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Casting Lots: The Illusion of Justice and Accountability in Property Allocation

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Accountability in Property Allocation

Carol Necole Brown

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Accountability in Property Allocation**

Carol Necole Brown

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University at Buffalo Law School

**CASTING LOTS: THE ILLUSION OF JUSTICE AND
ACCOUNTABILITY IN PROPERTY ALLOCATION
BY CAROL NECOLE BROWN**

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Casting Lots: The Illusion of Justice and Accountability in Property Allocation

CAROL NECOLE BROWN*

I. INTRODUCTION

When does resorting to random selection by casting lots produce a just distribution or allocation of property?¹ Some argue generally in support of casting lots, asserting that it is a viable substitute for equal distribution of property.² Others argue against casting lots,

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¹ Throughout this article, the term “property” is used in its broadest sense and includes not only traditionally held notions of property but also an expanded definition, broad enough to include the concept of dephysicalized property. See, e.g., Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980). Professor Vandavelde discusses the “dephysicalization” of property and the resultant broadening of property law to include valuable interests not traditionally treated or considered as property. Professor Charles A. Reich makes the case that government has emerged as a major source of wealth thereby displacing “traditional forms of wealth—forms which are held as private property.” Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). He concedes that “government largess” is not necessarily property and also advocates for the recognition of an expansion of traditional notions of private property to include a “new property.” *Id.* According to Professor Reich, this new and expanded understanding of property is important in safeguarding individual liberty against government overreaching. *Id.* at 739, 787. John Brigham, arguably advocates for an even more expansive conception of property. capsJohn Brigham, *Property and the Politics of Entitlement* 39 (1990). He observes that property claims generally concern citizen held expectations that are derived from promises made or obligations undertaken by government.

² E.g., BARBARA GOODWIN, *JUSTICE BY LOTTERY* 93 (1992) (stating generally that the lottery as an organizational principle “is a natural ally of democracy” and could justifiably be used by government as part of its policy-making process); Fred Hapgood, *Chances of a Lifetime*,

contending that it undermines distributive justice.³ This article considers instances of casting lots from the nineteenth century⁴ to the present⁵ and explains why the latter view is the better view.

BERKELEY J. SOC. WORKING PAPERS 39 (1975) “Lotteries are cheap, equitable, and incorruptible (or can be made so with little effort).” *Metro Broadcasting, Inc. v. Federal Communications Comm’n*, 497 U.S. 547 (1990) (upholding the constitutionality of a lottery as part of the Federal Communications Commission minority preference policy).

In enacting the lottery statute [47 U.S.C. § 309(i)(3)(A)], Congress explained the “current comparative hearing process” had failed to produce adequate programming diversity and that “[t]he policy of encouraging diversity of information sources is best served . . . by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.” . . . Only in this way would “the American public [gain] access to a wider diversity of information sources.”

Id. at 590 (citations omitted).

³ *E.g.*, GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 42 (1978); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 313 (1990); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In *Wygant*, plaintiffs, nonminority teachers who were laid off pursuant to Article XII of the collective-bargaining agreement between the Jackson Board of Education and the teachers’ union, claimed that they were laid off because of their race in violation of the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 270. Article XII provided that teachers with the most seniority would be retained and provided a racial preference for minority teachers so that in some instances, minority teachers were retained while nonminority teachers with greater seniority were laid off. *Id.* The Court held that the Board’s plan violated the Equal Protection clause as less intrusive means were available to achieve the legitimate goal of racial equality. *Id.* at 274-75. Justice Marshall, writing for the dissent, stated that Article XII was narrowly tailored to preserve the degree of faculty integration that the school system managed to achieve through affirmative action hiring policies adopted in the 1970’s. *Id.* at 303, 309 (Marshall, J., dissenting). Justice Marshall stated that determining layoffs by casting lots would be an alternative to Article XII, but a less narrowly tailored one. “A random system . . . would place every teacher in equal jeopardy, working a much greater upheaval of the seniority hierarchy than that occasioned by Article XII; it is not at all a less restrictive means of achieving the Board’s goals.” *Id.* at 310.

⁴ *E.g.*, *The Antelope*, 23 U.S. 66 (1825). Lotteries were frequently employed when there was a need to sacrifice an individual in times of extreme danger. *United States v. Holmes*, 26 F. Cas. 360 (E.D. Penn. 1842) (No. 15,383) (discussing the virtue of the lot in admiralty situations as a means of selecting an individual to be sacrificed in a perilous and emergency situation); *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884) (discussing the drawing of lots by starving sailors to determine who should be the victim of cannibalism).

⁵ For example, lotteries are presently used to allocate resources such as transportation rights for natural resources, entitlement to real property and improvements, cellular licenses, admission into educational institutions, employment opportunities, and immigration visas.

Lotteries are used to allocate rights to transport natural gas through limited space in natural gas pipelines. *E.g.*, *Duke Energy Trading & Mktg., LLC v. FERC*, 315 F.3d 377 (D.C. Cir. 2003); *PG&E Transmission v. FERC*, 315 F.3d 383 (D.C. Cir. 2003).

The following cases provide information on the use of lotteries to allocate “traditionally” recognized real and personal property rights. *E.g.*, *Brotherton v. Point on Norman L.L.C.*, 577 S.E.2d 361 (N.C. Ct. App. 2003), *reh’g denied*, 357 N.C. 249 (2003) (discussing the drawing of numbers to determine the order of selecting property lots in a subdivision); *Gray*

v. Crotts, 293 S.E.2d 626 (N.C. Ct. App. 1982) (discussing the propriety of drawing lots to distribute real property and improvements to siblings upon partition-in-kind); Lapeyrouse v. Lapeyrouse, 729 So. 2d 682 (La. Ct. App. 1999) (discussing LA. REV. STAT. ANN. § 9:2801 (West 1986) governing the partition of community property and subsection (d) in particular providing, in certain circumstances, for the drawing of lots as a method of assigning assets). In the cellular license and telecommunications context, lotteries are sometimes used to allocate cellular rights among competing parties. *See, e.g.*, Folden v. United States, 379 F.3d 1344 (U.S. App. 2004) (discussing cellular licenses); Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990) (discussing broadcast telecommunications generally).

For a discussion of education lotteries, see Part V.

Access to employment and to economic opportunities are sometimes decided by lottery. *See, e.g.*, Danskine v. Miami Dade Fire Dep't, 253 F.3d 1288 (11th Cir. 2001) (discussing use by fire department of random lottery to determine which applicants would advance to second phase of the selection process); Nappa Valley Publ'g Co. v. City of Calistoga, 225 F. Supp. 2d 1176 (N.D. Cal. 2002) (discussing ordinance allowing city to allocate certain defined newsrack spaces by conducting random lottery when permit applications exceed number of newsracks permitted at particular location); Moses v. State, 105 S.W.3d 622 (Tex. Crim. App. 2003) (discussing the drawing of lots for allocation of right to distribute towing job when two or more wreckers arrive at the same time and the owner of the vehicle to be towed has not requested a particular wrecker).

For a discussion of lotteries and diversity immigration visas, *see, e.g.*, IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK ch.6, pt. IV (4th ed. 1994) (stating that random selection procedures in the form of a lottery will be used to select among eligible candidates under the diversity immigration program); Gonzalez v. Immigration and Naturalization Serv., 2003 U.S. App. Lexis 26465 (9th Cir. 2003); Khan v. Ashcroft, 2004 U.S. Dist. Lexis 17251 (N.D. Ill. Aug. 27, 2004) (stating that selection through the purely random lottery process does not guarantee receipt of a visa but merely establishes *eligibility* to receive an immigration visa). *Id.* (emphasis added). In the context of diversity immigration visas, those selected by the lottery process are entitled to enter the United States as "LPRs" (lawful permanent residents). KURZBAN, *id.* at ch. 6, pt. IVA; *see* Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 589 (discussing how race discrimination taints current United States immigration law as evidenced by decisions regarding how to distribute lottery visa among competing countries).

Lotteries are also used as part of the electoral process. Recently, a mayoral election was decided by use of dice. *Utah Mayor Wins Re-Election by Dice*, THE ASSOCIATED PRESS, Nov. 17, 2003, available at <http://www.stamfordadvocate.com/features/health/sns-othernews-utahdice.story>.

With the roll of the dice and the flash of cameras, Mark Allen won a third term as this city's mayor.

Allen and Challenger Robert Garside tied in a Nov. 4 election with 724 votes each. Under Utah law, tie votes must be decided by drawing lots, which can mean anything from flipping a coin to drawing a name out of a hat.

"We felt rolling dice was a more fair way to make a choice," city recorder Shari Peterson said.

....

Both candidates said the race's outcome was fair.

Id. (emphasis added).

The obligation to participate in the draft is an instance of the use of lotteries to distribute governmental burdens and responsibilities. *See, e.g.*, GEORGE Q. FLYNN, CONSCRIPTION AND

The Antelope is one of the earliest United States Supreme Court cases addressing distribution of property by casting lots.⁶ It chronicles a dispute over the allocation of captured Africans as part of the international slave trade. The Supreme Court rejected the lower court's recommendation of casting lots to decide competing claims of Portugal, Spain, and the United States. Instead, the Court endorsed a more individualized, merit-based assessment for determining competing property rights.⁷ *The Antelope* provides rare insight into the Supreme Court's doctrinal approach to using weighted⁸ lotteries to settle complicated property disputes. These insights are useful when debating the propriety of distribution of property by casting lots.

The Court did not categorically reject casting lots. Rather, the Court provided insights on why the distribution of property by casting lots, while appearing impartial, might mask important prior choices that cause distribution conflicts. This masking effect renders government unaccountable for creating distributive imbalances.⁹ *The Antelope* illustrates why government should avoid the seduction of allocating property by casting lots. The lower court's decision to allocate by casting lots was a choice to avoid the accountability and transparency inherent in actively deciding the appropriate allocation.¹⁰ The

DEMOCRACY: THE DRAFT IN FRANCE, GREAT BRITAIN, AND THE UNITED STATES 1 (2002).

⁶ *The Antelope*, 23 U.S. 66 (1825) (discussing the arguments of the various claimants and establishing their entitlement to Africans as property and requiring designation by proof as opposed to casting lots as the mechanism for making allocations); *The Antelope*, 24 U.S. 413 (1826) (clarifying that designation by proof, not selection by lot, was required by the Court's 1825 decision); *The Antelope*, 25 U.S. 546 (1827) (discussing the number of Africans to be delivered to the Spanish claimants and the number to be delivered to the United States).

I do not use *The Antelope* to explore the rightness or wrongness of slavery; rather, I use it to explore the weaknesses of the lottery as a distributive mechanism.

⁷ For a full discussion of *The Antelope*'s procedural history see *infra* Part II and accompanying text and notes.

⁸ *Infra* Part III and accompanying text (discussing weighted lotteries).

⁹ See Leonard M. Fleck, *Models of Rationing: Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. PA. L. REV. 1597 (1992) (discussing the masking impact); *infra* Parts III and IV (discussing and providing examples of the masking impact).

¹⁰ See, e.g., GOODWIN, *supra* note 2, at 46-47 (discussing common objections to casting lots).

1. The lottery neglects human need.
2. Lotteries ignore personal merit and desert.
3. Lotteries expose people to a high degree of risk and uncertainty.
4. Any non-trivial lottery is antithetical to personal freedom, and reduces people's control

decision to treat humans as property was assumed away at a time in American history when an increasing number of citizens had begun to criticize the institution of slavery.¹¹ *The Antelope* is thus an excellent beginning point to consider contemporary issues surrounding lotteries and questions of distributive justice. The significance of casting lots to distribute property is not relegated to the past.¹² In recent years, courts have considered the legitimacy

over their own destiny.

5. The use of lottery to make a decision circumvents the processes of rational thought and deliberation to which we, as human beings, are committed, and of which we are proud.

6. Lottery allocation or decision-making undermines human dignity and diminishes the individual by attacking the very basis of individuality (that is, being considered as a person with attributes, rather than a cipher, in the decision process).

7. Any socially or politically important lottery . . . undermines elite and/or traditional sociopolitical structures and power bases.

8. Such a lottery also reduces the governors' control over the governed.

9. Lotteries unrealistically assume equality on the part of their participants and tend to promote unmerited equality in their processes and/or their outcomes.

Id.; see also CALABRESI & BOBBITT, *supra* note 3 (generally criticizing casting lots to allocate governmental resources).

¹¹ *E.g.*, Frances Howell Rudko, *Pause at the Rubicon, John Marshall and Emancipation: Reparations in the Early National Period*, 35 J. MARSHALL L. REV. 75, 75 (2001) ("Marshall's statements, both on and off the bench, reveal that he hated the institution of slavery and considered it demeaning to both slave and slave-owner."); Case of the *Antelope* otherwise the *Ramirez and Cargo*, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-98; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); Opinion of U.S. Supreme Court, December 14, 1825; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, pp. 133-36; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (citing to the Sixth Circuit Court of Appeals decision, referencing the lot language and reversing the lower court opinion as to the part directing the amount of restitution due the Spanish and Portuguese claimants).

¹² *See, e.g.*, *supra* note 5. When the lottery is mentioned, many people likely think of the jury selection system as an example of the most prevalent use of the lottery. For additional material on lotteries and the American jury system, *see, e.g.*, Akhil Reed Amar, *Choosing Representations by Lottery Voting*, 93 YALE L.J. 1283 (1984) (discussing lotteries and democracy but more particularly lotteries as part of the jury process); *see also* GOODWIN, *supra* note 2, at 79, 163-64 (discussing jury selection and lotteries).

The use of lotteries as a component of the jury selection system is beyond the scope of this article. While many argue that the jury system works efficiently and successfully, one would have to evaluate the standard for measuring its success. For instance, does success translate into high acquittal rates, high conviction rates, the degree of satisfaction of the jurors in their participation in the process, or is success more a function of the jury composition? Under the jury composition view is, a just lottery one that is representative of the population it serves along lines of race, gender, ethnicity, socioeconomics, and education

of casting lots to achieve distributive justice in educational opportunities.¹³ For example, in *Grutter v. Bollinger*, the United States Supreme Court rejected the district court's suggestion of a lottery as a component of the Michigan Law School's admission process.¹⁴ On the other hand, in *Belk v. Charlotte-Mecklenburg Board of Education*,¹⁵ the Fourth Circuit critiqued the use of lotteries

or; alternatively, is the preferred lottery one that excludes all but the ideal citizen, the citizen who is wealthy, highly educated, and a member of the majority class?

