

Immunity and Prescription

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The *Third Restatement's* treatment of diplomatic and organizational immunities, and of extradition law,¹ committed to this reviewer, reveals Professor Henkin's characteristic craftsmanship. His scholarship and erudition will make the *Restatement of Foreign Relations Law* a signal aid to judges and practitioners. Yet the critical reader must raise the question of what a Restatement should seek to accomplish beyond the scope of an ordinary hornbook or practitioner's text.

The project of restating American law first flowered at the hand of Joseph Story, the original Dane Professor of Law at Harvard and exegete for John Marshall on the Supreme Court. In the early Republic, federalism menaced as much as it promised, economically and intellectually. Commerce can be as harshly taxed by the parochialism of disparate legal systems as by any open tariff, requiring merchants who trade among states to master costly detail. Localism may dampen the hope of cultivating law as a liberal art and as a vocabulary for a common politics. Prompted by the dangers of centrifugal federalism, Story's comparative law treatises made an early protest against isolation. Story drew on great English judges of the common law and law merchant, civilians, and writers of the law of nations, as a frame for American law in commercial subjects such as partnership, agency, bills of exchange, promissory notes, and, to reconcile all, conflict of laws.² As capstone, *Swift v. Tyson*³

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, chs. 6, 7B (1987) [hereinafter RESTATEMENT (THIRD)].

2. Story's ambition for a unified American commercial law that would critically assess past practice sets his work apart from his near contemporaries. Zephaniah Swift confined his 1795 "system" to the law of Connecticut, though he had subscribers in most other states. James Kent's *Commentaries on American Law*, published from 1826 to 1830, did not seek to rival the detailed mapping of commercial practice and the muster of comparative authority that so intoxicated Story. Compare, for example, Kent's short essay on agency, lecture 41 of the *Commentaries*, with Story's 1839 volume.

Nathan Dane, a Massachusetts lawyer once famed for his *General Abridgment and Digest of American Law*, issued from 1823 to 1829, helped inspire Story's concern for a unified law, as well as funding his Harvard chair. Unintelligible law was dangerous to liberty, warned Dane, adding with historical largesse that Peter the Great had "soon understood every thing in the civilized parts of Europe, but the laws; and because he could not understand them, he never ceased to prefer the despotism of Turkey." The "evil to be feared" in America was "that so many sovereign legislatures, and so many Supreme courts, will produce too much law, and in too great variety . . ." To Dane, like Story, the "true course" was "plain, that is, by degrees, to make our laws more uniform and national, especially where there is nothing to make them

promised that coherent jurisprudence in a country of separate state legal systems might be advanced by an enlightened federal commercial bar, administering a federal common law. In *Swift's* world of intellectual nationalism, though there would be no automatic preemption of state law in commerce among the states, federal courts would offer litigants in diversity an alternative forum and a federal gloss on the common law.

This annointment of a federal common law vanguard, leading the states into the cosmopolitan world of *lex mercatoria* and universal jurisprudence, did not survive *Erie Railroad Co. v. Tompkins*,⁴ but by then the American Law Institute had been founded to take its place.⁵ The revived idea for a restatement of American law is usually credited to Wesley Newcomb Hohfeld, who was Southmayd Professor at Yale. In a 1914 address to the Association of American Law Schools, Hohfeld lamented "the complexities, the delays, the miscarriages of justice, the hobbles to business, and, in general, the enormous economic and social waste that necessarily result from having approximately fifty diverging legal systems with which to contend."⁶ Hohfeld intensely admired the 1896 German civil code, drafted over a 22-year period. The *Bürgerliches Gesetzbuch* showed "what may be done by great jurists" in unifying the law.⁷ But stating the law was not work for amateurs. For example, the

otherwise, but local feelings and prejudices. We have in the common and federal law, the materials of national uniformity . . ." 1 N. DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW xiv-xv (1823). But Dane lacked Story's talent at composition, and Story's ambition to bring together the law of England, Europe, and America.

Story began his treatise career, after two early formbooks on pleading in civil actions, by annotating older English works with American cases. He adapted Chitty on bills of exchange, Abbott on the law of shipping, and Lawes on assumpsit. Story's first major treatise, *Commentaries on the Law of Bailments, with Illustrations from the Civil and Foreign Law*, published in 1832, was followed in quick succession by the magisterial *Commentaries on the Constitution of the United States* (1833), and commentaries on the conflict of laws (1834), equity jurisprudence (1836), equity pleadings (1838), agency (1839), partnership (1841), bills of exchange (1843), and promissory notes (1845).

The scattering of Story's library of continental and English writers at the hands of the auction house of Phillips and Sampson following his death may be taken as the moment of passing of a scholastic ideal in American law, revived perhaps with James Brown Scott in the early 1900's and, for the nonce, lost again.

3. 41 U.S. 1 (1842).

4. 304 U.S. 64 (1938).

5. One also suspects that by the time of Brandeis' decision in *Erie*, New Deal ambitions made it clear that the power of the federal fisc would work toward law uniformity in the long run.

6. Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, in PROCEEDINGS OF THE FOURTEENTH ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 76, 133 (1914) [hereinafter 1914 AALS PROCEEDINGS], also reprinted in W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 332, 379 (1923).

7. 1914 AALS PROCEEDINGS, *supra* note 6, at 89.

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New York legislature's statutory revision of real property law in 1830 had changed the law "quite disastrously." In an "era of conscious struggle for change," counseled Hohfeld, the possible rashness of legislators must be channeled by sage advice, through

the gradual building up of a class of university jurists—legal pathologists and surgeons, we might call them—who shall have a far greater share and influence than at present in prescribing for our ills in connection with the constructive science and art of legislation.⁸

Hohfeld's own rather alarming proposals to unify American law through constitutional amendment and to add a species of law lords to state legislatures⁹ were wisely ignored. But University of Wisconsin Dean Harry Richards and Professor Eugene Gilmore, serving as AALS Presidents in 1915 and 1920, heard Hohfeld's call and proposed an academic center or institute to study the law "scientifically." Joseph Beale of Harvard, engaged as architect, recommended adding the advice and authority of other estates.¹⁰ A triarchic founding meeting of eminent *Professoren*, judges, and practitioners was held in 1923 at the Continental Memorial Hall in Washington, D.C., Elihu Root presiding and Holmes and Taft in attendance, to secure collaboration of the three orders for this "constructive scientific juristic work."¹¹ With the Carnegie Corporation as stage angel, the American Law Institute was begun, enlisting the trio

8. *Id.* at 88, 89.

