ELIMINATION OF CRIMINAL RECORDS

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Our ancestors attempted to institute a system of government that ensured freedom. In their implementation of this concept, they explicitly attempted to create a governmental mechanism limited in scope and power.[1] As John Quincy Adams said, "Our Country began its existance by the universal emancipation of man from the thralldom of man."[2] It was known as the Great American Experiment because, historically, the power of government was only limited by the will and skill of the person or persons wielding it.

Freedom was imperfectly implemented by the colonists. The Constitution embodied their aspirations for freedom but, due to their self-interest, they did not always put into practice what they envisioned. For instance, the colonists did not eliminate chattel slavery. Nevertheless, the Constitution arguably provided for the elimination of chattel slavery.[3] If nothing else, it did not require chattel slavery.[4]

The colonists rejected slavery in other forms as well. They rejected the philosophy that the people need to be guided and controlled by a relatively few ennobled persons. This philosophy was

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[1] Edward J. Imwinkelried, Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution, 71 **Minn. L. Rev.** 269, 287-88 (1986). Akhil Reed Amar, Of Sovereignty and Federalism, 96 **Yale L. J.** 1425, 1430 (1987).

[2] Quoted in Cong. Globe, 38th Cong., 1st Sess. 1319 (1864) (speech by Sen. Henry Wilson). Cf. Amar, supra note 1 at 1494 (implying that government has a tendency to be used in a lawless manner).

[3] H. Jefferson Powell, Enslaved to Judicial Supremacy, 106 **Harv. L. Rev.** 1197, 1211 (1993). James Gray Pope, Book Review, 39 **UCLA L. Rev.** 481, 502 n.40 (1991).

[4] Id.

at the core of the feudal society and nobility controlled government from which they fought to free themselves. Nobility and the self-serving, deceptive and cruel myth of noblesse obligee[5] were discarded--in form and substance.[6] The implementation of the Title of Nobility Clauses[7] into the Constitution was a key element in that effort.[8]

The nobility clauses carry a great deal of inherent meaning about the type of government the colonists attempted to implement. It is this underlying intent of the Constitution that should be followed today. If there is any doubt on how the Constitution should be applied, it should be applied in favor of freedom and against the exercise of governmental power. Since the colonists intended that government have only enumerated power and since this principle, which is inherent in the Constitution, has never been changed by the people, then any exercise of governmental power beyond that which is explicitly granted by the people through the Constitution should be considered tyrannical.

I am concerned about the ever increasing control that government has on the lives of people. The keeping and utilization of records is one of the ways that enables government to control people. Governmental power has grown to be so expansive that we all are monitored through

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[5] **Webster's Third New International Dictionary** 1532 (Philip Babcock Gove ed. 1986). The obligation of honorable, generous, and responsible behavior that is a concomitant of high rank or birth. Id.

[6] See **Thomas Norton, The Constitution of the United States** 89 (1922) (speaking on the nobility's illegitimate acquisition of wealth and prestige through misrule). **The Federalist** No. 43, at 274-75 (C. Rossiter ed. 1961) (remarks of James Madison) (speaking of colonist's aversion of aristocratic innovations).

[7] Article I, sections 9 and 10 of the U.S. Constitution provide, respectively, that "[n]o Title of Nobility shall be granted by the United States" and "[n]o State shall . . . grant any Title of Nobility . . . ."

[8] **The Federalist** No. 43, at 274-75. Madison knew that Constitutional mechanisms were needed to eliminate the "aristocratic or monarchial innovations" that would inevitably arise. Id. If these innovations were left unchecked, they would lead to an undoing of the republican form of government they were attempting to establish. Id.

records but the most egregious impact of records occurs to those who have been convicted of crimes.[9] It is the criminal record that I would like to attack with this paper as being unconstitutional.[10]

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[9] Eric E. Younger, Not Completely Dead -- But Seriously Injured: The Collateral Consequeces of Misdemeanor Arrest and Conviction, 52 **L.A.B.J.** 50, 50 (1976). Michigan v. Drew, 240 N.W.2d 776, 778 (Mich. Ct. App. 1976). In this case, a picture was painted of an exconvict who could not keep a job because he was haunted by his criminal record, who had little money and often slept in his car, and who lived on loans from relatives and friends. Id.

[10] Because of the effects of the burdens placed on the exconvict through record keeping are similar to a prison sentence, exconvict records may also be in violation of the Double Jeopardy clause in the 5th Amendment to the United States Constitution. **U.S. Const**. amend. V. Persons convicted of crimes are continually tried over and over for the same offense. Cf. Utah v. E.J.D., 867 P.2d 397, 399 (Utah Ct. App. 1994). "The record of a conviction is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at anytime threaten his social standing or affect job opportunities." Id. See Menard v. Saxbe, 498 F.2d 1017, 1024 (D.C. Cir. 1974) (person with a criminal record is more apt to come under police scrutiny); Menard v. Mitchell, 430 F.2d 486, 491 (1970) (criminal record may affect decision whether to arrest or file charges); Sadiqq v. Bramlett, 559 F.Supp. 362, 366 (N.D.Ga. 1983) (individuals with arrest records more vulnerable to police scrutiny). This kind of activity seems to be an infringement of the right of each individual to be secure in their person. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons of things to be seized." **U.S. Const**. amend IV. If an individual has rendered what was due for their past bad act they should no longer be burdened by it. It is unreasonable to think that just because a person has made a mistake that they will commit further bad acts. Michael F. Wais, Negligent Hiring -- Holding Employers Liable When Their Employees' Intentional Torts Occur Outside the Scope of Employment, 37 **Wayne L. Rev.** 237 n.94 (1990). It is the system that is at fault because it doesn't provide the right remedies for the wrongs committed and leaves the former wrongdoer without legitimate options.

Supposedly, an implicit notion of "police power" makes governmental record keeping constitutional.[11] However, according to the Constitution, any exercise of governmental power is prohibited unless explicitly granted.[12] "Police power" was not granted to the government by the Constitution.[13] Furthermore, governmental record keeping has the effect of ignobling the people, and especially people formerly convicted of crimes, so it is prohibited by the Title of Nobility Clauses.

I will examine the concept of nobility as understood by the colonists. I will examine case law which has invoked the Title of Nobility Clauses. Only two cases are closely related to the subject of this paper. Those two cases interpreted the Clauses as prohibiting government from ignobling or ennobling a person. The other cases are useful to illustrate the proposition that application of the Clauses is not limited to the mere prohibition of governmental hereditary titles but instead prohibits any sort of governmental activity that has the effect of ennobling or ignobling a person. Finally, I will wrap it all together by applying the principles I have established in the context of record keeping of a person's past bad acts.

I. Nobility

The concept of nobility and what it means to be titled are key elements of the Clauses.

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[11] Fleck & Assocs., Inc., v. City of Atlanta, 390 S.E.2d 396, 396 (Ga. 1990); Sandlin v. Criminal Justice Standards & Training Comm'n, 518 So.2d 1292, 1299 (Fla. Dist. Ct. App. 1987); Norman v. City of Las Vegas, 177 P.2d 442, 448 (Nev. 1947).

[12] All governmental authority is derived specifically from the Constitution otherwise it is specifically reserved to the people. **U.S. Const.;** G. Robert Blakey**,** Federal Criminal Law: The Need, Not For Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion, 46 Hastings L.J. 1175, 1202, 1219 (1995); Comment: The Folly of Overfederalization, 46 Hastings L.J. 1247 (1995); Rory K. Little, Myths and Principles of Federalization, 46 Hastings L.J. 1029, 1071 (1995);

[13] Kathleen F. Brickey, Criminal Mischief: The Federalization Of American Criminal Law, 46 Hastings L.J. 1135 (1995);

Understanding these concepts will illuminate the colonist's intended prohibition. The two key words in the Clauses are title and nobility.

A title is an appellation of rank, distinction, privilege or profession.[14] Nobility is a condition of possessing characteristics of a higher kind or order, either inherited or acquired.[15]

A historical understanding of nobility helps give definition to the Clauses. The colonists had a deep understanding of nobility. Britain ruled the colonies and nobility governed the British Empire - an empire based upon a feudal system.[16] The feudal system was spawned by vassals who provided military services to their lords in exchange for protection and economic maintenance.[17] The protection and support provided by the lord eventually became a vassal's right and the structure that developed created discernible class distinctions.[18] This basic framework, over time, produced a myriad of social classes inextricably linked with government.[19]

Under the feudal system, society became a complex hierarchy of governmental powers and privileges.[20] Multiple exchanges of obligations developed within the government hierarchy of

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[14] **Webster's New World Dictionary** 1404 (3d C. ed. 1988). **Webster's Third New International Dictionary**, supra note 5 at 2400. **Black's Law Dictionary** 1485 (6th ed. 1990). **The Jefferson Cyclopedia** 48-51 (John P. Foley ed. 1900).

[15] **Webster's New World Dictionary**, supra note 13 at 919. **Webster's Third New International Dictionary**, supra note 5 at 1532. **Black's Law Dictionary**, supra note 13 at 1485. **The Jefferson Cyclopedia**, supra note 13 at 48-51.