¹³ See e.g., *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 123 S. Ct. 2325 (2003) (discussing the possibility of a lottery system as a race-neutral admissions alternative for law school); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 2002 U.S. Lexis 2367 (2002) (upholding the legality of a black and of a nonblack weighted lottery as part of the Charlotte-Mecklenburg Schools desegregation plan which focused on the use of magnet schools to achieve racially balanced and integrated schools); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002) (discussing the use of lotteries weighted to consider factors such as race, gender, language, socioeconomic status, and special educational needs as part of the admissions process); Lynn Payer, *Dutch Choosing Medical Students by Lottery*, CHRON. HIGHER EDUC., Jan. 30, 1978, at 3. The Netherlands weights its admission plan to favor applicants who have the best grades. Neither the applicants nor the faculty are entirely pleased with the consequences of the weighted lottery. *Id.*

¹⁴ *Grutter*, 123 S. Ct. at 2345. The Court stated:

The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system". . . . But [this] alternative[] would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity.

Id.; but see *Parents Involved in Community Schools v. Seattle School District, No. 1*, 2004 U.S. App. LEXIS 15451 (9TH Cir. 2004). The court found that use of a randomized lottery while "perhaps not palatable to the electorate[,] would produce racial diversity comparable to the racial tiebreaking method currently used by the school district. *Id.* at *51. The court was unpersuaded by the *Grutter* Court's criticism of lotteries and stated the following:

Grutter rejected the plaintiffs' demand that the Law School consider a lottery because such a program would necessarily diminish the quality of its admitted students and might not produce adequate educational diversity due to potential under-representation of various (not necessarily racial) kinds of diversity in its limited applicant pool. Yet as the dissent *itself* notes, the School District's adoption of a lottery is subject to neither of these potential pitfalls. . . . (noting that in this case "there is absolutely no competition or consideration of merit All high school students must and will be placed in a Seattle public school. The students' relative merit is irrelevant.").

Id. (emphasis in original, footnote omitted).

¹⁵ *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 2002 U.S. Lexis 2367 (2002). Relatively few cases ever receive Supreme Court review; thus, for most litigants, the circuit courts practically serve as the courts of last resort. Thus, consideration of a recent circuit court of appeals decision in the context of school lotteries is illuminating.

in magnet school¹⁶ admissions processes as a means of achieving integrated public schools and concluded that, given the existing consent decree, casting lots was not unconstitutional.¹⁷

My thesis is that casting lots frequently results in unjust distributions of property.¹⁸ My critique has two parts. First, casting lots is deceptive because, although lotteries purport to be random, they are frequently preceded by nonrandom decisions that result in important distributional effects that the lottery masks.¹⁹ Second, even if government acknowledges that most lotteries are not completely random because of nonrandom pre-lottery decisions, casting lots is often unfair because it does not account for individual merit and characteristics such as need, fitness, desert, status, and position.²⁰ Essentially, casting lots obscures the decision to avoid making difficult choices.

Part II explores *The Antelope* case. It focuses on the critical aspect of the courts' opinions — the divergence between the circuit court and the United States Supreme Court on the propriety of casting lots to distribute the *Antelope* Africans among claimants with competing property interests. Part III discusses casting lots in the context of first- and second-order decisions which are pre-lottery decisions that alter the lottery's results. Using examples from *The Antelope*, Part III demonstrates how the use of first- and second-order decisions, in combination with casting lots, masks the choice to avoid responsible and transparent government decision-making. Part IV analyzes the role of casting lots in light of distributive justice. It uses examples

¹⁶ “Ordinarily, the term ‘magnet school’ refers to schools that confer unique educational benefits and draw from a districtwide geographic base through a lottery system.” *Comfort v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 245 n.71 (Mass. Dist. Ct. 2003). Sometimes though the term “magnet schools” simply refers to neighborhood schools designed around a “theme” for the purpose of attracting transfer students and thereby promoting integration. *Id.*; *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 2002 U.S. Lexis 2367 (2002) (“Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis, without requiring extensive busing and redrawing of district boundary lines.”). *Id.* at 336 (citation omitted).

¹⁷ *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 399 (4th Cir. 2001), *cert. denied*, 2002 U.S. Lexis 2367 (2002).

¹⁸ See *infra* note ___ and accompanying text (discussing when lotteries might be appropriate).

¹⁹ *Infra* Part III.A. (discussing weighted lotteries and the effects of weighting).

²⁰ *Infra* Part III.A.

from *The Antelope* to explore the distributive justice consequences of casting lots to make important decisions. Part V examines a recent Fourth Circuit Court of Appeals decision, *Belk v. Charlotte-Mecklenburg Board of Education*, to discuss casting lots as a tool to desegregate public schools. It explores present day uses of casting lots and applies a distributive justice framework in considering the ability of casting lots to yield just allocations. Part VI discusses alternatives to casting lots. It emphasizes the importance of transparent and responsible decision-making and why casting lots generally does not further these important goals. Part VII concludes by summarizing clear policies that disfavor casting lots and reinforces ways to more predictably achieve distributive justice.

II. AN EARLY CASE OF CASTING LOTS: A RETROSPECTIVE ON THE ANTELOPE CASE

The *Antelope* was a schooner designed to transport slaves during the flourishing international slave trade in the early 1800's.²¹ The events leading to *The Antelope* litigation began in 1819 with another slave ship, the *Columbia*.²² Sailing under a Venezuelan commission,²³ the

²¹ The *Antelope* ship was also known as the *General Ramirez*. Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); United States v. Charles Mulvey, Vice Consul of Spain and Others, Claimants of Africans part of the Cargo of the Antelope or Ramirez, The Same v. Frances Sorrell, Vice Consul of Portugal, February 1825; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; Record Group 21; National Archives and Records Administration—Southeast Region (Atlanta); Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS I (1997). Spanish and Portuguese seafarers initiated the international African slave trade near the beginning of the fifteenth century. ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY 208 (1991).

²² NOONAN, *supra* note 20, at 27 (stating that the *Columbia* was formerly the *Baltimore* and later, while at sea, changed her name to the *Arraganta*).

²³ Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

Columbia and its American captain, Simon Metcalf,²⁴ arrived on the west coast of Africa in January, 1820.²⁵ While at sea, the ship's crew forcibly boarded Portuguese slave vessels and an American slave vessel, the *Exchange*, of Bristol, Rhode Island.²⁶ The *Exchange* contained approximately twenty-five Africans who were being held as slaves.²⁷ The *Columbia* took Africans from these ships, including all of those on board the *Exchange*.²⁸

Near the time of the *Columbia*'s exploits, the *Antelope* was anchored at the port of Cabinda, also on the west coast of Africa.²⁹ The *Antelope* had purchased, boarded, and chained a number of Africans when the *Columbia*, then flying a Spanish flag, entered Cabinda on March 23, 1820.³⁰ The *Columbia* "fell in with the *Antelope* having a number of slaves on board and made prize of her as a Spanish vessel."³¹ The *Columbia* also captured a Portuguese vessel in

²⁴ Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); see NOONAN, *supra* note 20, at 26-28 (stating that the crew of the *Columbia* swore before a justice of the peace that they were not American citizens).

²⁵ NOONAN, *supra* note 20, at 27.

²⁶ Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); NOONAN, *supra* note 20, at 26-28.

²⁷ NOONAN, *supra* note 20, at 28; SHAW, *supra* note 20, at 218.

²⁸ NOONAN, *supra* note 20, at 28; SHAW, *supra* note 20, at 218; Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

²⁹ NOONAN, *supra* note 20, at 28.

³⁰ *Id.* at 29.

³¹ Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821 (italics added); Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); NOONAN, *supra* note 20, at 28-30.

Cabinda and transferred its Africans to either the *Columbia* or the *Antelope*.³²

The two ships traveled together until the *Columbia* was wrecked and stranded off the coast of Brazil.³³ After the *Columbia* was wrecked, the *Antelope* took on board survivors, both African and non-African.³⁴ With its human cargo, captured from Spanish, Portuguese, and American vessels,³⁵ the *Antelope* sailed for the

³² NOONAN, *supra* note 20, at 29.

³³ *Id.*

³⁴ *Id.* at 29; Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

³⁵ “Charles Harris, the former Mayor of Savannah and present Chairman of the Finance Committee of the city, Thomas Usher Pulaski Charlton, the present Mayor of Savannah—acted for the King of Spain or, more accurately, for Charles Mulvey, Vice Consul of in Savannah of the King of Spain.” NOONAN, *supra* note 20, at 42. Harris and Charlton claimed that 150 Africans on board of the *Antelope* were, at the time of capture, the property of Spain. Monition, Chs. Mulvey, Vice Consul v. 150 African Slaves, August 1, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); United States v. Charles Mulvey, Vice Consul of Spain and Other Claimants of Africans Part of the Cargo of the Antelope or Ramirez, The Slaves v. Frances Sorrell, Vice Consul of Portugal, February 1825; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (Spain claims a right in 150 of the Africans aboard the *Antelope*). NOONAN, *supra* note 20, at 43.

James Morrison and John C. Nicoll represented the Portuguese claimants in the name of Portugal’s Vice Consul, Francis Sorrell. NOONAN, ANTELOPE, *supra* note 20, at 42-43; Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (alleging that 130 of the Africans on board the *Antelope* were the property of Portuguese subjects). Morrison claimed 130 or more Africans on board the *Antelope* as property of subjects of Portugal. *Id.*

Deposition of Thomas Bradshaw, John Jackson v. The Antelope or Ramirez, C. Mulvey v. 150 Africans, Frances Sorrell v. 130 Africans, February 15, 1821; Vol. 103, Minute Book 1816-1823; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (stating that the number of Africans taken from the American vessel the *Exchange* numbered twenty-four or twenty-five); SHAW, *supra* note 20, at 218 (stating that twenty-five Africans were removed from the *Exchange*); NOONAN, *supra* note 20, at 54-55. John Smith, captain of the *Antelope*, and William Brunton, also of the *Antelope*, testified before the district court that twenty-five Africans were taken from the *Exchange*. *Id.* Brunton further

“Hole-in-the Wall,” a passage leading to the eastern coast of Florida.³⁶ Her destination was certain to be a slave market in the United States.³⁷

Captain John Jackson of the American revenue cutter *Dallas* encountered the *Antelope* off the coast of Florida.³⁸ Suspecting it to be a slave-smuggling vessel, he boarded the *Antelope* and, after “finding her laden with slaves, commanded by officers who were citizens of the United States, with a crew who spoke English, brought her in for adjudication[]” on June 29, 1820.³⁹ The *Antelope*

testified that all were boys or men. *Id.*

³⁶ NOONAN, *supra* note 20, at 30.

³⁷ *Id.*

The two vessels [the *Columbia* and the *Antelope*] . . . proceeded to the coast of Brazil obviously with a view to effect a clandestine sale of the slaves, but [with] the *Arraganta* [*Columbia*] being shipwrecked, and her captain drowned, the *Antelope* proceeded northwardly, and after vainly attempting to sell the slaves among the islands at length came off the coast of Florida for the same object, for it could be for no other. While off that coast she was [noticed] to the revenue cutter [*Dallas*] as a vessel of piratical appearance and Capt. Jackson, furnished with a reinforcement of soldiers, proceeded to attack her. On boarding her and finding her full of slaves and under command of a man holding an American protection, tho’ professing to act as a [commissioned] cruiser of Antigas, he took [possession] of her and brought her into an American port for adjudication.

Case of the *Antelope* otherwise the *Ramirez* and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-93; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

In fact, “[b]y Section 7 of the Act of 1807, ‘hovering on the coasts’ within the jurisdictional limits of the United States was specifically defined, in respect to slave ships, as an illegal act by itself comprising slave trading.” SHAW, *supra* note 20, at 224 n.18.

³⁸ *The Antelope*, 23 U.S. 66, 124 (1825); Case of the *Antelope* otherwise the *Ramirez* and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-93; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

³⁹ *The Antelope*, 23 U.S. at 124; NOONAN, *supra* note 20, at 31.

The day before, the *Dallas* under the command of John Jackson had been at St. Mary’s, Georgia. An informant in St. Augustine reported the appearance of a suspicious ship off the coast. Jackson proceeded to Amelia Island and took on twelve soldiers armed with muskets. Early in the morning of June 29 the *Dallas* sighted the *Antelope* between Amelia Island and the Florida coast. The *Antelope* was sailing north. The *Dallas* gave chase. The *Antelope* was overtaken in midafternoon.

Id.; see also KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM 169-70 (1990) (discussing generally universal jurisdiction over slave trading). Captain Jackson first brought the *Antelope* into St. Mary’s, Georgia and ultimately delivered her crew and cargo, including the African slaves, to Savannah, Georgia. NOONAN, *supra* note 20, at 32.

contained at least 280 Africans, as well as its crew, at the time of its ultimate capture.⁴⁰

Both Spain and Portugal claimed an interest in a portion of the *Antelope* Africans on behalf of their subjects.⁴¹ The United States opposed their claims on behalf of the Africans, never asserting a property interest in them.⁴² The United States argued that because the *Antelope* and the Africans on board were introduced into United States territory in violation of the Act in Addition,⁴³ the ship and its property were subject to the Act's forfeiture provisions.⁴⁴

⁴⁰ Frances Sorrel, Vice Counsel v. 130 African Slaves, August 12, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); NOONAN, *supra* note 20, at 29-30; SHAW, *supra* note 20, at 218; *but see* Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (stating that there were about 250 Africans aboard the *Antelope* upon its boarding and capture by *Dallas* cutter, commanded by Captain Jackson).

⁴¹ *The Antelope*, 23 U.S. at 124; NOONAN, *supra* note 20, at 43 (stating that Spanish representatives filed a libel claiming at least 150 of the *Antelope* Africans and Portuguese libelants claimed at least 130 of the *Antelope* Africans as property).