9. *Id.* at 105, 113-14, 132-33.

10. PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 115, 116 (1921). Joseph Beale's own address at the earlier 1914 convocation remains good reading and cures any belief that natural law succumbed to positivism in a single century. Nature and reason are now called science, but the faith is the same: freed from localism, the study of social practice will discern normative principles to aid men's reconciliation. American teachers of law should seek the heart of the common law not as a "mere[] empirical study" as in England, but as "surely a philosophical system, a body of scientific principle . . . which requires systematic statement in order that progress and reform may be possible." Beale's hopes for a fundamental jurisprudence that would "analyse and formally state the interests which it is the function of law to protect and the mutual relations of these interests" will resound for those familiar with the later work of Harold Lasswell and Myres McDougal. Beale, *The Necessity for A Study of Legal System*, in 1914 AALS PROCEEDINGS, *supra* note 6, at 31, 38, 40.

11. *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 AM. L. INST. PROC. 34-35 (1923) [hereinafter *1923 Report*]. The ALI's founding is discussed in the 1923 Report and in Lewis, *History of the American Law Institute and the First Restatement of the Law*, in AMERICAN LAW INSTITUTE, *RESTATEMENT IN THE COURTS* (1945). In tracing the parenthood of a unified American law, one is bound to note that the Uniform State Law Commissioners had been at work since 1889. Uniform statutes on sales and commercial paper were widely adopted by the time of the ALI's founding. Eugene Gilmore was Secretary to the National Conference of Commissioners on Uniform State Laws in 1919-20, when he put forward the proposal for an academic law institute on behalf of the AALS.

of Williston on Contracts, Beale on Conflicts, and Bohlen on Torts, as the first Reporters for a "Restatement of the Law."

Rather than *Swift's* lure of choice-of-forum, the *Restatements* were to convert purely by persuasion, providing state courts and legislatures with the better view of the common law, attested by an eminent assembly levied from practice, court, and university. By including the corporate and litigating bars in its deliberations, the American Law Institute could act as a guild jury on commercial practice—coining recommendations mindful of tradition, fair in light of the accepted ways of the craft, and practical in real life. The 1923 founders preferred common law to codification, believing, as would have pleased John Dewey, that law needed continuing adaptation. Courts should be able to modify past practice, and make exceptions to avoid injustice. The *Restatements* were not to be rules, but "principles", gaining influence by "sympathetic usage" and "the considerate judgment of the craftsmen of the profession."¹² The 1923 founders also had the rather striking idea that *Restatements* could be adopted by state legislators as legislative declarations of principle, rather than statutory rules, entitled only to the same weight as the *ratio* of case precedent.¹³ But even without legislative endorsement, the *Restatements* gained an authority that would have been elusive for any lone scholar publishing from his garret: balancing scholarship and prudence, decanting the "state of the law" from reported decisions, and adding the elders' view of what was best, by graceful elision of "is" and "ought", converting one to the other.

This project made great sense for areas of private law, such as contracts, torts, property, agency, trusts, conflicts, restitution and judgments. It is more curious, however, to conceive a *Restatement of Foreign Relations Law*. Victory over state localism in a federal structure is not the end in view. In recent decades at least, the states have asserted few constitutional perogatives touching foreign relations.¹⁴ Nor do publicists

12. Speech of John W. Davis, Feb. 23, 1923, in *An Account of the Proceedings of the Organization of the Institute*, 1 AM. L. INST. PROC. 113 (1923).

13. *1923 Report*, *supra* note 11, at 27.

14. The dominance of the federal government in foreign relations was not always clear-cut in the early nineteenth century. For example, in the settlement of the Northeastern border in the Webster-Ashburton Treaty negotiations, state commissioners from Maine and Massachusetts were part of the American treaty delegation, under the aegis of Article IV, Section 3 of the Constitution. The arrangement drove Alexander Baring, Lord Ashburton, to complain that compromise was difficult when one of the parties is "a jealous, arrogant, democratic Body." The Maine legislature, said Ashburton, is "wild and uncertain," and "unbounded Democracy is always best propitiated by violent measures." Lord Ashburton to Lord Aberdeen, April 25, 1842, in 3 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES: CANADIAN RELATIONS 1784-1860 706 (W. Manning ed. 1943). So, too, the states were recognized in early extradition proceedings as having a substantial and independent police interest in exclud-

any longer seek to persuade national sovereigns that they must conform their will to a law of reason or nature, established apart from the practice and consent of nation-states. The *Third Restatement* takes a positivist view in which international law is established by will and consent, not derived from any transcendent principle of nature, reason, science, or divinity.¹⁵ The practicality that the *Restatements* sought in private law is already part of the ethos of modern international law scholarship. The customary and positive law of nations has developed in the last two centuries on the assumption that idealism must be tempered with the demands of practice, that fruitful cooperation is best encouraged by realistic prescription. As Chief Justice Tilghman of the Pennsylvania Supreme Court said in 1823, struggling with Grotius' rule on extradition, theory "is a beautiful thing, but attended in practice by many difficulties."¹⁶ The indispensable volumes of Moore, Hackworth, and White-man, the yearbooks of the International Law Commission, the arcanelly indexed documents of the U.N. General Assembly, and the other innumerable sources for state practice and state aspiration, are testimony that international lawyers have not recently supposed the law of nations to be cast from an axiomatic system of Cartesian simplicity.

