John Quincy Adams and the Origins of Critical Legal Thought in America

A Heideggerian Re-Interpretation

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DEDICATION

I dedicate this work to my loving sisters

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INTRODUCTION

This book aims to make a modest contribution to the discipline of American critical legal thought, as a subspecies of the broader enterprise of American jurisprudence, by applying first and foremost the insights elucidated by the hermeneutic, phenomenological philosophy of Martin Heidegger. Primary emphasis is placed on identifying the origins of this discipline, its core assumptions and its attendant methodologies, by focusing on the singular contributions of the Sixth U.S. President, John Quincy Adams (JQA). Although JQA has been the subject of a great deal of scholarly research and the main contours of his legal and political thought are fairly well-known, this author's contention is that a great deal more about JQA's net contributions to the distinct tradition of critical legal thought in America can be learned by applying the lens of critical legal theory, hitherto missing.[1] Such a study requires knitting together diverse bodies of thought, as well as a more distinct and coherent analysis of the normative and analytic legal tools utilized by JQA, who, in fact, never bothered to undertake a systematic effort

to consciously pursue such a distinct legal discipline, inferred from his works. In this author's humble opinion, the problem stems largely from the consistent subordination of American legal thought (or theory) to the pulls and attractions, or said otherwise the overwhelming influence, of European legal-political thought, which is fortunately a well-covered territory – in countless commentaries, whose common denominator is a rather skewed view of American legal thought simply as a derivative discipline, borrowing heavily from the European thinkers, such as David Hume, John Locke, Thomas Hobbes, Algernon Sidney, Sir William Blackstone, Sire Edward Coke, Hugo de Grotius, Richard Hooker, Montesquieu, Francis Hutcheson, and Baron Samuel von Pufendorf.[2] But, a crucial point missed by such commentaries, particularly on JQA, is that although he relied on the arsenal of "classical" European legal knowledge,[3] such as on natural laws and the distinctions between common laws and natural rights, he was in fact closer to the radical position of the movement we now call "liberalism," irrespective of his self-understanding at the time.[4] In some respects, JQA absorbed the liberal political and legal assumptions and blended them in an evolutionary legal design, informed by the faculty of critical reasoning and reflection, a methodologically deconstructive approach that, in turn, allowed him to successfully juxtapose the existing laws (and legally binding treaties) with a higher calling (i.e., natural rights) in the famous case of Amistad.[5] A good deal of knowledge regarding this issue can be discerned from reading JQA's

memoir (and other writings), which have come handy in the present narrative's quest to understand and 'decode' the fundamental approach, or paradigm to use a more fancy term, underlying JQA's defense in *Amistad*, where through his eloquent 8-hour long speech managed to convince the justices of the U.S. Supreme Court (minus one) to prioritize the liberal natural rights theory over the existing, and legally binding, treaties.[6] As a result, JAQ has had a significant influence on the development of American legal thought that, to generalize, equates American democracy and republicanism with legal justice, later on epitomized by Lincoln's anti-slavery proclamations. Although not a strictly "abolitionist" on a personal level, JQA much like Lincoln was an ardent anti-slavery abolitionist as a legal thinker,[7] who was keenly aware of the complexity of anti-slavery agenda requiring a 'gradualist' approach. [8] Both men met the Kantian definition of "men of enlarged thought."[9]

A word of caution. We must be on guard in not confusing a person's personal views with his or her legal or political theory, nor should we confine ourselves to a thinker's self-understanding, which may or may not coincide with the full ramparts of that thinker's theory. Certainly, JQA did not lay claim to a new theory (or discipline), save in the realm of rhetoric and oratory, which is the subject of his extensive lectures at Harvard-turned-to a book (discussed in Chapter Three), and, much like his erudite father John Adams and the rest of Founding Fathers, considered themselves as heirs of

European legal thought, merely supplementing the latter.[10] For JQA, this stemmed partly from his humble character – that prevented him from ever claiming to have made an original contribution to, for instance, the European Enlightenment and its host of contributors, such as Diderot, Condorcet, Voltaire, Helvetius or, more on the radical side, Rousseau, Raynal, and Malby. In legal thought, however, originality and original contribution is subject to controversy and, moreover, requires the right methodology, in order to analyze and decipher a particular individual's relations with his or her contemporaries as well as those before him or her who might have influenced his or her thought. The problem does not lie in identifying the intellectual lineage, and with it, the diversity of the legal contributions from other sources, but rather in clarifying the place of a particular thinker, in this case JQA, in the history of legal ideas, thus uncovering his rigorous intellectual formation, his evolutionary perspective, and his dynamic openness commensurate with the very experimental nature of the nascent American democracy, which, in turn, required keen attention to the domestic context demanding a fluid legal strategy. Thus, the first step in our understanding of JQA and his original contributions to the American critical legal thought is to contextualize the subject and to provide an overview of the broader American legal milieu in the first half century or so after the Declaration of Independence, as a prelude to our understanding of the JQA's

critical contributions to the development of a distinct legal tradition in America we call critical legal theory.

The term "critical" has in various contexts been used with a number of other terms interchangeably, such as "criticism," "radical," or "anti-status quo." Implicit in such use of the term is the assumption that being "critical" is linked with being "ideological," that is, being value-driven and normative, which is sometimes considered improper within the legal universe and that, as a result, one cannot speak sensibly of "American critical legal thought" as a legitimate discipline. This line of criticism, harking back to the so-called positivist legal tradition, is flawed however and overlooks that "critical" is, in fact, a key philosophical term abundantly used by philosophers such as Immanuel Kant, who employed it as a central explanatory concept in the process of cognitive reflection and evaluating and improving upon other ideas, in other words, as part of a rationalist contestation of existing theories and philosophical approaches susceptible to modification or rejection.[11] Critical thinking and critical reflection are, as a matter of history of American thought, the *modus operandi* of American Revolution, emerging as an anti-colonial critical discourse that, ironically, owed much to the philosophical and intellectual traditions of the Western colonialists, such as the English Whig tradition – that influenced the political behavior of a number of American politicians, such as Henry Clay, an ardent opponent of the so-called "Jacksonian democracy" and founder of the American Whig Party (in 1834),

i.e., a precious few years before JQA's landmark speech before the U.S. Supreme Court in the case of Amistad, notwithstanding JQA's employment of the spirit of American democracy as an antidote to the flawed legal reasoning behind a bilateral treaty that aided the perpetuation of oppressive institution of slavery. Clearly, the interpretation offered here is at odds with the interpretation by, among others, Louis Hartz, who has emphasized the "conservative" orientation of American legal thought.[12] But, the problem with Hartz and other like-minded American political scientists and scholars of American political and legal thought is two-fold. First, they insufficiently probe and dissect the critical dimension of American thought and, second, they often collapse the distinction between the legal and the political, an error that is attributable to the fact that the pre-twentieth century thinkers, particularly the European Enlightenment and post-Enlightenment thinkers, relied on a comprehensive mode of thought that did not compartmentalize the disciplines, viewing the latter instead as essentially branches of the same tree. Due to such errors, commonly found in the vast literature on American legal thought, the unique contributions to the subfield of critical legal thought, reflected in the works of JQA and, after him, Abraham Lincoln, remain somewhat underappreciated. The usual tendency in the literature is to subsume the American contributions in the dominant patters of European political-legal thought, resulting in an undeserving disservice to such critical thinkers as JQA, whose contributions to the formation of a distinct critical

legal discipline or tradition is the subject of a rigorous explication here. Failure to fully appreciate this matter is, unfortunately, partly responsible for the peculiar undernourishment (or underdevelopment) of this subfield of legal theory – that constantly requires critical self-reflection and the related attempts to fine-tune its hypotheses, assumptions, and methodologies, in the interest of a 'dialectical' evolution. Inevitably, this calls for a direct connection with the corpus of modern intellectual thought, linking the evolution of American critical legal thought to the recent advances in social theory, instead of a narrow confinement of critical legal theory to the dominant assumption regarding the infection of the legal by the political. Unfortunately, not only the lines between the legal and the political are often too narrowly drawn, i.e., an epistemological mistake, worse, this distinction is said, in the burgeoning literature on critical legal theory, to form its linchpin, i.e., a rather dubious assumption, since this runs contrary to the theory's aversion vis-à-vis abstract generalizations. Consequently, one might want to argue for a revised definition of critical legal thought, one that is grounded in an alternative epistemology we call "neo-classicism" or "neo-Kantian," i.e. one that calls for the reinvigoration of the Kantian ideas about "rights" in legal arguments. For now, of course, we can only refer to such a necessary undertaking in passing, which requires a separate study for a theoretical analysis.

In bringing this introduction to a close, all human ideas are in one way or another conditioned by the human environment. In this author's case, the interest in JQA dates back to the author's education at Thayer Academy in Braintree, Massachusetts, steps away from JQA's historic home. Whether or not the geographical proximity has played a role in motivating this writing is a question left to posterity.

CHAPTER ONE
American Legal Thought: A Critical Review

The question of what is "American legal thought" tends to invite competing explanations, begging the preliminary question of what is "legal thought?" On this latter question, the typical answer is rather deceptive in its simplicity and straightforwardness. Legal thought refers to the legal ideas, the techniques, and the conceptual repertoire, that the legal scholars as well as legal practitioners, i.e., judges, lawyers, and legal advocates, deploy in their legal arguments, or opinions, about what the "law" is or ought to be. Vast intellectual energies have been expended in response to the related question of "what is law?" that "could embrace the writings of Grotius and the American *restatements,"* to paraphrase a legal scholar.[13] In their varying interpretations, legal scholars converge in their basic opinions of "law" as formal application of rules to facts, systematic in nature, and its rules descending (either deductively or inductively) from a set of coherently interrelated fundamental concepts and principles.

The origins and development of legal thought in America since the 1776 Revolution is a much-studied subject of research that, from the view point of legal historians, raises the interplay of ideas with events. This is the story of a historically-informed progression from one stage to another, often identified with the help of such terms as "classic," "modern," and "post-modern." Thanks to the work of legal historians, such as Neil Duxbury and Edward Purcel, much light has been shed on the complex background of modern legal thought in America, rooted in the anti-colonial struggles of the Founding Fathers and their heirs, the strength of Lockean tradition among them, as well as the relative absence of conscious attempts on their parts for the systematic theorizing of legal thought, preferring instead to view themselves as the latter day adherents to the rich European legal tradition; the latter provided the American revolutionaries with the necessary conceptual arsenal to define themselves in their rebellion.[14] The basic 'plot line' of American legal thought has been traced to the historical necessity of founding a new republic, but one based on the pre-existing ideas of constitutionalism, federalism, checks and balances, and fundamental rights. In terms of the "patterns" of American jurisprudence, judicious study of the British common law formed a crucial component, essentially delivering to the American thinkers at least the outline of the 'canon' of American legal thought, which has evolved in contemporary times to the point of reflecting several distinct "schools of

thought," namely, legal realism, legal process, critical legal study, legal feminism, and so on.