⁴² *The Antelope*, 23 U.S. at 114, 124; United States v. Charles Mulvey, Vice Consul of Spain and Others, Claimants of Africans part of the Cargo of the Antelope or Ramirez, The Same v. Frances Sorrell, Vice Consul of Portugal, February 1825; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (noting the claim by the United States to the Africans aboard the *Antelope*). Captain Jackson sued on behalf of the officers and crew of the *Dallas* as well as on behalf of the United States claiming the *Antelope* and its cargo as forfeited pursuant to the Act in Addition, ch. 101, 3 Stat. 532 (1819), *amending* Act of Apr. 20, 1818, ch. 91, 3 Stat. 450, *amending* Act of Mar. 2, 1807, ch. 22, 2 Stat. 426. Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 192; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

⁴³ The term "Act in Addition" refers to, collectively, The Act in Addition, ch. 101, 3 Stat. 532 (1819), *amending* Act of Apr. 20, 1818, ch. 91, 3 Stat. 450, *amending* Act of Mar. 2, 1807, ch. 22, 2 Stat. 426.

⁴⁴ *The Antelope*, 23 U.S. at 131-32; the Act in Addition, ch. 101, 3 Stat. 532 (1819), *amending* Act of Apr. 20, 1818, ch. 91, 3 Stat. 450, *amending* Act of Mar. 2, 1807, ch. 22, 2 Stat. 426; Monition, John Jackson Esq. in behalf v. The brig Antelope or General Ramirez, July 15, 1820; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, Folder U.S. or Span. Consul. v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 1; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

The “Act in Addition” refers to federal legislation outlawing international slave trading under United States law. By an act dated March 2, 1807, Congress prohibited the importation of slaves into the United States after January 1, 1808.⁴⁵ The Act in Addition of 1818 amended the act of March 2, 1807, and subjected ships employed in violation of the acts to forfeiture.⁴⁶ The Act in Addition of 1819 amended the Act in Addition of 1818 and granted the President authority to provide for the disposal of Africans found in the United States in violation of the laws of the United States.⁴⁷

⁴⁵ Act of Mar. 2, 1807, ch. 22, 2 Stat. 426:

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That from and after the first day of January, one thousand eight hundred and eight, it shall not be lawful to import or bring into the United States or the territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to service or labour.

Id.; *The Antelope*, 23 U.S. at 90; NOONAN, *supra* note 20, at 17; Rudko, *supra* note 11, at 77.

⁴⁶ *Supra* note 44 and accompanying text (discussing the Act of Mar. 2, 1807); Act of Apr. 20, 1818, ch. 91, 3 Stat. 450:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the passing of this act, it shall not be lawful to import or bring, in any manner whatsoever, into the United States, or territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of, any such negro, mulatto, or person of colour, as a slave, or to be held to service or labour; and any ship, vessel, or other water craft, employed in any importation as aforesaid, shall be liable to seizure, prosecution, and forfeiture, in any district in which it may be found; one half thereof to the use of the United States, and the other half to the use of him or them who shall prosecute the same to effect.

Id.

⁴⁷ Act in Addition, ch. 101, 3 Stat. 532 (1819):

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States be, and he is hereby, authorized, whenever he shall deem it expedient, to cause any of the armed vessels of the United States, to be employed to cruise on any of the coasts of the United States, or territories thereof, or of the coast of Africa, or elsewhere, where he may judge attempts may be made to carry on the slave trade by citizens or residents of the United States, in contravention of the acts of Congress prohibiting the same, and to instruct and direct the commanders of all armed vessels of the United States, to seize, take, and bring into any port of the United States, all ships or vessels of the United States, wheresoever found, which may have taken on board, or which may be intended for the purpose of taking on board, or of transporting, or may have transported, any negro, mulatto, or person of colour, in violation of any of the provisions of the act, entitled “An act in addition to an act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight, and to repeal certain parts of the same,” or of any other act or acts prohibiting the traffic in slaves, to be proceeded against according to law. . . . *Provided,* That the officers and men, . . . shall safe keep every negro, mulatto, or person of colour, found on board of

Congress also authorized a sum, not exceeding \$100,000, to carry out this task.⁴⁸ Thus, the prospects for the Africans of the *Antelope* were either colonization in Africa⁴⁹ if the United States prevailed or

any ship or vessel so seized, taken, or brought into port, for condemnation, and shall deliver every such negro, mulatto or person of colour, to the marshal of the district into which they are brought, if into a port of the United States, or, if elsewhere, to such person or persons as shall be lawfully appointed by the President of the United States, in the manner hereinafter directed, transmitting to the President of the United States, as soon as may be after such delivery, a descriptive list of such negroes, mulattoes, or persons of colour, that he may give directions for the disposal of them. . . .

Id.

Citizens violating the Act were subject to being fined and imprisoned. Act of Mar. 3, 1819, ch. 91, §§ 2, 7, 3 Stat. 450. Congress did not set forth in the act of March 2, 1807, what should be done with enslaved individuals transported into the United States or its territories when their enslavers were captured. NOONAN, *supra* note 20, at 17; Act of Mar. 2, 1807, ch. 22, 2 Stat. 426. Not until the Act in Addition of 1819 did Congress explicitly “contemplate[] that any [Africans] found to be the property of the United States in a slave trade case would be transported back to Africa.” G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURE CHANGE 1815-1935*, at 695 (1991). Concerned about the plight of Africans illegally imported into the United States, the American Society for Colonizing the Free People of Color of the United States (“The American Colonization Society”), approached Henry Clay, Speaker of the United States House of Representatives and himself a member of The American Colonization Society, and proposed that rescued Africans be returned to Africa. *Id.* Speaker Clay assigned the matter to a Special Committee which recommended that the United States form a colony or outpost in Africa for the purpose of receiving Africans illegally transported into the United States. NOONAN, *supra* note 20, at 18. President James Monroe, a protege of Thomas Jefferson and of his formula of “emancipation and deportation” of Africans as a solution to the nation’s race problem, committed himself to putting into effect The American Colonization Society’s interpretation of the Act in Addition of 1819. NOONAN, *supra* note 20, at 23. In a “Special Presidential Message to Congress” delivered on December 19, 1819, President Monroe “fastened on the capital consideration—the aim of the Act was to remove Africans from America; as long as they were kept in America, the Act’s purpose was unachieved.” *Id.* at 26. *The Antelope*, 23 U.S. at 91; NOONAN, *supra* note 20, at 18; Act of Mar. 3, 1819, ch. 91, §§ 2, 7, 3 Stat. 450.

⁴⁸ Act of Mar. 3, 1819, ch. 91, § 7 Stat. 450.

The President was authorized by this act to make such regulations and arrangements as he may deem expedient for the safe keeping, support, and removal beyond the limits of the United States, of all such negroes, mulattoes, or persons of colour, as may be so delivered and brought within their jurisdiction: And to appoint a proper person or persons, residing upon the coast of Africa, as agent or agents for receiving the negroes, mulattoes, or persons of colour, delivered from on board vessels, seized in the prosecution of the slave trade by commanders of the United States’ armed vessels.

Id. § 2.

⁴⁹ There is no evidence of a policy of reuniting Africans with their families or of returning them to their country of origin. Moreover, the United States was aware of an incident in November of 1822 in which nearly 130 newly emancipated slaves who had been colonized at Cape Mesurado, West Africa were attacked by hostile tribes resulting in the deaths of several of the African colonists. NOONAN, *supra* note 20, at 84; George Anastaplo, *John Quincy Adams Revisited*, 25 OKLA. CITY U. L. REV. 119, 136 (2000); *The Antelope*, 23 U.S. at 546, 550-51 (referencing the “Act in addition to the acts prohibiting the slave trade”).

continued enslavement if the Spanish or Portuguese claimants succeeded.⁵⁰

The *Antelope* trial commenced before Judge William Davies, United States District Judge for the District of Georgia, in the early months of 1821.⁵¹ Judge Davies disposed of the United States' main argument against the Portuguese and Spanish claimants by finding that, although the United States had outlawed the international slave trade, neither Spain nor Portugal had completely outlawed it.⁵²

The principle common to these cases is that the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed; if that law prohibits it, the vessel and cargo will be condemned as good prize.

....

No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested [sic] only [by] consent; and this trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose

The United States' policy consisted of repatriating slaves to the African continent and settling them in Liberia as free persons. SHAW, *supra* note 20, at 224-25 n.19.

⁵⁰ Anastaplo, *supra* note 48, at 136; NOONAN, *supra* note 20, at 116-17; Case of the *Antelope* otherwise the *Ramirez and Cargo*, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 195-96; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

⁵¹ NOONAN, *supra* note 20, at 57 (stating that Judge Davies issued his opinion on February 21, 1821). Prior to this time, in December 1820, Judge Davies heard the piracy case against John Smith. Smith was acquitted on all counts by a jury. *Id.* at 53.

⁵² NOONAN, *supra* note 20, at 26. United States District Attorney Richard Wylly Habersham, a Savannah native and a member of The American Colonization Society, handled the case for the United States. *Id.* at 44, 53-59. Rudko, *supra* note 11, at 82 (stating that Chief Justice John Marshall acknowledged that, although evolving, slave trading had not been universally recognized as an illegal practice and therefore other nations might have a property claim in Africans). South of the equator, Spanish and Portuguese shippers continued, legally, to engage in the international slave trade. SHAW, *supra* note 20, at 218.

governments have not forbidden it.⁵³

Judge Davies wrote that despite its injustice, unless a government had banned the slave trade, it created property rights.⁵⁴ The United States recognized Spain's and Portugal's property rights as the United States had an unequivocally slave tolerant Constitution and conceptualized the African as constitutional property.⁵⁵ Once the district court decided not to dismiss Spain's and Portugal's claims, the critical issue for the claimants was the allocation and distribution of the property, including the Africans.⁵⁶ Judge Davies ordered that the Vice Consul of Portugal take the Africans originating from the Portuguese ships and that the Vice Consul of Spain take the *Antelope* and those Africans who had first been on board the *Antelope*.⁵⁷ The Africans taken from the *Exchange* were allocated to the United States.⁵⁸ Judge Davies then decreed the total number of Africans to be allocated to Spain, Portugal, and the United States.⁵⁹ Importantly, he did not specify which particular Africans were allocated to each country.⁶⁰

⁵³ *The Antelope*, 23 U.S. at 118, 122.

⁵⁴ NOONAN, *supra* note 20, at 58; *see also The Antelope*, 23 U.S. at 118.

⁵⁵ *See* PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 82 (2d ed. 2001) (discussing the implementation of the slave tolerant Constitution and the legal recognition of the slave as a "species of property").

The property protected by the Constitution, like property generally, is "a system of authority established by government," and, as with any right, it "depends on the promise of government" When the courts rule on property, the decision involves a dominion one may lawfully exercise and its application in a particular situation. In constitutional history, the "things" to which the right is applied have changed, as have the doctrinal standards. The nature of the dominion, however, has not changed much at all. The society that allowed slaveholding made choices that seem wrong to us, but the way they were enforced should be comprehensible. The continuity in the meaning of the concept, despite shifts in the subject of its protection, is a key to constitutional property.

BRIGHAM, *supra* note 1, at 39-40.

⁵⁶ *The Antelope*, 23 U.S. at 125-27.

⁵⁷ NOONAN, *supra* note 20, at 59.

⁵⁸ *Id.* at 26. Judge Davies also ordered that Captain Jackson should be paid salvage on all the property in addition to a bounty in the amount of twenty-five dollars on each of the Africans determined to have originated from the *Exchange*. *Id.* The Circuit Court affirmed the District Court's determination regarding Captain Jackson's entitlement to the bounty and salvage. Extract from Decree of Circuit Court, Case of the *Antelope* otherwise the Ramirez and Cargo, May 11, 1821; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, John Jackson Com. Rev. Cutter Dallas v. The *Antelope* or General Ramirez Admiralty, 1821, Box 27, F-8; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

⁵⁹ NOONAN, *supra* note 20, at 59-60. After deducting from the total number of Africans

The Sixth Circuit Court of Appeals heard the appeal of *The Antelope* on May 8, 1821.⁶¹ On May 11, 1821, Justice William Johnson affirmed that part of the district court's decision which allocated the *Antelope* to Portugal and reversed the portion of the district court's decision allocating Africans originating from Portuguese ships to Portugal, Africans originating from the *Antelope* to Spain, and Africans originating from the *Exchange* to the United States.⁶² The most critical part of the court's opinion pertains to the chosen method for identifying the Africans and distributing them.⁶³ The relevant portion of the circuit court opinion states:

Until some better reason can be assigned I must maintain that it is a question altogether "inter alios" whether the Spanish & Portuguese nations had authorised the traffic in which their vessels were

initially brought into custody, the total number missing or deceased, Judge Davies apportioned this loss among Spain, Portugal, and the United States. *Id.*

⁶⁰ NOONAN, *supra* note 20, at 65.

⁶¹ *Id.* at 61.

⁶² Case of the *Antelope* otherwise the *Ramirez* and *Cargo*, May 11, 1821; Vol. 103, Minute Book 1816-1823, p. 197; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

⁶³ The allocation to the United States is most important because these individuals would ultimately be freed. Case of the *Antelope* otherwise the *Ramirez* and *Cargo*, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 195-96; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); SHAW, *supra* note 20, at 218.

In the federal circuit court for Georgia, the claims of the . . . *Antelope*, to be a legitimate privateer were quickly dismissed and all of the activities of her surviving crew deemed to have been strictly piratical. But this determination meant that the vessel herself and the slaves aboard remained the legal property of the original Spanish and Portuguese owners, and that only the 25 slaves taken from the Rhode Island vessel [the *Exchange*] could be confiscated and, under the new law, given their freedom. This decision gave rise to difficult practical problems in its implementation, as all of the slaves in the American, Spanish and Portuguese vessels had been mingled together by their captors and could no longer be identified individually; moreover, about one third of the original total had died. The solution devised by the circuit court was that sixteen of the surviving slaves, representing the fair proportion of the original twenty-five, should be chosen by lot and given their freedom, while the balance should be returned to their Spanish and Portuguese claimants.

