

PAST PRESENT

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This Essay has two main parts. The first meditates on how history fits within academic legal thinking and writing (an old topic, obviously) and tries to imagine how past and present might be arranged without adopting the assumptions of historians. The second part – taking seriously the conclusions of the first – tests matters through a back and forth reading of *Moore v. Dempsey*, somehow ending up juxtaposing *Moore* and *Boumediene v. Bush*. No warranties.

PART ONE

“Now! Now! Now!” In his 2012 hit movie, Abraham Lincoln catches right now right on. Interestingly often, these days “these days” – “at this time” – structures legal writing. *Immediacy* serves as one parameter fixing subject matter (“what we are discussing is what’s happening right now”) and also as proof of the force of the particular analysis (“what we propose shows and promotes or regulates what’s happening right now.”)

Maybe what I’m noticing is true in every period. Tight temporal bracketing is not without its appeals. It increases the likelihood that the particular topic addressed encompasses uniform-enough phenomena. Analysis will not break down too soon or too often in the face of diverging circumstances (more precisely, circumstances that the analysis does not itself depict as diverging.) It reduces the set of relevant writers. Works otherwise seemingly demanding attention – works of illustrious predecessors dead or alive, for example – may be moved off center stage without suggesting disrespect. (Harold Bloom smiles.) So too implications or concomitants until recently treated as both integral and intractable might be shelved, perhaps for the better. The possibility of moving forward, of a “fresh start” – methodological optimism, as it were – becomes more apparent. Around 1915, T.S. Eliot concluded dramatically:

The backward glance may yield regrets for our adventurousness, or may even change us to salt, but can bring out no information. Our theory of judgment is justifiable only by the system we build upon it. We ascend a

dizzy precipice, and the ledges crumble underneath; to return is disaster, to proceed offers at least the chance of triumph.¹

A.

“Now,” we know, is not new. Holmes wrote *The Common Law*, so he declared, on the assumption that “[t]he substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient.” That was a while back. His formula on point – ironically, given his own aversion to anachronism – remains alive, prominently included in our collection of regularly-evoked jurisprudential clichés: “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”

Does Holmes refute Holmes? Of course not: intensely contemporary legal work might readily refer to canonical and anti-canonical cases and ideas, and deploy famous catch phrases, purely for emphatic or other ornamental purposes, without in anyway opening serious inquiries into the premises or structures of past legal thinking. There are other notionally historical exercises too. “Originalism” in constitutional law – is (I would argue) really a variant on Herbert Wechsler’s “neutral principles” *sans* the often-problematic neutrality idea. The constitutional text (prototypically the 1787 Constitution or its Fourteenth Amendment) is understood as in some sense “embodying” a particular set of assertedly back-then background norms and associated word meanings (“republicanism,” for example) effectively serving as a restrictive filter for constitutional analysis now. The historical text is helpfully illustrative, to be sure, and thus adds plausibility to the principles. But if the principles were otherwise objectionable (“protect slavery,” for example) it is hard to believe that the exercise would be undertaken. We all understand why Michael McConnell wanted to root *Brown v. Board of Education* in mid-nineteenth century notions.² *Dred Scott and the Problem of Constitutional Evil* is the captivating book it is – we know, and Mark Graber knows – because the idea that this

¹ T.S. Eliot, “The validity of artificial distinctions,” undated manuscript (circa 1915), reprinted in TLS, May 30, 2014, at p. 14.

² Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

arguably most infernal of Supreme Court decisions made sense back then is sharply subversive now. Economic and sociological analyses of legal developments over time often proceed to treat past instances within terms unabashedly ours – frameworks plainly contemporary to our time – without worrying too much of what the subjects of study themselves would have made of their portrayals. Did William Howard Taft really think like a very good 1970s economist in *Addyston Pipe*?³ It is the appeal of the modeling that matters most.

There is nothing wrong – except maybe a risk of false advertising – in using the past in these ways. It is also, however, not what historians themselves do with law – so says Robert Gordon (who should know):

If there is one point above all others that historians, certainly including legal historians, have been trying to get across to lawyers for centuries now, it is surely the basic precept of historicism, that a social practice or document is a product of the preoccupations of the people of its own time and place, and that if it survives to be reenacted or reread at a later time, it will acquire a new set of meanings from its new context, new adherents and new instrumental purposes and consequences.⁴

So what? “History lite” – Martin Flaherty’s famously deflating titling – is simply a different project, we may want to think, an assemblage of devices distinctively tuned to legal analytics and arguments working across extended ranges of time. The interesting question is whether it is possible to move past ornament and framing and the like, to recognize ways of doing more with the past in legal analysis outside the pathways of historians. – to include a third possibility in Gordon’s long sentence.

B.

Does comparative literature offer us an alternative model?

“The past is a foreign country: they do things differently there.” L.P. Hartley’s famous first sentence in *The Go-Between*, published in 1953, should not be read too pessimistically. In life, obviously, we travel to foreign countries, we translate, we make do.

³ [cite JLE article]

⁴ Robert W. Gordon, “Critical Legal Histories Revisited”: A Response, 37 *Law & Soc. Inquiry* 200, 200 (2012).

David Damrosch pitches something akin to this more optimistic note, addressing reading of older literatures in *What is World Literature?* “We never truly cease to be ourselves as we read, and our present concerns and modes of reading will always provide one focus of our understanding, but the literature of other times and eras presents us with another focus as well, and we read in the field of force generated between those two foci.”⁵ The image of the ellipse is very nice. But what do we do when “we read in the field of force”? He adds this observation later on: “A work of world literature has its fullest life, and its greatest power, when we can read it with a kind of *detached engagement*, informed but not confined by a knowledge of what the work would likely mean in its original time and place, even as we adapt it to our present context and purposes.”⁶ “Adapt,” it appears, does not mean refashion to fit within “our present context and purposes,” at least not always: “[W]e may actually experience our customary horizon being set askew, under the influence of works whose foreignness remains fully in view.”⁷

Wai Chee Dimock, writing in *Through Other Continents*, emphasizes the complexity of the enterprise:

Two steps, at least, are involved here, something like a double alienation. First, there is a deliberate yoking together of a moment from the present and a moment from the past. On the heels of this, there is also a deliberate wrenching apart, a mutual tearing and mutual dislodging effected by the very act of conjoining. This double alienation produces a “relativity effect.” It brings together two segments of time, each plied from its synchronic neighbors, brought within hailing distance of each other, but not allowed to coalesce into a unified now.⁸

She notes the possibility of “serial unpredictability” and “unexpected contact,”⁹ underscoring an at bottom political danger:

Its force is never generalizable, for that force is measured by its peculiar grip ..., a grip that bears the imprint of one subjectivity.... It is at this point, ... that aesthetic judgment can be said to be a vital mental event, an event that marks a person. That mark cannot serve as a blueprint for

⁵ DAVID DAMROSCH, *WHAT IS WORLD LITERATURE?* 133 (2003).

