

# THE JURISPRUDENCE OF TRANSCENDENTALISM

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The Transcendentalists were a celebrated nineteenth-century group of writers and public figures “that set the tone – intellectual, moral, and spiritual – for an entire generation . . .”<sup>1</sup> They included, among others, the poet and philosopher Ralph Waldo Emerson; his protégé Henry David Thoreau; women’s rights activist Margaret Fuller; radical Unitarian minister Theodore Parker; founder of the Brook Farm utopian community George Ripley; and education reformer Bronson Alcott. They maintained that human beings could lift above their social and material circumstances and experience a union with divinely-inspired truth and goodness, and they forcefully promoted an appreciation of nature, a belief in individual freedom, and a commitment to living a moral life.

The Transcendentalists, it turns out, also had a great deal to say about law and legal institutions. Emerson, Thoreau, and their colleagues held out little hope that law and legal institutions could guide us to the type of deified humanism in which they believed. Quite the contrary, the Transcendentalists were especially disappointed with the legalism that had grown so important in American life. The process of transcending, they thought, included exposing the fundamental weaknesses of law and legal institutions. Indeed, the Transcendentalists thought that a critique of law and legal institutions was necessary in order to break free of day-to-day worries and to merge oneself with the divine Over-soul.

This article has four parts. The first part sketches the evolving legal fabric of Antebellum America, underscoring the growing importance of law and legal institutions and noting that Abraham Lincoln and Alexis de Tocqueville endorsed this development. The second part outlines the Transcendentalists’ jurisprudence, highlighting its negativity regarding law and legal institutions. The third part focuses on the Transcendentalists’ anger about slavery and the Fugitive Slave Law, an anger that is consistent with the Transcendentalists’ general hostility toward law and legal institutions. And the fourth and concluding part considers the role Transcendentalist jurisprudence played for later liberationists, civil rights activists,

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1. DONALD N. KOSTER, *TRANSCENDENTALISM IN AMERICA* 1 (1975).

and critical thinkers, including those affiliated with the Critical Legal Studies Movement of the final decades of the twentieth century.

#### PART ONE: ANTEBELLUM LEGISLATION

Tom Paine's prediction in his 1776 pamphlet *Common Sense* that in America the law could be king reassured and inspired many.<sup>2</sup> Yet it was to be over fifty years before Paine's belief that law could become the guiding light of the Republic became a reality. By that point, law and legal institutions had grown so powerful in the United States as to prompt a negative reaction among the Transcendentalists.

Law's dominance by the middle of the nineteenth century was multifaceted. It began perhaps with the transformation of the Constitution into much more than a legal blueprint for the federal government. Many in the period came to see the Constitution as a sacred text, and anguished jurists and scholars then and now never tired of arguing over how to interpret that text.<sup>3</sup> For average citizens, meanwhile, the specific words in the Constitution did not count for much. The Constitution as a whole and the very ideas supposedly behind it were what stirred Americans.<sup>4</sup> The Constitution, in one interpretation, became "an icon through which one could worship in the legal faith."<sup>5</sup> Like more conventional religious icons, the Constitution was a door that opened on all the faith entailed. Americans believed, due to the promise of the iconic Constitution, that citizens of the United States had rights and liberties within an established legal order.

Hard as it might be to believe in our more cynical present, the Constitution was part of average Americans' daily lives. Banners, wall hangings, and even handkerchiefs featuring the Constitution were common, especially among white men, and some Americans actually carried small replicas of the Constitution in their pockets and bags.<sup>6</sup>

Politicians routinely invoked the Constitution, albeit sometimes disingenuously. Daniel Webster was a one-time Congressman from New Hampshire who moved south and became a Congressman and then United States Senator from Massachusetts.<sup>7</sup> He said, "I believe no human working on such a subject, no human ability exerted for such an end, has ever produced so much happiness as the Constitution of the United States."<sup>8</sup> He was proud to cast himself as the "Defender

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2. THOMAS PAINE, *Common Sense*, in THE COMPLETE WORKS OF THOMAS PAINE 29 (Philip S. Foner ed., 1969).

3. See SANFORD LEVINSON, CONSTITUTIONAL FAITH 11–17 (1988).

4. See generally *id.* at 11.

5. See DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH 3 (1998).

6. See MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 3, 14 (1986).

7. Biographies of Webster include IRVING H. BARTLETT, DANIEL WEBSTER (1978); MAURICE G. BAXTER, ONE AND INSEPARABLE; DANIEL WEBSTER AND THE UNION (1984); and ROBERT V. REMINI, DANIEL WEBSTER: THE MAN AND HIS TIME (1997).

8. Quoted in Brooks D. Simpson, *Daniel Webster and the Cult of the Constitution*, 15 J. AMER. CULTURE 15, 15–16 (1992).

of the Constitution.”<sup>9</sup> Many debated what the Framers of the Constitution had intended the words of the document to mean, but by Webster’s time it had become a powerful symbol of American legal and governmental order.

In fact, Webster, often decked out in Revolutionary-War clothing even though he was not a combatant or even an adult during the War, played a role in an extraordinarily odd invocation of the Constitution as an icon. After shaking hands for hours in pouring rain at the 1841 inaugural, newly elected President William Henry Harrison became ill and died after only one month in office. Webster and a small group of close advisors gathered around Harrison during his final days and helped draft his farewell words. Harrison’s dying hope was for “the perpetuity of the Constitution and the preservation of its principles.”<sup>10</sup>

Beyond the Constitution, local ordinances and state statutes grew increasingly important during the Antebellum Period. Yet the common law remained the actual and symbolic centerpiece in the legal order. Reformers of different stripes had argued in the decades immediately following the Revolution that the common law should be abandoned by the new nation, but efforts to abandon the common law were for the most part unsuccessful. The common law remained “undisturbed.”<sup>11</sup>

One indicator of the common law’s continuing authority involved William Blackstone’s *Commentaries on the Laws of England*, the reigning summary of the common law. Blackstone’s work remained the most important and widely circulated law text in the United States.<sup>12</sup> Lawyers and judges in fact referred to the work for much more than summaries of common law rules and corollaries. In a surprising way, the *Commentaries* became the “bible of American lawyers.”<sup>13</sup> According to the historian Robert M. Cover, Blackstone’s work was not only a lawyer primer but also the era’s “organizing matrix for learning the law.”<sup>14</sup>

As for those expected to learn and master the law, i.e., American lawyers, the legal historian Lawrence Friedman interestingly speculates that the legal profession might have become a narrow, elitist profession, “a small, exclusive guild.”<sup>15</sup> But by the 1830s and ‘40s the American bar had instead become a broad, loosely organized, and widely dispersed profession. Legal education, bar admission rules,

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9. *Id.* at 17.

10. 4 JAMES D. RICHARDSON, *Death of President Harrison: Public Announcement*, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, (James D. Richardson ed., 1897); KAMMEN, *supra* note 6, at 1516, 61–62, 70–71 quotes early nineteenth-century Presidents, Harrison included, regarding the Constitution.

11. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 127 (1989).

12. CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS IN THE FOUNDING ERA: AN INTELLECTUAL HISTORY* 64 (2019).

13. Albert S. Miles, David L. Dagley, & Christina H. Yau, *Blackstone and His American Legacy*, 5 AUSTRALIA & NEW ZEALAND J. LEGAL ED. 46, 56 (2000).

14. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 16 (1975).

15. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 266 (1973).

and professional standards were minimal, and by the early nineteenth century, the bar was a sprawling and industrious band of professionals.<sup>16</sup>

For its part, the citizenry came gradually to trust lawyers and to turn to them for advice and assistance. This contrasted with the pronounced anti-lawyer hostility that had reigned during the first twenty-five years of the Republic.<sup>17</sup> Lawyers in that earlier period had taken over primary responsibility for collecting on American citizens' towering mountain of debt.<sup>18</sup> Who loves debt collectors, lawyers or otherwise? Anti-lawyer sentiments were so widespread that Massachusetts merchant Benjamin Austin had gained some traction with a campaign to completely eliminate the legal profession.<sup>19</sup>

As for the courts, the responsibilities of court officials and judges changed, and the changes contributed to the status and power of the courts as legal institutions. While in the colonial era prosecutions were for the most part private, in the Antebellum Period state and local prosecutors were increasingly available to pursue, indict, and convict wrongdoers. Furthermore, public prosecutors no longer had to rely on percentages of fines and penalties for compensation, and beginning in the 1820s prosecutors increasingly became elected rather than appointed officials.<sup>20</sup>

Judges in the state courts were especially influential legal officials,<sup>21</sup> and a general idea put forward by the Framers took hold: While the executive and legislative branches could wrestle with tough, contemporary issues, the courts would operate without reference to the politics that were inevitably part of those issues.<sup>22</sup> The courts were theoretically supposed to embody and operate with reference to and in keeping with the rule of law.

Within the courts, meanwhile, judges staked out their claims to be exclusively responsible for understanding and interpreting the law, and "the division of labor between the judge and jury sharpened."<sup>23</sup> While in a previous era, the judge and the jury had shared power with regard to both facts and the law, juries in the earlier decades of the nineteenth century were increasingly limited to appraisals of the facts. While this change reflected a declining sense that juries could speak for their communities, it also reflected a growing confidence that judges could and should understand and be able to articulate the law.

In general, a multifaceted legalism had become woven into American life. Most citizens respected the law and took themselves to be living by the rule of law.

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16. *See id.* at 267.

17. David Ray Papke, *The Legal Profession and Its Ethical Responsibility: A History*, in *ETHICS AND THE LEGAL PROFESSION* 41 (Elliott D. Cohen & Michael Davis eds., 2d ed. 2009).

18. *Id.*

19. *Id.*

20. *See* JOHN L. WORRALL, *PROSECUTION IN AMERICA: A HISTORICAL AND COMPARATIVE ACCOUNT* 5–9 (2008). Public defenders, meanwhile, were not even on the horizon. The first public defender agencies were established in California immediately before and then after World War I. *See* SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 29–30 (2020).

21. In general, state courts were more important than federal courts, and as they developed, the federal courts drew heavily on the experience of the state courts. *See* HALL, *supra* note 11, at 72.

22. *Id.*

23. *Id.* at 107.

According to one modern-day historian, law had become “the official discourse” and “principle medium” of the Republic.<sup>24</sup>

One senses the enthusiasm for this development in the words of a young, ambitious Illinois lawyer named Abraham Lincoln. He in fact suggested in 1838 in a speech in Springfield, Illinois that Americans take an oath never to violate the law:

Let reverence for the laws be breathed by every American mother to the lisping babe, that prattles on her lap – let it be taught in schools, seminaries, and in colleges.; - let it be written in Primers, spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; let the old and young, rich and poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice upon its altars.<sup>25</sup>

Perhaps Lincoln was as much panicky about social unrest as he was profound, but European visitors to the United States also noted the developments that were taking place with regard to law and legal institutions. This was especially true for the minor French aristocrat Alexis de Tocqueville. Sent by his country to report back on American penitentiaries, de Tocqueville instead produced a wide-ranging and still highly regarded report on life in the United States during the 1830s.<sup>26</sup> In his report, de Tocqueville said repeatedly that law and legal institutions had become foundational in the young, robust, and sometimes unpredictable American democracy.

Law and legal institutions, de Tocqueville thought, had a different standing in the United States than it had in Europe. Average Americans trusted the law, while in Europe the masses took the law to be tool of the rich.<sup>27</sup> Even Americans of modest means felt responsible for and empowered by the law, and they looked upon it with “a sort of paternal love . . . .”<sup>28</sup> Lawyers, he thought, formed “the political upper class and the most intellectual sector of the society.”<sup>29</sup> “If you ask me where the American aristocracy is found,” de Tocqueville said, “I have no hesitation in answering that it is not among the rich, who have no common link uniting them. It is at the bar or the bench that the American aristocracy is found.”<sup>30</sup> “The courts,” in de Tocqueville’s opinion, were “the most obvious organs through which the legal body influences democracy.”<sup>31</sup> “The American judge is constantly surrounded by men accustomed to respect his intelligence as superior to their own

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24. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 16 (1993).

25. 1 ABRAHAM LINCOLN, *Address before the Young Men’s Lyceum of Springfield, Illinois*, in *THE COMPLETE WORKS OF ABRAHAM LINCOLN* 43 (John C. Nicolay & John Hay eds., 1894).

26. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed. & George Lawrence trans., 1966).

27. *See id.* at 241.

28. *Id.*

29. *Id.* at 268.

30. *Id.*

31. DE TOCQUEVILLE, *supra* note 26, at 269.

. . . and apart from its use in deciding cases, his authority influences the habits and minds and even the very soul of all who have cooperated with him.”<sup>32</sup> As for the American jury, de Tocqueville thought it should be considered a political institution “inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into those of the rulers.”<sup>33</sup> Civil juries in particular “instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.”<sup>34</sup> The jury, in De Tocqueville’s opinion, was a “free school” in which jurors could receive practical training in how the law worked and also learn their rights.<sup>35</sup> He considered the jury “one of the most effective means of popular education at society’s disposal.”<sup>36</sup>

Even commentators as perceptive as de Tocqueville can of course be mistaken. When a foreign visitor attempts to make sense of the domestic cultural environment, the visitor will likely miss subtleties and nuances, and the visitor might in fact have large blind spots. But at the same time, a visitor such as de Tocqueville might perceive larger phenomena and cultural patterns that residents overlook or take for granted. In de Tocqueville’s case, he appears to have been accurate regarding the nation’s legalization. To quote him at length:

There is hardly a political question in the United States which does not sooner or later turn into a judicial one. Consequently the language of the everyday party-political controversy has to be borrowed from legal phraseology and conceptions. As most public men are or have been lawyers, they apply their legal habits and turn of mind to the conduct of affairs. Juries make all classes familiar with this. So legal language is pretty well adopted into common speech; the spirit of the law, born within the schools and the courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of the magistrate.<sup>37</sup>

De Tocqueville most likely did not know Tom Paine had wished in 1776 that the law in the United States would become king,<sup>38</sup> but as the nation began its second half-century, that wish had to a surprising extent come true.