Most fundamentally, foreign relations law is difficult to "restate" because the legal notables of the academy, courthouse and bar do not dominate prescription. In torts or contracts, at least in the days before the

ing foreign fugitives. See *Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 568-69 (1840); see also *id.* at 614 (opinion of Justice Baldwin). The recent quarrels over the provision of local government services to aliens show that local interests have not yet left an unchallenged field for the operation of federal power. See *Plyler v. Doe*, 457 U.S. 202 (1982).

15. See RESTATEMENT (THIRD) ch. 1, introductory note; *id.* § 102 & comment. It remains a mystery, in a positivist view, how customary international law is ever to be refined out of practice. Customary law is said to require general practice and *opinio juris sive necessitatis*, the belief of states that the practice is legally obliging. See RESTATEMENT (THIRD) § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); see also Statute of the International Court of Justice, art. 38(1)(b). But where, said the chicken to the egg, is that "sense of legal obligation" ever to come from? *Opinio juris* is left as self-referential. *Opinio juris* is a coherent requirement only if reformulated as a belief that the practice should be *made* legally obliging, a kind of decentralized legislative tally, or if a modicum of natural law theory is permitted as its basis.

The modern positivist creed, distinguishing legal from moral duty, reigns sufficiently strong that even privately professing naturalists may be inclined to disguise their belief behind the psychology of state actors. Naturalism may also linger in accepting as a source of international law, the "[g]eneral principles common to the major legal systems . . ." RESTATEMENT (THIRD) § 102(4); see also Statute of the International Court of Justice, art. 38(1)(c) ("the general principles of law recognized by civilized nations"). Universal recognition of a principle may be valued as a token of consent to its use, but also as evidence of a foundation beyond consent. As Locke's judicious Mr. Hooker declaimed, "[T]hat which all men have at all times learned, Nature herself must needs have taught . . ." 1 RICHARD HOOKER, *THE LAWS OF THE ECCLESIASTICAL POLITY* 172 (1592) (Oxford ed. 1850). Consent may be evidentiary, as well as justificatory.

16. *Commonwealth ex rel. Short v. Deacon*, 10 Serg. & Rawle 125, 130 (Penn. 1823).

stakes were so high, prescription was more willingly left to the lawyers. But in the world of international force and power, where the maxim *salus populi suprema lex est* still holds some sway, the ratiocination of lawyers may be only earnest prayer. The "foreign relations law" confronting an American lawyer or judge is an admixture of constitutional law concerning the relative power of the President and Congress, statutory law, bilateral and multilateral treaty obligations—as well as customary international law, and general principles of international law acted upon by the Executive or transformed into federal common law by courts in their decision-making. Prescriptive powers belong as much to politicians and diplomats as to judges, in creating international practice and in competing for control of foreign policy in the free zone between the President and Congress, so largely nonjusticiable. Prescriptive powers also reside in foreign nations, as they contribute to multilateral and bilateral instruments and to the practice that may become customary law. The triarchy of school, bar, and bench has entered the realm of other sovereigns.

With less power to make law, the *Restatement of Foreign Relations Law* has retreated in part to the old-fashioned task of law reporting. Computers and West should not purge our memory of the crucial function of older substantive treatises. These were valued not only for suggestions on what the law should be, but—in a world where practitioners would not have ready means of collecting the cases themselves—what the law "was." With international issues abounding in cities that may lack a depository of U.N. documents or a university international law library, the *Restatement of Foreign Relations Law* has the considerable virtue of making the law findable.

Congress' recent legislative handiwork in foreign relations is profuse and it is blessing just to find it gathered in one place. In diplomatic relations, for example, the Vienna Convention on Diplomatic Relations was finally ratified by the United States in 1972,¹⁷ and was implemented in the Diplomatic Relations Act of 1978¹⁸ and in the 1982 Foreign Missions Act.¹⁹ American consular relations came under the governance of the Vienna Convention on Consular Relations in 1969.²⁰ The work at Vienna was supplemented by the Convention on the Prevention and Pun-

17. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force with respect to United States on Dec. 13, 1972).

18. 92 Stat. 808 (1978) (codified at 22 U.S.C. §§ 254a-254e (1982)).

19. 96 Stat. 283 (1982), as amended 99 Stat. 418 (1985) (codified at 22 U.S.C. §§ 4301-4316 (1982 & Supp. 1986)).

20. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force with respect to United States in 1969).

ishment of Crimes Against Internationally Protected Persons,²¹ implemented in U.S. law by new criminal statutes.²² The immunity of foreign nations as defendants has been regularized in the 1976 Foreign Sovereign Immunities Act,²³ recasting the landscape for the International Organizations Immunities Act.²⁴

The *Restatement* also acts to circumvent parochialism in legal education. The intellectual worlds of domestic lawyers and international lawyers have been so cabined in American law school training and at the bar, that even such things as the relative standing of international law publicists may be hard for a domestic judge to fathom. The comfort of the American Law Institute's moniker provides considerable relief. International law's pluralist methods of law-making and varied sources of law also threaten to be unfamiliar. The interplay of treaty and customary law, the weight to be given to comity, unilateral declarations, or other forms of state practice, are difficult to chart for lawyers used to hierarchical systems of legislation and dispute resolution. (Surely I am not the first to find that baptism in international waters recolors the view of domestic lawmaking as well. Customary law is spoken, as M. Jourdain might allow, on occasions we never imagined.)

But what makes a *Restatement of Foreign Relations Law* ultimately a thwarting task is the decision to avoid legislative recommendation. The pressing activity of legislators undoubtedly demands caution: restatements may be ignored if they are too soon overtaken by a legislative tide. Still, a restatement as envisioned by Hohfeld would address itself to the full range of those who have prescriptive power. To Hohfeld, democracy's unruly horse was to be guided by the advice of cavaliers even in the keenest areas of the fight. Scientific jurists would address legislators as well as judges. Hohfeld observed in his *vade mecum*, perhaps with some alarm at measures of grass roots democracy,

legislation has become the chief agency in our legal growth . . . I do not think the present tendency will prove unfortunate in the end, provided that we and all others who have a heavy responsibility in the matter do all that is possible, directly and indirectly, to secure the *right kind* of legislation.²⁵

21. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (entered into force with respect to United States in 1977).

