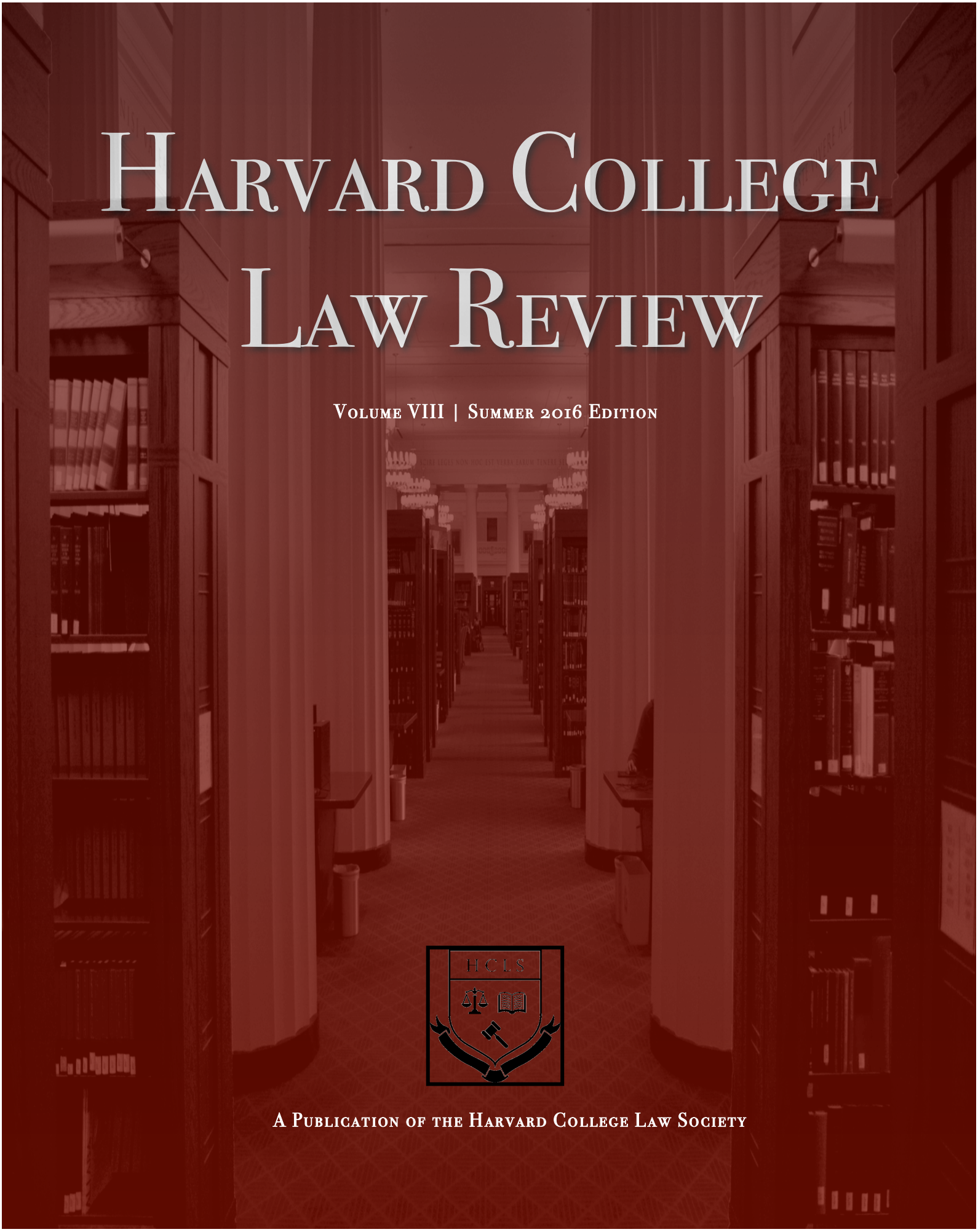

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TABLE OF CONTENTS

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Feature

JUST DESERT?
A CRITIQUE OF RETRIBUTIVISM IN CRIMINAL JUSTICE

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One of the core principles of our criminal justice system is the form of desert known as retribution: that it is morally permissible or even good to make criminals suffer for no other reason than the fact that they made others suffer. While this notion of "getting even" is as entrenched into our legal system as it is our intuitions, whether it is a legitimate form of punishment is an open question. In this paper, I challenge the legitimacy of retribution with some conceptual resources from philosophy. Common sense tells us that people cannot be responsible for actions that they did not commit freely, and since retribution requires is a special form of responsibility, it has special freedom requirements—requirements that, I shall argue, either are not satisfied or, if they are, cannot be verified to have been satisfied. Given our uncertainty about whether any instance of retribution would be justified, we have reason to not use it as a form of punishment.

I. WHY DO WE PUNISH?

Crime and punishment—they're one of those pairs where you just can't have one without the other. When society's offenders commit terrible atrocities, we expect sanctions to be made. And when we punish, we do not consider it legitimate unless there was some corresponding wrongdoing. But tight as this connection may be, punishment comes in many forms, with at least four main purposes.

The most obvious is restraint.[1] Dangerous offenders simply cannot be allowed to roam freely, where their criminal propensities could further harm society. However, we don't just want to prevent our wrongdoers from committing crimes (or postpone their crimes for a future date). It would be much better if we could reform them so that they wouldn't transgress in the future. This brings us to the second purpose of punishment: rehabilitation.[2] If certain forms of punishment (like labor, or confinement) can improve

[1] Arnold Loewry. *Criminal Law in a Nutshell* (Minnesota: West Publishing Company, 2003), 3-4.
[2] *Ibid*, 2-3.

discipline or demonstrate the negative repercussions of crime, society gains by having fewer threatening individuals, and criminals gain since they can go on living meaningful, productive lives.

Since punishment can teach criminals the consequences of their actions after they have committed crimes, it can also forewarn would-be criminals and de-incentivize them from breaking the law. This is the deterrence motivation for punishment.[3] It is best brought out by the $500 fines for littering, which are so high not to correct people who were caught littering, but to make people think twice before littering in the first place. Whether or not a punishment is meant to restrain a criminal or reform him, sometimes we might deliver a legal sanction since we believe this would prevent a great many others from committing similar crimes.

Lastly, consider the reactions that many had after hearing about Dzhokhar Tsarnaev's involvement in the 2013 Boston Marathon Bombing.[4] When people called for a death penalty, it clearly wasn't for restraint (a life sentence would do that), nor was it for rehabilitation (capital punishment is quite literally the negation of any possible rehabilitation). Moreover, I think few wanted Tsarnaev to die *just* so others would be less likely to commit similar atrocities. No, people wanted Tsarnaev to die because he had killed others. People wanted him to die because he had done something terrible and cruel and heartless, and such people do not, as some believe, deserve the lives they were given. This captures the final reason we punish and what lies in the heart of our justice system: retribution, or punishment for punishment's sake.[5] Even if we know a criminal won't do wrong again, even if we know that punishing him won't influence the future actions of others, many believe that the criminal owes a debt to society, that his punishment should fit his crime, that we must purge society or cleanse our minds by making suffer those who caused suffering.

Retributive punishment is meaningfully distinct from the other forms of punishment. While the other three are all forward-looking—they look at

[3] *Ibid, 6-8*.
[4] Bev Ford, Greg Smith, and Larry McShane, "Police narrow in on two suspects in Boston Marathon bombings," *New York Daily News*, April 18, 2013. Accessed July 19th, 2015, http://www.nydailynews.com/news/national/injury-toll-rises-marathon-massacre-article-1.1319080.
[5] Arnold Loewry. *Criminal Law in a Nutshell* (Minnesota: West Publishing Company, 2003), 5-6.

what *will* happen in considering what sanctions would be justified—retributive punishment is backward-looking—it considers what *has* happened. This sounds like beautiful justice to some and barbaric revenge to others, but I don't think the dispute can be resolved by having both sides consult their gut reactions and then just relay them to one another. Instead, following in the footsteps of others,[6] I think we can make significant progress on the legitimacy question by turning toward the free will debate in philosophy.

II. From armchair to electric chair

What does (or could!) armchair theorizing have to do with substantial, practical, legal matters?[7] Well, for starters, we can probably agree that we shouldn't punish someone for committing a crime unless they were actually responsible for the crime.[8] To alleviate any potential worries, I use responsible in a very wide sense here (negligence, inaction). For example, the toddler who stumbles upon his father's rifle and kills the neighbor's dog was responsible, in some sense, for the death; but we quite plausibly also think that the father bears responsibility for the negligence of leaving the gun out or the gun cabinet unlocked. Since any form of punishment requires some sort of responsibility, let's flag whatever sort of responsibility is required for retribution to be justified as *retributive responsibility*.

Now, a very general sort of responsibility (such as actually having done the crime or being in such a state that one will reliably continue to commit crimes), while perhaps enough to justify the other forms of punishment, doesn't seem to cut it when it comes to retribution. Consider a (clinically) insane person, like Andrea Yates, who drowned three of her children in a bathtub because she thought it would send them to heaven, and

[6] Josh Greene and Jonathan Cohen, "For the Law, Neuroscience Changes Nothing and Everything," *Philosophical Transactions of the Royal Society B: Biological Sciences* (2004), 1775-1785.
[7] I'm reminded of a lecture on the justifiability of torture that I attended last summer at Cambridge University. It was delivered by a philosophy professor to a panel of over forty judges. Remarked one judge at the end, echoing the sentiments (and explaining the demeanors) of many others: "This was a useless two hours. This guy's head is all in the clouds."
[8] I take this to be self-evident.

then called the police right after.[9] In a sense, she was fully responsible and admitted full responsibility over the murders, but the state of Texas found mitigating circumstances *by reason of insanity*.[10] We pardon Andrea because the murder is not authentically *hers*—because of some cause that we deem not part of Andrea (her mental illness), there is a sense in which she *could not* have done other than what she did. We can rightfully restrain Andrea and seek to rehabilitate her. Maybe we can even up her punishment a little to deter others from heinous murders. But we don't think Andrea deserves to suffer.

Why not? The basic intuition is that Andrea only murdered her children because of her mental illness. But she clearly didn't choose to be insane, nor does she have control over her mental illness. And if she doesn't have control over the thing that is leading her to murder, she doesn't seem to have control over whether she murders: she lacks *free will* in the matter. It's important to flag the part about not controlling her mental illness, because there is a sense in which drunk drivers, at the moment of collision, also lack any freedom in what they are doing (if they are sufficiently inebriated). But our intuitions for them diverge from our ones toward Andrea because we feel that they *chose to get drunk*, so did have control over entering a state in which they lacked control. So, we can check off one necessary condition for our concept of retributive responsibility, and that is exhibiting free action. Our two principles for justifiable retribution together, then, are:

(Condition 1): Retributivism is justifiable only if we are retributively responsible for some of our actions.
(Condition 2): We are retributively responsible for some action only if we acted it freely.

Since justifiable retribution requires retributive responsibility, and retributive responsibility in turn requires free will, justifiable retribution requires free will. Moreover, since justifiable retribution is exactly what we

[9] Jim Yardley, "Texas Jury Convicts Mother Who Drowned Her Children," *New York Times,* March 13, 2002.
[10] Dale Lezon, Peggy O'Hare, and Rosanna Ruiz, "Jury finds Yates insane, not guilty," *Houston Chronicle*, July 26, 2006. Accessed July 23rd, 2015, http://www.chron.com/news/article/Jury-finds-Yates-insane-not-guilty-1857308.php.

endorse when we call for a life sentence or the electric chair, and since free will is the sort of issue that philosopher's have grappled with for centuries from the armchair, there seems to be a deep connection between our most severe criminal verdicts and our conceptual work in philosophy. If we run the philosophical arguments and find that free will—or at least the kind that we believe is necessary for retributive responsibility—is not something we can confidently say we possess, then we've just lost one of the necessary things for justifiable retribution, and our death sentences begin looking more like the barbaric revenge and less like the beautiful justice.

