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THE NACIREMA REVISITED

*Jeffrey Kahn**

*'Tis an unweeded garden,
That grows to seed; things rank and gross in nature
Possess it merely.¹*

IN 1956, anthropologist Horace Miner published the article for which he is best known, *Body Ritual among the Nacirema*.² This short but groundbreaking essay described rituals practiced by a fascinating people whom Professor Miner situated ethnographically “between the Canadian Cree, the Yaqui and Tarahumare of Mexico, and the Carib and Arawak of the Antilles.”³ Notwithstanding his focus on the microcosm of individual habits and customs, Miner sought to make a larger point. He concluded the work with a quote from the great Bronislaw Malinowski about the value of studying lesser developed societies:

Looking from far and above, from our high places of safety in the developed civilization, it is easy to see all the crudity and irrelevance of magic. But without its power and guidance early man could not have mastered his practical difficulties as he has done, nor could man have advanced to the higher stages of civilization.⁴

Almost sixty years have passed since Miner’s observations from “our high places of safety in the developed civilization.” Miner died in 1993, after a distinguished career teaching at the University of Michigan and researching in the field, primarily in Nigeria, Morocco, and Algeria.⁵ (Among his best known works was his 1953 study, *The Primitive City of Timbuctoo*). But his obituary notice remarked that, with regard to his work on the Nacirema, “Miner regularly received letters from curious readers who wanted to know more about this fascinating and exotic group.”⁶

Inspired by Miner’s work and based on close-quarters fieldwork, this essay revisits the strange world of the Nacirema. Two of the more “legal” features of their society are explored: (1) what might be termed the higher-order constitutional design of their society, and (2) the mechanisms of day-to-day maintenance of their social order. In conclusion, I note a strange characteristic of the Nacirema: although they believe that their own socio-legal order can, and should, be transplanted into liminal societies, they resist such transfers in the other direction. Regardless of one’s interest in the Nacirema as a people, their experiments with the structure and order of their society are worth our attention. A system that has worked quite well for them (at least, many of them), may not be so

easily transplanted as some might think. Why this should be is of academic as well as practical importance and worth continuing study.

I. CONSTITUTIONAL DESIGN

The reader is strongly encouraged to consult Miner's still authoritative study at 58 *American Anthropologist*. Miner described Nacirema culture as "characterized by a highly developed market economy which has evolved in a rich natural habitat."⁷ Trade was first based on cash crops increasingly reliant on labor-intensive farming methods.⁸ Slavery supplied that labor.⁹ Although no longer practiced, its demographic effects remain profound and still may be perceived in differentials measurable along many socio-economic variables.¹⁰

Despite, or perhaps because of this origin, the Nacirema embrace a founding mythology based on the importance of human freedom and equality. The first Nacirema did not perceive the oddity so clear to us of holding such ideals in a slave-supported economy. In fact, a great many felt called to defend the practice, "with whatever weapons freemen can lay their hands on, and to carry high the banners of the free, whatever may betide."¹¹

In addition to slavery, social growth was also propelled by the Nacirema's belief in their divine entitlement to the lands of neighboring peoples.¹² This view (the founding mythos of freedom and equality again notwithstanding) justified the slaughter and subjugation of these neighbors, the destruction of their cultures, and the seizure of their lands. The Nacirema seem strangely blind to these transgressions against other peoples and cultures.¹³

Thus, the Nacirema seem to manage an incongruous relationship between their myths and their might. Beyond these ideologies, the Nacirema (who possess a written language) have committed their socio-legal organizational principles to a sacred text. Its sacred quality—although disputed by some scholars of the Nacirema—is evidenced by both extrinsic and intrinsic factors that make it highly resistant to change.

The text was composed in secret by the Great Men of Nacirema prehistory. These Great Men are revered in popular culture, although most Nacirema know little about them beyond their iconic, almost deified status and a few tall tales that become more difficult to separate from the historical record with the passage of time. Yet an increasingly popular view demands that the sacred text be interpreted just as it would have been understood in the social milieu of the Great Men themselves.¹⁴ This is despite the fact that, even in the hands of the most able Nacirema wise men, the historical record appears to be quite ambiguous, if not malleable.