⁶ *Id.* at 277.

⁷ *Id.* at 300.

⁸ WAI CHEE DIMOCK, *THROUGH OTHER CONTINENTS* 134 (2006).

⁹ *Id.* at 133.

human unity, for its very intensity inflects it, rigs it as subjective, the terrain on which disagreement thrives. The aesthetic thus points to a deep divisiveness among human beings; it is a foreshadowing of war rather than a deterrent to it.¹⁰

Present display of work of a prior time is not simply a “backward glance.” Damrosch and Dimock disagree with T.S. Eliot. The work is set apart from both its original setting and the present *ex ante*, marking it (relative to the present) as an intervening, independent phenomenon – potentially either reinforcing or disruptive, conceivably contentious, its introduction a matter of choice, an intervention, consequential and thus political.

Consider Friedrich Hölderlin: Early in the nineteenth century, repeatedly revising his *Death of Empedocles*, Greek tragedy two millennia late, Hölderlin thought hard about why he was doing what he was doing, as his revisions pushed further and further away from familiar forms, more and more in the direction (we might say) of twentieth century cousins like Samuel Beckett:

[E]very poem, including the tragic, must indeed have proceeded from poetic life and poetic actuality, that is, from the poet's own world and soul, because otherwise the proper truth everywhere goes missing; nothing at all can be understood and brought to life if we are unable to transpose our own innermost heart and our own experience to the foreign analogical material. Thus in the tragic dramatic poem too the divinity that poets sense and experience in their own world expresses itself; the tragic dramatic poem too is for the poets an image of the living, of that which is and always was present to them in their own life; yet this image of intensity everywhere denies its ultimate basis, and has to do so...; the more infinite and ineffable the intensity is, ... the more rigorously and more coldly the image has to distinguish among human beings and their felt element in order to arrest the sensibility within its boundaries, the less is the image capable of expressing that sensibility immediately. ... [T]he material has to be a bolder more foreign likeness and exemplar ..., while the form has to withstand something more like a counterposing and separating. A different world, foreign surroundings and characters, are called for, and yet, ... they are heterogeneous only in the extrinsic configuration.... The more alien these foreign forms are, the livelier they have to be; and the less the poem's visible material can be likened to the underlying material..., the less may the spirit of the divine, as the poets sensed then in their world, be denied in the artifice of the foreign material. Yet also in the case of this foreign, more artificial material, the

¹⁰ *Id.* at 121.

intense, the divine, dare not and cannot express itself otherwise — as long as the sensibility that lies at its basis grows increasingly intense — than through a correspondingly greater degree of differentiation.¹¹

With Professor Damrosch we glimpse a “customary horizon ... set askew,” and “foreignness ... fully in view.” With Professor Dimock we note “two segments of time ... brought within hailing distance,” yet “not allowed to coalesce.” Is this “field of force” — even if surely “a vital mental event” — a distinctive mode of thought or experience (“detached engagement”), or just “tearing and ... dislodging,” “deep divisiveness ... foreshadowing ... war”? High stakes....¹²

PART TWO

Past present: at points, in law as in literature? Is it possible to discern manifestations of David Damrosch’s ellipses and force fields in legal analyses?¹³ Occasions of crisis, as Wai Chee Dimock imagines?¹⁴

I start with *Moore v. Dempsey*,¹⁵ a matter of real moment, its decision a genuinely remarkable effort, an opinion set simultaneously in two times. The carefully put together majority opinion of Justice Holmes, panoramic in its account of the petitioner’s allegations in the case, juxtaposed its terse, peremptory declaration that the federal judge initially reviewing the petitioner was under an unqualified duty to undertake a full factual inquiry. Justice McReynolds, exasperated, dissented given the twice-over departure from usual comity, Holmes having rode roughshod over not only the judgment of the federal judge below that no close look was in order, but also the similar judgments of several state judges. But if we read the allegations — as it seems Holmes did — as evocative of the continuing whirlwind of white terrorism and official acquiescence that had plagued and largely defeated post-Civil War Reconstruction some fifty years earlier, Holmes’s conscription looks to be not at all surprising -- just generalship, as it were.

Moore v. Dempsey inserts half-century old Reconstruction principles, I try to show, into the otherwise almost entirely well-settled constitutional world of post-*Plessy*

¹¹ “The General Basis [of Tragic Drama],” in *The Death of Empedocles* 143

¹² Hölderlin suffered a profound mental collapse, leaving *Empedocles* as fragments — he is for us a truly great poet (although not in the estimation of any but a few of his contemporaries).

¹³ [cite recent Dimock article on science as theory in lit crit]

¹⁴ [discuss Dimock’s own discussion of law re *Plessy*, e.g.]

¹⁵ 261 U.S. 86 (1923).

acquiescence. It is one of very few Supreme Court acts of resistance, in this case unusually explicit and also (I agree) unusual in Holmes's own work, establishing bulwarks against a still-bloody tide of white supremacy, reasserting at least in principle otherwise seemingly moribund duties to protect constitutionally equal citizenry. Holmes here writes to an urgent beat, to profound and moving purpose – especially visible to those who glimpse his abrupt marching of past into present.

Time travel matters, “jaunting” of this sort (apologies to Alfred Bester) reveals juxtapositions that work like structure within what sometimes appears to be the haphazard heap of legal documents – a quasi-ordering, something like an index, or a canon less possessed by imperial aspiration. The discussion that follows jumps around a lot. I try as often as possible to re-envision one legal document or idea within the perspective of an older one – to fold together past and present without merger.

A.

Initially it is best to proceed at one remove, to read Justice McReynolds in dissent first, depicting a controlling conjunction of overtly general legal norms and institutions *inter-twinned* with a picture of social order informed sharply by hierarchical notions of race and class:

If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are “true to the best of his knowledge and belief,” and thereby obtain as of right further review, another way has been added to a list already long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal....¹⁶

We are asked to overrule the judgment of the District Court discharging a writ of habeas corpus by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. ... The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the *ex parte* affidavits of three other negroes who had pleaded guilty and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men – low villains according to their own admissions. Considering all the circumstances ... the District

¹⁶ *Id.* at 93.