[16] Jeffrey A. Heldt, Military: Titles of Nobility and the Preferential Treatment of Federally Employed Military Veterans, 19 **Wayne L. Rev.** 1169, 1171 (1973).

[17] Id.

[18] Id.

[19] See id. at 1170 (indicating that aristocracy was a system of government-induced or supported peerage).

[20] Id. at 1171. To become "titled" meant to become "entitled." Id. English monarchs even granted fiefdoms to favored individuals in America**. James Bassett, A Short History of the United States** 76 (2d ed. 1924). The aristocracy in

kings, greater lords and lesser lords.[21] But nobility did not necessarily mean eminence. Lower nobility occupied various levels of public office according to their importance, and governmental power was centralized and consolidated, not representative.[22]

The nobility abused this centralized and consolidated power.[23] It produced the phrase coined by Lord Acton, "Power tends to corrupt and absolute power corrupts absolutely."[24] The

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Britain intended to establish a nobility for life in America rather than a hereditarial one. **Bernard Bailyn, The Ideological Origins of the American Revolution** 278 (1967), noted in Richard Delgado, Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice, 32 **UCLA L. Rev.** 100, 111 n.72-75 (1984). Nobility, although untitled, exists just as much in America as it does in Britain. Noted in Delgado, supra at n.11. Debrett's, which publishes the directory of Britain's nobility, announced its intention to publish **Debrett's Texas Peerage**. Id. This was the last of ten volumes devoted to "the untitled aristocracy" in the United States. **Peters, Tilting at Windmills**, Wash. Monthly, Oct. 1983, at 4, 6-7. Id.

[21] Heldt, supra note 15 at 1171. There are many noble or noble-like rankings--not all based on heredity. **Webster's Third New International Dictionary**, supra note 5 at 1244 (King), id. at 1862 (Queen), id. at 1802 (Prince), id. at 1802 (Princess), id. at 699 (Duke), id. at 698 (Duchess), id. at 1384 (Marquess), id. at 713 (Earl), id. at 178 (Baron), id. at 178 (Baroness), id. at 1249 (Knight), id. at 1337 (Lord), id. at 1263 (Lady), id. at 776 (Esquire) and id. at 2216 (Squire) are some of them.

[22] Heldt, supra note 15 at 1171. The colonists fought the Revolutionary War because government was not representative; they only had structural representation. **James K. Hosmer, Samuel Adams; American Statesmen** 62-89 (John T. Morese, Jr. ed. 1884). **Henry Mayer, A Son of Thunder: Patrick Henry and the American Republic** 130-140 (1986).

[23] 2 **Records of the Federal Convention of 1787** 224 (Max Farrand ed. 1911) [hereinafter Farrand]. Centralized and consolidated power leads to abuse. Cong. Globe, 34th Cong., 3d Sess. app. at 140 (1857) (remarks of Ohio Rep. John Bingham). Cong. Globe, 38th Cong., 2d Sess. 143 (1865) (remarks of Indiana Rep. Godlove Orth). **The Jefferson Cyclopedia**, supra note 13 at 51. **The Federalist** No. 85, at 521-22 (A. Hamilton).

[24] Quoted in **Gerry Spence, With Justice for None** 217 (1986).

abuse the colonists suffered from the nobility led to war and the founding of a new nation.[25]

Consequently, the colonists were essentially unanimous in their efforts to prohibit government supported nobility in their new nation.[26] The very concept was repulsive to the colonists.[27] One writer has noted that "[t]he records of the Constitutional Convention are replete with expressions of fear of monarchy."[28] Elbridge Gerry, Edmund Randolph and George Clymer, representatives to the Constitutional Convention, said aristocratic forms were to be avoided.[29] Randolph went on to state that "the permanent temper of the people was adverse to the very semblance of Monarchy."[30]

The prohibition against government endowed nobility was first enacted by the Continental Congress.[31] It is found in every draft of the Articles of Confederation except the first.[32] The first

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[25] **The Federalist** No 85, at 521-22 (A. Hamilton).

[26] Delgado, supra note 19 at 112.

[27] Raoul Berger, Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser, 1990 **B.Y.U. L. Rev.** 873, 876 nn.27, 28 (1990).

[28] Berger, supra note 26 at 876. **The Federalist** No. 43, at 274-75 (remarks of James Madison) (speaking of colonist's aversion of aristocratic innovations).

[29] 2 Farrand, supra note 22 at 286. (Gerry); id. at 513 (Randolph); id. at 524 (Clymer). There were similar utterances by Constitutional Convention representatives John Rutledge, Benjamin Franklin, George Mason, Elbridge Gerry and Gouverneur Morris. 1 Farrand, supra note 22 at 119 (Rutledge); 83 (Franklin); 101 (Mason); 152, 425 (Gerry). 2 id. at 35-36 (Morris).

[30] 1 Farrand, supra note 22 at 88. **The Federalist** No. 43, at 274-75.

[31] Delgado, supra note 19 at 112. The Articles of Confederation provide:

> . . . nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

Articles of Confederation art. VI.

draft of the Constitution provided that "The United States shall not grant any title of nobility" and it became law virtually without change.[33] The Nobility Clauses were implemented into the Constitution with little dissent.[34]

II. The People and the Constitution

The Nobility Clauses indicate who should interpret the Constitution. The colonists did not intend to create a constitutional or even a legal priesthood in light of the underlying precepts of the Title of Nobility Clauses.[35]

Alexis de Tocqueville said, "[b]y birth and interest a lawyer is one of the people, but he is

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[32] **Drafting the Federal Constitution** 706 (Arthur T. Prescott comp. 1941) [hereinafter Prescott], in Delgado, supra note 19 at 112 n.89.

[33] Delgado, supra note 19 at 112.

[34] Prescott, supra note 31 at 711; 2 Farrand, supra note 22 at 183, noted in Delgado, supra note 19 at 112 n.87. 1 **U.S. Continental Congress, Secret Journals of the Acts and Proceedings** 294, 305, 352 (1821) (Articles of Confederation), in Delgado, supra note 19 at 112 n.88. Twenty-one state constitutions, and one autonomous political entity in voluntary association with the United States, have similar prohibitions. **Ala. Const.** art. 1, s. 29; **Ariz. Const.** art. 2, s. 29; **Ark. Const.** art. 2, s. 19; **Conn. Const.** art. 1, s. 18; **Del. Const.** art. 1 s. 19; **Ind. Const.** art. 1, s. 35; **Kan. Const. Bill of Rights** s. 19; **Ky. Const.** s. 23; **Me. Const.** art. 1, s. 23; **Md. Const. Declaration of Rights** art. 42; **Mass. Const.** Pt. 1, art. 6; **N.H. Const.** pt. 1, art. 9; **N.C. Const.** art. 1, s. 33; **Ohio Const.** art. I, s. 17; **Or. Const.** art. I, s. 29; **Pa. Const.** art. 1, s. 24; **S.C. Const.** art. 1, s. 4; **Tenn. Const.** art. 1, s. 30; **Va. Const.** art. s. 4; **Wash. Const.** art. 1, s. 28; **W. Va. Const.** art. 3, s. 19; **P.R. Const.** art. II, s. 14.

[35] David M. Ebel, Why and to Whom Do Constitutional Meta-Theorists Write?--A Response to Professor Levinson, 63 **U. Colo. L. Rev.** 409, 411 (1992). Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 14-15 (1984). Raul Berger, The Activist Legacy of the New Deal Court, 59 **Wash. L. Rev.** 751, 786 (1984).

an aristocrat in his habits and tastes . . . ."[36] Although his comments were phrased in such a way not to denigrate the American legal aristocracy (because of his predisposition to aristocracy),[37] De Tocqueville did say that it is at the bar or the bench that the American aristocracy is found.[38]

1. Masters as Servants and Servants as Masters: The People and the Constitution

The colonists did not intend to create a constitutional or even a legal priesthood in light of the underlying precepts of the Title of Nobility Clauses.[39] However, judges have ordained themselves as the ultimate interpreters of the law and the constitution.[40] United States Supreme

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[36] **Alexis de Tocqueville, Democracy in America** 245 (J.P. Mayer and Max Lerner eds. 1966). See Peter J. Ferrara, Comment On: Making the Case for a Constitutional Right to Minimum Entitlements, 44 **Mercer L. Rev.** 568 (1992).

[37] De Tocqueville, supra note 35 at xxxvi-xxxvii. Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 **Yale L. J.** 1271 (1991). De Tocqueville said the army was one of the constituents of the core "aristocratic element" in the European *Ancien Regime*. Not only does the legal profession have a monopoly (through statutes prohibiting the unauthorized practice of law) but lawyers are de facto unelected law makers. **Roger S. Haydock, et al., Fundamentals of Pretrial Litigation** 8 (3d ed. 1994). They are the unelected 4th arm of the government. James W. Hurst, Lawyers in American Society, 50 **Marq. L. Rev.** 594, 598 (1966).

[38] De Tocqueville, supra note 35 at 247. R. Kent Newmyer, Daniel Webster as Tocqueville's Lawyer: The Dartmouth College Case Again, 11 **Am. J. of Legal Hist.** 127, 128 (1967).