22. 18 U.S.C. §§ 11, 112, 970, 1116, 1201 (1982); 31 C.F.R. 13.1-13.8 (1988).

23. 90 Stat. 2891 (1976) (*codified at* 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-1611 (1982)).

24. 59 Stat. 669 (1945) (*codified at* 22 U.S.C. §§ 288-288f (1982)).

25. Hohfeld, *supra* note 6, at 88 (emphasis in original).

The 1923 Report from the founding meeting of the ALI took a quite different view, preferring common law method to statute, advising that only the quieter areas of the law should be sought. Said the 1923 Report,

Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth, in any restatement of the law such as we have in mind.²⁶

But the 1923 Report also preached against attempting to "restate" international law, on the ground that the bar and academy lacked the necessary powers of persuasion.²⁷ Having taken the chance, it pitieth us to decline address to the full range of those with prescriptive power. The present *Restatement of Foreign Relations Law* promises to set out international standards separately, so that differences from American practice are clear, but one misses advice on what American law should be, and on what standards the United States might propose for multilateral acceptance. The roundheads of the Hill and Foggy Bottom might even welcome the counsel.

Perhaps a few words will be permitted the reviewer about the underlying problems that the laws of immunity address. Whether domestic (legislative, executive, or judicial), or international (diplomatic, consular, head-of-state, sovereign, or organizational), the many forms of immunity reveal common failures of the law as a system of agreement and social control.²⁸ The limits of the law underlying the forms of immunity are at least three: cost, culture, and cunning.

Immunity recognizes the heavy weight of transaction costs in any application of the law—the out-of-pocket and opportunity costs from adjudication's long delays, its temporal and emotional distraction from other duties, disruption of relationships and public airing of confidential information, not to mention the cost of hiring gladiatorial talent. Immunity also recognizes our lack of confidence in interpreters who are outside shared interest or culture. The third limit in law is its incomplete ac-

26. *1923 Report*, *supra* note 11, at 15. One might have charged the 1923 founders with timidity, or more, in their disclaimer of any competence to address "changes in governmental organization," "the law pertaining to taxation," "advocacy of novel social legislation, such as old age or sickness pensions," or any "method of improving the relations between capital and labor." *Id.* at 16.

27. Said Elihu Root's committee, "The unsuitability of a subject for immediate treatment may come from a variety of causes. . . . it may not be in the power of the bar by a restatement, however good, to attain desirable results. Such a subject is international law." *Id.* at 44.

28. Another form of immunity is geographical. When a person is outside the territorial limits of a state, he may be immune in practice from the prescribing state's ability to have its own law applied. For instance, even where questioned conduct falls squarely within a foreign state's prescriptive jurisdiction, the principle that the courts of one nation will not apply the penal laws of another, may create a form of adjudicative and enforcement immunity.

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knowledge of our purposes, *unser gegenwille*, the unspoken intentions that we will not or cannot confess, but cannot disclaim in practice. Immunity exists in part to account for this "law of our members."²⁹

The regimes of immunity are constituted by choices in five matters:

(a) *the jurisdiction against which immunity is granted*. Do we only bar jurisdiction to adjudicate and enforce? Or also jurisdiction to prescribe?

(b) *the form of liability against which immunity is granted*. Criminal? Civil only?

(c) *the scope of activity immunized*. Private business as well as public duty? All acts occurring in connection with the performance of an office? Only acts properly part of the office?

(d) *duration of the immunity*. During tenure in office only, even if with grace periods before and after? So long as the offender remains outside the jurisdiction where the disputed conduct took place? Forever?

(e) *the role of the actor's mental state in defining the scope of immune activity*. Is it necessary or sufficient to have subjective good faith, an actual belief in the legality of conduct? Is reasonableness of belief necessary or sufficient? What if the actor believes his conduct is part of his official duties, but is mistaken?

Differences in immunity regimes might be explained by a single adequate theory of immunity, but in modern practice, one soon discovers that no single principle easily accounts for the many variations. The three traditional theories of justification for immunity, sometimes not clearly separated, are:

i) *The nature of sovereignty*. To either a positivist or natural lawyer, it would seem incompatible with the independent and equal sovereignty of nation-states for one state to legislate for another, or to punish an individual for carrying out an act which his state had a right to commit.³⁰ Older notions that sovereignty is God-given or sacred, or that an emissary of high rank is the personal delegate of a sovereign ruler, may also cast a state representative in sanctifying light; ideas of national dignity do the same.³¹

29. *Romans* 7:14-25.

30. One example, though not called immunity by name, is the separate regime of the law of war. This regime immunizes soldiers from the exercise of ordinary domestic criminal jurisdiction. The acts of war are not formed from soldiers' own intention; in legal gaze it is the sovereign acting. Only if the soldiers violate *jus in bello*, or arguably, if the state's resort to war is forbidden by *jus ad bellum* and the military actors are of high rank, will they become personally liable for homicidal acts.

31. *E.g.*, DIGEST OF JUSTINIAN 50.7.18 (A. Watson ed. 1985); CICERO, PHILIPPICS 8.8 (W. Ker ed. 1927); LIVY i.24 (B. Foster ed. 1919).

ii) *The limits of prescriptive and other jurisdiction.* Only when one begins with the Enlightenment premise that domestic legal regimes do not vary with the rank of person, is the conception of "immunity" needed. In an earlier age, when the legal equality of persons was not assumed and applicable law might vary according to status even for domestic subjects, what we call immunity could also be conceived as a boundary of a legal rule.³² In an age of domestic equality, prescriptive jurisdiction reaches all persons within the territory of the legislator, as well as persons abroad where justifiable on theories of nationality, domestic effect, or protection of security. Enforcement jurisdiction remains largely territorial. A foreign emissary who is present in your territory only to serve mutual interests may seem much like a litigant who is making a "special appearance"; he enters the jurisdictional reach of the lawgiver and enforcer only on condition that a fiction of extraterritoriality is indulged.

iii) *Functionalism.* Things may work better if law is suspended, for no ambassador would venture forth unless he had a safe conduct. Extending immunities through custom or agreement will depend on the judgment that other means tolerably deter misconduct by emissaries, when balanced with the advantage gained by embassy.