#### PART TWO: TRANSCENDENTALISTS ON LAW, LEGISLATION, AND LAWYERS

The Transcendentalists did not share de Tocqueville’s enthusiasm regarding legal developments in American society and culture, and they worried that Americans had taken too eagerly to the law. The resulting Transcendentalist critique does not appear in a single tract, but a jurisprudential bricolage reflecting

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32. *Id.* at 276.

33. *Id.* at 272.

34. *Id.* at 274.

35. *See id.* at 275.

36. DE TOCQUEVILLE, *supra* note 26, at 275.

37. *Id.* at 270.

38. *See* PAINE, *supra* note 2, at 29.

their reservations about law can be assembled from the Transcendentalists' assorted lectures and writings. This body of thought about law is overwhelmingly negative.

The starting point for Transcendentalist jurisprudence was the Transcendentalists' strong belief in a higher law. For his part, Ralph Waldo Emerson had assumed at first that such a higher law dwelled within the law posited by the state, but when he looked into how the courts were deciding cases, he was dismayed to learn that "the Higher Law was reckoned a good joke . . ."<sup>39</sup> He then began exploring the law itself and especially Blackstone's *Commentaries on the Common Law*, all in hopes of finding that morality and fundamental Biblical teachings were central in legal reasoning and thinking. Once again, his search was to no avail.<sup>40</sup>

Emerson, it seems, was searching for a type of natural law that could dwell within the posited law. He hoped to locate and underscore a set of fundamental laws and principles to which human beings could look for protection of their divinely-inspired personhood. These fundamental laws and principles, Emerson thought, were universal. He believed higher laws existed "out of time, out of space, and not subject to circumstance."<sup>41</sup>

The other Transcendentalists shared Emerson's longing for and commitment to a higher law. Bronson Alcott, for example, refused to commit to made-made law. Writing in an exquisite short volume titled *Tablets*, Alcott said written laws were "but images of, or substitutes for those true laws which ought to be present in every human soul and through a perfect insight into the good."<sup>42</sup> Theodore Parker, whose essay "Transcendentalism" has been characterized as "the most exact and comprehensive presentation of this somewhat elusive trend of thought," heartily agreed.<sup>43</sup> He dismissed legal precedents and looked instead to "natural justice, natural right; absolute justice, absolute right."<sup>44</sup> In Transcendentalist politics, he said, "the question of expediency is always subject to the question of natural right."<sup>45</sup>

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39. RALPH WALDO EMERSON, *The Fugitive Slave Law – Address to the Citizens of Concord, 3 May, 1851*, in *THE PORTABLE EMERSON* 474, 480 (Jeffrey S. Cramer ed., 2014).

40. According to his son Edward, Emerson was dogged in his pursuit for a higher law: "The national disgrace [slavery] took Mr. Emerson's mind from poetry and philosophy and almost made him for a time a student of law and an advocate. He eagerly sought and welcomed all principles in law-books, or broad rulings of great jurists, that Rights lay behind Statute to guide its application . . ." Edward Emerson, *Preface to the 1851 Address*, CONCORD LIBRARY, [https://concordlibrary.org/special-collections/emerson-celebration/Em\\_Con\\_39](https://concordlibrary.org/special-collections/emerson-celebration/Em_Con_39).

41. RALPH WALDO EMERSON, *THE MAJOR PROSE* 111 (Ronald S. Bosco & Joel Myerson eds., 2015).

42. BRONSON ALCOTT, *TABLETS* 150–51 (1868)

43. ROBERT E. COLLINS, *THEODORE PARKER: AMERICAN TRANSCENDENTALIST* iii (1973).

44. THEODORE PARKER, *Transcendentalism*, in *THEODORE PARKER: AN ANTHOLOGY* 91 (Henry Steel Commager ed., 1960).

45. *Id.*

This sense of a higher or natural law somewhat resembles but in the end differs from the vision of natural rights and natural law which had been espoused by the social contract thinkers and especially by John Locke.<sup>46</sup> The latter had asserted in *The Second Treatise on Government* that a natural law existed in “the state of nature.”<sup>47</sup> This natural law included various natural rights, with life, liberty, and property being among them. In Locke’s mind, the right property was especially important. He was convinced that man could and should remove land from the state of nature and mix it with his labor, thereby making this land his own “property” and excluding others from claiming it.<sup>48</sup> Locke even argued that once the state been formed, the state had a special obligation to protect property rights: “The great and chief end, therefore, of men uniting into commonwealths and putting themselves under government is the preservation of their property.”<sup>49</sup>

This line of thinking regarding natural rights of course influenced the Framers of the Declaration of Independence and of the United States Constitution. When Thomas Jefferson and his colleagues met in Philadelphia in 1776 to draft the former, their sense that their natural rights had been violated became a reason for demanding independence from England.<sup>50</sup> In Jefferson’s language “life, liberty, and property” became “life, liberty and the pursuit of happiness.”<sup>51</sup> Later, for better or worse, the Founders jettisoned the “pursuit of happiness” phrase in favor of the more conventional right of property when they added the Bill of Rights to the Constitution in 1791.<sup>52</sup>

The surface similarities between social-contract natural rights and the Transcendentalists’ higher law notwithstanding, it was neither a Lockean natural law nor a Jeffersonian “pursuit of happiness” that the Transcendentalists envisioned when they spoke and wrote of higher law. Christian romantics more than political theorists in the social contract tradition, the Transcendentalists subscribed to a higher law that was not as shaped and specific as what Locke and the Framers had in mind. The Transcendentalists’ higher law seemed to consist of very general Christian rules and principles. Respecting and living by these rules and principles presumably enabled people to reach divinely-inspired Truth.

While the Transcendentalist higher law was vague, this higher law was neither weak nor unable to inspire. Emerson thought man-made laws which violated or disregarded the higher law had no validity,<sup>53</sup> and Theodore Parker argued that the

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46. For a consideration of the most important social contract thinkers, see JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986).

47. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 5–6 (Thomas P. Peardon ed., 1952).

48. See *id.* at 17–18.

49. *Id.* at 71.

50. See David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291 (2002). Indeed, some have suggested that Thomas Jefferson lifted language almost verbatim from Locke’s work. See *id.* at 287.

51. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776). The phrase “the pursuit of happiness” has flummoxed historians a bit, with at least one arguing that the Framers intended the phrase to refer to the pursuit of virtue and striving to live by natural law. See CARLI N. CONKLIN, *THE PURSUIT OF HAPPINESS IN THE FOUNDING ERA* 8 (2019).

52. U.S. CONST. amend. V.

53. See EMERSON, *The Fugitive Slave Law*, *supra* note 39, at 479.



“natural justice” of American government should derive from “legislation that is as divine as true anatomy is divine, legislation which enacts law representing a fact of the universe, a resolution of God.”<sup>54</sup> If law did not measure up to this elevated standard, no obligation existed to obey it. Human beings started out with an immanent morality, and government could not show up on the doorstep demanding that American citizens relinquish the morality that had been bestowed on them.

