

THE SECRET OF THE SPECIAL MARITIME JURISDICTION OF THE UNITED STATES EXPOSED



REVEALING THE MOST REPUGNANT FRAUD
EVER PERPETRATED ON THE PEOPLE OF
THE UNITED STATES OF AMERICA

A BRIEF DISSERTATION EXPOSING
THE TRUE NATURE AND CAUSE
OF MODERN CRIMINAL
ACCUSATIONS

by

VALIANT LIBERTY, 2001

Valiant Liberty was the pen name of one of the top 5 or 10 researchers in the legal reform movement during the 1990s and early 2000s, whose real name was Tom Gipson. Mr. Gipson died on July 7, 2012. See: <https://adask.wordpress.com/2012/07/24/r-i-p-valiant-liberty/>

This cover page has replaced the original to give him credit for his outstanding research and writing skills.

Woe unto you also, you lawyers;
for you lade men with burdens grievous to
be borne, and you yourselves touch not the
burdens with one of your fingers.

Luke 11: 46

Woe unto you, lawyers!
For you have taken away the key of
knowledge:
you entered not in yourselves, and them
that were entering in you hindered.

Luke 11: 52

THE SCOPE OF THE FRAUD

The trials and tribulations that many people accused of “criminal offenses” are a direct result of not understanding the nature and cause of the accusation. The end result of this lack of knowledge and understanding is that the United States and the States have the largest prison population in the world and execute the most people. Lives and families are destroyed. Family farms are stolen by unscrupulous judges and attorneys. Hard-working folks who have done no wrong have lost their homes and savings and have been reduced to a state of poverty by an encounter with the American system of injustice. The horror stories are limitless. This author believes that this lack of understanding is the result of the “dumbing down of America,” a part of a scheme devised and orchestrated by foreign and domestic enemies of the people of the United States of America, not the least of which are the American Bar Association and the various State Bar Associations which sprang from England. These Bar Associations have concocted a Luciferian scheme bringing the maritime jurisdiction onto the land and the scheme undoubtedly includes every member of every bar association up to the dishonorable justices of the Supreme Court. These foreign and domestic enemies of the people of the united States of America are believed by many, including the author, to have schemed for years, at least since the founding of our nation, to establish a total takeover of not only our country, but the entire planet and to enslave the people in their demonic quest to establish a One World Government or “New World Order” created out of the chaos of the destruction of Liberty and to be founded upon the ruins of the principles on which our once great nation was established and with the slave labor supplied by a once free, self sufficient and proud people.

Yes, Virginia, there is a conspiracy. There is a conspiracy by attorneys to steal everything that you have and to make you a slave. The members of the bar have bestowed honors, privileges and immunities upon themselves in direct violation of the very constitutions that they have sworn an oath to uphold so they can steal with impunity. They have defecated on the principles of law and justice. This author has personally witnessed them laugh about their “license to steal” when referring to their membership in the bar. Lawyers have infiltrated and taken control of the legislatures so they can enact laws for their own unjust enrichment. For the most part, they occupy or control the offices of the executive branches of the governments of the several states so they can sign the legislative enactments into law. They absolutely control the judicial branch so they can adjudicate and enforce the laws and divide the spoils among themselves. They control the banks so they can launder their ill-gotten gains. These zealous advocates of injustice will strip you of everything of value you have if they are given the least opportunity. If you hire one to help you out of a scrape with the law, for the most part, you will end up in prison while your lawyer is sipping margaritas on the beach in Cancun, paid for with your money. Your ex-wife might even be with him. Only if you have as much money as T. Cullen Davis or O.J. Simpson once did, might you be able to buy

yourself some justice. The justice these two colorful characters bought for themselves cost them their fortunes, but they evaded imprisonment and possible execution for a price paid in money.

Most people don't have the financial resources with which to bribe the members of the bar, so they languish in prison while the lawyers take what little property they had, plus a bonus from the State for their "services." When you go into a court accused of a "crime," and are inclined to hire a lawyer or accept a court appointed lawyer to help you out, remember that the lawyer is being paid by the STATE and is licensed by the STATE, the judge is licensed and paid by the STATE, the jury is licensed and paid by the STATE (they at least have driver licenses, don't they?), the prosecutor is licensed and paid by the STATE. If the judge orders a psychological evaluation to determine if you are competent to stand trial, the psychobabelist is also licensed and paid by the STATE. The cop that accused you and who will testify against you is licensed and paid by the STATE. If you are tried and sentenced to death, the cleric who comes to pray for your miserable soul before the execution is licensed and paid by the STATE. The guy who sticks the needle in your arm for the euthanasia is licensed and paid by the STATE. After they inject you with poison, the doctor that pronounces you dead is licensed and paid by the STATE. Could there be a hint of conflict of interest here? If the reader has ever had any experience with the modern criminal injustice system, the term "contempt of court" has taken on a whole new meaning for him.

The lawyers fill the prisons with people who have injured no one but are convicted of statutory crimes of a maritime jurisdiction. Prisons are filled with people whose only "crime" was to be in possession of a substance that they, the lawyers, have declared to be illegal. Good parents are separated from their children for attempting to discipline them, or because of divorce. Fathers are in prison because they cannot pay the court ordered child support; it is blatantly imprisonment for debt. People are in prison for exercising their presumed right to keep and bear arms. People are routinely thrown in jail for non-jailable traffic offenses and the Supreme Court in *Atwater v. City of Lago Vista*, #99-1408, (Apr. 24, 2001) has said it is OK. People are jailed every day for such heinous offenses as not wearing a seat belt or not paying a "motor vehicle" registration fee. America, the land of the slave and the home of the fee, has more people in prison and more people on death row than any other country in the world, and new prisons are being built every day. And in order to keep these new prisons filled beyond capacity, the various lawyer-controlled legislatures are busy enacting more and more new statutory maritime crimes.

Woe be unto you if you don't pay a tax that is presumed to be due. If you don't pay up, the zealous advocates of injustice will drag you into their secret maritime jurisdiction on the presumption of a tax debt and steal your bank account, your car, your home and anything else they can find. You may even go to prison. If you resist

too much or know too much, they will send their minions, the police, to assassinate you in broad daylight with impunity. The lawyers protect their obedient minions. These police agencies, whose motto is “to protect and serve,” get away with murder on a routine basis. Yes, they do protect and serve their masters, the lawyers, very well. This is why this essay must be spread far and wide as quickly as possible. The word must get out. The attorneys will stop at nothing to keep the scheme of their maritime jurisdiction secret. One advantage that the people have is that the rats are not yet totally in control of the Internet. Please use it; if you have a web page, please post this article. Another advantage that the people have is numbers; there are more of us than there are of them. The greatest advantage that the people have is the truth. The lawyers fear it; they go to extraordinary lengths to suppress it. If you want to know what fear smells like, find a judge after you read this article and explain what you are about to learn from the succeeding pages. Mail copies of this article to every lawyer, judge, legislator and sheriff you can, if you know of any who can read. Let the pungent odor of fear waft across the land. They know that once the truth escapes it cannot be held back and once again covered with darkness, at least not for several generations. When they are exposed, they will be powerless and vulnerable. People eventually recognize the truth; the truth is light, and the darkness flees from the light. The American people still have a sense of justice, and the lawyers especially fear justice.

How have they gotten away with the fraud for so long and managed to keep secret the maritime jurisdiction that has come onto land? The answer is; because the lawyers also control the fourth estate and institutions of religion and learning. The news media aids and abets the Esquires by suppressing the truth and perpetrating lies. It is a form of Orwellian mass mind control. The people are constantly fed a stream of propaganda through the network news, the newspapers, the public schools, colleges and universities (all lawyer controlled), and most especially, the incorporated 501(c)3 churches. Like all other corporations these churches are controlled by lawyers. The corporations that the people work for aid and abet the lawyers by perpetuating the false truths in their corporate policies. The subliminal messages transmitted are the lies that America is a free country, slavery is abolished, America is the great land of opportunity, there is separation of church and state, and “good Americans” and especially “good Christians” should submit to the government; it is the patriotic “Christian” thing to do. These themes never cease; they are constantly bombarded and ingrained into the psyche of the people. Hitler recognized in his work, *Mein Kampf* that if you told a lie and repeated and reinforced it often enough, the people would begin to accept the lie as a truth. The bigger and more outrageous the lie the better. After a period of time, when the lie is sufficiently programmed into the psyche of the national consciousness and is accepted as truth, the human mind does a remarkable thing. If the truth is then presented, it will be rejected as a lie. The psychobabelists have recognized this phenomena and describe it as cognitive dissidence. This cognitive dissidence can be compared to programming a computer; if you program lies and false information

into the computer, it will spew out lies and false information or just lock up completely and cease to function. Junk goes in; junk comes out. This cognitive dissidence is powerful and difficult to overcome. Your authors have struggled to overcome it for years.

Another method very successfully used by the lawyers to keep their secret under the cover of darkness is the age-old strategy of sending their minions to infiltrate, divide and conquer any organization of people banding together to resist the present tyranny of the injustice system. The authors have personally witnessed the effectiveness of this strategy. The minions of the Esquires sent to infiltrate “patriot organizations” are intelligent, skillful and highly trained in the arts of deception and betrayal. They are people of likable personalities, who are able to gain trust, induce people into “offending” some maritime penal regulation and set them up for prison. The most active or successful “patriots” are the ones on the top of the list to be targeted. They must be beaten into submission or “neutralized,” sometimes with extreme prejudice; witness the fate of Gordon Kahl. Some of these infiltrators are undoubtedly honest people that have run afoul of a maritime penal regulation and have caved in to the pressure put on them by lawyers and their minions to inform on others in order to avoid incarceration. Some do it purely for money. Others are agents of the lawyers who travel the “patriots’ circuit” holding seminars and disseminating false information and “sure fire remedies” guaranteed to be the proverbial magic bullets. Many good people have lost their property and liberty pursuing these false remedies sold by patriots for profit who are paid by the attorneys to lie and then double dip into their victim’s pocket by selling the false information. And then there are other patriots holding seminars who truly believe that they have the answer, and end up in jail after an attempt to apply their own theory. It is understandable how one can fall victim to a false “patriot for profit” scheme. Your authors have been victims of some of these schemes. People that run afoul of the American system of injustice are so desperate for some relief that they become easy targets of opportunity. Live and learn. The age-old warning of *caveat emptor* should be applied to this instant article. Do your own research and check it out. Education, however it is obtained, is usually expensive. Hopefully, most folks learn by their mistakes.

But the dawn is near; the sun is rising. The path traveled by those seeking the truth of the fraud has been a long and arduous journey. It passes through a jungle growing over the hollow remnants of many small businesses, the ruins of family farms, the shells of homes once occupied by close-knit families, and passes by dead bodies and graves marking the way. The path to truth has been filled with stumbling blocks seemingly insurmountable and many forks lead to false trails. Many who have started down the path have found the journey so difficult that they have turned back. Others, more determined and of stronger character have perished along the way. A great debt is owed to those who have blazed the trail before us and marked at least part of the way, marked false trails and removed some of the

stumbling blocks. Without the knowledge that they have gained to be built upon, your authors would have never discovered what they have.