Court held the alleged facts insufficient prima facie to show nullity of the original judgment.¹⁷

McReynolds endorsed *Frank v. Mangum*,¹⁸ decided eight years earlier by the Supreme Court, as “right and wholesome,” declaring “the whole should be read,” although allowing himself only “to quote a few paragraphs.”¹⁹ “[I]rregularities or erroneous rulings” at a trial held by “a court of competent jurisdiction, according to established modes of procedure,” were not in themselves departures from “due process in the constitutional sense” and “could not be reviewed by habeas corpus.”²⁰ But if “jurisdiction was lost in the course of the proceedings,” “if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, ... so that there is an actual interference” without “corrective process”: *then* habeas relief would lie.²¹ This latter circumstance did not describe Frank’s own case (Justice McReynolds ignores the awful ending: the anti-Semitic mob hounding Leo Frank’s trial would finally capture Frank and lynch him.) Nor did the idea of mob domination capture Moore’s circumstance. McReynolds stressed that the federal district court initially ruling on the habeas motion was possessed of “the complete record of the cause in the state courts – trial and Supreme – showing no irregularity.” To be sure, “[t]he trial was unusually short but there is nothing in the record to indicate that it was illegally hastened.”

It did appear, he acknowledged, that

... during September 1919, bloody conflicts took place between whites and blacks in Phillips county, Arkansas – “the Elaine riot.” Many negroes and some whites were killed. A committee of seven prominent white men was chosen to direct operations in putting down the so-called insurrection and conduct investigation with a view of discovering and punishing the guilty. This committee published a statement, certainly not intemperate, ... wherein they stated the “ignorance and superstition of a race of children” was played upon for gain by a black swindler, and told of an organization to attack the whites. It urged all persons white or black, in possession of information .. to confer with it.²²

¹⁷ *Id.* at 92-93 (McReynolds, J., dissenting). Justice Sutherland concurred in McReynolds’s dissent. See *id.* at 102.

¹⁸ 237 U.S. 309 (1915).

¹⁹ *Moore v. Dempsey*, *supra*, 261 U.S. at 93-94 (McReynolds, J., dissenting).

²⁰ *Id.* at 94 (McReynolds, J., dissenting) (quoting *Frank v. Mangum*).

²¹ *Id.* at 95-96 (quoting *Frank v. Mangum*). “

²² *Id.* at 99.

“I find nothing in this statement,” McReynolds declared, “which counsels lawlessness or indicates more than an honest effort by upstanding men to meet the grave situation.”²³ Similarly, he thought, statements by white organizations later opposing commutation were “not violent.”

I am unable to say that the District Judge, acquainted with local conditions, erred when held the petition for the writ of habeas corpus insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings. [¶] ... I cannot agree that the solemn adjudications by courts of a great state ... can be successfully impeached by the mere ex parte affidavits made upon information and belief of interested convicts joined by two white men – confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.²⁴

Justice McReynolds returns at the end of his opinion to its beginnings. He is, it is clear, at home in the governing realm of “prominent white men” – “us” and “our” encompassing citizens committees, the “courts of a great state,” as well as “orderly” federal courts including (it seems to seem to McReynolds) the Supreme Court of the United States.

B.

Joined by Justice Hughes, Justice Holmes dissented in *Frank*.²⁵ He was surer of the power of habeas corpus as an investigative device. “[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.”²⁶ He was also did not doubt the substance of the constitutional requirement. “Mob law does not become due process of law by securing the assent of a terrorized jury.”²⁷ But he also frequently interspersed tentative notes. “Of course we are speaking only of the case made by the petition, and whether it ought to be heard.”²⁸ Holmes wrote the Supreme Court’s

²³ *Id.*

²⁴ *Id.* at 101-02.

²⁵ See *Frank v. Mangum*, *supra*, 237 U.S. at 345-50).

²⁶ *Id.* at 346.

²⁷ *Id.* at 347.

²⁸ *Id.* at 349 (Holmes, J., dissenting). “It may be that on a hearing a different complexion would be given....” *Id.* The allegations themselves were dramatic. Leo Frank, who was Jewish, was prosecuted for a rape occurring in Georgia, triggering a huge anti-semitic outcry.

majority opinion in *Moore* in a considerably stronger voice. He proceeded quickly to the allegations of petitioners, declaring that proper procedure required that they be treated as true. In a *tour de force* of one thousand words or so, his opinion artfully arranged and carefully presented eighteen points for consideration in notably staccato, rat-tat-tat concrete prose. It is – we are supposed to see – the crux of the matter.

The concatenation began noting an initial attack by “a body of white men” upon “a number of colored people assembled in their church” seeking “to employ counsel against extortions ... by the landowners,” proceeded through further violence leading to additional black and white casualties; gubernatorial appointment of a citizens committee, newspaper “inflammatory articles,” arrest of petitioners, a mob march to the jail “for the purpose of lynching” blocked by “the presence of United States troops,” and a committee promise to the mob “to execute those found guilty in the form of law”; followed thereafter by committee whipping and torture of “colored witnesses,” a packed all-white grand jury, and indictment; next, a trial lasting “about three-quarters of an hour,” “thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result,” utterly passive appointed defense counsel, jury guilty verdict “of murder in the first degree” in “less than five minutes”; still further thereafter, subsequent organized “appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of petitioners” against the backdrop of another looming trial “of six other negroes” who in “all probability” would “be lynched”

“The trial ... at Atlanta ... was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. ...[T]his hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in the city, both of who were known to the jury. ... {W]hen the solicitor general entered the court, he was greeted with applause, stamping of feet and clapping hands, and the judge, before beginning his charge, had a private conversation with the petitioner’s counsel in which he expressed the opinion that there would be ‘probably danger of violence’ if there should be an acquittal or a disagreement, and that it would be safer for not only the petitioner but his counsel to be absent from the court when the verdict was brought in. ... When the verdict was rendered, and before more than one of the jurymen had been polled, there was such a roar of applause that the polling could not go on until order was restored. The noise outside was such that it was difficult for the judge to hear the answers of the jurors, although he was only 10 feet from them. With these specifications of fact, the petitioner alleges that the trial was dominated by a hostile mob and was nothing but an empty form.

Id. at 345-46.

unless something were done “to appease the mob spirit” – whereupon “the Governor fixed the date for the execution of the petitioners....”²⁹

The reader is exhausted, overwhelmed, besieged – surely Justice Holmes’s intent.

Strikingly, state judges – whether at trial or on appeal – do not figure at all in this accumulation – Holmes (the allegations he synthesized) essentially described their context or environment; the world all round them, within which they claimed jurisdiction to preside or review. Like Justice McReynolds, he took *Frank v. Magnum* as controlling. But Holmes transformed *Frank* – its “mob domination” exception no longer read as an acknowledgement of occasional possibility: rather declaratory, evidence of a strong, commanding obligation, in terms plainly encompassing the allegations in the case at hand (as Holmes had already laid them out):

We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask--that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.³⁰

“[T]he whole proceeding is a mask....”

