hung v. President of the Legislative Council* (No.1), cited in *Yau Wai Ching v. Chief Executive of Hong Kong* [2017] 20 H.K.C.F.A.R. 390, 17 (C.F.A.)

<sup>43</sup> *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* art. 8.

<sup>44</sup> *Leung Kwok Hung v. President of the Legislative Council* (No.1) [2014] 17 H.K.C.F.A.R. 689, 28 (C.F.A.)

<sup>45</sup> *Lau Kong Yung v. Director of Immigration* [1999] 2 H.K.C.F.A.R. 300 (C.F.A.)

<sup>46</sup> *Id.* at 161

follows from the doctrine of the separation of powers, is a basic principle of the common law and is preserved and maintained in Hong Kong by the Basic Law.”<sup>47</sup> Yet under the Basic Law, courts could interpret on their own only with the authorization of the NPCSC.<sup>48</sup>

Despite the alluring choice to classify the HKSAR government as adopting a Westminster Model (as Justice Hartmann first stated in *Yau Kwong Man v. Secretary for Security*), the government organs are not so intertwined. There is a formal separation—indeed even political separation as the Chief Executive and her Ministers cannot be affiliated to political parties—between what is called the Government and the Legislative Council. According to Xiao Weiyun, co-chair of the sub-group on the political system of the Basic Law Drafting Committee, “the judiciary shall remain independent and the legislature shall check and balance each other while working in mutual co-operation.”<sup>49</sup>

The notion of Executive-Led Government was made explicit by a member of the colonial government. Chief Secretary Anson Chan and Governor Chris Patton both reference this term as to mean that policy will be formulated and administrated by the Government but is accountable through the Legislature.<sup>50</sup> In addition, non-official members—usually members of LegCo—sit in the Executive Council, a seeming violation of the philosophy of the separation of powers.<sup>51</sup> To appropriate a common phrase, Hong Kong’s separation of powers is a separation of powers with Hong Kong characteristics.

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47 *Director of Immigration v. Chong Fung Yuen* [2001] 4 H.K.C.F.A.R. 211, Sec 6.3. (C.F.A.)

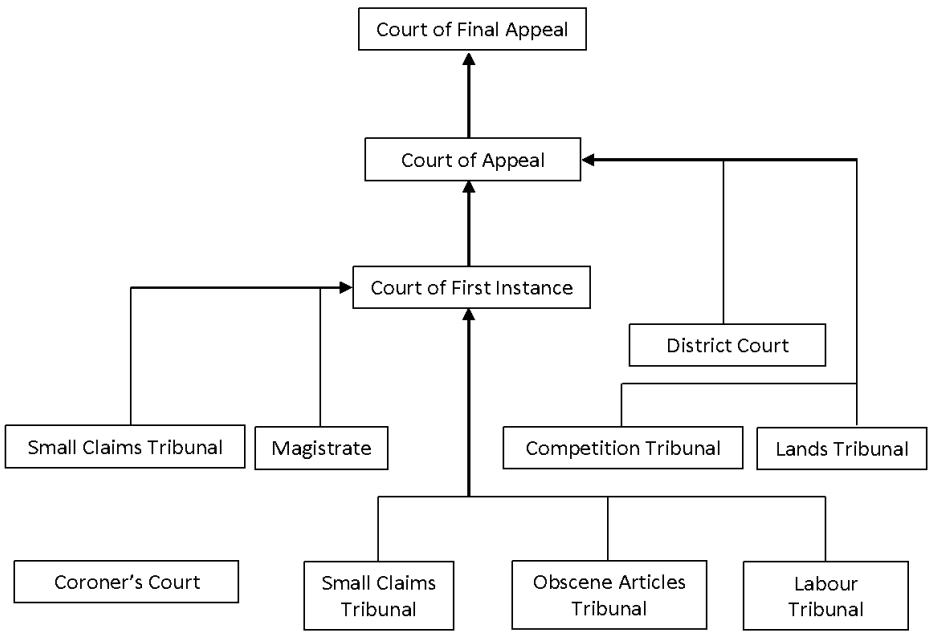
48 *The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* art. 158, 2.

49 Xiao Weiyun, quoted in Pui-Yin Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997*, 40 (2014)

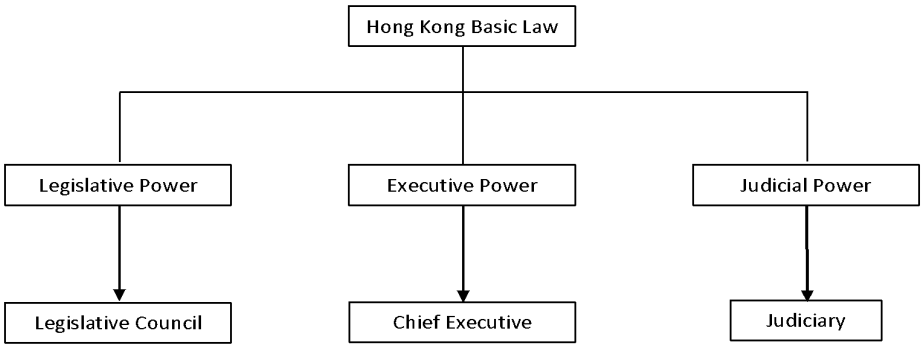
50 Pui-Yin Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997*, 40 (2014)

51 In the United States, the Ineligibility Clause (U.S. Const. Art. 1. Sec. 6 Clause 2) prohibits members of Congress from simultaneously serving in the Executive or Judicial Branches and vice-versa.