On the whole, however, one can detect a certain disdain or, said otherwise conscious self-distancing, of the contemporary legal thinkers in America vis-à-vis the classical approach and its central emphasis on "natural laws." For all practical purposes, that approach is explicitly rejected or, to put it more mildly, simply ignored under the impression that it smacks of "transcendental nonsense" and or "rudimentary" ideas that have been overtaken by more sophisticated approaches with the passing time. Consequently, in some recent works on the "modern American political thought," the original ideas associated with the Founding Fathers and their contemporaries, such as JQA, are implicitly if not explicitly branded as "pre-modern," the assumption being that the "modern" stage in American legal thought is a brainchild of the second half of the nineteenth century onward. Unsurprisingly, the "classical" stage pertaining to the era of Founding Fathers is often regarded as a "minor theme" in the evolutionary history of legal thought, under the impression that, to quote David Kennedy, "a general history of American law would need to relate the work of legal theorists to American political, social, economic, and intellectual development."[15] True, yet this insight runs the risk of a historical reductionism, which is, neglecting the autonomy of intellectual thought and reducing it to the exigencies of the historical in its multi-various political, social, and economic dimensions.

But, there is no one on one correspondence between the intellectual and the historical, the two are mediated, and the empiricist method of extrapolating the contours of intellectual thought or output simply from the concrete history must therefore be avoided in earnest. Only then are we able to re-evaluate and re-appraise the contemporary dismissal of the "natural laws" tradition of the Founding Fathers, and to incorporate that tradition in a new approach we call "neo-classical." Seen in this light, the modernist legal attempts to jettison the traditional approach do not rise to the level of an "evolution," strictly speaking, but rather a "devolution," that is to say, a regressive move forward that has unconsciously impoverished American legal thought by the sheer attempt to 'modernize' it, i.e., a hopeless endeavor. A critique of modernist American legal thought, in its multiple manifestations including critical legal theory and legal process, should proceed from their faulty, linear understanding of historical progress, without the accompanying dialectic of a Hegelian *aufhebung*[16] putting the emphasis not just on "abolishing" and "perishing" the old (ideas) but also "preserving" them (in a new synthesis). Hence, we must vigorously challenge the presuppositions of the "modernist" and "post-modernist" interpretations of American legal thought that, to reiterate, by and large consign to past history, and thus deem as largely irrelevant save as the incipient stages on the scale of evolving history, covering the legal output of the first generation of American legal thinkers, associated with the first half century or so of the new republic.[17] In

other words, although deified in the American public, the legal philosophy of those thinkers -- John Adams, Thomas Jefferson, Alexander Hamilton, James Wilson, JQA, among others – at the intellectual level they do not seem particularly original or highly relevant to the contemporary legal discourses, we may safely assume. Consequently, there is a paradox between the perpetual embrace of these thinkers in the public sphere on the one hand, yet without a corresponding high appreciation of their contemporary relevance to the modern legal thought, on the other. Again, this paradox is connected to the underlying evolutionary orientation of contemporary legal scholarship in America that boasts of tangible advancement in legal theory and practice over the centuries. Influenced by the parallel progress in scientific knowledge, harking back to Herbert Spencer, August Comte and others, the modern American legal scholars have treated law as an intellectual discipline independent of theology, moral philosophy, economics, or political science, one that involves the application of “scientific methods” to common law materials; commensurate with the exigencies of American industrial and corporate capitalism, the central emphasis has been on the protection of property and on free contracts, i.e., laissez-faire constitutionalism-- subjected later on to the transformations of Keynesian economics we associate with the New Deal. Closely associated with the philosophical tradition of American pragmatism, the modern legal thought has found its clearest expression in Oliver Wendell Holmes's famous dictum: "The life of the law has not been

logic: it has been experience.”[18] Yet, to this date, it remains unclear what exactly constitutes “legal pragmatism” and some of its ardent defenders have conceded that there is an absence of “well-defines theses” and the approach remains murky, harking back to the works of William James who understood pragmatism as a means of reconciling empiricist, normative, and conceptual demands, albeit with only partial success.[19]

To elaborate, a fundamental 'divide' between “formal rules” and “substance” features the pragmatist school of legal thought, with some theories of law, such as Ronald Dworkin's, assigning rules the property of weight, rather than assigning them absolute priority and identifying them based on pedigree. Even Dworkin's theory, however, assigns rules a distinctive force because of their formal status, which he calls their "fit."[20] A number of authors have already provided apt critique of pragmatic “legal reasoning” that, in its extreme form, can lead to a theoretical nihilism, in light of the undue emphasis on the “styles,” e.g., of a judge's reasoning in reaching a decision, involving the “controlling authorities,” at the expense of the underlying legal-philosophical views and criteria, not to mention the “structure of power relations,” to paraphrase Chantal Mouffe’s critique of (Richard) Rorty*ian* pragmatic suspicion of abstract theories.[21] According to Andrew Morris, the pragmatic approach is vulnerable to the criticism that it leaves “an infinite regress” problem that can be stopped only with “a substantive theory.”[22] Still, we must be careful not to lump together diverse thinkers under the rubric

"pragmatic," given the pronounced philosophical differences among those legal theorists who fit under this term. Borrowing from the early works of German philosopher, Jurgen Habermas, with his distinct emphasis on the "quasi-transcendental" human interests, enshrined in Kant's works, the pragmatic American legal thought as a whole can be critiqued, however, for its tendency to jettison, and thus deem as irrelevant, such infusions in legal thought (as more or less mere banalities). [23] Jumping ahead of ourselves for a moment, had JQA subscribed to this line of pragmatic legal reasoning, he would have never contemplated an entire legal defense centered on the "higher" philosophical principles, rather than the rules of (common) law. From a strictly pragmatist point of view, however, JQA's strategy resembles what James referred to as "sentimental superstitions" that ought not to play any role in a legal proceeding. But, this method of invalidating a past legal belief, (which proved so successful in resolving a moral issue regarding slavery in Amistad), is itself suspect for the undue empiricism that fails to recognize the importance of reconciling between different thought traditions, i.e., in JQA's case, value-driven classical rationalism with rule-based legal empiricism. For what we detect in JQA's defense is a synthetic approach that reflects pragmatism's emphasis on what works in practice, in that case a direct appeal to the natural laws in place of existing laws. Hence, we must distinguish pragmatism as a legal methodology from pragmatism as a legal philosophy, insofar as the former

entails a more limited appropriation of the pragmatist 'orientation' than the latter. It is tempting to argue that JQA pursued a middle way that asked the judges to (pragmatically) look to society's norms or value judgments, instead of the laws in the book, for the judges to determine the weight of the interests at stake; in a word, this reflected a limited usage of pragmatic method in order to reach a 'post-pragmatic' legal decision. His overall defense approach was, as we shall discuss in fuller detail in the subsequent pages, more complex and the pragmatist method formed only one of a multiple defense strategies aiming to deconstruct an existing bilateral treaty. In a certain sense, that approach fits what Jerome Frank has identified as "the modern mind" in American law. According to Frank, we need judges and lawyers who "administer justice as an art, so as they do not "encourage, not discountenance, imagination, intuition, [and] insight."[24] Sadly, the opposite seems to have happened, in light of the strong emphasis on the formal rules in effect discouraging the need to cultivate such an orientation among the judges and other legal practitioners, culminating in a poverty of legal imagination, to put it harshly. A solution to this problem lies with a creative re-embrace of the past ideas and legal orientations, such as JQA's, which benefit the contemporary generation as sources of legal enlightenment. Inevitably, this means, first and foremost, revisiting the conceptual repertoire of American legal thought at the time of JQA, above all the natural law doctrine.

The Natural Law Doctrine Revisited

As is well-known, the Founding Fathers' legal reasoning, in drafting the US Constitution and the foundation of American jurisprudence, was that the various rights – individual, economic, social, and political – were the manifestations of laws found in nature, beyond the written, established, or enacted, laws. Broadly speaking, this was in line with Kant's philosophy of natural law; essentially, Kant expressed this existence of natural law as a separation of law from morality, where morality was internal to each human being and law was external. Accordingly, natural law has a distinct independent existence, is not dependent upon any perception or creation of the human beings for its existence, and requires the use of the rational faculty to determine and understand what the principals of natural law are or should be.[25]

Following Habermas, we need to distinguish 'rationalization' from 'rationality' and thus avoid the common problem of conflating the theistic rationalization of legal viewpoints, citing the role of the "Providence" for example, with the content of the non-theistic legal thought on the part of the Founding Fathers. In fact, the latter encompassed a rich reservoir of legal thought that, again, was inspired by various European thinkers, which we may sum up as follows: the fundamental equality of all human beings, the universality of the natural law applicable to all humans and the governments,

the right to self-preservation, to personal property, and the duty to enforce justice in order to protect the liberties (Grotius, Locke, Montesquieu, Blackstone). Thus, in the Declaration of Independence the quest for the independence of the United States is grounded in the notion of natural God-given rights, encompassing the right to form a free government:

> "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."

As this and other historical documents, such as the Declaration of the First Continental Congress of 1774, make clear, the early American thinkers did not make a practical distinction between natural law and the common law, nor between natural rights and political and civic liberties. There were, of course, plenty of discussions and disagreements on the meaning(s) and connotation of "equality," and subsequent thinkers such as Lincoln readily extrapolated from the Declaration and other related documents a dynamic future-oriented, and reform-minded, orientation, that is, "a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere."[26] Indeed, Lincoln's logic, much like JQA and Jefferson before him, followed the Founding Fathers'

spirit of "consensus" or, to put it in Jeffersonian language, "harmonizing interests.," i.e., the Declaration aimed to capture "the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc."[27] In light of the conservative British influence on American thought, Jefferson might have wanted to add Edmund Burke, his British contemporary who used a similar language in his influential writings, to the list, albeit with some reservations, in light of Burke's rejection of the grounding of natural rights in human will, noting that "men have no right to what is not reasonable, and to what is not for their benefit." But Burke clearly defended what he termed the real right of man. Equal justice, the pursuit and enjoyment of property, family, and religious practice; Burke recognized all these as universal rights while, at the same time, he critiqued the radical (Jacobinist) abstractions of these rights for authoritarian purposes.[28] Irrespective of their differences, these strains of "natural law" postulates differentiated themselves from the so-called "positive law" by holding that law must be evaluated in relations to some standards – a view clearly refuted since the early twentieth century by the likes of Italian jurist Vecchio who argued that natural law in the legal sciences was refuted precisely because it did not meet the standards of positive law, which is essentially founded on the rule of precedence and case by case jurisprudence.[29] But, the problem with limiting the scope of legal inquiry to concrete cases is, and has always been, a facile interactionism lacking philosophical rigor. Critiques of this approach, such as Roscoe Pound, have long called for a purposeful study of law from the vantage of an "ideal basis" or "creative ideal."[30]

Still, Pound and other like-minded jurists fell short of calling for a re-embrace of eighteenth and nineteenth century ideas of "natural laws" and "natural right," most likely as a result of their discourse's infection with the "system of science of law," in a word, legal realism. More recently, however, a number of other authors, including Leon Fuller, have discovered limited heuristic values in the "natural law" doctrine, in order to discover any discrepancies, or "zones of uncertainty," in the creation and application of the law.[31] This is linked to a conception of judicial supremacy, which "subjects positive law to the inhibition of the moral order, constitutionally implemented." [32]