The federal district court, finding state process to be sufficient, proceeded no further: *did nothing* (for McReynolds precisely the right course). Holmes responded brutally.

[I]t does not seem to us sufficient to allow a Judge of the United States to *escape the duty* of examining the facts for himself when if true as alleged they make the trial *absolutely void*. We will not say that they cannot be met, but it appears to us *unavoidable* that the District Judge should find whether the facts alleged true and whether they can be explained so far as to leave the state proceedings undisturbed.

²⁹ *Id.* at 88-90. I reproduce the full Holmes statement of facts in the Appendix *infra*.

³⁰ *Id.* at 91.

Order reversed. The case to stand for hearing before the District Court.³¹

The district court judge had *no choice* – was *duty-bound* to conduct an independent inquiry. Justice Holmes understood obligation as reflex – “*unavoidable*” – and presented the Supreme Court as itself responding immediately. No elaborated analysis, no suggestion of discretion; just a direct, unequivocal order.³² *Picturing* – the scene Holmes set assembling the allegations – did the work of judgment.³³

C.

Perhaps there is an echo here of *United States v. Shipp*.³⁴ Joseph Shipp, a Tennessee county sheriff, was charged with contempt of the Supreme Court after allegedly absenting himself from his jail, making no efforts whatsoever to prevent or halt a horrendous mob lynching of Ed Johnson, a black prisoner – convicted in a state court of raping a white woman – whose execution had been stayed by the Court pending argument (itself ordered by the Court) regarding his appeal from a federal circuit court decision denying habeas corpus. Shipp contended that no non-frivolous constitutional question (and thus no federal matter) grounded the prisoner’s habeas petition, neither the circuit court nor the Supreme Court possessed jurisdiction, and thus he was free to ignore the stay. Justice Holmes agreed that “orders made by a court having no jurisdiction to make them may be disregarded without liability to process for contempt.”³⁵ But Shipp’s case was different:

[E]ven if the circuit court had no jurisdiction to entertain Johnson’s petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before

³¹ *Id.* at 92.

³² The Holmes dissent in *Frank v. Magnum* was much longer and considerably more diffuse. See *Frank v. Magnum, supra*, 237 U.S. at 345ff (Holmes, J., dissenting).

³³ “The life of the law is not logic but experience”: We might wonder whether Justice Holmes was at some level influenced by his father’s hugely successful popularization of stereography. “A stereoscope is an instrument which makes surfaces look solid.” Oliver Wendell Holmes, Sr., *The Stereoscope and the Stereograph*, 3 *Atlantic Monthly* 738 (1859). “By means of ... two different views of an object, the mind, as it were, *feels round it* and gets an idea of its solidity. We clasp an object with our eyes, as with our arms, or with our hands, or with our thumb and finger, and then we know it to be something more than a surface.” *Id.* at 742-43. “The mind finds its way into the very depths of the picture.” *Id.* at 744. See generally David Trotter, *Stereoscopy: modernism and the ‘haptic,’* 46 *Critical Quarterly* 38 (20__).

³⁴ 203 U.S. 563 (1906).

³⁵ *Id.* at 573.

it. . . . Until its judgment declining jurisdiction should be announced, it had authority, from the necessity of the case, to make orders to preserve the existing conditions. . . . [T]he law contemplates the possibility of a decision either way, and therefore must provide for it.³⁶

It has been suggested that the court is a party and therefore leaves the fact to be decided by the defendant. . . . The court is not a party. There is nothing that affects the judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case.³⁷

Shipp's job was thus to "obey[] and enforce[e]" – *failure to do so* left him open to being treated as just one more member of the lynch mob.³⁸

The federal judge in *Moore* had – *by doing nothing* – made himself a member of the mob too? If "the law" generally "contemplates the possibility of a decision either way," why doesn't adjudicative concern that "the law should be obeyed and enforced" incorporate recognition of judicial distance and discretion as Justice McReynolds argued? Isn't this the perspective – an almost Olympian indifference – we expect when we read Justice Holmes?³⁹

What's going on? Several sentences in the last paragraph of the dissent in *Frank*, Holmes evidently concerned to clarify his argument, offer a key:

To put an extreme case and show what we mean, if the trial and the later hearing before the [state] supreme court had *taken place in the presence of an armed force known to be ready to shoot* if the result was not the one desired, we do not suppose that this court would allow itself to be silenced by the suggestion that the record showed no flaw. . . . [T]he power to secure fundamental rights . . . becomes a duty, and must be put forth. . . . [S]upposing the alleged facts to be true, we are of opinion . . . the courts of the United States should act; and . . . it is our duty to act upon them now....⁴⁰

"Armed force?" *It is as though the courts were at war.*

D.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *id.* at 574-75. For Shipp's trial and conviction on the merits, before the Supreme Court itself, see *United States v. Shipp*, 214 U.S. 386 (1909).

³⁹ [Horwitz cite]

⁴⁰ *Frank v. Magnum*, supra, 237 U.S. at 348-49, 349-50 (Holmes, J., dissenting).

Theodore Roosevelt, some say, nominated Oliver Wendell Holmes to the Supreme Court because he greatly admired the celebratory defense of soldiery Holmes propounded in “The Soldier’s Faith,” the Harvard commencement address he delivered in May, 1895. This is the central passage:

I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man lives in the same world with most of us can doubt and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has no notion, under tactics of which he does not see the use.⁴¹

How can this be? The next paragraph depicts the face of battle, at the outset pretending war had come to Boston:

Most men who know battle know the cynic force with which the thoughts of common-sense will assail them in times of stress; but they know that in their greatest moments faith has trampled those thoughts under foot. If you had been in line, suppose on Tremont Street Mall, ordered simply to wait and to do nothing and have watched the enemy bring their guns to bear upon down a gentle slope like that from Beacon Street, have seen the puff of firing, have felt the burst ..., the shrieking fragments go tearing through your company and have known that the next or the next shot carries your fate....⁴²

Suddenly Boston disappears. Holmes shifts without transition to describing his own war – the Civil War:

... if you have advanced in line and have seen ahead of you the spot which you must pass where the rifle bullets are striking; if you have ridden by night at a walk toward toward the blue line of fire at the dead angle of Spottsylvania, where for twenty-four hours the soldiers were fighting on the two sides of an earthwork, and in the morning the dead and dying lay piled in a row six deep, and as you rode have heard the bullets splashing in the mud and earth about you; if you have been on the picket-line at night in a black and unknown wood, have heard the spat of the bullets upon the trees, and as you moved have felt your foot slip upon a dead man’s body; if you have had a blind fierce gallop against the enemy, with your blood up and a pace that left no time for fear, -- if, in short, as some, I hope many, who hear me, have known, you have know the vicissitudes of terror and triumph in war, you know that there is such a thing as the faith I spoke of. You know your own weakness and are modest; but you know that has

⁴¹ [cite]

⁴² [cite]

in him that unspeakable somewhat which makes him capable of miracle, able to lift himself by the might of his own soul, unaided, able to face annihilation for a blind belief.⁴³

This is – we see in a flash – *Moore v. Dempsey*, only the order of paragraphs reversed. It is “duty” “unavoidable” not simply given context but brought into existence by circumstance, by battle, by war. The judges – all of them including the Justices – were soldiers. (So too secondarily officials like Shipp.) But why would Holmes as jurist see *Moore* (and *Frank* at least at the end of his dissent) as tantamount to war? Shouldn’t we leave “The Soldier’s Faith” alone – understand it as an eloquent, unnerving flashback, or (maybe more) simply a ceremonial confection?⁴⁴

E.