This article is not the work of any one man. It is the accumulated work of many. It is the culmination of many pieces of a giant puzzle that has been assembled with Divine intervention. The authors sincerely believe that the timing of this revelation of fraud is keyed to the timetable of the Creator. His plan for the destiny of mankind and the Universe has existed from the beginning, and the Plan is nearing the final stages of execution. The lawyers are soon to suffer the woes described in the Gospel of Matthew, Chapter 23. The secular judges are soon to be judged by the Judge of the Universe. How can they defend themselves? You may be assured that most of all they live in fear of their own judgment before the Supreme Judge. They are responsible for their own actions as observed by one jurist in the case of *Robin v. Hardaway*, 1 Jefferson 109; 1 Am Jur 2d 14: “A legislature must not obstruct our obedience to Him from whose punishments they cannot protect us.”

THE SIXTH AMENDMENT

The key to the fraud hinges on understanding the 6th Article of Amendment of the Constitution of the United States. The discussion begins with the text as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and **to be informed of the nature and cause of the accusation**; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. [Emphasis added].

The key words in the emphasized portions are ALL and SHALL. “All” implies that there is more than one criminal jurisdiction. “Shall” makes the enjoyment of the right to be informed mandatory. The information or indictment must state the nature and cause in plain language that is understood by the accused. Many victims accused of offenses against the STATE or UNITED STATES have found themselves in prison and all their assets forfeited “for lack of understanding” of the nature and cause of the accusation.

The Supreme Court has held:

There are no common law offenses against the United States. Only those acts which Congress has forbidden, with penalties for disobedience of its command, are crimes. *United States v. Hudson &*

Goodwin, 11 U.S. (7th Cr.) 32 (1812); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Britton*, 108 U.S. 199, 206 (1883); *United States v. Eaton*, 144 U.S. 677, 687 (1892).

Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions. *Oceanic Navigation Co. v. Stranaham*, 214 U.S. 320 (1909); *Hepner v. United States*, 213 U.S. 103 (1909); *United States v. Regan*, 232 U.S. 37 (1914).

Contempt proceedings, which were at one time not considered to be criminal prosecutions, are no longer within that category. Compare *In re Debs*, 158 U.S. 564 (1895), with *Bloom v. Illinois*, 391 U.S. 194 (1968).

WHAT IS THE NATURE OF THE ACCUSATION?

If common law crimes against the United States do not exist, what kinds of crime do exist against the United States? Article III, Section 2 provides for four different jurisdictions, law, equity, admiralty, and maritime. By process of elimination, we can automatically rule out law by virtue of the above Supreme Court holdings. Equity is defined as “Justice administered according to fairness as contrasted with the strictly formulated rules of common law. The term equity denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men. (See Black’s 6th). Equity deals with fictions, like corporations. . . . Since it is common knowledge that law and equity have been combined and are virtually indistinguishable from each other, and that anyone who has witnessed “criminal” proceedings in the courts easily recognizes that these “criminal” or “quasi-criminal” accusations are most usually contrary to the spirit and habit of fairness and justness and right dealing of men with men. Therefore, the cause of action cannot be in equity.

Admiralty is defined in Bouviers 1856 edition as: “the name of a jurisdiction which takes cognizance of suits or actions which arise in consequence of acts done upon or relating to the sea; or, in other words, of all transactions and proceedings relative to commerce and navigation, and to damages or injuries upon the sea.” 2 Gall. R. 468. Black’s 6th edition observes that: “the terms ‘admiralty’ and ‘maritime’ are virtually synonymous.”

Bouvier’s 1856 edition defines “Maritime Cause” as:

1. Maritime causes are those arising from maritime contracts, whether made at sea or on land, that is, such as relate to the commerce, business or navigation of the sea; as, charter parties, affreightments, marine loans, hypothecations, contracts for maritime service in building, repairing, supplying and navigating ships, contracts and quasi contracts respecting averages, contributions and

jettisons; contracts relating to marine insurance, and those between owners of ships. 3 Bouv. Inst. n. 2621.

2. There are maritime causes also for torts and injuries committed at sea.

3. **In general, the courts of admiralty have a concurrent jurisdiction with courts of law, of all maritime causes: and in some cases they have exclusive jurisdiction.** [Emphasis added].

As long ago as 1851 the Supreme Court recognized that the Congress has the power to extend the jurisdictions of admiralty and maritime causes to the land under the commerce clause and deprive the people of the right of a trial by jury. The following holding by the high court pretty much says it all:

This power [of admiralty jurisdiction] is as extensive upon land as upon water. The Constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort which the courts of the United States may lawfully exercise on the high seas, can be extended to the lakes under the power to regulate commerce, it can with the same propriety and upon the same construction, be extended to contracts and torts on land when the commerce is between different States. **And it may embrace also the vehicles and persons engaged in carrying it on. It would be in the power of Congress to confer admiralty jurisdiction upon its courts, over the cars engaged in transporting passengers or merchandise from one State to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury.** Now the judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. **But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land."** *Propeller Genessee Chief et al. v. Fitzhugh et al.* 12 How. 443 (U.S. 1851)

The very next year, in 1852, the Supreme Court warned that this admiralty or maritime threat to Liberty was encroaching on the land and morphing itself into an air-breathing creature just as a harmless tadpole transforms itself into a frog, and this is a really ugly frog. If you had never seen a tadpole gradually go through this miraculous process, you might never believe that such a transformation could occur, changing a harmless water-breathing creature into an air-breathing predator.

Next to revenue (taxes) itself, the late extensions of the jurisdiction of the admiralty are our greatest grievance. **The American Courts of Admiralty seem to be forming by degrees into a system that is to overturn our Constitution and to deprive us of our best inheritance, the laws of the land.** It would be thought in England a dangerous innovation if the trial, of any matter on land was given to the admiralty" *Jackson v. Magnolia*, 20 How. 296 315, 342 (U.S. 1852)

Has the Congress expanded this admiralty and maritime jurisdiction? The answer is a definite and emphatic yes. One only need examine the codification at Title 18 of the United States Code, Section 7:

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE PART I - CRIMES
CHAPTER 1 - GENERAL PROVISIONS

Sec. 7. Special maritime and territorial jurisdiction of the United States defined

The term "**special maritime and territorial jurisdiction of the United States**", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, **and any vessel belonging in whole or in part to the United States or any citizen thereof**, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any

other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

-SOURCE- (June 25, 1948, ch. 645, 62 Stat. 685; July 12, 1952, ch. 695, 66 Stat. 589; Pub. L. 97-96, Sec. 6, Dec. 21, 1981, 95 Stat. 1210; Pub. L. 98-473, title II, Sec. 1210, Oct. 12, 1984, 98 Stat. 2164; Pub. L. 103-322, title XII, Sec. 120002, Sept. 13, 1994, 108 Stat. 2021.)

The broad language of Title 27, Code of Federal Regulations, Part 72.11 makes almost all crimes whether or not they are Federal or States crimes “commercial crimes”. In the *Propeller Genessee Chief*, supra, it was revealed that admiralty courts have jurisdiction over interstate commerce, so it would follow that the crimes listed in 27 CFR 72.11 are cognizable in an admiralty or maritime court, and such are commercial courts. The relevant part of the text is as follows:

Commercial crimes. Any of the following types of crimes (Federal or State): Offenses against the revenue laws; burglary; counterfeiting; forgery; kidnapping; larceny; robbery; illegal sale or possession of deadly weapons; prostitution (including soliciting, procuring, pandering, white slaving, keeping house of ill fame, and like offenses); extortion; swindling and confidence games; and attempting to commit, conspiring to commit, or compounding any of the foregoing crimes.

Addiction to narcotic drugs and use of marihuana will be treated as if such were commercial crime.

In the Ebsworth & Ebsworth lecture of 1994, *infra*, Proctor Wiswall states: “Congress has been repeatedly held by the Court to have the power to extend the admiralty and maritime jurisdiction by statute, and Congress has repeatedly

exercised that power;" (see e.g., *The "Lottawana"*, 88 U.S. 558 (1875); also *Panama Railroad v. Johnson*, 264 U.S. 375 (1924)).

What many of the victims accused of maritime "crimes" don't realize is that admiralty and maritime jurisdictions were merged with the law and equity jurisdictions in 1966 (See: Federal Rules of Civil Procedure, notes to Supplementary Rules for Certain Admiralty and Maritime Claims). All four causes of action (or natures of the cause) which were once separate and distinct are now rolled into one set of rules and indistinguishable from one another in our modern courts. Federal Rules of Civil Procedure, (FRCP) Rule 1 provides that: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty with the exceptions stated in rule 81." Rule 2 provides that: "There shall be one form of action to be known as "civil action." FRCP Rule 9(h) provides in part: "If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not." FRCP Rule 38(e) provides that: "These rules shall not be construed to create a right to a trial by jury of the issues in an admiralty or maritime claim within the meaning of rule 9(h).

Well now, aren't the rules revealing. Maybe this explains why the judge can amend or reverse a jury verdict, or even jail the jurors for contempt if they don't do what the judge tells them to do. It has happened. The jury is just there for window dressing to make the sheep think that there is a trial by jury. Law, equity, admiralty and maritime, the once separate and distinct jurisdictions are now neatly rolled into one set of rules, tried in the same courtroom with the same judge, on the same docket and with nothing to distinguish the different jurisdictions from one another.

If the criminal accusations that plague Americans today are not in the jurisdictions of common law or equity, they must be in admiralty or maritime jurisdictions. And though admiralty and maritime jurisdictions are virtually indistinguishable, Bouvier's definition of a "Maritime cause" as those arising from maritime contracts whether made at sea or on land fits the bill.

For the sake of illustration, let's take time to consider the condition of military personnel. When a young man enlists in the armed forces, he signs an enlistment contract that binds him to the law of the Code of Military Justice. This Code of Military Justice (COMJ) cannot apply to civilian folks who are not contracted. Under the COMJ, the accused is guilty until proven innocent. If the accused wishes to defend himself, he is put into the position of trying to prove a negative, a virtual impossibility, e.g., he is put into the position of proving that he did not do something. The military court or court-martial, where these military cases are tried, is a legislative criminal court established under the legislative power of the congress to regulate the armed forces. Their jurisdiction is entirely

penal¹“An action upon a penal statute” is defined as: an action for the recovery of a penalty given by statute. In a broad sense, the term has been made to include all actions in which there may be a recovery of exemplary or vindictive damages; an action in which the judgment against the defendant is in the nature of a fine or is intended as a punishment. and disciplinary. The word “penal” is inherently a much broader term than “criminal” since it pertains to any punishment or penalty and relates to acts which are not necessarily delineated as criminal. Military personnel are subject to court-martial penalties because they are under a maritime contract.