Unfortunately, such valiant efforts, to recuperate the old doctrine even if in a truncated fashion for the sake of retaining a modicum of morality and ethics in the fact-obsessive legal profession, have fallen by the way side due to the inadequate theoretical sophistication; their theoretical and philosophical toolkit are simply not complex and sophisticated enough to pursue this 'recuperative strategy' without running into the knock-out punches of legal realism and its instrumental, or functionalist, separation of objective facts from subjective values, so ingrained in the contemporary legal edifice. A conceptual jailbreak from the confines of legal positivism/realism is therefore necessary, which in turn, directs our attention to the requirements of inter-disciplinary and inter-paradigmatic dialogue and learning, including from such diverse sources as constructivism in international relations theory and the recent forays in philosophical and sociological theory. Thus, for

example, constructivism's central emphasis on "social facts" as historically and linguistically-mediated stands in sharp contrast with the naïve legal realist postulate of "facts" that ignores the latter's crystallization in the web of communicative and intersubjectively-formed networks of meaning. Following this insight, the past conceptions of natural law, which have receded to the background, can become more explicit (and relevant) following a conscious legal strategy of "self-grounding" that is not helplessly caught in the maelstrom of "concrete" reality, but rather is motivated to couch its "pattern of legal behavior" within a web of underlying ethical standards, such as fidelity to the basic liberties, truthfulness, sincerity, and relative openness to the discourse of 'others," instead of a permanent self-enclosure within pre-existing approaches. Seen in this light, the re-embrace of "natural law" would appear less on the doctrinal level, as a subjective choice, but rather as a mode of thinking, e.g., a form of legal sensibility, concerned, first and foremost, about the limits of legal realism and the related reification of moral and ethical standards by the fiat of legalist instrumental rationality (i.e., the means-end approach to rules and procedures). To shortcut a long theoretical detour, following Habermas and other critical philosophers, this would necessitate a critique of instrumental rationality in the legal discourse and the uncoupling of law from the barbwires of "value-free" realism that ultimately posits a groundless law, hanging in the air. Certainly, the basic tenet of "natural law" is reason, as Fuller and others have conceded, yet what

these authors have failed to do is to provide a more differentiated and complex notion of "reason" that does not conflate instrumental with strategic and or communicative rationality, to borrow from Habermas. Hence, a Habermasian deployment of a multi-faceted notion of reason and its attendant "validity claims" is called for, one that is not reductionist and theoretically-sensitive to the incandescent 'spirit of law' that constantly guards itself against subjective-value intrusions – to a limit. In this vein, "natural law" is not to be mistaken with judicial "supremacy" but rather judicial horizontalness, to coin a term, conveying a sense of law denude of power relations and the corruptive influence of hierarchical relations, so paramount in the US as well as, for that matter, in every Western capitalist society.[33] The "legal superstructure" is not necessarily a predicate of the associated economic relations, that would be too strong a statement, yet it is patently clear that the exact nature of relations must be studied closely in the context-specific societal circumstances. To add another point, there is a sense in which the "natural law" and "natural rights" arguments or discourses on law contain an emancipatory element or intent, by forming the pillars of a legal critique (of the hierarchical status quo and the intrusions of money and power in the legal realm), that must be articulated and perhaps even embraced by the legal professionals, particularly lawyers, who are more in tune with the functionalist case-by-case orientation and, as a result, conceptually operate in a vacuum. This might sound like an abstract generalization, but one that is

empirically defensible, by the sheer weight of legal positivism and pragmatism and the prevailing suspicion of non-factual subjective intrusions, as if the facts stands on their own and are discernible apart from an accompanying intersubjective filter (e.g., the constructivist critique of realism in IR theory, extendable to legal theory). On the whole, this new orientation solicits attention to the need to render explicit the implicit value assumptions, and thus to articulate the hitherto inarticulate, which can be done only by revisiting the past and the particular usages of the "natural law" doctrine, yet to do so under the new light of a more differentiated theory of rationality and legal discourse than those deployed by the recent, and rather circumspect, re-embrace of this doctrine, cited above.

Furthermore, we may draw on the philosophical insights of Martin Heidegger in order to reach a better understanding of how a discursive legal return to the original insights on "natural law" can be rewarding, theoretically speaking, particularly with respect to the above-mentioned point on legal 'mood-setting' in line with moral standards.[34] The main outline of a Heideggerian re-interpretation would encompass the following: with the American Revolution seen as a "world historical event," the accompanying legal thought based on "natural rights" and "natural laws" fulfilled an original need (*Wesen)*, which eventuated a break from the past status quo (tradition) as a cognitive legal leap (*Sprung)* to undertake a primordial futural thinking Heidegger called "inceptual thinking." One virtue of this Heideggerian

reading of the Founding Fathers is that it brackets legal realism's urgency of "here and now" and gives ear to the abandonment of a radical break with the past by virtue of understanding that the American legal history is always grounded by the momentous "very beginning" (*das Ursprugliche*) and the initial echo *(Anklang)* that can still be heard here and there, covering the theme of "inheritance."[35] Hence, a leap to the past to reclaim or recuperate that "inheritance" is not a regressive leap backward but rather a leap of inventive thinking *(Erdenken)* whereby the legal "being" (Sein) can be construed as the essential or established openness, i.e., as the gift of that historical event and, simultaneously, as the opening-up of a historical world in which law occupies a middle, i.e., inter-space *(Zwischenrauum)* between man and nature. *Lichtung* is another name for this inter-space, which grants the courts the possibility of operating beyond the pattern of "seeing from nowhere" epitomized by the positivistic law, but in such a way that it allows reflective relations with the original doctrine(s) without being fettered by them, particularly since the original grounding cannot be thought as a sort of metaphysical grounding but rather relative "conditioning" (by the moral conscience of law).[36] Through intimating and knowing awareness of this initial echo (*Anklang),* legal decision then leaps into a holistic Dasein that is no longer a mere choice of alternatives by a rule-bound free agent (e.g., judges), but one that raises to the highest form of preserving self-integrity transcending all individual or private concerns. The legal decision must be

ventured within this web of intersubjective and historically-mediated understanding, or gesturing (*intimus),* toward the "very beginning," otherwise the latter ends in legal nihilism and the relegation of accounts of (legal) truth (*Wahrheit*) to the exigencies of the moment. Perhaps paramount is that the questions of legal decision and legal truth based on a 'conditional' "natural laws" provide the primary conceptual pathway by which legal thought can gain a first, grounded stance within the 'events' of law. Legal thinking thus becomes even more historical *(geschichtlich*), paving the way to even a new beginning. In the context of a hermeneutics of legal 'facticity,' following a tradition that runs from Parmenides to Dilthey to Husserl to Heidegger, the basic mode of legal knowledge is interpretive exposition out of a background of understanding that by and large remains tacit, that is, implicit yet perpetually operative in its meaningful context informed by the perpetual initial echo (*Anklang),* thus setting the parameters of an intuitive "legal mood,"[37] one distinguished by its sentimental attachment to the original doctrine and the constant internal recourse to their 'lampposts'. The tacit dimension of pre-disposition toward such a dynamic and open "legal mood" forms a basic presupposition of the "neo-classical" approach advocated here, imagining the "legal-rational" as possessive of, and being possessed by, a coherent original beginning, enshrined in the Constitution and other related historical documents. In this approach, this 'pre-understanding' that is interlaced with the normal process of "legal reasoning" and "legal review" is,

in fact, repeatedly cultivated in the legal process as a whole, as part and parcel of rendering that process intelligible. Working through the problematic of "concrete" legal issues or cases, the "neo-classical" legal mood functions as the pacesetter of a deeper and more comprehensive pursuit of truth and justice, one that opens the question of origination of legal thought in the evolutionary and emancipatory intent, i.e., the perpetual quest for a "more perfect union."

Needless to say, this Kantian-Heideggerian take on the American legal thought does not pretend to answer all the questions and, in fact opens new questions as well, such as on the familiar agency/structure dualism, but undoubtedly it is highly preferable to the positivistic ensnaring of law in the clutches of empiricism. All the issues of law – evidence, truth, verification, falsification, judgment – acquire a different signification once approached through the lens of "neo-classical" that, as stated above, is firmly grounded in an openness with respect to the original "inheritance" allowing a dynamic fusing of objectivity with normativity. The latter was, indeed, the hallmark of JQA in his critical appropriation of "natural law" in the service of anti-slavery in the famed case of Amistad, which must appear to us in new light as we begin to process that specific historical event with the aid of a "neo-classical" approach.

To elaborate on the latter, there can be no straightforward and uncritical adoption of the classical American legal thought for the

contemporary purposes. The "natural rights of men" that the Founding Fathers and others such as Thomas Paine wrote about were conceptual creations of their times and, for one thing, were almost completely anthropocentric and, as a result, lacked meaningful insights on such notions as "animal rights" or the natural rights of nature itself (for self-preservation), reflected in the more recent ecological jurisprudence (also called green law). Therefore, a fuller and more inclusive notion of "natural law" and "natural rights" is required, incorporating the feminist and ecological insights, for the sake of a creative re-embrace of these ideas by the present and future generation of students and practitioners of law.

CHAPTER TWO
John Quincy Adams and Legal Deconstruction

Having provided the outline of a Heideggerian re-reading of John Quincy Adams and his net legal contributions in the previous chapter, a more specific treatment of the subject is now in order. This desire to re-evaluate JQA builds on Kantian critique of defective philosophies, carried forward to the present era by the works of a number of other thinkers, above all Heidegger who, in his earlier works, such as *Being and Time*, claimed that the postulates of pure reason were contingent upon a more original involvement with the world through such concepts as "very beginning" (*das Ursprugliche*) and the initial echo *(*Anklang*)*. Heidegger referred to a process of exploring the categories and concepts that tradition has imposed on a word, and the history behind them.[38] This insight then equips us with a "negative critique" or "refusal," i.e., terms which some writers have associated with deconstruction. Case in point, Niall Lucy writes that "Deconstruction begins, as it were, from a refusal of the authority or determining power of every 'is', or simply from a refusal of authority in general. While such refusal may indeed count as a position, it is not the case that

deconstruction holds this as a sort of 'preference.'"[39] A delicate yet vastly important point about a historic refusal, such as JQA's and Lincoln's rejection of slavery, is that the strategy of refusal, as a totalistic project, does not necessarily correspond with a harmonious (set of) tactics; this, in turn, raise the issue of style a lot more than substance, and, in fact, the two may be at odds with each other, at least for a specific duration, as part and parcel of what Heidegger called a "clearing." Yet, the "clearing" is not always linear or unidirectional and may experience the tensions associated with tactical 'zigzags' and even inconsistencies, interwoven in a complex legal defense, such as JQA's defense in the case of Amistad.