No.

The *Moore* “flashback” *re-presents* Reconstruction as background and foreground both, pulls into the case the long-running terrorist counter-campaign, and the considerable victory the New South had already pretty clearly won long before 1923. In the process *Moore* equates adjudication and war. (*Holmes channeled George Lakoff and Steve Winter?*)

If we read *Moore*’s form as grounded in metaphor, it is metaphor uncomfortably close to the literal state of affairs: Reconstruction conflict was indeed very often violent, marked notably by recurring resort to unrestrained insurgent brutality plainly meant to terrify, threaten and demoralize African Americans and their white allies in the South and

⁴³ [cite]

⁴⁴ Louis Menand notes a letter that Holmes wrote to his parents after the battle at Fredericksburg, which Holmes missed because of dysentery, his responsibilities passing to a friend, who survived, but lost 48 men under his command. “The disaster made a deep impression on Holmes. ... Abbott’s comportment seemed to him the acme of heroism. ... {B}ut what struck him was not that Abbot had exposed himself so cavalierly to danger. It was that he had done so despite knowing that the order to advance was stupid, and despite a complete antipathy toward the cause in whose name he was, for all he knew, about to die. ... [W]ar, in which the boldest are the likeliest to die, was a hideous human waste.” LOUIS MENAND, *THE METAPHYSICAL CLUB* 43 (2001). Edmund Wilson reports that Henry James – a longtime friend of Holmes – “had his reservations” after reading “The Soldier’s Faith,” writing to his brother William: “It must have been rarely beautiful as delivered. It is ever so fine to read, but with the always strange something unreal or meager his things have for me – unreal in connection with his own remainder, as it were, and not *wholly* artful in expression. But they are ‘very unique’ – and I shall write to him in a high key about this one.” EDMUND WILSON, *PATRIOTIC GORE* 758 (1962).

North.⁴⁵ Washington officials, legislators, and judges mostly watched. Then and now, the pitched battle fought at Colfax, Louisiana in 1873 – more precisely, the way white fighters conducted themselves during and after the battle – seemed and seems emblematic (it was also not at all unique, we know too):

Grant Parish, named after the president, was a black-belt county created as an advantage to the Republicans and had a Negro majority; at its county seat, Colfax, named after Grant's first vice-president, a heated dispute broke out over who had won the 1872 county election. The blacks, representing the Kellogg forces, seized the courthouse in late March and, barricading themselves inside, held it for several weeks. Then on April 13 about 200 whites of the McEnery faction, with the help of a cannon, surrounded and attacked the courthouse, which was being defended by about 150 blacks. After heavy fighting a truce was declared, but shortly afterward it was broken by both sides. Adding atrocity to political violence, the whites set fire to the courthouse. Some blacks were burned alive; others were shot as they ran from the flaming building. The wounded were bayoneted where they lay or ridden down in the fields. The prisoners never even reached the jail, for their drunken guards opened fire on them during the night. Their bodies were mutilated, abdomens ripped open and brains blown out. Since the families of the slain were too terrified to claim the bodies, their remains were thrown into the river. About 71 blacks and 2 whites died.⁴⁶

The Colfax killings led to indictments, trials, and convictions of a few participants – but also to judicial review overturning the prosecutions.⁴⁷ In *United States v. Cruikshank*, Justice Bradley, sitting as circuit justice after attending the trials, declared the federal indictments to be invalid as drafted, ruling immediately after conviction of the defendants.⁴⁸ But his opinion included this remarkable passage:

The war of race, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla of predatory form, or by private combinations, or even by private outrage or intimidation, is

⁴⁵ See, e.g., STEVEN HAHN, "Of Paramilitary Politics," *A NATION UNDER OUR FEET* 265-313 (2003); GEORGE C. RABLE, *BUT THERE WAS NO PEACE* (1984)(2d ed. 2007).

⁴⁶ WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869-1879*, p. 115 (1979). Professor Foner describes the Colfax massacre as "[t]he bloodiest single instance of racial carnage in the Reconstruction era...." ERIC FONER, *RECONSTRUCTION 437* (1988). See also TED TUNNELL, *CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA, 1862-1877* (1984). Interest in the Colfax incident persists. See, e.g., CHARLES LANE, *THE DAY FREEDOM DIED* (2008); LEEANNA KEITH, *THE COLFAX MASSACRE* (2008).

⁴⁷ See generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 87-128 (2011); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION* 142-79 (1985)(2d ed. 2005).

⁴⁸ *United States v. Cruikshank*, 25 F. Cas. 707 (No. 14,897) (C.C. La. 1874).

subject to the jurisdiction of the government of the United States; and when any atrocity is committed which may be assigned to this cause it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspiracies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the states, unless, indeed, the state, by its laws, denies to any particular race equality of rights, in which case the government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner.⁴⁹

His formulation pointed to the defect Bradley found in the wording of the indictments.⁵⁰

At the same time, whether or not he was genuinely shaken by the Colfax events, Bradley acknowledged the “war of race” to be an independent matter of constitutional concern and recognized a thorough-going constitutional authority to act in response on the part of the federal government.⁵¹

⁴⁹ *Id.* at 714.

⁵⁰ For example, in reviewing the fourth count in the indictment, Justice Bradley concluded:

The 14th amendment, amongst other things, declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. But the indictment does not allege that this has been done. The count manifestly refers to the rights secured by the civil rights bill of April 9, 1866 That act ... expressly declares that all citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right in every state and territory to make and enforce contracts, etc., and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. The conspiracy charged in the fourth count is a conspiracy to interfere with the free exercise and enjoyment of this right. But the count does not contain any allegation that the defendants committed the acts complained of with a design to deprive the injured persons of their rights on account of their race, color, or previous condition of servitude.

Id. at 715.