III. A PRIMER ON DETERMINISM AND FREE WILL

We should now feel justified in taking a slight philosophical detour to explore whatever we mean by "free will." Consider the following three statements:

(S1) We have free will
(S2) The universe is (for all intents and purposes)[11] deterministic
(S3) Free will is incompatible with a universe that is (for all intents and purposes) deterministic

We have initial reasons for believing each statement. (S1) comes from introspection. If by free will, we mean that our decisions are to some extent *up to us*, that we have genuine control over which actions we take (in a way that Andrea Yates did not), then we certainly *feel* like we have it. It seems obvious that, while we cannot control the beating of our hearts, we can control whether we lie or tell the truth, or whether we steal.

(S2) seems like a plausible empirical truth. If someone flips a coin twice and it lands heads one time and tails the other, few would deny that there is an explanation of this. Maybe he flipped it once with more power. Maybe a gust of wind came. Whatever the cause, there must be *some cause*.

[11] The "all intents and purposes" caveat comes from the fact that in so far as we buy that the human brain is the center of decisions, what really matters is whether the brain operates deterministically or not. There may be indeterminisms at the quantum level when we shoot a proton through a double slit, but if those indeterminisms are in no way relevant to the physical basis of our decisions, then it does not seem relevant to our decision-making.

Coins don't, holding antecedents constant, magically land one way or the other. This seems to motivate determinism, which is the thesis that all events have causal antecedents that fully determine the future, such that some prior state of the universe in conjugation with the laws of nature entail everything that will happen. In other words, for any fixed past and fixed laws of nature, there is one possible future; the universe, composed of just atoms bouncing around according to set laws, proceeds in a clockwork manner.

(S3) is an intuition held by many when thinking about what determinism would mean for human action. After all, if all events have causes, and our actions themselves are events, then our actions too have causes. Maybe an agent's decision to lift his right hand was caused by a conscious choice to do so, but presumably that conscious choice is itself an event with a cause. Even if the cause of that was another conscious choice, if determinism is really true, then we can keep tracking the line of causation back until we get outside of the agent (or before he was born). And this seems to strip genuine control from the agent; if everything is determined by past events being acted upon by the laws of nature, and nobody has control over the past or the laws of nature, then how does anyone have genuine control over their actions? If determinism is true, then it is true to say that billions of years before we were born, it was locked into the fabric of the universe that we would do each and every action that we have done, are doing, and will go on to do. If all of my actions were determined before I was born, then there is a certain sort of freedom that I seem to lose.

Although, given their initial plausibilities, we'd like to have (S1), (S2), and (S3), there's a problem: we only get two. Suppose we pick (S2) and (S3). If the universe is functionally deterministic and this isn't compatible with free will, then we cannot have free will. This makes us hard determinists. On the other hand, we might want to hold on to free will (S1). If we concede (S3), we must reject (S2), that our universe is functionally deterministic. This makes us libertarians (no relation to the political philosophy of the same name). Finally, if pick (S1) and (S2), then we are conjoining the very two

things which (S3) says we cannot conjoin, so we must deny that free will and determinism are incompatible. That would make us compatibilists.

Since the retributivist must uphold that people have free will, he fixes (S1) and so must abandon either (S2) or (S3). At this point, is important to narrow our discussion as it relates to retribution; the philosophical literature on free will is vast and a substantial portion of it is finding the right conceptual analysis of free will. Perhaps, as many compatibilists argue, the variety of freedom that is "worth wanting"[12] is not the freedom that is ruled out by determinism.

Since there is no fixed analysis of what free will means, we need to hone in on *whatever freedom is necessary for retributive responsibility*. Thus, we can reformulate the free will discussion in terms of retributive responsibility (the sort of responsibility such that if we had it, we would deserve retribution). Again, we have three potential claims:

(S1)* We are retributively responsible for some of our actions.
(S2)* The universe is (for all intents and purposes) deterministic.
(S3)* Retributive responsibility is incompatible with a universe that is (for all intents and purposes) deterministic.

Here, I think there is a much greater amount of pressure on compatibilist positions toward retributive responsibility. While I have no idea what the right conceptual analysis of free will is, or the kind of freedom needed for us to deserve blame or praise, I cannot believe that we could justifiably punish someone retributively in a deterministic world. The reason is straightforward; I find it morally repugnant to make someone suffer for an action that they were determined to do before they were born. Retribution in a deterministic world would mean that we would be condemning people to Hell before they were even born.

Given the structure of (S1)*, (S2)*, and (S3)*, the retribution-sympathizer must reject either (S2)* or (S3)*. I will spend the remainder of the paper only focusing on the sympathizer who tries to uphold retribution by rejecting (S2)*—that our universe is deterministic—for three reasons.

[12] Daniel Dennet, *Elbow room: the varieties of free will worth wanting* (Cambridge, MA: MIT Press, 1984).

First, as I mentioned, I find such punishment in a deterministic universe morally repugnant, which would rule out the avenue that rejects (S3)*. Second, the compatibilist strand of retribution has been discussed elsewhere.[13] Finally, experimental philosophy shows that most people experience their decisions as free in the sense that they *were not* determined long before birth,[14] and, I believe that of those who believe in retribution, they uphold it because they think that when people are confronted with committing a crime or not, both alternatives are *genuinely open*, or possible, in the very way that the deterministic universe is ruled out. That is, they believe that the criminal could have actually decided not to commit to the crime, given the exact same past leading up to the moment of choice. The criminal who decided to break the law *freely* was the one who was faced with two or more alternatives, chose one of them, and if you were to somehow rewind time back to that moment of decision—with all the molecules in the same position and all the circumstances the same—the criminal really might have chose one of the other alternatives.[15]

So I will assess the merits of the retribution-sympathizer who maintains that while retributive responsible is incompatible with a deterministic universe (he upholds (S1)* and (S3)*), the universe is indeterministic and there is something about indeterminism that gives us the sort of freedom needed for retributive responsibility.

IV. SIGN POST

The type of retributivist we are dealing with needs to tell a libertarian story that convinces us why we get retributive responsibility in an indeterministic universe while we aren't retributively responsible in a

[13] Josh Greene and Jonathan Cohen, "For the Law, Neuroscience Changes Nothing and Everything," *Philosophical Transactions of the Royal Society B: Biological Sciences* (2004), 1775-1785.
[14] Shaun Nichols, "Experimental Philosophy and the Problem of Free Will," *Science* 331 (2011), 1401.
[15] So, if you depart from me for any of the three reasons above, this paper will only be half the story in ruling out retribution.

deterministic one. Thus, the real centerpiece is why exactly *indeterminism* is giving us extra freedom or extra responsibility. There are two kinds of indeterminacies that libertarians appeal to—event-causal, and agent-causal[16]—and I will deal with each in turn. And, as a reminder, the libertarian must satisfy two of our conditions before we proves to us that we can justifiably use retribution:

(Condition 1): Retributivism is justifiable only if we are retributively responsible for some of our actions.
(Condition 2): We are retributively responsible for some action only if we acted it freely.

So, the retribution sympathizer must give an account of free will that makes two jumps: one from his version of free will to retributive responsibility, and one from retributive responsibility to legitimate retribution. In the remainder of this paper, I will argue that neither the event-causal nor the agent-causal account of libertarianism can make both jumps. My strategy will be as follows: before proceeding, I will give the retribution-sympathizer a gift: I will bite my tongue and give him whatever version of libertarian free will (event- or agent-causal) he wants. Even given the truth of his indeterministic story, however, I will argue that the event-causal story does not give us the kind of freedom needed for retributive responsibility. I will further argue that while the agent-causal story does plausibly give us the ability to assess which agents are retributively responsible, and when. Since the only two branches of libertarian freedom cannot give an account of freedom that legitimizes retribution, we should eliminate retributivism from our criminal justice system.

V. EVENT-CAUSES AND LUCK

The basic libertarian move is to agree that there is something deeply troubling about a deterministic universe; because there is no possibility for things to go other than how they actually go, we will not find free will or

[16] Robert Kane, "Introduction: The Contours of Contemporary Free-Will Debates" in *Oxford Handbook of Free Will* (Oxford: Oxford University Press, 2011), 20-21.

retributive responsibility anywhere in them. Good thing then, says the libertarian, that our universe isn't like that! The universe contains a type of indeterminism that is *freedom-enhancing*. For event-causal libertarians, in situations where an agent acts freely, an agent's external circumstances along with his character (his reasons and desires) do not determine the decision he makes—some indeterministic *event* is what tips the scale.

What does this concretely look like? The most developed, in my mind, of the event-causal accounts (like those of Kane[17] and Balaguer[18]), center on decisions in which the agent is torn between two alternatives. For example, consider a man who has just been dropped off by his getaway vehicle and stands outside of a private bank with an assault rifle. He experiences in that moment a genuine dilemma between robbing the bank and being able to fuel his excessive consumptive desires for a long time, and simply walking away because stealing money and threatening the lives of innocent people would be the wrong thing to do. Regardless of the moral value of either set of reasons or motivations, the man has competing sets of desires and is confronted with a decision of enormous moral (and legal) repercussions. Suppose that the man makes his decision and goes on to rob the bank for hundreds of thousands of dollars.

To event-causal libertarians, the man wouldn't be retributively responsible if such circumstances played out in a deterministic world.[19] But, according to the event-causal proponent, the man would be retributively responsible if neither his robbing reasons nor his moral reasons sufficiently determined his action, but instead left his action indeterminate, and an indeterminacy settled which set of motivations would win over. Kane invokes a parallel processing model where the man's brain simultaneously

[17] John Martin Fischer, Robert Kane, Derk Pereboom, and Manuel Vargas, *Four Views on Free Will* (Malden: Blackwell Publishing Company, 2007), 5-43.
[18] Mark Balaguer, *Free Will as an Open Scientific Problem* (Cambridge: MIT Press, 2010).
[19] Even though he decided to rob the bank, it was determined that he would make that decision before he got up (and indeed, before he was even born). The incompatibilist intuition is that since his action of robbing the bank was sufficiently determined by circumstances before his birth, and he had no role in producing those circumstances which determined his robbery, it would be wrong to make the man suffer simply for the sake of suffering.

process the two sets of compelling reasons and motivations, and which set wins over depends on the indeterministic activity of ion channels.[20] Balaguer's account is much less speculative, simply proposing that if he faces such a torn decision, and the decision is undetermined, then we exercise libertarian freedom.[21]

As I promised earlier, I will concede to the event-causal proponent whatever brain events he is proposing; if Kane postulates thermally indeterminate ion channels, then let's assume they exist (though to the best of my knowledge, neurobiology gives us no reason to think they do). If this is what the libertarian means by free will, why does some indeterministic event (like the activity of an ion channel) give us retributive responsibility? For both authors, when the indeterministic event allows one set of reasons to win over (and the man decides to commit armed-robbery), he still acts intentionally, knowingly, and for reasons that flow from his character, and these are just what are needed for having retributive responsibility.[22] The problem here is that these are the exact same kinds of responses given by compatiblists; they say that it doesn't matter if we are determined to act in the way we do, for even if our deepest reasons and motivations are determined, they still comprise *us*, and we act intentionally, knowingly, and for reasons that flow from our character even if we had not control over what our character in fact is. The event-causal libertarian must explain why this story is more plausible when two indeterminate sets of reasons vie and then one wins over versus when two determinate sets of reasons vie and one inevitably wins over.