[39] David M. Ebel, Why and to Whom Do Constitutional Meta-Theorists Write?--A Response to Professor Levinson, 63 **U. Colo. L. Rev.** 409, 411 (1992).

[40] **Fred Rodell, Woe Unto You Lawyers** 16, 18 (A Berkley Book 1980) (1939). Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-180 (1803). The declaration by the Supreme Court that the Supreme Court is the final arbiter of the Constitution is self-serving and fails to recognize that that the people never gave the Supreme Court this kind of authority and that the people should be able to exercise this power through the jury. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 **Yale L. J.** 1131, 1188-89 (1991). Contra Sparf v. U.S., 156 U.S. 51, 72 (1895) (holding that the jury may not be instructed that they the power of nullification).

Court Chief Justice Charles Evans Hughes said, "we are under a Constitution, but the Constitution is what the judges say it is."[41] Because the Supreme Court has ultimate control over the whole legal system, five people can exert their will over hundreds of millions of people.[42]

This structure is a very ominous and foreboding one. It is quintessential embodiment of an entrenched aristocracy, as George Mason defined it, "the governt. of the few over the many"[43] in our society today. De Tocqueville warned America of the dangers of such tyranny several hundred years ago. He acknowledged that the President could abuse his power, but his power was limited.[44] De Tocqueville said Congress had great power but legislation could be changed after the election of representatives more sensitive to the wishes of the people.[45] But the United States Supreme Court could plunge a nation into anarchy or civil war.[46] De Tocqueville's words were prophetic.[47] They still are. Thadeus Stevens was similarly prophetic when he said in 1850, speaking of the slavery of the black man and its likely transmutation into a larger sphere, that "[t]he people will ultimately see

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[41] Quoted in Rodell, supra note 39 at 41.

[42] Ronald J. Bacigal, Putting People Back into the Fourth Amendment, **62 Geo. Wash. L. Rev.** 359, 384 (1994).

[43] 2 Farrand, supra note 22 at 224. See Cong. Globe, 34th Cong., 3d Sess. app at 140 (1857) (remarks by Rep. Bingham) (linking the government of a few over many with slavery).

[44] Phil C. Neal, De Tocqueville and the Role of the Lawyer in Society, 50 **Marq. L. Rev.** 607, 608 (1966).

[45] Id.

[46] Id.

[47] See Dred Scott v. Sanford, 60 U.S. 393, 451 (1856). A civil war followed not long after the Supreme Court's declaration that people with black skin color are not actually people, and hence are not attributed the rights of people, so they may be reduced to property. Id. People have effectively been reduced to property through the government's establishment and development of the corporation. Great unrest among the populace was caused by the injustices perpetrated through the empowerment of the corporation. Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co., 15 F. Cas. 649 (D. La. 1870) (Slaughter-House Cases).

that laws . . . will eventually enslave the white man."[48]

The fundamental tool of tyranny used by judicial aristocrats is the doctrine of stare decisis - "to abide by, or adhere to, decided cases."[49] Everyone must abide by the decisions of the few at the top.[50] This doctrine sprang from the same tyrannical aristocratic atmosphere from which the colonists fought to free themselves.[51] Even though this is not just, the Court knows that it must appear to be so.[52] They substitute consistency for justice.

Although, technically, stare decisis is only a "principle of policy, not a mechanical formula,"[53] it has been treated like a rule of law.[54] Practically speaking, rarely can a "lower" court

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[48] Quoted in **Hans Trefousse, The Radical Republicans** 56 (1969).

[49] **Black's Law Dictionary**, supra note 13 at 1406.

[50] Maurice Kelman, The Force of Precedent in the Lower Courts, 14 **Wayne L. Rev.** 3, 4 (1967).

[51] James C. Renquist, The Power that Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court, 66 **B.U. L. Rev.** 345, 348 (1986). One of the key elements of a government ruled by the people is a jury where they judge both law and fact. Amar, supra note 39 at 1187-95. This is one of the things the colonists fought for. Hosmer, supra note 21 at 191.

[52] Charles H. Nalls and Paul R. Bardos, Stare Decisis and the U.S. Court of International Trade: Two Case Studies of a Perennial Issue, 14 **Fordham Int. L. J.** 139, 142 (1990).

[53] Patterson v. Mclean Credit Union, 485 U.S. 617, 618-619 (1988). Supposedly, it is a doctrine of convenience. Charles J. Cooper, Stare Decisis: Precedent and Principle in Constitutional Adjudication, 73 **Cornell L. Rev.** 401, 402-403, 410 (1988). In reality, there is no stare decisis at all. Leading Cases, 105 **Harv. L. Rev.** 177, 187 (1991). Frank H. Easterbrook, Ways of Criticizing the Court, 95 **Harv. L. Rev.** 802, 818 n.39 (1982) (stating that stare decisis really is little more than a mirage invented by judges in an effort to have us, as well as other judges, believe they are constrained).

[54] Kelman, supra at note 259 at 4.

decide a case differently than a similarly decided case by a "higher" court.[55] The Court has articulated the arrogance and contempt for justice embodied in this policy: "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right."[56]

Not only do judges enforce their views upon everyone else but they have also taken it upon themselves to drastically change the kind of government the colonists implemented. Any changes made to government were to be made by the people - a foundational premise upon which the government of this nation rests.[57] If the Constitution needs changing, the people have provided the mechanism for its change - Constitutional amendments.[58] If there isn't sufficient impetus among the populace to change the Constitution, it shouldn't be changed.[59]

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[55] See Id. (stating that there is an absolute duty to apply the law as last pronounced by superior judicial authority). The persuasive value of an opinion should be an adequate substitute for reliance on stare decisis. **Peter Wesley-Smith, Theories of Adjudication and the Status of Stare Decisis**, reprinted in **Precedent in Law** 73-87 (Laurence Goldstein ed. 1987). **Erik G. Light, Legal Theory and Philosophy** 1705, 1706 (1989).

[56] Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1931) (Brandeis, J., dissenting).

[57] Mayer, supra note 21 at 298. Even with "consent," government cannot legitimately be used beyond its intended scope regardless of its "representativeness." Cong. Globe, 34th Cong., 3d Sess. app. at 140 (1858) (remarks of Ohio Rep. John Bingham).

[58] **U.S. Const.** art. V.

[59] **John Marshall's Defense of McCulloch v. Maryland** 130-31 (Gerald Gunther ed. 1969). The people are supreme. The Constitution is subordinate to the people and those people at the reins of government subordinate to the Constitution. Id. Amar, supra note 1 at 1463 n.163. "[A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." **The Federalist** No. 45, at 289 (J. Madison). Governmental supremacy through discretionary power is a British theory and was anathema to the colonists. Amar, supra note 1 at 1480. In America ". . . the people, without exaggeration, may be said to be entirely the masters of their own fate." **The Federalist** No. 28, at 180-81 (A. Hamilton). People at the reins

2. Masters as Servants and Servants as Masters: Juries and the Law

The doctrine of stare decisis typifies the attitude of those people at the reins of government and is further reflected in the diminution of the role of the jury. Not only have those people in the legal profession ennobled themselves but they have ignobled their masters - the people. Early in this nation's history, the jury had the right to decide questions of law and fact in each case.[60] They were essentially a mini-governmental body with veto power.[61] The role of the jury ensured that the government did not rest on a small number of persons because juries changed in composition with each case and were drawn from the general population.[62] The judiciary has since made the jury

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of government are to be subordinate to the Constitution, not redefine it or make implicit assumptions about it. The colonists were aware of the folly of "representatives" thinking they were the people and their views were representative of the people. **The Antifederalist Papers** 19. Representatives commonly "betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter . . . ." Id. **The Federalist** No. 71, at 433 (A. Hamilton). Government officials are only "representatives," "agents," "delegates," "deputies," and "servants" and are not considered the people and have only ministerial, not discretionary, powers. Amar, supra note 1 at 1436.

[60] Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794). United States v. The William, 28 F. Cas. 614 (D. Mass. 1808) (allowing the jury to decide questions of law). Sparf v. U.S., 156 U.S. 51, 156 (1895) (Gray & Shiras, JJ., dissenting) (arguing that the jury had the power of nullification). Amar, supra note 39 at 1187-95.

[61] Amar, supra note 39 at 1187-95. Bacigal, supra note 41 at 366-69, 407. John Adams said, "the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature" as they have with regard to other decisions of government. 2 **John Adams, The Works of John Adams** 253 (Charles C. Little & James Brown eds. 1850). Vox populi, vox dei. The voice of the people is the voice of God. An Interview with Tom Foley, **C-SPAN**, 6:30 p.m., 12-23-94.