Did you ever notice that Texas has a Code of Criminal Procedures, but not one criminal law? That’s right, there is no Criminal Code and not one criminal law in Texas, but, there is a Penal Code that is just chock full of “offenses” and more are being added every time the legislature convenes. And if you have done battle in the Texas court system, you will have noticed that the courts don’t follow the Code of Criminal Procedure very well. If you make enough noise, they will give it a little bit of “lip service,” but the judges mostly ignore it. The courts have held:

Power of punishment is vested in the legislature, not in the judicial department, it is the legislature, not the court, which is to define a crime, and ordain his punishment. *U.S. v. McClain*, 545 F.2d 988, rehearing den. 551 F.2d 52, (5th Cir. 1977).

The legislature may declare that the doing of certain acts, shall constitute the offense of sodomy, and may ignore, if it sees fit, the common law elements of the offense. *Slusser v. State*, 232 SW2d 727, 1949.

Under Texas law, no act or omission is a crime unless made so by statute. *Dawson v. Vance*, 329 F.Supp. 1320, (D.C.Tex. 1971).

The Legislature may create an offense and in same enactment, provide exceptions to its application. *Williams v. State*, 176 SW2d 177, Tex.Cr.App., 1943.

In summary and according to the courts, the legislature defines crimes, can create a crime, while ignoring the common law elements of a crime and mandate the punishment for the crime it creates. There is no crime unless it is created by the legislature. All of this certainly flies in the face of the common law rule that there must be an injured party for a crime to exist. These creations of the legislature are

¹Black’s 6th ed. defines a “Penal action” as a civil action in which a wrongdoer is subject to a fine or penalty payable to the aggrieved party. The word “penal” is inherently a much broader term than “criminal” since it pertains to any punishment or penalty and relates to acts which are not necessarily delineated as criminal. Action is essentially “penal” if amount sought to be recovered is arbitrarily exacted for some act or omission of the defendant.

most certainly maritime “crimes”. The Texas legislature has certainly exercised its power to extend the maritime jurisdiction.

CADET CUSTER’S COURT-MARTIAL

The story of George Armstrong Custer’s court-martial is a case on point. In 1861, as a young cadet in West Point, Mr. Custer struck an officer and knocked him to the ground. He was immediately arrested, tried before a court martial and found guilty of the offense. Custer was about to be sentenced to 15 years of hard labor. Before sentencing, Custer addressed the court and asked why the sentence was so severe, it was only a friendly fist fight. The court explained to Custer that the sentence imposed was mandated by the Articles of War, which provided at Article 9:

Any officer or soldier who shall strike his superior officer, or draw or lift up any weapon, or offer any violence against him, being in the execution of his office, on any pretense whatsoever, or shall disobey any lawful command of his superior officer, shall suffer death, or such other punishment as shall, according to the nature of his offense, be inflicted upon him by the sentence of a court-martial. (2 Statutes at Large 259).

The court went on to explain that Custer, as a cadet had signed the Articles of War when he was admitted to the academy and was bound to the punishment. The court felt that the punishment was suitable to the nature of the offense and quite merciful under the circumstances. Custer expressed confusion and stated that he didn’t know anything about these Articles of War and didn’t have any recollection of signing them. This statement put the officers of the court-martial in a frenzy. They immediately adjourned the court to inspect the enrollment records. Sure enough, they found that Custer had not signed the Articles of War. When the court was reconvened, the judge ruled that the case is dismissed for lack of subject matter jurisdiction. Custer was then ordered to sign the Articles of War or discontinue his education at West Point. The fate of Custer was determined by the want of a signature.

In this trial, Custer was afforded the right of allocution. Allocution is the formality of a court’s inquiry of a defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on conviction (See: Black’s 6th). In this case, Custer was able to show cause as to why he should not be sentenced and save himself from being imprisoned and possibly hanged. When Custer denied having signed the contract, the burden of proof was shifted because of his rebuttal of the presumption that the contract existed. Custer was freed because, without the contract, the court-martial did not have subject matter jurisdiction to execute the sentence. Custer may have known what he was doing by demanding the right of allocution, which is alive and well today, but I doubt it. The authors believe

he was just lucky and stumbled and bumbled into the remedy. This story is a fact of history. It is also a fact of history that Custer did not learn much from the court-martial because he later disobeyed orders by not waiting for reinforcements at a place called Little Big Horn, a place where his luck left him. Moral of the story is: if the lawyers don't get you the Injuns will.

The right of allocution is an ancient right rooted in the English common law and cannot be denied. The Supreme Court has held in *Green v. United States*, 365 U.S. 301 (1961):

The design of Rule 32 (a) did not begin with its promulgation; its legal provenance was the common-law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K. B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32 (a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement in his own behalf," and "to present any information in mitigation of punishment". We therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32 (a). See *Taylor v. United States*, 285 F.2d 703.

However, we do not read the record before us to have denied the defendant the opportunity to which Rule 32 (a) entitled him. The single pertinent sentence - the trial judge's question "Did you want to say something?" - may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play, is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak

and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and we therefore find that his sentence was not illegal.

However, to avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing. *GREEN v. UNITED STATES*, 365 U.S. 301 (1961).

The U.S. Fifth Circuit Court of Appeals, in *U.S.A. v. Myers*, 1998, expanded further on this holding of the Supreme Court:

Rule 32(c)(3)(C) of the Federal Rules of Criminal Procedure states that the court *must*, before imposing sentence, address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence.

Initially, we must decide whether Myers was, in fact, denied the so-called "right of allocution" secured him by Rule 32. We review *de novo* whether a district court complied with a Federal Rule of Criminal Procedure. *U.S. v. Scott*, 987 F.2d 261, 264 (5th Cir. 1993). The government contends that Myers was indeed afforded his allocution rights because (1) the court invited Myers to explain why the firearm enhancement should not apply, and (2) *through defense counsel*, Myers was able to argue that he had cooperated with the government and that he was a minor participant in the conspiracy. Further, the government contends that a remand is, in any case, not warranted since Myers received the lowest sentence possible. We reject the government's arguments as meritless.

First, we observe that thirty-seven years ago the Supreme Court, in *Green v. United States*, 365 U.S. 301 (1961), we rejected the argument that a defendant's right of allocution may be satisfied through his counsel. In *Green* the court stated:

The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting

eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement on his own behalf," and "to present any information in mitigation of his sentence." We therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a).

As the Supreme Court recognized, **Rule 32 envisions a personal colloquy between the sentencing judge and the defendant.** See *U.S. v. Anderson*, 987 F.2d 251, 261 (5th Cir. 1993); *U.S. v. Dominguez-Hernandez*, 934 F.2d 598, 599 (5th Cir. 1991). The arguments of Myers's counsel therefore did not satisfy Rule 32.

Second, the court's two questions to Myers regarding the firearm enhancement were patently inadequate to meet the plain requirements of Rule 32. **By its own terms, Rule 32 mandates that a defendant be given the opportunity "to make a statement and *present any information in mitigation of sentence.*"** FRCrP 32(c)(3)(C). (Emphasis added). The court questioned Myers merely to confirm that there was a factual basis for the firearm enhancement. Those esquires were not even an arguable attempt to give Myers the broad-ranging opportunity to speak embodied in Rule 32. See, e.g., *U.S. v. Sparrow*, 673 F.2d 862, 864 (5th Cir. 1982); see also, *U.S. v. De Alba Pagan*, 33 F.3d 125, 129 (1st Cir. 1994).

We also reject the government's assertion that, because Myers received the lowest sentence possible, a remand for resentencing would be a useless act. We pretermitt discussion of that issue, however, until the next section.

In sum, in order to satisfy the command of Rule 32(c)(3)(C), the court, the prosecutor, and the defendant must at the very least interact in a manner that shows clearly and convincingly that the defendant knew he had a right to speak on any subject of his choosing prior to the imposition of sentence.

De Alba Pagan, 33 F.3d at 129, citing *Green*, 365 U.S. at 304 -05. Buttressed by our own independent review of the record, we reject the government's claim that Myers was afforded his Rule 32 right of allocution.

We now must turn to a question left undecided by the Supreme Court in *Green*: whether denial of a defendant's Rule 32 right

of allocution requires an automatic reversal and remand for resentencing, or whether such an error can be deemed "harmless" if the record shows that, regardless what the defendant might have said in his own behalf, the court would not have imposed a lower sentence. The government implicitly contends that a harmless error analysis should apply when it urges that "remand is not warranted because there is no possibility that a lower sentence would have been imposed by the district court." Citing our decision in *Dominguez-Hernandez*, the government maintains that remanding Myers's case for resentencing would therefore be a "useless bow to procedural nicety". *Dominguez-Hernandez*, 934 F.2d at 599.

The government misconstrues *Dominguez-Hernandez*, a case which, we must observe, entirely refutes the government's position. In *Dominguez-Hernandez*, we reaffirmed the settled principle that "[i]f the district court fails to provide the [Rule 32] **right of allocution, resentencing is required**". *Dominguez-Hernandez*, 934 F.2d at 599, citing *U.S. v. Posner*, 868 F.2d 720, 724 (5th Cir. 1989) (Emphasis added). We remanded for resentencing even though the defendant (1) had not raised the error to the district court, and (2) did not even assert that, on resentencing, he wished to exercise his right of allocution. *Dominguez-Hernandez*, 934 F.2d at 599. It was in view of the latter point in particular that we observed remand could "well be a useless bow to procedural nicety." *Id.* Nonetheless, we found that failure to afford the defendant his allocution rights necessitated remand; our precedents dictated, and continue to dictate, such a result. See, e.g. , *U.S. v. Anderson*, 987 F.2d 251, 261 (5th Cir. 1993); *U.S. v. Sparrow*, 673 F.2d 862, 864-65 (5th Cir. 1982).