The explanation usually given is best summed up by Balaguer: the event-causal action is not "causally influenced, at the moment of choice, by anything outside the person's conscious reasons and thought."[23] What Balaguer means is that if the criminal is conflicted between robbing and

[20] John Martin Fischer, Robert Kane, Derk Pereboom, and Manuel Vargas, *Four Views on Free Will* (Malden: Blackwell Publishing Company, 2007), 182-183.
[21] Balaguer, *Free Will as an Open Scientific Problem*.
[22] Robert Kane *Free Will and Values* (Albany: SUNY Press, 1985).
[23] Mark Balaguer, *Free Will as an Open Scientific Problem* (Cambridge: MIT Press, 2010), 98.

walking home, if his action is undetermined then there is nothing *external* to him or his reasons that determines the event (whereas in a deterministic universe, external factors to him and his reasons did determine the event). Unlike in a deterministic universe, if we rolled back time and watched the criminal make the same decision again, he really might have walked home. However, the newly added indeterministic information, while not *external*, is not *internal* to the criminal either—it's not really located anywhere. This is the luck objection event-causal libertarianism, and one that I find, for retributive punishment, quite compelling. Even if the robber's reasons do not sufficiently determine what he does, the reason that rewinding and watching the same decision might yield a different result is because of some tiny indeterministic neural event; and if a neural blip is what allows one set of reasons to triumph over the other, it is hard to see how this adds responsibility. It was simply blind luck that settled which set of reasons won over—indeterministic luck which the robber obviously had no control over.

To put it one final way, imagine that there is a world largely like our own, but humans have a neural chip implanted in their brain that is inert except for when they face the torn decisions that fascinate people like Kane and Balaguer. Whenever people find themselves in these conflicted decision circumstances, with competitive sets of reasons, the chip sends a signal to a physicist's laboratory and receives the latest indeterministic event that was recorded (say, a quark spinning up or down), and that settles which set of reasons wins over. Here I think the right intuition is that these are people who act largely deterministically, plus a little indeterminism from a laboratory whose outcome they clearly have no control over—it is impossible here for me to appreciate any more retributive responsibility-bearing freedom than in a deterministic world. But does it really matter whether the quantum indeterminacy happens inside the head or very far away? If so, then what if the chip instead sent a signal to a tiny container in the laboratory that ran a quantum calculation and reported the indeterminate result? If that is still relevantly different from indeterministic ion channels, let's keep moving that container closer to the head. Does it become relevant once it becomes inside

the head, or if the neural chip itself was the thing running the quantum simulation? I cannot appreciate any difference when the locus of the indeterminacy is inside or outside of the skull—the criminal has no control over its outcome in either cases—and if that is the only difference between brain indeterminacies and the physicist's laboratory, it does not seem that this concept of "free will" gets us anywhere close to the retributive responsibility needed to ground legitimate retributivism.

VI. Agent-causes and knowledge

I will not spend any more space on event-causation for two reasons. First, I find the luck objection very compelling against the justifiability of retribution. Moreover, most people (outside of the philosophy classroom) who believe in some sort of indeterministic action don't associate it with indeterministic potassium channels or quantum blips that translate into neural events through chaos. Instead, they believe they have a soul, or spirit, or some entity that transcends the physical but can still influence action.[24] This is the agent-causal side of libertarianism, where some extra kind of causation is postulated over and above deterministic, natural processes. If agent-causation is correct, then people are free in their choices because the universe could have been exactly the same up to the moment of choice, but *it was entirely possible for them to be an uncaused cause or an unmoved mover and choose one way or the other.*

Now, while I'm skeptical that just having indeterminism through neural blips can do anything for retributive responsibility (as the event-causal proponents would argue), I agree (though not everyone does) that if we possess agent-causal powers, we are retributively responsible for our actions. Here the indeterminism is not just indeterminacy in the causal flow of events, but the agent-cause is postulated to be the indeterministic causal source of an action in the very way that I think is required by retributive responsibility. Agents simply have the basic power to choose among alternatives in the

[24] Eddy Nahmias, "Intuitions about Free Will, Determinism, and Bypassing," in *The Oxford Handbook of Free Will, 2nd ed. (Oxford: Oxford University Press, 2011).*

most robust sense—the freedom needed for retributive responsibility is simply assumed.

The common objections to agent-causation are that it is both metaphysically uneconomical (you need to assume a lot of power in humans) and scientifically suspect (it would require our souls to be able to influence neural events that lead to our actions). Moreover, there are legitimate questions on whether such a conception of agency is even coherent. But, as I promised with event-causation, I will assume that we *do* possess full-blooded agent-causal powers.

So what's left? I've agreed that if we have agent-causation, then we have retributive responsibility (we deserve retributive punishment), and agreed that we're agent-causal. By still denying that retributivism is justified, am I hopelessly irrational by failing to understand modus ponens?[25] Here, we must distinguish *people deserving retribution* from *us justifiably using it*. These two are not equivalent: suppose a man is on trial for murder but there is not a sliver of incriminating evidence against him. Also suppose he is guilty of the murder. Although he *deserves to go to jail*, we cannot *justifiably incarcerate him* because we lack access to the truth; we cannot distinguish him from an innocent person who also has the same amount (none) of dirt against him. The example is contrived, but the point is clear: epistemic limitations can block metaphysical implications.

I contend that these epistemic limitations pose an enormous difficulty in using agent-causal libertarianism to justify retribution, even if we deserve it. Consider the following thought experiment offered by Peter van Inwagen[26]: a libertarian-free agent (Alice) is deciding whether or not to lie. According to the libertarian, and as we've seen in our encounters with "rewind" cases, the physical state of the universe moments before Alice's decision (call this moment before t_1) could have been the exact same and she genuinely could have lied or told the truth at the moment her agent-cause

[25] It's worth noting that modus ponens has actually come under fire in recent years (Kolodny and MacFarlane, 2010).
[26] Peter Van Inwagen. "Free Will Remains a Mystery," in *The Oxford handbook of free will* (Oxford: Oxford University Press, 2011), pg.

kicked in (call this moment t_2). Now suppose that there is a God with the power to press the rewind button on the universe. He brings the universe back to t_1 and presses play again until t_2 has passed. Suppose he does this 1,000 times—what happens? Since the libertarian maintains that Alice *freely* acted, that lying and truth-telling were *genuinely* open, we would not see 1,000 lies or truths (then, we would think it *wasn't* possible for Alice to have done otherwise). Van Inwagen suggests that Alice will both lie and tell the truth and that, as the sample becomes sufficiently large, the proportion of each will converge on some fraction.

Van Inwagen believes that as we watch more and more replays, we should become convinced that what will happen in the next replay is *just* a matter of chance. I will not address this claim, but cash out this thought experiment with a weaker conclusion: libertarian free acts, if they exist, would be *indiscernible* from indeterministic random acts like quantum blips.[27] And since we have no way of differentiating libertarian acts (one's that deserve retribution) from chance events (one's that don't), it doesn't seem like we can justifiably retributively punish someone for an action that equally could have been the product of randomness. Like the man who might be guilty but whom we have no evidence against, how can we say that the criminal acted with libertarian freedom when we have no way of identifying a libertarian act? The libertarian gets the freedom he wants only by positing something that is wholly untouchable by science and reason. While this might be a metaphysical asset ("you can't prove we *don't* have libertarian freedom!"), it is equally an epistemic liability.

The libertarian has response: admit we can't identify libertarian actions, but suggest that we *assume* actions are libertarian free unless there is evidence suggesting the contrary.[28]

I think this response has a serious defect: this means that we would be punishing people who we aren't even sure deserve retribution. Consider

[27] It's worth pointing out that we can't bury libertarianism by pointing out the identity of indiscernibles (so suggest that libertarian freedom collapses into randomness), since libertarian acts and random acts would only be indiscernible *to us*.
[28] Thanks to Josh Greene for this possible response.

the following four possibilities covering our epistemic relationship with a suspect's criminal action.

	The act was libertarian free	**The act was not libertarian free**
We know the libertarian status of the action.	Positive Identification	Negative Identification
We do not know the libertarian status of the action	Uncertainty1	Uncertainty2

There is no conceptual problem with a libertarian arguing that we can't identify libertarian actions but that we can identify ones that aren't. Maybe libertarianism is like our biological conception of life—it's hard to tell when there is life but it's easy to tell where there isn't; the asymmetry exists because it is hard to see if sufficient conditions *have* been met but easy to tell when necessary ones *haven't* been met. However, this only allows the libertarian legal theorist to differentiate Negative Identification from the other three. Furthermore, it does not allow him to ever differentiate Positive Identification from either of the Uncertainty predicaments since, by the libertarian's own account, the ascientific nature of the agent-cause renders it indistinguishable from an indeterminisic, unfree act (such as a quantum blip). The problem now is that since the libertarian cannot positively identify libertarian actions (Positive Identification will never obtain), if he assumes an act was free and only withholds retribution from ones that are negatively identified, then *every instance* of retribution punishment is one in which we are uncertain that the victim actually deserves it (since we have no way of knowing if we are in Uncertainty1 or Uncertainty2). Perhaps the libertarian and I part ways here, but I would rather, with such high stakes and such *uncertainty*, fail to retributively punish someone who deserves it than punish someone who does not.[29]

[29] The only further response is to assume that any action that is not negatively identified is a positive agent-causal action. But this seems utterly implausible. How are we supposed to

A common argument against the death penalty is that the legal system inevitably makes mistakes, and that it would be much more preferable to let a guilty man go free than to murder an innocent—what strikes many as an unconscionable act. What I am suggesting here is essentially a compounding of the same reasoning; while we face the possibility of Type I and Type II errors when we are deciding whether a suspect committed a crime, we face the same structural challenge *even when we know that he did commit the crime*. Even given that he committed the crime, we are left uncertain of whether the right freedom requirements obtained such that his committing the crime was an instance of retributive responsibility, and therefore deserving of retribution.

At this point, the libertarian might accuse me of pulling a quick one. When I made him agree that neither rationality nor empiricism could identify libertarian acts, I forgot to mention intuitions. The libertarian tells me that he can identify libertarian acts by his intuitions after considering the evidence. I'm skeptical. It seems perfectly clear that our intuitions are sensitive to *physical* factors that evoke moral outrage based on psychological contingencies, but these are irrelevant to whether the act was triggered by a *nonphysical* agent cause. The libertarian must posit some "libertarianometer" that can perceive agent-causes and which is entirely different from ordinary sensing mechanisms. But this is just *ad hoc*; positing that the agent-cause sends libertarian-freedom vectors into the ether, which we conveniently detect, is too metaphysically and epistemologically uneconomical to take seriously without independent rationale. I am willing to concede panicky metaphysics[30] to explore the justifiability of retribution, but once the libertarian resorts to *desperately* panicky metaphysics, we will again have to part ways.

VII. WHERE DOES THIS LEAVE US?

know when the agent-cause can transcend the physical operations of the brain? Could it in cases like those of Andrea Yates? We lack so much information about how the criminal's brain was, on a neuron to neuron level, operating at the moment of his crime, that this assumption is unreasonable.

[30] Galen Strawson, "The Impossibility of Moral Responsibility," *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 75 (1994).

In order for us to legitimately exercise retributive punishment on criminals, they need to deserve it (based on the nature of decision-making) and we need to recognize that they deserve it (based on our access to the nature of those decisions). I have argued that the free will dialogue is an excellent place to look for the nature of our decisions, and that among each of the possible positions toward free will, human agency is such that either we aren't retributively responsible and so don't deserve retribution (for compatibilist[31] and event-causal accounts), or we do deserve retribution but we can never tell when people deserve retribution (agent-causation). If this line if reasoning is correct, then under no possible configuration of the mechanism behind our most important decisions can we plausibly justify retributivism.