[62] Amar, supra note 39 at 1183, 1187-95. Bacigal, supra note 41 at 368. The judge's role is merely to give an opinion and to provide some guidance to a jury which "clearly means by way of advice and instruction only, and not by way of order or command." Sparf, 156 U.S. at 135 (Gray and Shiras, JJ., dissenting).

little more than their rubber stamp.[63]

When the Constitution was established, the people were adamant about having ultimate control of the law.[64] They established themselves as the final arbiter of the law by establishing a jury in which they had the power to determine both law and fact.[65]

The infringement upon the role of the jury in the application of the law was one of the key issues which triggered the colonist's struggle for independence.[66] Their right under the Magna Charta of having "judgment of his peers on the law of the land" was being taken away from them.[67] In the colonial era, the jury had the right and obligation to decide matters of both law and fact - even contrary to the instructions of the judge or the will of the legislature.[68] In fact, they were a

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[63] Spence, supra note 23 at 87-91. Today the jury can't be instructed that they have ultimate say on what the law is. Sparf, 156 U.S. 51; United States v. Dougherty, 473 F.2d 1113 (1972) (refusing an instruction of jury nullification). Mark D. Howe, Juries as Judges of Criminal Law, 52 **Harv. L. Rev.** 582 (1939) (tracing the decline of the jury's ability to determine law). See generally Note, The Changing of the Jury in the Nineteenth Century, 74 **Yale L. J.** 170 (1964) (documenting the decline of the power of the jury). Bacigal, supra note 41 at 378.

[64] Hosmer, supra note 21 at 191. Bacigal, supra note 41 at 369-70. Ronald Bacigal noted, "Alexander Hamilton successfully asserted that jurors 'have the right beyond all dispute to determine both law and fact'." Id. at 369. Amar, supra note 39 at 1133. Thomas Jefferson stated, "It is in the power, therefore to the juries, . . . to take on themselves to judge the law as well as the fact." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 3 **The Writings of Thomas Jefferson** 82 (H.A. Washington ed. 1853) Quoted in Bacigal, supra note 41 at 388.

[65] Hosmer, supra note 21 at 191. Bacigal, supra note 41 at 370-71. Sparf, 156 U.S. at 165 (Gray & Shiras, JJ., dissenting).

[66] Hosmer, supra note 21 at 191. Bacigal, supra note 41 at 374-78.

[67] Hosmer, supra note 21 at 191. Bacigal, supra note 41 at 374-75.

[68] Amar, supra note 39 at 1187-95.

mini-governmental body for each case.[69] Thomas Jefferson said, "[t]he jury, which was the most energetic means of making the people rule, is also the most effective means of teaching it to rule."[70]

The jury's protective role was praised as a "safeguard against the arbitrary exercise of power by the government. . . ."[71] The jury, by design for pragmatic and philosophical reasons, served as mechanism to keep power in the hands of the people and out of the hands of judges.[72] Thomas Jefferson said, "I know of no safer depository of the ultimate powers of the society but the people

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[69] Id. 1 Tocqueville, supra note 35 at 293. De Tocqueville stated, "The jury is, above all, a political institution . . . ." Id. According to Alexander Hamilton, the jury had the power to determine the law "for reasons of a political and peculiar nature, for the security of life and liberty." 7 **Hamilton's Works** 335-36 (1886).

[70] Quoted in Spence, supra note 23 at 87. De Tocqueville, supra note 35 at 254.

[71] Carmen A. Frattaroli, The Jury: Is it Viable, 6 **Suffolk U. L Rev.** 897, 898 (1971). Paul Hoffman, Double Jeopardy Wars, The Case for a Civil Rights "Exception", 41 **UCLA L. Rev.** 649, 668 (1993) (stating that jury nullification is a safeguard against governmental oppression). Sparf, 156 U.S. at 149 (Gray and Shiras, JJ., dissenting). See also Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (extolling the jury as an "inestimable safeguard against the compliant, biased or eccentric judge").

[72] **Anne Strick, Injustice for All** 185 (1977). To the colonist, common sense was superior to "great legal science." Paul D. Carrington, Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816), 53 **Pitt. L. Rev.** 705 (1992). A judge's main function was to "see that the parties has a fair chance with the jury." Howe, supra note 62 at 591. It is the height of arrogance and spurious for a "servant" to foist his views upon his "master" through notions of "police power" or "general welfare." Cf. Stephen P. Halbrook, To Keep and bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791, 10 **N. Ky. L. Rev.** 13, n.94 (1982) (stating that the people retained the right to conduct themselves in a manner they wish and that government officials are not their overseers). Cf. Amar, supra note 1 at 1434, 1440 (stating that government officials only have the power that the people explicitly gave them).

themselves."[73]

III. Defining the Title of Nobility Clauses: An Early American Perspective

The executive branch has relied upon the Clauses as authority in support of its actions. Andrew Jackson, the seventh President of the United States, weighed in on this issue in one of "[t]he most widely read and discussed presidential vetoes in our annals."[74] Jackson vetoed legislation from Congress that was meant to extend the charter of the Second Bank of the United States.[75] The veto was based on the premise that such a charter was unconstitutional and a constant threat to the American future.[76]

He warned of the dangers of using the government to give one person advantage over another person.[77] He insisted that governmental titles, distinctions, gratuities and privileges are in violation of the Constitution.[78] To allow governmental power to be exercised in a discretionary manner is unjust, leads to factions and threatens the foundation of government, he argued.[79]

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[73] Strick, supra note 71 at 226. Ronald Bacigal stated, "The jury serves a limited term and can never grow into a dangerous system." Bacigal, supra note 41 at 412 n.328.

[74] **Marquis James, Andrew Jackson: Portrait of a President** 302 (1937).

[75] Id.

[76] **Burke Davis, Old Hickory: A life of Andrew Jackson** 306 (1977). Jackson's veto is authoritative because the acts of an officer of the government, previously sworn to uphold the Constitution, are given the presumption of constitutionality. Illinois v. Krull, 480 U.S. 340, 350-51 (1987). The veto deserves additional weight because it was upheld by Congress. Davis, supra note 75 at 308.

[77] **Jackson versus Biddle: The Struggle over the Second Bank of the United States** 19-20 (George Rogers Taylor ed. 1949) [hereinafter Taylor].

[78] Id.

[79] Id. Davis, supra note 75 at 306.

According to Jackson, there are no necessary evils in government.[80]

Legislation in association with the Clauses is nearly non-existent. Only one federal statute addresses titles of nobility. It requires a person becoming a United States citizen to renounce any previously acquired title or order of nobility.[81]

Jackson's application of the Clauses most closely defines their underlying intent. As a participant in the American Revolution and a contemporary of the people of that era, he, more than anyone else, knew the will of the people. Necessary evils in the name of "police power" or "general welfare" simply were not part of the constitutional grant of authority to the government and are in violation of the will of the people.[82]

Jackson, a Revolutionary War soldier,[83] had a deep understanding of what the war and the new government was all about and it showed in his veto message. The concept of the great American Experiment as embodied in the Declaration of Independence and the Constitution is very simple. The principles upon which government was based was that its direct or indirect scope and power was to be extremely limited, decentralized,[84] well defined and not rest upon pragmatic

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[80] Id.

[81] Hereditary Titles and Orders of Nobility, 8 U.S.C. s. 1448 (b) (1952) (56 Fed. Reg. 50475, 50499 codified at 8 C.F.R. s. 337.1). An exhaustive search has not turned up any state statutes which directly reference Titles of Nobility.

[82] Robert Blakey, Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion, 46 **Hastings L. J.** 1175, fn. 158 and related text (1995).

[83] **Marquis James, The Border Captain**, 26-30 (1933).

[84] Hosmer, supra note 21 at 58-59, 418-431. The Revolution was about implementing the "leveling" spirit characterized in the New England states. It was antagonistic to the coercive power of the minority. They believed that "[a]ll men are born free and independent." John and Samuel Adams and Patrick Henry enthusiastically agreed with the sentiment that even though "[t]he dons, the bashaws, the grandees, the patricians, the sachems, the nabobs, call them

notions. Nearly everything was left to private initiative and if not undertaken privately not undertaken by government either.[85]

This turned the world upside down because prior to the Experiment, and certainly before the Magna Charta, nearly anything was under the purview and permissible through government. So, in light of this, Jackson spent a great deal of time defining the Necessary and Proper Clause of the Constitution. The gist of his argument was that necessary implies that there be no other less intrusive remedy. Proper means within its constitutional powers. So, even if an item were necessary, it was not proper if it was not within the powers explicitly granted in the Constitution.[86]

Madison's statement in the Federalist No. 45 supports Jackson's view that the framers envisioned a limited federal government with only enumerated powers. "The powers delegated by the proposed Constitution to the federal government are few and defined." Numerous and indefinite federal powers are antithetical to the Constitution. They did not include "objects which, in the ordinary course of affairs, concern the lives, liberties, and prosperities of the people . . . ."[87]

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what you please, sigh and groan, and fret, and sometimes stamp, and foam, and curse, but all in vain" because the "decree is gone forth, and it cannot be recalled, that a[n] . . . equal liberty . . . must be established in America." They fought so that "[T]he insolent domination of a very few, opulent" persons "will be brought down . . . ." This certainly was what the people fought for and are entitled to whether it was implemented by their "servants" or not. Mayer, supra note 21 at 295-299. See De Tocqueville, supra note 34 at 64.

[85] See generally **Richard A. Epstein, Takings** (1985). The Constitution only allows taxation in return for direct benefits to all of those taxed--such as law enforcement or infrastructure. Ferrara, supra note 35 at 577 n. 45.