Because it is apposite to Myers's case, we add that a remand is necessary even when the judge's comments, at the sentencing hearing or elsewhere, indicate that the judge would remain unmoved in the face of anything the defendant has to say. See *Sparrow*, 673 F.2d at 865...6. The right of allocution embodied in Rule 32 does not exist merely to give a convicted defendant one last-ditch opportunity to throw himself on the mercy of the court. To be sure, one important function of allocution is "to temper punishment with mercy in appropriate cases, and to ensure that sentencing reflects individualized circumstances." *De Alba Pagan*, 33 F.3d at 129. But the practice of allowing a defendant to speak before sentencing, which dates back as far as 1689 to the case of *Anonymous*, 3 Mod. 265, 266, 87 Eng.Rep. 175 (K.B. 1689), has symbolic, in addition to functional, aspects. As a sister Circuit has observed, "[a]ncient in law, allocution is both a rite and a right. ...[A]llocution has value in terms of maximizing

the perceived equity of the [sentencing] process." *De Alba Pagan*, 33 F.3d at 129 (citations and internal quotes omitted). The right of allocution, then, is one "deeply embedded in our jurisprudence"; both its longevity and its symbolic role in the sentencing process counsel against application of a harmless error analysis in the event of its denial. *Id.*

The district court was well within its discretion in rejecting the § 51.1 motion and also, as we will below demonstrate, in subjecting Myers to the firearm enhancement. See discussion *infra* Part II. All we say, however, is that Myers should have been invited to speak freely in his own behalf prior to sentencing. A hypothetical observer to the proceedings, then, would have been left with no doubt that Myers's sentence reflected the sentencing court's considered judgment about the gravity of his individual participation in the drug conspiracy. Such benefits, although perhaps intangible, could have been bought at the relatively cheap cost of complying with the simple, clear language of Rule 32(c)(3)(C). As we have already observed, the burden of such compliance falls upon the sentencing court, and not upon the convicted defendant. See *Dominguez-Hernandez*, 934 F.2d at 599. We recognize that our holding today puts us at odds with some of our sister Circuits. For example, the Fourth, Sixth and Ninth Circuits apply some variation of harmless error analysis to the denial of a defendant's Rule 32 allocution rights. See, e.g., *U.S. v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994); *U.S. v. Riascos-Suarez*, 73 F.3d 616, 627 (6th Cir.), cert. denied, 117 S.Ct. 136 (1996); *U.S. v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997), cert. denied, 118 S.Ct. 731 (1998). On the other hand, the First Circuit, in *De Alba Pagan*, *supra*, squarely held that such an error could not be harmless. *De Alba Pagan*, 33 F.3d at 129, see also *U.S. v. Patterson*, 128 F.3d 1259, 1261 (8th Cir. 1997), citing *U.S. v. Walker*, 896 F.2d 295, 301 (8th Cir. 1990).

For the foregoing reasons, we AFFIRM the district court's application of the firearm enhancement, but we VACATE Myers's sentence because of the district court's failure to accord Myers his Rule 32 right of allocution. We must therefore REMAND FOR RESENTENCING.

The right of allocution is alive and well in Texas. It may be a right, but not necessarily a "rite" as elucidated by the 5th Circuit Court of Appeals. According to the Texas Courts, the defendant must take the initiative and demand the right to the "rite" of allocution himself **before** sentencing. The Texas courts hold:

The trial court does not err in failing to grant the defendant his right of allocution, where, even though the record shows that the mandatory question was not asked by the trial court, there are no objections to the

court's failure to inquire of the defendant if he had anything to say as to why the sentence should not be pronounced against him, and where there is no contention that any of the statutory reasons set forth to prevent the pronouncement of sentence ever existed. *Hernandez v. State*, (App. 9th Dist. 628 SW2d 145, (1982)).

When the record is silent on the subject [allocution] and there is no showing to the contrary, it will be presumed on appeal that the requirement was complied with. *Johnson v. State*, (1883) 14 App. 306; *Bohannon v. State* (1883) 14 App. 271.

Where there is no objection in trial court that defendant has been denied right of allocution, no error is shown on claim that recitation in formal sentence that defendant was asked by court whether she had anything to say why sentence should not be pronounced against her is not supported by transcription of court reporter's notes. *Tenon v. State* 563 SW2d 197, (1978).

The old cliché that if you don't know what your rights are, you don't have any seems to be the order of the day in Texas Courts. Those living in other states might want to do some research on the holdings of their respective courts concerning allocution.

THE REQUIREMENT TO REVEAL THE NATURE AND CAUSE

The author has made, and has witnessed others make, numerous demands for "bills of particular" and "more definite statements" to determine the nature and cause of these penal offenses that we sometimes find ourselves charged with. It is enough to say here that the sliminess, stonewalling and just plain blatant viciousness of the courts and prosecutors in their attempts to conceal the true nature and cause of the accusation can be astonishing. . . . The 6th Amendment makes this "right" to know the nature and cause mandatory. Why are they (judges and prosecutors) so bent on concealing this mandatory information? The Supreme Court has held:

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge. *United States v. Cruikshank*, 92 U.S. 542, 544, 558 (1876); *United States v. Simmons*, 96 U.S. 360 (1878); *Bartell v. United States*, 227 U.S. 427 (1913); *Burton v. United States*, 202 U.S. 344 (1906).

No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology, but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. **The facts necessary to bring the case within the statutory definition must also be alleged.** *Potter v. United States*, 155 U.S. 438, 444 (1894). *United States v. Carll*, 105 U.S. 611 (1882).

If an offense cannot be accurately and clearly described without an allegation that the accused is **not within an exception contained in the statutes**, an indictment which does not contain such allegation is defective. *United States v. Cook*, 84 U.S. (17 Wall.) 168, 174 (1872).

Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the **nature of the charge** sought to be established against him. *Rosen v. United States*, 161 U.S. 29, 40 (1896).

The right to notice of accusation is so fundamental a part of procedural due process that the States are required to observe it. In re Oliver, 333 U.S. 257, 273 (1948); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Rabe v. Washington*, 405 U.S. 313 (1972).

Article VI of the Constitution of the United States mandates that all the judges of every State are bound to the supreme Law of the Land and all judicial officers shall take an Oath or Affirmation to support the Constitution. The office of judge is an office of public Trust under the Constitution and this “trust” creates a duty and obligation on the judges. This author submits that every judge in every local, State, and Federal court is in breach of the duty to reveal the nature and cause of their quasi criminal, maritime penal charges that they are misrepresented to the people to be crimes in common law.

FRAUDULENT CONCEALMENT

All this brings us to the topic of “fraudulent concealment.” A few of the definitions of fraudulent concealment provided by the Texas Courts are:

Party having superior knowledge who takes advantage of another’s ignorance of the law to deceive him by studied concealment or misrepresentation can be held responsible for that conduct. *Fina Supply, Inc. v. Abilene Nat. Bank*, 726 S.W.2d 537, 1987.

Knowing failure to disclose material information necessary to prevent statement from being misleading, or making representation despite knowledge that it has no reasonable basis in fact, are actionable as fraud under Texas law. *Rubinstein v. Collins*, 20 F.3d 160, 1990.

Party in interest may become liable for fraud by mere silent acquiescence and partaking of benefits of fraud. *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 1994.

When circumstances impose duty to speak and one deliberately remains silent, silence is equivalent to false representation. *Fisher Controls International, Inc. v. Gibbons*, 911 S.W. 2d 135, 1995.

When a person sustains to another a position of trust and confidence, his failure to disclose facts that he has a duty to disclose is as much a fraud as an actual misrepresentation. *Blanton v. Sherman Compress Co.*, 256 S.W. 2d 884, 1953.

There are literally hundreds of similar holding by U.S. and Texas courts if one cares to go look in the library. There are some people who would call this fraudulent concealment of the nature and cause of the accusation treason.

CLEAN HANDS AND FICTITIOUS PLAINTIFFS

When a prosecuting attorney brings a cause of action to court accusing some poor soul with a crime in the secret maritime jurisdiction, he (or at least his client) needs standing to sue. All cases in law, equity, admiralty or maritime, are now classified as “civil actions.” Civil maritime and admiralty actions require a contract between the plaintiff and defendant for the plaintiff to have standing to sue. For the plaintiff to have standing and for the court to have jurisdiction of the subject matter, there must be in existence a bona fide contract binding the accused into the criminal maritime jurisdiction and the lawyer rat had better be able to get it properly into evidence. This is the foundation of the venue jurisdiction and the subject matter jurisdiction of the court. Under the doctrine of “clean hands”, relief will not be granted to a party, who as an actor, seeks to set the judicial machinery in motion and obtain some remedy, if such party in prior conduct has violated conscience or good faith or other equitable relief. One seeking relief cannot take advantage of one’s own wrongdoing.

The plaintiff’s attorney (prosecutor) is representing the STATE OF TEXAS, or the UNITED STATES, both corporations. If you don’t believe the STATE OF TEXAS is a corporation, look up Article XI, Section 1 in the Texas Constitution; it is all clear enough. [The several counties of this State are hereby recognized as legal subdivisions of the State.]

If you don't believe that the UNITED STATES is a corporation, it is right there in Title 28 USC 3002 (15)(A). The prosecuting attorney is representing a corporation, a fictitious plaintiff, and bringing a maritime claim on the *presumption* that a maritime contract exists between the STATE OF TEXAS and the defendant, or more correctly, the ignorant victim. The ignorant victim does not know that this presumption even exists, does not know that the cause of action cannot be in the common law because a crime in law requires a *corpus delecti*, that is to say, the body of the crime or an injured party, and a corporation cannot be the body of the crime or an injured party because it is artificial, a fiction. Trust the author on this, there is plenty of well-settled authority, but it will not be cited here in the interests of brevity while covering the essentials. Because of constant government indoctrination and the lasting effects of cognitive dissidence, the fact that the cause is of a maritime nature is beyond the poor victim's comprehension. The ocean is a long way from Kansas, Dorothy! So how could the accused victim of an alleged offense committed on the land end up in a maritime court and be bound to a presumed maritime contract?

The attorneys for the plaintiff are prosecuting the suit in maritime jurisdiction without evidence entered into the record of the contract binding the Petitioner to the maritime law. Without such contract the trial court is wholly in want of subject matter jurisdiction and venue jurisdiction. The doctrine of "unclean hands" applies to the attorneys for the plaintiff. The courts have held:

It is old hat that a court called upon to do equity should always consider whether the petitioning party has acted . . . with unclean hands. *Texaco Puerto Rico, Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir. 1995). This consideration is rooted in the maxim that "he who comes into equity must come with clean hands." *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945).

Under the doctrine of unclean hands, a court may refuse to grant equitable relief to a plaintiff who has been guilty of unlawful or inequitable conduct regarding the issue in dispute. *Lazy M Ranch, Ltd. v. TXI Operations, LP*, 978 S.W.2d 678, 683 (Tex. App. 1998)

It is well settled that a party seeking equity cannot come into a court with unclean hands. *Schenk v. Halliday Real Estate, Inc.*, 803 S.W.2d 361, 366 (Tex. App. 1990)

The findings show fraud on [the part of the party seeking legal subrogation]. He does not come into court with clean hands, and is therefore not in a position to invoke the equitable principles upon

which legal subrogation rests. *Rotge v. Dunlap*, 91 S.W.2d 905, 908 (Tex. App. 1936)

Applying to legal subrogation the maxim that "one who seeks equity must come into court with clean hands., *Christian v. Manning*, 59 S.W.2d 234, 237 (Tex. App. 1933), and see: *Bell v. Franklin*, 230 S.W.2d 181, 185 (Tex. App. 1921) (same).

PRESUMPTIONS

A presumption is an inference in favor of a particular fact; a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of the presumed fact, until the presumption is rebutted. It is a legal devise, which operates in the absence of other proof to require that certain inference be drawn from the available evidence. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof. A presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non persuasion, which remains throughout the trial upon the party on whom it was originally cast. In commercial law², a presumption means that the tryer of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its non- existence. **A conclusive presumption is one in which proof of a basic fact renders the existence of the presumed fact conclusive and irrebuttable.** Few in number and often statutory, the majority view is that a conclusive presumption is in reality a substantive rule of law, not a rule of evidence. **A rebuttable presumption can be overturned upon the showing of sufficient proof. In general, all presumptions other than conclusive presumptions are rebuttable presumptions. *Once evidence tending to rebut the presumption is introduced, the force of the presumption is entirely dissipated and the party with the burden of proof must come forward with evidence to avoid a directed verdict.*** (See: Black's 6th).