One reason for the Transcendentalists’ limited enthusiasm for man-made law involved the way lawmakers were chosen, i.e., through elections. Alcott reminded his readers that while voting was in general a good practice, “There are times nevertheless in one’s history when abstinence from this first privilege of a freeman and republican, seems a duty best performed in its non-performance . . . .”<sup>55</sup> Thoreau was even more leery of voting and cast it as “a sort of gaming, like chequers or backgammon, with a slight moral tinge to it . . . .”<sup>56</sup>

Given the general mindset of legislators, the Transcendentalists were not surprised by the poor quality of legislatures’ work. Republics abound in young civilians, Emerson thought, “who believe that laws make the city.”<sup>57</sup> These “young civilians” foolishly think that you merely need enough votes and voices to make laws that can prudently and morally guide us.<sup>58</sup> Using an intriguing metaphor, Emerson counseled that naïve legislation was just “a rope of sand, which perishes in the twisting.”<sup>59</sup> The citizenry might honor and esteem statutes, “but law is only a memorandum.”<sup>60</sup>

“No man with a genius for legislation” Thoreau added, “has appeared in America.”<sup>61</sup> Legislators, along with politicians and office-holders, might be eloquent, but they rarely have insights regarding “the much-vexed questions of the day.”<sup>62</sup> As a result, legislation is often merely “wordy wit.”<sup>63</sup> When oblivious legislators enact laws about fishing, Thoreau said in a chapter of *Walden* titled “Higher Laws,” they focus on the number of hooks that might be used rather than on the bodies of water in which the fish swim.<sup>64</sup> With the capture and return of fugitive slaves continuing to convulse the populace, the Massachusetts Legislature,

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54. 6 THEODORE PARKER, *Transcendentalism*, in THE WORKS OF THEODORE PARKER: THE WORLD OF MATTER AND THE SPIRIT OF MAN 27 (George W. Cooke ed., Am. Unitarian Ass’n 1907).

55. ALCOTT, *supra* note 42, at 149.

56. HENRY DAVID THOREAU, *Resistance to Civil Government*, in THE HIGHER LAW: THOREAU ON CIVIL DISOBEDIENCE AND REFORM 63, 69 (Wendell Glick ed., 2004).

57. RALPH WALDO EMERSON, *Self Reliance: Politics*, in THE PORTABLE EMERSON 279, 280 (Jeffrey S. Cramer ed., 2014).

58. *Id.*

59. *Id.*

60. *Id.*

61. THOREAU, *Resistance to Civil Government*, *supra* note 56, at 88.

62. *Id.*

63. *Id.* at 89.

64. See HENRY DAVID THOREAU, *WALDEN* 190 (1906).

“was wholly absorbed in the liquor-agency question, and indulging in poor jokes on the word ‘extension.’”<sup>65</sup> Overall, according to Thoreau, legislators “are as likely to serve the devil, without intending it, as God.”<sup>66</sup>

And yet, despite the dubious realities of voting and the abundant flaws in legislative law-making, many Americans faithfully followed the laws. According to Thoreau:

A common and natural result of an undue respect for the law is that you may see a file of soldiers, colonel, captain, corporal, privates, powder-monkeys, and all, marching in admirable order over hill and dale to the wars, against their wills, against their common sense and consciences . . .<sup>67</sup>

“Law never made man a whit more just,” Thoreau said, “and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.”<sup>68</sup>

From the Transcendentalist perspective, lawyers were suspect regardless of whether they worked in legislatures or not. To be sure, lawyers can, in Emerson’s opinion, see the different sides of a controversy and “get you out of a scrape.”<sup>69</sup> But lawyers tend to offer qualifications upon qualifications.<sup>70</sup> While lawyers might have struck de Tocqueville as an indigenous aristocracy,<sup>71</sup> Emerson was willing to concede only that lawyers were a “prudent race.”<sup>72</sup>

What did the Transcendentalist think should be done about the distasteful laws that surrounded them? For starters, underscore that the Transcendentalists were *not* law reformers.<sup>73</sup> A positive attitude about “law reform” of course reigns in modern legal education, and almost all teachers and students agree it is desirable as a process. But the Transcendentalists had little taste for changing law for the better. In general, the Transcendentalists were interested more in the reform of the individual than in the reform of society.<sup>74</sup>

Thoreau for example, refused to pay his taxes because he thought they would be used to finance the Mexican War, but he did not refuse to pay his taxes because

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65. HENRY DAVID THOREAU, *The Last Days of John Brown*, in *THE HIGHER LAW: THOREAU ON CIVIL DISOBEDIENCE AND REFORM* 145, 149 (Wendell Glick ed., 2004).

66. THOREAU, *Resistance to Civil Government*, *supra* note 56, at 66.

67. *Id.* at 65.

68. *Id.*

69. RALPH WALDO EMERSON, *Representative Men*, in *EMERSON IN HIS JOURNALS* 354 (Joel Porte ed., 1984).

70. *See id.*

71. *See* DE TOCQUEVILLE, *supra* note 26, at 268.

72. EMERSON, *Representative Men*, *supra* note 69, at 413.

73. *See* George E. Carter, *Martin Luther King: Incipient Transcendentalist*, 40 *PHYLON* 318, 321 (1979).

74. *See id.* John A. Buchrens would differ with an assertion that the Transcendentalists were not committed to social reform. In his mind, they were at the center of an activist network that included Frederick Douglass, Elizabeth Cady Stanton, John Brown, Dorothea Dix, and others. *See* JOHN A. BUCHRENS, *CONFLAGRATION: HOW THE TRANSCENDENTALISTS SPARKED THE AMERICAN STRUGGLE FOR RACIAL, GENDER, AND SOCIAL JUSTICE* 1 (2020).

he hoped his civil resistance would lead to changes in government policy or to a rescinding of the declaration of war.<sup>75</sup> Thoreau in fact asked at one point if it was better to obey offensive laws while working to amend them or to transgress them at once. He chose the latter:

Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them [the laws]. They think that, if they should resist, the remedy would be worse than the evil. But it is the fault of government itself that the remedy "is" worse than the evil.<sup>76</sup>

Thoreau also thought the government took too long to reform the laws. "I have other affairs to attend to," he said. "I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad."<sup>77</sup>

Instead of trying to reform the laws, the Transcendentalists thought individual laws as well as whole bodies of law could be rejected. If a man-made statute or ordinance was ostensibly immoral, it could be flaunted. A person sometimes had to deny the authority of the law and refuse to give it any respect. Furthermore, if immoral laws were numerous and/or egregious enough, that could invalidate the government as a whole. The objections that have been brought against a standing army, Thoreau thought, could also be brought against a standing government.<sup>78</sup> Both a standing army and a standing government could be rejected.

When such a rejection proved necessary, though, the Transcendentalists did not endorse the social-contract theorists' idea that a given social contract could be replaced with one that was more respectful of natural law. Instead of calling for a new social contract, the Transcendentalists and especially Thoreau endorsed a personal separation from the state which might in turn lead to something utopian. Writing in his classic essay colloquially known in the present as "Civil Disobedience" or "The Duty of Civil Disobedience,"<sup>79</sup> Thoreau suggested that *individuals* should be allowed to drop out of the state, almost like apples falling and rolling away from a tree.<sup>80</sup> "A State that bore this kind of fruit, and suffered it to drop off as fast as it ripened" he said, "would prepare the way for a still more perfect and glorious State, which also I have imagined, but not yet anywhere seen."<sup>81</sup>

Many in Thoreau's era and in later years as well would consider this line of thought personally indulgent and patently impossible. For example, James Willard

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75. See Carter, *supra* note 73, at 321.