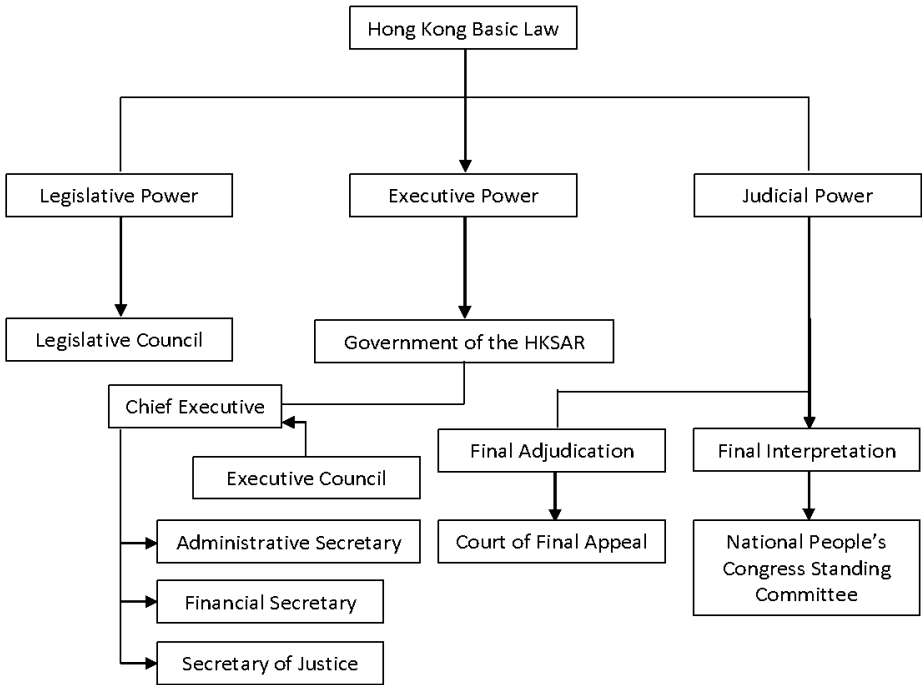
*Figure 1: Judiciary of Hong Kong circa 2018*



*Figure 2: A Popular Conception of the HKSAR Separation of Powers<sup>52</sup>*

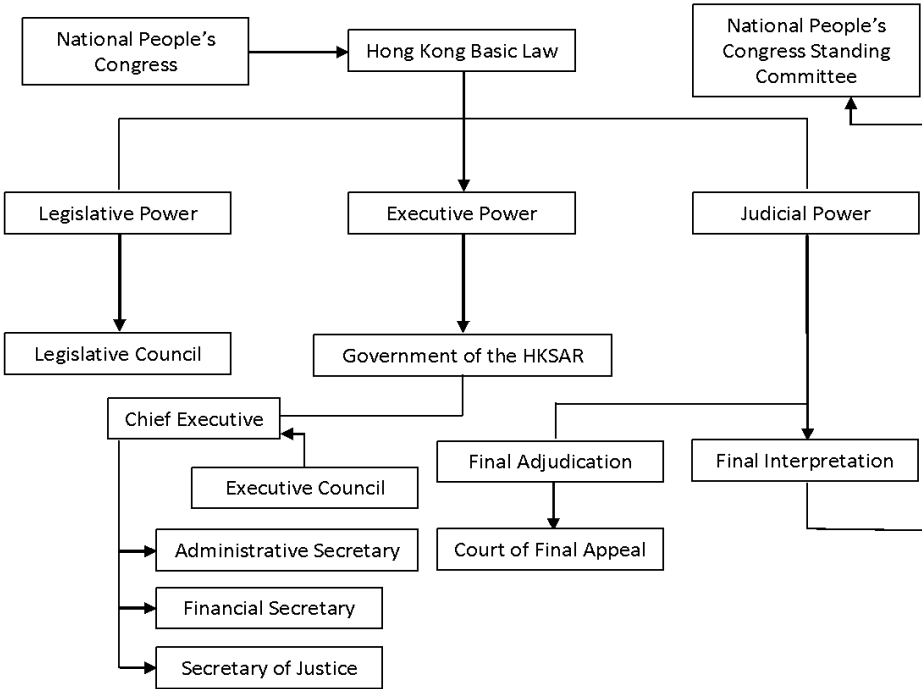
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<sup>52</sup> The inspiration for this conception is quite obvious, either the Westminster model or the Washington model will suffice.



*Figure 3: A Plausible Version of the HKSAR Separation of Powers*<sup>53</sup>

<sup>53</sup> Unlike say the United States, the executive power is divided between the Chief Executive and the Executive Council. In addition, the Administrative, Financial, and Justice Secretaries—as well as their departments—are mandated by the Basic Law. For the sake of brevity, the judicial construction in the diagram is minimal so as to illustrate the division of interpretation from adjudication. The High Court and its composition is mandated by the Basic Law as well.



*Figure 4: Hong Kong Basic Law within the Constitutional System of the People's Republic of China*

### Two Systems, Three Perspectives

As a territory with a significant amount of autonomy, Hong Kong being within the auspices of the PRC is interesting for the bifurcation of power and the seeming total continuity of Hong Kong's political system. Constitutional contentions in Hong Kong—more often than not about democratization—are not only the repeat of eternal fights from the colonial era, but the enduring state of political and constitutional affairs. The more things change, the more they stay the same.