[86] Taylor, supra note 76 at 13-17.

[87] **The Federalist** No. 45, at 292-93 (J. Madison). See also Imwinkelried, supra at 287-88. "The Founding Fathers fashioned a constitutional model designed to contain and restrain government power. That model identifies liberty with the absence of government." Id.

Madison, when noting the great differences between the English and United States Constitutions observed:

> it may not be thought necessary to provide limits for the legislative power in that country (Britain), yet a different opinion prevails in the United States . . . . The people of many States have thought it necessary to raise barriers against power in all forms and departments of the Government . . . .[88]

Moreover, the principles behind the Bill of Rights support this principle. They were not to be understood as an implication that any rights unenumerated were forfeited to the national government. Madison said:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[89]

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[88] 1 The Debates and Proceedings in the Congress of the United States 436 (Joseph Gales ed. 1834) [hereinafter Gales]. See **Zechariah Chaffee, How Human Rights Got into the Constitution** 19-21 (1952).

[89] 1 Gales supra note 87 at 452. Madison's explanation of reasons for the clause was made on June 8, 1789, as follows:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights in this system; but, I conceive, that it may be guarded against, I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

1 Gales, supra note 87 at 439 (emphasis added). See Federal Gazette, Jan. 5, 1790, at 2, col. 3. "A bill of rights for freemen appears to be a contradiction of terms . . . . [I]n a free country, every right of human nature . . . are as

Stephen Halbrook captured the sentiment of the people of a government of limited, enumerated powers by illustrating a letter to the Federal Gazette on July 2, 1989:[90]

> [T]he very idea of a bill of rights is a dishonorable one to freemen. What should we think of a gentlemen, who, upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects.' In short, as a mere servant, the government had no power to interfere with individual liberties in any manner absent a specific delegation. A master reserves to himself . . . everything else which he has not committed to the care of those servants.[91]

The convict record system places enormous economic burdens on a former wrongdoer. The former convict becomes a virtual slave.[92] Slavery can encompass more than

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numerous as sands upon the sea shore . . . ." Federal Gazette, Jan. 15, 1790, at 3, col. 3. "The absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident No enumeration of rights can secure to the people all their privileges . . ." Noted in Halbrook, <u>supra</u> note 60 at n.94.

[90] Halbrook, <u>supra</u> note 60 at 30.

[91] Federal Gazette, July 2, 1789, at 2, col. 1, reprinted in Halbrook, <u>supra</u> note 60 at n.73.

[92] Robert J. Homant & Daniel V. Kennedy, <u>Attitudes Toward Ex-Offenders: A Comparison of Social Stigmas</u>, 10 **J. Crim. Just.** 383, 384 (1982). For instance, in an experiment testing the employability of similarly situated persons with the only difference being that some had a convict record, the number of employers who expressed interest in an exconvict was one and nine for the applicant with no criminal record. <u>Id.</u> <u>See</u> <u>Saxbe</u>, 498 F.2d at 1024 (criminal record can have adverse effect on employment opportunities); <u>Mitchell</u>, 430 F.2d at 490 (same); Morrow v. District of Columbia, 417 F.2d 728, 742 (D.C. Cir. 1969) (speculating that main evil of dissemination of arrest records is adverse

physical bondage. It can be economic, too. Before the Revolutionary War, the people of this country were effectively being reduced to slaves by corporate "persons" and the aristocracy which spawned and directed them.[93] The people were reduced to a state of slavery through economic bondage instituted through the British government and its artificially created entities - corporations.[94]

The abuse of governmental power enabled corporations to have an economic choke hold on the colonies.[95] The machinery of government was used to make them subservient to England -

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effect on job opportunities); Johnson, 714 F.Supp. at 524 (concluding that economic losses may result from lost opportunities for schooling or employment); Sadiqq, 559 F.Supp. at 366 (same); United States v. Johnson, 714 F.Supp. 522, 524 (S.D.Fla. 1989) (economic losses may result from lost opportunities for professional licenses). However, the mere fact that a person has a criminal record, even a conviction for a crime of violence, does not in itself establish the fact that a person has a violent or vicious, nature. Wais, supra note 10 at n.94.

[93] Hosmer, supra note 21 at 27-30, 131. Letter from G. Washington to George William Fairfax (June 10, 1774), in 3 **Writings** 223-24, quoted in **L. Baker, John Marshall; A Life in Law** 19 (1974), noted in James G. Wilson, Justice Diffused: A Comparison of Edmund Burke's Conservativism with the Views of Five Conservative, Academic Judges, 40 **U. Mia. L. Rev.** 913, n.224 (1986). George Washington stated, "[T]hose from whom we have a right to seek protection are endeavoring by every piece of art and despotism to fix the shackles of slavery upon us." Id.

[94] Id. at 131. The concept of economic slavery is a reoccurring threat. Standard Oil Co. v. United States, 221 U.S. 1, 83 (1911) (Harlan, J., concurring and dissenting). Harlan stated that, "[T]he conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people." Id.

[95] Michael Conant, Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined, 31 **Emory L. J.** 785, 798-99 (1982). **John C. Miller, Sam Adams: Pioneer in Propaganda** 124 (1936). England prevented the colonists from manufacturing iron "much beyond the making a horse shoe or hobnail." Id. England had swaddled inter-colonial commerce so tightly that the provinces were "scarcely permitted to vend egg shells beyond their boundaries." Id.

directly through the law and indirectly though the economics of the corporation.[96] Colonial industry was crushed under the weight of Britain's corporations.[97] Greed was passed off as patriotism.[98] Although many reasons are proposed for the cause of the Revolutionary War, the freedom the colonists sought was essentially economic.[99]

Slavery meant more than chattel slavery during the Revolutionary War and it meant more than chattel slavery during the Civil War, too.[100] Just like slavery, the corporate form has perverted the concept of freedom the colonists sought to implement.[101]

Civil War era reformers believed that the law should not be used to advantage one person

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[96] Id. **Robert A. Burt, The Constitution in Conflict** 39 (1992).

[97] Hosmer, supra note 21 at 27, 28. See Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (condemning the discriminatory use of government to make economic distinctions). Justice Matthews stated,

> the very idea that one man many be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself.

Id.

[98] Hosmer, supra note 21 at 29, 30. Burt, supra note 95 at 39.

[99] Hosmer, supra note 21 at 29. See **Judith N. Shklar, American Citizenship: The Quest for Inclusion** 79-81 (1991) (stating that Americans have long viewed slavery in economic terms and cited, as an example, the corporation's institution of "wage slavery").

[100] Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 138 **U. Pa. L. Rev.** 437, 443 (1989). See **Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property** 352, 357 (1934) (stating that the corporation has assumed a life of its own and through sheer economic power has supplanted the Constitution).

[101] Cong. Globe, 38th Cong., 2d Sess. 142 (1865) (remarks of Rep. Godlove Orth) (speaking of the slave state).

over another person just as it should not be used to legitimize and support chattel slavery.[102] Civil War era Representative John Holman of Indiana said: "Mere exemption from servitude is a miserable idea of freedom."[103] According to Civil War era Representative Thomas Shannon, to make the many subject to the few and make the laborer the tool of the capitalist centralizes the power of the nation and reduces the people to a state of slavery.[104]

The Thirteenth Amendment was intended to provide an unobstructed sky of opportunities for the economic advancement of all.[105] As Senator Charles Sumner said, "[s]lavery must be abolished not in form only, but in substance . . . ."[106] When the South lost the battle over chattel slavery, they

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[102] Cong. Globe, 38th Cong., 1st Sess. 2948 (1864). A variety of employment customs were labeled as "perpetuations of slavery." VanderVelde, supra note 99 at 448, 452, 453.

[103] Cong. Globe, 38th Cong., 1st Sess. 2962 (1864).

[104] Cong. Globe, 38th Cong., 1st Sess. 2948 (1864). Lawrence E. Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 **Colum. L. Rev.** 1404 (1967) (the effect of the corporation has placed the substance of life is in another man's hands).

[105] **J. Gardiner, An Oration, Delivered July 4, 1785, at the Request of the Inhabitants of the Town of Boston, in Celebration of the Anniversary of American Independence** 13 (Boston 1785); See Norton, supra note 6 at 89 (stating that the Clauses prevent government supported favoritism); **Merrill Peterson, Thomas Jefferson and the New Nation** 113-14 (1970); 1 **K. Rowland, The Life of Charles Carroll of Carrollton** 247 (1898); Wood, supra note 117 at 73, noted in VanderVelde, supra note 99 at 495. See Delgado, supra note 19 at 116 (using the Title of Nobility Clauses to support his version of equal protection).

[106] Cong. Globe, 39th Cong., 1st Sess. 91 (1865). Cong. Globe, 38th Cong., 1st Sess. 1324 (1864). **Eric Foner, Politics and Ideology in the Age of the Civil War** 73 (1980) (defining the concept of freedom inherit in the Thirteenth Amendment to rest on economic independence rather than mere self ownership). Cf. Kevin D. DeBre, Patents on People and the U.S. Constitution: Creating Slaves or Enslaving Science, 16 **Hastings Const. L. Q.** 221, 246-247 (1989) (arguing that genetics can be used to establish a form of slavery).

instituted the North's economic practices to recover what vestiges they could of it.[107] Just as the badges and incidents of slavery were not eliminated in 1864, neither were all of its forms.