Still, are we not giving up such a fundamental part of ourselves by abandoning retribution? In one sense, I think this is true. Whenever the most depraved among us commit the most taboo acts, people will (I believe) always call for vengeance, and seeing those transgressors receive the most extreme punishments often feels righteous and just—an eye for an eye, so goes the old biblical phrase. And to be frank, if the love of my life were cruelly murdered, I would likely feel nothing but the utmost hatred toward the perpetrator, want nothing more than to see him or her suffer, and feel that such a revenge would justice in another name.

But the way in which I think this is true is the way in which I think some people really *do* feel that homosexuality is morally wrong or feel that some people are inferior because of the color of their skin. These feelings—whether from a certain cultural or religious upbringing, or simply instilled within us from the evolutionary advantages they begot upon our ancestors—reflect more about our fallibility as humans and as biological creatures than our sensitivity to what is right. These are intuitions that we ought to acknowledge, but which we also ought to question. And if, upon scrutiny, we find that they are feelings that have no rational or just foundation, they may always be a part of ourselves but we do not need to act upon them. People may always call for executions, and we can in turn always respond that

[31] Though, as I've said, I haven't argued it extensively here.

revenge is different from justice—that to do so would not be reasonable and would not be right.

We live in a country of mass incarceration, with over 2 million behind bars[32] and another five million either on probation or parole.[33] Our incarceration rate, at nearly .7% of the population, is among the highest in the world, over five times that in the UK,[34] and fourteen times Japan's.[35] We are in the minority of countries who have not abolished the death penalty,[36] and we seem to have no problem with enacting laws that can turn minor crimes into life sentences. We focus little on rehabilitation, and enact measures that can leave people with "pedofile" or "drug dealer" labeled to their name for their entire lives, with little attention toward the circumstances that led them to break the law or the steps they have made to change since.[37] The common thread among all of these is retribution. In America's eyes, crime and retribution are one of those pairs where you just can't have one without the other. But we *can* have crime without retribution, and, as I've tried to argue, we should. It will be a sad time for our conscience if we continue to allow the fear and anger behind our primitive gut-reactions—instead of the reason and values behind our well-considered reflections—determine our punitive measures and legal sanctions.

Retribution is the idea that we should bring Hell to Earth, that we should give these retributively blameworthy people a "sneak peak" of the suffering they deserve. By giving it up, I think we not only will better direct our limited resources to more valuable endeavors, but will also better align the law with the moral principles that it is supposed to instantiate. Maybe

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[32] Lauren Glaze and Danielle Kaeble, "Correctional Populations in the United States, 2013" *Bureau of Justice Statistics*, 4.
Bureau of Justice Statistics. Correctional Populations in the United States, 2012, pg. 3.
[33] *Ibid.* 4
[34] "Highest to Lowest—Prison Population Rate," *International Centre for Prison Studies*, accessed July 28th, 2015 http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.
[35] *Ibid.*
[36] "The Death Penalty Worldwide," accessed July 30th, 2015 http://www.infoplease.com/ipa/A0777460.html.
[37] Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (New York: Spiegel & Grau, 2014), 15.

then we will be released from the binds of our anger, and maybe then the most despised among us will be released from the injustices that those binds have held for so long. ◆

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Historical

REPUBLICAN CONSTITUTIONALISM IN FEDERALIST NO. 4

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James Madison, writing in *The Federalist* as Publius – the collective pseudonym for Alexander Hamilton, John Jay, and Madison – makes a concerted effort in Federalist No. 49 to dismantle a provision suggested by Thomas Jefferson in "Notes on the state of Virginia." Jefferson's 1783 plan for the Constitution of Virginia includes an appeal to the people to act as a safeguard for the principle of separation of powers, whenever two-thirds of any two of the three governmental branches call for a convention. Moreover, Madison's criticism of Jefferson's plan proves the existence of a divergence between these two Founding Fathers in terms of the methods of implementing republican principles. Jefferson views the constitution to be merely a stepping-stone, preceding ceaseless experimentation and evolution in pursuit of a philosophical ideal. In contrast, Madison favors the pragmatic approach, advocating the imperfect, "miracle" Constitution as a final, authoritative decree. Madison crafts four "insuperable" objections to Jefferson's provision, each indicating a fundamental discrepancy in Madison and Jefferson's view on the nature of republican constitutionalism.

Broadly, Madison's rejection of the provision in Federalist No. 49 reflects the practical necessity of establishing a constitution that would be perpetually binding and worthy of immortal veneration, preserving what the Federalists achieved in the 'providential moment.' Specifically, Madison objects first to the inability of the provision to prevent the legislative branch

from dominating or allying with another branch and thereby benefiting from a convention. Second, he argues that the provision will have a detrimental impact on societal perceptions of the government. Third, he maintains that the provision threatens public tranquility. Fourth, Madison contends that the provision would be ineffective to protect against the "encroaching spirit of power" in government.

Madison's first objection is a minute correction, stipulating that Jefferson's proposed "two of the three branches of government shall concur in opinion, each by the voices of two thirds of their whole number" cannot be checked by the provision, as a department can ally itself with another and thereby benefit at a convention.[38] The next three objections, however, speak to the principle of separation of powers as it pertains to the wellbeing and political participation of the people.

In the second objection, Madison is cautious about appealing to the people at every instance of departmental power struggle or an overstepping of constitutional powers. Informing the people with each case is equivalent to going to the doctor with a sniffle – or perhaps leads to a "boy who cried wolf" scenario, in which invocations to the people are so commonplace that the danger of departmental tyranny is forgotten. Moreover, involving society in the behind-the-scenes struggles of constituting the departments would indicate a defect in the running of the government. Madison, therefore, by making this objection, inherently implies that the "parchment barriers" that

[38] Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN: Liberty Fund, Inc., 2001), No. 49, 261.

supposedly constrain each branch are bound to fail, and fail often. Jefferson prefers the people be aware of governmental failings in order to most effectively advocate for changes. When the constitution is considered a constant work-in-progress, there is no shame in failure. Madison, however, perceives a threat to the reverence attributed to the government.

However, depending on how frequent the provision appeals to the people, the transparency constituted by informing citizens of breaches in government could rather lead to increased accountability and trust. Transparency concerning governmental faults or defects does bring them to light, but it also assuages a public fear that worse deviations from the constitution are not occurring. If the people are cognizant of the imperfections of the constitution – a product of imperfect people – failings or transgressions of the separations of powers ought to be expected. The people should, counter-intuitively, need only worry if they never hear about an issue with the government's functioning, if transparency is to be expected. Suspicion of the government covering up worse crimes would lead to an appeal to irrational passions of the people, making successful deliberation at a convention more complicated. Thus, promoting transparency protects Madison's concept of republican constitutionalism by preventing the success of future conventions.

Additionally, appeals to the people demystify the government process, "depriv[ing] the government of that veneration which time bestows on everything."[39] Madison laments the loss of blind authority by appealing to

[39] Ibid.

the people, or at least the possibility of accumulating the prejudices of the people. The respect for tradition and ancient authority must be balanced with the use of each individual's rational capabilities. Madison and Jefferson split over the "tension between unattached pursuit of truth and love of country."[40] Federalist No. 14 declares the glory of the American populace for "they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestion of their own good sense."[41] However, outside of a "nation of philosophers," the expectation that each citizen is especially enlightened is far-fetched.[42] Thus, veneration aids in establishing the appearance that government institutions are perhaps more appreciated than their attributes deserve. Government rests on opinion, and it is easier to have an opinion in the majority than to be a maverick, as "the reason of man, like man himself, is timid and cautious when left alone."[43] Even if some individuals are predisposed to their opinion because of blind veneration for antiquity, merely surrounding oneself with other like-minded citizens is sufficient to fortify a rationally conceived idea. Madison resolves the tension between reason and trust by clarifying that a certain level of veneration is necessary to support man's timid nature, to provide "firmness and confidence" in man's opinion, encouraging political participation.[44]

In stark contrast, Jefferson maintains that constitutions are merely experiments in republican self-government, never meant to be objects of

[40] Jeremy D. Bailey, "Should We Venerate That Which We Cannot Love? James Madison on Constitutional Imperfection," *Political Research Quarterly* 65, no. 4 (December 1, 2012): 733.
[41] *The Federalist*, No. 14, 67.
[42] *The Federalist*, No. 49, 262.
[43] Ibid.
[44] Ibid.

blind reverence. Therefore, provisions are vital that supply methods of calling new conventions and proposing alterations to the existing governing documents. Dustin A. Gish and Daniel P. Klinghard, in "Republican Constitutionalism in Thomas Jefferson's Notes on the State of Virginia" explain Jefferson's perspective:

> Just as scientists are advised to prefer cautious skepticism over dogmatic certainty and to challenge the dictates of seeming authorities; so too, Jeffersonian constitutionalism promotes a fundamental iconoclasm that rejects as unrepublican an investment of authority that impairs the continual application of evolving political science to constitutional matters.[45]

In so far as veneration restricts the evolution of the constitution, Jefferson's provision is desirable in the abstract to protect the principle of separation of powers, as well as republican liberty. In Madison's realistic view, however, stability and energy in government, bolstered by veneration of the Constitution, is a prerequisite to civil rights and liberty.[46]

Madison's third objection concerns the potential detriment to public tranquility as a result of frequent appeals to the people. Madison notes that, when the public is faced with a danger to society, public opinion is most unified. Dangers to society act as an excellent security against a bickering populace, by "repress[ing] the passions most unfriendly to order and concord."[47] Thus, Madison's present predicament of establishing a new constitution only resorts to a split between the Anti-Federalist and the Federalists. The danger to society – the threat of the British – has receded

[45] Dustin A. Gish, and Daniel P. Klinghard, "Republican Constitutionalism in Thomas Jefferson's Notes on the State of Virginia," *The Journal of Politics* 74, no. 1 (2012): 46.
[46] Ibid., 47.
[47] *The Federalist*, No. 49, 262.

enough to permit the "ordinary diversity of opinions on great national questions."[48] Society is most easily maintained in a tranquil state when current events stifle the diversity of opinions and ties to party lines. However, in Jefferson's model of republican constitutionalism, "[c]onstitutional reflection and revision becomes the ceaseless duty of republican statesmen and citizens, not the work of a glorified legislator or monolithic founder."[49] In Jefferson's model, society would be in a constant state of self-criticism and upheaval. Madison prioritizes the prudent aim of societal stability. In this way, Jefferson approaches the enforcement of separation of powers like an "ingenious theorist… in his closet or in his imagination," compared to the pragmatic Madison.[50]

The final objection concerns the efficiency of appealing to the people to mediate between the branches. Madison distinguishes between the relationships the people have with each of the three branches. The executive is subject to unpopularity and jealousy. The judiciary is much too permanent to "share much in their prepossessions" with the people.[51] On account of the small number of offices in the executive and judiciary departments, few people have personal connections to those branches. The legislative branch is the most well-connected and dangerous, and thus the most in need of restriction. The individual representatives in the legislature are numerous and their roles mandate gaining public trust and influence. Therefore, the appeals

[48] Ibid.
[49] Gish and Klinghard, "Republican Constitutionalism in Thomas Jefferson's Notes on the State of Virginia," 46.
[50] *The Federalist*, No. 37, 184.
[51] Ibid., No. 49, 263.

to the people would mainly originate from the judiciary or executive, but the people are not likely to favor these two branches over the legislative. Moreover, the same skill and influence necessary for representatives to be elected can also be used to obtain seats in the convention, effectively permitting legislators to act as their own judges. Instead, Madison prescribes a minimalist approach utilizing inter-departmental and institutional competition – "ambition must be made to counteract ambition" – rather than formal boundaries and enforcements.[52] It is significant that Madison does not uniquely reject Jefferson's appeal to people, but rather *any* process that could prospectively lead to future conventions or alterations of the constitution.