76. See THOREAU, *Resistance to Civil Government*, *supra* note 56, at 73.

77. *Id.* at 74.

78. See *id.* at 63.

79. When Thoreau published this essay in the spring of 1849, it was formally titled "Resistance to Civil Government," but the title "Civil Disobedience" was used for a printing of the essay in 1866, four years after Thoreau's death. See HOWARD ZINN, *Introduction*, in *THE HIGHER LAW: THOREAU ON CIVIL DISOBEDIENCE AND REFORM* xiv (Wendell Glick ed., 2004).

80. See THOREAU, *Resistance to Civil Government*, *supra* note 56, at 90.

81. *Id.*

Hurst, the distinguished father of modern legal history, forcefully challenged the idea that the state could somehow be subordinate to individual conscience.<sup>82</sup> Hurst had no stomach for “Thoreau’s “high-toned individuality”;<sup>83</sup> he characterized Thoreau’s thinking as naïve.<sup>84</sup>

But Hurst and others who have been so critical of Thoreau’s vision did not realize how it is merely the culmination of a much larger Transcendentalist jurisprudence. Although a multi-vocal construct and a decidedly negative reaction to what the Transcendentalists saw developing around them, Transcendentalist jurisprudence was surprisingly consistent and insightful. Buffeted by their era’s widespread legalization, the Transcendentalists were highly skeptical of and hostile to the law and legal institutions. The laws did not honor and respect what they took to be a higher law. The legislatures could not be trusted to protect God-given entitlements. Crafty, calculating lawyers did not search for profound truths but rather drafted mindless statutes and engineered expedient deals and compromised arrangements. From the Transcendentalist perspective, even the state as a whole was prone to immorality, and if this immorality was extensive enough, one could individually secede from the state. Questions of practicality aside, Transcendentalist jurisprudence was a tool for individuals to remove the ornamental mantel of legalism from American life.

### PART THREE: THE FUGITIVE SLAVE LAW

The Transcendentalists criticized slavery throughout the Antebellum Period, but their criticism grew detectably sharper after the enactment of the Fugitive Slave Law in 1850. The procedures set out in the Fugitive Slave Law were in themselves flawed and troubling, but the Law’s enactment and then its enforcement also brought to the surface the Transcendentalists’ negative thoughts about law and legal institutions. They drew on this jurisprudence in what became an especially harsh critique of the Fugitive Slave Law. The latter was worrisome from a Transcendentalist perspective in part because law and legal institutions were in general not to be trusted.

If one drops back in time, it seems the Transcendentalists’ earliest criticism of slavery was cautious and a bit understated, and this may have related to their distaste for the abolitionists. The Transcendentalists often displayed a sense of Brahmin entitlement, and according to one historian, their class consciousness and elitism was especially obvious in their reactions to the abolitionists.<sup>85</sup> These fierce opponents of slavery struck some Transcendentalists as “despicable outcasts,” and the Transcendentalists also took the abolitionists’ direct appeal to women and children “as an incursion on patriarchal authority.”<sup>86</sup> From a Transcendentalist

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82. See James Willard Hurst, *Thoreau, Conscience and Law*, 19 SO. DAKOTA L. REV. 1, 1 (1974).

83. *Id.* at 8.

84. See *id.* at 6.

85. See BELL GALE CHEVIGNY, *THE WOMAN AND THE MYTH: MARGARET FULLER’S LIFE AND WRITINGS* 285–86 (1994).

86. *Id.* at 286.

perspective, the abolitionists “had to be shrill enough to be heard,”<sup>87</sup> and their shrillness was offensive to the Transcendentalists.

Margaret Fuller perhaps had especially pronounced reservations regarding the abolitionists. Her review of *The Narrative of Frederick Douglass* in Horace Greeley’s *New York Tribune* has been lauded as “one of the first pieces of Transcendentalist commentary on the plight of the African slave,”<sup>88</sup> and while arguing in 1845 against allowing Texas to join the Union, she warned annexation would “rivet the chains of slavery and the leprosy of sin permanently on the nation.”<sup>89</sup> But when it came to the abolitionists, “their heart and vehemence, combined with their threat to individualism, distracted Fuller for years from the content of their exhortations.”<sup>90</sup> In a memoir written while she was in Italy, Fuller confessed, “I could never endure to be with them at home, they were so tedious, often so narrow, always so rabid and exaggerated in their tone.”<sup>91</sup> As for the fiery William Lloyd Garrison, the nation’s most prominent abolitionist and a resident of Boston, Fuller said he had “indulged in violent invective and denunciation till he spoiled the temper of his mind.”<sup>92</sup> She compared him to a man “who has been in the habit of screaming himself hoarse to make the deaf hear” and as a result “can no longer pitch his voice on a key agreeable to common ears.”<sup>93</sup>

The Transcendentalists’ uneasiness with Garrison and the abolitionists abated somewhat after the Compromise of 1850, which was extremely distasteful for both the abolitionists *and* the Transcendentalists.<sup>94</sup> Prompted less by the growing debate over abolition than by disagreements regarding slavery in the territories, the Compromise was a sloppy stew of arrangements and promises. They included the admission of California as a new state and the creation of the Utah and New Mexico as territories with no restrictions on slavery.<sup>95</sup> As part of the Compromise, Texas yielded on several issues involving the New Mexico boundary, and in return the federal government assumed the Lone Star State’s public debt.<sup>96</sup> Lawmakers also finally ended the notorious slave trade in Washington, D.C., which had so offended abolitionists. And last but not least, the Fugitive Slave Law sweetened the pot for southerners by providing for the appointment of federal commissioners who could decide whether a purportedly escaped slave should be returned.

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87. *Id.*

88. Blake Carrera & John Pipkin, *Transcendentalist Literature and the Question of Slavery*, 7 J. UNDERGRAD. RSCH. 8, 8 (2017).

89. CHEVIGNY, *supra* note 85, at 271.

90. *Id.* at 286.

91. MARGARET FULLER, *THE WRITINGS OF MARGARET FULLER* 427 (Mason Wade ed., 1941).

92. CHEVIGNY, *supra* note 85, at 341–42.

93. *Id.* at 342.

94. *See generally* Micheal Fellman, *Theodore Parker and the Abolitionist Role in the 1850s*, 61 J. AMER. HISTORY 666, 666–70 (1974).

95. *See* EARL M. MALTZ, *DRED SCOTT AND THE POLITICS OF SLAVERY* 49 (2007).

96. *Id.*

Proceedings before these commissioners were highly suspect. The Fugitive Slave Law did not anticipate that commissioners would hold jury trials, take testimony from slaves, or recognize state writs of habeas corpus.<sup>97</sup> Rather, commissioners could hear the slaveholders or examine their affidavits *ex parte* and, based on their statements or affidavits, decide whether to return supposed slaves to their purported owners. What's more, the commissioners were to receive fees, and the fees were larger for returning a supposed slave than for recognizing the supposed slave, to use the language of the era, as a free Negro.<sup>98</sup> When these federal commissions finally closed up shop, commissioners had returned 332 supposed slaves and recognized only eleven men and women as free.<sup>99</sup> The commissions amounted to administrative agencies returning fugitive slaves or rounding up other men and women alleged to be fugitive slaves.