The Supreme Court discusses substantive and rebuttable presumptions in *Heiner v. Donnan*, 285 U.S. 312, (1932), where the court held that:

...it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence or of substantive law as the result of the later statute making it conclusive. In both cases it is a substitute for proof;

²Author's note: According to the case of Propeller Genessee Chief and 27 CFR 72.11, it is evident that admiralty or maritime courts have jurisdiction over all commercial law.

in the one, open to challenge and disproof, and in the other conclusive. **However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made, to exist in actuality, and the result is the same...** This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut violates the due process clause of the Fourteenth Amendment. For example, **a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by a direct enactment.**

If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.

For those worried about the applicability of the Fourteenth Amendment, the high court further held that:

Nor is it material that the Fourteenth Amendment was involved in the Schlesinger Case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Heiner v. Donnan, supra.*

And for the discerning reader who requires deeper study on the subject of presumptions, see: *Tot v. U.S.*, 319 U.S. 463, (1943); *U.S. v. Bowen*, 414 F2d 1268, *U.S. v. Simmons*, 416 F2d 33, (1973); *U.S. v. Perry*, 474 F2d 983; *U.S. v. Lake*, 482 F2d 146, (1973) and *U.S. v. Belgrade*, 484 F2d 915 (1973). There is also no shortage of state court holdings on the subject of presumptions.

HOW THEY DO IT

The process of bringing the harmless tadpole out of the sea and transforming it into a fire breathing murderous predator on the land began, as near as the authors can determine, around 1851 and recognized by the holdings of the Supreme Court in the case of Propeller *Genessee Chief et al. v. Fitzhugh et al., supra*, warning of the power of Congress to expand the admiralty jurisdiction of the federal courts. So the beast of Revelation, Chapter 13:1, has risen from the sea and come upon the land and “the dragon [Congress?] gave him his power”, “and power was given to him over all kindred’s, and tongues, and nations”. If the reader is still not convinced that the courts are exercising and enforcing a maritime jurisdiction, the following portions of Proctor Wiswall’s lecture should be of help.

The 1994 Ebsworth & Ebsworth Maritime Law Lecture entitled THE JURISDICTION AND PRACTICE OF THE ADMIRALTY COURT REVISITED and subtitled A comparison of developments in Australia, the United States and England over the past quarter-century by Frank L. Wiswall, Jr. J.D., Ph.D. (Cantab.), F.R.Hist.S., Proctor and Advocate in Admiralty, plainly relates how this has happened in the United States by a relevant portion of the lecture quoted below with emphasis added and footnotes omitted. We are indebted and thankful to Proctor Wiswall (a real lawyer) for finally revealing the "nature and cause." The complete text of his report can be found at the following website and the authors recommend that you study it in its entirety:
<http://www.anu.edu.au/law/pub/icl/lectures/The1994EbsworthEbsworthMar.html>

Proctor Wiswall informs us:

In the United States the first development noted is the 1966 merger of the old General Admiralty Rules into the Federal Rules of Civil Procedure. Though several commentators made predictions concerning the effects of unification upon the substantive law of admiralty, it was not until the late 1970s that the Admiralty Court began to exercise with any measurable regularity the power to administer equitable remedies in admiralty cases. The delay may seem strange, especially in light of the quite rapid effects of the 1938 merger of the Equity Rules into the first Federal Rules of Civil Procedure. **But the late depression era was one of great social activism on the part of the Federal government, and this faded seamlessly into wartime legislation which appropriated control of private property.** The District Courts under the new FRCP were quickly forced by the volume of litigation into the wholesale application of equitable remedies in actions "at law".

The 1938 merger of law and equity rules left no loose ends; the procedure is entirely uniform regardless of the nature of the remedy prayed, though of course issuance of an injunction requires at least an ex parte hearing in chambers. **The 1966 merger, however, leaves six special Supplemental Admiralty Rules appended to the body of the FRCP, and in order to apply those Supplemental Rules it is necessary that the complaint specifically invoke the jurisdiction of the "admiralty side" of the Court, so as to ensure that the action does not proceed on the "law side" if the common law is competent to supply an in personam remedy in the particular case. The effect of this has been to perpetuate an artificial distinction between the law and admiralty "sides" of**

the Court, whereas the distinction between the law and equity "sides" has long since disappeared. The equitable power of the American Admiralty Court had earlier been held to derive from the first Judiciary Act of 1789; in the words of the late and colorful Chief Judge John R. Brown of the U.S. Court of Appeals for the Fifth Judicial Circuit:

"The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiraltyjudge, dispense, as would his land-locked brother, that which equity and good conscience impels."

But the American Admiralty Court has been slow to begin to wield the equity power, which it has always had, and usage of which the 1966 merger was clearly intended to facilitate.

Unfortunately the remedial authority of the Admiralty Court has been complicated by the second American development - **the 1985 amendments to the Supplemental Admiralty Rules with respect to the issuance of in rem and quasi in rem process.** The problem arose because of a line of decision which emerged in the 1970s in cases of attachment of property under State law, where the defendants argued successfully that in having their property seized without a prior hearing they were deprived of property without the "due process of law" which is guaranteed by the 5th Amendment to the Constitution. It did not take long for challenges to be mounted to the constitutionality of maritime attachment under FRCP Supp. Rule B and arrest in rem under FRCP Supp. Rule C. A few Federal District Judges were swayed by the argument and declared Rule B attachment and/or Rule C arrest unconstitutional without a hearing prior to issuance of the warrant; the remaining District Judges confronted with the question and a majority in all of the Circuit Courts of Appeal found the traditional procedure constitutional, deftly grasping that the Constitution's grant of Admiralty jurisdiction carried with it the essentials of procedure as historically applied in maritime cases, and for a Federal District Court sitting in Admiralty that procedure constituted "due process of law". However, the consensus of opinion within the Maritime Law Association of the United States which had filed briefs amicus curiae supporting the traditional procedure in several of the cases and was even granted oral argument in one pivotal case involving Rule C 17 was that the risk of a reversal by the U.S. Supreme Court should be insured against, and it proposed amendments to Supp. Rules B and C requiring judicial scrutiny prior to issuance of a warrant and to Supp. Rule E to provide for prompt

post-seizure hearing. The amendments were adopted by the Supreme Court and entered into effect in 1985.

Beyond doubt the 1985 amendments were wiser than playing "judicial roulette" - they have effectively ended the debate over the constitutionality of arrest and attachment proceedings in admiralty. But they have also added a new and quite different requirement in order to employ traditional process in the Admiralty Court. The price paid for security has not been entirely limited to the additional time and paperwork of the new procedures.

The third development in America centers upon the Supreme Court's recent decision in *Miles v. Apex Marine*, 498 U.S. 19 (1990). To approach Miles in the proper frame of mind, one must first accept that **every admiralty case in the United States which touches upon jurisdiction or practice is fundamentally a case of constitutional law, the grant of jurisdiction to the American Admiralty Court in all such cases flows directly from the Constitution and not from any act of the legislature.** Legislation regarding admiralty and maritime jurisdiction cannot constitutionally restrict that jurisdiction, but can only ensure that other legal remedies, if applicable, remain available as well.

In the jurisprudence of the United States it is the exclusive prerogative of the Supreme Court to pronounce finally upon what does or does not lie within the admiralty and maritime jurisdiction. So over the history of the United States the Supreme Court has altered maritime remedies, for example first establishing, and then later abrogating, a rule of divided damages in collision cases; and it has determined maritime rights, for example first denying a right of action under the general maritime law for wrongful death, then later establishing the right of action.

In *Miles*, the Court upheld the right of action for wrongful death under the general maritime law ("GML"), but ruled that the remedy of damages for loss of society was not within the power of the GML to grant. This is an interesting contrast with the Court's view of over 175 years" standing that the GML empowers the award of punitive ("exemplary") damages, which has been the basis for a considerable line of decision by highly respected Circuit Courts of Appeal upholding recovery of punitive damages in seamen's actions under the GML. **The basis for the Court's holding in Miles is in a nutshell that the Congress had excluded the recovery of "non-pecuniary" damages in actions brought under legislation which predated**

the Court's establishment of the right of action for wrongful death under the GML, and the Court has an obligation to ensure uniformity in the maritime law of the United States.

Congress has been repeatedly held by the Court to have the power to extend the admiralty and maritime jurisdiction by statute, and Congress has repeatedly exercised that power; (see e.g., *The "Lottawana"*, 88 U.S. 558 (1875); also *Panama Railroad v. Johnson*, 264 U.S. 375 (1924)). However the Court has also repeatedly declared that there are constitutional limitations upon the power of Congress to legislate in this area. The most direct recent exercise was the Admiralty Jurisdiction Extension Act of 1948, T.46 U.S.C. 740, **which gave the Admiralty Court cognizance in rem as well as in personam of torts caused by a vessel on navigable water "notwithstanding that such damage or injury be done or consummated on land"**. As to the Supreme Court itself it is not to be doubted that, in the interest of uniformity, the Court has authority to fashion and to limit remedies in Admiralty and maritime cases.

Further into the lecture, Proctor Wiswall, while discussing developments in Australian maritime law gives the startling revelation that:

[In] the case of *The "Golden Glory"*, *Bari Navigation Company Limited v. Ship "Golden Glory" and Glorious Shipping S.A.*, (unrep. Fed. Ct., Sydney Registry No.G199 of 1991, 2 May 1991), which is noted because it "sets the stage" for a yet more significant case. **The issue before the Admiralty Court was whether an action in rem lies to compel specific performance of a contract for the sale of a ship**, the ship in question having been arrested within the geographical jurisdiction of the Court and the owners having moved for release. **An action for specific performance is in its nature a suit in equity in personam and is not the same as the possessory or petitory suit in admiralty.** . . . Without discussing the equitable powers of the Admiralty Court or the source thereof, the Court held for the probability of jurisdiction and instead of issuing a decree for specific performance made the Solomonic decision to release the vessel from arrest conditional upon an undertaking by the defendant to execute and deliver a deed of sale in approved form. To coin a phrase, **this was a "neat" way to confirm that the equitable jurisdiction of the Admiralty Court may be exercised in actions in rem.**

In the case of *The "Shin Kobe Maru" Empire Shipping Co. Inc. v. Owners of the Ship The "Shin Kobe Maru"*, (1991) 32, F.C.R. 78, 104 A.L.R. 489 (F.C.), the most important question for decision was

whether a claim asserting an equitable interest in the ship under the terms of the JVA was a claim properly cognizable by the Admiralty Court in an action in rem....The Court pointed out the restraints which Parliament had placed in Sec.6 of the [Australian] Admiralty Act 1988 upon the creation of new maritime liens and new causes of action under the authority of the Act, and concluded that the Act's extension of the categories of claims cognizable in rem does not violate these restraints; put another way, **the Act may create new remedies but it does not create new rights.**