Id. Moreover, the Act of 1820, the full title of which is "An Act to continue in force 'An act to protect the commerce of the United States, and punish the crime of piracy,' and also to make further provisions for punishing the crime of piracy" formally declared that participation in the international slave trade constituted an act of piracy. Act of May 15, 1820, ch. 113, § 4, 3 stat. 690 (1820); SHAW, *supra* note 20, at 214-15.

engaged. Not so as to the American vessel. I have a law to direct me as to that, and the slaves taken out of her must be liberated. I would that it were in my power to do perfect justice on their behalf. But this is now impossible. I can decree freedom to a certain number. . . . It is impossible to identify the individuals who were taken from the American vessel, and yet it is not less certain that the benefit of this decree is their right and theirs alone. Poor would be the consolation to them to know that because we could not identify them we have given away their freedom to others. Yet shall we refuse to act because we are not vested with the power of divination?

We can only do the best in our power, the lot must decide their fate, and the Almighty will direct the hand that acts in the selection. . . .

. . . .

. . . . That as to the slaves the number taken from the American vessel the Exchange be ascertained by a ratio stated from the whole number on board the Antelope when she left the coast, the number actually surviving when the separation takes place & the number found on board the Exchange and that the number so found being separated by lot from among the men and boys,⁶⁴ the individuals thus selected be delivered to the United States. That the residue be retained in the hands of the marshal until the next term at which they shall be divided by lot between the Spanish & Portuguese claimants according as they shall make their several interests appear on further proof.⁶⁵

⁶⁴ NOONAN, *supra* note 20, at 66. "For the first time in the judicial record of the case it was necessary to name some of the Africans as human beings. They were all males, since, as only men and boys had come from the *Exchange*, Justice Johnson directed that only males could be winners." *Id.*

⁶⁵ Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-98; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); Opinion of U.S. Supreme Court, December 14, 1825; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, pp. 133-36;

On January 1, 1822, the United States appealed to the United States Supreme Court that portion of the Sixth Circuit Court opinion allocating Africans from the *Antelope* to Spain and Portugal.⁶⁶ Chief Justice John Marshall, writing for the Court, decided the extent of Spain's and Portugal's entitlement to the *Antelope* Africans and directly addressed the casting of lots.⁶⁷ The Court dismissed Portugal's claim.⁶⁸ According to the Court, the absence of any individual Portuguese claimants suggested that the true owners were not Portuguese citizens and that the true owners wanted to conceal their nationality because their country of origin had outlawed the international slave trade.⁶⁹ The Court then disposed of the contest between Spain and the United States. The Court required Spain to designate by proof the Africans who had first been on board the *Antelope* and later removed from her possession.⁷⁰ According to the Court, "[t]he onus probandi, as to the number of Africans which were on board when the vessel was captured, unquestionably lies on the Spanish libellants."⁷¹ Their proof

Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta) (citing to the Sixth Circuit Court of Appeals decision, referencing the lot language and reversing the lower court opinion as to the part directing the amount of restitution due the Spanish and Portuguese claimants).

⁶⁶ Charles Mulvey, Vice Consul. v. 150 African negroes part of the cargo of the General Ramirez, January 2, 1822; Vol. 103, Minute Book 1816-1823, pp. 263-64; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

⁶⁷ Although it shied away from a general condemnation of the slave trade on the basis of international law, the Supreme Court could still aid the cause of the *Antelope* Africans by its interpretation of "strict law." For example, the Court took the view that it could inquire into the claimants' title and that something more than mere possession was needed to prove title under the peculiar circumstances of this case. 23 U.S. at 131-32; X THE PAPERS OF JOHN MARSHALL: CORRESPONDENCE, PAPERS, AND SELECTED JUDICIAL OPINIONS JANUARY 1824-MARCH 1827, at 157 (Charles F. Hobson ed., 2000); Rudko, *supra* note 11, at 82-83.

⁶⁸ *The Antelope*, 23 U.S. at 130; SHAW, *supra* note 20, at 219. "No subject of the crown of Portugal has appeared to assert his title to this property, no individual has been designated as its proper owner.' Thus, [Chief Justice] Marshall reasoned, the ownership of the Portuguese slaves, or even their status as slaves, was in considerable doubt." HOBSON, PAPERS, *supra* note 66, at 157.

⁶⁹ 23 U.S. at 129-31.

⁷⁰ *The Antelope*, 23 U.S. at 128.

⁷¹ JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 29 (5th ed. 2002). "A libel is the admiralty law equivalent of a lawsuit, and the libellant (or libelant) is the equivalent of the plaintiff in an action at law."

is not satisfactory beyond ninety-three. The individuals who compose this number must be designated to the satisfaction of the Circuit Court.”⁷²

The number of Africans apportioned to Spain was ultimately reduced from ninety-three to fifty because the Court apportioned to Spain part of the loss resulting from Africans who died during the ensuing litigation and “it was the opinion of [the] Court, that [the] number [ninety-three] should be reduced according to the whole number living. The circuit court fixed the whole number to which the Spanish claimants were entitled at fifty, and then inquired as to their identity.”⁷³ The circuit court determined that Spain ultimately produced credible evidence to the extent of thirty-nine⁷⁴ of the Africans and the United States Supreme Court agreed.⁷⁵

⁷² *Id.* at 128-29. On December 21, 1825, Justice William Johnson and District Judge Jeremiah Touche Cuyler, sitting as a court of two, certified to the Supreme Court the question of whether the lottery had been approved by the Court. Petition of Spanish Vice Consul for a division, In the matter of “The Africans” of the “General Ramirez” or Antelope, December 21, 1825; Vol. B23/36B026, Mixed Cases 1790-1860, F-7, U.S. or Spanish Consul v. Brig. Antelope or General Ramirez v. Africans 1820, F-7, Folder 2; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta); NOONAN, *supra* note 20, at 119. They disagreed as to the proper interpretation of Justice Marshall’s opinion pertaining to the casting of lots. NOONAN, *supra* note 20, at 119. Of course, Justice Johnson had earlier approved of the lot in his 1821 opinion. Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-98; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta). Judge Cuyler was not so certain that the Court had approved of this method of allocation. NOONAN, *supra* note 20, at 119. In an explanatory decree at the February term, 1826, the Court ordered that Spain must designate by proof, to the satisfaction of the Circuit Court, the Africans to be delivered to Spain. Libel Decree, United States v. Africans of the Cargo of the Antelope or General Ramirez, May 9, 1826; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, p. 181; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

[I]t is ordered that the Spanish Claimant in the above case do on or before the next Term of this Court, designate by proof to the satisfaction of the Court, the Africans of the above Cargo, not exceeding fifty in number which by the decree of the Supreme Court of the United States made at February Term 1825 and the explanatory decree of the said Court made at February Term 1826 the said claimant claims to be entitled to.

Id.; *The Antelope*, 24 U.S. at 413.

⁷³ 25 U.S. at 552.

⁷⁴ See SHAW, *supra* note 20, at 224 n.19.

These 39, the remnant of about 150 original Spanish slaves, were not, however, conveyed into . . . slavery. During the pendency of the *Antelope* case, they had been nominally in the custody of a federal marshal, but were actually placed at work upon plantations, and during

The consequence of the Spanish claimants' failure to carry their burden of proof meant that their right to possession of particular Africans as property was diminished.⁷⁶ To the extent the Spanish claimants failed to meet their burden, their claim to possession of the

that time "many of them had been married, and became heads of families—had been partially domesticated with us, and were desirous of remaining in this country". . . . A spirited debate ensued. The three alternatives facing the 39 blacks were to remain in Georgia as slaves, to be transported to [their Spanish owners in] Cuba as slaves, or to be sent to Liberia as free persons. They obviously preferred the first choice.

Id. Grondona, who had formerly been a second officer on board of the *Antelope* identified the Spanish Africans by various methods including the making of signs, speaking with the Africans, and having the Africans speak to him. 25 U.S. at 553. The Court also considered that the designated Africans appeared to recognize Grondona and were able to communicate with him although the witnesses present were not able to understand the languages spoken by the Africans nor by Grondona. *Id.*

⁷⁵ 25 U.S. at 552; HOBSON, PAPERS, *supra* note 66, at 157.

Like a bouncing ball, the case reappeared on the Supreme Court's 1826 docket on the certificate of division. Without argument, the Court issued a tersely worded order that the Africans to be delivered to the Spanish claimant "must be designated by proof made to the satisfaction" of the circuit court. At length that court identified thirty-nine individuals to be turned over to the Spanish claimant, including at least one who had been certified free by the lottery employed in the original circuit court decree.

Id. (citing to 24 U.S. 413).

⁷⁶ The United States Supreme Court explicitly mentions that the international slave trade was banned in the United States. 23 U.S. at 118-22. It is therefore thinking in terms of having banned the slave trade when it requires the designation by proof by Spain and the Court has to know that the proof will be difficult if not impossible to produce. *See also* 25 U.S. 552 (stating that competent evidence exists to designate by proof). The Court has placed a very high burden of proof on Spain, and the result of any failure to prove identities of claimed slaves will be the liberation of the slaves. *The Antelope*, 25 U.S. at 551. "We are of opinion it ought to be certified to the Circuit Court, that all the Africans captured in the *Antelope*, except those directed to be delivered to the Spanish claimants, should be decreed to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses." 25 U.S. at 551; *United States v. Certain Africans the Cargo of the Ramirez*, December 1, 1826; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, p. 207; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).

And upon collating and combining their decree of 1825 with the explanatory decree of 1826 [referring to decrees of the United States Supreme Court] the two will be found to amount to this, that the rights of the Spaniard shall be recognized, but in reducing that right to possession they shall be held to have established a claim originally to ninety three, which number shall be reduced by the average of deaths, and to the number so ascertained they shall be held to produce proof of individual identity. But all the cargo with the exception of those to be thus identified shall be delivered over to the United States. This will be doing what that Court certainly intended to do - it will make a final disposition of a most troublesome charge.

Id. (consider also page 205 referring to the Decree of 1825 and the explanatory Decree of 1826 as emanating from the United States Supreme Court).

Africans as property was denied and such Africans were delivered over to the only other party with a viable claim—the United States.⁷⁷ “The process of returning the Africans dragged on from the date of the decision on March 15, 1825, until July of 1827 ‘when some 130 Africans adjudicated to the United States sailed from Savannah for Liberia.’”⁷⁸

III. AN ANALYSIS OF CASTING LOTS AND *THE ANTELOPE CASE*

The lottery has a long history.⁷⁹ For instance, there are numerous Biblical accounts of casting lots.⁸⁰ Casting lots though is not

⁷⁷ Rudko, *supra* note 11, at 83.

⁷⁸ *Id.* at 77.

⁷⁹ *Supra* Parts I and II and accompanying notes and text; *infra* note 79; *see, e.g.*, JOHN BURNHEIM, IS DEMOCRACY POSSIBLE?: THE ALTERNATIVE TO ELECTORAL POLITICS 9 n.2 (1985) (“In order to have democracy we must abandon elections, and in most cases referendums, and revert to the ancient principle of choosing by lot those who are to hold various public offices.”); THOMAS W. SIMON, DEMOCRACY AND SOCIAL INJUSTICE: LAW, POLITICS, AND PHILOSOPHY 205 (1995) (“Organizations operating according to lot selection rather than majority rule can qualify as democratic.”); *see* JON ELSTER, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 62 (1989) (discussing societal lotteries in various contexts). Shirley Jackson’s fictional account of the use of an annual lottery to elect the victim for their ritual stoning shocks readers in part because of the casual manner in which the lottery is used to make critical decisions. Shirley Jackson, *The Lottery*, in *THE LOTTERY AND OTHER SHORT STORIES* 291 (ed. 1982); F. HULTSCH, 1 THE HISTORIES OF POLYBIUS 490 (Evelyn S. Schuckburgh trans. 1962) (discussing the Roman practice of dispensing military punishment upon the commission of certain crimes by casting lot). According to Roman practice, if a number of men in a legion are found guilty of mutiny such that it is determined to be impossible to subject all of them to execution, “[t]he Tribune assembles the legion, calls the defaulters to the front, and, after administering a sharp rebuke, selects five or eight or twenty out of them by lot, so that those selected should be about a tenth of those who have been guilty of the act of cowardice.” *Id.* Those selected by lot would then be punished “without mercy” and the remainder would be punished less severely. Exposing all to an equal chance of having the lot fall on them and making conspicuous examples of those escaping the lot was determined to be the best means of “inspir[ing] fear for the future, and . . . correct[ing] the mischief which [had] actually occurred.” *Id.* at 490-91. STEPHEN DANDO-COLLINS, CAESAR’S LEGION: THE EPIC SAGA OF JULIUS CAESAR’S ELITE TENTH LEGION AND THE ARMIES OF ROME 88 (2002) (describing Caesar’s official decimation of the 9th Legion by drawing lots for every tenth man to die after finding that the 9th Legion was guilty of instigating a mutiny).

⁸⁰ *Leviticus* 16:8-10 (New International). Moses, believed by Christians and Jews to be the author of the Book of Leviticus, describes the ritual for the Day of Atonement.

(6) Aaron is to offer the bull for his own sin offering to make atonement for himself and his household. (7) Then he is to take the two goats and present them before the LORD at the entrance to the Tent of Meeting. (8) He is to cast lots for the two goats - one lot for the LORD and the other for the scapegoat. (9) Aaron shall bring the goat whose lot falls to the LORD and sacrifice it for a sin offering. (10) But the goat chosen by lot as the scapegoat shall be presented alive before the LORD to be used for making atonement by sending it into the desert as a scapegoat.