JQA's oral argument in the Amistad case is notable for his explicit appeal to the Declaration of Independence's eloquent defense of life, liberty, and the pursuit of happiness (as the cornerstone of American freedom and justice). "I know of no law, but one which I am not at liberty to argue before this court, no law, statute or constitution, no code, no treaty, applicable to the proceedings of the executive or the judiciary, except that law," he said, pointing to the copy of the Declaration of Independence (hanging against one of the pillars of the court-room).[40] The mere physical gesture to the document provided JQA with a historical,[41] moral and meta-legal grounding that he then quickly framed in terms of "law of nature" by adding, "I know of no other law that reaches the case of my clients, but for the Law of Nature…That law, in its application to my clients, I trust will be the law on which the case of my clients will be decided by this court." This corresponds with what the deconstructivist philosopher Derrida has referred to as the

"metaphysics of presence," that is, the desire for immediate access to meaning and the privileging of presence over absence, in this case the absence of any other viable existing law to make recourse to or rely on.[42] The symbolic gesture at the Declaration of Independence on JQA's part was meant to symbolically-mediate the actual with the ideal and to use the latter as a knock-down punch vis-à-vis the former (i.e., a US-Spanish bilateral treaty mandating the return of Spanish property), by virtue of a patterned direction of attention to the slaves' individuality and their rights.. At the same time, this method proceeded from a deliberate self-deprecation, or evasive self-uncovering, to use another Heideggerian terminology, upon which the defensive attorney readily admitted his own lack of a viable defense from the prism of existing laws, only to simultaneously recuperate from this self-loss by seeking to ground the American law within the larger compass of its higher authority, enshrined in such documents as the US Constitution and the Declaration of Independence.

By all indications, this was a brilliant tactical maneuver that brought into the foreground the unique characteristics of America as the land of liberty, a providential promised land, in which the lofty spirit of freedom lurked underneath its concrete legal manifestations, even when the latter did not seem on the surface to support or comport with such an (idealistic) interpretation -- that connected the Declaration of Independence with the ""self-evident principles of human rights." The reference to "self-evident" was a semantic ploy to uncover truth and

untruth, and the Heideggerian 'discoveredness" (*Entdecktheit*) of being free in the world, grounded in human experience's (Heideggerian) *Dasein*. The core discussion of the essence of justice is both positive and negative, by drawing charges of the vacuity of the existing laws and the ""willful and corrupt perjury" of the US administration at the time, articulated in such a way as to create a dynamic enabling of the justices to come to presence of the higher moral law, what Heidegger calls the "domain of projection" (*Entwarfsbereichs*), associated with "openness" and "clearing," albeit a new clearing. The key to reach this new understanding was JQA's persuasive, and deconstructive method, that zigzagged from an initial admission of no relevance of that higher authority (of natural law) and its inapplicability to the standards of the High Court, to the exact opposite of reformulating the essence of relationship between the initial ethos, reflected in the Declaration of Independence, and the mandates of concrete justice, a reformulation that was, in fact, closely wedded to a fundamental transformation; much like Hegel, JQA conceived his defense in terms of the reconciliation and re-recognition of the American spirit of freedom and the relative unconnectedness of the specific law or treaty in question with that essential referent (*angewissen auf*). Thus, from an initial self-admission of the impossibility of rendering applicable the principles of natural law, JQA moved swiftly to the logical principle of non-contradiction of the spirit of American law with the philosophical undercurrent that, in turn, limited the

applicability of a bilateral treaty binding on the United States. The seemingly contradictory discourse captured the essence of the subject being discussed (before the court), requiring a gradual turning away of the judges' gazes from the laws in the book to the central appropriation of certain ethical principles, in tandem with JQA's strategy to shift the differential relations between the two (realms) by positing a (Hegelian) unity. For JQA, the upshot was that the truth of the higher principle was a great disdainer of that which was unconnected to it, i.e., disrespect for the human rights of slaves, and was prior to and independent of that which enabled it to become manifest, in other words, has an ontological difference; without allusion to this ontological difference, the appeal to the moral standards was insufficient for the objective of enabling the justices to conceive of the above-mentioned differentiation, and thus to problematize the said treaty and to successfully seek relief over and against that treaty. To reach that point, JQA had to propagate and instill as much as possible the virtues of American democracy, whereby the justices on the bench would be eminently moved in the highest mode in favor of seemingly forgotten values and thus close the gaps between "rights" and "duty," i.e., by in part arguing that the natural law provided the "foundation of all obligatory human laws."

To elaborate on the latter, JQA's defense was not merely content with citing the familiar doctrine of "natural law" and the attendant "natural rights," it was also connected to a related theoretical effort to take a radical distance

from the Hobbesian notion of individual rights, which he insisted was "utterly incompatible with any theory of human rights, and especially the rights which the Declaration of Independence proclaims as self-evident truths." At the same time, JQA re-posed the question of individual rights, by exhorting the court to refrain from subsuming the defendants under any "group" category: he expressed the hope that the court "will form no lumping judgment on these thirty-six individuals, but will act on the consideration that the life and the liberty of every one of them must be determined by his decision for himself alone." Closely connected to this was JQA's persistent effort to plant the image of slaves in questions as individuals entitled to the same rights as others, what Hegel calls "the existential form of self-conscious individuality."[43] JQA defended the idea of slaves' right for self-ownership, vividly violated by both their initial owners as well as the US government that kept them in custody, in contradiction to "human rights," as opposed to the perception of those slaves as "property" to be returned to their Spanish owner, citing the US Constitution:

> "The Constitution of the United States recognizes the slaves, held within some of the States of the Union, only in their capacity of persons--persons held to labor or service in a State under the laws thereof--persons constituting elements of representation in the popular branch of the National Legislature--persons, the migration or importation of whom should not be prohibited by Congress prior to the year 1808. The Constitution nowhere recognizes them as property. The words slave and slavery are studiously excluded from the Constitution. Circumlocutions are the fig-leaves under which these parts of the body politic are decently concealed. Slaves, therefore, in the Constitution of the United States are recognized only as persons, enjoying rights and held to the performance of duties."

From this observation, JQA then moved to the central point that the 1795 Treaty does not cover slaves and pertains to only goods and property: "The article

cannot apply to slaves. It says ships and merchandise. Is that language applicable to human beings…But if it was intended to embrace human beings, the article would have included a provision for their subsistence until they are restored." JQA's 'legal humanism' aforementioned was, in fact, interwoven with a complex legal argument that highlighted several contradictions, such as between the extra-judicial demands of the Spanish government (i.e., asking the US Executive Branch to interfere in the affairs of the US courts), and the US laws, the prior Spanish violations of the prohibited slave trade marking the unlawful "original intent," illustrating the contradiction of those demands with the Spanish laws themselves,[44] requiring a shift of perception of the victims and villains in the case, not to mention a related contradiction between the Treaty and the actions of US government in apprehending those slaves.[45] JQA argued persuasively that the latter indicated a "total misapplication" of the Treaty itself to the case at hand. But, this was not the only contradiction cited by JQA and, in fact, he placed a great deal of emphasis on the extensive violations of existing laws in the case. First, there were the evidence of Spanish violations of prohibited slave trade from Africa, citing witnesses from Cuba, among others. Not only that, JQA also pointed at the improper intrusions of the Executive branch in the Judicial branch, in an explicit effort to undermine the US government's position on the case that was sympathetic to the Spanish side: "In supporting the motion to dismiss…I shall be obliged not only to investigate and submit to the censure of this Court, the form and manner of the proceedings of the Executive in this case…but the motive of the reasons assigned for its

interference in this unusual manner in a suit between parties for their individual rights."

Here, seen through contemporary lens, JQA's strategy closely resembles Habermas' critique of the "systematic distortions" of power, requiring a redemptive strategy.[46] Indeed, the entire strategy exhibits a courageous confrontation with the "systematically distorted communication" between the US and Spanish diplomats in regards the Amistad case, showing evidence of the former's appeasement of the latter and the latter's unlawful set of demands, i.e., "It demands of the Chief Magistrate of this nation that he should first turn himself into a jailer, to keep these people safely, and then into a tipstaff to take them away for trial among the slave-traders of the baracoons. Was ever such a demand made upon any government? He must seize these people and keep them safely, and carry them, at the expense of the United States, to another country to be tried for their lives! Where in the law of nations is there a warrant for such a demand?" Having established the unreasonable nature of the Spanish demands on the US, such as in effect asking the US President acting like an "arbitrary and unqualified power," JQA made 'new sense' of the official sense of the case, transforming the latter into a 'nonsense' undeserving of judicial support.[47] He did so in part by a linguistic deconstruction of the "strange" word "Gubernativamente."[48]

What is at work here is a Heideggerian 'meaning production' based on 'factuality,' recalling Heidegger's observation that meaning is rooted in the experience of the reliability of things; factuality, on the other hand, is a set of

'data' that are interpreted in terms of meanings of being (Dasein). At the same time, JQA's critique of both governments' conduct with respect to the case at hand, taking cues from a judge's reference to the case as "an anomalous case," tacitly appealed to the judges' own self-identity and the autonomy of their judicial "public sphere" by highlighting numerous evidence of what Habermas calls "structural violence" observable behind the manipulative intentions and interactions of the Executive branch.[49] Serving to de-legitimize the unsympathetic (to the cause of his slave clients) position of the US administration; such criticisms by JQA were part and parcel of his overall legal strategy that questioned the legality of the entire actions taken against his clients from the very beginning: "The whole of my argument to show that the appeal should be dismissed, is founded on an averment that the proceedings on the part of the United States are all wrongful from the beginning. The first act, of seizing the vessel, and these men, by an officer of the navy, was a wrong. The forcible arrest of these men, or a part of them, on the soil of New York, was a wrong." According to JQA, racial prejudice, resulting in US government "sympathy with the white, antipathy to the black" was patently discernible, adding to the illegitimacy of their position.[50]

Furthermore, another aspect of JQA's defense strategy hinged on analogical reasoning, which was an integral part and parcel of his method of legal deconstruction. An analogical reasoning is an explicit representation of a form of analogical reasoning that cites accepted similarities between two systems to support the conclusion that some further similarity exist.[51] The key to such reasoning is

relevance: Even if two objects are similar, we also need to make sure that those aspects in which they are similar are actually relevant to the conclusion. In his Amistad speech, JQA relied on analogical reasoning in both a positive and negative way, first to bolster his position by citing a somewhat similar case (involving the death of a British sailor on an British ship)[52] and, second, by dismissing the relevance of a supposedly similar case (i.e., the so-called Antelope case).[53] He was able to soundly dismiss the latter's similarity with the present case by simply pointing out that in the previous case, slave trade was still legal in Spain, whereas in the present case it was not – a form of deductive reasoning showing the diversity, the dissimilarity of the two cases, and the untenable and superficial similarity between them claimed by the opposite side.