In the preparatory work which led to the Admiralty Act 1988, and in *The "Shin Kobe Maru"* judgment, detailed consideration has been given to the significance of the words in s76(iii) of the Commonwealth Constitution 1900 which grant authority to Parliament to confer upon the High Court original jurisdiction "in any matter of admiralty and maritime jurisdiction." **The addition of the words "and maritime" are clearly taken from the counterpart clause of the Constitution of the United States, and commentators and jurists have quite uniformly accorded importance to the word "maritime". In seeking out the import of that word, the Court in *The "Shin Kobe Maru"* followed most writers to the American judgment of Mr. Justice Joseph Story, sitting as Circuit Justice in the celebrated case of *DeLovio v. Boit*, 7 Fed. Cas. 418 (No. 3,776)(C.C.D. Mass. 1815). Little notice, however, has been taken by modern writers of the more detailed explanation given by Story in his greatest work, commonly known as Commentaries on the Constitution. Here his exposition of the constitutional grant of jurisdiction draws additional distinctions between the words "admiralty" and "maritime", and in my reading he plainly declares that the purpose of the latter [maritime] is not only to free the jurisdiction of the Admiralty Court from the shackles forged by centuries of writs of prohibition issuing from the courts of common law, but also (1) to enable the fullest development of sea-borne foreign commerce in accordance with principles of maritime international law, and (2) to enable the Admiralty Court to exercise its jurisdiction in rem beyond those causes which are founded upon maritime liens, notably in cases which "affect the commerce and navigation of foreign nations". It is this second point made by Justice Story which most holds my interest.**

In stating that the word "maritime" has special significance in relation to "foreign ships" and "foreign employment", so that when such are involved "the general maritime law enables the

courts of admiralty to administer a wholesome and prompt justice", Story observes that:

"[A]s the courts of admiralty entertain suits in rem . . . as well as in personam, . . . they are often the only courts, in which an effectual redress can be afforded, especially when it is desirable to enforce a specific maritime lien, or claim, in the nature of a pledge."

Story used his words carefully; he could not have meant to equate a lien under the general maritime law - a *jus in re* - with the more general "claim". A quarter of a century after his meticulous judgment in *DeLovio v. Boit* he is speaking of alternatives - on the one hand a maritime lien and on the other hand a claim, in the nature of a pledge.

Significantly, the word "pledge" has commonly been used as the **English translation of the French term "hypothèque". The hypothèque is emphatically not a lien, as the International Convention on Maritime Liens and Mortgages 1993 well illustrates.**

One example coming easily to mind of a "claim" not dependent upon any maritime lien is the claim of ownership which is the foundation for the jurisdiction to entertain suits for possession of a ship. Indeed a contemporary of Justice Story's, Judge Betts, wrote that **petitory³ suits, while not (then) entertained by the English Admiralty Court, "are recognized in the United States as indubitable and convenient modes of exercising the maritime jurisdiction."** Yet Story had written extensively of possessory suits only a few years previously, and if he had meant to limit himself to that sort of claim he would have done so in unmistakable terms. Interestingly, very recent scholarship has established that the English Admiralty Court in the sixteenth century - not subject at the time to restraint by prohibition frequently proceeded in rem where no recognizable maritime lien was involved. **Justice Story would not have foreseen such developments as the statutory lien, the statutory "right in rem", or the statutory power of equitable decree in a maritime case,** all of which came about later in the 19th century; he would surely have foreseen changes in the rules of procedure in the courts, but it is to be

³Black's 6th defines "Petitory action" to mean an action in which the plaintiff seeks to establish and enforce, by an appropriate legal proceeding, his right of property, or his title, to the subject matter in dispute; as distinguished from a "possessory" action, where the right of possession is the point in litigation, and not the mere right of property. In admiralty suits to try title to property independent of questions concerning possession are referred to as "petitory suits", which suits must be based on a claim of legal title; the assertion of a mere equitable interest is not sufficient.

doubted that he could have imagined the extent of collateral effects of those changes upon the Admiralty Court.

Taken on its own and without reference to the facts of the particular case, that portion of the instance judgment of Mr. Justice Gummow in *The "Shin Kobe Maru"* which examines the authority of parliament and the judiciary under the constitutional grant of admiralty and maritime jurisdiction could well be held by future legal historians to have had the same degree of impact upon the jurisdiction and practice of the Admiralty Court in Australia as *DeLovio v. Boit* had in the United States. Here are drawn together almost all of the known and accepted authorities on the scope of the Admiralty jurisdiction in England, the United States and Australia. To these I would add only the commentary by Mr. Justice Story to which I have just referred. Provided the judgment is ultimately upheld one should expect to see more application of equitable remedies by the Australian Admiralty Court, for **it is also a corollary of the procedural theory of the action in rem that the appearance of the shipowner changes the character of the action into one in personam. The natural expectation is that an Admiralty Court operating under the procedural theory would find little difficulty in exercising equitable powers in an action begun in rem and in which an appearance has been entered.**

As I understand the position at the time of this writing, the instance judgment has now been the subject of an interlocutory appeal (prior to trial on the merits) and has been unanimously upheld en banc by the Federal Court; on further appeal to the High Court of Australia the original plaintiff raised an additional ground of jurisdiction, and the case has been sent back to the Admiralty Court for consideration whether the pleadings should be amended accordingly. Therefore the "final word" may not have been spoken and it is not meet that I should make any more detailed comment about a matter, which may still be sub judice.

Although the structure of the Admiralty Act 1988 was virtually handed down on a tablet of stone, one must be conscious of the pitfalls in setting forth the admiralty and maritime jurisdiction by detailed legislation - the maxim *expressio unius est exclusio alterius* [A maxim of law, literally, the expression of one excludes another] comes easily to mind. The dangers did not wholly escape the Law Reform Commission prior to enactment, nor have they escaped commentators since, but I have seen no comment which contrasts the absolute necessity of proceeding by detailed legislation in a State having no fixed

constitution as opposed to the option of so proceeding in a State with a separate written constitution which sets forth a broad grant "of any matter ... of admiralty and maritime jurisdiction". **It is not an answer to say that the constitutional grant in America runs directly to the judiciary, whereas the grant in Australia runs to the legislature, because in both constitutions the power is given to the legislature to structure the court system which will exercise the admiralty and maritime jurisdiction at first instance.**

The chief difference between the Mareva injunction as employed in England and Australia and maritime attachment as employed in America lies in the use of the process: the former is used only after an action in personam has been commenced by service of a writ, **whereas the latter [America] may be so used but is most commonly the means of founding jurisdiction in personam.**

Even with sensitivity toward the stated Australian antipathy to attachment *ad fundandam jurisdictionem*, one may be permitted to observe that the failure to employ the full remedy of maritime attachment both in England and Australia is a vestige of the old myth that the Admiralty Court really exists to act only in rem. **This self-imposed limitation is made more odd with recognition that the Admiralty jurisdiction is wielded by the same court which is supposed to have all powers at common law and in equity, and that both England and Australia profess adherence to the procedural theory of the action in rem, which essentially views the ship as mere property of the defendant which may be arrested in order to found in personam jurisdiction upon appearance to defend the res.**

Let's stop and review some of the information provided by Proctor Wiswall.

(1) Since 1966, in the courts of the United States, law, equity, admiralty, and maritime cases are controlled by one set of rules, the Federal Rules of Civil Procedure. There are six additional Supplemental Admiralty Rules, that, when used make it necessary to specifically invoke admiralty jurisdiction in the complaint. This creates an artificial distinction between the law and admiralty sides of the court. The distinction between the law and equity sides has long since disappeared. However, when the supplemental rules are not used and the claim is cognizable only in admiralty, it is an admiralty or maritime claim whether or not so stated in the claim, FRCP, Rule 9(h), and the distinction between law and admiralty disappears.

(2) The Congress has the power to extend the admiralty and maritime jurisdictions by statute, and Congress has repeatedly exercised that power.

(3) Equitable remedies can be used to settle admiralty and maritime disputes. For instance, an action for specific performance is in its nature a suit in equity in personam and is not the same as the possessory or petitory suit in admiralty, but this type of suit is subject to the power of an admiralty court, *i.e.*, the equitable jurisdiction of the admiralty court may be exercised in actions in rem.

(4) The extension of the jurisdiction of the admiralty powers of a court may create new remedies, but it does not create new rights.

(5) Notwithstanding, the above definitions in Bouvier's and Black's of admiralty and maritime, there is a distinction between the two. According to Justice Story, the purpose of maritime jurisdiction is not only to "free the jurisdiction of the Admiralty Court of the shackles forged by centuries of writs of prohibition issuing from the courts of common law", but also to enable the Admiralty Court to exercise its jurisdiction in rem beyond those causes which are founded upon maritime liens. Admiralty Courts exercise jurisdiction in rem and in personam to enforce maritime liens in the nature of a pledge.

(6) Petitory suits, *i.e.*, suits to enforce rights in property or title, are recognized as convenient modes of exercising the maritime jurisdiction in American Courts.

(7) Maritime jurisdiction has been extended to developments of the statutory lien, the statutory right in rem and the statutory power of equitable decree.

(8) In actions in rem, the ship (or other res) is arrested to compel the "appearance" of the owner. When the owner appears to defend the res the action is converted to an action in personam and the owner becomes responsible for the injury caused by the thing and equitable powers can be exercised in the matter. In America, actions in rem are commonly used as a means of founding an action in personam.

(9) Admiralty Courts exercise powers in maritime, common law, and equity jurisdictions.

A PRACTICAL EXAMPLE OF THE USE OF THE MARITIME JURISDICTION BY THE LAWYERS AND THEIR MINIONS

It should be becoming apparent to the reader what is really going on in the Federal and State courts when one is charged with a penal offense, and it should be apparent that penal is not the same as criminal. Take the issuance of a traffic ticket for example. The lawyer's minion, the police officer, goes out on the public rights of way to solicit business for his master, the prosecuting attorney for the CITY OF CORRUPTION or the COUNTY OF TYRANNY, both of which are corporate instrumentalities of the STATE OF CONFUSION. This solicitation of business for the lawyer by the police officer is called Champerty.⁴ Champerty is, or at least used to be, a tort and a crime at common law.

The police officer lurks around and finds someone violating a traffic regulation, let's say for driving an unregistered motor vehicle, arrests him, and issues a citation on the presumption that the "offender" is bound in some undisclosed manner to the maritime jurisdiction, a presumption probably created by the existence of the state driver license, or on the presumption that the STATE has acquired an interest in the "motor vehicle" being driven by the offender, or on the presumption that the STATE has an interest in the offender himself. On threat of imprisonment, the cop forces the "offender" to sign a "citation" as a promise to appear in a certain court at a certain time. This citation is a contract to compel specific performance. The cop signed and the offender signed. It looks like a legitimate contract, except for a couple of problems.

