

their problem in the larger national landscape. Perhaps we overdosed on national commissions in the era of Warren and Katzenbach and Kerner and Eisenhower, perhaps we tended to overstate the acuteness of the problems put before commission bodies and to call for too many resources and too much change to remedy these selected national problems. But in a political system and public consciousness that find problems easy to ignore, sustained attention on important chronic problems will often serve the public good.

A Dangerous Thought Experiment

One interesting test of the value and limits of commissions of inquiry as a public policy tool is a “thought experiment” along the lines suggested by Walter Cronkite. Imagine that President Clinton had appointed a national commission on drug control in 1997 (prudence suggests the year after rather than the year before a presidential election). What sorts of questions might such a body have asked? What sorts of research might have emerged? What types of policy changes might this commission have considered and recommended? What short-range and longer-range policy changes might have occurred in its wake?

Like many thought experiments, there is considerable room for different assumptions and presumed effects in the future that we are asked to imagine in my Cronkite

commission experiment. And it is easy to use a mythical national commission as a magical mechanism that will change public prejudices and overcome persistent political logjams. Walter Cronkite seemed to be hoping for some such magical transformation with his televised plea in 1995.

My own view of the impact of our imaginary drug commission is much less optimistic than Cronkite’s but still leaves ample room to see a National Commission on Drug Control as a public benefit well worth its modest costs. It could settle some factual questions, resolve disagreements about costs and outcome of public programs, and clarify difficult choices. It could outline the nature of the drug problems we had best learn to live with and perhaps identify other problems that are not inherently part of government’s ongoing involvement in drugs.

It could do many of the modest but important things that the Wickersham staff and commissioners accomplished in 1931. And that, in my judgment, would be a considerable improvement on the public relations puffery that executive government now manufactures. The commission of inquiry model that Wickersham brought to American crime and criminal justice probably served the public interest far better than some of its recent alternatives. If so, this conference is well-timed for serious students of the American future. ■

David Ray Papke

Exploring Socio-Legal Dominance in Context: An Approach to American Legal History

Professor David Papke of Marquette University Law School traveled with his family to Uganda last summer. He spoke by invitation at Makerere University, Stawa University, and the Law Development Centre in Kampala. This is an abridged version of his speech at Stawa.

One of the courses I teach annually at Marquette University Law School is American Legal History, and I was asked if I would discuss that course today. It’s a semester-long course, so I really couldn’t summarize it in just an hour or so. But I think I can describe how I approach the subject matter of American legal history.

My approach rests on the assumption that law does not somehow stand above and apart from social life.

Law, in my opinion, is not self-contained, not self-generating, and not even distinct as a cultural construct. Hence, I teach legal history as intertwined with social history. I try to examine how law grows out of a given social context and also how law contributes to that context. Particularly interesting to me are questions involving the relationship of law and an era’s dominant interests. I try in my course to explore socio-legal dominance in context.

I have three illustrations of this approach, but let me suggest at the outset what justifies the approach. If we think about how law interacted with social life in the past, I believe, we can better understand law and theorize about law in the present. I am also persuaded that if we articulate the relationship between law and dominant groups in the



David Papke in Uganda.

past, we can better grasp how law relates to comparable contemporary groups. This is admittedly a critically minded approach to legal history. As I consider law's place in social context, I am consciously undermining any thought that law is autonomous, that it has a truth in itself. My interrogating, judging, and condemning law's relationships to power in the past are designed to engender a critique of law's relationships to power in the present.

Law and the Displacement of the Native People

My first illustration involves law and the displacement of the Native People, a process that dates to the colonial period. European countries colonized what is today the eastern seaboard of the United States from roughly the 1590s until the end of the Revolutionary War in 1781—a period of almost 200 years. Native People preceded, interacted with, and fought against the European colonists. North America was not “empty” and waiting to be filled up by people with white skins. An estimated 5 to 7 million Native People lived in what would become the United States, and hundreds of tribal cultures and languages were alive and vibrant.

Many of the Native People on the eastern seaboard were decimated by disease carried by the Europeans and also in wars with the Europeans. An estimated 90 percent of the Native People on Cape Cod, to cite just one example, died in a chicken pox epidemic in the early 1600s. Europeans' wars against assorted tribal groups, meanwhile, started literally in the first decade of settlement and continued until American independence, at which point Americans became the war makers. Europeans often justified their war making on the grounds that the Native People were heathens who resisted the true Christian God.

Disease and war could be discussed at much greater length, but law was also extremely important in the

displacement of the Native People. Indeed, I'd argue that law was as important as disease or war in this displacement. There were a half-dozen European colonizers on the eastern seaboard—the Dutch, French, Spaniards, Swedes, etc.—but early in the period the colonies of those Euro-

peans powers were taken over by the English Crown. As a result, the law was, for the most part, English law.