CHAPTER THREE
The Quintilian Legal Discourse of John Quincy Adams

In order to grasp the full significance of JQA's argument in the Amistad case, it is vitally important to go beyond a mere descriptive account of the substantive aspects, covered in the previous chapter, and to analyze both the form, the style, that is, rhetorical and oratorial aspects of that historic speech as well. Certainly, as a former professor of rhetoric at Harvard University who had published a well-received book that was a collection of his lectures on the subject, JQA was not merely content to win the appeal on behalf of his (former) slave clients, but to do so by relying on his arsenal of rhetorical knowledge accumulated over the years, dating back to his youth, in light of the correspondence to him by his erudite father, John Adams, dated January, 1788, encouraging him to familiarize himself with the works of the "British Quintilian," Hugh Blair, along with other classical orators such as Cicero and Quintilian.[54] Four years earlier, Blair's *Lectures on Rhetoric and Belle Lettres* had been published in the US (as a college textbook), which

elicits comparison with JQA's *Lectures on Rhetoric and Oratory*, published in 1810.[55] According to Adam Potkay, Blair had a huge influence on the American audience, emphasizing the importance of civic eloquence, vividly demonstrated in JQA's forensic oratory in the case of Amistad.[56] That speech is remarkable for its tight construction and its logical cohesion, weaving facts, precedent, and reasoning full of binary comparisons exemplifying the principles at stake. At the same time, it was an awesome display of emotional manipulation, allusions, dramatizations, a convolution of roles and personae that at first sight might seem out of place and even irrational yet made perfect sense as part of a meticulous defense aimed at persuasion before the justices of the US Supreme Court. He invoked the gruesome image of dismembered bodies, appealed to memory, presented a convincing case against the government's interference in the judicial matters and, simultaneously, in a similar, but subtler, appeal he identified his opponents as anathema to the judges' vested judicial interests. His tone throughout the lengthy speech conveyed an eclectic, yet calculated, blend of moral outrage, indignation, disgust, empathy, humor, resoluteness, and steadfastness.

Unfortunately, it is nearly impossible without going on great length, to offer a proper exegetical treatment of such a brilliant presentation. Thus we must limit our discussion to a few crucial points and examples that demonstrate JQA's mastery of the "science of oratory." An ardent student of the ancient Greek and Roman works on rhetoric, JQA was not content with

merely imitating them, but rather to have his own imprint on the subject, by highlighting the profound differences between the ancient and contemporary times and advocating the improvement of the 'art of rhetoric' through democratic practices. Still, his speech is riddled with the evidence of the rhetorical classicists – Aristotle, Cicero[57], Quintilian –who emphasized the necessity of persuasion because the duty of the orator is to arouse his hearers and win their favor. Performing like an "ideal orator," his technique was deductive logic, moving from the abstract to the concrete, beginning with a reference to Justinian's definition of "justice" as "the constant and perpetual will to secure to everyone HIS OWN right," which he quoted in the original Latin (emphasis his own). By all account, this was an "American Cicero" *par excellence,* notwithstanding JQA's explicit homage to the ancient "father of eloquence" who was, like him, a lawyer, politician, and philosopher. It has been observed that it was Cicero's patriotism that attracted JQA to him most, writing: "Cicero had the most capacity and the most constant as well as the wisest and most persevering attachment to the republic" As a result, a number of authors have gone so far as referring to the "Ciceronian" rhetoric of JQA in the Amistad case, reflecting "that Cicero had the greatest influence" on JQA" and that JQA "from his youth to his old age the preeminent role model for Adams's legal career, his oratory, literary style, letter writing, and self-image as statesman and political theorist was consistently Cicero."[58] Curiously absent here, however, is any reference to

Marcus Fabius Quintilian, whose voluminous *.Institutio Oratoria*[59] clearly had a deeper and more profound implication for JQA's courtroom oratory than Cicero, dating back to JQA's Harvard lectures (i.e. in considering the objections to eloquence), wherein he readily admitted that Quintilian's institutes "embrace the most comprehensive plan, formed by any of the ancient rhetoricians; and the execution of the work is in all respects worthy of the design." As far as JQA was concerned the ancient art of oratory "started" with Cicero and "ended" with Quintilian. Unfortunately, various American scholars who have probed the influence of classical rhetorical tradition on JQA, they have placed a one-sided emphasis on Cicero's influence, which is certainly true at the political level, but have underappreciated Quintilian's influence on JQA as a lawyer.[60]

It is noteworthy that JQA had previously lamented the exclusion of oratory from the judicial proceedings, arguing for its preservation, blaming it on the "shackles" of (written) pleadings that weighed heavy on the prosecution while the defendants were "less cramped" by such limitations. Also, he had allowed for the "liberal indulgence of preparation" on the part of an orator "upon great and important occasions" and, certainly, his presentation before the US Supreme Court in the Amistad case met that occasion. With respect to the Quintilian influence, suffice to say the following. First, like Quintilian, JQA had compartmentalized the "whole science of rhetoric" into constituent parts, which he called "invention,

disposition, elocution, memory, and pronunciation or action."[61] This comports with Quintilian's division of rhetoric in five parts, i.e.., invention, arrangement, expression (words to be used), memory, and delivery. JQA's lengthy deliberation in Amistad recalls Quintilian's advice that orators must not be consumed with a passion for brevity."[62]

Lest we forget, Quintilian emphasized the importance of "virtue" as a hallmark of a good orator, which might explain JQA's infusion of his personal background in his speech, as a "credibility-enhancing" supplement. JQA concurred with Quintilian's observation that expression or elocution is a question of style, namely the wording of what is to be asserted, and that it presents the greatest difficulty for the speaker to master. Both men regarded clearness as the essential ingredient of a good style. For the orator to speak clearly he must use intelligible words and phrases that his audience will understand and avoid all meaningless phrases that are intelligible only to himself. He therefore must shun language that is obscure, such as the use of words which are familiar in certain districts though not in others and sentences that are so long that it is impossible to follow their drift. Clearness of thought can also be defeated by introducing useless words, as for example the use of a multitude of words to explain a simple idea. Rather what is needed is a direct and simple statement of the facts. The latter must be delivered (i.e., the final stage) aptly with the visual presentation of the speech matching the vocal endeavor of the orator, in a word, delivery is concerned

with both voice and gesture.[63] Certainly, JQA's gesture toward the Declaration of Independence, discussed in the previous chapter, meets this criterion, just as his entire arrangement of the speech is in line with Quintilian's discussion of arrangement, according to which the orator decides which information or arguments should be presented. Information that is not precise is discarded along with those arguments that are fallacious. What remains--distinct facts and persuasive arguments--is organized into an outline of the discourse. But, perhaps the most important part of a legal discourse, readily admitted by both Quintilian and JQA is the first part, which they both termed "invention." Invention is the gathering of material on which the orator will speak.[64] He should pay close attention to factual detail realizing that his audience will respond more favorably to a presentation that includes specific informational content. Further, after gleaning exact knowledge, he must discover arguments that will convince his audience that his conclusions are correct.[65] In Amistad, this meant a hybrid discourse that contained transcendental elements pertaining to the higher moral authority, i.e., "natural law," combined with a straightforward reference to the existing laws and their contradictions with the criminal claims made against his African clients by the prosecution, altogether meeting the prior standard JQA had set for good forensic oratory, i.e., one mixed with "profound reflection and subtle ingenuity." A clue to the latter, JQA's speech was part pedagogical, educating the hearer on the human rights of the slaves, meant to instill values,

articulating through the possibility of here and now the ultimate good toward which he aimed, namely, the abolition of the despicable institution of slavery. For there is little doubt that JQA was convinced of the march of history against that institution and the transitional period in which he existed, requiring what Heidegger calls "speaking toward the future." According to Heidegger, The future, in this way, is read through the conditions of the present in terms of feasibility. We weigh feasibility with reference to what has come before, and thus in legal and political argument we use examples from the past to guide our judgment of the present and its possibilities. Future matters lay themselves in their capacity to be otherwise regarding things that can be done or not done, and the question for the hearers is whether or not these things should be done. Furthermore, it has been observed that Heidegger's contribution to rhetoric is to direct attention to moodedness, and how "'the available means of persuasion' hold for us the possibilities for action with others in the particular case. Those possibilities are 'given' to us with mood, along with the different ways of reading/interpreting our moods in the words of an appropriate response."[66] This follows closely the Aristotle's discussion of *epideictic* -- speaking as addressing both the speaking of present matters, and how each act of speaking presents things in the context of the matter. We must, as he writes, "know on what grounds" to praise and blame so that we might show ourselves to be trustworthy.[67] Heidegger argued that genuine originary conceptuality comes from a careful

attendance toward comportment, disposition and speaking, i.e., all the things patently operative in JQA's speech, including his final remark which contained a personal caveat, functioning to hammer the message of speaker's ethical disposition, drawn in connection with the legal objective (of prevailing in an appeal), recalling Heidegger's description of an event that "uniquely comes to radiance in the fullness of its grace."[68] Seen in this light, the Amistad speech appears in new lights, as a Heideggerian "message of destiny," relaying the message with resoluteness to the hearer (the judges) the coming end of slavery and the futility of sticking to it, an implicit yet subtle message, one that could be heard, comprehended in the temporal context of "being-in-time" and not stranger to it. At bottom, this was a message on identity, on the legal self-definition, which changes over time and, by all indications, put the judges at a crossroad: to be present with the transition to a post-slavery in the future, as opposed to what "is." There was, as a result, but a short distance between a verdict recognizing the human rights of the African defendants and allowing them to return to their home as free beings, to the loftier objective of declaring the entire system of slavery as unjust and inhuman. That short distance, at the conceptual level, was sadly a great deal more difficult at the practical level and, as it turned out, would be settled through a bloody civil war.

Conclusion

This work has sought to provide a philosophical bridge between early American legal thought and the philosophical contributions of the modern thinkers, above all Heidegger and Habermas, notwithstanding the relatively rapid fading away altogether of the original concepts of "natural law" and "natural rights" from the compass of contemporary American law. We began with questioning and critiquing the foundations upon which this process was based, attempting to flesh out a venue to reclaim and to redefine these notions and to illustrate how in one particular instance, in the case of Amistad, they were aptly used to advance the voices of the excluded and the marginalized, in a word, to illustrate their empancipatory potential as the bedrocks of human rights. If these ideas are to disappear, as they appear, then one can certainly wager that the basic philosophical premises of American legal thought are yet to be fleshed out. This is an area that, in a contingent way, contributed to the understanding of the judiciary at the time of the Founding Fathers and was an integral part of their legal episteme. Here, we have examined JQA's defense, tracing the successful incorporation of those ideas

and the enduring importance of this approach for the discipline of critical legal thought. Truth, justice, and equality before law are conceivably more difficult to achieve without some form of legal-philosophical underpinning and, hence, continuity with the part, requiring a very rigorous attempt to re-examine the history of legal thought and practice, as both the products and shapers of society. Contrary to Michel Foucault,[69] whose whole concept of law gravitated around a negative conception of the "disciplinary" power of the legal system, thus overlooking the discursive power 'from the below,' our work here has hopefully demonstrated the need to shift to a more dynamic notion of "legal" discourse that allows a field of struggle for the marginalized 'other,' to even shift the balance of power I nits favor. Heidegger's rich and multi-faceted hermeneutic philosophy helps us to understand the law's complexity better than Foucault (and other like-minded theorists), which is why Heideggerian insights have formed the theoretical framework that underpins this study of JQA's role and impact. The interconnections between legal discourses and various forms of knowledge are simply too variegated to warrant the kind of abstract generalizations found in Foucault's works, i.e., a point easily missed by some of the recent Foucauldian forays in American jurisprudence. In contrast, a Heideggerian interpretation of modern law, highlighted in this work, suggests a more rewarding potential outcome, epistemologically speaking. In particular, it opens a new platform to re-evaluate and to even re-embrace the past ideas and to articulate them as parts

and parcel of a new thinking on critical legal thought in America, to put it in Heideggerian terms, an a priori engagement with legal meaning (being-in-*Bedeutsamkent)* that is tantamount to what he called "this being-ahead-of-ourselves as a returning" (*Sich-verweg-sein als Zuruckkommen).*

APPENDIX

Excerpts from the Argument of John Quincy Adams before the Supreme Court of the United States In the case of Amistad, 1841

"In rising to address this Court as one of its attorneys and counsellors, regularly admitted at a great distance of time, I feel that an apology might well be expected where I shall perhaps be more likely to exhibit at once the infirmities of age and the inexperience of youth, than to render those services to the individuals whose lives and liberties are at the disposal of this Court which I would most earnestly desire to render. But as I am unwilling to employ one moment of the time of the Court in anything that regards my own personal situation, I shall reserve what few observations I may think necessary to offer as an apology till the close of my argument on the merits of the question.