The text itself contains no overt mention of slavery (just as it does not mention conquest), but careful readers may discern oblique references.¹⁵ The text makes only one explicit reference to equality.¹⁶ This relatively late addition has been the subject of intense debate and, just as often,

limiting interpretations. For instance, it has been deemed irrelevant to many of the forms of inequality that pervade Nacirema society. In any event, its inclusion in the sacred text appears to have only partially and gradually ameliorated some of the baseline inequalities in the society traceable to past slavery, archaic gender norms, and the continuing hyper-stratification of property regimes.

The sacred text establishes a triumvirate of rulers who govern simultaneously. Some, but not all, of these rulers are chosen by the people. Two of the three ruling bodies are corporate in form, while the third is a king figure who sits atop a pyramid of assistants of varying fealty. While this complexity might seem unwieldy, it appears to be helped along by a belief that the rulers and ruled all operate under divine providence. Seldom is a ruler heard to speak who does not invoke the deity's will and blessings for the society. Further field research is necessary to determine how, if at all, Nacirema oratory reflects the influence of these beliefs on action.

Each power center is allocated a large stone palace. These are heavily guarded. Although each palace is considered a house of the people, open to all, very few Nacirema are allowed unhindered access. There is a strange parallel here with the work of these bodies. Their commands (and the process by which these are generated) are deemed the treasure of all, and all are expected to be bound by their proclamation. But few understand the esoterica of what is produced in each palace, let alone how the public spectacle of its production is influenced by what occurs behind the palaces' many closed doors and secret chambers.

In tribute to their status, the triumvirate and their senior-most advisors are given many social and financial advantages unavailable to ordinary Nacirema, some of which continue long after they depart their offices. This may seem contrary to the mythos of equality, especially since these leaders seem least in need of any public subsidy in comparison to the common folk. But the Nacirema seem to tolerate it. Indeed, field research reveals that few members of the society completely understand the different rituals for the triumvirate's selection nor care to participate in them with any regularity.¹⁷

The first set of rulers mentioned in the text is a corporate collective of elders. Their regular selection is organized around their affiliation with one of two main social factions. These are symbolized by different animals (neither one, oddly enough, indigenous to the region). The selection process requires special ceremonies not mentioned in the sacred text. Indeed, historians of the early Nacirema suggest that such factions were discouraged by many of the Great Men, but this fact—if fact—has been ignored.¹⁸ Wealth, personal or otherwise, is an essential prerequisite in the selection process. Thus, most find such social position unattainable, adding to its mystery and prestige. This extra-governmental ordering also redirects control of much governance into the hands of each faction's own hierarchy of elders. Their decisions often dictate the more formalized public rituals of norm creation with which this body is charged.

The second ruler is a traditional king figure. (There is nothing in the sacred text requiring a male leader, but the alternative would have been considered outlandish by the Nacirema for most of their history, remains insensate for many today, and has yet to occur.) The Nacirema tend to favor for this position those trained in war; most kings were Nacirema warriors in their youth.¹⁹ Although popularly perceived as an office of considerable power—the Nacirema instinctively blame the king for virtually every problem that occurs during his reign—the outside observer must be surprised by just how little the king can do on his own. However, this fact does not seem to stop the king or the elders from frequent proclamations to the contrary. This seems only to increase the general confusion.

The king is chosen through a quadrennial selection described in the sacred text in great detail. This process is heavily influenced by a proceeding organized by the extra-textual animal factions mentioned above, though the text makes no mention of their involvement. Both processes, however, defy common understanding and are unlike any other procedure used in other societies. It appears to grant Nacirema in relatively sparsely populated settlements early, outsized influence over the initial slate of competitors, while those in preferred regions have the power to choose a king unacceptable to a simple majority.

The third body, another collective, is the true source for the rules that govern Nacirema society. It is composed of a quasi-priestly class whose elite are esteemed as the true interpreters of the sacred text. This gives them extraordinary power. They are the only rulers who are not elected, but chosen by agreement of the other two ruling bodies. The priests then rule for life. They are the only rulers who wear a costume (long, black gowns), carry a weapon (wooden mallets), and expect to be addressed by an honorific rather than by reference to their position.