Another independent reason as to why Jefferson's provision lacks efficacy is that it is an appeal to passion:

> The *passions*, therefore, not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.[53]

Madison fears the passion and irrationality of the people getting in the way of the rational, solemn choice of the people for good government. He differentiates between the momentary inclinations of the populace and the choice for good government made after long, critical reflection. Madison's criticism of Jefferson's provision, therefore, can be simplified to the clarification that "the people are not a dispassionate "fountain" of authority which can judge according to the charter it grants. […] Thus when they act as

[52] Ibid., No. 51, 268.
[53] Ibid., No. 49, 264.

the foundation of authority, the people's verdict on the authority of the departments will be tainted by their own part in the dispute."[54] The government acts to control the people's passions that could otherwise be used as a weapon against the government and social stability. Appealing to these same passions in order to constrain the government is illogical as it requires the use of reason when emotions naturally dominate. The government must appeal to passions, however, in order to reap certain benefits, such as veneration. Therefore, if Jefferson's provision destroys veneration, then Madison appeals to the passions of the people by actively excluding that provision. This specific appeal to passion can be justified in that it forms a baseline for majority opinion, which supports the "timid nature of man," thereby encouraging more people to exercise their rational capabilities in forming opinions on the government, promoting political participation. Appeal to passion for judgment, as in Jefferson's plan for Virginia's Constitution, is harmful to Madison's conception of republican constitutionalism because it provokes an impetus for change. Madison aims to instill a balance between independent thinking and a certain level of satisfaction involving the structure of the government.

Moreover, Federalist No. 49 reflects the broad paradigmatic divide between Madison and Jefferson. Madison recognizes that pursuing a philosophical ideal is fruitless. Embracing an imperfect constitution is preferable to an endless search for an abstract sense of republicanism.

[54] David F. Epstein, *The Political Theory of The Federalist*, (Chicago: The University of Chicago Press, 1984), 136.

Madison seeks to establish an immortal, perpetually binding foundation for government. For Jefferson, immortality exists in the constant revising and editing process of governing documents. In so far as Jefferson's philosophical approach – exemplified by his provision for the Constitution of Virginia – does not yield security and stability, it is insufficient as a basis for the Constitution. Madison's criticism in Federalist No. 49 reveals this inadequacy and highlights Madison's own prudence. ◆

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Historical

JOHN ADAMS AND THE STAMP ACT

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As the English attempted to exert a growing influence on their American colonies, John Adams penned a series of editorials for the Boston Gazette that exemplified the attitude of most colonists at the time. Worried about rising levels of taxation and legal oversight, the colonists felt resentful toward the English, but their desire to rebel had not yet taken hold. Accordingly, Adams analyzed human nature, European and colonial legal history, and the present conflict in order to argue that education and free press were indispensable guarantors of colonial freedoms, and he believed that British attempts to infringe upon these rights were of grave concern. Adam's article, "A Dissertation on the Canon and Feudal Law," demonstrates that the American Revolution was by no means inevitable in the year 1765, and it may have even been prevented had the English responded to American demands that the English restore these specific liberties.

When the American revolutionaries signed their assent to the Declaration of Independence in 1776, they broke away from the English common law to establish a new legal tradition—one based more on written contracts than unspoken custom. Believing that any legitimate government must protect man's sacrosanct right to life, liberty, and the pursuit of happiness, these men argued that England's transgressions invalidated any premise for prolonging its jurisdiction over the colonies. However, given the attitude of these patriots a mere decade earlier, it was by no means evident that the colonies would soon revolt. John Adams was initially a reluctant critic of British policy, fearing retribution against his young family and growing legal practice. However, the introduction of the Stamp Act convinced him to join the public debate. His *Dissertation on the Canon and Feudal Law*, published serially in the *Boston Gazette* in 1765, provides a unique

glimpse into the colonists' growing anger over what they viewed as a blatant disregard by the English for common law in their relations with the colonists. Adams' general argument—that the colonists should trust common law but must remind England of its relevance to the colonies—can best be understood by deconstructing his *Dissertation* into three parts: analysis of human nature, review of European and colonial legal history, and discussion of the conflict.

Adams first described his view on human nature, a philosophy that charted a moderate course amidst the divergent opinions of his predecessors. For example, Thomas Hobbes (1588-1679) emphasized that men were inherently in a state of chaos and strife, which he used to justify a strong, centralized state that could wield nearly unlimited authority over its citizens. John Locke (1632-1704), on the other hand, believed that men were by nature reasonable and fair-minded, though their flaws warranted a limited state under a social contract that protected their basic freedoms.[55] Like Locke, Adams believed that men were naturally good, lauding their "exalted soul…that aspiring, noble principle founded in benevolence, and cherished by knowledge."[56] Moreover, all men deserved access to their natural rights, which could not "be repealed or restrained by human laws" because they were "derived from the great Legislator of the universe."[57] This inherent

[55] Bristow, William, "Enlightenment", The Stanford Encyclopedia of Philosophy (Summer 2011), Edward N. Zalta (ed.)
[56] Adams, John. "A Dissertation on the Canon and Feudal Law." Editorial. Boston Gazette 1765: Teaching American History. Ashland University. Web. 27 Nov. 2014.
[57] Ibid.

benevolence and universal right to liberty formed the first part of Adams' understanding of human nature.

More central to Adams' argument was his belief that every man fostered a "love of power," which could exercise either a positive or negative influence on the state of society. On one hand, if freedom was the status quo, then the individual's effort to preserve control over his own life "has always stimulated the common people to aspire at independency, and to endeavor at confining the power of the great within the limits of equity and reason." In this way, the impulse to protect personal freedom could provide a natural check on authority. If left unchallenged, however, "this principle…has always prompted the princes and nobles of the earth, by every species of fraud and violence, to shake off all the limitations of their power." The individuals who wielded more power at any point could soon pervert man's "desire of dominion," once a trait that protected freedom, into "an encroaching, grasping, restless, and ungovernable power" that oppressed other members of society.[58]

This regretful circumstance, under which the common people were unable to organize an opposition or defend themselves using historical precedent, meant that Adams considered it much more difficult for a corrupt state to reform than for a just society to survive. This trend became incredibly difficult to reverse because, in Adams' opinion, educated men were born with "a reluctance to examine into the grounds of our privileges, and the extent in which we have an indisputable right to demand them." This

[58] Ibid.

unwillingness to criticize legal authorities and their privilege, which Adams himself struggled to overcome before publishing the *Dissertation*, stemmed from recognition that the British government had historically punished its more vocal critics, and it led men to become inherently conservative. Adams reiterated this point later in his work, declaring that the colonists' ancestors were "the objects of persecutions and proscriptions," so they inherited "habits of reserve and a cautious diffidence."[59] This analysis of human nature, by which a noble trait could become a fatal flaw, was the basis upon which Adams formed his solution for the ongoing conflict with the British government.

Next, Adams transitioned from philosophy to history; he described first how the troubled legacy of canon and feudal law in Europe was an unfortunate, but not unexpected, consequence of man's thirst for power, and then he recounted how English common law emerged in response to this experience. He began by characterizing canon and feudal law as "the two greatest systems of tyranny" to befall mankind, the former "framed by the Romish clergy for the aggrandizement of their own order" and the later established for "the same purposes of tyranny, cruelty, and lust." When these two institutions joined together, they formed a "wicked confederacy" by which the priests and aristocracy aided one another in a mutual quest to "employ their ascendancy over the consciences of the people, in impressing on their minds a blind, implicit obedience to civil magistracy." This system, as Adams foretold on a philosophical level, meant that "one age of darkness

[59] Ibid.

succeeded another" as "liberty, and with her, knowledge and virtue too, seem to have deserted the earth" throughout the Middle Ages. Adams referenced other writers who agreed with his unforgiving assessment of the canon and feudal legacy. He quoted Lord Kames, a Scottish philosopher, who characterized feudal law as, "A constitution so contradictory to all the principles which govern mankind," and he recounted how Rousseau considered this system, "That most iniquitous and absurd form of government by which human nature was so shamefully degraded." Thus, Adams joined his peers in decrying the horrors that these establishments inflicted on Europe for nearly one thousand years. When, as Adams wrote, "God in his benign providence raised up the champions who began and conducted the Reformation," a divine force emerged to provide the people with leaders who helped the common people cast off their chains, spreading knowledge and organizing peasants in opposition to religious and secular tyrants and the corrupt systems they espoused.[60]

Although this movement for liberation influenced all of Europe, it had a particularly strong impact in England, which Adams attributed to the nation's common law tradition. Adams emphasized three critical moments in the evolution of English law: the Magna Carta (1215), English Revolution (1651), and Glorious Revolution (1689). The Magna Carta was one of the first documents in British history that placed limits on the authority of the crown's prerogative. The English Revolution culminated in the beheading of Charles I during a revolt against his attempts to reinstate Catholic law in

[60] Ibid.

England, and it resulted in the brief existence of a commonwealth under Oliver Cromwell. Lastly, Adams focused on the Glorious Revolution, during which James II fled the country for many of the same reasons as his father, Charles I, had done so decades before, and Parliament crowned William and Mary in his stead. Not only did this act increase Parliament's authority over the monarchy, but it also forced William and Mary to sign the Bill of Rights, which protected free speech and further curtailed the crown's authority. These events contributed to forming a body of documents and precedents that outlined basic principles of common law, primarily the rights of individuals and the restrictions on government. Overall, the common law provided more room for interpretation by the people and less reliance on laws dictated by authority, an arrangement that helped England break free of feudal and canon chains earlier than its continental peers. Given this history, Adams trusted in the potential of the common law to adapt to new circumstances, proposing that, "the spirit of liberty is as ardent as ever" among English legal scholars, "although a few individuals may be corrupted" in its practice.[61] This interpretation of English legal history, specifically how the fall of canon and feudal law was hastened by the exceptionalism of common law, formed the basis for Adams' continued faith in the common law system despite the Stamp Act conflict.

Continuing his historical analysis, Adams turned to American legal culture, describing how the colonies improved common law by emphasizing knowledge through education and the press. Adams considered it

[61] Ibid.

advantageous that the first colonists came to American in pursuit of greater religious freedom, since this led them to particularly abhor the excesses of canon law and to strive for proving "consistent with the principles of the best and greatest and wisest legislators of antiquity." Adams rejected the idea that these men harbored republican sympathies, characterizing the early colonists as being "far from being enemies to monarchy," merely men who set out to create societies in which "popular powers must be placed as a guard, a control, a balance, to the powers of the monarch and the priest." It was really this "love of universal liberty, and a hatred, a dread, a horror, of the infernal confederacy before described" that inspired the colonists to leave behind comfortable lives in England and settle in the North American wilderness. Thus, just as English common law emerged as reaction to canon and feudal law, the early colonists also "formed their plan, of ecclesiastical and civil government, in direct opposition" to the abuses under these systems.[62]

In Adams' eyes, though God inspired the move away from these oppressive institutions in the colonies as in Europe, the early colonists recognized that they couldn't rely on divine intervention to protect future generations. Therefore, the first colonists' goal was two-fold: to establish "a government of the state more agreeable to the dignity of human nature" and "to transmit such a government down to their posterity." Recalling how education was the most successful protector of individual liberty, they decided that promoting "a general knowledge among the people" would

[62] Ibid.

most effectively secure the "right, an indisputable, unalienable, indefeasible, divine right," to personal freedom. The first step in spreading knowledge depended upon fostering public education and higher institutions of learning. The colonists established schools in every district, ensuring that the "education of all ranks of people was made the care and expense of the public, in a manner that I believe has been unknown to any other people ancient or modern." They also "laid very early the foundations of colleges, and invested them with ample privileges and emoluments" to guarantee their success. Over the following years, "so universal an affection and veneration for those seminaries, and for liberal education" spread that universities flourished throughout the American colonies, particularly in the Northeast.[63] Thus, Adams' forefathers endeavored to enhance their descendants' ability to resist oppression by imbuing citizens with an appreciation for education.