### A British Legacy

Despite what the Chinese Central Government may claim, the modern Hong Kong the world knows is very much a British creation. The post-war economic boom was facilitated by the colonial government's financial non-interventionism. English is widely used in the territory, Hong Kong's English spelling conventions are more British than American, and its university system mirrors that of the British. People in Hong Kong drive on the left and British-style architecture dots the skyline. Most importantly, the Government maintains the practices of White/Green Papers, a competent civil service, and an English-style judiciary. On the dedication of the opening of the then Supreme Court Building in 1912, Governor Lugard proudly declared that “[o]ur courts of justice shall always surpass all other structures in durability, firm set on their foundations and built four-square to all the winds that blow, as an outward symbol perhaps of the justice which shall stand firm though the skies fall.”<sup>54</sup>

The role of the judiciary within state and society is curious from a constitutional and separation of powers perspective, especially if one were to look at the British Constitution. The British have no written constitution, and by virtue of the constitutional monarchy, the Queen reigns and the Government rules. There is no such thing as an unconstitutional Act of Parliament. Therefore, constitutional law is relatively underdeveloped as a distinct area of law. Scholar Albert Venn Dicey believed that this should be so, as laws are created by the people in democracy, and, as Bogdanor paraphrases, it “was to be protected by Acts of Parliament, but not by judges.”<sup>55</sup> The twin pillars of royal prerogative and parliamentary sovereignty have

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<sup>54</sup> Sir Frederick Lugard, quoted in Simon Ng, “Court of Final Appeal building is a timeless symbol of Hong Kong's most cherished legal ideals”, *South China Morning Post* (Sep. 15, 2015, 7:56 am), <https://www.scmp.com/news/hong-kong/law-crime/article/1858129/court-final-appeal-building-timeless-symbol-hong-kongs-most>

<sup>55</sup> *The British Constitution in the Twentieth Century*, 336 (Vernon Bogdanor ed., 2003)

instituted a rejection of American precedents from British case law, most notably the exceedingly famous judicial review case of *Marbury v. Madison*. It was not until the United Kingdom had entered the European Community and then came under European Community law that the Judiciary began to assert their judicial power rigorously, striking down English laws that conflicted with European Community law.<sup>56</sup>

Throughout most of the 20th century, British judges often stressed high formalism because they gave exceeding deference to the political Parliament and Government.<sup>57</sup> By the Thatcher Ministry in the 1980s, the courts began to see themselves as “a separate branch of government along the lines of the American judiciary.”<sup>58</sup> The Government, led by the Prime Minister, was politically answerable to the Parliament and legally answerable to the judiciary. Until very recently, the judiciary has not played an important role in shaping the British constitution.

Until the Court of Final Appeal became the court of last resort for Hong Kong, the highest tier of the Judiciary of Hong Kong was shared with many other territories and countries around the world: the Judicial Committee of the Privy Council. The Judicial Committee heard appeals from colonial courts throughout the empire. A number of select judges (known as a Board) heard each case and rendered Judgements with a desire for uniformity and imperial unity.<sup>59</sup> As the British Empire morphed into the Commonwealth of Nations, uniformity was deemphasized.<sup>60</sup>

Mainly because the constitutional documents of Hong Kong imposed extremely few restrictions on what the Hong Kong colonial government could do, the Privy Council rarely entreated the colony to significant constitutional change. To do so would be to create a shadow constitution out of whole cloth. The appeals from Hong Kong were “bland,” and the interaction between Hong Kong and the Privy Council was “uncontroversial.”<sup>61</sup>

A description of the British separation of powers was given by Lord Templeman as: “Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law.”<sup>62</sup> This description is far from uni-

56 *The British Constitution in the Twentieth Century*, 357 (Vernon Bogdanor ed., 2003)

57 *Id.* at 343

58 *Id.* at 539

59 Oliver Jones, *A Worthy Predecessor? The Privy Council on Appeal from Hong Kong, 1853 to 1997*, in *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong*, 96 (Simon N. M. Young & Yash Ghai eds., 2014).

60 *Id.* at 97

61 *Id.* at 118

62 *M v. Home Office* [1994] 1 AC 377 (HL) [¶ 395] quoted in Lo Pui Yin, *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997*, 54 (2014).

versal—the American maxim is more along the lines of: Congress makes the law, the President enforces the law, and the Courts interpret the law. In contrast, Lord Wilberforce asserted that the separation of powers “has never been a governing principle in [England].”<sup>63</sup> The words of AV Dicey echoes.

According to Gustavo Fernandes de Andrade, “there are three forms of determining the constitutionality of... legislation”: political, jurisdictional/judicial, and mixed.<sup>64</sup> The British system undoubtedly follows the political review model since there is no such thing as an unconstitutional Act of Parliament. The American system follows the judicial review model, as courts have the power to set aside legislation conflicting with the Constitution. Hong Kong’s system is the last model: courts review one type of legislation and a political organ reviews another type. That Hong Kong’s system can be qualified as a mixed model should be qualified by the fact that the political organ is on a different tier of government separate from the HKSAR. In this respect, the HK-Mainland relationship has federalist characteristics.

### A Chinese View

A minor controversy erupted when the legal chief of the Chinese Central Government’s Hong Kong Liaison Office declared that under the OCTS, “Hong Kong can have its own law, an independent judiciary, but it cannot have its own constitution.”<sup>65</sup> Technically speaking, Wang Zhenmin isn’t wrong—Hong Kong is a part of China, so the Chinese Constitution is its supreme law, much like every other political entity in China. The HK-SAR regime was created under Article 31 of the Chinese Constitution, and while the Basic Law was promulgated by the National People’s Congress to adhere to the OCTS policy, it was done so in the accordance of Article 31 that “[t]he systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of the specific conditions.”<sup>66</sup>

If the Basic Law is a piece of legislation enacted by the National

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63 Robin Cooke, *The Law Lords: An Endangered Heritage*, 119 L.Q. Rev. 49, 58 quoted in Lo Pui Yin, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997*, 55 (2014).

64 Gustavo Fernandes de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. Pa. J. Const. L. 977, 978 (2001).

65 Sum Lok-kei, “Liaison Office Legal Chief Tells Hong Kong: Basic Law is Not Your Constitution”, *South China Morning Post* (July 15, 2018, 7:01 AM), <https://www.scmp.com/news/hong-kong/politics/article/2155297/liaison-office-legal-chief-tells-hong-kong-basic-law-not> (last updated July 15, 2018, 12:36 PM).