Id. *Joshua* 18:1-6, 8-10 (New International), (discussing the distribution of the inheritance

confined to the distant past; it is presently used in a variety of situations.⁸¹ One of the primary benefits of casting lots is that it absolves decision-makers from making difficult choices with harsh consequences for the loser.⁸² Casting lots often masks the pre-lottery

of seven of the twelve tribes of Israel by the method of casting lots); *1 Chronicles* 26: 13-16 (New International) (casting lots to determine the division and assignment of the gatekeepers who were responsible for ministering in the Lord's temple); *Nehemiah* 11:1 (New International) (discussing casting lots to redistribute populations from their then present town to Jerusalem to live); *Jonah* 1:7 (New International). Jonah fled from the Lord and attempted to reach Tarshish by ship. *Id.* at 1:3. During the voyage a great storm arose and threatened to destroy the ship. *Id.* at 1:5. The sailors on board cast lots to determine who was responsible for the storm "and the lot fell on Jonah." *Id.* at 1:7. *John* 19:24 (discussing the casting of lots after the crucifixion of Jesus to distribute his clothes); *Acts* 1:21-26 (New International). The then eleven apostles cast lots to determine which of two men, Joseph or Matthias, would assume the ministerial role vacated by Judas. *Id.*

Biblical accounts reveal an "interpretation of selection by lot, as the revelation of God's will" not as a random selection device. ELSTER, SOLOMONIC, *supra* note 78, at 50; TORSTEIN ECKHOFF, SOCIAL INTERACTION: ITS DETERMINANTS IN SOCIAL INTERACTION 3 (1974); NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING 16, 18 (1999). The Bible never criticizes casting lots as a distributive device. ELSTER, SOLOMONIC, *supra* note 78, at 50. "From the Old Testament until the early modern age, divinatory, divisory and consultory lotteries were often used for the purpose of discovering God's will." ELSTER, SOLOMONIC, *supra* note 78, at 50. Today, the lottery is viewed as a method for equally distributing the chances for participating individuals to obtain the relevant burden or benefit. ECKHOFF, *supra* note 79, at 215. These two competing views of the lottery, meaning the lottery as expressing God's divine will versus the lottery as expressing chance, are inherently incompatible; God's decisions are not perceived as random. *Id.* at 216; Proverbs 16:33 (New International). The comment to Proverbs 16:33 states that the lot was commonly used to make decisions; however, every decision came from God. Thus, God controlled, not chance. *Id.* (commentary). This interstice in logic has not prevented the two views from co-existing. *Id.*

In modern times, the general perception of the lot as a method of discerning God's intentions has been replaced by a more analytically critical interpretation of casting lots and of randomization as merely one of several decision-making devices. ELSTER, SOLOMONIC, *supra* note 78, at 40. "Randomness can be seen as a property of a process or as a property of the selections it generates." *Id.* Thus, the concept of randomization might be confusing or incoherent to some. *Id.*

⁸¹ *Supra* Part I and accompanying notes and text.

⁸² Goodwin summarizes the benefits of the lottery as follows:

1. The lottery puts choice in distribution beyond human interference and so prevents corruption, if it is fairly operated.
2. Use of a lottery therefore means that no one is to blame for the selection; this is especially important if evils are being distributed or harsh decisions taken.
3. Likewise, the lottery allows no one to boast of his or her selection or to claim that it is especially apposite or deserved. . . .
4. Being, as it is a 'refusal to choose', the lottery lets everyone off the hook where unpleasant or mortal decisions have to be taken. Not only is no one to blame, but no one actually has to do the choosing.
5. The lottery assumes that everyone in the draw is equally qualified, or deserving, or liable.

decisions that necessitate tough choices, the types of choices that lottery advocates allege make casting lots an attractive alternative to responsible decision-making.⁸³

The lottery's veiling of the decision to avoid making difficult choices is best illustrated by considering instances of tough decisions or what Guido Calabresi and Philip Bobbitt call "tragic choices"—choices that challenge a government's fundamentally held notions and values.⁸⁴ *The Antelope* is one such example of a tragic choice.⁸⁵

This is a precondition of any lottery, but it is also part of the justification for its use.

6. If properly conducted, a lottery is entirely impartial between individuals and is thus eminently fair according to the basic and widely accepted definition of fairness.

7. Repeated drawings of the lot tend to equalize everyone's chances of enjoying whatever goods, or suffering whatever evils, are being distributed.

GOODWIN, *supra* note 2, at 46.

⁸³ *Infra* Part III.

⁸⁴ CALABRESI & BOBBITT, *supra* note 3, at 145. Calabresi and Bobbitt define tragic choices subjectively as those decisions that each individual experiences as "appalling." *Id.* at 17.

Tragic choices come about in this way. Though scarcity can often be avoided for some goods by making them available without cost to everyone, it cannot be evaded for all goods. In the distribution of scarce goods society has to decide which methods of allotment to use, and of course each of these methods—markets, political allocations, lotteries, and so forth—may be modified, or combined with another. The distribution of some goods entails great suffering or death. When attention is riveted on such distributions they arouse emotions of compassion, outrage, and terror. It is then that conflicts are laid bare between on the one hand, those values by which society determined the beneficiaries of the distributions, and (with nature) the perimeters of scarcity, and on the other hand, those humanistic moral values which prize life and well-being.

In such conflicts, at such junctures, societies confront the tragic choice. . . .

Id. at 18-19 (footnote omitted). Tragic choices are notable, in part, for their "'moral remainders' or 'moral traces'" which are described as the persistent feeling that some injustice or wrong has occurred even though the action taken was, under the circumstances, the most appropriate course. *Id.* at 710. Particularly in the context of tough decisions or tragic choices, the lottery exonerates decision-makers by freeing individuals and government from the burden of making difficult decisions, thereby placing blame and responsibility at the feet of chance. GOODWIN, *supra* note 2, at 175.

The reasons for using a lottery to make tragic choices are:

1. that the limits of 'mindful' (i.e. psychological, rational or moral) choice have been reached;
2. the blindness or impartiality of the lottery process; and
3. the moral judgement that people should be treated as absolutely equal where basic life-chances (chances of life or survival) are involved.

Id.; but see CALABRESI & BOBBITT, *supra* note 3, at 41-44 (criticizing lotteries and randomness as allocative approaches).

Not all lotteries involve tragic choices. See, e.g., ELSTER, SOLOMONIC, *supra* note 78, at 59, 93 (discussing lotteries in strategic decision-making and lotteries in the judicial process pertaining to assignment of judges and magistrates to cases); W. Bradley Wendel, *Professional Roles and Moral Agency: Ethics for Adversaries: The Morality of Roles in Public and Professional Life*: by Arthur Isak Applbaum, 89 GEO. L.J. 667, 710 (2001). As a

These choices vary among societies depending on the norms, rules, and standards of each society.⁸⁶

The essence of a tragic choice is that sufficient of the essential good cannot be produced—in the short term, at least—to satisfy everyone, and that the consequence of this shortage is life-threatening for some people. Alternatively, a tragic choice must be made when an unmitigated evil has to be allocated to someone out of a group.⁸⁷

A. Understanding First- and Second-Order Decisions

component of strategic decision-making, for example, “the purpose of randomization is not to resolve indeterminacy, but to keep other people uncertain about what one is doing.” ELSTER, SOLOMONIC, *supra* note 78, at 59. Thus, allowing decisions to be made by casting lots might be a procedure that avoids revealing regularities in behavior, discernable by one’s opponent or targeted object. *Id.* Elster uses the innocuous examples of poker opponents and Native American hunters attempting to prevent their opponents or prey from discerning a pattern as two examples of the use of casting lots in strategic decision-making situations. *Id.*

⁸⁵ *Supra* Part II.

⁸⁶ CALABRESI & BOBBITT, *supra* note 3, at 49.

⁸⁷ GOODWIN, *supra* note 2, at 174; CALABRESI & BOBBITT, *supra* note 3, at 18, 22.

Before considering the appropriate role of casting lots in decision-making, one must discuss the choices that typically pre-date the lottery and weight it, thus preventing the lottery from being a “pure” lottery.⁸⁸ “Pure” lottery is used in this article in contrast to a weighted lottery, meaning a lottery that is modified through the use of either pre- or post-selection lottery criteria to account for individual characteristics and societal goals.⁸⁹ Accounting for such characteristics and goals affects who is subject to the lottery and the lottery results.⁹⁰

These pre-lottery decisions sometimes necessitate the tragic choice.⁹¹ Casting lots involves at least two levels of decisions.⁹² First, government must decide how much of the resource will be produced (a first-order decision).⁹³ These are the choices that generally create

⁸⁸ CALABRESI & BOBBITT, *supra* note 3, at 18-19. Pure lotteries are extremely rare because virtually all lotteries are preceded by choices, no matter how remote, that affect the lottery and its outcome. Thus most discussions of the lottery should rationally anticipate the weighted lottery context.

Pure lotteries discourage individuals from distinguishing themselves by investing the time and energy necessary to qualify to assume positions requiring more than a remedial skill level. ELSTER, SOLOMONIC, *supra* note 78, at 111. According to Calabresi and Bobbitt:

By treating as equal all candidates, lotteries embody the naive or simple conception of equality, which is anathema to other conceptions. Moreover, in their pure form, lotteries give no weight to either individual or societal desires—except the societal desire to treat everyone in precisely the same way, regardless of the consequences. Nor do lotteries entirely avoid the costs of costing. True, they do not price tragic goods nor do they nakedly involve the state in the selection of victim-losers. But they do something just as costly. The pure lottery inevitably spotlights the first-order determination which created the scarcity. This has the same effect as pricing lives, for example, since it emphasizes our inability to maintain that the right to the scarce resource . . . is absolute.

CALABRESI & BOBBITT, *supra* note 3, at 146.

⁸⁹ CALABRESI & BOBBITT, *supra* note 3, at 18-19.

⁹⁰ *Id.*

⁹¹ *See infra* Part III.

⁹² CALABRESI & BOBBITT, *supra* note 3, at 19. Some scholars also refer to a third-order decision, the individual’s decision to apply for a scarce resource, possibly including an exemption from a burdensome responsibility. ELSTER, SOLOMOIC, *supra* note 78, at 68-69. Consideration of third-order decisions is beyond the scope of this article.

⁹³ CALABRESI & BOBBITT, *supra* note 3, at 18-19.

Tragic choices show two kinds of moving progressions. First, there is society’s oscillation between the two sorts of decisions it must make about the scarce good. It must decide how much of it will be produced, within the limits set by natural scarcity, and also who shall get what is made. . . [T]he former decision is called a first-order determination and the latter a second-order determination or decision. Secondly, there is the motion that is composed of the succession of decision, rationalization, and violence as quiet replaces anxiety and is replaced by it when society evades, confronts, and remakes the tragic choice.

the need the lottery is designed to address.⁹⁴ Second, government must decide who shall receive what is produced (a second-order decision).⁹⁵ Consideration of casting lots and of its relationship to first- and second-order decisions reveals the lottery's masking effect. As previously stated, my critique has two aspects: first, casting lots is deceptive because it is preceded by nonrandom decisions with significant distributional effects; second, casting lots is unfair because it does not account for individual merit and characteristics.⁹⁶ At the level of the first-order decision, a determination to provide more resources in one area means that fewer resources will be available to commit to competing endeavors and pursuits.⁹⁷ The first-order decision is a choice about the degree of scarcity government will permit.⁹⁸ The second-order decision selects who will benefit from receiving or, conversely, who will bear the burden

Id. (citation omitted); see also ELSTER, SOLOMONIC, *supra* note 78, at 68 n.114 (referencing Calabresi and Bobbitt and the first-order, second-order distinction).

⁹⁴ CALABRESI & BOBBITT, *supra* note 3, at 18-19; ELSTER, SOLOMONIC, *supra* note 78, at 68 n.114.

⁹⁵ CALABRESI & BOBBITT, *supra* note 3, at 19; see also ELSTER, SOLOMONIC, *supra* note 78, at 68 n.114 (referencing Calabresi and Bobbitt and the first-order, second-order distinction).

⁹⁶ *Supra* Introduction.

⁹⁷ See STEPHEN R. MUNZER, A THEORY OF PROPERTY 279 (1990). Choices are made in a world of incommensurability. ELSTER, SOLOMONIC, *supra* note 78, at 108. Incommensurability is one variety of indeterminacy. *Id.*

Here comparisons of the claims or the options is inherently impossible or unreliable, not just costly or difficult. In individual choice this situation can arise when preference orderings are incomplete or when it is impossible to assign numerical probabilities to the outcomes of action. . . . In social allocation it can arise in several ways. First, within a given dimension of choice, interpersonal comparisons may be inherently controversial. Consider the allocation of medical resources according to such criteria as social utility, need and past contributions to society. . . .

Id. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994). Professor Sunstein explores the manner in which choices and valuations are made among incommensurable goods and acknowledges the substantial task involved in establishing an adequate theory for determining how society should make choices among competing incommensurable goods and among types of valuation that are different. He asserts that there is no established formula for dictating how choices among incommensurable goods should be assessed; rather, the criteria for appropriate public and private action vary and the search for valid criteria requires careful examination of individualized cases and an appreciation for the consequences of choices made. *Id.* at 857-58, 861.

⁹⁸ CALABRESI & BOBBITT, *supra* note 3, at 19-20; ELSTER, SOLOMONIC, *supra* note 78, at 68-69.

of doing without desired resources.⁹⁹ As Calabresi and Bobbitt indicate, at times first- and second-order decisions are made together but in instances of tragic choices, they are made independently.¹⁰⁰ As long as the two levels of decisions are maintained separately, decision-makers can facilitate the perception that the government is not responsible for creating the scarcity¹⁰¹ or the “unmitigated evil” compelling the tragic choice.¹⁰² Casting lots masks important first- and second-order decisions; it also perpetuates the often unfounded belief that the lottery allocation is fair, meaning unaffected by bias or human intervention.¹⁰³

B. Understanding *The Antelope* as Impacted by First- and Second-Order Decisions

Decisions in *The Antelope* litigation reveal a number of first- and second-order decisions by the circuit court.¹⁰⁴ *The Antelope* is an example of a weighted lottery in which the circuit court purportedly

⁹⁹ CALABRESI & BOBBITT, *supra* note 3, at 19-20; *see also* ELSTER, SOLOMONIC, *supra* note 78, at 68-69. Second-order decisions are also used to allocate burdensome tasks and dangerous responsibilities such as draft participation.

¹⁰⁰ CALABRESI & BOBBITT, *supra* note 3, at 20.

¹⁰¹ In actuality, general scarcity exists, meaning there are fewer resources whose abundance knows no bounds, than there are resources that are either owned, or restricted. *See* MUNZER, *supra* note 96, at 279. Exceptions to the rule of general scarcity exist of course. For example, air is unowned, although if one wants air for a particular purpose or of a special composition, it must be compressed and contained so that it can be sold and marketed. *Id.*; Fleck, *supra* note 9, at 1608-09.