Once knowledge became widespread, the founders, and Adams himself, hoped that men would apply their learning through public debate that would prevent any one individual from gaining excessive power. Adams considered a robust, free press, which the first colonists spread through sponsoring newspapers and printing presses, to be capable of reducing corruption and empowering citizens by questioning existing systems of authority. Over the prior century, colonists took "care…that the art of printing should be encouraged, and that it should be easy and cheap and safe for any person to communicate his thoughts to the public." As a result of these actins, Adams believed that, by 1765, "none of the means of

[63] Ibid.

information are more sacred, or have been cherished with more tenderness and care by the settlers of America, than the press."[64] Other colonists generally agreed with this assessment regarding colonial newspapers' importance, as demonstrated by their regard for Benjamin Franklin's simple rhyme: "While free from Force the Press remains/Virtue and Freedom cheer our Plains."[65]

The third and final section of Adams' work describes how, despite the English efforts to develop a common law and the colonial emphasis on spreading knowledge, liberty in the colonies was under imminent threat, and it could only be restored if rule by common law was returned to the colonies. First, Adams wrote that "there has been among us a party for some years, consisting chiefly…of high churchmen and high statesmen imported since, who affect to censure this provision for the education of our youth."[66] Those men claimed that education should be privately funded and that colonial efforts to educate all citizens were a prodigious waste of money; these accusations were, in Adams' mind, a mere cover for the fact that the British felt threatened by colonial knowledge. Adams countered, "The preservation of the means of knowledge among the lowest ranks is of more importance to the public than all the property of all the rich men in the country."[67] With this statement, Adams directly opposed English policies for the first time, and his hostility toward English attempts to control the

[64] Ibid.
[65] Breig, James. "Early American Newspapering." *Colonial Williamsburg Journal.* Winter 2002. Web. 30 Nov. 2014.
[66] Adams, *A Dissertation on the Canon and Feudal Law.*
[67] Ibid.

colonies grew as he finally addressed the immediate cause for his *Dissertation*: British attacks on free press via the Stamp Act.

The Stamp Act sought to place a levy on all printed materials, which had the indirect effect of making newspapers and journals less accessible to the common people and less economical for business owners. Adams lambasted this tax, accusing the British of "hypocrisy, chicanery, and cowardice" in targeting the American press, since American writers offered more intelligent, constructive critiques than their British counterparts. Adams exhorted American journalists to remain strong, declaring, "I hope in God the time is near at hand when they will be fully convinced of your understanding, integrity and courage." Reflecting upon mankind's unfortunate predisposition for facilitating oppression, he warned writers that "the jaws of power are always opened to devour, and her arm is always stretched out, if possible, to destroy the freedom of thinking, speaking, and writing," which was particularly destructive since journalists served as essential guarantors of liberty in the colonial psyche. Although Adams hoped that writers would not be "intimidated, therefore, by any terrors, from publishing with the utmost freedom," the English's increasing presence in the colonies meant that royal authorities could imprison and fine those who spoke out against English policy.[68] As a result, not only were British attempts at censorship attacking the journalists, who sought to defend freedom, but the Stamp Act also went one step further in attacking the economic foundation for the press.

[68] Ibid.

Adams' final sentences expressed a heightened concern over colonial affairs. His use of anaphora suggested a sense of urgency, calling for his peers to "let every order and degree among the people rouse their attention and animate their resolution…let them all become attentive to the grounds and principles of government." Moreover, he recognized that little time remained to resist the "direct and formal design on foot, to enslave all America."[69] He again stressed the illegality of British actions using more anaphora, demanding:

> "Let it be known, that British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts, coequal with prerogative, and coeval with government; that many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. Let them search for the foundations of British laws and government in the frame of human nature, in the constitution of the intellectual and moral world. There let us see that truth, liberty, justice, and benevolence, are its everlasting basis; and if these could be removed, the superstructure is overthrown of course."[70]

Thus, Adams believed that the natural rights due to all men form the pillars of common law in English society, so these rights must be upheld and respected in the colonies as in the mainland. His final plea—for a return to the basics of common law, and a restoration of the colonial right to knowledge—underscores the modest nature of Adams' argument. Though he criticized the English, he was careful to attack the crown's ministers, not the king. Though he believed that British policies were a cause for concern, he did not advocate rebellion. He simply sought to convince that English that they must apply common law to colonists as well as Englishmen.

[69] Ibid.
[70] Ibid.

Despite widespread outrage over the Stamp Act, this interpretation represented the general consensus among colonists in the year 1765: few favored a political and legal break from England, and those who did were regarded as extremists. As American legal scholar William Dunham reflected, "The stand that the Americans took was at first conservative and as based on old shibboleths, Magna Carta, the 1628 Petition of Right, 1689 Bill of Rights, and the Revolution Settlement."[71] Though the king and his ministers were actively violating the rights espoused by these very documents, they argued that "many Americans hoped for a constitutional settlement against a presumptuous parliament" through the intervention of the king himself (60). Samuel Langdon, President of Harvard during the Revolutionary War, said that England's unwritten customs formed a "constitution of government which has so long been the glory and strength of the English nation," and Alexander Hamilton for many years regarded common law as "the best model the world ever produced."[72] It is therefore clear that Adams' continued trust in the English legal system was not an anomaly, but it in fact represented the general consensus of colonists who were familiar with the conflict.

In short, Adams used his *Dissertation on the Canon and Feudal Law* to provide a philosophical and historical basis for his analysis of the Stamp Act conflict. Although Adams trusted that men were inherently good, their

[71] Dunham, William Huse. "A Transatlantic View of the British Constitution 1760-1776." In Jenkins, ed. Legal History Studies 1972. Presented to the Legal History Conference, Aberystwyth 18-21 July 1972. Cardiff: University of Wales Press, 1975, 51

[72] Dunham, *A Transatlantic View*, 50

proclivity for exerting influence over others made the human race susceptible to suffering under tyrannical institutions. Thus, England's common law system developed as a mechanism to prevent canon and feudal law from regaining strength, and the colonists further sought to protect individual liberty by promoting education and free press. Despite his anger over recent British policy with respect to the colonies, specifically regarding the pending implementation of the Stamp Act, Adams trusted that English common law, which had evolved to promote the best and protect against the worst aspects of human nature, would provide a remedy to prevent the return of canon and feudal law.

However, by 1776, the colonists would conclude that their trust was misplaced. As Julius Goebel later reflected in the *Columbia Law Review*: "Except for such occasional highlights as the Magna Carta, the Act of Supremacy or the Bill of Rights, the details of English constitutional history are only to be found in the common law and the activities of the common law courts."[73] Though Adams still trusted in the common law when he penned his *Dissertation*, he would soon discover that no precedents or customs within this system could prevent the crown from imposing taxes or suppressing liberty in the colonies.[74] Over the ten years that followed the publication of Adams' *Dissertation,* a sequence of new taxes and a transformation of the British attitude toward the colonies showed Adams that English legal tradition was not protecting the liberties that Americans so

[73] Goebel, Julius. "Constitutional History and Constitutional Law." Columbia Law Review 38 (1928): 558-9

[74] Adams, *A Dissertation on the Canon and Feudal Law.*

valued. When the revolutionaries wrote their Declaration of Independence and later a new Constitution, they followed Adams' example in the *Dissertation*. By applying their own knowledge of humanity, legal history, and recent events, the founders of the United States broke away from common law to delineate written constitution that directly protected the essential liberties of man. ◆

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Theory

UNGER'S PROPOSALS THROUGH THE LENS OF AUSTIN AND HABERMAS

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This paper places Unger's criticism of rationalizing legal analysis within the bifurcated framework of language established by J.L. Austin's observation of performative and constative utterances. With this foundation in place, this paper then accordingly evaluates and validates Unger's suggestions of alternative futures (namely, extended social democracy, radical polyarchy, and mobilizational democracy) with the help of the logical frameworks within Jürgen Habermas' communicative action theory. This paper aims to showcase the logical consistency of Unger's proposals as interpreted through the lens of Habermas' communicative action theory, as a force that successfully counteracts the problems posed by rationalizing legal analysis as viewed through the lens of Austin's philosophy on language. It argues that Unger's proposed alternatives of higher-energy democracies set the stage for constant and active communication that encourages critical reflection on social norms; through this, the participants of this constant and active conversation – i.e. the citizenry – come to recognize the nature of the language of the law as performative rather than constative, pushing the boundaries of words to wider imagination and structural revisions.

Seeing as "law" is a discourse amongst words in its composition, production, application, and adjudication, it is impossible to separate the role and human perception of language from our discussion on legal analysis. How do speech acts and the written word fit into the debate between those who view the law as a latent normative order and those who see it as the will of the sovereign? Aside from language itself, it is also worthwhile to explore how the human perception of what speech acts can do and cannot do – i.e. describe versus create – factors into our ability or inability to see beyond the limits of our imaginations as caged by the "intelligible and defensible plan of social life." Language serves as an important wheel in the vehicle of Roberto Mangabeira Unger's discourse on law and legal analysis; what language is and how society perceives language play critical roles in what the "law" becomes in the eyes of the public, the lawmaker, and the adjudicator.

This paper places Unger's criticism of rationalizing legal analysis within the bifurcated framework of language established by J.L. Austin's observation of performative and constative utterances. With this foundation in place, this paper then accordingly evaluates and validates Unger's suggestions of alternative futures (namely, extended social democracy, radical polyarchy, and mobilizational democracy) with the help of the logical frameworks within Jürgen Habermas' communicative action theory. The theoretical explorations of this paper operate under the "charity principle" of granting as given reality all assumptions that the theorist makes in his normative philosophy. As a result, any economic, political, or institutional assumptions that Unger's theories might make to present itself as applicable to our abstract vision of society are not posed as significant issues in this paper. Rather, it aims to showcase the logical consistency of Unger's proposals as interpreted through the lens of Habermas' communicative action theory, as a force that successfully counteracts the problems posed by rationalizing legal analysis as viewed through the lens of Austin's philosophy on language. This paper argues that Unger's proposed alternatives of higher-energy democracies set the stage for constant and active communication that encourages critical reflection on social norms; through this, the participants of this constant and active conversation – i.e. the citizenry – come to recognize the nature of the language of the law as performative rather than constative, pushing the boundaries of words to wider imagination and structural revisions.

In Part I, I will lay out the foundation for the Austinian lens I employ in reading Unger's critique of rationalizing legal analysis by providing a brief refresher and analysis of Austin's philosophy on language as posited in *How To Do Things with Words*. I will then walk the reader through placing Unger's critiques in the context of this Austinian foundation. In a similar fashion, in Part II, I will provide a brief refresher and analysis of Habermas' theory of communicative action before placing Unger's suggestions of alternative realities in its context. In Part III, I will engage the Austinian and Habermasian frameworks established as related to Unger's discussion of legal analysis in Parts I and II in a unified conversation, showing how they fit together to provide a coherent narrative of Unger's critiques and proposals. I will then conclude and in the process also discuss more tangible and real-world applications of the previous theoretical discussions.

I.