These theories tincture any discussion of immunity, but in a time of little consensus on foundations, functionalism carries the day. Cost, culture, and cunning are really functionalist explanations.

A first failure of law is cost and delay. We provide forms of immunity because the distraction and expense of appearing in court are severe, delaying the performance of public duties, even discouraging their pursuit. The law's costly choreography, its demands on calendars and consuming anxiety, is something we ignore for ordinary citizens; we decline to provide counsel for indigent civil defendants or to require any demonstrated factual predicate for filing a civil suit (a puzzle to those of us who were

32. An example is the "benefit of clergy" in English criminal law. Though cleric and king would hardly agree whether the immunity was a limit of the king's power or a matter of grace, a defendant who could show membership in a religious order was exempted from ordinary criminal sanctions, instead to be regulated and disciplined by his ecclesiastic superiors. Benefit of clergy was later manipulated as a fiction to permit leniency to nonclerical persons; if a defendant could read a passage from the Bible, showing the gift of literacy formerly reserved to clerics, he was spared capital punishment. For many qualifications, see 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 439-57 (2d ed. 1898); 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 293-302 (1909); Cheney, *The Punishment of Felonous Clerks*, 51 *ENG. HIST. REV.* 215 (1936), reprinted in C. CHENEY, *THE ENGLISH CHURCH AND ITS LAWS, 12TH-14TH CENTURIES XI* (Variorum Reprints 1982) (includes 1981 bibliographic note); Helmholz, *Crime, Compurgation and the Courts of the Medieval Church*, 1 *LAW & HIST. REV.* 1, 7 & n.23 (1983), reprinted in R. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 119, 125 & n.23 (1987).

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born as criminal lawyers and find probable or reasonable cause to be the natural prerequisite to any exertion of public power). But the urgent quality of some public duties and the exposure of officials to retaliation have gained a modest recognition of the need to subordinate litigation to other purposes.

In a functionalist theory of immunity, the degree of protection against personal liability might vary with the importance of the official's work, the ease with which he can be replaced, and his likely exposure to meritless claims, as against the adequacy of other controls on his conduct. So, in the regime of the Vienna Conventions, accredited diplomats are given absolute criminal immunity in all matters, and absolute civil immunity in all matters other than personal transactions in real estate, business, and probate. A top-level diplomat is a plausible target for harassment, privy to sensitive information that could be divulged under arrest, and, absent hot-lines in real time, is conductor of communications that may be pertinent to war and peace. Lower-level Embassy personnel, assigned to administration or technique, with duties more easily reassigned, enjoy full criminal immunity but civil immunity only in carrying out their official duties. Embassy service staff and all consular officials enjoy civil and criminal immunity only for official acts, though consular officials are subject to arrest before trial only for a grave crime.³³ There is debate on whether some of these immunities run against prescription or only against adjudication and enforcement. The new "restrictive view" suggested by the United States in regard to diplomatic immunity—limiting its duration to the period of a diplomat's accreditation, and permitting prosecution for private acts if the diplomat should return to the United States as an ordinary visitor—is most easily rationalized as a recognition of the procedural cost of the law.

In our own domestic legal regime, everything is ratcheted downward from the diplomatic. Only the President, judges, jurors, court witnesses, and prosecutors enjoy absolute immunity from civil damages for official acts, and in the last only for juridical acts in a court setting.³⁴ Other

33. Officials of international organizations are given absolute immunity only for official acts, though one chafes at the explanation that it is because their duties are less critical than diplomats'. Diplomats assigned as heads of missions to international organizations are accorded the absolute immunity of their bilateral peers.

34. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). Officials who act as judges and prosecutors in agency proceedings enjoy the same absolute immunity as their judicial cousins. *Butz v. Economou*, 438 U.S. 478, 508-17 (1978).

Like court players, the President enjoys personal immunity in his official acts only from civil damages, not criminal penalties, although it is debatable whether a President could be criminally prosecuted without first being removed from office by impeachment. *See, e.g., Bickel*,

executive officers, even Cabinet members and governors, are shielded from claims of constitutional tort only by a qualified immunity—originally requiring the official to believe in the legality of his conduct, and to have an objectively reasonable basis for that belief.³⁵ The defendant's actual belief rarely could be demonstrated through undisputed facts on a motion for summary judgment, much less prior to discovery; even for domestic governance, the Supreme Court concluded that the procedural cost was too high for the gain in compensation and deterrence of illegal conduct. In *Harlow v. Fitzgerald*, the Court abolished the subjective prong of the test, casting belief adrift, and allowing full civil immunity whenever the official could show the law's sharp edge had earlier been "objectively" indistinct.³⁶

In Congressional immunity, the Constitution affords Senators and Representatives exemption from arrest for misdemeanors that do not breach the peace, even arising from private conduct, but only during attendance at Congress or getting there and back; immunity is again premised on the high cost of distraction. In part to prevent distraction, though also to limit prescriptive jurisdiction and protect legislative independence, the speech or debate clause forbids the questioning of a Senator or Representative for any legislative act, or even its introduction into evidence in a proceeding against him, though it does not save him from prosecution for corrupt promises.³⁷

The second ill-kept secret of the law is that we rarely trust its measure to an adjudicator, absent a supporting political culture or shared interest that constrains interpretation. Whatever our views on the determinacy of legal texts, it is clear that reasons can be given in law-like language for results we find unfaithful to the intention of a project. The United States

The Constitutional Tangle, THE NEW REPUBLIC, Oct. 6, 1973, at 14-15. Placement of the decision to prosecute in public hands, rather than private, the requirement of a preliminary showing to a grand jury, and the demanding *mens rea* requirement of criminal law, minimize the problems of harassment, though some might entertain a worry about the Independent Counsel Act.