66 Xianfa art. 31 (1982) (China).

People's Congress, it makes sense that only the National People's Congress should have the power to change it. This logical conclusion was affirmed in the Basic Law through Article 159, that "[t]he power of amendment of this Law shall be vested in the National People's Congress."<sup>67</sup> To hedge against any possibility that changing the Basic Law in any way will weaken the position of the Mainland in the Mainland-SAR relationship, the Article also stipulates that "[n]o amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong."<sup>68</sup>

While OCTS may refer to the two different political and cultural systems of the Mainland and the SARs, it can be taken quite literally in the case of Hong Kong; Hong Kong's legal system of common law is wildly divergent from the civil law system practiced everywhere else in China (including Portuguese-style Macau). *Qi Yuling v. Chen Xiaoqi* (2001), which was an attempt to create a Chinese *Marbury*, failed miserably as the rest of the judiciary simply declined to follow the Supreme People's Court's decision.<sup>69</sup> To temper hyperbole, this sort of mixed jurisdiction is not completely unprecedented nor is it unique. The European Court of Justice operates under a civil law framework and its jurisdiction includes common law regimes such as the United Kingdom.

The seeming incompatibility of the Hong Kong and Chinese judicature does pose a problem if the OCTS expires in 2047. Indeed, the unifying policy thread of most localist parties that erupted after the Umbrella Revolution is the continuation of the OCTS *after* 2047. Fortunately, the OCTS framework that was untried became tried and true. Early fears of the total collapse of Hong Kong's way of life after the Handover were unfounded. However, successive Administrations of the HKSAR government have been increasingly unpopular, eventually leading to the 3rd Chief Executive, CY Leung, to be the first one to not seek a second term.

On June 10, 2014, the Information Office of the State Council of the PRC published a White Paper on the OCTS policy. It sought to 'correct' some of the interpretations of the policy by Hong Kongers. It asserted that the right of autonomy and the OCTS policy were not inherent in the lives of Hong Kongers but rather was "authorized by the central leadership."<sup>70</sup>

67 Xianggang Jiben Fa art. 159 (H.K.).

68 *Id.*

69 N. W. Barber & Adrian Vermeule, *The Exceptional Role of Courts in the Constitutional Order*, 92 Notre Dame L. Rev. 817, 829 (2017).

70 State Council Information Office of the People's Republic of China, Full text: "Chinese State Council white paper on 'One Country, Two Systems' policy in Hong Kong", *South China Morning Post* (June 10, 2014, 12:25 PM), <https://www.scmp.com/news/hong-kong/article/1529167/full-text-practice-one-country->



Given the other exhortations about patriotism and the eternal facet of Chinese socialism, the Paper emphasized the “One Country” over the “Two Systems.” The State Council reminded Hong Kongers that “the high degree of autonomy of the HKSAR is not full autonomy, nor a decentralized power.”<sup>71</sup> Of course, that is obvious, as the highest level of autonomy would be full sovereignty—an independent nation.

One could charitably argue that the Basic Law also constrains Chinese authorities from unauthorized interference into Hong Kong. A written piece of law is surely better than an unwritten piece of legislation. If nothing else, the Chinese Central Government is abiding by a three decade-old promise.

### An American Comparison

The position of the Basic Law within the Chinese Constitution—a piece of legislation promulgated by the national legislature that acts as a constitution for a subnational polity—is interesting, since that description fits the nature of the Constitution of Puerto Rico.

In the aftermath of the Spanish-American War, the United States acquired several former Spanish colonies in the Caribbean and the Pacific, one of which was the colony of Puerto Rico. It subsequently became a territory. According to the United States Constitution, “[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>72</sup> This Territory Clause gives the federal government broad discretion to govern the territories, whether ruling it directly by installing an appointed government or ruling it indirectly by establishing a local government.

The Foraker Act, an organic act that creates the framework of territorial government, was passed by Congress in 1900.<sup>73</sup> For the first time under American rule, a civilian government governed Porto Rico (as it was then called). Like the Governor of Hong Kong, the Governor of Porto Rico was an appointed position, although the appointment needed to be confirmed by the Senate.<sup>74</sup> Like the Governor of Hong Kong, the Governor of Porto Rico was assisted by an Executive Council. Like the early days of the

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[two-systems-policy-hong-kong-special](#) (last updated June 10, 2014, 9:40 PM).

<sup>71</sup> *Id.*

<sup>72</sup> U.S. Const. art. IV, § 3, cl. 2.

<sup>73</sup> R. Sam Garrett, Congressional Research Service, *Political Status of Puerto Rico: Options for Congress*, RL32933, 9 (2011).

<sup>74</sup> *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 17, 31 Stat. 77, 81 (1900).

British ExCo, members of the Porto Rican ExCo were all appointed; unlike the British counterpart, “native inhabitants” were mandated in the composition of the Council.<sup>75</sup> Therefore, the Porto Rican ExCo consisted of the cabinet—six *ex officio* members—and the five native members.

Interestingly, the Executive Council exercised *legislative* power since it was also the upper chamber of the Legislative Assembly. The lower chamber was the House of Delegates. It comprised of thirty-five elected members. There were seven geographic constituencies, divided by population, each of which provided five members to the chamber.<sup>76</sup>

Because of the federal nature of the American system, there is a bifurcation of government and powers; this is true even in territories. The most obvious point is the Judiciary. Federal courts exist alongside state courts (or, in this case, territorial courts). As a general matter, federal laws apply everywhere. In practice, the plenary power of the federal government over territories allows Congress to exempt application of the laws within these areas if it so chooses.

The Supreme Court of Porto Rico was established, and it was to be comprised of members appointed by the president, with the advice and consent of the Senate. Local district court judges were to be appointed by the Governor, with the advice and consent of the Executive Council. All other officials were to be chosen by the legislative assembly.<sup>77</sup> In addition, the territory was to get its own federal judge. Appeals from the Porto Rican judicial system were to be taken to the federal judicial system in the same manner as other territorial judicial systems.<sup>78</sup> With the establishment of the federal district court, the provisional court that had been in place during military government was abolished.