¹⁰² When first- and second-order decisions are made separately, it:

allows for the more complex mixtures of allocation approaches which are brought to bear on the tragic choice, and it permits a society to cleave to a different mixture of values at each order. Indeed, when the first-order determination of a tragic choice appears to be no more than a dependent function of the second order, it will usually be the case that the connection is illusory, serving to obscure the fact of tragic scarcity and—while the illusion lasts—evading the tragic choice.

CALABRESI & BOBBITT, *supra* note 3, at 20.

¹⁰³ *See, e.g.*, ELSTER, SOLOMONIC, *supra* note 78, at 110-13, 121 (stating that a reduction in the ability to alter the lottery’s outcome through exercise of discretionary power, for example, is a fundamental reason for using lotteries); Vicki Been, *What’s Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1030 (1993) (stating that in an ex ante scheme a lottery procedure can ensure for each participant an equal chance at being chosen to bear a societal burden); ECKHOFF, *supra* note 79, at 305 (stating that some value randomness because it perpetuates the belief that randomness shields participants from bias); CALABRESI & BOBBITT, *supra* note 3, at 41-44.

¹⁰⁴ *Supra* Part II; *infra* Part III.B.

considered substantive criteria such as need,¹⁰⁵ fitness,¹⁰⁶ desert,¹⁰⁷ status,¹⁰⁸ and position¹⁰⁹ in conjunction with casting lots.¹¹⁰ Substantive criteria weight the lottery.¹¹¹ First, substantive criteria are used to define the pool of participants in the lottery; second and less frequently, these criteria are used to eliminate some of the randomly chosen participants and in this way the substantive criteria serve as a post-selection mechanism.¹¹² Despite the weighting effect, randomness does not generally guarantee that those most in need or best suited to take advantage of the object of the random allocation will actually prevail.¹¹³

First-order decisions weight lotteries by defining the scope of the lottery. The first-order decision to allow slavery in the American colonies had resounding legal and moral implications in *The Antelope* and led to other important first-order decisions including, among others, choices: (1) to conceptualize Africans as personal property subject to being sold, mortgaged, and/or leased;¹¹⁴ (2) to

¹⁰⁵ According to Torstein Eckhoff, the five most important individual characteristics relevant to decision-making are individual need, fitness, desert, status, and position. ECKHOFF, *supra* note 79, at 38. Need is used, in this sense as descriptive of what an individual wants or desires. Alternatively, it can be understood in a normative sense as indicative of what an individual honestly believes is required or believes would be in his or her best interest. *Id.*

¹⁰⁶ Fitness references an individual's ability to safeguard the benefits bestowed upon him or her, to withstand any burdens imposed, and to learn from any punishment or reward experiences. *Id.*

¹⁰⁷ The notion of desert includes the concept of retribution and duly earned rewards and punishment. *Id.*

¹⁰⁸ Status refers to an individual's inclusion in a socially recognized and relevant category. *Id.* The categories can either be ordered by rank such as adult/child or they can be ordered on the same level, such as male/female. *Id.*

¹⁰⁹ Position simply refers to a person's position on a waiting list. *Id.*

¹¹⁰ *Supra* Part II; *infra* Part III.B.

¹¹¹ ELSTER, SOLOMONIC, *supra* note 78, at 67.

¹¹² DUXBURY, *supra* note 79, at 18. Duxbury states that human judgment is necessarily a part of every lottery. "[P]eople decide where lotteries should be used, what forms those lotteries should take and who falls into the pool of eligible candidates." *Id.*

¹¹³ ECKHOFF, *supra* note 79, at 304.

¹¹⁴ GEORGE M. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 33-34, 39-41 (1968); see Thomas D. Morris, "Society is not marked by punctuality in the payment of debts": I *The Chattel Mortgages of Slaves*, in ARTICLES ON AMERICAN SLAVERY: LAW, THE CONSTITUTION AND SLAVERY 265 (Paul Finkelman ed., 1989). "[D]uring the establishment of slavery in the 1600s slaves were often defined as real property, not as chattels personal. This was true in Barbados, South Carolina, and in Virginia (which did not change the definition of slaves to chattels personal

restrict the liberties of Africans; (3) to later outlaw the international slave trade after January 1, 1808, while not outlawing domestic slavery and slave breeding as it already existed in the United States;¹¹⁵ (4) to legally recognize the property rights of Spain and Portugal which had not outlawed slavery nor the international slave trade;¹¹⁶ and (5) to return Africans imported into the United States in violation of the Act in Addition to Africa and colonize them.¹¹⁷

These choices represent first-order decisions because at each point the government, both state and federal, decided the degree to which it would recognize a property interest in the Africans.¹¹⁸ These pre-lottery choices established “the scope of the [African’s] entitlement to be free from injury,” which competed with the claimants’ right to not be divested wrongfully of their property.¹¹⁹

Justice Johnson’s opinion reveals several important second-order decisions, decisions about who will be benefitted or burdened, such as the decision to exclude women and girls from the lottery to determine the United States’ allocation.¹²⁰ Similarly, the decision to allow *all* of the men and boys to participate in the lottery was a

until the early 1790s.” *Id.* (citation omitted); see Arthur Howington, “A property of special and peculiar value”: *The Tennessee Supreme Court and the Law of Manumission*, in ARTICLES ON AMERICAN SLAVERY: LAW, THE CONSTITUTION AND SLAVERY 210 (Paul Finkelman ed., 1989).

[The Tennessee Supreme] Court singled out humanity as the characteristic that gave slave property a ‘peculiar nature and character.’ The slave’s humanity did not lessen his standing as property. Rather, the Court focused on humanity as the factor that conferred particular value on slave property. . . .

Humanity not only made slave property uniquely valuable, but, as Tennessee Supreme Court Justice John Catron put it, in slaves “the rights of humanity combined themselves with the rights of property.”

Id.

¹¹⁵ This decision, while a first-order decision, is simultaneously a second-order decision as well because it is a decision that Africans introduced into the United States after January 1, 1808 are ineligible to participate in the slave society.

¹¹⁶ *Supra* Part II.

¹¹⁷ *Supra* note 77 and accompanying text (discussing the actual fate of the *Antelope* Africans allocated to the United States); *supra* note 48 and accompanying text (discussing the hazards of colonization for Africans).

¹¹⁸ *Supra* Part III and accompanying text.

¹¹⁹ POSNER, *supra* note 3, at 325.

¹²⁰ *Supra* note 94 and accompanying text (defining second-order decisions). The evidence before the court was that only men and boys had been removed from the *Exchange*. NOONAN, *supra* note 20, at 66. Thus, Justice Johnson directed that only males were allowed to participate lottery.

second-order decision.¹²¹ Instead, the court could have required the claimants to produce evidence regarding the actual men and boys originating from the *Exchange*, and then allocate only these Africans to the United States. According to the lower court, only the Africans originating from the *Exchange* were entitled to be allocated to the United States, and they were all male.¹²² When the lower court decided to allow all men and boys to participate in the lottery to establish the United States' allocation, the court effectively created an opportunity to benefit some men and boys who, according to the binding law of the time, were not entitled to be benefitted because they did not originate from the *Exchange*.¹²³

Resorting to weighted lotteries, meaning casting lots after engaging in first- and second- order decisions, is a choice to diminish the randomness of the lottery's results and to do so in a way that permits government to avoid public accountability.¹²⁴ Attention is diverted away from the first- and second-order decisions and instead is placed on the actual mechanism for casting lots. *The Antelope* is a compelling example of the masking effect of casting lots and demonstrates how casting lots focuses attention away from government accountability for the pre-lottery choices that necessitated the casting of lots in the first instance.¹²⁵ The masking effect is not merely an historical consequence of casting lots. As revealed in Part V, the masking effect impacts contemporary lotteries and acts as a shield between government and its constituents.¹²⁶

One might inquire, assuming that casting lots predisposes decisions to some form of masking effect, what is the harm? Must government decisions be fully transparent in order to protect the public interest in the distribution of property entitlements and other governmental resources? My thesis is that casting lots frequently undermines government's ability to achieve distributive justice thereby resulting in unjust property allocations.¹²⁷ Weighted lotteries have the harmful

¹²¹ *Supra* Part II.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Supra* Part III; *infra* Part V (revealing the masking effect of casting lots).

¹²⁵ *Supra* Part III and accompanying notes and text.

¹²⁶ *Infra* Part V and accompanying notes and text.

¹²⁷ *Supra* Part I; *infra* Part IV.

effect of diverting public attention away from the pre-lottery choices that may be biased in ways that skew the distributional effect in a manner that makes attaining distributive justice difficult if not impossible.¹²⁸ Moreover, in order to reach just distributions of property, decision-makers must inquire into what allocation method would result in substantive and procedural fairness and equality for all of the participants.¹²⁹ The actual process of casting lots cannot inquire into fairness and equality concerns. Arguably, the randomness alone of the procedural process of casting lots is a guarantor of fairness and equality¹³⁰ but, as mentioned above, casting lots rarely is the sole mechanism for making decisions.¹³¹ It is typically preceded by the first- and second- order decisions that, by definition, keep it from being purely random.¹³² And, even if one were able to imagine a “pure” lottery, this form of lottery also highlights the governmental decisions creating scarcity and the need to make choices that are tragic for certain participants; further, pure lotteries, like weighted ones, do not account for individual characteristics, merit, or public desire.¹³³

Distributive justice concerns are intricately involved in the debate over casting lots. Understanding the interaction between casting lots and distributive justice helps focus attention on the truly central issues of why, in some instances, there are insufficient resources for everyone to have an adequate portion and what creates the need for

¹²⁸ *Id.*

¹²⁹ *Infra* Part IV.

¹³⁰ *E.g.*, ECKHOFF, *supra* note 79, at 305 (stating that the randomness of casting lots makes the process attractive to some because of the belief that the randomness protects participants from bias, implicitly making the lottery fair).

¹³¹ *Supra* Part III.A.

¹³² *Id.*

¹³³ CALABRESI & BOBBITT, *supra* 3, at 146.

tragic choices; are they inevitable or typically the result of poor governmental decision-making predating the tragic choice?

IV. ACHIEVING DISTRIBUTIVE JUSTICE

A. Distributive Justice and Property Law

Distributive justice is at the core of property law.¹³⁴ While a certain degree of inequality in property distribution is unavoidable, excessive inequality prevents the victims of distributive injustice from benefitting from the private property system in a meaningful way.¹³⁵

In fact, the values that justify recognition of private property in the first place also demand concern for distributive fairness and for a substantial level of equality.

¹³⁴ “[T]he degree of solution of the problem of distributive justice, or the equitable distribution of the rewards available in a society, is the most important determinant of individual satisfaction and effectiveness and of social peace.” George C. Homans, 27 AM. SOC. REV. 270 (1962) (reviewing ELLIOTT JAQUES, *EQUITABLE PAYMENT: A GENERAL THEORY OF WORK, DIFFERENTIAL PAYMENT, AND INDIVIDUAL PROGRESS* (1961)); ECKHOFF, *supra* note 79, at 205.

¹³⁵ JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 163 (2000).

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Property requires neither that we acquiesce in the inequality it creates, nor that we commit to realizing an impossible ideal of absolute equality, but a willingness to establish a base level of equality that gives every person the ability to enter the property system on terms that are fair and the means necessary to sustain a dignified human life.¹³⁶

Therefore, I use a distributive justice analysis to explore the propriety of casting lots to allocate property.

¹³⁶ *Id.* at 162.

Distributive justice is a difficult concept to define.¹³⁷ But, this difficulty does not preclude one from offering a workable definition, one that incorporates thoughts from noted scholars and philosophers, towards the end of encouraging an analysis of whether casting lots yields just property allocations. This article does not attempt to explore all of the many definitions and developments of distributive justice; rather, for purposes of the randomness discussion and analysis, distributive justice is concerned with how government articulates and implements just “principles for the evaluation of allocations of harms and benefits.”¹³⁸ It applies the theories of several scholars and philosophers and also explores distributive justice through vignettes or analogies when appropriate. Generally, distributive justice requires both fairness and the minimization of unjustified inequality; therefore, consideration of fairness and equality principles is important in ascertaining whether casting lots reliably produces distributively just allocations.¹³⁹ John Rawls articulates the following theory of justice:

first, each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and

¹³⁷ See, e.g., Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 897 (2002) (stating that justice has always been difficult to define). Scholars and writers have pondered the meaning of the “justice” for ages. I BRIAN BARRY, THEORIES OF JUSTICE: A TREATISE ON SOCIAL JUSTICE 3 (Brian Barry et al. eds., 1989). There emerge not one but many theories of justice and on varying levels. JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 19 (2001); Distributive justice, “justice in the distribution by the state of money, honors, . . . other things of value [, and burdens] . . . requires distribution according to merit.” POSNER, *supra* note 3, at 313.

¹³⁸ KAROL EDWARD SOLTAN, THE CAUSAL THEORY OF JUSTICE 13 (Brian Barry et al. eds., 1987). Justice at its core is concerned with inequality among people. BARRY, THEORIES, *supra* note 134, at 145-46, 354-57.

¹³⁹ Distributive justice requires both impartiality and minimization of unjustified inequality. E.g., Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7 (2003) (discussing regulatory takings and justice); GOODWIN, *supra* note 2, at 34 (discussing justice in the context of a procedural device for distributing benefits and burdens); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 144 (2000). “Decentralization promotes justice by recognizing the dignity and equality of each individual. It promotes the utilitarian goal of maximizing human satisfaction by creating the conditions necessary for economic efficiency and social welfare. These justice and utilitarian goals often go together.” *Id.*; John Stuart Mill, *Social Justice and Utility from Utilitarianism* (1861) in WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS 167 (Robert C. Solomon & Mark C. Murphy eds., 2d ed. 2000) (stating that justice requires impartiality).

second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all. These principles express justice as a complex of three ideas: liberty, equality, and reward for services contributing to the common good.¹⁴⁰

Rawls' idea of justice "conveys the idea that the principles of justice are agreed to in an initial situation that is fair."¹⁴¹ Rawls' conception of justice popularized the theory that the justness of a distribution may only be determined when decision-makers, responsible for allocating benefits and burdens, arrive at their decisions after operating behind a "veil of ignorance" in which there is no "vestige of bias, knowledge, or future prediction on the part of" the decision-makers.¹⁴² In their "original position" decision-makers are ignorant of their personal condition and circumstances and cannot predict how their various options will affect their particular situation.¹⁴³

Therefore, they must evaluate distributive principles based solely upon general considerations. The condition of the original position ensures that the persons subject to the decisions are treated as moral persons, both equally and fairly.