Besides the President, *Harlow v. Fitzgerald* suggested, there might be a small class of top-level officials in "such sensitive areas as national security or foreign policy [where] absolute [civil] immunity might well be justified to protect the unhesitating performance of functions vital to the national interest." 457 U.S. 800, 812 (1982). This suggestion was abandoned by a plurality in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), rejecting absolute immunity for the Attorney General for ordering warrantless domestic security wiretaps.

35. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974); *Wood v. Strickland*, 420 U.S. 308 (1975); *Butz v. Economou*, 438 U.S. 478, 500-01 (1978); *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

36. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-18 (1982). See *Davis v. Scherer*, 468 U.S. 183 (1984); *Oklahoma City v. Tuttle*, 471 U.S. 808, 812 n.1 (1985); *Anderson v. Creighton*, 107 S. Ct. 3034 (1987).

37. *United States v. Helstoski*, 442 U.S. 477, 487-94 (1979). State legislators enjoy similar immunity. See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

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may hedge its faith in a World Court, a commercial party may distrust an arbitrator who does not intend to stay in the business, because they fear the absence of shared purpose that informs a domestic court's interpretation.

So, too, in diplomatic relations. The absolute immunity of ambassadors for all public and most private acts reflects each country's concern that its antagonists may not agree on the scope of official functions. The Vienna Convention is notably imprecise in defining the functions of a mission. What would happen to Embassy personnel who meet with or give advice to political dissidents, travel to restricted areas, or gather information from highly placed government sources outside the ordinary channels of diplomatic address? For domestic civil servants, limiting immunity to a reasonable construction of the office's duties enjoys the comfort of the greater intelligibility of domestic law to those who act within it, and the shared purpose of courts, citizens, and executive officials in preferring lawful but effective government.³⁸

As immunity is necessary in light of disparate purpose, so does it depend on some shared pursuits. Foreign antagonists still may share an international political culture; belief that diplomatic immunity is gainful undergirds the doctrine. What has strained the practice of immunity in recent years, is the breach of understandings of self-restraint. Diplomatic bags have world-old been misused to smuggle monies or contraband, but the new dangers of narco-diplomacy put pressure on the inviolability of the courier's pouch. The standard now reached in the draft U.N. convention is that a diplomatic bag can be returned if there are "serious reasons to believe" it has been misused.³⁹ The absolute immunity of diplomats and their mission has been accepted on the understanding that the sanctuary would not be exploited for morally heinous acts. But consensus again has been disturbed by violent incidents, such as the attempted kidnapping of a dissident by officials of Nigeria's London embassy, the

38. Yet worries about cultural distance and dissympathy are not limited to the foreign arena. The breathtaking expansion of domestic executive immunity in *Harlow* may reflect the Supreme Court's unspoken belief that judges, whose occupation is reflective and revisory, are, in a sense, of a different culture from law enforcement officers and executive branch administrators who are inclined to action and may feel more personally responsible for public safety—and in turn, that constitutional commentary has become too recondite for full understanding by ordinary observers. Cf. *Davis v. Scherer*, 468 U.S. at 196, quoting P. SCHUCK, *SUING GOVERNMENT* 66 (1983) ("officials are subject to a plethora of [administrative] rules, 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively.' . . . In these circumstances, officials should not err always on the side of caution.").

39. *Seventh Report on the Status of the Diplomatic Courier and the Diplomatic Bag Not Accompanied by Diplomatic Courier*, U.N. Doc. A/CN.4/400, 41 U.N. GAOR Supp. (No. 10) at 24 (1986).

shooting of a British police officer from the Libyan embassy, and, in an earlier decade, an attempt of the Soviet Union to forcibly repatriate a national through its New York consulate. The acceptability of immunity depends on the condition that license will be used with self-restraint; it exists in a curious zone where suspicion is hemmed by trust.

The law often pulls between aspiration and fallen nature. Law may announce what we would like to believe about government, what we wish for as reciprocal practice among countries. It is sometimes less articulate in acknowledging what we will abide: whether it is the exercise of less pluralistic control of foreign affairs through inherent Article II powers of the Presidency (powers perhaps deliberately left uncharted so that they may be available in true emergency, but subjected to constant dispute and reproach so that they will not be too casually exercised), or the violation of norms of preferred conduct in international relations, such as the practice of governments, despite Henry Stimson, of reading each other's mail. The Vienna treaty immunized diplomatic officials in activities no one wished to acknowledge or approve, such as procuring restricted defense information from the enemy, activities which the signatories may have silently recognized were necessary in each country's view, and deterrable to acceptable limits through other devices of control, such as by limiting the size of missions, vigorously exercising the power of expelling diplomats as *personae non gratae*, and prosecuting non-immune private citizens.⁴⁰

40. Perhaps too great tolerance of human imperfection entered domestic law in *Harlow*. Absent a state of emergency, the law governing domestic affairs has assumed that public safety can subsist with legal regularity. Surely an official should not be encouraged to act in a way he strongly believes will be found illegal, even if the law has not yet been settled. *Harlow* creates a latitude, a curtilage of protection, for officials who may doubt the legality of their action, but find no compelling rule. Executive officials need no longer adhere to a self-denying reading of how the law will be declared, and their personal convictions about legality are unexaminable. Where the underlying law is unsettled, where there is not yet a "clearly established statutory or constitutional right[]," see 471 U.S. at 812 n.1, is it really true that anything goes?