Austin's work bifurcates speech acts into two general categories – the constative and the performative. The difference between the two is ultimately one between "performance of an act *in* saying something as opposed to performance of an act *of* saying something," with the former being the performative speech act and the latter being the constative speech act (Austin 99). Constative speech acts are those that express an observation of the world external to the speaker. Factual statements such as "He is running" and "The shirt is blue" are successful statements as long as the idea of what they are describing is indeed reflected in the world being observed. For readers that are more inclined towards the study of language, this idea might

open up additional questions about language as a social construct – Why is blue "blue," and running "running"? What does it mean that human beings agree to this unified set of vocabulary? – but this is not a conversation that this paper will tackle. Provided the existence and acceptance of language, constative statements have a truth value, meaning that they can be deemed true or false.

Meanwhile, the recognition of action *in* saying something was the truly groundbreaking work that Austin did. Performative speech acts performs the action referred to within it, simply by virtue of having been said. The classic example for Austin's performative speech act is "I pronounce you man and wife," where the reality of a man and a woman becoming a married couple is produced simultaneously with the saying of the statement. While constative speech acts express observations of the external world, there is no external referent for the performative speech act: "Whereas in our case it is the happiness of the performative 'I apologize' which makes it the fact that I am apologizing: and my success in apologizing depends on the happiness of the performative utterance 'I apologize'" (Austin 47). Because the lack of an external referent also takes away any standard against which the trueness of the performative speech act could be measured, there is no truth value in performative speech acts, meaning that performatives cannot be flatly deemed true or false in the same way as constative speech acts.

Meanwhile, it is from Austin's extensive criteria for a "felicitous," or successful, performative speech act that we see a basis for his positivist view

of law as the will of the sovereign. The performative statement "I pronounce you man and wife" can be considered felicitous only if the speaker of the statement had the authority to pronounce two people man and wife; for example, a child playing make-believe on two adults by saying the statement would perform the act *of* saying the statement perhaps deliberately with the same tone and voice, but his statement would ultimately be unsuccessful because he lacks the authority to bring the idea in his statement to reality. For Austin, law is the performative expression of desire by the sovereign (for example, "I would like you to stop at the red light"), one that ends up being felicitous because the sovereign does carry the authority to enforce the red light, and threats of punishment should that enforcement be interrupted. The great advantage of the system that Austin lays out is its simplicity. The sovereign does not necessarily require a legitimate claim to power, but is simply the person whose threats to punishment the citizenry happens to find credible at the time (Dworkin 33). Meanwhile, the paradox of Austin's theory on law lies in the fact that while the sovereign needs to be distinguishable from the citizenry in some way or form in order for law to function as the performative word of the sovereign, the distance between the sovereign and the people is rather small in more limited governments (i.e. constitutional democracies) where the people limit themselves to a certain extent.

Now that the foundational refresher on Austin's theory of language and law has been made, it is a worthwhile endeavor to lay out Unger's history of legal thought before delving into the issues present in the narrative in the context of Austin's philosophy. Unger presents the universal history of legal

thought as an ongoing quest to settle two views of law, "law as latent normative order and law as will of the sovereign" into peaceful coexistence (Universal 2). The two views defy each other's ideas about what the law is and how it is conceived; if the law is a social order that is latent and waiting to be discovered, how can it be that it is the product of the individual desires of the sovereign, and vice versa? This incompatibility is reflected in each view's internal issues: the idea of law as the sovereign will succumbs to "the method of the Pontius Pilate [whose] campaigns begin and ends with hand washing" ("intellectual emptiness" as Unger puts it), while the view of law as doctrine leads to the eventual (and unconscious) loss of humanity's self-determination in the trapping dialectic between practice and belief (Universal 30). Despite this fundamental incompatibility, the two views share a common foundation in their belief in law as a reflection of a real structure of society, the third element of the universal pattern of thinking about law according to Unger. It is from this view, based in perceptions of real institutions and real ideology, that Unger derives the inspiration to move towards a "deepening of democracy through this institutional reconstruction and ideological reinvention" (Universal 43). The more concrete alternative futures that Unger sets forth as potential solutions to the dilemma are discussed in the next section, after the following discussion of Unger's critiques of contemporary efforts to marry the two views in the context of Austin's philosophy on language.

In *What Should Legal Analysis Become?*, Unger devotes a hefty portion of the book to criticize rationalizing legal analysis. Working under the view of

law as doctrine, the adjudicator and legal authorities rationalize towards a ready-built and indivisible social order in the mind: "The content is already there, as the hidden content of the package people bought when they committed themselves to a general type of social organization, and it provides the basis for intelligible policies and principles allegedly immanent in the law" (Social Theory 148). Meanwhile, through adjudication, the judge comes to stand "at the center of this imaginative system because he is supposed to be the embodiment of reason in law," becoming somewhat like the sovereign that defines and embodies the purpose of the law (WSLAB 110). Unger laments the loss of humanity's imaginative capacity throughout this version of the dialectic between the law as doctrine and the law as the will of the sovereign, as society becomes trapped, both ideologically (by its naturalized assumption of an all-encompassing and indivisible social order to rationalize towards) and institutionally (through the structure of our legal system and the role that the judge plays in legal interpretation).

Meanwhile, disentanglement out of this trap involves more than mere ideological transcendence and institutional change; the inherent trapping point is in the human perception of the language of the law. In starting his discussion on the dilemmas posed by the view of law as doctrine, Unger notes the role that discourse itself plays in the formation of ideology: "It is to register that the discourse helps make the subject matter. Unlike the sociology of law, the sociology of religion, and linguistics, legal doctrine, theology, and grammar help shape law, religion, and language. They do so not as an unintended effect but as one of their explicit and organizing goals"

(Universal 12). In helping "make the subject matter," the conversation leading up to the ideological outcome becomes in itself a formative leg for the ideology, outside the boundaries of the actual ideological and content-based disputes within the conversation. In this way, the language itself generates a new layer of reality that supports the ideological outcome represented in the law. In other words, the language involved in the law and the conversation leading up to it in fact serves a performative role in terms of creating and imprinting the effects of that law on the real social structure.

Austin comments on this further in no more than a small footnote in *How to Do Things with Words*: "Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact" (4, n.2). The core issue underlying the flaws of rationalizing legal analysis is made clear when we apply Austin's criticism of society's perception of the language of law to Unger's critique: jurists assign truth values to the language of the law, and in doing so, view performative language as constative. Perception of the language of the law as constative (rather than performative) fits perfectly into the agenda of rationalizing legal analysis. Constative language operates under the presumption that there already exists a valid referent in the reality external to the speaker, the writer, or the interpreter; in interpreting the language of the law as constative, jurists assume that the social order presented through the law is something that was there before the law. This interpretation subtracts from the imaginative capacity of the language of the law, because assuming an external referent

blocks the performative potential within language; if it is understood that what the law is talking about is already latent somewhere within society, there is no reason to think that the law is a dynamic contribution to the social order in any regard. While it is not as simple as the flick of a switch, it is interesting to note how much the opening and closing of the possibility of law as a performative concept depends simply on the individual's change of mind on the perception of language. How this awakening can be proactively encouraged is discussed in the next section, through Unger's proposals of various forms of higher-energy democracies in the context of Habermas' communicative action theory.

Unger elaborates on the down-spiraling dialectic between analysis and normative judgment in "The Universal History of Legal Thought": "The textual or verbal materials must be interpreted in light of a project (in legal doctrine), a message (in theology), or a view of canonical usage (in grammar). In this sense, as well, doctrine refuses cleanly to distinguish analysis from normative judgment; the two meet in the engaged elaboration to which doctrine is devoted" (12). The downward spiral towards the synthesis of mere re-confirmation of an already-presumed social order ("the engaged elaboration to which doctrine is devoted") is endless. The inability of jurists to separate analysis from normative judgment – that is, their coupling of their interpretation of the law and the indivisible social order towards which they "should" rationalize, made unconscious and indiscernible through their habit of viewing the language of the law as constative rather than performative – does away with the imaginative capacity of the "textual" and "verbal

materials" present in the law by taking us straight back to the elaboration of the presumed social order.

The jurists' interpretation of the language of the law as constative and the public's inability to see beyond this interpretation results in the distancing of the immanent problems of social life from the needs that the law is ultimately interpreted to serve. The view of the language of the law as constative rather than performative therefore takes "life and meaning" out of the application of law to societal reality: "The representations that breathe life and meaning into practices and institutions must make them seem a tolerable solution to the problems of social life. It is not enough that they make it possible to understand these practices as the expression of a vision of society. They must also do so on terms that command assent and allegiance" (Universal 14). The quest for Unger then, is to awaken the citizenry to this mistaken interpretation of the language of the law as constative so that it can demand mechanisms to deliver "assent and allegiance" to the jurists' interpretation and application of the law. This leads us well into an exploration of Unger's proposed alternatives in conjunction with Habermas' theory of communicative action.

II. Directly paralleling the structure of the previous section in which the Austinian lens through which Unger's narrative would be analyzed was established before a more thorough discussion of Unger's critiques themselves, this section will also provide first a brief refresher of Habermas' theory of communicative action before using it as a vehicle through which

Unger's proposed alternatives would be set in motion against the flaws of rationalizing legal analysis discussed above. Habermas' critical theory of communicative action is underpinned by an understanding of the Austinian bifurcation of language into the performative and the constative. Habermas notes that in the status quo view of the language of the law as constative by the jurists and the citizenry, "…law develops into an external force, imposed from without, to such an extent that modern compulsory law, sanctioned by the state, becomes an institution detached from the ethical motivations of the legal person and dependent upon abstract obedience to the law" (TCA 174). Rather than stem from within – which would make the language of the law a performative projection of the desires or ideals of the lawmaker, the interpreter, or the applicator onto social reality – law here becomes an "external force," reinforced by its external referent. As formerly discussed, this distances the law from the most local ethical motivations of those that pertain to the law, closing off the imaginative capacity of the language of the law to potentially embody paradigm-shifting changes in response to real and present social needs.

Habermas posits that an awakening from this naturalized understanding of the relationship between the language generator and the external world can come about as a result of "communicative action." Working from a stipulated and unified set of "reasons that a speaker could provide in order to convince a hearer that he is entitled in the given circumstances to claim validity for his utterance," participants in communicative action cooperatively orient the direction of their conversation

to a mutual understanding of each other's individual plan (Pragmatics 232). Underlying the structure of this conversation is Habermas' assumption of a set of stipulated linguistic norms that makes ideological discourse the genuine focal point of the conversation, not debate inspired by semantics and disagreements on terms and grammar. For Habermas, this opens up access to a whole new world of potential for real mobilization: "At this stage, language…gains a special significance for the social sciences; it not only delimits the domain of social action, but makes it accessible…In disclosing the grammars of forms of life, the logical analysis of ordinary language touches the very object domain of the social sciences" (Logic 231-232). In the realm of communicative action, the task of legal analysis is no longer rationalizing an unanalyzed language to fit an indivisible presumed social order. Rather, it is the appreciation of legal language for what it is and tolerance for the universally stipulated rules of grammar and semantics to unleash their full performative potential on the face of social reality.

When the focal point of discourse becomes the ideological content, participants are forced to provide and explicate legitimate defenses of their positions, actions that lead them to become more self-critical and reflective: "By internalizing the role of a participant in argumentation, ego becomes capable of self-criticism. It is the relation-to-self by this model of self-criticism that we shall call "reflective." Knowing that one does not know has, since Socrates, rightly been regarded as the basis for self-knowledge" (TCA 75). Habermas goes on to note that such a human being has already "demarcated from the external world of facts and norms a special domain of

subjectivity marked by privileged access and intuitive presence." By being able to reflect and locate oneself within the context of a larger society from a birds' eye view (hence his ability to demarcate his own special domain from the external world of facts and norms), the human being no longer sees himself as the receiver of an indivisible social order imposed from the outside; now, he has the capacity to proactively place the things generated from his internal discourse into the external setting. With this newfound capability and the stipulated set of linguistic norms that allows the full performative potential of the ideas embodied in the law to be released, the door to institutional and ideological imagination is reopened.