None of these characteristics is to be found in the sacred text (indeed, the exclusive power to interpret the sacred text is one that the priests bestowed on themselves), but they are nevertheless accepted by the Nacirema almost without question.²⁰ The young, particularly those who train to be scribes, champions, and lawgivers themselves, are taught to revere the priests through a process of acculturation and training that revolves around the study of their many sacred decrees. On occasion, the highest order priests have even been known to decide who should be given positions in the other ruling bodies.²¹

Sometimes the other palaces, or the people themselves, challenge the high priests' rule. Angered by an interpretation of the sacred text, they may engage in massive resistance, ignoring or circumventing priestly decrees that would be unquestioned in other instances.²² The most prominent instances of this recalcitrant behavior are associated with priestly decrees seeking to remedy the after-effects of slavery in Nacirema society.

Other times, resistance may come from officials lower in the society. On some issues, at least, there appears to be an almost cyclical disregard for decrees. Consider, for example, repeated decrees by the high priests that prohibit practices tending to hurt the poor (whom wealthier Nacirema tend to avoid and sometimes seem even to fear) by banishing them from public places. This disturbing feature of Nacirema social organization is telling, for as Gandhi noted, “A nation’s greatness is measured by how it treats its weakest members.”

Here one perceives what appears to be a certain *déjà vu* feature to the cycle of sacred decrees: the newer decrees remind the reader of the older ones, which were essentially the same, but seem not to possess any discernible long-term effect.²³ Social fears seem simply to overwhelm ordinary Nacirema respect for their priests, who then must return to the same matters in future decrees about the same issue. Little mention of this cycle is made in the decrees themselves, perhaps out of anxiety that the whole decree-issuing edifice rests on Nacirema respect for this power of the priesthood. Since their power is without firm foundation in the sacred text itself, the high priests appear to be institutionally cautious not to over-employ it.

In short, the Nacirema proudly perceive themselves to be broadly democratic in their social organization. Their texts and myths certainly both point in that direction. In reality, however, perhaps only a plurality understand their system of government, fewer care to participate in it, a minority can seat the king, and the unelected high priests rule for life. Governance is not infrequently administered by this priesthood and by officials chosen through arcane rituals controlled by special groups. The Nacirema, like most societies, venerate their past but with a rather shallow understanding of it. This combination seems to generate a certain stability for a society that is otherwise marked by high levels of inequality that, while decreasing along some social and economic dimensions, increases along others.

II. MAINTAINING SOCIAL ORDER

The sacred text enshrines certain rituals that the Nacirema believe protect them from social harm. For example, Nacirema accused of some transgression against the community may insist on the judgment of neutral neighbors, who meet in secret to decide the fate of the accused after a ritual of public orations by champions for each side.²⁴ This ritual will be discussed further below.

Another ritual found in the sacred text requires constables to obtain the permission of lower-level priests before intruding into a Nacirema home or private spaces.²⁵ In addition, the high priests have added other protections not found in the sacred text. For instance, the constable must utter a special magic phrase before seizing and questioning a suspected wrongdoer.²⁶ Field research indicates that the mantra’s imposition may only tend to kindle the imagination of constables to employ methods of

interrogation (or sequence those methods in ways) that more advanced societies might consider grueling or degrading. But the Nacirema believe, or at least their priesthood have decreed, that this spell will prevent any undeserved harm from befalling the recipient.²⁷

Such beliefs may seem strange to us. Of course, we have the benefit of our more scientific study of the nature of false confessions and the primitive nature of such interrogations. So we must not judge the Nacirema out of their social context. In Nacirema society, constables are entrusted with the enforcement of voluminous codices containing thousands of transgressions ranging from the great ones found in all social orders (e.g. murder) to the very small and strange (such as public sleeping).²⁸ Even a greatly admired Nacirema champion, and later high priest, noted that “[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.”²⁹ And as one field researcher observed, the trend is toward “overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions. . . . [Nacirema] legislatures regularly add to criminal codes, but rarely subtract from them. In a world like that, lists of crimes in statute books must bear only a slight relation to the conduct that leads to a stay in the local house of corrections.”³⁰