The first problem is that it was signed under a threat. That alone should be enough to void the contract. The second problem is that the cop did not pay any "consideration" to the offender to perform. Want of consideration is always a defense under the Texas Business and Commerce Code, (same as the UCC) Sec. 3.408, unless there is an underlying or "antecedent" obligation, and there is no evidence of an antecedent obligation, but it is presumed. A third problem is the unconscionability of the contract. The authors will not discuss unconscionability⁵ here, except to say that it is unconscionable to force someone to contract under threat, coercion, or duress and unconscionability can be grounds to void a contract.

If the offender does not sign the citation, the cop, exercising the quasi in rem maritime jurisdiction, seizes the offender (in his *ens legis*⁶ capacity), and usually the "motor vehicle" which are merely things under maritime law and throws the

⁴ Black's 6th defines "Champerty" as a bargain between a stranger and a party in a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds; it is one type of "maintenance", the more general term which refers to maintaining, supporting, or promoting another person's litigation. "Maintenance" consists of maintaining, supporting, or promoting the litigation of another.

⁵For more on unconscionability, see UCC 2-302 and related notes.

⁶Black's 6th defines "*ens legis*" as a creature of the law; an artificial being, as contrasted with a natural person.

offender in jail (warehouse) without the need of a warrant. The offender is eventually brought before some magistrate to enter a plea in a court of maritime jurisdiction and the only issue before the court is whether or not the motor vehicle was registered. When the offender identifies himself by admitting his name and enters a plea, the quasi in rem action automatically converts to a maritime personam action, in which the real man is held liable for actions of the property in which the State claims a priority interest and the offender has become the defendant.

Adherence to the constitutional requirements for due process are not required in the maritime jurisdiction because of the presumption that the offender agreed to be abused in this manner when he signed the presumed maritime contract or granted the presumed interest in the *ens legis* or the motor vehicle, or both. This is the same situation Cadet Custer found himself in, on the presumption that he had signed the Articles of War, he was subject to the penalties prescribed by them. Custer avoided the sentence because he shifted the burden of proof by challenging the subject matter jurisdiction of the court-martial.

In the instances of our traffic violation and Custer's court-martial, the *onus probandi*⁷ has been thrown on the defendant. He is put into the unenviable position of proving that he did not commit the offense. He is put into the position of proving a negative, which is usually an impossibility, and he is going to pay the penal sum required by the contract. He is guilty until proven innocent.

The defendant's remedy, if he has one, is to shift the burden of proof or *onus probandi* to the STATE's lawyer, the prosecutor. He can do this by challenging the jurisdiction of the subject matter and by challenging the presumptions by admitting evidence to the contrary.

The subject matter is merely the facts of the case. Facts must be properly admitted into evidence according to the rules of court. If there are no facts in evidence, there is no subject matter. If there is no subject matter, there is no subject matter jurisdiction and the only action the court can take is to dismiss the claim.

The Court may not inquire into the controversies between the parties until such time as the subject matter jurisdiction has been properly invoked by the parties. The subject matter jurisdiction of a court is not *prima facie*. The Supreme Court has held that:

"A man must assign a good reason for coming (to the court). If the fact is denied, upon which he grounds his right to come (into the court), he

⁷*Onus probandi* means: Burden of proving; the burden of proof. The strict meaning of the term "*onus probandi*" is that, if no evidence is adduced by the party on whom the burden is cast, the issue must be found against him. Black's Law Dictionary, 6th Ed.

must prove it. He, therefore, is the actor in the proof, and, consequently, **he has no right, where the point is contested, to throw the onus probandi on the defendant.**" Maxfield's *Lessee v. Levy*, 4 U.S. 330. [Emphasis added]

Now the question arises, how is the defendant going to shift the burden of proof? Maybe he should admit some facts into evidence denying the presumptions and follow the court's rules of evidence when he does it. Maybe he should challenge the subject matter jurisdiction of the court. Maybe he should demand some discovery by demanding the prosecutor bring the contract or other obligation into court and properly admit it into evidence, and follow the court's rules of discovery when he demands the production of the documents.

Maybe the defendant could shift this burden of proof by admitting a simple affidavit into evidence of the case stating that the defendant denies that he signed any contract or other obligation that binds him to the maritime or admiralty jurisdiction. That the defendant did not convey any interest, right or title of his car or himself to the STATE. If these facts are properly admitted into evidence, the burden of proof is shifted to the prosecutor to prove the existence of the contract or other obligation by admitting the original into evidence, and this must be done by the real party in interest, whoever it is.

If, on being unable or unwilling to admit the contract or other obligation into evidence, the prosecutor refuses to withdraw the claim and the judge refuses to dismiss the case they will be proceeding without subject matter jurisdiction. With no subject matter jurisdiction they have no official or judicial immunity. The courts have held:

When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost. *Rankin v. Howard*, (1980) 633 F.2d 844, cert. den. *Zeller v. Rankin*, 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326.

A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. *Davis v. Burris*, 51 Ariz. 220, 75 P.2d 689 (1938).

When a judicial officer acts entirely without jurisdiction or without compliance with jurisdiction requisites he may be held civilly liable for abuse of process even though his act involved a decision made in good faith, that he had jurisdiction. *Little v. U.S. Fidelity & Guaranty Co.*, 217 Miss. 576, 64 So. 2d 697.

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." *Ableman v. Booth*, 21 Howard 506 (1859).

"We (judges) have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohen v. Virginia*, (1821), 6 Wheat. 264 and *U.S. v. Will*, 499 U.S. 200.

Maybe if the court refuses to back off the defendant should demand that the judge take mandatory judicial notice of the above cases and similar cases. If the court still does not back off and worse comes to worse, the defendant should raise the issue of subject matter jurisdiction after trial and before sentencing at allocution. Allocution must be demanded before sentencing or the right is presumed waived. If the rats still don't back off the defendant can make a direct appeal to the appellate court and on to the Supreme Court of the United States; he can file petitions for the writ of habeas corpus; he can sue the perpetrators, i.e., the cop for champerty, the lawyer for barratry and bringing a case with unclean hands, the judge for lack of jurisdiction, and all of them for conspiracy to fraudulently conceal the true nature and cause of the accusation, and maybe even for RICO. It is never too late to challenge subject matter jurisdiction. It ain't over until the defendant gives up. The courts have held and the rules reveal that:

Subject matter jurisdiction cannot be waived by parties, conferred by consent, or ignored by court. *Babcock & Wilson v. Parsons Corp.*, 430 F.2d 531 (1970).

Subject matter jurisdiction may not be waived and courts may raise the issue *sua sponte*" FRCP, Rule 12(h).

Lack of subject matter jurisdiction is a defense that is never waived." FRCP, Rule 12(h)3.

Subject matter jurisdiction can never be waived and can be raised at any time, even after trial. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 494 F.Supp. 1161 (D.C. Pa., 1980).

Lack of subject matter jurisdiction is not waivable and can even be raised on appeal after judgment on the merits. *Monaco v. Carey Canadian Mines, Ltd.*, 514 F.Supp. 357 (D.C., Pa., 1981)

Judgment of court lacking jurisdiction is void. *Burnham v. Superior Court of California, County of Marin*, 110 S.Ct. 2105 (1990).

Many “patriots” have discovered that the flag in the court room is a gold-fringed maritime or admiralty flag. Extensive research has been done on the subject. The research indicates that there can be no doubt that the court displays a maritime flag. So what! It is obvious the court is a court of maritime jurisdiction enforcing maritime contracts. Many patriots have gone to jail challenging the jurisdiction of the maritime flag. Hind sight is 20/20, but they should have been challenging the subject matter jurisdiction of the court. They should have been rebutting the presumption of the contract and shifting the burden of proof.

OTHER EXAMPLES

In 1998, in the United States District Court for the District of Colorado, a woman was charged with three courts of misdemeanor violations including violations of Title 16 U.S.C. 551, Title 43 U.S.C, 1761, and related regulations. These violations were for using Forest Service roads without a special use authorization and for not obtaining a required permit. The information clearly states that the offenses occurred within the “**special maritime and territorial jurisdiction of the United States.**”

The accused woman was subsequently tried in the maritime court, found guilty, and sentenced to jail and to pay a fine. The authors have no idea how she tried to defend the case, but obviously her defense was unsuccessful. Had she challenged the subject matter jurisdiction of the court and shifted the burden of proof to the U.S. attorney to prove the jurisdiction, her case might have been dismissed. Had she known what has just been revealed and reviewed Title 18 U.S.C. 7, *supra*, she might have had some questions, such as:

1. Is it presumed that her body is a vessel under 18 U.S.C. 7(1).
2. Is it presumed that the car she was driving is a vessel under subsection 2?
3. Is it presumed that the United States acquired the land where the United States is exercising it’s special maritime and territorial jurisdiction; was conveyed to the United States by the Legislature of Colorado, and if so, where is the enactment by the Colorado legislature that conveyed the land as mandated by Article IV, Section 3?
4. Is it presumed that Colorado did not enter the union of the several States on equal footing with all the others according to the equal footing doctrine and is not a State, but remains a territory?
5. Is it presumed that Colorado is located on the moon?
6. Is it a presumption that the Social Security insurance contract has bound the defendant into the “special maritime jurisdiction”?

7. Is it presumed that the defendant or the defendant's car was engaged in interstate commerce?

Had she challenged these presumptions, and shifted the burden of proof, she might have prevailed. Had she known to deny a maritime contract at the allocution stage of proceedings, she might have prevailed; it is still not too late for her to challenge the subject matter jurisdiction.

And what about cases involving the IRS? Does the IRS come after people in a maritime jurisdiction? The courts have held:

That a participant would be subject to criminal maritime charges pursuant to Title 26 U.S.C. 6012(1)(F) and under 18 U.S.C. 3045, by non-governmental IRS Agents; because: In this country revenue causes had so long been the subject of admiralty cognizance, that Congress considered them as civil causes of Admiralty and Maritime jurisdiction. *The Huntress*, 12 Fed. Case 984 at 992, no. 6,914, (1840).

Although, presumably for purpose of obtaining jurisdiction, action for forfeiture under Internal Revenue Laws is commenced as proceeding in Admiralty. *United States v. \$3,976.62 in currency and one 1960 Ford Station Wagon, serial #0C66W145329*, 37 FDR 564, (1965).

Forfeiture should be an action of debt. Debt begins in Admiralty whether on land or navigable waters. *United States v. \$5,372.85*, 283 F.Supp. 904 (1968).

If the claim is cognizable only in Admiralty, it is an Admiralty or Maritime claim for those purposes whether so identified or not. FRCP Rule 9(h).

Social Security (FICA) is a maritime insurance policy. *United States Federal Statutes Annotated*, Vol. IX, page 92, Article III, Sec. 2, VII, 5(5), *DeLovio v. Boit*, 7 Fed. Case 3,776 (1815) Policy of insurance is a Maritime Contract – A policy of insurance is a maritime contract and therefore of admiralty jurisdiction.