I therefore proceed immediately to say that, in a consideration of this case, I derive, in the distress I feel both for myself and my clients, consolation from two sources--first, that the rights of my clients to their lives and liberties have already been defended by my learned friend and colleague in so able and complete a manner as leaves me scarcely anything to say, and I feel that such full justice has been done to their interests, that any fault or imperfection of mine will merely be attributed to its true cause; and secondly, I derive consolation from the thought that this Court is a Court of JUSTICE. And in saying so very trivial a thing, I should not on any other occasion, perhaps, be warranted in asking the Court to consider what justice is. Justice, as defined in the Institutes of Justinian, nearly 2000 years ago, and as it is felt and understood by all who understand human relations and human rights, is--

"Constans et perpetua voluntas, jus suum cuique tribuendi."

"The constant and perpetual will to secure to every one HIS OWN right."

And in a Court of Justice, where there are two parties present, justice demands that the rights of each party should be allowed to himself, as well as that each party has a right, to be secured and protected by the Court. This observation is important, because I appear here on the behalf of thirty-six individuals, the life and liberty of every one of whom depend on the decision of this Court. The Court, therefore, I trust, in deciding this case, will form no lumping judgment on these thirty-six individuals, but will act on the

consideration that the life and the liberty of every one of them must be determined by its decision for himself alone…I trust, therefore, that before the ultimate decision of this Court is established, its honorable members will pay due attention to the circumstances and condition of every individual concerned.

When I say I derive consolation from the consideration that I stand before a Court of Justice, I am obliged to take this ground, because, as I shall show, another Department of the Government of the United States has taken, with reference to this case, the ground of utter injustice, and these individuals for whom I appear, stand before this Court, awaiting their fate from its decision, under the array of the whole Executive power of this nation against them, in addition to that of a foreign nation. And here arises consideration, the most painful of all others, in considering the duty I have to discharge, in which, in supporting the motion to dismiss the appeal, I shall be obliged not only to investigate and submit to the censure of this Court, the form and manner of the proceedings of the Executive in this case, but the validity, and the motive of the reasons assigned for its interference in this unusual manner in a suit between parties for their individual rights.

At an early period of my life it was my fortune to witness the representation upon the stage of one of the tragic masterpieces of the great Dramatist of England, or I may rather say of the great Dramatist of the world, and in that scene which exhibits in action the sudden, the instantaneous fall from unbounded power into irretrievable disgrace of Cardinal Wolsey, by the abrupt declaration of displeasure and dismission from the service of his King, made by that monarch in the presence of Lord Surry and of the Lord Chamberlain; at the moment of Wolsey's humiliation and distress, Surry gives vent to his long suppressed resentments for the insolence and injuries which he had endured from the fallen favorite while in power, and breaks out into insulting and bitter reproaches, till checked by the Chamberlain, who says:

"Oh! my Lords;

Press not a falling man too far: 'tis Virtue."

The repetition of that single line, in the relative position of the parties, struck me as a moral principle, and made upon my mind an impression which I have carried with me through all the changes of my life, and which I trust I shall carry with me to my grave.

It is, therefore, peculiarly painful to me, under present circumstances, to be under the necessity of arraigning before this Court and before the civilized world, the course of the existing Administration in this case.

The charge I make against the present Executive administration is that in all their proceedings relating to these unfortunate men, instead of that Justice, which they were bound not less than this honorable Court itself to observe, they have substituted Sympathy!--sympathy with one of the parties in this conflict of justice, and Antipathy to the other. Sympathy with the white, antipathy to the black…This sympathy with Spanish slave-traders is declared by the Secretary to have been first felt by Lieutenant Gedney. I hope this is not correctly represented. It is imputed to him and declared to have become in a manner national. The national sympathy with the slave-traders of the baracoons is officially declared to have been the prime motive of action of the government: ..The sympathy of the Executive government, and as it were of the nation, in favor of the slave-traders, and against these poor, unfortunate, helpless, tongueless, defenceless Africans, was the cause and foundation and motive of all these proceedings, and has brought this case up for trial before your honors.

In the sequel to the diplomatic correspondence between the Secretary of State and the Spanish minister Argaiz, relating to the case of the Amistad, recently communicated by the President of the United States to the Senate, [Doc. 179. 12 Feb. 1841,] the minister refers with great apparent satisfaction to certain resolutions of the Senate, adopted at the instance of Mr. Calhoun, on the 15th of April, 1850, as follows:

1. "Resolved--That a ship or vessel on the high seas, in time of peace, engaged in a lawful voyage, is according to the laws of nations under the exclusive jurisdiction of the state to which her flag belongs as much as if constituting a part of its own domain."

2. "Resolved--That if such ship or vessel should be forced, by stress of weather, or other unavoidable cause into the port, and under the jurisdiction of a friendly power, she and her cargo, and persons on board, with their property, and all the rights belonging to their personal relations, as established by the laws of the state to which they belong, would be placed under the protection which the laws of nations extend to the unfortunate under such circumstances."

Without entering into any discussion as to the correctness of these principles, let us admit them to be true to their fullest extent, and what is their application to the case of the Amistad? If the first of the resolutions declares a sound principle of national law, neither Lieut. Gedney, nor Lieut. Meade, nor any officer of the brig Washington had the shadow of a right even to set foot on board of the Amistad. According to the second resolution, the Africans in possession of the vessel were entitled to all the kindness and good offices due from a humane and Christian nation to the unfortunate; and if the Spaniards were entitled to the same, it was by the territorial right and jurisdiction of the

State of New York and of the Union, only to the extent of liberating their persons from imprisonment. Chevalier d'Argaiz, therefore, totally misapprehends the application of the principles asserted in these resolutions of the Senate, as indeed Mr. Forsyth appears by his answer to this letter of the Chevalier to be fully aware. From the decisiveness with which on this solitary occasion he meets the pretensions of the Spanish Envoy, a fair inference may be drawn that the Secretary himself perceived that the Senatorial resolutions, instead of favoring the cause of Montes and Ruiz, have a bearing point blank against them.

The Africans were in possession, and had the presumptive right of ownership; they were in peace with the United States; the Courts have decided, and truly, that they were not pirates; they were on a voyage to their native homes--their dulces Argos; they had acquired the right and so far as their knowledge extended they had the power of prosecuting the voyage; the ship was theirs, and being in immediate communication with the shore, was in the territory of the State of New York; or, if not, at least half the number were actually on the soil of New York, and entitled to all the provisions of the law of nations, and the protection and comfort which the laws of that State secure to every human being within its limits.

In this situation Lieut. Gedney, without any charge or authority from his government, without warrant of law, by force of fire arms, seizes and disarms them, then being in the peace of that Commonwealth and of the United States, drives them on board the vessel, seizes the vessel and transfers it against the will of its possessors to smother State. I ask in the name of justice, by what law was this done? Even admitting that it had been a case of actual piracy, which your courts have properly found it was not, there are questions arising here of the deepest interest to the liberties of the people of this Union, and especially of the State of New York. Have the officers of the U. S. Navy a right to seize men by force, on the territory of New York, to fire at them, to overpower them, to disarm them, to put them on board era vessel and carry them by force and against their will to another State, without warrant or form of law? I am not arraigning Lieut. Gedney, but I ask this Court, in the name of justice, to settle it in their minds, by what law it was done, and how far the principle it embraces is to be carried.

The whole of my argument to show that the appeal should be dismissed, is founded on an averment that the proceedings on the part of the United States are all wrongful from the beginning. The first act, of seizing the vessel, and these men, by an officer of the navy, was a wrong. The forcible arrest of these men, or a part of them, on the soil of New York, was a wrong. After the vessel was brought into the jurisdiction of the District Court of Connecticut, the men were first seized and imprisoned under a criminal process for murder

and piracy on the high seas.

Honors, I am simply pursuing the chain of evidence in this case, to show the effects of the sympathy in favor of one of the parties and against the other…I know not how, in decent language, to speak of this assertion of the Secretary, that the minister of Her Catholic Majesty had claimed the Africans "as Spanish property." In Gulliver's novels, he is represented as traveling among a nation of beings, who were very rational in many things, although they were not exactly human, and they had a very cool way of using language in reference to deeds that are not laudable. When they wished to characterize a declaration as absolutely contrary to truth, they say the man has "said the thing that is not." It is not possible for me to express the truth respecting this averment of the Secretary of State, but by declaring that he "has said the thing that is not." This I shall endeavor to prove by showing what the demand of the Spanish minister was, and that it was a totally different thing from that which was represented…

May it please your Honors--If the President of the United States had arbitrary and unqualified power, he could not satisfy these demands. He must keep them as a jailer; he must then send them beyond seas to be tried for their lives. I will not recur to the Declaration of Independence--your Honors have it implanted in your hearts--but one of the grievous charges brought against George III. was, that he had made laws for sending men beyond seas for trial. That was one of the most odious of those acts of tyranny which occasioned the American revolution. The whole of the reasoning is not applicable to this case, but I submit to your Honors that, if the President has the power to do it in the case of Africans, and send them beyond seas for trial, he could do it by the same authority in the case of American citizens. By a simple order to the marshal of the district, he could just as well seize forty citizens of the United States, on the demand of a foreign minister, and send them beyond seas for

Now, how are all these demands to be put together? First, he demands that the United States shall keep them safely, and send them to Cuba, all in a lump, the children as well as Cinque and Grabbo. Next, he denies the power of our courts to take any cognizance of the case. And finally, that the owners of the slaves shall be indemnified for any injury they may sustain in their property. We see in the whole of this transaction, a confusion of ideas and a contradiction of positions, from confounding together the two capacities in which these people are attempted to be held. One moment they are viewed as merchandise, and the next as persons. The Spanish minister, the Secretary of State, and every one who has had anything to do with the case, all have run into these absurdities. These demands are utterly inconsistent. First, they are demanded as persons, as the subjects of Spain, to be delivered up as criminals, to be tried for their lives, and liable to be executed on the gibbet.

Then they are demanded as chattels, the same as so many bogs of coffee, or bales of cotton, belonging to owners, who have a right to be indemnified for any injury to their property.