Such a large compass may seem hard to explain in a society that expects its members not only to abide by all of its rules, but to feel a sense of shared responsibility for their promulgation. Yet the constable is granted a special power that makes his work appear almost like a game. He is allowed, if not encouraged, to pretend to seek to enforce some insignificant, easily violated part of one of the many codes (every Nacirema constable has his favorites, but especially popular is the code governing daily migrations between home, work, and play—the Nacirema love to move about and spend much time doing so). Having gained a toehold on this pretext, he then searches for evidence of more serious transgressions about which he lacks evidence enough to satisfy one of the lower priests but that his hunches (or prejudices) assure him can be found. So long as some minor malefaction can later be identified that warranted a stop (and one almost always can be found), no one bothers with the constable’s actual motive.³¹ The Nacirema seem to tolerate this sleight-of-hand as long as the social order seems reasonably well-preserved by it. Perhaps another factor is that, empirically, the burdens of this practice tend to be imposed disproportionately on marginalized social groups.

A word now about the public trial ritual already mentioned. Many of the ritual’s adversarial characteristics are enshrined in the sacred text. One could be forgiven the misperception, shared by the Nacirema themselves, that it is based on an equality of arms between accuser and accused maintained by a neutral magistrate who referees the contest between them. Neophyte champions, priests, even constables, are taught this myth, and it retains its central place in Nacirema conceptions of their

social order.³² The lay population consumes a steady diet of literature and theater in which such institutions are seen to achieve great feats of justice attributed to the nature of the adversarial procedures themselves.

Oddly, this tableau of justice is rarely experienced in reality. According to one Nacirema priest, the vast majority of defendants subject themselves to a different system than the one described in the constitutional text, and one not foreseen by it.³³ As another Nacirema priest observed, “A Martian anthropologist, sent to observe criminal justice . . . but lacking access to our textbooks, would have relatively little to say about trials.”³⁴

Instead, most defendants make due with what the first priest himself described as a “brief formal procedure” over which the priests preside that certifies an agreement to forego the trial ritual in exchange for a reduced punishment. The procedure that replaces the trial is intended more to close the period of uncertainty about the defendant’s fate than to decide legal issues or weigh conflicting evidence.³⁵ This veneer covering the sacred text’s prescribed process “obscures what can be an invisible, but elaborate and lengthy process of adjudication of the defendant’s guilt. This process is rarely governed by formal legal standards, other than the basic definitions of offenses, and the procedures by which it operates are not usually written down anywhere. But it is this process that our alien anthropologist would surely identify as the actual adjudication process for criminal cases.”³⁶

This reality looks quite a bit different than the ideal described in the law and imbibed by the young who study in hopes of becoming great champions and priests themselves.³⁷ As one priest recently argued, the “suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth: it is much more like a ‘contract of adhesion’ in which one party can effectively force its will on the other party.”³⁸ There is here, as elsewhere in Nacirema society, a stark disparity between the law’s effects and enforcement that varies according to wealth (often covariant with race), despite a well-known admonition popular in that society not to ration justice.³⁹ The Nacirema believe in severe punishments, including death (quite unusual even in less civilized societies), and these stakes serve a certain unspoken coercive role in the actual way the system works.⁴⁰ The Nacirema imprison more of their people than any other comparable society.⁴¹ This may explain why they expend roughly the same amount of money for their entire judicial branch of government as for their prisons alone.⁴²

A word should be said about the way Nacirema view their law in threatening times. Of course, every society faces pressure to ignore the counsel of its better angels when danger draws near. The Nacirema are no more immune to this human phenomenon than other societies, though they tend to believe otherwise. It is their insistence that they are exceptional that draws the puzzlement of the social scientist and scholar. An example may be found in the strangely permeable boundary that the Na-

cirema have developed between their laws in times of peace and in times of war. It appears to be important to Nacirema society to make a sharp distinction between these two times, while insisting that law remains a bulwark protecting everyone at all times.