This “law of displacement” begins with charters. The English Crown was prepared to grant legal charters to Englishmen for parts of North America. The charters were of different kinds, but suffice it to say that the Crown authorized English individuals, groups, or trading companies to take control of parts of North America. The same approach, I might mention in passing, had been used in Ireland in the 1500s. Both the Native People of North America and the Irish a century earlier were taken by the English to be nomadic, uncivilized, and lacking the type of government that could claim and control the lands. This was an important argument for the English: Since the Native People did not have governments that could “subdue” the land, the Native People had only a “natural right” to the land. This was not the equivalent of a legally protectable “civil right.”

Beyond the legal charters, English property law was crucial in the displacement of the Native People. The law devoted to the land—to so-called “real property”—was perhaps the single most developed part of the English common law. Landowners were said to own individual plots of land from the center of the earth to the heavens. Owners of individual plots were also said to have a “bundle of rights” that went along with their land. They had the right to enjoy and use their land and to exclude people they did not want on their land. Landowners could also control, convey, sell, or rent their lands as they saw fit.

In the North American colonies, the English Crown granted charters, and then the holders of the charters gave or sold small parts of the land to individual Englishmen. Soon, almost all of the land was divided up and owned by individual people, and this might literally have been incomprehensible to many of the Native



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People. Most did not share the English sense of private ownership of the land. They might recognize hunting and farming rights for an area of land for a particular tribe, but most of the Native People did not subscribe to individual or family ownership of particular plots of land. Individual Native People did not imagine that they could buy and sell land, because they did not think of the land as something they could own individually. Indeed, many saw the lands and the wild animals—nature—as their god. How do you sell pieces of god?

Law and American Slavery

My second illustration of law's relationship to power in context involves American slavery. When Americans think about slavery, the “slavery to freedom” narrative often springs to mind, and law plays a positive, almost heroic role in that narrative. To be sure, President Lincoln did issue the Emancipation Proclamation during the Civil War, and the Congress did end slavery through the Thirteenth Amendment to the Constitution. However, we should also recognize the relationship of law to the “slave society” that preceded the Civil War. In the decades preceding the Civil War, this “slave society” stretched across the American South from the Atlantic seaboard all the way to Texas, and throughout this large region, law was coordinated with and supportive of the institution of slavery.

The “slave society” had as many laws, lawyers, and courts as any other part of the country. The “slave society” was certainly not “lawless,” much less anarchic. What's more, the American South subscribed as much to a rule of law ideology as did other parts of the country. At least in theory, law was supposed to be neutral, and people were supposed to use it in objective and fair ways to solve problems and resolve disputes. The chief problem is that law in various ways served power in the “slave society” and especially the interests of the slave owners.

As in the displacement of the Native People, property law was particularly important. There have been many nations and tribal groups with slaves in world history, but slavery has usually been understood as a

status or condition. In the American South, meanwhile, slaves were defined under the law as private property owned by non-slaves. In addition, the law's definition of slaves as property changed over time. Early on, slaves were defined as real property, and they were seen as connected to the land almost like a barn or a tool shed. Over time, though, the southern states came to define slaves as chattel or personal property, something comparable to tools or equipment. The change was made because personal property was easier to legally transfer in the marketplace than was real property. By the time of the American Civil War in the 1860s, the selling of slaves, buoyed as it was by the law, had become the South's second-largest business, second only to the production and sale of agricultural crops, especially cotton.

Beyond considerations of property law, allow me to mention the law of civil rights and liberties. All of the slave states had constitutions, and they made clear that the slaves had no fundamental rights and liberties. Furthermore, slaves for the most part did not have what we sometimes refer to as “secondary rights,” that is, rights related to such things as marriage, procreation, parenting, education, and privacy.

The denial of these secondary rights helped make it possible to sell and to control the slaves. So, for example, while slaves in some areas developed an informal marriage ceremony that took the form of two slaves jumping over a broom in front of witnesses, this ceremony went unrecognized by the state. Among other things, allowing slaves to marry would have complicated the sale of slaves in the marketplace, especially if children were involved. Slaves were also denied the secondary right of education, especially as the Civil War approached. In Georgia it was even a crime to teach a slave to read or write. The ability to read and write, it might have occurred to slave owners, could fuel rebelliousness and stir revolt. With the slave population burgeoning and exceeding the white population in some areas, the South was, in historian Lawrence Friedman's terms, a “kingdom of fear.” The denial of secondary rights helped make the situation less frightening for those in power.

Law and American Industrialism

My third and final illustration of exploring socio-legal dominance in context involves American industrialism. My focus here is on the decades following the Civil War. There had been some industrial development earlier (e.g., the building of grain and textile mills on the rivers of the Northeast in the 1820s and 1830s), but the greatest period of industrialization occurred in the decades following the Civil War. According to the historian Charles Beard, “With a stride that astonished statisticians, the conquering hosts of business enterprise swept over the continent; twenty-five years after the death of Lincoln, America had become . . . the first manufacturing nation of the world.”

By this point in history, the United States stretched from one ocean to another, and abundant resources—coal, timber, iron ore, etc.—facilitated industrialization. Then, too, there was an immense internal market. Industrial goods could be not only produced in the United States but also sold there. What’s more—and by this point in my lecture you won’t be surprised to hear this—law also played a large role in advancing industrialization. Law helped to make industrialization more viable, and this over time generated huge profits for the large industrial capitalists.