Fairness doctrines contemplate both substantive and procedural justice questions.¹⁴⁴ One definition of substantive justice is "the fair distribution of social costs and benefits."¹⁴⁵ Substantive justice

¹⁴⁰ JOHN RAWLS, COLLECTED PAPERS 47 (Samuel Freeman ed., 1999).

¹⁴¹ JOHN RAWLS, A THEORY OF JUSTICE 11 (rev. ed., 1999).

¹⁴² E-mail from Mark Drumbl, Assistant Professor, Washington and Lee University School of Law, to Blake Morant, Professor and Director, Frances Lewis Law Center, Washington and Lee University School of Law (Feb. 24, 2004, 11:07 EST) (on file with author); RAWLS, THEORY, *supra* note 138, at 17.

¹⁴³ Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT. L. REV. 291, 295 (2003); RAWLS, THEORY, *supra* note 138, at 17.

¹⁴⁴ ELSTER, SOLOMONIC, *supra* note 78, at 113; Been, *supra* note 102, at 1028-68 (discussing the various meanings of fairness as a theoretical basis for siting locally undesirable land uses). Rawls asserts that if one is to attempt to construct a theory of justice, one must first start with some intuition of what would be fair or just courses of action in certain given cases. RAWLS, THEORY, *supra* note 138, at 4; Erik Luna, Symposium, *The Model Penal Code Revisited: Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000).

¹⁴⁵ E.g., Luna, *supra* note 141, at 623; RAWLS, THEORY, *supra* note 138, at 50-52.

considerations are outcome oriented and require subjective decisions regarding what outcome, distribution, or allocation is best under the given circumstances. Determining whether substantive justice has been attained necessarily requires an inquiry into what constitutes fairness under a given set of circumstances.¹⁴⁶ For example, one theory of substantive fairness requires equal division.¹⁴⁷ The equal division concept has a strong and a weak version.¹⁴⁸ The strong version requires a proportional distribution of benefits; the weak version requires a proportional distribution of burdens.¹⁴⁹ John Stuart Mill offers a utilitarian perspective on substantive justice and stresses the impact of decisions on the common good as a measure of substantive justice.¹⁵⁰ According to Mill, personal happiness is a good to the individual and general happiness is a benefit to all persons.¹⁵¹ “To determine whether an action is just requires measuring any increase or decrease in the happiness of every individual affected by the action, and then to compute the net gain or loss in happiness caused by such action.”¹⁵²

¹⁴⁶ *Supra* notes 141-142 and accompanying text.

¹⁴⁷ Been, *supra* note 102, at 1028; Michael H. Shapiro, Symposium, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 780 (1994).

¹⁴⁸ Been, *supra* note 102, at 1029; see also ECKHOFF, *supra* note 79, at 37.

¹⁴⁹ Been, *supra* note 102, at 1029. “Because exemptions from social burdens are benefits, it follows that burdens such as [locally undesirable land uses] should be proportionally distributed.” *Id.* According to Professor Been, the lottery procedure is fair under the weak version because it creates an equality of opportunity whereby each potential recipient of a social burden has an equal opportunity of being selected to receive the burden. *Id.* “It is unnecessary to tackle the strong version of the theory . . . because if the burdens [in this context] are proportionally distributed, the concomitant benefit of being free of those burdens will necessarily be proportionally distributed.” *Id.* at 1030.

¹⁵⁰ JOHN STUART MILL, UTILITARIANISM 53 (2d ed. 2001) (“[T]he idea of justice supposes two things—a rule of conduct and a sentiment which sanctions the rule. The first must be supposed common to all mankind and intended for their good.”); Michael Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 800 (1985).

¹⁵¹ Rosenfeld, *supra* note 147, at 800 (quotation omitted).

The metaphor that perhaps best illustrates the process whereby a classical utilitarian would determine whether a particular action is just is that of the rational and impartial sympathetic spectator. The impartial spectator, unaffected by self-interest, examines the situation from the perspective of each affected individual. At the end of the process, the impartial spectator balances the nature and intensity of the satisfactions and dissatisfactions experienced by those affected and decides whether the action produced a net gain or loss of satisfaction.

Id. at 800-01.

¹⁵² Rosenfeld, *supra* note 147, at 800.

Procedural justice is often approached from one of two theories, although individuals have various conceptions of procedural justice.¹⁵³ Pure procedural justice focuses entirely on procedure; whatever the outcome of the procedure, it is, by definition, just.¹⁵⁴ Rawls' "original position" incorporates pure procedural justice principles.¹⁵⁵ The original position's outcome defines "the appropriate principles of justice. . . . The essential feature of pure procedural justice, as opposed to perfect procedural justice, is that there exists no independent criterion of justice; what is just is defined by the outcome of the procedure itself."¹⁵⁶

In contrast to pure procedural justice, perfect procedural justice requires "both a criterion of a just outcome and a fair procedure for

¹⁵³ BARRY, THEORIES, *supra* note 134, at 265-66 (discussing pure procedural justice); JUSTICE: VIEWS FROM THE SOCIAL SCIENCES 21 (Ronald L. Cohen ed., 1986) (discussing perfect procedural justice); *e.g.*, Been, *supra* note 102, at 1060-65. Been's theory of procedural fairness, requires both a procedure that lacks any intention to discriminate; in essence, the removal of self-interested individuals from positions of decision-making authority, and the treatment of all participants as equals. *Id.*; *see infra* JOHN REES, EQUALITY 96 (1971) (discussing different measures of equality, primarily numerical and proportional).

¹⁵⁴ BARRY, THEORIES, *supra* note 134, at 265-66. The demand for administration of the laws in a nondiscriminatory way is a demand:

that decisions should be made according to law: that only those features of the situation recognized by the law should enter into the determination of the case. . . . The second demand, that the laws themselves should be nondiscriminatory, is satisfied to the extent that the laws do not mandate or permit differential treatment of people who are in all other respects similar (according to the legally prescribed criteria of relevance) but differ in race, gender or some other characteristic, where that characteristic should not be regarded as relevant.

Id. A correct choice of the basic societal structure is essential to the development of a system of rights and duties that will give way to justice in the distribution of societal burdens and benefits. COHEN, JUSTICE, *supra* note 150, at 21-22.

The relation of just procedures to just outcomes varies with the limitations we meet. Sometimes it is possible to determine an independent standard for deciding what outcome is just and to devise a procedure for guaranteeing that outcome, but this is rare. More frequently we can do one or the other but not both. For instance, we may agree on what a just outcome would be but have no procedure that will guarantee that outcome. Or we may have no independent criterion of a just outcome, and yet we have a fair procedure that, when followed, gives a just outcome.

. . . .

And often we can reach no agreement on what would be a just outcome. In this case, we tend to rely on "pure procedural justice"—agreeing that whatever results from following a fair procedure will be fair.

Id.

¹⁵⁵ BARRY, THEORIES, *supra* note 134, at 266.

¹⁵⁶ *Id.* (citation omitted).

ensuring the outcome.”¹⁵⁷ An alternative but related definition of perfect procedural justice is “the choice of institutions to implement ‘an independent and already given criterion’ of what is just (or fair).”¹⁵⁸ Thus, perfect procedural justice has two important features. First, it must be possible to discern an independent criterion, defined independent of and prior to the followed procedure, for what constitutes a fair division.¹⁵⁹ Second, it must be possible to devise a procedure that is certain to produce the outcome that is desired.¹⁶⁰

Harrington’s Law is often cited as an example of a procedural mechanism that provides perfect procedural justice.¹⁶¹ The spirit of Harrington’s Law is that no division is just if, after the division, any one participant would prefer the portion allocated to another participant.¹⁶² Harrington’s Law can be summarized in the sentence, “I divide, you choose” and is more fully explained as follows: Two individuals are to divide a cake, the cake being symbolic of any particular good or bad. If we assume that the fair division is a division that results in an equal apportionment, what procedure will assure a fair outcome? Harrington’s Law provides an answer.

That each of them therefore may have that which is due, “Divide”, says one unto the other, “and I will choose; or let me divide, and you shall choose.” If this be but once agreed upon, it is enough; for the dividant [sic] dividing unequally loses, in regard that the other takes the better half; wherefore she divides equally, and so both have right.¹⁶³

Overlapping and even conflicting conceptions of distributive justice do not undermine the relevance of distributive justice theory to the important question in both *The Antelope* litigation and in the public

¹⁵⁷ COHEN, JUSTICE, *supra* note 150, at 21. When a procedure cannot be devised to ensure a just outcome, this is an instance of imperfect procedural justice. *Id.*

¹⁵⁸ BARRY, THEORIES, *supra* note 134, at 265-66.

¹⁵⁹ COHEN, JUSTICE, *supra* note 150, at 21.

¹⁶⁰ *Id.*

¹⁶¹ THE POLITICAL WORKS OF JAMES HARRINGTON 172 (J.G.A. Pocock ed., 1977); *e.g.*, COHEN, JUSTICE, *supra* note 150, at 21; GOODWIN, *supra* note 2, at 198.

¹⁶² POCOCK, POLITICAL WORKS, *supra* note 158, at 172; COHEN, JUSTICE, *supra* note 150, at 21.

¹⁶³ POCOCK, POLITICAL WORKS, *supra* note 158, at 172.

school desegregation context discussed in Part V—whether the casting of lots results in just property distributions.

Those who hold different conceptions of justice can . . . still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life. Men can agree to this description of just institutions since the notions of an arbitrary distinction and of a proper balance, which are included in the concept of justice, are left open for each to interpret according to the principles of justice that he accepts. These principles single out which similarities and differences among persons are relevant in determining rights and duties and they specify which division of advantages is appropriate.¹⁶⁴

B. *The Antelope and Distributive Justice*

By appearing to avoid conscious choice, casting lots pretends to treat all participants equally and, in fact, scholars contend that the equality of all participants is a precondition of any just lottery.¹⁶⁵ Relatedly, lottery advocates contend that the lottery is just and fair in part because of the impartiality resulting from its inherent randomness¹⁶⁶ and in part because of the original choice to voluntarily enter the lottery.¹⁶⁷ A “theory of fairness as process would assert that a

¹⁶⁴ RAWLS, THEORY, *supra* note 138, at 5.

¹⁶⁵ Been, *supra* note 102, at 1029; see REES, *supra* note 150, at 92 (defining equality); see GOODWIN, *supra* note 2, at 29-30 (suggesting randomness can lead to the reduction of unjustifiable inequality by its equalizing effect on long term outcomes). The dominant feature of randomization is that no characteristic of the individual affects the result of the draw. DOUGLAS RAE, EQUALITIES 66 (1981). “Randomness epitomizes a conception of egalitarianism that treats everyone alike. As such, it clashes with other conceptions, like ‘to each according to his need,’ which require differentiation.” CALABRESI & BOBBITT, *supra* note 3, at 42.

¹⁶⁶ *Infra* notes 254-255 and accompanying text (discussing the removal of self-interested decision-makers from the lottery process).

¹⁶⁷ GOODWIN, *supra* note 2, at 34, 44. Goodwin does acknowledge that through ignorance, bad judgement, or other factors, individuals sometimes voluntarily submit themselves to procedures and situations that are unjust; however, in the context of distributive lotteries, she argues that “their impartiality and foundational assumption of equality make them fair in the process and just in the outcome unless more compelling reasons can be advanced for non-random distribution.” *Id.*; see also JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT

distribution is fair as long as it results from a process that was agreed upon in advance by all those potentially affected.”¹⁶⁸ If casting lots cannot result in distributive justice without the voluntary and informed consent of all participants, one must carefully define lottery “participants” in each casting of lots.¹⁶⁹

In *The Antelope*, if the Africans are the lottery participants, certainly they were not voluntary participants.¹⁷⁰ The lower court recommended the lottery and then selected the eligible participants both for the lottery between Spain and Portugal and for the lottery to establish the United States’ allocation.¹⁷¹ Thus, a fundamental component of a just lottery is absent in *The Antelope*.¹⁷² A tragic choice is made from the participants’ perspective, the consequences of winning and losing are dire, but the participants are not the ones choosing, nor are they allowed to opt out of the random process. Alternatively, if one defines the owners represented by Spain and Portugal as the lottery participants as well as the United States, arguably only the United States is a voluntary participant; Spain and Portugal are involuntary participants. Spain and Portugal are part of the lottery because the *Dallas* captured the *Antelope* at sea and brought the *Antelope*, along with its contents, before the courts in Georgia for the purpose of adjudicating the rights of the relevant claimants to the *Antelope* and its property.¹⁷³ Essentially, Spain and Portugal had no viable alternative to casting lots other than to abandon any property claim on behalf of their citizens. According to this view, the Africans, treated as property, were not entitled to

10, 13 (Charles Frankel ed., Hafner Publishing Co. 1966) (1948) (criticizing the idea of the ability to voluntary consent to certain types of burdensome relationships, specifically, slavery).

¹⁶⁸ Been, *supra* note 102, at 160; *supra* Part IV.A (discussing procedural fairness).

¹⁶⁹ *Supra* note 122 and accompanying text; *see also* GOODWIN, *supra* note 2, at 34 (acknowledging the presence of voluntary consent does not necessarily mean that a process is just as people sometimes feel compelled by circumstances to consent to unjust processes).

¹⁷⁰ The Africans could be considered participants in the same manner that the Spanish and Portuguese owners might be considered participants. *See infra* pages 43-44 (discussing the Spanish and Portuguese owners as lottery participants). Consider the United States government as representing the Africans and asserting their claims of self-ownership just as Spain and Portugal represented their citizens’ claims.

¹⁷¹ *Supra* note 59 and accompanying text.

¹⁷² *Supra* notes 129, 136-137 and accompanying text (discussing equality as a component of a just lottery); *supra* notes 165-166 and accompanying text (stating that voluntariness of lottery participation is necessary for the lottery process to be fair).