The Transcendentalists may not have fully appreciated the exact workings of commissions, but the new Fugitive Slave Law spurred them to action. Bronson Alcott and Theodore Parker, for example, joined "Vigilance Committees," whose chief purpose was the protection of fugitive slaves.<sup>100</sup> Alcott also helped a fugitive slave flee to Canada, using the slave's harrowing escape as a lesson for his children, "bringing before them the wrongs of the black man and his tale of woe."<sup>101</sup> Parker also posted signs in Boston warning not only fugitive slaves but also all African Americans that the Fugitive Slave Law put them in danger of being captured and kidnapped.<sup>102</sup>

Not surprisingly, a change was also detectable in the Transcendentalists' lectures and writings related to slavery. Stated simply, the Transcendentalists became much more outspoken in their opposition to slavery. Within a year of the enactment of the Fugitive Slave Law, according to one interpretation, the Transcendentalists had awakened from their "dormancy" regarding slavery and were increasingly prepared to excoriate it.<sup>103</sup>

This transformation is especially evident in Emerson's lectures and writings. Emerson's opposition to slavery was evident as early as 1844, when he gave a lecture in Concord celebrating the tenth anniversary of the British abolition of slavery in the West Indies.<sup>104</sup> In his lecture Emerson commended the British decision to free the slaves in the West Indies and expressed the hope the decision

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97. See COVER, *supra* note 14, at 176.

98. *Id.* at 175.

99. One supposed fugitive slave was returned to his owner after 19 years in the North. See ZINN, *supra* note 79, at xv.

100. BRONSON ALCOTT, *Entry of April 15, 1851*, in THE JOURNALS OF BRONSON ALCOTT 245 (Odell Shepard ed., 1938); see also Theodore Parker, NAT'L PARK SERV., <https://www.nps.gov/people/theodore-parker.htm>.

101. BRONSON ALCOTT, *Entry of February 9, 1874*, in THE JOURNALS OF BRONSON ALCOTT 190 (Odell Shepard ed., 1938).

102. See Fellman, *supra* note 94, at 668; *Placard Cautioning Slaves to Be Careful*, GETTY IMAGES, <https://www.gettyimages.com/detail/news-photo/placard-written-by-theodore-parker-issued-by-the-vigilance-news-photo/514905564>.

103. Carrera & Pipkin, *supra* note 88, at 8.

104. See RALPH WALDO EMERSON, *Considerations By the Way: Emancipation of the Negroes in the British West Indies*, in THE PORTABLE EMERSON 449, 449–73 (Jeffrey S. Cramer ed., 2014).

would be the beginning of abolition of slavery throughout the world, but one senses little genuine outrage regarding slavery. Using curious language, Emerson praised the British decision because it “gave the immense fortification of a fact, - of pure history,- to ethical abstractions.”<sup>105</sup> Even when praising the British emancipation of slaves, Emerson was more learned than passionate.

Six years later, Emerson’s tone had changed. His ire had in fact been piqued by the enactment and enforcement of the previously outlined Fugitive Slave Law, and on May 3, 1851 he delivered a truly impassioned lecture, his first of several public attacks on the Fugitive Slave Law. In Emerson’s opinion, the Fugitive Slave Law was nothing less than “filthy.”<sup>106</sup> The citizens of Massachusetts and of the nation as a whole, he was certain, should “abrogate” the law, refuse to return fugitive slaves, and once and for all “exterminate” slavery.<sup>107</sup>

Emerson’s anger regarding the Fugitive Slave Law is palpable, but what is intriguing for purposes at hand is that Emerson’s expression of that anger is coordinated with Transcendentalist jurisprudence in general. Man-made law was often the product of party politics and “monied interests,” Emerson said, and the concomitant opinions of the courts are “the political breath of the hour.”<sup>108</sup> Immoral law, Emerson thought, could and should be broken:

An immoral law makes it a man’s duty to break it, at every hazard. For virtue is the very self of every man. It is therefore a principle of law that an immoral contract is void, and that an immoral statute is void. For, as laws do not make right, and are simply declaratory of a right which already existed, it is not to be presumed that they can so stultify themselves as to command injustice.<sup>109</sup>

“A wicked law cannot be executed by good men.” Emerson was certain, “and must be by bad.”<sup>110</sup>

The other Transcendentalists shared Emerson’s anger and seconded his criticism of the Fugitive Slave Law. Their criticism not surprisingly began with a sense that the Fugitive Slave Law violated what they took to be higher law. The courts rejected arguments that the Fugitive Slave Law denied due process and was therefore unconstitutional,<sup>111</sup> but lest there be any doubt on the matter, the United States Constitution was not what the Transcendentalists considered higher law. They were concerned not about constitutionality but rather the fundamental righteousness of the Fugitive Slave Law vis-à-vis the higher law.<sup>112</sup> If a judge reviews a law with regard its constitutionality, Thoreau said, that is like inspecting a pick-

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105. *Id.* at 449.

106. EMERSON, *The Fugitive Slave Law*, *supra* note 39, at 485.

107. *Id.* at 488.

108. *Id.* at 477.

109. *Id.* at 478.

110. *Id.* at 482–83.

111. See COVER, *supra* note 14, at 177.

112. See ZINN, *supra* note 79, at xviii.

lock to see if it is in working order.<sup>113</sup> It is just as impertinent to ask if the Fugitive Slave Law is constitutional, he added, “as to ask whether it is profitable or not.”<sup>114</sup>

The Transcendentalists’ opposition to the Fugitive Slave Law illustrated not only their unyielding opposition to enactments violating the higher law but also their distrust of legal institutions such as legislatures, including but not limited to the United States Congress. The latter, after all, had been responsible for the Compromise of 1850 and the Fugitive Slave Law which was central in that Compromise.<sup>115</sup> “When, in some obscure country town, the farmers come together to a special town meeting, to express their opinion on some subject which is vexing the land,” Thoreau said, “that, I think, is the true Congress, and the most respectable one that is ever assembled in the United States.”<sup>116</sup>

The member of the actual Congress with whom the Transcendentalists were most upset was the previously mentioned Daniel Webster. In addition to being a prominent national politician, Webster was a Massachusetts lawyer.<sup>117</sup> He represented various rich and widely known clients, e.g., John Jacob Astor, and he argued well over 200 cases before the Supreme Court of the United States. When in the spring of 1850 he spoke in the United States Senate in favor of the Compromise of 1850 and the Fugitive Slave Law, many felt betrayed.<sup>118</sup> Alcott attended the rally and called Webster a “moral recreant,”<sup>119</sup> and it was also just the type of thing you might expect from a member of the legal profession. Transcendentalist criticism of Webster’s complicity in the Compromise of 1850 and in his support for the Fugitive Slave Law intriguingly segued to the fact that he was a lawyer.<sup>120</sup>

Emerson and Thoreau, both doubters of the legal profession’s morality, illustrated this line of criticism regarding Webster. When Emerson compared Webster’s arguments for the Fugitive Slave Law to arguments made by legal theorists who recognized a higher law, Emerson said Webster’s arguments “were the spray of a child squirt against a granite wall.”<sup>121</sup> As for Thoreau, he shifts within a single paragraph of his “Resistance to Civil Government” from a criticism of Webster’s work as a Senator from Massachusetts to a blistering attack on the way Webster thought like a lawyer. Lawyers might be practical, Thoreau says, but “this

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113. See HENRY DAVID THOREAU, *Slavery in Massachusetts*, in *THE HIGHER LAW: THOREAU ON CIVIL DISOBEDIENCE AND REFORM* 91, 98 (Wendell Glick ed., 2004).