The first thing to note is the “corporation,” which is, among other things, a legal construct. A corporation has advantages over traditional business partnerships. It is more permanent than a partnership, and, unlike a partnership, a corporation shields founders and shareholders from any personal liability for the corporation’s debts and losses. The corporation is also an extremely effective legal construct for attracting investors and aggregating financing for large-scale ventures.

Corporations existed in the first half of the nineteenth century, but they were different from what evolved. The earliest corporations tended to have a public purpose of some sort—bridges, toll roads, even railroads; they almost seemed sometimes like agencies of state governments. This changed in the final decades of the nineteenth century, as incorporation came to be almost exclusively a profit-seeking strategy. Those who incorporated saw the step as more of a right than a privilege, and some states set up special licensing agencies to move things along more quickly. By 1900, the corporate legal form was dominant in American industry, and corporations produced fully two-thirds of the nation’s manufactured goods.



John Papke

Giraffes block the road on another part of Professor Papke’s trip.

Law also played a major role in structuring the relationship between the corporations and those corporations’ workers—in particular, what is often called “organized labor.” By the end of the nineteenth century, state governments had ceased to criminalize organized labor, and organized labor was growing increasingly able to mount protests, strikes, and boycotts, much to the dismay of the corporations. The corporations, as a result, turned to the civil courts and to the law of injunctions to thwart organized labor. The corporations could and did ask courts to enjoin unions when they went on strike or organized a boycott. One legal historian has estimated that between 1880 and 1930 courts issued as many as 1,800 injunctions against organized labor. Another legal historian has said that that number is much too low and that, really, it is closer to 4,300. In this context, the injunction against a labor organization became an effective tool to use against workers, greatly enhancing corporate power in the relationship between management and labor. When in 1894 the Pullman Company prevailed against the striking American Railway Union, union president Eugene Debs, reflecting on the various court orders and injunctions that had been issued, said, “The men went back to work, and the ranks were broken, and the strike was broken up by the Federal courts of the United States.”

Conclusion

Each of the three narratives I have shared continues into the present. History is the engine of the present, and legal history is the engine of contemporary law. In particular, the Native People who have not blended into the general population live on impoverished reservations, with the largest of those reservations being



located in the western part of the United States. Personally, I think of the Native People as conquered and living under the thumb of their conquerors, and I remind you of the important role law played in this.

As for the slaves, they were freed by the Civil War and by amendments to the United States Constitution in the 1860s, and today the descendants of the slaves—known as Negroes, then as blacks, then in the present as African Americans—have the rights and privileges of white citizens. A man who identifies as African American is our president. But still, the average African American is much poorer than the average white American, and the majority of African Americans live in older, rundown parts of the cities. Political equality, in other words, has not brought socioeconomic equality along with it. One of the keys to this, even in the present, is that African Americans were once defined by the law as property and also subjugated by law.

Some factories, meanwhile, are still operating, but the overall scene is quite different from what it once was. Much of American industry has closed down or moved to foreign countries where labor is cheap, and the American economy is now more of a service

economy than a manufacturing economy. Organized labor is in decline, and membership in unions is much smaller than in the past. Starting in the days when industrial capitalism was at its peak, workers were never able to acquire equal bargaining power. Disadvantaged by this inequality, the largest unions rarely spoke of the struggle between “labor” and “capital” and focused instead on more modest goals such as incrementally higher wages, better job security, improved working conditions, and collective bargaining. I assign law a major role in these developments.

I’ve tried with my three illustrations to demonstrate how one might approach American legal history. I’ve cast my approach as an exploration of socio-legal dominance in context. In employing this approach, I try to avoid being unduly reductive, and I disdain claims and even implications of determinism. But still, I insist that (1) law is a product of and contributor to a given context, (2) law tends to especially aid those with power, and (3) law, in general, is best conceptualized as socio-legal in nature. If we are able to grasp these matters while considering the past, we are more likely to appreciate them in the present. ■

Joseph D. Kearney

Remarks at the Investiture of Circuit Judge Lindsey Grady

On August 17, 2012, Dean Joseph D. Kearney spoke at the investiture of Lindsey Grady, L’00, as a judge of the Milwaukee County Circuit Court. The court session occurred in the ceremonial courtroom of the Milwaukee County Courthouse.



Liam and Lucy Grady have the right spirit at the judicial investiture of their mother, Lindsey Grady (Chief Judge Jeffrey A. Kremers is in the background).

Justice Bradley, Chief Judge Kremers, and May It Please the Court. When Lindsey Grady (or Lindsey Canonie, as she then was) and I first encountered one another, it is hard to say who was the more inexperienced—or, if I may be candid, the more ignorant. This was the spring of 1998. On Lindsey’s side of the argument, if you will, she was a first-year law student, enrolled in civil procedure. That makes for a rather powerful case: a first-year law student, let us stipulate, does not know much. But my own claim is also strong: I had never taught