A resident commissioner was also established for Porto Rico. Elected by qualified voters of Porto Rico, they represented the territory in Congress. Lastly, a three-member Commission was also established by the Foraker Act. Its purpose was to survey the state of Porto Rico and recommend any potential changes. Among its various mandates was to “make all other provisions that may be necessary to secure and extend the benefits of a re-

75 *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 18, 31 Stat. 77, 81 (1900).

76 *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 28, 31 Stat. 77, 82 (1900).

77 *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 33, 31 Stat. 77, 84 (1900).

78 *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 35, 31 Stat. 77, 85 (1900).

publican form of government to all the inhabitants of Porto Rico.”<sup>79</sup>

In 1917, a new act concerning Porto Rico was adopted by Congress. Passed on March 2, the Jones-Shafroth Act made major changes to the status of Porto Rico and its inhabitants. A Bill of Rights was established for Porto Rico, mirroring several features found in the United States Constitution, such as: no deprivation of “any person of life, liberty, or property without due process”; the right to have “the assistance of counsel” in trial; “a speedy and public trial”; habeas corpus; double jeopardy; and no ex post facto laws or bills of attainder.<sup>80</sup> Presaging the passage of the 18th Amendment and the implementation of Prohibition, the Jones-Shafroth Act did not allow Porto Rico “to import, manufacture, sell, or give away, or to expose for sale or gift any intoxicating drink or drug” except for the purposes of “medicinal, sacramental, industrial, and scientific uses only.”<sup>81</sup>

The Executive Branch was reformed. The Departments of Justice, Finance, Interior, Education, Agriculture, Labor, and Health were created. The head of the Departments of Justice and Education were appointed by the President and confirmed by the U.S. Senate; the other department heads were appointed by the governor, with the advice and consent of the newly-created Senate of Porto Rico.<sup>82</sup> These six heads of the Executive Departments became the new membership of the Executive Council.<sup>83</sup>

The Legislature of Porto Rico was still bicameral, but the Executive Council no longer constituted the upper chamber and was replaced by the Senate of Porto Rico.<sup>84</sup> There were nineteen members, two from each of the seven geographical districts (which were drawn by the ExCo) and five at-large members.<sup>85</sup> The lower chamber was renamed the House of Representatives. It was expanded to have thirty-nine members, one from each of the thirty-five geographical districts (drawn by the ExCo) and four at-large members.<sup>86</sup> In addition to restricting the legislative power to affect the Ex-

79 *An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes*, Pub. L. No. 56–191, § 40, 31 Stat. 77, 86 (1900).

80 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes, Public Law*, Pub. L. No. 64–368, § 2, 39 Stat. 951, 951 (1917).

81 *Id.* at 952

82 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes, Public Law*, Pub. L. No. 64–368, § 13, 39 Stat. 951, 955–56 (1917).

83 *Id.* at 956

84 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes, Public Law*, Pub. L. No. 64–368, § 25, 39 Stat. 951, 958 (1917).

85 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes, Public Law*, Pub. L. No. 64–368, § 26, 39 Stat. 951, 958–59 (1917).

86 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes, Public Law*, Pub. L. No. 64–368, § 27, 39 Stat. 951, 959 (1917).

executive Departments without approval from the federal authorities, many federal laws—such as the various interstate commerce acts—were not to apply in Porto Rico.<sup>87</sup> The Act lengthened the term of Resident Commissioner to four years. Similar to the delegates of other territories, the Commissioner represents his territory in the U.S. House of Representatives and, with the exception of voting on the passage of proposed legislation, functions as a Representative.<sup>88</sup> Appeals from the Supreme Court of Porto Rico were to be heard in the U.S. Court of Appeals for the First Circuit.<sup>89</sup>

By far, most significant change in the Jones-Shafroth Act was that all citizens of Porto Rico became citizens of the United States unless they made a declaration to not become US citizens.<sup>90</sup> Those who did and held no other national allegiance effectively became stateless. That citizenship was granted to the people of Porto Rico and was not automatically acquired as right was due to the *Insular Cases*.

By 1946, the Commonwealth of the Philippines—acquired by the United States in the same treaty as Porto Rico—gained their independence. Their final road to independence began upon the passage of the Philippine Independence Act, setting the date of withdrawal July 4th following ten years after the establishment of a new government under a new constitution.<sup>91</sup> On July 4, 1946, the Treaty of Manila was signed by High Commissioner Paul V. McNutt of the United States and President Manuel Roxas of the Philippines, recognizing the independence of the Philippines. For Puerto Rico, the status of self-governance and autonomy had remained unchanged.

On August 5, 1947, Congress passed the Elective Governor Act, giving Puerto Ricans the right to choose their own governor. In doing so, the Governor of Puerto Rico became an elected position. As the head of the executive branch of the Puerto Rican government, the Governor was treated similarly to the President of the United States and other state governors. This include provisions for the Governor's impeachment and the line of

87 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes*, Public Law, Pub. L. No. 64-368, § 26, 39 Stat. 951, 964 (1917).

88 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes*, Public Law, Pub. L. No. 64-368, § 26, 39 Stat. 951, 963 (1917).

89 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes*, Public Law, Pub. L. No. 64-368, § 26, 39 Stat. 951, 966 (1917).

90 *An Act Temporarily to Provide a Civil Government for Porto Rico, and for Other Purposes*, Public Law, Pub. L. No. 64-368, § 26, 39 Stat. 951, 953 (1917).