Upon closer inspection, however, this appears to be primitive mythologizing similar to the equality myth and fair trial myth discussed above. While important for cultural reasons, this belief does not reflect the reality of Nacirema society. Not long ago, the Nacirema suffered a surprise attack from unforeseen enemies that killed thousands and shook the social order by exposing its vulnerability. It took relatively little time before the Nacirema appear to have engaged in torture with a frequency that belies the absolute prohibition of the practice expressed in their laws and those of the most advanced nations.⁴³ Nacirema courts refuse to hear complaints alleging torture, whether filed by enemies of the Nacirema, neutrals, or even their own citizens.⁴⁴ Strangely, the priesthood seemed to concede the possibility that the injuries alleged may be true, while at the same time insisting that they must not be asked to remedy them. Why they did not exercise their special prerogative to render justice is unclear. But special deference to Nacirema warriors may be a partial explanation, as anxiety that the warriors will ignore the judges has been a recurring theme in their past, dating at least to the slave era.⁴⁵

It is also worth noting that although the Nacirema hold their trial rituals in high esteem, they have been reluctant to permit access to them in what may be called "special" cases. Those suspected of complicity with the enemies of the Nacirema tend to be held in special prisons controlled by Nacirema warriors or other tribes and refused access to normal judicial forums or champions to speak for them. They may be held for years at a time, and subject to quite barbaric treatment, before being processed through the plea-bargain system described above or convicted of offenses quite different than those originally alleged against them.

Most Nacirema, again notwithstanding their professed high regard for justice and the rule of law, do not seem to care much about these cases. Astonishingly, they exhibit a rather blithe disregard even for measures to curtail their freedom of movement (which many take for granted) without any oversight even by the lowest level priests.⁴⁶ Further field work is required to determine whether this cognitive dissonance is related to the previously noted low levels of participation in leadership selection.

Of course, one might understand a disinclination to open Nacirema courts to enemies captured abroad. Indeed, the Nacirema appear little different from other societies in insisting on the detention and trial of such enemies in forums quite different than those reserved for domestic transgressions. Oddly, however, the permeable boundary appears here, too. Sometimes, enemies may be captured on a battlefield or kidnapped from their enemy camps by Nacirema warriors before transport for appearances before priests in the homeland. During this time, they are subjected to intensive and (some suspect, brutal) interrogation.⁴⁷

III. CONCLUSION

The thick descriptions of anthropological discourse can seem too critical at times. Students of human nature habitually compare other societies to their own and tend to find them wanting. Indeed, one prominent Nacirema priest himself noted his “dismay that [critical observers of the Nacirema] have allowed the pursuit of perfection in criminal justice to become the enemy of the good.”⁴⁸ It is worth noting a few extraordinary qualities of the Nacirema social order by way of conclusion.

First, compared to so many other societies, the Nacirema have few problems with public corruption: the Nacirema tend not to bribe the constable.⁴⁹ Such a state of affairs is the envy of many societies but taken for granted by most Nacirema (who seldom think about it).

Second, their society is remarkably tolerant of offensive speech: its people jealously guard their open forums against any hint of censorship. Perhaps these attributes arise from the Nacirema’s supreme confidence in the strength of their society. Having reached such unassailable heights, rebellious speech seems unthreatening to them. (This seems a plausible explanation, since when confidence of unassailability is low, intolerance grows.)⁵⁰

Third, unlike most other societies, its internal subdivisions are not based on religious or ethnographic differences. Indeed, its internal boundaries are almost antiseptic in this regard, based instead on geographic features or even the straight lines of early surveyors. Doubtless much strife has been avoided by this banality, which (again) tends to be taken for granted by the inhabitants.

Finally and notwithstanding all of the peculiarities and shortcomings that must strike the modern observer, the Nacirema perceive their law as highly advanced. There can be no doubt that Nacirema leaders have achieved a high level of devotion and loyalty from their people to the institutional structures of their society, such that these structures are rarely questioned. Even to the outside observer, there seems good reason for the pride the Nacirema exhibit. The Nacirema have created a society in which, for good reasons, many desire to live. *But it is not their low corruption/high tolerance society that they are so eager to export.* The Nacirema take these traits for granted, as people grown use to freedom and prosperity often do.

This, then, is the oddest feature of Nacirema legal culture: the Nacirema encourage adoption of their social organization, systems of law and norm creation, and methods for their enforcement, though these may be ill-suited to other societies. Without irony (given what is known about the low participation of the Nacirema in these practices), the Nacirema tout the value of their governance and their trial practices. Their sense of superiority leads to a certain evangelism toward other societies when the Nacirema might, like Candide, cultivate their own gardens.⁵¹

An example of this strange tendency occurred in the years shortly before and just after Miner’s death in 1993, thus eluding his sharp eye. As

is well-known, the world witnessed at that time the collapse of the Soviet Union and the revolutionary freedom of the peoples of what was once called “the second world.”⁵² The Nacirema were not of that world and little understood it, although they failed as much as anyone in the “first” and “third” worlds to avoid the Cold War’s proxy conflicts and ideological struggles. Miner would have viewed the reaction of the Nacirema to these events with keen anthropological interest. For with a missionary zeal, the Nacirema perceived a role for their society as a guiding light to Central and Eastern European peoples desperate to reorient themselves toward a rule of law that had been lost to some countries for fifty years or more, and in some realms seemed never to have been known at all.