I now ask if there is, in any one or in all those specifications, that demand which the Secretary of State avers the Spanish Minister had made, and which is the basis of the whole proceeding in this case on the part of the Executive…. But the article is not applicable at all. It is not a casus foederis. The parties to the treaty never could have had any such case in view. The transaction on board of the vessel after leaving Havana entirely changed the circumstances of the parties, and conferred rights on my most unfortunate clients, which cannot but be regarded by this honorable court…

May it please your Honors, there is not one article of the treaty that has the slightest application to this case, and the Spanish minister has no more ground for appealing to the treaty, as a warrant for his demand, than he has for relying on the law of nations…

The reason for this extended analysis of the demand by the Spanish minister is, that we may be prepared to inquire what answer he ought to have received from the American Secretary. I aver, that it was the duty of the Secretary of State instantly to answer the letter, by showing the Spanish minister that all his demands were utterly inadmissible, and that the government of the United States could do nothing of what he required. It could not deliver the ship to the owner, and there was no duty resting on the United States to dispose of the vessel in any such manner. And as to the demand that no salvage should be taken, the Spanish minister should have been told that it was a question depending exclusively on the determination of the courts, before whom the case was pending for trial according to law. And the Secretary ought to have shown Mr. Calderon, that the demand for a proclamation by the President of the United States, against the jurisdiction of the courts, was not only inadmissible but offensive--it was demanding what the Executive could not do, by the constitution. It would be the assumption of a control over the judiciary by the President, which would overthrow the whole fabric of the constitution; it would violate the principles of our government generally and in every particular; it would be against the rights of the negroes, of the citizens, and of the States...

He thinks it impossible there should not be a power in the Federal Government to put down these proceedings of the courts, but he admits that unfortunately there is no such power, and then asks the Secretary of State if he cannot find a power, somewhere, to take the matter out of the hands of the judiciary altogether. And if not, he shall hold this Government responsible for the consequences, for if it has not power to fulfill the treaty, no treaty is binding on either party…

That is to say, the treaty stipulation has taken away the power of the courts of the United States to exercise jurisdiction between parties. Is that a doctrine to be heard by the Secretary of State of the United States from a foreign ambassador without answering it?

The Constitution of the United States recognizes the slaves, held within some of the States of the Union, only in their capacity of persons--persons held to labor or service in a State under the laws thereof--persons constituting elements of representation in the popular branch of the National Legislature--persons, the migration or importation of whom should not be prohibited by Congress prior to the year 1808. The Constitution no where recognizes them as property. The words slave and slavery are studiously excluded from the Constitution. Circumlocutions are the fig-leaves under which these parts of the body politic are decently concealed. Slaves, therefore, in the Constitution of the United States are recognized only as persons, enjoying rights and held to the performance of duties."

ABOUT THE AUTHOR

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Notes

[1] "Critical Legal Studies Movement,"*The Bridge* (September 2017). Also, Allan C. Hutchinson, *Critical Legal Studies* (Rowman & Littlefield, 1989).

[2] Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995). Also, Grant Gilmore, *the Ages of American Law* (1977). Edward J. Purcell, "American jurisprudence between the wars: legal realism and the crisis of democratic theory," The American Historical Review 75 (2): 424-446.

[3] According to Kaplan, for early Americans, "Legal education was essentially an intensive reading course, starting with William Blackstone's *Commentaries on the Laws of England* and procedding through various eighteenth century British texts on common law, statute law, pleadings, admiralty law, and so on." Fred Kaplan, J*ohn Quincy Adams: American Visionary* (Harper Collins, 2014): 95-96.

[4] Representative works on JQA are: Fred Kaplan, J*ohn Quincy Adams: American Visionary (Harper Collins, 2014);* William J. Cooper*: The Lost Founding Father: John Quincy Adams and the Transformation of American Politics (Norton and Company, 2017*). Lynn Hudson Parson*, John Quincy Adams (Rowman & Littlefield, 1999).* William Lee Miller, *Arguing about Slavery: John Quincy Adams and the Great Debate in the United States Congress (Vintage Books, 1988). John Quincy Adams, Slavery, and the Disappearance of the Right of Petition,* Published online by Cambridge University Press. **(**28 October 2011). David C. Fredrick, "John Quincy Adams Revisited," 25 Okl. City U.L. Rev 119 (200). Charles N. Edel, *Nation Builder: John Quincy Adams and the Grand Strategy of the Republic* (Harvard University Press, 2014). Lyon Rathbun, "The Ciceronian Rhetoric of John Quincy Adams," Rhetorica, Vol 18, Issue 2 (2000). Jeffery Auer and Jerald L. Banninga, "The Genesis of John Quincy Adams' Lectures on Rhetoric and Oratory," Almetric (June 5, 2009).

[5] Briefly, John Quincy Adams represented before the Supreme Court of the United States in 1841 to plead the case of three dozen Africans who had been found off the coast of New York in command of the Spanish vessel *La Amistad*. Some two months prior, Spanish slave traders had held the Africans on a short voyage from Havana to Puerto Príncipe; soon the captives overtook the ship, killed the captain, and held two members of the crew hostage. When a U.S. brig intercepted La Amistad off the coast of Long Island, authorities in the courts of admiralty released the Spanish crew members, and took the Africans into U.S. custody. Spain's government demanded that the U.S. hand over the Africans as legitimate property held under a 1795 treaty between the United States and the Kingdom of Spain. The relevant section of the treaty provided for the return of "ships and merchandise" that

are "rescued out of the hands of any Pirates or Robbers on the high seas." For more background information, see the National Archives: The Amistad Case: https://www.archives.gov/education/lessons/amistad?_ga=2.10110397.948710992.1659624390-253199022.1659624390.

[6] John Quincy Adams, *Memoirs of John Quincy Adams: Comprising Portions of His Diary from 1795 to 1848 (Palata Press, 2018). Also, John Quincy Adams, The Social Compact: Exemplified in the Constitution of the Commonwealth of Massachusetts; with Remarks on the Theories of Divine Right of Hobbes and the Counter Theories of Sidney, Locke, Montesquieu, and Rousseau, Concerning the Origin and Nature of Government* ***(****Harvard University Press, 2018****).***

[7] Potter has argued that the issue for Americans of the early republic was not a "choice of alternatives" between slavery and post-slavery, "but a ranking of values…of how they ranked these priorities." David M. Potter, The Impending Crisis (Harper, 1976): 43-45.

[8] On Lincoln and anti-slavery, see Benjamin Quarles, *Lincoln and the Negro* (Oxford University Press, 1962). A balanced interpretation of Lincoln's legacy must of necessity incorporate a devastating critique of Lincoln's complicity with the war crimes perpetrated on the southern population during the infamous Sherman march – that deliberately targeted the civilian population. The latter represented the application of bad and amoral means for a noble end, thus undercutting the latter, historically speaking. Lincoln's tacit approval of Sherman's atrocities, fully documented in the annals of American history of the Civil War, in turn raises the question of *post hoc* judgment, by applying the contemporary standards on (unjust) war. For a typical work that overlooks this matter see, Doris Kearns Goodwin, *Leadership in Turbulent Times* (Simon and Schuster, 2018).

[9] Kant defined men of "enlarged thought" as those who reflect from a universal standpoint "which he can determine by placing himself at the standpoint of others." Immanuel Kant, *Critique of Judgement*, translated by J.H. Bernard (MacMillan Co., 1914): 74.

[10] Carl J. Richard, *The Founders and the Classics* (Harvard University Press, 1994). Also, David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2014). What these authors overlook is how JQA's Quintilian 'style' of rhetoric helped him to get rid of the conceptual legal formalism that had dominated the American legal thought at the time.

[11] In the preface to the Critique of Pure Reason, Kant's compares his new critical project with respect to its rivals and outlines its basic standards and aims. It opens with a celebrated description of the parlous state of contemporary

metaphysics as a "battlefield of endless controversies." Kant draws out this metaphor, in a somewhat convoluted manner, to describe his main philosophical opponents: *dogmatism*, *scepticism*, *empiricism* and *indifferentism*. Critique, it will transpire, is opposed to all four schools. Immanuel Kant, *Critique of Pure Reason* (Penguin, 2009).

12 Louis Hartz, *The Liberal Tradition in America* (Mariner Books, 1991).

13 Graham Hughes, "the Existence of a Legal System," 35 NYU L. Rev. 1001 (1960). Also, John Baker, *An Introduction to English Legal History* (Oxford University, 1998).

14 Richard Ashcroft, "Locke's Political Philosophy" in Vere Chappell, ed., *The Cambridge Companion to Locke* (Cambridge University Press, 1994): 226-251. Max Farrand, *The Framing of the Constitution of the United States* (Yale University Press, 1913).

15 David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

1616 In his *Science of Logic,* the concept *aufhebung* conveys a perpetual oscillation between opposition and preservation, in contrast to a straightforward "overcoming" or negation. Gerog Willhem Hegel, *Scince of Logic,* translated by A.V. Miller (Humanity Books, 1969): 106-107.

17 Brian Bix, "Natural Law Theory" in Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford, UK, Blackwell 1996). Also, Justin Buckley Dyer, *C.S.Lewis on Politics and the Natural Law* (Cambridge University Press, 2017).

18 Oliver Wendell Holmes, "Book Notice," 14 Am L.Rev 233. 234 (1880), reprinted Sheldon M. Novick, ed., *The Collected Works of Justice Holmes* (Chicago University Press, 1994): 103.

19 William James, Pragmatism (Routledge, 1995). Also, Ellen Kappy Suckiel, *The Pragmatic Philosophy of William James* (University of Notre Dame Press, 1982).

20 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978): Chap. 2-4.

21 Chantal Mouffe, "Rorty's Pragmatic Politics," Economy and Society, Vol. 29, Issue 3 (2000).

22 Morris, Andrew J., "Some Challenges for Legal Pragmatism: A Closer Look at Pragmatic Legal Reasoning" (March 1, 2007). Available at SSRN: https://ssrn.com/abstract=967440 or http://dx.doi.org/10.2139/ssrn.967440.

23 Jurgen Habermas, *Knowledge and Human Interests (Beacon Press, 1971). This is not to embrace all aspects of Habermas' theory. For a critique of Habermasian theology, see Kaveh L. Afrasiabi, "Communicative Theory and Theology: A Reconsideration," Harvard Theological Review,* Vol. 91 , No. 1 (January 1998): 75 – 87, reprinted by Cambridge University Press (June, 2011): https://www.cambridge.org/core/journals/harvard-theological-review/article/abs/communicative-theory-and-theology-a-reconsideration/2F4A64A5D63833FDDC3912ACF520813C.

24 Jerome Frank*, Law and the Modern Mind* (Routledge, 1930): 168. Also, David Couzens Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," 58 S.CAL. L. Rev. 136 (1985).

25 Heinrich A. Rommen, *The Natural Law, A Study in Legal and Social History and Philosophy* (Liberty Fund, 1998). Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago University Press, 1963). Douglas W. Kmiec, "Natural Law v. Natural Rights: What Are They? How Do They Differ?" 20 Harv. J.L. & Pub. Pol'y 627, 649 (1997).

25 Michael Daly Hawkins, "John Quincy Adams and the Antebellum Maritime Slave Trade: The Politics of Slavery and the Slavery of Politics," Okla. City U. L. Rev. 1 (2000).

26 Abraham Lincoln*, "Speech on the Dred Scott Decision, June 26, 1857,"* in *Selected Speeches and Writings* (New York: Library of America, 1992)*:* 120.