Even the *Harlow* majority initially seemed to shrink from this extreme; while the *Harlow* opinion cut off discovery and trial on bare-bones pleading, on any "bare allegation[] of malice," 457 U.S. at 817, with officials to be "generally . . . shielded" from trial unless the law was clear at the time of violation, *id.* at 818, the opinion seemed to leave open possible liability if the plaintiff came to court with cogent *threshold* evidence to show an official *believed* he was violating a constitutional right. Such a belief would spell bad faith in the *Scheuer v. Rhodes* sense. Since that time, however, *Harlow* has been read to preclude offering any evidence concerning subjective intention. See *Davis v. Scherer*, 468 U.S. at 191; *Oklahoma v. Tuttle*, 471 U.S. at 812 n.1; *Mitchell v. Forsyth*, 472 U.S. at 517, 524, 530. The *Harlow* Court's continued use of the phrase "qualified or 'good faith' immunity" has become a misleading solecism—for faith now has nothing to do with it.

A more moderate solution could have been invented by adopting pleading rules similar to *Franks v. Delaware*, 438 U.S. 154 (1978), allowing a case to proceed past a motion to dismiss only where the plaintiff already possesses strong evidence that the official believed or had reason to believe he was violating constitutional requirements. Discovery, after all, began as a

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There is at least one instance in which the *Restatement* appropriately accommodates fallen nature. The Vienna Convention on Diplomatic Relations announces that the premises and archives of an embassy are inviolable, and that the host state must "protect free communication" by the mission for official purposes.⁴¹ Yet the United States' Foreign Intelligence Surveillance Act of 1978⁴² explicitly permits the electronic surveillance of foreign government offices upon warrant from the FISA court. Congress concluded these two standards were not at odds, that FISA did not violate the Vienna Convention's inviolability guarantee, but in the unlikely event of conflict, provided that FISA would supersede the earlier treaty.⁴³ The *Restatement* points to the assumed international practice of electronic surveillance, something the very proper International Law Commission deliberations never spoke a word about, pronouncing:

The Vienna Conventions draw no explicit distinctions among means of communication, implying that the privacy of all diplomatic or consular communications must be respected. It is common practice, however, for states to monitor telephonic or telegraphic communication by accredited foreign missions or consulates in their territory, and to attempt to "break" their cryptographic codes.⁴⁴

While this may seem old hat to readers of *The New York Times*, several recent espionage cases prosecuted by the United States illustrate the usefulness of such realism. In several cases, including one prosecuted by this writer, foreign espionage defendants claimed that alleged government surveillance practices breached the Vienna Convention. The superseding effect of the Foreign Intelligence Surveillance Act would have mooted the issue so far as U.S. law was concerned, under the last-in-time rule. But it is most straitening to imagine a court offering *obiter* on the international legality of alleged surveillance, while ignorant of the "common practice"⁴⁵ of states that would logically inform a working interpretation of the Vienna Convention. The *Restatement* reporters can take "judicial notice" of matters that governments are unable to discuss, allowing judges access to a more worldly understanding of treaty provisions.

remedy in chancery. Closer attention to its equity would make unnecessary the harsh triage of *Harlow*, in which even compelling proof of an official's unconstitutional intention is turned out of doors.

41. Vienna Convention on Diplomatic Relations, *supra* note 17, arts. 22, 24, 27(1), 27(2), 27(3).

42. 92 Stat. 1783 (1978), *codified at* 50 U.S.C. §§ 1801-1811 (1982) [hereinafter FISA].

43. H.R. CONF. REP. NO. 1720, 95th Cong., 2d Sess. 26 (1978); H. REP. NO. 1281, 95th Cong., 2d Sess., pt. 1, at 70 (1978); S. REP. NO. 701, 95th Cong., 2d Sess. 16, 56 (1978).

44. RESTATEMENT (THIRD) § 466 comment f.

45. *Id.*

To return to the matter of legislation and multilateral proposal, let me point out a number of archaic qualities in the present administration of the law of immunity, which the *Restatement* does not go far enough to address. First, there is no principled reason to have any lacuna in the regulation of the conduct of immunized personnel, even where the regulation must be undertaken through unusual jurisdiction. For example, our diplomatic personnel stationed abroad enjoy complete criminal immunity from foreign law, yet they are not subject to any assimilative U.S. law for common law crimes committed abroad, unless they happen to act within the special maritime or territorial jurisdiction of the United States. If we wish to promote law-abiding conduct among foreign countries' personnel as well as our own, this prescriptive gap is hardly a worthy example. In 1972, for instance, an American Embassy staff member committed a homicide, and was prosecutable only because he acted within the Embassy grounds, considered by American law to be part of its special territorial jurisdiction.⁴⁶

Second, it is surprising that we have not proposed a good faith duty to waive diplomatic immunity for serious criminal conduct, at least where there is otherwise a failure of justice and where the sending country finds the evidence convincing, the conduct criminal by the legal standards of both countries and similarly punished, foreign adjudicative procedures sufficiently close to domestic standards of due process, and no prejudice to national interest. (One could apply here criteria similar to extradition decisions.) Under the Convention on Privileges and Immunities of the United Nations, the Secretary General has a duty to waive immunity in appropriate cases for U.N. personnel.⁴⁷ The *Restatement* does not take a position on whether that duty should be extended to diplomatic personnel. Of course any change in multilateral law is hard to effect, but a

46. *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973). Diplomatic immunity does not protect a diplomat from the jurisdiction of his own sending state, per article 31(4) of the Vienna Convention, *supra* note 17. The *Restatement* acknowledges that this article was "apparently added to encourage sending states to assure a competent forum for hearing cases against members of their diplomatic missions abroad." RESTATEMENT (THIRD) § 464 reporters' note 9. But the *Restatement* does not point out the lacuna in American jurisdiction or suggest a cure.

The Omnibus Diplomatic Security and Antiterrorism Act of 1986 newly allows federal prosecution of physical violence against American nationals abroad, but only where the Attorney General certifies the offense was "intended to coerce, intimidate, or retaliate against a government or civilian population." 18 U.S.C. § 2331 (Supp. 1986).