Nacirema efforts, both public and private, delivered their accumulated wisdom and experience to the countries emerging from the Warsaw Pact.⁵³ *Prêt-à-porter* drafts of statutes on a host of subjects were sent to freshly elected legislatures. A cottage industry arose to provide training in trial techniques, judicial ethics, and other skills and education.⁵⁴

From our perspective of dispassionate remove, it remains puzzling why the Nacirema not only expected these liminal social orders to be particularly receptive to such legal transplants, but fully expected the seeds that they planted to flourish in foreign soils. Some did in some places. Often, however, these efforts overlooked pre-existing legal traditions, histories, and cultures, which substantially reduced the fruit they bore. To be sure, the best Nacirema efforts in this regard exhibited a greater self-awareness that modulated the risks inherent in such prideful assertiveness. But the tendency remains noteworthy.

More study is warranted of this interesting impulse of the Nacirema, which seems driven in equal measures by idealism and self-preservation. In an increasingly interconnected world, what role should societies like the Nacirema play in such liminal and transitory periods of state-building? The Nacirema have grown secure in the conclusion that the design of their society ought to serve as a model for others. There is certainly great beauty in their garden, but weeds grow there too. We should recall the cautionary words with which Miner himself began his classic study: “The anthropologist has become so familiar with the diversity of ways in which different peoples behave in similar situations that he is not apt to be surprised by even the most exotic customs.”⁵⁵

NOTES

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1. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc 2.