114. *Id.* at 103.

115. HALL, *supra* note 11, at 139.

116. THOREAU, *Slavery in Massachusetts*, *supra* note 113, at 99.

117. According to one scholar, Webster was “the leading attorney of the early nineteenth century, perhaps of the entire history of the nation . . . .” MARUCIE G. BAXTER, *DANIEL WEBSTER AND THE SUPREME COURT* v (1966).

118. Many gathered at the Boston rally, where they “poured and dashed indignity on Webster and the abettors of the Fugitive Slave Law.” BRONSON ALCOTT, *Entry of March 23, 1850*, in *THE JOURNALS OF BRONSON ALCOTT* 230, 245 (Odell Shepard ed., 1938).

119. *Id.*

120. THOREAU, *Resistance to Civil Government*, *supra* note 56, at 87.

121. EMERSON, *The Fugitive Slave Law*, *supra* note 39, at 481.



quality is not wisdom, but prudence."<sup>122</sup> The lawyer's truth," Thoreau insists, "is not Truth, but consistency, or a consistent expediency."<sup>123</sup>

Theodore Parker thought the Fugitive Slave Law itself came from the seed that slavery had sown and harrowed into northern soil, and he was appalled that northerners seemed prepared to comply with the Law.<sup>124</sup> For his own part, Thoreau thought it was ridiculous that the fate of escaped slaves should be decided by legal tribunals.<sup>125</sup> He professed to trust more in the sentiment of the people.<sup>126</sup> "In their vote, you would get something of some value, at least, however small; but, in the other case, only the trammelled judgment of an individual, of no significance . . ."<sup>127</sup> Perhaps courts could work for simple civil cases, but Thoreau was horrified by the idea "of leaving it to any court in the land to decide whether more than three millions of people, in this case, a sixth part of the nation, have a right to freedom or not . . ."<sup>128</sup> "Show me a free state, and a court of justice, and I will fight for them, if need be," he promised, "but show me Massachusetts, and I refuse my allegiance, and express my contempt for her courts."<sup>129</sup>

From the Transcendentalists' perspective, the worst thing about the Fugitive Slave Law and its concomitant enforcement procedures was that the people would go along with them. The Transcendentalists feared the Law and its enforcement would contribute to slavery being accepted far and wide. After all, according to Alcott, the Fugitive Slave Law was a "draconian schoolmaster."<sup>130</sup> The law told the citizenry what to do and what to think. The people, the Transcendentalists thought, were often sheep, and they would follow in whatever direction the law indicated.

#### PART FOUR: CONCLUSION

The Transcendentalists were their era's most provocative thinkers, writers, and philosophers. Meeting with their paterfamilias Ralph Waldo Emerson in Concord, Massachusetts or gathered together at a range of metropolitan Boston sites,<sup>131</sup> the Transcendentalists took ideas seriously and sharpened their thoughts through earnest and spirited exchanges with one another. They believed generally in the possibility of man transcending to a divine consciousness, and while by no means the leaders of the abolitionist movement, the Transcendentalists came to vigorously oppose slavery. Most importantly for purposes at hand, the

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122. THOREAU, *Resistance to Civil Government*, *supra* note 56, at 87.

123. *Id.*

124. See Fellman, *supra* note 94, at 668.

125. See THOREAU, *Slavery in Massachusetts*, *supra* note 113, at 97.

126. See *id.*

127. *Id.*

128. *Id.* at 97–98.

129. *Id.* at 106.

130. ALCOTT, *Entry of April 15, 1851*, *supra* note 100.

131. One scholar has argued that Transcendentalist movement should not be seen as based primarily in Concord but rather should be seen as Boston-based. See BUCHRENS, *supra* note 74, at 1.

Transcendentalists reacted skeptically to the legalization of their era and offered a jurisprudence that criticized law and legal institutions.

The Transcendentalists' thoughts regarding law and legal institutions can be assembled into a jurisprudential bricolage, but as noted earlier, this assembly is not the equivalent of a tightly-argued jurisprudential treatise. Emerson was the most respected thinker among the Transcendentalists, and Henry David Thoreau was perhaps the most distinctive. But numerous Transcendentalists joined Emerson and Thoreau in articulating their jurisprudence. Their overall jurisprudence was multi-vocal rather than univocal. It also was put forward not on a given date or in a specific year but rather over a 30-year period stretching from the 1830s through the Civil War.

Nevertheless, the Transcendentalists conveyed a consistent message about man-made law and how human beings should approach it. Transcendentalist jurisprudence insisted on a higher law that is superior to whatever laws man might make. This jurisprudence underscored the short-sightedness and corruption of legislatures and, in Emerson's especially provocative metaphor, cast legislation as "a rope of sand, which perishes in the twisting."<sup>132</sup> This jurisprudence also criticized courts and raised doubts about lawyers who called the courts their institutional home.<sup>133</sup> Even a court that decided cases with reference to the constitutionality of a statute or government program, the Transcendentalists maintained, was doing nothing more than checking a pick-lock to see if it was in working condition.<sup>134</sup> Law, legislatures, courts, and lawyers, the Transcendentalists concluded, could never get one to fundamental truths.<sup>135</sup>

The most pointed example of the Transcendentalist thinking about law was perhaps Thoreau's call for civil disobedience. "Law never made man a whit more just," Thoreau said, "and, by means of their respect for it, even the well-disposed are daily made the agents of injustice."<sup>136</sup> If the law required one to be an agent of injustice, Thoreau exclaimed, "I say break the law."<sup>137</sup> As for American government in general, Thoreau added, "It is a sort of wooden gun to the people themselves."<sup>138</sup> When the government and is unjust, it is man's duty "to wash his hands of it."<sup>139</sup>

Thoreau's thoughts on civil disobedience as well as the other Transcendentalists' more general skepticism regarding law and legal institutions make clear that the Transcendentalists were something other than conventional law reformers.<sup>140</sup> However, Transcendentalist jurisprudence constituted a powerful challenge to what the young Abraham Lincoln had cast as the law-centered

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132. EMERSON, *Self Reliance: Politics*, *supra* note 57, at 280.

133. See EMERSON, *Representative Men*, *supra* note 69, at 268.

134. See THOREAU, *Slavery in Massachusetts*, *supra* note 113, at 98.

135. See *id.*

136. THOREAU, *Resistance to Civil Government*, *supra* note 56, at 65.

137. See *id.* at 73.

138. *Id.* at 65.

139. *Id.* at 71.

140. Thoreau envisioned protesting and resisting law as a valuable precursor to law reform itself. See THOREAU, *Resistance to Civil Government*, *supra* note 56, at 73.