Well, all of you tax protesters out there, it looks like if you signed up for Social Security, you should stop evading your taxes and quit complaining about the unjust court system and pay up. You contracted yourself into it. You owe the tax – if the rats can prove their maritime jurisdiction when the presumption is rebutted and if the contract is found to be valid, with full disclosure, consideration, the meeting of the minds, the parties competent to contract – things like that. Tell the rats to bring out that contract so that you can challenge its validity.

Knowing the nature and cause of the accusation is the key to knowing how to challenge the jurisdiction. All admiralty and maritime causes require a contract or other obligation of some kind. Where is it? Stop worrying about the fringe on the flag and start looking for the contract. Rebut the presumption that it exists. Better yet, make the rats find it. Whatever they are presuming to be the contract or obligation, whether it be the Social Security application that you signed when you were 14 years old, if at all, the State Driver License, the Birth Registration, the Voter's Registration, Marriage License, or something else, make the rats find and put it into evidence so you can challenge the validity of the instrument, whatever the instrument is *presumed* to be.

DIVORCE, CHILD CUSTODY AND CHILD SUPPORT

These are all maritime actions for the enforcement of contract. Proctor Wiswall tells us in his lecture that the English Courts of Admiralty have been consolidated with the Queen's Bench (a common law court) and makes no bones about it. According to Wiswall, *infra*:

In England and Wales since 1969 the first notable development has proven to be almost wholly historical - the ironically peaceful "capture" of the Admiralty Court by the foremost of the Courts of Common Law. By Section 2 of the Administration of Justice Act of 1970 **the Probate, Divorce and Admiralty Division of the High Court - popularly known as "wills, wives and wrecks" - was reconstituted as the Family Division and the Admiralty Court transferred to the Queen's Bench Division with a status equal to that of the Commercial Court.**⁸ Thus was swept away the last vestige of the formerly exclusive jurisdiction of the English civil lawyers - the "Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts". I will resist the temptation which always arises at this point to take us into the ghostly quadrangle of "Doctors" Commons and say simply that, **to all outward appearances and for all practical purposes, the 1970 change in the status of the Admiralty Court has created a distinction without a difference.**

The authors submit that the condition in the United States is exactly the same. A distinction without a difference! And how appropriate! A commercial court popularly known as wills, wives, and wrecks is reconstituted as a Family Court; and the venue and nature of commerce is admiralty!

Among the top money makers for lawyers are surely divorce cases and from these divorce actions, spring child custody and child support cases and other family

⁸Author's note: Even Proctor Wiswall equates Commercial Courts with admiralty and maritime courts.

matters. The STATE claims an interest in the parties through the doctrine of *parens patriae*.⁹ For an in depth essay on the subject, go to website: <http://www.state-citizen.org/misc/paren%20patriae.txt>. It is highly recommended reading. The STATE may rely on the marriage license, birth certificate registration, Social Security application, driver license, or some other contract or quasi-contract, or all of the above. Whatever it is, the STATE is claiming an interest that conveys a right to the STATE to regulate the marriage. The authors believe all divorce actions to be unconstitutional because Article I, Section, Clause I, clearly mandates in no uncertain terms, in plain English that even a lawyer should be able to understand that: “No State shall . . . pass . . . any Law impairing the obligation of Contracts.” If the lawyer cannot understand those simple words, the Supreme Court has explained them many times in numerous decisions which need not be cited here. If there is any doubt that marriage is a contract, there is much authority on that issue also. The matters are *stare decisis*, and have been for centuries.

In a divorce proceeding, the parties go to court where the attorneys and the judge negotiate a new contract. This new contract to dissolve the marriage replaces the original marriage contract and marriage license. Both parties sign the contract. Both parties are bound by it. Both parties have consented to who will have custody of the children and when. Both parties consent to who will pay how much to support the children. And if the contract is breached, the STATE’s lawyers will enforce the new contract with a vengeance. If the parent who agreed to pay child support fails or refuses to pay promptly, no matter what the reason, that parent goes to debtor’s prison, which does not make any sense to the authors because how can one support his children from jail, even if he wants to? But, that is the wisdom of the lawyers. Pay up or go to debtor’s prison; it is in the best interest of the child. One could easily avoid these ordeals, even if the other spouse is hell-bent on divorce. Just say no to the new contract, the divorce decree; don’t sign it. When the other spouse’s lawyer files the divorce suit, why not counter sue the rat for the common law tort of interfering with the obligations of a contract? Just because you can’t get along with your spouse, you are not necessarily obligated to divorce. One has the option of living separately but married and thereby keeping the STATE off your back and out of your pocket.

Under the doctrine of *parens patriae* the STATE is your mamma and your daddy. You are a dependent of the STATE. Daddy knows best, and knows what is in the best interests of his dependents. Because of this doctrine of *parens patriae*

⁹*Parens patriae* is defined in Black’s 6th as: literally “parent of the country, refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents. It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare for the people, interstate water rights, and general economy of the state.

resulting from some undisclosed contractual nexus with the STATE, the STATE has acquired interests in your energy or labor, your bank account, your car, your home, your spouse and your children. If you don't manage your affairs according to the will of the STATE, the STATE will step in and manage your affairs for you through its lawyers and maritime courts. The STATE can tell you how much you must insure your car for. The STATE can tell you how to educate your children, how to discipline your children, how and when to vaccinate and medicate your children if they are sick. The STATE can demand that your children be drugged into oblivion with psychotropic drugs like Ritalin or Prozac should their STATE licensed and paid teachers think they show too much initiative in class. If the parents of the child object and refuse to administer the STATE ordered mind altering drugs to their child, the STATE can take the child away from the parents for child abuse. The parents might even face criminal charges. The abuses go on and on. It happens.

One court in Missouri, regarding the doctrine of *parens patriæ* in the case of *IN THE MATTER OF G.K.D., A MINOR, N.D.L., (PETITIONER) APPELLANT v. FAMILY & CHILDREN'S SERVICE OF GREATER ST. LOUIS, RESPONDENT*, 332 S.W.2d 62, (1960) held:

"Parents who faithfully discharge their parental obligations with assiduity and to the full extent of their means and abilities are entitled to the custody of their children. Parental rights, however, are not absolute and are not to be unduly exalted and enforced to the detriment of the child's welfare and happiness. The right of parentage is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to protect and care for the child. The law secures their parental right only so long "as they shall promptly recognize and discharge their corresponding obligations. As the child owes allegiance to the government of the country of its birth, so it is entitled to the protection of that government, which, as *parens patriæ*, must consult its welfare, comfort, and interests in regulating its custody during its minority. Citing: *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802, 18 L.R.A., N.S., 926.

Absent fraud, duress, coercion, and other elements which might make the consent of the mother involuntary, for which a court in its sound discretion might permit the revocation of the consent, the rights of the parties are fixed at the time of the consent and the subsequent orders of the court having jurisdiction.

The STATE can control the welfare of your children because the STATE has an *interest* in them. The reader has probably noticed the word "interest" has been used a number of times in this article. Maybe it would be proper to define "interest."

According to Black's 6th, "interest" denotes a right, claim, title, or legal share in something; it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title. There you have it folks, the STATE looks at your children as property, and claims the priority right or legal share in them. Was Shakespeare right about what to do with the lawyers?

SLAVERY AND DEBT BONDAGE

If the STATE claims some right, or interest in the people, it means that the STATE is treating the people as property, and when people are treated as property they are slaves. Debt bondage or peonage is a form of slavery and slavery is against the law. Slavery violates the 13th Amendment. Slavery violates federal law at Title 18 U.S.C., Section 1581 and Title 42 U.S.C. 1994.

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE PART I - CRIMES CHAPTER 77 - PEONAGE AND SLAVERY

Sec. 1581. Peonage; obstructing enforcement

(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 10 years, or both. (b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a). SOURCE (June 25, 1948, ch. 645, 62 Stat. 772; Pub. L. 103-322, title XXXIII, Sec. 330016(1)(K), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 104-208, div. C, title II, Sec. 218(a), Sept. 30, 1996, 110 Stat. 3009-573.)

TITLE 42 - THE PUBLIC HEALTH AND WELFARE CHAPTER 21 - CIVIL RIGHTS SUB-CHAPTER I - GENERALLY

Sec. 1994. Peonage abolished

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, **the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.**

-SOURCE- (R.S. Sec. 1990.)

It should be apparent even to the lawyers that the plain language of the statutes make contracts of both voluntary and involuntary peonage null and void and punishable by up to ten years in prison.

The Supreme Court discusses the issue of slavery and peonage quite succinctly in the case of *Alonzo Bailey v. State of Alabama*, 219 U.S. 219, (1911). Suffice it to say that the court held that contracts of peonage may be breached by either party at any time with impunity because contracts for peonage are unconstitutional. This is a landmark and very important case and the authors recommend that the readers obtain and study it. It is available at the website: <http://www.findlaw.com/http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=219&page=219>

All forms of slavery including debt bondage and peonage are prohibited by a number of treaties forbidding slavery to which the United States is a high contracting party. The mention of only two of these treaties of which the United States is a party will be suffice to make the point. The full text of all the anti-slavery treaties may be found at the website: <http://tufts.edu/departments/fletcher/multi/humanRights.html>

AMERICAN CONVENTION ON HUMAN RIGHTS “PACT OF SAN JOSE COSTA RICA”

(22 Nov. 1969) – Entered into force on 18 July, 1978.

Article 6. FREEDOM FROM SLAVERY. 1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as is the slave trade and traffic in women.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

(Adopted by UN General Assembly Resolution 217A (III) of 10 December 1948)

Article 4. No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

The language of the treaties should be clear even to the most incompetent of lawyers, that slavery, in all of its insidious forms, violates the well established, universally recognized norms of universal law and the international consensus of nations. Your authors now submit that **the governments of the UNITED STATES and the various STATES are rogue states that violate their own laws and the laws of nations and are managed by pirates.** These rogue states ignore their own laws and the international laws of nations by making their own people slaves.

The most egregious thing that our tyrannical government does is the enforcement of the death penalty in maritime causes. The authors have no objection to the execution of a man clearly guilty of a heinous axe murder, rightfully and

lawfully convicted. What we object to is the fact that the “offender,” even if guilty, is not executed for the heinous act, whatever it might have been, but he is executed by a corporation, a fiction, for breaching one of its contractual maritime penal rules. If the corporation can make a rule requiring the execution of a man convicted of murder in a maritime court, it can make a rule to execute a man for spitting on the sidewalk. If the man executed is later found to be innocent, too bad. The corporation made a mistake, they are sorry, but there is no one real man to be held accountable. All the acts required to accuse, convict, and execute the victim were done by licensed agents acting on behalf of a corporation, and no one is accountable. They were just doing their job. In recent times, the only other thing that the government has done that compares with this Draconian intent of oppression of these maritime executions, is the massacre at Waco. That too, was done under an admiralty or maritime jurisdiction on the presumption that the people murdered were nothing but property under a maritime contract wherein they agreed to be tortured and murdered.

The STATE OF TEXAS and most of the other States are not only liars, they are murderers. And with that final thought, we end with this article with this prayer:

“Lord, come quickly and forgive them not, for they know what they do. Amen.”

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