⁵¹ The “war of race” discussion appears to limit the interpretive approach that Justice Bradley otherwise treated as applicable:

One method of enforcement may be applicable to one fundamental right, and not applicable to another. With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular state of which he is a citizen to protect and enforce them, and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the constitution of the United States only by a declaration that the state or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the constitution, but that the constitution only guarantees that they shall not be impaired by the state, or the United States, as the case may be. The fulfillment of this guaranty

The Supreme Court as a whole reviewed Justice Bradley's decision, in the main agreeing with him that the indictments were improperly drawn.⁵² The majority opinion that Chief Justice Waite wrote, however, pointedly omitted any passage akin to the Bradley "war of race" discussion. Waite reasserted the analytical priority of ordinary constitutional structure:

The duty of a government to afford protection is limited always by the power it possesses for that purpose. ... The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. ... [I]t may sometimes happen that a person is amenable to both jurisdictions for one and the same act. ... This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen ... owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its law. In return, he can demand protection from each within its own jurisdiction.⁵³

Did Waite reject Bradley's contention that race war in and of itself sufficiently justified federal intervention? (Bradley joined the *Cruikshank* majority opinion.) Plainly, the Supreme Court sought to change the form of the constitutional inquiry. Instead of considering directly whether events indeed constituted "the war of race," the initial task became the delineation of the "respective spheres" of state and federal responsibility – state responsibility precluded federal responsibility. "The duty of a government to afford

by the United States is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residual sovereignty.

Id. at 710. Bradley must have understood the rights or privileges relevant in circumstances of race war as different in kind from common law rights or privileges. If he understood former slaves to be claiming a right of protection derived from the fourteenth amendment's first sentence grants of national and state citizenship, his conclusions might indeed follow: United States citizenship – supposing the then-familiar formula that citizenship itself created reciprocal duties of allegiance and protection – would have pointed to a federal constitutional duty to protect in cases in which individuals were attacked because of their race if – like Taney in *Dred Scott*, say – attackers treated race as a marker of the distinction between citizenship and noncitizenship. If race were not the determining factor, the general state obligation of equal legal protection would have been pertinent, but the threshold requirement of state failure to act also pertinent too.

⁵² *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁵³ *Id.* at 549-51.

protection is limited always by the power it possesses for that purpose.” Ordinarily, “[t]he powers which one possesses, the other does not.”⁵⁴ “[I]t may sometimes happen,” Waite acknowledged, that the “special purposes” of federal government might be also demonstrably relevant. The Fourteenth Amendment imposes its “equal protection of the laws” obligation on *state* officials – requires that they treat it as *theirs*, as though an *a priori* participant in state law-making and enforcement. But the amendment also authorizes – grants power to – *federal* interpreters and enforcers. Waite, we might think, carefully ignored the complexity all this would have introduced into his neat divisions. (*We also recognize that this compound structure provided precisely the formal structure within which Holmes wrote in Moore.*)

* * * * *

Colfax and *Cruikshank* are not the only Reconstruction overlaps *Moore* brings to mind. The central, decisive image of the “mask” surely recalled post-Civil War “night riders” in 1923, evoked dramatically (as heroes) in “The Birth of a Nation,” the hugely successful film distributed less than a decade earlier – underscored also the post-World War I re-ascendency of the Ku Klux Klan. (Now we might link “color of law” and the “mask” image, perhaps also think again of the overarching preoccupation with official failure to act visible in much of the Ku Klux Klan Act.) We are led to reconsider, moreover, the premises put forward and the challenges raised by the Supreme Court’s statements of organizing principles in *Ex parte Milligan*,⁵⁵ issued in 1866:

⁵⁴ For example, Chief Justice Waite declared, discussing the Equal Protection Clause:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.

Id. at 555. In another part of his discussion, Waite notes: “The charge made is really of nothing more than a conspiracy to commit a breach of peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States.” *Id.* at 556. It is hard to see (impossible to see) how this exercise in minimization was true to the allegations in the case. But as a result, the question of federal power in cases in which courts were prepared to acknowledge the fact of all-out race war was conspicuously left unaddressed.

⁵⁵ 71 U.S. 2 (1866)

[I]t is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is .. alone ... the means which the laws have provided for that purpose, and if ... ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.⁵⁶

If ... the courts are actually closed, and it is impossible to administer criminal justice according to law, then, ... where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the ... society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.⁵⁷

In the first passage, we readily recognize the immediate preoccupations of *Moore* and *Shipp*, “the clamor of an excited people,” and the “immunity from punishment” that the accused are entitled to claim if they are not “to be tried and punished according to law.” But it is the second passage that especially propels close consideration of the circumstances Justice Holmes depicted and confronted. In *Milligan*, the question was whether a military tribunal or an ordinary civil court had jurisdiction to try and sentence an accused – famously, the Court gave priority to civil court jurisdiction unless “the courts are actually closed.” But in *Moore* and *Shipp* there were no military forces on scene seeking to establish order in their own way. There was only “clamor,” “excited people” taking over matters themselves outside and inside the court, “actually” closing the courts precisely in the sense of the concern in *Milligan*, preventing “trial according to law.” What were judges or sheriffs to do? *Act legally militarily*, Holmes concluded, it appears – proceed unhesitatingly, engage conflict, bring to bear “the force of law.”

F.

What now? Does a sense of “past present” carry forward as a marker of seriousness or importance in subsequent readings of *Moore v. Dempsey*?

⁵⁶ Id. at 119.

⁵⁷ Id. at 127.

Yosal Rogat pushed Oliver Wendell Holmes off his pedestal. “Holmes put forward a fundamentally impoverished account of legal phenomena.”⁵⁸ His “detached acceptance and detached rejection of men as he saw them” led his legal theories, Rogat argued, to “substantially eliminate the institution that he seeks to understand.”⁵⁹ Edward Purcell has stressed the presence of racism of a sort (fellow-traveling, anyway) as a concomitant of Holmes’s approach to law.⁶⁰ Rogat nonetheless regarded the Holmes opinions in *Moore* and *Frank* as “splendid and historically important.”⁶¹ Professor Purcell sounds a similar note (“[i]n fairness”).⁶²

In 1953 in their monumental first edition of *The Federal Courts and the Federal System*, Henry Hart and Herbert Wechsler twice gave extended attention to the Supreme Court’s then recent, elaborately divided treatment of habeas corpus and related questions in *Brown v. Allen*.⁶³ They quoted Justice Black writing in dissent: “I read *Moore v. Dempsey* ... as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution.” Justice Frankfurter appeared as in agreement: “[C]onsiderations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. ... However, this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore v. Dempsey*...”⁶⁴

Ten years later, just a few years out of law school, Paul Bator published his famous and famously controversial *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*.⁶⁵ Ostensibly a belated critique of *Brown v. Allen*, tweaking

⁵⁸ Yosai Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225 (1964).