The ex convict status has an ignobling effect. It may even be intentional. Gouverneur Morris' said that vassalage has always been a favorite tool of the aristocracy.[108] America's convict recording system is creating vassalage in certain Americans. A record of past bad acts takes away the very essence of their humanity -- their name and their identity.[109] Even thought they have given what was required of them, they are saddled with inescapable burden of a governmentally enforced tarnished name and reputation for the rest of their life.

III. Application of the Clauses by the Judicial, Executive and Legislative Branches of Government

Only two courts have directly invoked the Title of Nobility Clauses as direct authority to support their propositions. Only one President, Andrew Jackson, arguably the most populist President, and a person who was personally acquainted with the ideals of the Revolutionary War, invoked the Clauses. Legislation is almost non-existent and provides little insight into the intended

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[107] VanderVelde, supra note 99 at 486-487. The resources of the South were still concentrated in a relatively few persons and the people were forced to acquiesce to their terms. Id. The sharecropper's situation is a good illustration. Id.

[108] 2 Farrand, supra note 21 at 222 (comparing slavery with the vassalage associated with aristocracy). See Cong. Globe, 38th Cong., 1st Sess. 1320 (1864) (aristocracy produces slavery). In one form or another, slavery will be the product of aristocracy. Cong. Globe, 35th Cong., 1st Sess. 1282-83 (1858) (remarks of Rep. Francis Blair).

[109] Evelyn A. Peyton, Rogue's Rights: The Constitutionality of the Plaintiff-Proof Rights Doctrine, 34 **San. Clr. L. Rev.** 179 (1993). "Good name in man and woman, dear my lord, Is the immediate jewel of their souls: Who steals my purse steals trash; 'tis something, nothing, 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor." Id.

application of the Clauses.

In Horst v. Moses,[110] a law which granted an exclusive gaming license to two persons in exchange for contributions to the state's school fund was invalidated.[111] Even though the benefit was not based on heredity, nor accompanied by a formal title, the Alabama Supreme Court said the law was, among other things, in contravention of the Alabama's anti-nobility clause.[112]

In Horst, Justice B.F. Saffold explicitly defined the phrase "title of nobility" and the kind of governmental activity the term is intended to prohibit.[113] Justice Saffold said that when the government bestows a privilege, honor or emolument upon an individual or group at the expense of the rest, the anti-nobility clause is violated.[114] The benefit need not be one which extends from generation to generation or relate to an "empty title or order" but focuses rather on the benefits attached.[115] For the government to bestow privileges, honor or emoluments violates the equality of

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[110] 48 Ala. 129 (1872).

[111] Horst v. Moses, 48 Ala. 129 (1872). The General Assembly of Alabama enacted legislation giving a partnership a monopoly on gaming in Mobile for a period of ten years. Id. at 130. The partnership was obligated to pay $1,000 per year to the local school district for this privilege. Id. at 131. The partnership was exempt from taxation, except for state purposes. Id.

[112] Id. at 142. The Alabama Constitution provides, "That no title of nobility of hereditary distinction, privilege, honor, or emolument shall ever be granted or conferred in this state." **Ala. Const.** art. 1, s. 29. This clause was found at Ala. Const. art. 1, s. 32 when this opinion was written. **1 The Federal and State Constitutions, Colonial Charters and Other Organic Laws** 135 (Francis Thorpe ed. 1909) [hereinafter Thorpe]. The clause has not changed. Id.

[113] Horst, 48 Ala. at 142.

[114] Id.

[115] Id.

all persons that government is supposed to ensure.[116]

In In re Application of Jama,[117] a New York court refused to allow a private citizen to use the powers of government for self-ennoblement or give an individual the power to perpetuate an ennobled condition.[118] A citizen petitioned the court to allow him to change his name from Jama to von Jama.[119] He desired the change because, historically, the family name was von Jama but after immigrating to the United States the family dropped the prefix.[120] He wanted to emphasize his Germanic heritage because without the prefix his friends and acquaintances assumed he was Slavic.[121] The court rejected his request because "von" has historically been a prefix designating nobility.[122] The court relied exclusively on the Title of Nobility Clauses for authority.[123]

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[116] Id. Justice Saffold did recognize that if the ennobling governmental act was for the "public good," then it would be permissible. Id. at 142. To recognize such an exception would swallow the rule. First, the clauses specifically prohibit *any* title of nobility. **Ala. Const.** art 1, s. 29; **U.S. Const.** art. I, ss. 9, 10. Second, nearly anything can be construed as for the "public good." The Constitution was never intended to permit such a free-wheeling application. See **The Federalist** No. 10, at 79-84 (J. Madison) (stating that government is to protect the rights of each person even in the face of the combined power of all). The concept underlying the clauses prohibits the few from forcing their "ennobled" views or activities on the many. See supra notes 1-27 (stating the principles underlying the Clauses); infra notes 112-126, 202-223, 236-305 (stating the principles underlying the Clauses). If something is "good," the people will avail themselves of it and coercion is not necessary nor desirable.

[117] 272 N.Y.S.2d 677 (N.Y. Civ. Ct. 1966).

[118] In re Application of Jama, 272 N.Y.S.2d 677, 678 (N.Y. Civ. Ct. 1966).

[119] Id. at 677.

[120] Id.

[121] Id.

[122] Id. at 678. The learned judge determined that even the act of using government powers to merely bestow upon an individual what might be considered an ennobled name to be un-American and to cut at the very heart of the principles of this nation. Id.

Other references to the Clauses have been made inversely or tangentially and only in support of equal protection arguments. The Clauses have been invoked to prevent ignobility. In Eskra v. Morton,[124] the Board of Indian Appeals of the Department of the Interior had held that an individual born out of wedlock could not inherit through her mother.[125] This ruling was reversed by the Eskra court.[126] Although the holding of the case was grounded in the due process clause of the 5th Amendment,[127] Justice Stevens, writing for the court, also reasoned that preventing one from inheriting property on the basis of an official stigma constituted a badge of ignobility in contravention of the anti-nobility clauses.[128]

In Mathews v. Lucas,[129] the United States Supreme Court upheld a Social Security provision which entitled all legitimate and some illegitimate children to a presumption of dependency, but which required other illegitimate children to prove dependency.[130] Justice Stevens, in a dissent, argued that all illegitimate children should have the right to receive survivor's

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[123] 272 N.Y.S.2d at 678.

[124] 524 F.2d 9 (7th Cir. 1975).

[125] Eskra v. Morton, 524 F.2d 9, 11 (7th Cir. 1975).

[126] Id. at 15.

[127] Id. at 13-15.

[128] Id. at 13 n.8. Stevens stated, "The rationale behind the prohibition against the grant of any title of nobility by the United States, . . . equally would prohibit the United States from attaching any badge of ignobility to a citizen . . . ." Id. An argument could be made against ex-convict labels because they tend to ignoble a person even though the individual has given what was due. Trop v. Dulles, 356 U.S. 86 111 (1958) (Brennan, J., concurring).

[129] 427 U.S. 495 (1976).

[130] Mathews v. Lucas, 427 U.S. 495, 516 (1976).

insurance benefits.[131] He said the anti-nobility clause forbids the government from attaching any badge of ignobility or economic distinction to a citizen.[132]

In Zobel v. Williams,[133] the United States Supreme Court struck down an Alaska statute which awarded cumulative dividends from the state's oil revenues derived from drilling on state-owned land on the North Slope to its citizens based on length of residency.[134] Four concurring Justices invoked the anti-nobility clauses in a footnote to disapprove this preferential treatment by government.[135] Justice Brennan, joined by Justices Marshall, Blackman and Powell, charged Alaska's degrees-of-citizenship approach with establishing a latter-day nobility, observing that the "American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in [Art. I, sec. 9, cl. 8 of] the Constitution."[136]

In Fullilove v. Klutznick,[137] Justice Stewart, joined by Justice Rehnquist in a dissent, cited the anti-nobility clause to support his objections to a set-aside provision in the Public Works

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[131] Id. at 520 (Stevens, J., dissenting). Stevens' equal protection argument eventually prevailed - at least in part. Mills v. Habluetzel, 456 U.S. 91 (1982).

[132] Id. at 520 n.3. This was not his main point - equal protection was his focus. Id. at 516. He essentially repeated his Eskra comment. Id. He seemed to use the clause only as a last resort.

[133] 457 U.S. 55 (1982).

[134] Zobel v. Williams, 457 U.S. 55, 56-57 (1982). The dividend disbursement scheme was an unequal distribution of benefits. Id. at 60. Alaska could not show any valid state interest that would be rationally served by its discriminatory actions. Id. at 65.

[135] Id. at 69 n.3 (Brennan, J., concurring).

[136] Id. The Court linked the anti-nobility clauses with the Virginia Declaration of Rights (1776). Id. at 69 n.3. The Virginia Declaration of Rights supports the proposition that government discrimination should not exist - even if it benefits the recipient. 7 Thorpe, supra note 31 at 3813.