27 Thomas Jefferson, *"Letter to Henry Lee, May 8, 1825",* in *Thomas Jefferson, Writings* (New York: Library of America, 1984), 1501.

28 Edmund Burke, *Reflections on the Revolution in France*, vol. 2 of *Selected Works of Edmund Burke* (Indianapolis: Liberty Fund, 1999): 193.

29 Giorgio Del Vecchio, The Formal Bases of Law (Palala Press, 2018).

30 Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1959).

31 Leon L. Fuller, *Anatomy of the Law* (Prager, 1968).

[32] Martin P. Golding, *The Nature of Law, Reading in Legal Philosophy* (random House, 1966). Charles E. Marske, Charles P. Kofron, and Steven Vago, *The Significance of Natural Law in Contemporary Legal Thought*," The Catholic Lawyer, Vol. 24, No. 1 (Winter 1978).

[33] The term "empire of law" symbolically recycles an ossified notion of law, with the judges essentially portrayed as autonomous chiefs, the last emperors, not subject to democratic accountability. This was not the original intention and represents a clear case of perversion of the original intent. A 'linguistic turn' away from this image is essential to a neo-classical approach that redraws the symbolic and conceptual repertoire of the Founding Fathers in new directions.

[34] This section draws on the complete works of Heidegger, including both his early and late works, but of course the main reference is *Being and Time,* translated by John Stambaugh (State University of New York Press, 2010). Also, Heidegger, *Die Grundprobleme der Phänomenologie*. Ed. Friedrich-Wilhelm von Hermann. (Frankfurt: Klostermann, 1992). Relevant works are: Also, Brian Leiter, *Heidegger and the Theory of Adjudication," 106 Yale L.J. 253 (1996-1997). Oren Ben-Dor, Thinking about Law in Silence with Heidegger (Hart Publications, 2007).*

[35] A parallel can be drawn here with Heidegger's comparison of the early and the late philosophies, the former acting as the enabling influence, e.g., he introduced the works of Parmenides to show that the very beginning of philosophy something was named that permitted all the later versions of philosophy, even while it retreated from their grasp. See, Heidegger, *Grundbegriffe der aristotelischen Philosophie*. Ed. Mark Michalski (Frankfort: Klostermann, 2001).

[36] "When Kant represented the conscience as a 'court of justice' and made this the basic guiding idea in his Interpretation of it, he did not do so by accident; this was suggested by the idea of moral law." Heidegger, *Being and Time (*Must Have Books, 2018): 339. For Heidegger, the role of conscience is tied to "resoluteness" and "authenticity." Similar argument maybe made about the "inauthenticity" of modern American legal system, whereby "in waiting for the next thing, the old one is forgotten... Resoluteness constitutes the loyalty of existence to its own being." *Being and Time, 443.*

[37] This part draws from the insights of Heidegger on "fundamental mood" (*Grundstimmung*), as a space of meaningfulness disclosed to a historical people (*Volk)* in a unitary and holistic manner. A relevant work is by Andreas Elpidorou and Lauren Freeman, "Affectivity in Heidegger I: Moods and Emotions in *Being and Time," in Philosophy Compass, Online at:* https://doi.org/10.1111/phc3.12236.

[38] *Being and Time, 21-23.*

[39] Niall *Lucy.* A Derrida Dictionary *(Blackwell Publishing, 2004).*

[40] Quoted from "Argument of John Quincy Adams, Before the Supreme Court of the United States : in the Case of the United States, Appellants, vs. Cinque, and

Others, Africans, Captured in the schooner Amistad, by Lieut. Gedney; 1841," Yale Law School online: https://avalon.law.yale.edu/19th_century/amistad_002.

[41] This recalls Heidegger's observations on "Being-historical" or "Being-destinal" (*seyns-geschichtlich*) thinking, understood in terms of a historical "destiny" (Geschick) that "dispatches" meaningfulness to human beings in historically changing configurations.

[42] Derrida, Jacques Derrida, *Of Grammatology* (The Johns Hopkins University Press, 1997).

[43] George W. F. Hegel, *The Phenomenology of Spirit* (Pantianos Classics, 1910): 87.

[44] "The vessel would have been condemned, and the slaves liberated, by the laws of the United States; because she was engaged in the slave-trade in violation of the laws of Spain... I have shown that Ruiz and Montes, the only parties in interest here, for whose sole benefit this suit is carried on by the Government, were acting at the time in a way that is forbidden by the laws of Great Britain, of Spain, and of the United States…these negroes have only obeyed the dictate of self-defence. They have liberated themselves from illegal restraint; and it is superfluous to say, that Messrs Ruiz and Montes have no claim whatever under the treaty."

[45] "Resolved--That if such ship or vessel should be forced, by stress of weather, or other unavoidable cause into the port, and under the jurisdiction of a friendly power, she and her cargo, and persons on board, with their property, and all the rights belonging to their personal relations, as established by the laws of the state to which they belong, would be placed under the protection which the laws of nations extend to the unfortunate under such circumstances." Without entering into any discussion as to the correctness of these principles, let us admit them to be true to their fullest extent, and what is their application to the case of the Amistad? If the first of the resolutions declares a sound principle of national law, neither Lieut. Gedney, nor Lieut. Meade, nor any officer of the brig Washington had the shadow of a right even to set foot on board of the Amistad. According to the second resolution, the Africans in possession of the vessel were entitled to all the kindness and good offices due from a humane and Christian nation to the unfortunate."

[46] Jurgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Beacon Press, 1987). Chief among JQA's criticisms was that the US Secretary of State "misrepresented" the "demands," such as by directing a district attorney to keep the case within the jurisdiction of the federal government. Still, this was not a blanket rejection and, in fact, JQA praised those aspects of the Secretary's communication that emphasized "The constitution and laws have secured the judicial power against ALL interference of the Executive authority." JQA second him by adding: "That is very true." This conforms with the Derridaian deconstructive approach or method and his notion of "trace," in this case the traces or fragments of truth in an otherwise distorted

communication.

47 The transformation of sense into another sense is discussed in the literature on Heidegger, e.g., Steven Crowell and Jeff Malpas, eds., *Transcendental Heidegger* (Stanford University Press, 2007).

48 "Gubernativamente, again; that is the idea which was in the mind of the Spanish minister all the while, gubernativamente. That is what he was insisting on, that was the demand which the Secretary of State never repelled as he ought, by telling Mr. Argaiz that it was not only inadmissible under our form of government, but would be offensive if repeated."

49 In his theory of communicative action, Habermas refers to "a structural violence…takes hold of the forms of intersubjectivity of possible understanding." *Theory of Communicative Action, Vol. 2,* op.cite. 187.

50 "They (the government –KA) have substituted sympathy with one of the parties in this conflict of justice, and antipathy to the other – sympathy with the white, antipathy to the black."

51 For a relevant work, see Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics,and the Rational Force of Legal Argument by Analogy," 109 HARV. L. Rev. 923, 933, 951-52 (1996). Also, Michael S. Moore, "The InterpretiveTurn in Modern Theory: A Turn for the Worse?" 41 STAN. L. Rev. 871, 909-10 (1989) (distinguishing between process of discovery and process of justification).

52 "Is there a member of this Honorable Court of age to remember the indignation raised against a former President of the United States for causing to be delivered up, according to express treaty stipulation, by regular judicial process, a British sailor, for murder on board of a British frigate on the high seas? At least, all your Honors remember the case of the Bambers?"

53 "By what possible process of reasoning can any decision of the Supreme Court of the United States in the case of the Antelope, be adduced as authorizing the President of the United States to seize and deliver up to the order of the Spanish minister the captives of the Amistad? Even the judge of the District Court in Georgia, who would have enslaved all the unfortunates of the Antelope but seven, distinctly admitted, that, if they had been bought in Africa after the prohibition of the trade by Spain, he would have liberated them all. It was by the application of this principle, to the fact, that, at the time when the Antelope was taken by the Arraganta, the slave-trade, in which the Antelope was engaged, had not yet been made unlawful by Spain."

54 John Quincy Adams, *Life in A New England Town* (1903): 125-26, note 3.

55 Hugh Blair, *Lectures on Rhetoric and Belle Lettres* (Liberty Funds, 1985). According to Blair, a man actuated by a strong passion "becomes much greater than he is at other times." P. 165.

56 Adam S. Potkay, "Theorizing Civic Eloquence in the Early Republic: The Road From David Hume to John Quincy Adams," Early American Literature, Vol. 34, No. 2 (1999): 147-170.

57 Marcus Tullius Cicero, *Orator*, translated by H. M. Hubbell (Harvard University Press, 1942).

58 Lyon Rathbun, "The Ciceronian Rhetoric of John Quincy Adams," Rhetorica, Vol 18, Issue 2 (2000).

59 Marcus Fabius Quintilian, *Institutio Oratoria*, an English translation by H. E. Butler in four volumes (G. P. Putnam's Sons, 1920).

60 JQA argued that in judicial discourse, "the aim of the speaker must be to produce conviction, rather than persuasion, to operate by proof, rather than influence." He also recognized that the "task of disuassion or opposition is much easier to the orator, than that of persuasion." *Lecture XII "Judicial Oratory, Part One,* available online: https://www.briantriber.com/WritingSamples/Rhetoric/Rhetoric_14_Lecture_12.html. Yet, in the same lecture, JQA talked about the orator's need to "convince" the judges, which in turn raises the question of aptness of his distinction between persuasion and producing conviction, since the latter clearly requires a measure of the former. Indeed, that was Cicero's and Quintilian's understanding – they saw rhetoric as the practical application of persuasion, i.e., if one is to win cases and direct the state, he must use persuasive speech. For scholarly works on persuasion, see Lynn Gary Cronkhite, "Logic, Emotion, and the Paradigm of Persuasion," Quarterly Journal of Speech, Vol. L (February, 1964):. 13-18. Dennis G. Day, "Persuasion and the Concepts of Identification," Quarterly Journal of Speech, Vol. XLVI (October, 1960): 270-275.

61 JQA, *Lecture VIII "State of the Controversy," online: https://www.briantriber.com/WritingSamples/Rhetoric/Rhetoric_10_Lecture_8.html*.

62 Quintilian, op.cit. Vol. 3, 207.

63 Quintilian, op. cit., Vol. IV, p. 357. Quintilian argued that the ideal orator should develop a voice that "is easy, strong, rich, flexible, firm, sweet, enduring, resonant, pure, carrying far and penetrating the ear." Ibid, 265.

64 It has been observed that JQA spent three months to prepare for his speech, "filling his diary with accounts of his striving to absorb pertinent documents, legal treaties, and reports of germane court cases." Cooper, *The Lost Founding Fathers, 365.*

65 Quintilian, op. cit., Vol III, p. 187, 207, 209.

66 Allen Michael Sculty "Aristotle's Rhetoric as Ontology: A Heideggerian Reading," Philosophy and Rhetoric, Vol. 32 (1999): 146-159.

67 Aristotle, *Categories, On Interpretation, Prior Analytics*. Trans. H. P. Cooke and Hugh Tredennick (Harvard University Press, 1938).

68 Heidegger, *On the Way to Language*, Trans. Peter D. Hertz (Harper & Row, 1971): 54.

69 Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage

Books, 1995).

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