91 *An Act to Provide for the Complete Independence of the Philippine Islands, to Provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for other Purposes*, Public Law, Pub. L., No. 73-127 § 10, Stat. 463 (1934)

succession.<sup>92</sup> He also assumed the responsibility of appointing the heads of the executive departments.<sup>93</sup> The end of the Act added the following to the Bill of Rights:

The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico to same extent **as though Puerto Rico were a State of the Union** and subject to the provisions of paragraph 1 of section 2 of the article IV of the Constitution of the United States.<sup>94</sup> (Emphasis added)

The Puerto Rican Independence Movement—small as it was—was burgeoning. Puerto Rican nationalists garnered national headlines when they fired shots in the House Chamber of the U.S. Capitol in 1954 and when they attempted to assassinate President Truman in 1950. The local Puerto Rican legislature passed its version of the Smith Act in 1948 to suppress the movement. Known as the Gag Law or *Ley de La Mordaza*, Law 53 criminalized expressing support for independence, whether it be displaying the Puerto Rican flag or singing patriotic tunes or meeting anyone advocating for independence. Several revolts occurred and were suppressed by the Puerto Rican National Guard.

Recognizing that Puerto Rico had been undergoing a gradual recognition of the right of self-government, Congress passed an Act allowing Puerto Ricans to draft a constitution for their own territory.<sup>95</sup> Under the Act, Puerto Rican voters were to participate in a referendum to either accept or reject the proposal to create a constitution. If approved, the Puerto Rican legislature was to call for a constitutional convention to draft the constitution. After the constitution is drafted, it is to be sent to the President for approval, then to the Congress for approval. Once it is approved by Congress, the constitution becomes effective on Puerto Rico. In addition, the Jones-Shafroth Act was renamed the “Puerto Rican Federal Relations Act.”<sup>96</sup>

The referendum pursuant to Public Law 81-600 was held on June 4, 1951, and the Act was approved by 76.5% of voters. A constitution was quickly drafted, and it was approved in an island-wide referendum on March 3, 1952, of 374,649 votes to 82,923.<sup>97</sup> The U.S. Congress passed a

92 *An Act to Amend the Organic Act of Puerto Rico*, Public Law, Pub. L. No. 80-362, § 2, Stat. 771 (1947)

93 *Id.*

94 *Id.* at 772-773

95 *To Provide for the Organization of a Constitutional Government by the People of Puerto Rico*, Public Law, Pub. L., No. 81-600, § 1, 319 (1950).

96 *Id.*

97 *Approving the Constitution of the Commonwealth of Puerto Rico Which was Adopted by the*

Joint Resolution on July 3 approving it upon several conditions: that Article II Section 20 was removed; that Article II Section 5 be modified to read: “Compulsory attendance at elementary public schools to the extent permitted by the facilities of the state as herein provided shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices”; that Article VII Section 3 be added with the following: “Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.”<sup>98</sup> In other words, “Congress removed a provision recognizing various social welfare rights (including entitlements to food, housing, medical care, and employment); added a sentence prohibiting certain constitutional amendments, including any that would restore the welfare-rights section; and inserted language guaranteeing children’s freedom to attend private schools.”<sup>99</sup>

The requirements of the Joint Resolution were accepted by the Constitutional Convention of Puerto Rico on July 10, 1952, and the Constitution of the Commonwealth of Puerto Rico was proclaimed to be in effect by Governor Luis Muñoz Marín—the first elected governor—on July 25, 1952. Thus, Puerto Rico had a full republican form of government without being a State.

Ironically, Puerto Rico seems to lack what Hong Kong does not and Hong Kong seems to lack what Puerto Rico does not. One would be hard pressed to see any deficiency in Puerto Rico in terms of having a republican form of government. And yet compared to Hong Kong, Puerto Rico has less autonomy when it concerns economic legislation, such as the minimum wage. Hong Kong by contrast is a hybrid regime with democratic and authoritarian elements. In addition, there are restrictions on travel between the Mainland and these Special Administrative Regions in China while any American can travel freely between States and Territories.

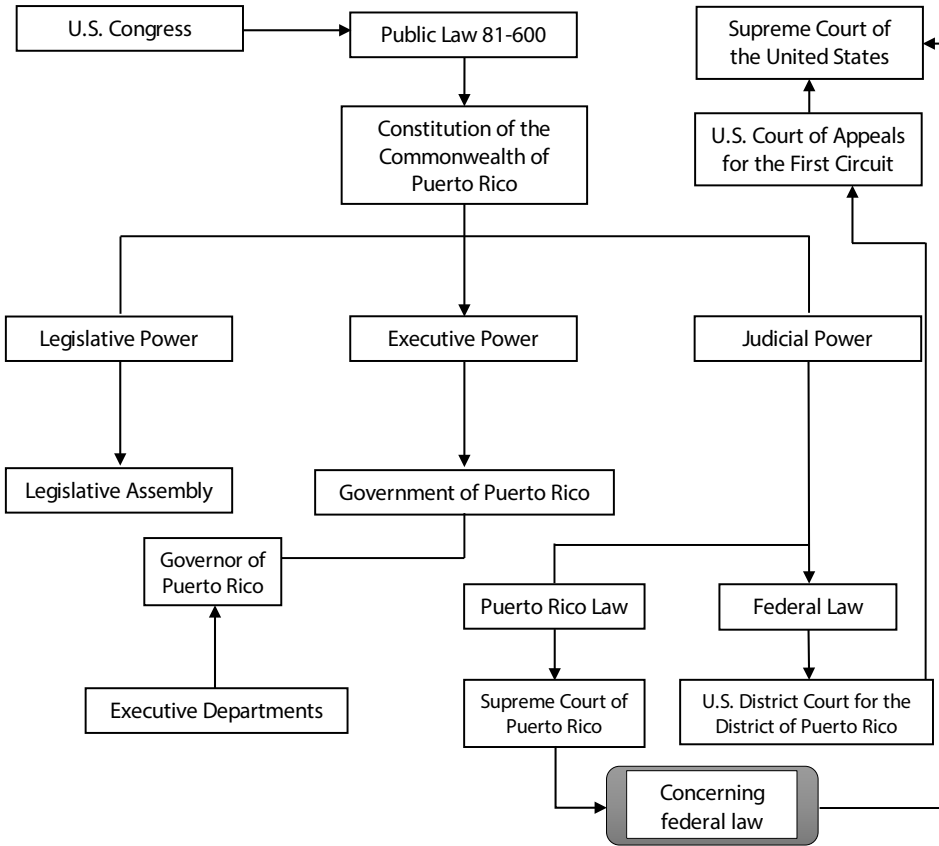
Constitutionally speaking, there is nothing that prevents Congress—other than the policy preference of its members—from theoretically turning Puerto Rico into a Hong Kong-style political regime.