[137] 448 U.S. 448 (1980).

Employment Act.[138] His understanding of the Clauses supports a broad application. He recognized the colonist's antipathy to the concept of using government to endow benefits.[139] The anti-nobility clauses, Stewart states, were part of the colonist's effort to establish a government "that recognized no distinctions" among people.[140]

Justice Stevens also dissented in Fullilove, and spoke unfavorably of government endowed privileges.[141] Government endowed privileges lead from animosity, to discontent, to anarchy, he stated.[142] It was his view that the colonists used the anti-nobility clause as one of many provisions to ensure that government was impartial.[143]

In State v. Boren,[144] the Washington Supreme Court held laws preventing the unlicensed practice of dentistry to be a valid exercise of police power.[145] Justice Mallery, in dissent, condemned the use of the governmental mechanism for economic engineering.[146] He said that the use of government to promote economic privileges is akin to slavery and as objectionable as a title

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[138] Fullilove v. Klutznick, 448 U.S. 448, 531 n.13 (1980) (Stewart and Rehnquist, JJ., dissenting).

[139] Id.

[140] Id.

[141] 448 U.S. at 532-33 (Stevens, J., dissenting).

[142] Id.

[143] Id.

[144] 219 P.2d 566 (Wash. 1950).

[145] State v. Boren, 219 P.2d 566 (Wash. 1950). A number of individuals had been involved in the unlicensed practice of dentistry or had aided and abetted the practice of dentistry by unlicensed individuals. Id. at 567. The statute prohibiting the unlicensed practice of dentistry was a reasonable exercise of police power. Id. at 572.

[146] Id. at 573 (Mallery, J., dissenting).

of nobility.[147]

In Morey v. Doud,[148] Illinois established a licensing and regulation scheme for the money order business. However, American Express was exempted by name.[149] Other money order businesses challenged the law and the Court invalidated it, in part, because it had created government supported economic advantages for a certain class.[150]

Legislation in association with the Clauses is nearly non-existent. Only one federal statute addresses titles of nobility. It requires a person becoming a United States citizen to renounce any previously acquired title or order of nobility.[151]

The Clauses should prohibit ex-convict records. Analogous to Horst, governmental power has been used to bestow a certain status upon certain persons.[152] Similar to Jama, the government

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[147] Id. Justice Mallery condemned governmental classification. Id. He said it would lead to a caste system that would destroy constitutional government. Id. Justice Mallery argued that when governmental power is used "as an economic device to promote special privileges for individuals . . . it becomes an instrument of regimentation. Titles of Nobility could be no more objectionable." Id. at 574.

[148] 354 U.S. 457 (1957), overruled, New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam). Morey was overruled only on the basis of changed notions of Equal Protection. Id. An analysis of the Title of Nobility Clauses did not appear in Dukes.

[149] Morey v. Doud, 354 U.S. 457, 458 (1957).

[150] Id. at 469.

[151] Hereditary Titles and Orders of Nobility, 8 U.S.C. s. 1448 (b) (1952) (56 Fed. Reg. 50475, 50499 codified at 8 C.F.R. s. 337.1). An exhaustive search has not turned up any state statutes which directly reference Titles of Nobility.

[152] Horst, 48 Ala. at 142. Justice Saffold found that granting of separating persons into a unique group was violative of the state's title of nobility clause which is identical to the one found in the Constitution. Id. Under Justice Saffold's reasoning in Horst, the status conferred upon former wrongdoers is impermissible because it is government enforced. Id.

is in effect conferring upon an individual an ignobled name.[153] Consistent with Zobel, a scheme has been devised whereby certain persons are set apart due to their government enforced status.[154] Consistent with Boren, governmental powers are being used to establish a caste system which is violation to the Title of Nobility Clauses.[155] Analogous to Fullilove, government power has been used to distinctions between people.[156] Analogous to the positions asserted in Eskra and Mathews, the people have been ignobled because the power of government has been used to reduce former

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[153] Jama, 272 N.Y.S.2d at 678. Judge Maurice Wahl determined that even the act of using government powers to merely bestow upon an individual what might be considered an ennobled name to be un-American and to cut at the very heart of the principles of this nation. Id. Under the reasoning in Jama, any act by the government to bestow upon any individual a title or anything that might be considered an ignobled status, no matter how slight, is in contravention of the Clauses. Id. at 678.

[154] Zobel, 457 U.S. at 69 n.3 (Brennan, Marshall, Blackman and Powell, JJ., concurring). The four concurring judges in Zobel found that the use of government to grant degrees-of-citizenship establishes a latter-day nobility. Id. Under the reasoning of the concurring judges' opinion in Zobel, the government's criminal records have the effect of establishing former wrongdoers into a certain status and is impermissible because it reestablishes a vassalage in contravention of the Clauses. Id.

[155] Boren, 219 P.2d 573, 74. Justice Mallery's dissent in Boren found that to use government to reinstitute a caste system is as objectionable as a title of nobility. Id. Under the reasoning of Justice Mallery's dissenting opinion in Boren, the effect that criminal records have upon a former wrongdoer are akin to the grant of a title of ignobility and are impermissible. Id.

[156] Fullilove, 448 U.S. 531 n.13. Justice Stewart's dissent in Fullilove found that government endowed distinctions are antithetical to the colonists effort to establish a government that did not recognize distinctions between people. Id. (Stewart and Rehnquist, JJ., dissenting). Justice Stevens' dissent in Fullilove found that government endowed distinctions are in violation of the principle that government is to be administered impartially. Id. at 532-33 (Stevens, J., dissenting). Under the reasoning in the dissenting opinions in Fullilove, government's bestowing of a certain status

wrongdoers to a state similar to slaves and vassals.[157] A Title of Ignobility[158] is effectively conferred on the people because they are indirectly burdened by particularized state action that is not directly related to their culpable conduct.[159]

Consistent with the intent of the Clauses[160] and Andrew Jackson's assertions,[161] every exercise of governmental power to establish people within a certain status is prohibited. Since there is not any grant of authority to establish criminal records, the Clauses specifically disallow the application of any rationale to sanitize the government's activity.[162]

IV. Government as Understood through the Colonial World

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upon certain individuals violates the inherent principles upon which this government was founded. Id. at 531 n.13, 532,33.

[157] Eskra, 524 F.2d at 13 n.8. Mathews, 427 U.S. at 520 n.3 (Stevens, J., dissenting). Justice Stevens' arguments in Eskra and Mathews asserted that government distinctions that disadvantage some in relation to others affixes a title of ignobility which is impermissible. Id. Under the reasoning of Justice Steven's arguments in Eskra and Mathews, government bestows an ignobled status upon former wrongdoers through the keeping and use of criminal records. Id.

[158] 448 U.S. at 535 n.1 (stating that the Clauses also prevent government induced ignobility); 427 U.S. at 521 n.3 (stating that the Clauses also prevent government induced ignobility).

[159] Cf. 448 U.S. at 535 n.1 (stating that the Clauses also prevent government induced ignobility); 427 U.S. at 521 n.3 (stating that the Clauses also prevent government induced ignobility).

[160] See supra notes 1-32.

[161] See supra notes 63-73 (stating that the use of government to disadvantage some in comparison to others is unconstitutional and threatens the foundation of government).

[162] **U.S. Const.** art. I, ss. 9, 10 ("[n]o Title of Nobility shall be granted by the United States" and "[n]o State shall . . . grant any Title of Nobility . . .") (emphasis added).

Supposedly, the primary justification for criminal records is recidivism. The problem of recidivism has troubled Americans since colonial times.[163] Although the problem of recidivism probably cannot be completely eliminated because of the current human condition, it can be greatly diminished if the purpose of government is properly understood and implemented.

The American Revolutionary War occurred on the heals of the Great Awakening.[164] Much of the colonial population was born again during this time. With the transformation of the individual's spirit, comes transformation of the individual's thinking and actions. The colonist's understanding of government was Biblically based. They understood that people were created free and in the beginning there was no authority for one person to exercise control over another person.

The colonists understood that government was established for a limited and defined purpose -- to prevent chaos from reestablishing itself in the earth. Government was established only for the purpose of requiring that a wrongdoer remedy a wrong which injured another person. This transformed way of thinking is evident in the founding document of the government of the United States of America -- the Declaration of Independence. It provides valuable insight on what the proper scope of government should be.

The Declaration of Independence says, "[w]e hold these truths to be self-evident, that all men are *created* equal and endowed by their *Creator* with certain *unalienable* Rights, that among

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[163] Selective Incapacitation: Reducing Crime through Prediction of Recidivism, 96 **Harv. L. Rev.** 511 n.1 (1982).

[164] **Keith J. Hardman, Charles Grandison Finney, 1792-1875: Revivalist and Reformer** (1987); **David W. Bartlett, Modern Agitators, or, Pen Portraits of Living American Reformers** (1855); **Milton J. Coalter, Gilbert Tennent, Son of Thunder: A Case Study of Continental Pietism's Impact on the First Great Awakening in the Middle Colonies** (1986).

these are Life, Liberty and the pursuit of Happiness."[165] (emphasis added) The Declaration recognizes that government was created and established by God.[166] American government was established on the premise that God, as Creator, has vested in individuals an expansive array rights that were to be held inviolate--even in the face of "compelling" governmental "interests."[167] However, there is not a right to wrongfully inflict injury upon another so these rights are to be exercised within the context of immutable standards, established by God, as Creator, by which all are expected live.