⁵⁹ *Id.* at 226.

⁶⁰ See Edward A. Purcell, Jr., *On the Complexity of “Ideas in America”: Origins and Achievements of the Classical Age of Pragmatism*, 27 LAW & SOC. INQUIRY 967 (2002).

⁶¹ Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 291 (193).

⁶² Purcell, *supra*, at 978 n.21.

⁶³ See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1264-68, 1276-96 (1953), discussing *Brown v. Allen*, 344 U.S. 443 (1953).

⁶⁴ See HART & WECHSLER, *supra*, at 1267, 1268, quoting Justices Black and Frankfurter. We know now that Black and Frankfurter collaborated to try not to minimize by accident their sense of the significance of *Moore*. See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 115-16 (2001).

⁶⁵ Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

Professor Hart and Justice Frankfurter along the way, Bator wrote as *Fay v. Noia* approached the Supreme Court. His critique of “anything goes” habeas jurisdiction was plainly tied, in important part, to the Warren Court’s accelerating constitutional criminal procedure revolution (*Gideon* was looming too), and the flood of petitions beginning to reach federal district courts. Bator started from a Holmes-like skepticism: “[I]f the lawfulness of the exercise of power to detain turns on whether the facts which validate its exercise ‘actually’ happened in some ultimate sense, power can never be exercised lawfully at all, because we can never absolutely recreate past phenomena and thus can never have final certainty as to their existence.”⁶⁶ So too regarding “correct” decision of a question of law: “we can never be assured that any particular tribunal has in the past made it; we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned.”⁶⁷ Thinking through habeas corpus jurisdiction, therefore, ought not to focus on the possibility of error, but on the sufficiency of institutional arrangements. “[L]awfulness of ... exercise of power must eventually turn on institutional arrangements which provide, through their findings and judgments, an assurance of justice deemed acceptable by society....”⁶⁸ Skepticism therefore begat homely common sense: “[I]f a job can be well done once, it should not be done twice.”⁶⁹

After a bracing gallop across much federal habeas, his maxim emerged ready for use, Paul Bator rereading what he insisted was “the great case of *Frank v. Mangum*.”⁷⁰ Justice Pitney’s “highly sophisticated analysis” recognized that “the question whether ‘a trial is in fact dominated by a mob’ is, after all, a *question*, and that the decision of that question ... by a competent and unbiased tribunal through fair process may, on collateral inquiry, itself be deemed the process that is ‘due.’”⁷¹ Leo Frank’s allegations “were considered by the Georgia supreme court under conditions which were concededly free from any suggestion of mob domination, and fund by that court, on independent inquiry, to be groundless.”⁷² *Frank*, Bator thought, “for the first time” recognized that “if ... a

⁶⁶ *Id.* at 447

⁶⁷ *Id.*

⁶⁸ *Id.* at 448

⁶⁹ *Id.* at 451

⁷⁰ *Id.* at 484

⁷¹ *Id.* at 484-85

⁷² *Id.* at 485

state tribunal has failed to supply ‘corrective process’ with respect to the full and fair litigation of federal questions, whether or not ‘jurisdictional,’ in a state criminal proceeding, a court on habeas may appropriately inquire into the merits in order to determine whether the detention is lawful.”⁷³ Of course – “I regard this as common sense,” Bator inserted – *Frank* also confirmed that “previously adjudicated” “full and fair litigation” of the merits of a claim of federal rights, if the work of an “unbiased court of competent jurisdiction,” is “crucially relevant to the question whether detention ... may be considered unlawful.”⁷⁴

“Was *Frank v. Mangum* ‘discredited’ a mere eight years later in *Moore v. Dempsey*?”⁷⁵ No: “[A]ll *Moore v. Dempsey* may be saying ... is that a conclusory and out-of-hand rejection by a state of a claim of violation of federal right, without any process of inquiry being afforded at all, cannot insulate the merits of the question from the habeas corpus court.”⁷⁶ On to *Brown v. Allen*!

After all his pummeling was done, Professor Bator paused:

It is natural that, in an era of such rapid growth in the substantive federal law, there should be a demand that the remedial system keep pace.... And there is, of course, the underlying suspicion that in fact the states have not done so, that if we do not keep a sharp eye out, federal rights will be subtly eroded, verbal respect paid to the principles but the substance robbed of meaning through astringent and unsympathetic application. (The suspicion is surely fed by the knowledge that a substantial proportion of those accused of crime, particularly in the Southern States, will be Negroes.)⁷⁷

Remarkably, in response, he pulled the future back into the present:

[W]e must think in terms of tomorrow as well as today. Hopefully we will reach the day when the suspicion will no longer be justified that state judges – especially Southern state judges – evade their responsibilities by giving only the appearance of fairness in their rulings as to state defendants’ federal rights. *The unification of the country is, after all, in progress; the day when Southern justice is like Northern justice, justice for*

⁷³ *Id.* at 486-87

⁷⁴ *Id.* at 487

⁷⁵ *Id.* at 488.

⁷⁶ *Id.* at 489.

⁷⁷ *Id.* at 523.

*the Negro like justice for the white, is no longer out of sight. And our remedial system ought to take account of this motion.*⁷⁸

January, 1963.

G.

In the sixth edition of Hart and Wechsler's *Federal Courts*, published in 2009, *Frank* and *Moore* are vestigial, allocated three summary sentences sketching Paul Bator's procedural reconciliation of the two decisions, also briefly noting other views stressing inconsistency.⁷⁹ William Stuntz, in his 2011 *Collapse of American Criminal Justice*, took *Moore* seriously on its own terms, observing that "procedural failings" – "all signs of a rigged legal process" – were not really Justice Holmes's primary concern. *Moore* "rested largely on what happened outside the courtroom, where a lynch mob stood ready to take justice in its own hands in the unlikely event of an acquittal or a hung jury."⁸⁰ Stuntz concluded, though, that *Moore* accomplished little. "The Supreme Court's decision ... failed even to put an end to proceedings like the one in *Moore*, much less usher in any deeper change in appellate review of criminal convictions."⁸¹ As its chapter titles make clear, *Collapse* was an account of "too much law," of how "constitutional law's rise" – especially "Earl Warren's errors" – led to "a broken system," racially riven, oscillatory and erratic, overly lenient or inordinately punitive.⁸² (Obviously not at all Paul Bator's wish, we should think.)

In the Supreme Court now *Moore v. Dempsey* hardly figures at all, so it initially seems. Justice Kennedy, concurring in *Carey v. Musladin* in 2006, declared that "[t]rials must be free from a coercive or intimidating atmosphere," and that this "fundamental principle of due process" was "the square holding in *Moore v. Dempsey*."⁸³ He treated *Frank* as of a piece.⁸⁴ Notably, Kennedy also linked *Moore* (and thus the judicial struggle against Jim Crow terror) with the Supreme Court's important effort to manage

⁷⁸ *Id.* at 524.