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*People of Puerto Rico on March 3, 1952*, Public Law, Pub. L., No. 82-447, § 1, 327, (1952).

<sup>98</sup> *Id.*

<sup>99</sup> *Puerto Rico v. Sanchez Valle* 579 U.S. (2016), 3



**Figure 5:** *Puerto Rico's Constitution within the Constitutional System of the United States of America*

### The Tipping Game and Five Cracks

If an Interpretation by the NPCSC is a crack at the OCTS wall, then there have been five fractures of various sizes: 1999, 2004, 2005, 2011, and 2016.

#### First Interpretation—Court Stumbles

Under the Basic Law, permanent residents have the right of abode in Hong Kong.<sup>100</sup> Article 24 of the Basic Law listed the qualifications for people to be regarded as permanent residents. The third category—children born outside of Hong Kong to people in the first two categories—had several implications. These children knew so, too, and sued the HKSAR government to acquire the right of abode. The case was *Ng Ka Ling & Ors v. Director of Immigration* (1999).

*Ng Ka Ling* was Hong Kong's own *Marbury*. It concerned the right of abode and two points were raised: one regarding the constitutionality of the legislation and one regarding the constitutional legitimacy of the Provisional Legislative Council. In its Judgement, the CFA invoked the principles of judicial review:

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. Although this has not been questioned, it is right that we should take this opportunity of stating it unequivocally. In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.<sup>101</sup>

Compare that sentiment with the following excerpt from *Marbury v. Madison*:

It is emphatically the duty of the Judicial Department to say what

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100 The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 24.

101 *Ng Ka Ling & Ors v. Director of Immigration*, [1999], HKCFAR, 61.



the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. If courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.<sup>102</sup>

Unlike the American experience, the Hong Kong experience was tumultuous. *Ng Ka Ling* was the Judgement of the Court of Final Appeal in the Hong Kong Special Administrative Region. And yet in the next paragraph, they make an astonishing claim:

What has been controversial is the jurisdiction of the courts of the Region to examine whether any legislative acts of the National People's Congress or its Standing Committee (which we shall refer to simply as "acts") are consistent with the Basic Law and to declare them to be invalid if found to be inconsistent. In our view, the courts of the Region do have this jurisdiction and indeed the duty to declare invalidity if inconsistency is found. It is right that we should take this opportunity of stating so unequivocally.<sup>103</sup>

The Court of Final Appeal had made the error of asserting that it could strike down acts of the National People's Congress. Indeed, such a power—of a subnational court having the power to nullify national acts—exists nowhere in the world. Members of the legal community, including prominent members of those involved in the drafting of the Basic Law criticized the ruling as being overly expansive. The CFA was asserting a power that was—especially in the context of OCTS—absurd and unnecessary.

The prospect of millions of Chinese nationals with a new-found right of adobe flooding into HKSAR led to Government to ask the NPCSC to negate the Judgement. As a result, the First Interpretation was rendered on June 26, 1999. *Ng Ka Ling* was not explicitly overruled—and the parties in the case were unaffected by the Interpretation—but the Court's decision regarding Article 22 and Article 24 were effectively overruled.

After the Hong Kong Court of Final Appeal issued its first judgement since the Handover came the first constitutional interpretation by the Standing Committee of the National People's Congress (NPCSC). Reinterpreting the relevant provision contested in *Ng Ka Ling*, the NPCSC all but negated the effects of the CFA's judgement. The Court of Final Appeal

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102 *Marbury v. Madison*, 5 U.S. 137-138, 137(1803).

103 *Ng Ka Ling & Ors v. Director of Immigration*, [1999], HKCFAR, 62.

stumbled on its first step. In *Lau Kong Yung*, the CFA reversed itself by disregarding paragraph 62 of *Ng Ka Ling*. Already, legal conflict had erupted and not even two years since the Handover.

### Second Interpretation—Election Rules Overruled

Elections were the instrument to achieve democracy in Hong Kong. The guarantee of the eventuality of universal suffrage in electing the LegCo and the Chief Executive, however, was always to be moderated by the nebulous pace of democratization stipulated in the Basic Law.<sup>104</sup> The first few elections in Hong Kong was carried out according to the procedures listed in the Basic Law. The Basic Law, however, was not omniscient—it could not dictate every election in the future. Electoral reforms had to be passed by the LegCo and then be submitted to the NPCSC for approval in order to be ratified.

On April 6, 2004, the NPCSC, on its own initiative, added two new rules to the electoral procedures involving the Chief Executive. First, the Chief Executive had to submit a report if the HKSAR government was even considering a proposal. The NPCSC would then decide if such a proposal was to be approved. In terms of the power balance, the Second Interpretation changed nothing; but now, reforms could be killed before they were even voted upon.

### Third Interpretation—Hong Kong's Own Tyler Crisis

It is a given that in presidential systems such as the United States, a successor to the head of the executive branch will serve out the remainder of the term the previous occupant was elected to. For example, if the President dies in office, the Vice President takes his place and serves out the remainder of his term. Shockingly, the Basic Law did not have a provision for this situation. The first Chief Executive resigned due to ill health. His successor Donald Tsang became the Acting Chief Executive and served in that capacity until June. On April 27, 2005, the NPCSC ruled in a way that comported with the conventions of the United States, declaring that the successor will only serve out the remainder of the term rather than starting a new five-year term.