God, as Creator, knowing the potential abuse of this mechanism also set the proper scope and purpose of government. So, if government, as in all things, is used beyond its proper scope and

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[165] If there were no Creator, then this maxim might lack credibility or it might be subject to modification today. However, it is just as true today as it was when it was stated in spite of the intervening Origin of the Species and its progeny. Evolution is a scientific impossibility. The principle of entropy, among other things, is a clear proof of this.

[166] Genesis 9:6.

[167] Even the Revolutionary War teaches us this. John Quincy Adams, Oration on the 4th of July, 1831, quoted in 1 Joseph Story, Commentaries on the Constitution of the United States s. 209 n.1 (Da Capo Press reprint ed. 1870)

> It is not true, that there must reside in all governments an absolute, uncontrollable, irresistible, and despotic power; nor is such power in any manner essential to sovereignty . . . . Unlimited power belongs not to man; and rotten will be the foundation of every government, leaning upon such a maxim for its support. Least of all can it be predicated of a government, professing to be founded upon an original compact. The pretence of an absolute, irresistible, despotic power, existing in every government somewhere, is incompatible with the first principles of natural right.

Madison said, with Edmund Randolph, that government "should not . . . violate any of those cannons" and that "in all the revolutions of time, of human opinion, and of government, a perpetual standard should be erected, around which the people might rally and by a notorious record be forever admonished to be watchful, firm and virtuous." Mayer, supra note 21 at 301-02. The contemporary theory of considering the government's interests in light of the constitutionality of the government's acts certainly flies in the face of these precepts.

purpose it becomes illegitimate, loses its authority and can be ignored, severed or abolished.[168] The colonists understood this and properly and legitimately invoked these principles when they established a new government.

In the beginning, people were created free[169] but they have not been free from injury inflicted by the hands of their fellows. People injure one another as inevitably as the night follows the day. To be injured by another is bad enough but to leave it unrectified is intolerable and unjust.

People can withstand incredible pain, starvation, grief and all manner of misery but they cannot bear injustice. If injuries inflicted by others are not rectified, victims may retaliate against their victimizers.[170] As Homer said, revenge is "sweeter far than flowing honey!"[171] But victims

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[168] Mayer, supra note 21 at 299. Power was derived from the people, who had the right to "reform, alter, or abolish" governments that fail to meet their purposes. See The Declaration of Independence para. 2 (U.S. 1776). ". . . whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or abolish it . . ." See **The Federalist** No. 44, at 286 (J. Madison) (if the government acts unconstitutionally, the people must change it). See also **The Federalist** No. 45, at 289 (J. Madison) ("Were the Union itself inconsistent with public happiness . . . Abolish the Union"). Alexander Hamilton said, "I trust the friends of the Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness." Quoted in Cong. Globe, 38th Cong., 2d Sess. 484 (1865) (remarks of Rep. James Patterson). See 7 Thorpe, supra note 99 at 3813. The Constitution of Virginia--1776 recognized the right and duty of the people to reform, alter or abolish government. 1 Gales, supra note 87 at 434. Government cannot legitimately be used beyond its intended scope regardless of its "representativeness." Cong. Globe, 34th Cong., 3d Sess. app. at 140 (1857).

[169] There was no government. One did not have the right to coerce another.

[170] Spence, supra note 23 at 5, 6.

[171] Id. at 8.

may have a skewed sense of what is just, and if allowed execute vengeance on their own, their solution may be out of proportion to the wrong suffered.[172]

Some victims are unable or unwilling to take justice in their own hands and an injury may grow in their memory until it is far out of proportion to what actually happened. An avalanche of calamity is the likely result. Victims generally become victimizers because unresolved injuries surface in their relationships with other persons in the community. Whether originally considered large or small, self-executed vengeance or harbored injury has the same cyclical effect. Injuries grow exponentially resulting in anarchy or destruction on a large scale.[173] While it has not been practical to eliminate injuries between people, it has been practical and beneficial to rectify them.

In the beginning, injuries were to be rectified voluntarily and fairly by people responsive to their conscience. Through conscience, one was to act in such a fashion to avoid injuring another and to remedy a situation if injury to another did occur--thereby restoring a right relationship between the people. If conscience was not self-exercised it could be externally induced through peer pressure, human mortality, and the ability of earth to respond favorably to those who do good and against those that do evil.[174]

However, the violent refused to be responsive to their conscience. So, as a solution to this situation, government was established as a further external supplement to coerce wrongdoers to fulfill their obligations in the restoration process. It was to compel a wrongdoer to render to

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[172] Albert W. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 **Harv. L. Rev.** 1808 (1986).

[173] Spence, supra note 23 at 24, 89, 90; see **Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in America** 206, 272 (1976); see also Wayne D. Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 **Vand. L. Rev.** 1295, 1359 (1978).

[174] To induce is to influence, not to coerce.

another what is due.[175] This is justice.[176] However, because of its coercive power, its authority was limited to providing only certain remedies for only certain injuries[177] that, if not voluntarily resolved, would result in chaos in society.[178]

This system allowed those who were peaceful and accountable for their actions to prosper and those that weren't, didn't. Peaceful people accumulated wealth and power and it was dispersed upon death to those people who were, due to the family relationship, more likely to use it in a similar fashion.

The resolution of disputes requires right remedies. The remedy should fit the wrong and courts should award remedies other than money more readily--such as activities that specifically remedy the injury caused and restore the parties. The injuror should be strictly liable to restore the injured.[179] The goal to be pursued is the restoration of the injured to a position as close as possible as they were in before the injury occurred.[180] But any activity focused on the wrongdoer (death, flogging, etc.) should be based upon culpable intent.

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[175] Spence, supra note 23 at 101.

[176] Id. at 6.

[177] The authority and execution of the governmental mechanism is limited to those acts which are injurious to an actual person in a distinct and palpable way. To provide a remedy on behalf of a non-entity such as "the people," "society" or "the state" is one of the most inane aristocratic and tyrannical concepts. See also De Tocqueville, supra note 34 at 478. The state has no interests outside of the rights of individuals. **The Federalist** No. 51, at 321-22 (J. Madison); accord 1 Farrand, supra note 21 at 421-22 (remarks of Madison).

[178] Alschuler, supra note 159 at 1808, 1809.

[179] Douglas H. Cook, Negligence or Strict Liability? A Study in Biblical Tort Law, 13 **Whittier L. Rev.** 1 (1993). Affirmative defenses to liability would be available such as self-defense or consent.

[180] Strick, supra note 71 at 222.

Cases would be kept open until the people are restored. The remedy should be applied as the costs are incurred. The court's propensity to consider a dispute resolved with one decision in the interest of disposing of a case should end. Merger, bar, and issue preclusion (collateral estoppel) should be a theories of the past.

Regardless of whether the violation is a contract or tort, the remedy would be a minimum of two times the damage done to the victim. The more egregious the act and the more unwilling the perpetrator is or has been to resolve the issue, the higher multiplier used. The base damage award (before a multiplier is used) would include interest from the date of injury.

Once the decision of the court is carried out, there would not be a record or title (of ex convict, for instance) to dog a person. This only exacerbates the restoration of a person who committed a wrong. The appropriate remedy for murder, kidnapping, incest, and rape is death. The remedy is consistent with the wrongful act. Furthermore, those acts are so egregious that the people committing them have demonstrated that they are devoid of conscience or are unwilling to live by it therefore it is highly likely that persons committing those acts will continue to be violent people.[181] Prison would rarely be an appropriate remedy and especially not for situations where one has unintentionally killed another. The people involved are far better served when the

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[181] Even though the reason for using death as the remedy for certain crimes is because the remedy is appropriate for the act committed, it does have positive subsidiary effects. For instance, three criminals modified their conduct because "real guns were too dangerous, because if someone were killed in the commission of the robberies, they would all receive the death penalty." One of the participants said, "I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber." Frank G. Carrington, Deterence, Death, and the Victims of Crime: A Common Sense Approach, 35 **Vand. L. Rev.** 587, 598 (1982).

wrongdoer is active in the restoration process.[182] False witnesses would receive the same judgment the defendant did, or would have received, if found guilty.

People would be given the opportunity to choose flogging in the place of a prison sentence. Flogging might be particularly appropriate when an individual is not making a good faith effort to comply with the directives of the court or in situations when taking the person's life would not be appropriate but where the impartial execution of vengeance should be part of the restoration process.

This system would ensure freedom for the individual and the family. It also provides the best protection for minorities. Protection from conscienceless individuals is provided by unrestricted access to a dispute resolution system with coercive power and a jury of one's peers which decides both fact and law. This decentralized system provides the best assurance of freedom for all. Thomas Jefferson said, "I know of no safer depository of the ultimate powers of the society but the people themselves."[183]

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[182] Id. at 221.

[183] Strick, supra note 71 at 226.