“political religion” of Antebellum America.<sup>141</sup> Put in more modern terms that the Transcendentalists themselves did not employ, the Transcendentalists challenged the belief in law and the rule of law that had become a part of the nation’s dominant ideology.<sup>142</sup>

The term “ideology” of course means different things to different people. For some, ideology is consciously duplicitous and conniving and customarily determined to defend an unjust the status quo.<sup>143</sup> Alternatively, one might understand of ideology as merely an expression of reigning ideas, beliefs, and attitudes. One scholar, for example defines ideology as “socially produced and systematized justifications, which are associated with the production of ideas of knowledge and offered to explain experience and thus to legitimate it.”<sup>144</sup> Ideology understood in this way continues to have normative implications and might be misused, but it is not necessarily disingenuous. Indeed, all ongoing regimes rely on ideology for self-definition and cohesion, and an ideology could not be effective if it were completely false.<sup>145</sup>

When the Transcendentalists tried on the dominant American ideology of the Antebellum Period, they found the widespread ideological belief in law and the rule of law to be a scratchy hair shirt. While intangible, this belief could buoy the notion that legal processes are ideal ways “to control forms of organized public and private power.”<sup>146</sup> A belief in law and the rule of law could affect government programs and policies, and, even more profoundly, contribute to the state’s claiming and retaining authority.<sup>147</sup> When the dominant ideology includes a belief in the rule of law, a state purportedly generating and enforcing laws enhances its own legitimacy.

The aspect of the law-related “political religion” or what in the present we might call law-related “ideology” that most troubled the Transcendentalists was the way the populace internalized it. A belief in law and the rule of law, the Transcendentalists feared, could influence people and shape their thinking about social life. A belief in law, after all, not only impacted socioeconomic activity and disputes related to it but also cramped people’s political consciousness.

Transcendentalist jurisprudence might be important in countering this tendency. The Transcendentalist demystification of law and legal institutions can expose an unreflective belief in law and in the rule of law. Transcendentalist

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141. See LINCOLN, *Address before the Young Men’s Lyceum of Springfield, Illinois*, *supra* note 25, at 43.

142. See David Ray Papke, *Postmodern Decline? The Belief in a Rule of Law as a Tenet of American Ideology*, 1 *ATHENS J.L.* 221, 223–25 (2015).

143. For a review of the many ways the term “ideology” might be used, see RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 126–30 (1976).

144. RON EYERMAN, *FALSE CONSCIOUSNESS AND IDEOLOGY IN MARXIST THEORY* 306 (1981).

145. See *id.* at 304–06; Papke, *supra* note 142, at 222–23.

146. Hurst, *supra* note 82, at 5.

147. See *id.* at 17.

jurisprudence can reveal that the widespread belief in law and the rule of law is an unduly confident and optimistic part of American false consciousness.<sup>148</sup>

Without necessarily subscribing to the Transcendentalists' variety of divine humanism, important dissenters in subsequent eras have also attempted to demystify an ideological belief in law. Mahatma Gandhi, for example, had read Thoreau's works and later referred to these works as he led campaigns for civil disobedience campaigns against tyrannical British colonial rule.<sup>149</sup> In the United States, Martin Luther King, Jr. had been so deeply moved when he encountered Thoreau's "Resistance to Civil Government" during his undergraduate days at Morehouse College that he could not resist reading the essay time and again.<sup>150</sup> More generally, King shared the Transcendentalists' belief that a person should obey one's personal conscience rather than the demands of state.<sup>151</sup> King listened, as did the Transcendentalists, to an inner voice, and this inner voice told him which man-made laws he should follow and which ones he should be prepared to break.<sup>152</sup> Writing in his legendary *Letter from Birmingham Jail*, King maintained that there were two types of laws: just laws and unjust laws. "I would agree with St. Augustine," he said, that "An unjust law is no law at all."<sup>153</sup>

Still later in time, scholars and radical thinkers in the movement known as Critical Legal Studies (CLS) also insisted that the ideological dimension of law be recognized and that law and legal analysis should be demystified. CLS emerged in the 1970s, was most active during the 1980s, and withered somewhat in the 1990s.<sup>154</sup> The "Crits," as subscribers to CLS came to be known, tended to be not activists but rather writers, intellectuals, and academics. Their critique of a belief in law and the rule of law rattled legal education and continues to echo in surprising ways in the present.

CLS, of course, has a wide range of perspectives and offshoots, but in general it shared the Transcendentalists' skepticism regarding law and legal institutions. From its founding in the 1970s, CLS promoted a critique of law and law-related ideology.<sup>155</sup> One of CLS's founders and most important voices even suggested that "a transcendent spiritual impulse" originally buoyed this critique.<sup>156</sup> This impulse seems not to have been a lasting part of CLS, but leading CLS scholars maintained that law resembled religion in some earlier historical periods in that it became "an

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148. For a useful discussion of the notion of "false consciousness," see EYERMAN, *supra* note 144, at 305–07.

149. See ZINN, *supra* note 79, at xxi–xxii.

150. See MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 91 (1958).

151. See Carter, *supra* note 73, at 318–319.

152. See *id.* at 322.

153. Martin Luther King, Jr., *Letter from Birmingham Jail*, MLK ONLINE, [www.mlkonline.net/jail.html](http://www.mlkonline.net/jail.html).

154. Summarizing studies of CLS include RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE* (1996) and MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1996), Eric Shierman, *The Rise and Fall of Critical Legal Studies*, *CATALYST* (Dec. 31, 2021), <https://oregoncatalyst.com/56869-critical-legal-studies-judicial-discussion-politics>.

155. See generally Frank W. Munger & Carroll Seron, *Critical Legal Studies versus Critical Legal Theory: A Comment on Method*, 6 *LAW & POL'Y* 257, 257 (1984).

156. Peter Gabel, *CLS as a Spiritual Practice*, 36 *PEPP. L. REV.* 515, 516 (2009).

object of belief which shapes popular consciousness toward passive acquiescence or obedience to the status quo."<sup>157</sup>

Because of their law-related insights and especially because of their willingness to think critically about the role of law in American ideology, the Transcendentalists deserve a place in the pantheon of American legal thinkers. The jurisprudence of Transcendentalism, as negative as it almost always was, underscored the difference between man-made laws and a higher law and insisted that the former must sometimes give way to the latter. The Transcendentalists also pointed out that legislatures, courts, and the legal profession had the ability to denigrate and oppress as much as they might praise and liberate. In conjunction with their problematizing of law and their criticism of legal institutions, the Transcendentalists sought to demystify the belief in law. The Transcendentalists proffered a critique of that part of the dominant ideology that lionized law and claimed that a rule of law reigned.

In the present, the jurisprudence of Transcendentalism remains useful. Too many of us give man-made law our unstinting respect and blind obedience. We might instead reflect critically on law and on the workings of legal institutions, and in some cases we should be prepared to resist the laws and disobey the legal authorities. If we approached law in these ways, we would be faithful to the most important aspect of the jurisprudence of Transcendentalism.

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157. Peter Gabel & Paul Harris, *Building Power & Breaking Images: Critical Legal Theory and the Practice of Law*, 11 NYU REV. L. & SOC. CHANGE 369, 374 (1982).