### Fourth Interpretation—Clear as the Text

Article 158 of the Basic Law not only stipulated that the NPCSC

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<sup>104</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Annex I-II.

would have final interpretive power over the Basic Law, but also that the courts should consider seeking an Interpretation from the NPCSC if cases involved affairs under the responsibility of the Central Government.<sup>105</sup> In 2011, the CFA asked for an interpretation in the case *Democratic Republic of Congo v. FG Hemisphere*.<sup>106</sup> An American corporate entity sued to prevent the China railway group from paying US \$104 million to the Democratic Republic of Congo.<sup>107</sup> The Government intervened in the case, claiming that China has never entertained a case “in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant property of the foreign state or government.”<sup>108</sup> Yet the common law doctrine that Hong Kong follows has principles regarding restrictive sovereign immunity.

Realizing the potential conflict Hong Kong could create with China if Hong Kong were to set principles that would effectively restrict China’s foreign policy, the Court of Final Appeal decided, for the first time, to ask for an interpretation from the NPCSC.

The interpretation quickly and decisively brought the litigation to an end. The fact that the Hong Kong CFA asked the Chinese NPCSC for advice was monumental. Critics of the action saw it as tantamount to surrender. Lo Pui Yin argued that the Chinese legal system and the Hong Kong legal system had finally been “conjoined.”<sup>109</sup> Judicial autonomy was not lost; rather, what had been lost was the separate judicial identity.<sup>110</sup>

### Fifth Interpretation—Political Wordsmithing

The most recent Interpretation of the Basic Law by the NPCSC was a case known more of its political implications than for its finer legal points. The slogans disregarding Article 1 of the Basic Law could not have been enforced without requisite national legislation pursuant to Article 23 or LegCo rules punishing members. If anything, the Fifth Interpretation made Article 1 of the Basic Law judicially enforceable. Reflecting the split-the-baby nature of OCTS, the judicial powers of Hong Kong can be summarized by this sentence: the interpretation of the law is for the courts, but the interpretation

105 *Id.* at 158

106 *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, [2011] HKCFAR, 395.

107 Pui-Yin Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997*, 151-152 (2014)

108 *Id.* at 152

109 P. Y. Lo, *The Gateway Opens Wide*, 41 Hong Kong L.J. 69-76, 385 (2011).

110 *Id.* at 391

of the Basic Law is for the NPCSC.

But any constitutional court provides the ability for observers to see hints into the future direction, whether by the Judgements or even the dissents. As former Justice Bokhary noticed: “Of the various purposes served by a dissenting judgement in a court of last resort, the most important one is that of providing as basis for the court to reconsider the position in the future.”<sup>111</sup> He reasons, quoting Charles Evans Hughes (a former Chief Justice of the United States): “[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”<sup>112</sup> Dissents can lay the groundwork for future reversal. Judgements lay the groundwork for future jurisprudence—although the Court of Final Appeal has never buttressed the nullification claim in *Ng Ka Ling* since they stated it, neither have they explicitly repudiated it.

The vesting of the power of final interpretation with the NPCSC implies the existence of intermediate interpretation. In this vein, the Hong Kong Judiciary has taken up that role. Justice Brett Kavanaugh of the United States stated that “the structure of the Constitution—the separation of powers and federalism—are not mere matters of etiquette or architecture but are essential to protecting individual liberty.”<sup>113</sup> The job of the Hong Kong Judiciary—even in its more constrained role—can accomplish that job in the hybrid regime.

### Conclusion

Twenty years after the Handover and nearly fifteen years after the political crisis regarding the Basic Law, Hong Kong’s political arena has stagnated. One Country, Two Systems, once regarded as a shield for autonomy, is increasingly seen as a burden on identity. In fact, One Country, Two Systems was actually first envisioned as a response in dealing with the reunification of China and Taiwan, before being utilized to ameliorate British concerns regarding the economy of Hong Kong.<sup>114</sup> The “facts” then no longer seem to apply now.

111 Justice Kemal Bokhary, *Recollections*, 553 (2013)

112 *Id.* at 554

113 Justice Brett Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, The Heritage Foundation (Feb. 1, 2018), <https://www.heritage.org/courts/report/the-role-the-judiciary-maintaining-the-separation-powers>

114 Pui-Yin Lo, *The Judicial Construction of Hong Kong’s Basic Law: Courts, Politics and Society after 1997*, 20 (2014)

Much like the ninety-nine-year lease of the New Territories, the One Country, Two Systems presents a new temporal element into the Hong Kong political economy. What happens in 2047? The principle is scheduled to expire then, leaving the status and autonomy of Hong Kong to be a political free-for-all. Now that Hong Kong is nearly half-way through this timeline, it seems only fitting and almost poetic that the same consternation the government in London felt as 1997 approached is now present in Hong Kong as 2047 inches closer. As a practical political matter, of course, Beijing would not risk the popular uprising that would surely occur—as things stand now—if it attempted to suddenly integrate the HKSAR regime as a province or a directly-controlled city at the expiration of OCTS.

The One Country, Two Systems framework has preserved much of the pre-1997 regime. Chinese Hong Kong retains much of its British features. No more is that clearer than in the rule of law and the legal system. Fundamentally, common law and civil law are at odds in many areas. *Stare decisis* is perhaps one of the biggest in terms of how the Judiciary functions. The end of judicial autonomy in Hong Kong would create many problems in an attempted integration of Hong Kong's judicial system into the Chinese Judicature. Given the subnational nature of Hong Kong, most of its jurisprudence will likely be destroyed and cast aside as useless to the Chinese legal system.

OCTS entails a separation between the Chinese system and the Hong Kong system. In theory, this prevents Chinese law from affecting Hong Kong. But as a Special Administrative Region, Hong Kong's legal existence is possible only due to the Chinese Constitution. If, as both sides and this paper assumes, the OCTS policy is a constitutional principle, then there is a constitutional crisis. Hong Kong constitutionalism is more about political faith than it is about the procedures and electoral rules.

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