Such logic is strikingly applicable to resolving the flaws posed by rationalizing legal analysis as previously discussed in our Austinian reading of Unger's critique in this paper. In discussing his preferred state of society as "indeterminate" (leaving open the door for institutional and ideological re-imagination), Unger argues:

> The abstract idea of society must be translated into a connected series of schemes of human association: a practical, context-specific view of what relations among people can and should look like in each part of social life. In each such field, the model or models of human association will be at once descriptive and prescriptive. They will connect downwards to a discourse about what people owe one another, especially what they owe one another by virtue of occupying certain roles. They will connect upwards to a plan of social life that

> can be held, at least implicitly in the mind, and serve as a basis for inferring out obligations to one another. (Universal 15)

In order for the model for human association to work as both "descriptive and prescriptive" simultaneously, the human being must be both present and removed enough from the present social order to be able to see both the connection "downwards" to local human discourse and "upwards" to a dynamic plan of social life, as Unger describes. This type of simultaneous departure and immersion can come only as a result of stability such as displayed by the set of stipulated linguistic norms in Habermas' narrative of communicative action. Only when imaginative capacity is freed in this way from the trap of analyzing and interpreting unstipulated language towards the security of a presumably latent social order, is the full performative potential of the language of the law unleashed.

Habermas, in his essay "Constitutional Democracy: A Paradoxical Union of Contradictory Principles," sets the stage for applying this theoretical concept to a constantly facilitated process of constitution–revising and –making spearheaded by the citizenry itself: "The allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives of the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations" (768). This proactivity and participation comes from the citizen's understanding of the self as an agent of creation and performance, a situation in which "…citizens [are] able to understand themselves also as authors of the law to which they are subject as

addressees" (BFN 449). When we take upon ourselves the duty to continuously consider the constitution, we place ourselves outside the context of the effects of the law on us or in building up to mold into the assumed social order, and are able to observe from the top-down the interplay amongst the law, the language of the law, and the social order, we shorten the gap between law and democracy. The citizen, empowered in this way, is no longer subject to the arbitrary shaping of the law by the jurists: "The jurist, no longer the imaginary judge, must become the assistant to the citizen. The citizen rather than the judge must turn into the primary interlocutor of legal analysis" (WSLAB 113).

III. With this more theoretical discussion as our foundation, how does the judge become "the assistant to the citizen" in the more tangible realm? In Unger's manifesto on the future of legal analysis, *What Should Legal Analysis Become?,* he posits three alternative futures. There is the transformation and decentralization of society into a confederation of communities under the name of "radical polyarchy." As the basis for this alternative future, Unger posits, "…the most important action in society takes place within settings of group life rather than in the biographies of individuals or the histories of societies" (149). Meanwhile, Unger also grants privilege to the individual in another of his alternative futures, "extended social democracy," in which the ability of the individual to define and execute his own life projects is revived through facilitation by "a corporatist style of political economy." Once again, the bottom-up principle is the foundation that is emphasized: "The legal

ideas with the greatest affinity to extended social democracy are therefore those emphasizing the continuous creation of law from the bottom up, by social organizations" (in lieu of communities as in radical polyarchy) (141). By putting the focus on continuous local discourse on the law and accentuating real social needs as the most significant inspiration for the law, Unger's "radical polyarchy" and "extended social democracy" puts the citizen before the judge in his influence over the creation, interpretation, and revision of the law.

The third alternative future of a free society that Unger suggests is "mobilizational democracy." Unlike the two previous alternative future in which he broke down society into smaller pods that facilitated constant conversation that encourages self-critique and reflection, the whole of society plays simultaneously in the game of "mobilizational democracy." The goal is to heat politics up and "loosen all factional strangleholds upon the key societal resources of political power" (WSLAB 163). In this faster-paced context, change becomes the status quo under a structure-revising structure: "Change becomes banal, as the transparency of the institutional context of action, and its openness to tinkering, increase. This is no move from stability to instability; it is a shift in the quality of stability, a shift that merely moves forward in a direction in which market economies and representative democracy have already taken us." (164). Change in itself becomes the foundational stability that underpins the functioning of society. The implementation of this alternative reflects a society that has naturalized a perception of legal language as performative rather than constative; the chain

between the language of the law and a presumed and indivisible social order to mold towards has been broken. Above the foundation of this new stability, the language itself has mobilized, with performance rather than description as its status quo duty.

Conclusion

A frequent critique of the Ungerian progressive alternatives for a free society is that at the end of the day, Unger does not draw out any ladder work applicable to the present-day social reality so we can reach the high-energy democracies that he speaks of through tangible steps. Meanwhile, as our ever increasingly technology-infused society gives birth to democracies in which citizens have never been as quickly informed and armed with the ability to follow and comment on the latest political discourse (but still can vote only every four years or so), Unger's portraits of more dynamic and mobilizational democracies are more than worth considering at least as a regulative ideal for the future. While the exploration of Unger's critiques and proposed solutions through Austinian and Habermasian lenses in this paper shows that the underpinning causes of the inertia imposed by rationalizing legal analysis stretches as deep down as the human perception of language as performative versus constative, the question of how to satisfy a rising expectation of citizen engagement in the face of social media and Web 2.0 is a real and valid concern. The trick is to look beyond mere intra-structural innovation and the indivisibility of –isms; but how possible that ultimately is in the context of modern preoccupation with structure-based economic

competition and political infighting, etc., and how many layers of blinds we will have to peel back in order to be able to see beyond the system at this point are both questions that merit research as a follow-up to this paper and the discourse on Ungerian progressive alternatives in general. ◆

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Interview Series

AMERICA'S NEXT TOP LAWYER: WHAT IT TAKES TO BECOME A CORPORATE SUMMER ASSOCIATE

Alexandra Tartaglia
Harvard University

Imagine the life of a summer associate at a top NYC corporate law firm. Imagine the endless nights of partying, the extravagant all-expense paid dinners, the casual evening cocktail parties hosted in the mansions of big shot partners out in Greenwich, Connecticut, and the endless outings to Yankee games, art exhibits, music concerts, and Broadway shows. Indeed, headliners[75] depict the life of a summer associate to be one that is of no work and all play. Yet, while the life of a summer associate may seem glamorous from the outside, behind the façade lay the stories of hardworking and brilliant individuals.

Summer associates (referred to as "summers" for short) are rising third-year law school students who are given the opportunity to intern at law firms the summer before graduation with the hope of receiving full-time offers. Summers are ranked "top of the ladder" at some law firms, even above partners. Undoubtedly, within such large firms, there is a sort of fascination, obsession if you will, with the shiny, brand-new summer associates, most of whom are just entering their third year at law school. Lawyers revel at the opportunity to socialize with the fresh talent their firm scooped up during recruitment. Glance at the resume of any summer associate at a top firm and it's no surprise why such a fascination exists. Most

75 Fuchs, Erin. "The 10 Most Fun Law Firms for Summer Associates." *Business Insider*. Sep 24 2013. http://www.businessinsider.com/most-fun-law-firms-for-summer-associates-2013-9#ixzz3jaFJdDVN.

law students that manage to find work at such firms are of the most remarkable people. They come from the top law schools, have top grades, and in addition to this, have a unique skill or trait that distinguishes them from their classmates. In fact, just to get to the point of being a summer associate at any big law firm in NYC requires drive, dedication, and the ability to think and perform in unique and remarkable ways.

Mina Chang, age 26, is just one of the many remarkable young summers that one top firm, Skadden, Arps, Slate, Meagher & Flom LLP, hired this past summer. Chang, currently a Harvard Law Student, already holds her undergraduate degree from Harvard University as well. A government concentrator, Chang extended her interest in government beyond the classroom, even as an undergraduate. Yet, the defining moment for Chang that led her to pursue law school was after her internship with the Justice Department during her senior year of college. For Mina, her interest in law stems from its intersections with social justice. Her work with the Department of Justice opened a new world for Chang: "I had never seen attorneys practice law till the summer after my senior year when I worked at the Department of Justice, where I saw attorneys using law to achieve social justice. At the time, the Arizona Bill was being debated. The law itself was about being able to stop and ask for documentation on the street and the Department of Justice was suing Arizona. For the first time, I could see where law was tantamount with social justice." After graduating, Chang served for a year as a special assistant to the Korean Ambassador in Washington, D.C. Prior to attending law school she also worked as a copy

editor for a year while studying for the LSAT, a mandatory law school entrance examination. Chang's "time off" prior to attending law school is representative of a growing trend nationwide. Law students are expected to spend a few years working to give them a broader perspective of the world.

In addition to Chang's impressive resume, extensive work experience, and exemplary academics, Chang also has unique interests that distinguish her from other law students. For Chang, these interests include white collar litigation, a niche area of law. Chang explains: "I was interested in Skadden for their litigation team. What's unique about the firm that I'm at is that they have a separate white collar team. Generally, white collar tends to be a subgroup of the general litigation team, or partners on the upper level tend to work on more white collar work. It's interesting to see something I wanted to get involved in be offered as a special group at Skadden." Such niche interests are one of many ways students and firms can match with each other during recruitment.

Considering how strong the emphasis is on work, it seems impossible to believe that summers have such extravagant social experiences during their internships. "My work starts around 9:15 am and stretches till 7:00 in the evening, although it can get a lot worse depending on the work you are doing," says Chang. While Skadden is ranked the 8th most fun firm for summer associates by Business Insider, it is clear that the law students are doing much more than partying during their internships.* The reality is that summers are expected to balance the heavy work load with the extensive social calendar. "Yes, there are a lot of summer events," Chang explains. She

says, "They orient the program for summer associates to be less about grueling work and more about getting to know people. The way it was conveyed to me is that the summer is important to forge relationships, create connections, and create the opportunity to know the culture of the firm you are entering the year after. There are a lot of events, lunchtime talks, training happy hours to get to know different teams and groups." Chang's favorite firm outing was seeing "Then She Fell," an interactive theater show, a bonding event which she attended with 15 others in the white collar litigation group. Chang also mentioned other fun events summers could attend including Yankees and Mets games, and receptions at rooftops bars to converse with partners and associates in casual settings.

You may be wondering how summers take advantage of the countless opportunities their summer internships provide them with while also performing at their highest level in the office. Chang admits to getting to the office early in the mornings, sometimes as early as 7:00 am or 8:00 am, to stay on top of her work, while others will take work home with them or return to the office after attending evening social events. It is important for summers to demonstrate that they are able to do it all: submit exemplary work and also partake in the firm's social events. As the summer of 2015 comes to a close, the summers who have impressed their firms will receive an offer to return the following year. Unfortunately, some summers who did not make the cut will not receive an offer.

It is clear, that the life of a law student is a challenging one. A career in a top notch law firm can be stressful, confusing, and a bit bumpy. Law

students are expected to stand out, perform at the highest level, and have fun while doing it. In these high pressure environments, it can be easy for students to get lost in the stress. Ultimately, it is love and passion for the law that overcomes all else. Chang admits that there is a spirituality law students feel regarding the historical tradition of practicing law. She says, "I think all law school students tend to have this moment where you're just sitting in the library—it's been several months, its 12 O'clock at night—and you suddenly realize as you're sitting in Langdell library: I'm studying the law. It's just this glow that you suddenly have when you're like woah, this is what centuries of people have been doing and I'm finally part of it." ◆

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