47. Section 20 of the Convention on Privileges and Immunities of the United Nations, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15; RESTATEMENT (THIRD) § 469 comment f. Similarly, under section 14 of the Convention, a member state of the United Nations "not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

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Restatement designed to perdure for a generation should point toward at least some appropriate changes.⁴⁸

Third, there is no reason why the losses caused by immune personnel should not be compensated. In the case of auto accidents, Congress finally provided in the Diplomatic Relations Act in 1978 that losses would be spread through mandatory insurance.⁴⁹ Why stop at cars? The costs of other forms of tortious activity might sensibly be spread, by insurance or indemnification by the federal government, rather than left as a disproportionate loss on the unhappy interlocutors of diplomats.⁵⁰ Emerging principles of international state responsibility also may suggest that the sending country should compensate for some torts committed by its diplomats abroad, even when liability is not enforceable in domestic courts.⁵¹

A *Restatement* might also propose a way of reconciling the independence of special prosecutors with the demands of diplomatic immunity. Such a measure could prevent repetition of the recent imbroglio in which Independent Counsel Whitney North Seymour, Jr., issued a subpoena to the Canadian Ambassador in the course of the Michael Deaver prosecution.⁵² While most government trial subpoenas issue without specific authorization by the trial judge, it would be reasonable to require that no subpoena be delivered to any person arguably immune under the Vienna Convention until the State Department has had an opportunity to advise of its position on immunity and, in the event of a dispute, until the court has made a preliminary finding that the named witness is not immune.

48. The *Restatement* notes in deadpan, "Since it is increasingly accepted that diplomatic immunity is based on 'functional necessity,' . . . it has been suggested that a sending state should waive immunity in every case in which waiver would not interfere with the functions of the diplomatic mission." RESTATEMENT (THIRD) § 464 reporters' note 15. But the *Restatement* takes no position for or against this suggestion.

49. 22 U.S.C. § 254e (1982); State Department Regulations on Compulsory Liability Insurance of Diplomatic Missions and Personnel, 22 C.F.R. 151.1-151.11 (1987) (requiring insurance for vehicles, vessels, and aircraft); State Department Circular Note of June 18, 1981, reprinted in 75 AM. J. INT'L L. 939 (1981).

50. Moral hazard is less of a problem where the insurance is mandatory, the beneficiaries are third parties, and there are reputational costs to tortious conduct. Insurance companies can estimate by experience the probability even of intentional conduct.

51. See Article 6 of the Draft Articles on the Content, Forms and Degrees of International Responsibility, proposed by the Special Rapporteur in his Fifth Report, A/CN.4/380 at 4-9, A/CN.4/380/Corr. 1 (1984), reprinted in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 341 (M. Spinedi & B. Simma eds. 1987). Those who choose to deal with diplomats in contractual relations might be appropriately excluded from any domestic scheme to spread losses, since they can estimate the risk beforehand.

52. See N.Y. TIMES, May 27, 1987, at A1, col. 1; May 28, 1987, at A1, col. 1; Oct. 17, 1987, § 1, at 10, col. 1; Oct. 27, 1987, at A30, col. 1. The Deaver incident took place after the closing date of the *Restatement*.

In regard to former heads-of-state, the claim of immunity from jurisdiction to adjudicate traverses delicate matters of foreign policy and our relationship to foreign governments. Though head-of-state immunity arises under federal common law, here the *Restatement* rests with an unenlightening agnosticism. Noting the *Marcos* litigation, it remarks, "a former head of state appears to have no immunity from jurisdiction to adjudicate," adding only "[i]n the United States, the courts might grant immunity if suggested by the Executive Branch on foreign policy grounds, even though it is not required by international law."⁵³ But what, pray, should a court do? In recent decades courts have been less wont to defer to Government suggestions in matters of foreign affairs. Guidance for a court, were the U.S. Government to suggest former head-of-state immunity, would be most helpful.

One worries at times that, even when it means to be nonprescriptive, the *Restatement* takes too brisk a view of things. Where law moves in lambent light, the *Restatement* seeks starkness. For example, the *Restatement* commentary says "[t]he Department of State will usually certify whether a person has diplomatic status in the United States, and that certification is binding on the courts."⁵⁴ That was more surely the law in the pre-Vienna era. Even now any certification by the State Department concerning diplomatic status deserves extraordinary deference in a U.S. court, lest judges get into the business of redesigning U.S. protocol for acceptance and rejection of diplomats. But in the most recent case on diplomatic immunity, the court of appeals' careful study of the defendant's indicia of status does not suggest blind unreviewability.⁵⁵

In its treatment of extradition, the *Restatement* fails to take any position on or suggest any change in the so-called political offense exception. This doctrine is of central importance since it can effectively immunize serious acts of political violence, and, with the non-appealability of these Article I decisions,⁵⁶ is an area where extradition magistrates pointedly need guidance. The *Restatement's* historiography of the doctrine begins only in 1890, ignoring a rich earlier history, including Daniel Webster's 1846 view that the political offense exception did not protect the common crimes of murder or arson even when committed in political tumult.⁵⁷ It

53. RESTATEMENT (THIRD) § 464 reporters' note 14.

54. *Id.* § 464 comment f (emphasis added). The reporters' note repeats, "A certification by the Department of State that an individual is, or is not, a diplomatic agent, communicated to a court in the United States, is binding on the court." *Id.* § 464 reporters' note 1.

55. *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1985).

56. *United States v. Mackin*, 668 F.2d 122 (2d Cir. 1981).

57. *Cong. Globe App.*, 29th Cong., 1st Sess. 536 (Apr. 7, 1846).

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is a pity the *Restatement* did not suggest legislative reform to make extradition determinations appealable, nor give its own view of the appropriate standards for immunity for political crimes in extradition. For a Hohfeldian, it is precisely the areas inspiring public reaction in which the counsel of scholars and the bar is most needed.