⁷⁹ RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1222 (6th ed. 2009).

⁸⁰ WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 202 (2011).

⁸¹ *Id.* at 202-03.

⁸² For chapter titles, see *id.* at vii-viii. See also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

⁸³ *Carey v. Musladin*, 549 U.S. 70, 80 (2006)(Kennedy, J., concurring in judgment).

⁸⁴ See *id.*

and protect civil rights demonstrations in *Cox v. Louisiana* in 1965.⁸⁵ “The rule against a coercive or intimidating atmosphere at trial exists because ‘we are committed to a government of laws and not of men,’ under which it is “of the utmost importance that the administration of justice be absolutely fair and orderly.”⁸⁶ *Cox* – tense and tightly reasoned, addressing a demonstration across the street from a courthouse and alternating police orders – translated *Moore* forward (we might think), ultimately recognizing that concern for proper judicial process and occasion for demonstrative free speech were both elements of constitutional order, *both* therefore structuring police discretion, itself now to be understood as constitutionally complex. Kennedy juxtaposed *two pasts*.

In the past ten years or so, Justice Kennedy’s concurring opinion in *Musladin* is the only *overt* acknowledgement of *Moore v. Dempsey* in terms anything like those within which Justice Holmes wrote. There was also, though, two years later, *Boumediene v. Bush*⁸⁷ -- no small case. Justice Kennedy wrote for a majority this time:

Habeas corpus is a collateral process that exists, in Justice Holmes’ words, to “cu[t] through all forms and g[o] to the very tissue of the structure. It comes from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.” *Frank v. Mangum*, ... (dissenting opinion). Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant. ... This is so, ... even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights.⁸⁸

Kennedy quotes, we recognize, precisely the passage in the *Frank* dissent that anticipates the decisive paragraph in *Moore*. Another echo follows:

For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors.... This includes some authority to assess the sufficiency of the Government’s evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to

⁸⁵ 379 U.S. 559 (1965).

⁸⁶ *Carey, supra*, 549 U.S., quoting *Cox*, 379 U.S. at 562.

⁸⁷ 553 U.S. 723 (2008).

⁸⁸ *Id.* at 785.

supplement the record on review.... *Here that opportunity is constitutionally required.*⁸⁹

Boum, boum, boum. This is not Paul Bator forty-five years later. Bator understood that in a threatening context – “the war of race” paradigmatically – the case for open-ended habeas inquiry was difficult to deny. Alternative to the “past present” Justice Holmes discerned in 1923 and struck out against, Professor Bator imagined a “dawning” new age, “structurally sound” American perpetual peace (at least racially). Justice Kennedy returned to *Brown v. Allen* or something like it, we might think.⁹⁰ We are likely able to summarize straightforwardly the worries of Justices Black and Frankfurter lying behind their strongly-worded reassertions of *Moore* in *Brown*. But what is the risk against which Kennedy mobilizes? Error per se? If so, we may readily imagine Bator’s response.

Kennedy was not fighting “the war of race” in *Boumediene*. Dan Meltzer took up the matter in the 2008 *Supreme Court Review*.⁹¹ He proceeded at considerable length, exquisitely careful (his own circumstances at that point went without saying). “[T]o explain the Court’s decision and to assess whether it is justified, one has to explore circumstances known to the Court but not emphasized in the *Boumediene* opinion.”⁹² “[R]eports,” “deep-seated misgivings,” “serious questions about the fairness” of the executive proceedings, “extreme actions taken by the government,” a “little old lady in Switzerland who writes checks to what she thinks is a charity,” “a Kafkaesque ... transcript,” etc: “the Court simply lacked faith that military officials ... possessed the combination of capacity and will needed to make judgments that struck reasonable accommodations between the contending interests at play.”⁹³ Meltzer did not disagree. He suggested a predecessor model: judicial structural remedies remaking prisons and hospitals in the 1970s and 1980s. “[C]ourts ultimately determined that if public administrators were unwilling or unable to redress serious and ongoing constitutional violations, there comes a point when the judiciary, whatever its limitations as compared

⁸⁹ *Id.* at 786.

⁹⁰ See *id.* at 782, quoting Justice Frankfurter in *Brown v. Allen* re “vital flaw”).

⁹¹ Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1 (2009).

⁹² *Id.* at 47.

⁹³ *Id.* at 47-49, 49.

to responsible administrators, feels compelled to step in.”⁹⁴ (*Not Paul Bator, Abram Chayes?*) In the end, though, like Professor Bator, Professor Meltzer looks forward. “The resolution of many ... open questions may depend importantly ... on whether the next administration alters the process for military adjudication of the lawfulness of detentions. From both a doctrinal and a legal realist perspective, the scope of judicial inquiry on habeas is likely to turn importantly on the quality of the administrative proceedings that precede it.”⁹⁵ It is his business, he almost seemed to say, to get this right.

Better, we may think, to have a chance to frame clearly what we fear. *Moore v. Dempsey* did so, looking backward – in the process it has become part of our present, even now. *Boumediene* is a major decision indeed. We now – or will soon enough – have the chance to develop more openly our anti-authoritarian worries: our sense of what Bush governance became, what Obama governance (perhaps) could not give up, what worries globally we now concede to be persistent. If so, we may become able to reconstruct *Boumediene*’s implicit past.

⁹⁴*Id.* at 52.

⁹⁵*Id.* at 59.

Appendix

Moore v. Dempsey: *The text of the summary of allegations written by Justice Holmes*

[1] On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men. and in the disturbance that followed a white man was killed. [2] The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. [3] The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' innocence *88 or guilt but solely the question whether their constitutional rights have been preserved. [4] They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. [5] It should be mentioned, however, that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

[6] A Committee of Seven was appointed by the Governor in regard to what the committee called the 'insurrection' in the county. [7] The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was 'a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the 'Progressive Farmers' and 'Household Union of America' established for the purpose of banding negroes together for the killing of white people.' According to the statement the organization was started by a swindler to get money from the blacks.

[8] Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as *89 the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was 'that this Committee gave our citizens their solemn promise that the law would be carried out.' [9] According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, ... the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. [10] However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. [11] On November 3 the petitioners were brought into Court,

informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury--blacks being systematically excluded from both grand and petit juries. [12] The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. [13] The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. [14] The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. [15] According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live Phillips County and if *90 any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

[16] The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that 'all our citizens are of the opinion that the law should take its course.' Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a 'solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.' A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. [17] In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. [18] It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921....