2. Horace Miner, *Body Ritual among the Nacirema*, 58 *AM. ANTHROPOLOGIST* 503, 503-07 (1956).

3. Miner, *supra* note 2, at 503.
4. Miner, *supra* note 2, at 507 (quoting BRONISLAW MALINOWSKI, *MAGIC, SCIENCE, AND RELIGION* 70 (1948)).
5. Robbins Burling, *Death Notices: Horace Mitchell Miner*, *ANTHROPOLOGY NEWSLETTER*, (Am. Anthropological Ass'n, Arlington, Va.), Mar. 1994, at 40.
6. *Id.*
7. Miner, *supra* note 2, at 503.
8. See BETTY WOOD, *SLAVERY IN COLONIAL AMERICA 1619-1776* 31 (2005).
9. See *id.*
10. See Heather A. O'Connell, *The Impact of Slavery in Racial Inequality in Poverty in the Contemporary U.S. South*, 90 *SOCIAL FORCES* 713, 713-15 (2012).
11. John W. Daniel, *Oration at Washington and Lee University* (June 28, 1883), in *CEREMONIES CONNECTED WITH THE INAUGURATION OF THE MAUSOLEUM AND THE UNVEILING OF THE RECUMBENT FIGURE OF GENERAL ROBERT EDWARD LEE*, 32 (1883).
12. See *ENCYCLOPEDIA OF AMERICAN INDIAN REMOVAL* xiii-xiv (Daniel F. Littlefield, Jr. & James W. Parins ed., 2011).
13. John Fabian Witt, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 35 (2012) (referencing writing by Thomas Jefferson about the uncivilized cruelty of British treatment of American prisoners of war in the same letters in which he boasts of the scorched earth annihilation of entire settlements of American Indians).
14. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 886 (1985).
15. Regarding slavery, see, e.g., U.S. CONST. art. I, § 1, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3. Regarding the acquisition of new territory, see U.S. CONST., art. IV, § 3.
16. See U.S. CONST. amend. XIV.
17. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2012* (noting participation in presidential and congressional elections between 1932 and 2010, ranging from a low of 33.1% (1998) to 62.8% (1960), but typically below 50%), available at <https://www.census.gov/compendia/statab/2012/tables/12s0397.pdf>. *Study: Americans Don't Know Much About History*, NBC Los Angeles Channel 4, (Jan. 26, 2009), <http://www.nbclosangeles.com/news/local/Study-Americans-Dont-Know-About-Much-About-History.html> (noting 71% failure rate on civic literacy).
18. *California Democratic Party v. Jones*, 530 U.S. 567, 591 n.2 (2000) (Stevens, J., dissenting).
19. *VETERANS HEALTH ADMINISTRATION, MILITARY ROOTS: PRESIDENTS WHO WERE VETERANS*, available at <http://www.va.gov/health/NewsFeatures/20110221a.asp>.
20. *Marbury v. Madison*, 5 U.S. 137 (1803); U.S. CONST. art. III, § 1 (Good Behavior Clause); see also Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 *YALE L.J.* 139, 139 (2006) ("It is simply unclear, on the face of it, what the provision is all about.").
21. *Bush v. Gore*, 531 U.S. 98 (2000); *Powell v. McCormack*, 395 U.S. 486 (1969).
22. See, e.g., cases preceding and following *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).
23. Consider this repetitive series of opinions about laws criminalizing vagrancy: *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972); *Kolender v. Lawson*, 461 U.S. 352, 358, 360 (1983); *City of Chicago v. Morales*, 527 U.S. 41, 58-59 (1999). With the arrival of *Desertrain v. Los Angeles*, 754 F.3d 1147 (9th Cir. 2014), it seems only a matter of time before the issue returns again to the Supreme Court.
24. U.S. CONST. amend. VI.
25. U.S. CONST. amend. IV.
26. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Dickerson v. U.S.*, 530 U.S. 428 (2000).
27. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in *CRIMINAL JUSTICE IN OUR TIME* 1 (A. E. Dick Howard ed., 1965).
28. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 514-19 (2001). In the City of Dallas, as in many other municipalities, it is an offense to "doze[] in a street, alley, park, or other public place," Dallas, Tex., Code of Ordinances § 31-13(a)(1) (2014). A fine and costs totaling \$146.00 is assessed for dozing (unless slumber occurs in a school zone, in which case an additional \$25.00 fee is added), see <http://www.dallascityhall.com/courts/pdfs/CourtFinesList.pdf>. Dozing, at least in Dallas, is a strict liability offense, see Dallas, Tex., Code of Ordinances § 1-5.1(a) (2014). It is unclear whether the crime may be committed while incarcerated in a Dallas jail.

29. Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940–41).
30. Stuntz, *supra* note 28, at 507.
31. *Whren v. U.S.*, 517 U.S. 806 (1996).
32. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2117–18 (1998) (“The conventional wisdom among U.S. lawyers tends to glorify the American system, which is claimed to be more protective of liberty, more democratic, and less dominated by agents of the government establishment than the civil law tradition, thanks to the role of the lay jury, the formal equality between the representatives of the government and of the defendant, and the ‘neutral’ independence of the judiciary . . . The typical criminal procedure course in an American law school describes—albeit in greater detail—a process that students essentially recognize from their high school civics courses.”).
33. Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS (Nov. 20, 2014), available at <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/?insrc=toc> (reporting that “[i]n 2013, while 8 percent of all federal criminal charges were dismissed (either because of a mistake in fact or law or because the defendant had decided to cooperate), more than 97 percent of the remainder were resolved through plea bargains, and fewer than 3 percent went to trial.”). The criminal justice systems run by the different states produce similar statistics. *Id.*
34. Lynch, *supra* note 32, at 2121.
35. *Id.* at 2123.
36. *Id.* at 2123.
37. *Id.* (“It is true that guilty pleas are often entered by frightened, powerless defendants on the advice of over-worked or under-qualified appointed defense lawyers, under the threat of lengthy prison sentences if convicted at trial, facing pre-trial detention that may itself—even if the defendant is ultimately acquitted—exceed the sentence being offered as part of the plea bargain, in cases that may have received as little attention from equally over-worked or under-qualified prosecutors.”).
38. Rakoff, *supra* note 33.
39. Learned Hand, 75th Anniversary Address to the Legal Aid Society of New York (Feb. 16, 1951) (“If we are to keep our democracy there must be one commandment: Thou shalt not ration justice.”), cited in Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 FORDHAM L. REV. 1729, 1729 n.3 (2002).
40. Rakoff, *supra* note 33 (“Reflecting, perhaps, the religious origins of our country, Americans are notoriously prone to making moral judgments. Often this serves salutary purposes; but a by-product of this moralizing tendency is a punitiveness that I think is not likely to change in the near future. Indeed, on those occasions when Americans read that someone accused of a very serious crime has been permitted to plea bargain to a considerably reduced offense, their typical reaction is one of suspicion or outrage, and sometimes not without reason. Rarely, however, do they contemplate the possibility that the defendant may be totally innocent of any charge but is being coerced into pleading to a lesser offense because the consequences of going to trial and losing are too severe to take the risk.”).
41. Adam Liptak, *U.S. prison population dwarfs that of other nations*, N.Y. TIMES, Apr. 23, 2008.
42. Compare Chief Justice John Roberts, 2013 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (Dec. 31, 2013) (“On December 5, 2013, the Judicial Conference appealed to Congress to approve an appropriation of \$7.04 billion for the Judiciary for fiscal year 2014. The Conference calculated this amount, which again is less than two-tenths of one percent of total federal outlays, as needed for the federal courts to operate successfully.”) and U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS FY 2014 BUDGET REQUEST AT A GLANCE (2014), available at <http://www.justice.gov/jmd/2014summary/pdf/bop.pdf> (referencing \$6.936 billion).
43. See, e.g., *Al Nashiri v. Poland*, App. No. 28761/11 (Eur. Ct. H.R. July 24, 2014).
44. See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *Meshal v. Higgenbotham*, 1:09-2178 (D.D.C. June 13, 2014), and the voluminous, multi-jurisdictional litigation concerning Jose Padilla.
45. *Ex parte Merryman*, 17 F. Cas. 144 (1861); *Ex parte Milligan*, 71 U.S. 2 (1866); see also *Ex parte Quirin*, 317 U.S. 1 (1942).

46. Matthew Barakat, *U.S. Terrorist Database Growing at Rapid Rate*, ASSOCIATED PRESS, July 18, 2014; *see also* JEFFREY KAHN, *MRS. SHIPLEY'S GHOST: THE RIGHT TO TRAVEL AND TERRORIST WATCHLISTS* (2013).

47. The case of Ahmed Abdulkadir Warsame is illustrative. Warsame, a Somali national, was seized in April 2011 in international waters by U.S. military forces and interrogated aboard ship for over two months before his transfer to civilian custody and appearance in federal court. He subsequently accepted a plea bargain and awaits sentencing in the Southern District of New York. *See* "Guilty Plea Unsealed in New York Involving Ahmed Warsame, a Senior Terrorist Leader and Liaison Between al Shabaab and al Qaeda in the Arabian Peninsula, for Providing Material Support to Both Terrorist Organizations," Press Release U.S. Attorney's Office, Southern District of New York, March 25, 2013, *available at*: <http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shab-aab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations>.

48. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV., 1099, 1100 (2014).

49. *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2013/results/> (last visited Oct. 5, 2014).

50. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

51. VOLTAIRE, *CANDIDE* (1759) (concluding his satire with "'Excellently observed,' answered Candide; 'but let us cultivate our garden.'").

52. Alfred Sauvy, *Trois Mondes, Une Planète*, L'OBSERVATEUR, 14 août, n°118, p. 14 (1952), *available at* <http://www.homme-moderne.org/societe/demo/sauvy/3mondes.html>.

53. According to the firm of ABA CEELI co-founder Homer Meyer, "More than 5,000 American lawyers, judges, and legal scholars, as well as distinguished professionals from Canada and Europe, have served without pay as CEELI volunteers in more than 30 countries and have provided nearly \$190 million in pro bono legal services and assistance." *See* MILLER CHEVALIER, *American Bar Association Central Europe and Eurasia Law Initiative (CEELI)*, <http://www.millerchevalier.com/Quotes/AmericanBarAssociationCentralEuropeanandEurasianLawInitiativeCEELI> (last visited Oct. 5, 2014).

54. James E. Moliterno, *Exporting American Legal Education*, 58 J. LEGAL EDUC. 274, 278 (2008) (noting and criticizing this export approach).

55. Miner, *supra* note 2, at 503.