¹⁷³ *Supra* Part II and accompanying text.

choose whether or not to participate. The Africans were the lottery res, analogous to the monetary prize which is the res in most modern-day lotteries.

Spain's and Portugal's involuntary participation in the lottery deprives the lottery of its justness and fairness.¹⁷⁴ The same arguments that apply in the case of the *Antelope* Africans as involuntary participants apply to Spain and Portugal.¹⁷⁵ The Spanish and Portuguese owners are burdened by the lottery as a result of their involuntary participation. The following is just one example of the burden placed upon Spain and Portugal. To the extent some of the *Antelope* Africans were healthier, stronger, and generally more fit than others, these Africans would be commercially more valuable than their peers. Casting lots subjected Spanish and Portuguese owners to being randomly allocated a disproportionate number of the sickly and weak, less commercially valuable, Africans.

Treating the *Antelope* Africans as nonparticipants also raises distributive justice concerns under Rawls' "veil of ignorance" theory.¹⁷⁶ Certainly, the Spanish and Portuguese owners would not have voluntarily subjected themselves to the casting of lots if there was a chance that they could personally be selected to bear the burden of enslavement. These owners, by means of casting lots, shielded themselves from the burden of being a lottery loser, defined as one who has to remain enslaved, and they also potentially benefitted from Africans being selected as losers because, of course, these individuals would be recognized as their property. The lower court focused on the fairness of casting lots from Spain's, Portugal's, and the United States' perspectives and ignored the distributive justice question from the *Antelope* Africans' perspective—was the actual decision to choose by casting lots fair?¹⁷⁷

Treating the Africans as nonparticipants would also make casting lots substantively and procedurally unfair in the following way. One theory is that substantive fairness requires either proportional

¹⁷⁴ *Supra* note 169 and accompanying text.

¹⁷⁵ *Supra* notes 167-169 and accompanying text.

¹⁷⁶ *Supra* Part IV.A.

¹⁷⁷ Casting lots raises at least two fairness questions: (1) when is the actual casting of lots fair, and (2) when is it fair to choose to cast lots to make allocations? ELSTER, SOLOMONIC, *supra* note 78, at 113 n.250.

distribution of benefits (the strong version) or proportional distribution of burdens (the weak version).¹⁷⁸ According to some, procedural fairness requires a nondiscriminatory procedure and equal treatment of participants.¹⁷⁹ *The Antelope* demonstrates the lottery's general inability to account for these definitions of substantive and procedural fairness.

The lower court failed to treat all participants, defined as all Africans on board the *Antelope*, equally. The court would have excluded *all* women and girls from the proposed lottery to determine the United States' allocation because the evidence revealed that only men and boys were removed from the *Exchange*, but it would have included *all* men and boys when only a small portion of the males on the *Antelope* originated from the *Exchange*.¹⁸⁰ Thus, women and girls would have borne a disproportionate amount of the burden under the proposed lottery. Some men and boys would have been disproportionately benefitted by being eligible to participate in the lottery to decide the United States' allocation even though they did not originate from the *Exchange*.¹⁸¹ Ultimately, the United States Supreme Court rejected the lottery, thus allowing some women and girls to be allocated to the United States.¹⁸² Any women and girls in whom the Spanish claimants could not establish a property interest by sufficient proof would necessarily be delivered to the United States.¹⁸³

One could argue that the exclusion of women and girls from the lottery to decide the United States' allotment was the result of a neutral rule that said, where there is conclusive evidence that an African did not originate from the *Exchange*, that African shall not be allowed to participate in the lottery to determine the United States' allocation. This view also fails to achieve substantive

¹⁷⁸ *Supra* Part IV.A.

¹⁷⁹ *Id.*

¹⁸⁰ *Supra* Part II.

¹⁸¹ The corollary is that men and boys originating from the *Exchange*, but not selected, would be unfairly burdened. *Cf.* HOBSON, PAPERS, *supra* note 66, at 157 (stating that at least one African "who had been certified free by the lottery employed in the original circuit court decree" was identified by sufficient proof by the Spanish claimant and turned over). *Id.* (citation omitted).

¹⁸² *Supra* Part II.

¹⁸³ *Id.*

fairness.¹⁸⁴ Not all men and boys on the *Antelope* originated from the *Exchange*; some had been transported from Spanish and Portuguese ships.¹⁸⁵ Nevertheless, the lower court would have permitted all men and boys to participate in the lottery to determine the United States' allocation even given the same lack of evidence of origin as existed with regard to women and girls.¹⁸⁶

Procedural fairness may require proportional equality so that when relevant factors are taken into account, such as need, fitness, desert, status, and position, the formal method of the allocation is identical.¹⁸⁷ Thus, “[e]quality demands, not just permits, not only that those similarly situated be treated similarly, but that those dissimilarly situated be treated dissimilarly.”¹⁸⁸ Again, *The Antelope* demonstrates the inequality inherent in casting lots. For example, the lower court, by suggesting that all of the men and boys on board the *Antelope* should be eligible lottery participants, did not attempt to determine which individual men and boys actually originated from the *Exchange*, and were, therefore, more “deserving” based upon their “status.”¹⁸⁹ As a result, African males originating from the *Exchange* were in jeopardy of not being selected in the lottery to determine the United States' allocation and could have lost their “entitlement” to be selected to males originating from either Spanish or Portuguese ships.

¹⁸⁴ Been, *supra* note 102, at 1029.

¹⁸⁵ *Supra* Part II.A.

¹⁸⁶ *Supra* Part II.

¹⁸⁷ REES, *supra* note 150, at 92 (stating that “proportional equality has regard to the relative merits of the persons concerned” in contrast, numerical equality requires everyone to receive identical treatment regardless of individual and circumstantial differences); see also Jon Elster, *Some Unresolved Problems in the Theory of Rational Behavior*, 36 ACTA SOCIOLOGICA 179, 181 (1993). To the extent inequality exists, the primary issue is whether the inequality between and among people in terms of their relations is defensible. *Id.*; RAWLS, COLLECTED PAPERS, *supra* note 137, at 47.

¹⁸⁸ Michael H. Shapiro, Symposium, *Thinking About Biomedical Advances: The Role of Ethics & Law: On the Possibility of “Progress” in Managing Biomedical Technologies: Markets, Lotteries, and Rational Moral Standards in Organ Transplantation*, 31 CAP. U. L. REV. 13, 50 (2003); Shapiro, *Regulation as Language*, *supra* note 144, at 781 (discussing components of fungibility that enhance fairness, equality and personal autonomy); Eckhoff, *supra* note 79, at 31-32 (discussing absolute and relative equality); Elster, *Unresolved Problems*, *supra* note 183, at 181.

¹⁸⁹ *Supra* Part II; *supra* notes 106-107 and accompanying text (defining desert and status).

Equality theory requires attention to the equality among advantaged groups but also to equality between advantaged groups and disadvantaged groups.¹⁹⁰ *The Antelope* court elevated the claimants' property interests, the advantaged group, above the liberty interests of the Africans, the disadvantaged group, which fundamentally undermined the equality necessary for the lottery mechanism to result in distributive justice.¹⁹¹ The advantaged group benefitted from opting out of the lottery and the attendant burdens imposed on the losers and the disadvantaged group was forced into the lottery. The challenge of distributive justice is one of assigning rights under a general system of predictable and reliable rules.¹⁹² In the law, participants in the legal process value reasoned and responsible decision-making. Responsible decision-making, or taking responsibility, has two dimensions—forward backward-looking.¹⁹³ The forward-looking dimension implicates the qualities of “acceptance, commitment, care, and concern” while the backward-looking orientation emphasizes reward and punishment, blame, praise, mitigation, and excuses.¹⁹⁴ For purposes of this article, accountable and responsible decision-making is both forward-looking and backward-looking, requiring: (1) the exercise of good

¹⁹⁰ *Supra* notes 129, 136, 137 and accompanying text (discussing nondiscriminatory laws and nondiscriminatory procedures as elements of equality theory and stating that equality requires decision-makers to be just as attentive to the needs of the advantaged as to the needs of those who are disadvantaged); *see supra* notes 169-171 and accompanying text (discussing an alternative view of Spanish and Portuguese owners and the United States as the relevant participants).

¹⁹¹ *Supra* notes 129, 136-137, 169-171.

¹⁹² *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1221-22 (1967). Professor Michelman discusses the value of predictability and consistency in the context of taking jurisprudence and compensation decisions. He notes that citizens will only view disadvantageous government treatment as fair if they can perceive the particular decision as evidence of an overall general practice that is consistently applied. *Id.* Thus, predictability of rules and practices is fundamental to a just distributive system. “More fully, if law and government act effectively to keep markets competitive, resources fully employed, property and wealth widely distributed over time, and to maintain the appropriate societal minimum, then if there is equality of opportunity underwritten by education for all, the resulting distribution will be just.” RAWLS, COLLECTED PAPERS, *supra* note 137, at 140. Equality of opportunity in this context refers not to an equal random chance at receiving a benefit or of being passed over for a burden; instead, it refers to equality of rights and of access to legal and societal processes and institutions. *Id.* at 161 (stating that those similarly situated in terms of ability and motivation should have similar prospects for success).

¹⁹³ CLAUDIA CARD, *THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK* 25 (1996).

¹⁹⁴ *Id.*

judgment, (2) the giving of due consideration based upon the matter in question, and (3) an emphasis on attaining justice.¹⁹⁵

The concept of taking responsibility manifests itself in numerous ways.¹⁹⁶ First, taking responsibility may implicate the administrative, also known as the managerial, sense which involves organizing and sizing up possibilities in a comprehensive way.¹⁹⁷ Second, taking responsibility may be viewed from the care-taking perspective in which an individual or entity is dedicated to supporting and following through with an agenda.¹⁹⁸ Third, taking responsibility may also implicate a sense of accountability – agreeing to be liable or answerable for something.¹⁹⁹ Finally, taking responsibility can refer to “the credit sense of responsibility – owning up to having been the (morally) relevant cause of something’s happening or not happening, taking the credit (or blame) for it.”²⁰⁰ The first three perspectives are all forward-looking and require the responsible party to consciously undertake a task and then follow-through. This is the anthesis of randomness and casting lots. The very nature of randomness is that it inserts chance as a decision-maker as a substitute for taking the initiative to engage in an undertaking and to follow through with that undertaking. Likewise, the backward-looking credit sense of responsibility is inapposite to randomness. It requires initiative just as the forward-looking dimensions do.

Decision-makers “are more responsible when they take responsibility in a sense that shows initiative than when they do not.”²⁰¹ I do concede that there may be limited circumstances in which the lottery and randomness may be an acceptable way to allocate the burdens and benefits of scarce resources.²⁰² Examples of such situations

¹⁹⁵ *Id.* at 27.

¹⁹⁶ *Id.* at 28.

¹⁹⁷ *Id.* The administrative or managerial perspective is forward-looking.

¹⁹⁸ *Id.* The care-taking sense of responsibility is a forward-looking perspective.

¹⁹⁹ *Id.* The accountability sense of responsibility is a forward-looking perspective.

²⁰⁰ *Id.* at 28. The credit sense of responsibility is a backward-looking perspective.

²⁰¹ *Id.* at 28-29.

²⁰² *Supra* Parts III-V and accompanying notes and text; *but cf.* Pauline T. Kim, *The Colorblind Lottery*, 72 *FORDHAM L. REV.* 9 (2003). “In certain circumstances, an unbiased lottery may well be a sensible way of allocating unavoidable burdens or of distributing scarce resources.” *Id.* at 12. The difficulty this article expresses is that it is nearly

would be instances in which there are no merit-based or other compelling reasons to prefer certain persons or groups when allocating scarce resources or entitlements.²⁰³ Because of the rarity of such situations, randomness generally fails to promote the accountable and responsible decision-making upon which the American legal system has grown to rely.

Neil Duxbury acknowledges that lotteries may seem rational, impartial, and cost efficient.²⁰⁴ However, he also acknowledges a tendency to be dissatisfied in the legal arena with decisions reached by casting lots:

The process of legal decision-making is generally, if often only implicitly, considered to be more important than the quality of decision reached; and so a highly contentious legal decision furnished with reasons is likely to meet with greater approval than would a genuinely impartial (and, in consequentialist terms, welcome) decision arrived at by lot. . . .

. . . . [W]hat we seek, particularly in legal decision-making, is not right answers but attributable answers—answers for which somebody can be held responsible or accountable. More than this, we commonly want legal answers which are serious as well as attributable—answers, that is, which are furnished with reasons as opposed to being based on instinct or caprice or some other emotional response.²⁰⁵

Citizens want to be confident in the legal system's decisions. They also want to be certain that reasoned, foundational principles underlie

impossible to construct a truly "unbiased" lottery.

²⁰³ See *supra* note 14 and accompanying text (discussing *Parents Involved in Community Schools v. Seattle School District, No. 1*). Seattle School District may be used to support an argument that lotteries may be appropriate in the limited circumstances.

²⁰⁴ DUXBURY, *supra* note 79, at 14.

Aversion to decision-making by lot is, I believe, indicative of a distinct attraction, possibly even an addiction, to reason. It is possible to envisage instances in which resort to lot will produce decisions that are impartial and extremely cost-efficient and in which, moreover, reasoning one's way to a decision will most likely take considerable time and expose one to the accusation of partiality. Yet, even in these cases, there rarely exists any inclination to decide by resort to sortition.

²⁰⁵ *Id.*

the legal system.²⁰⁶ Lotteries, by their nature, are fundamentally unreasoned and unexplained because of their randomness.²⁰⁷ Therefore, their use to make decisions with legal consequences offends generally recognized notions of distributive justice.²⁰⁸ Ultimately, the United States Supreme Court rejected the lottery and placed the burden on the party who would deny the Africans their freedom, the Spanish claimants, to designate by proof the specific Africans to whom they were entitled.²⁰⁹ Essentially, the Court adopted Francis Scott Key's argument that proof by random allocation in the form of casting lots was an unsatisfactory allocative mechanism.²¹⁰ The Supreme Court demonstrated that the assignment of rights and burdens based upon chance is an anomaly in a legal system premised on the notion of rights and relief correlated to individualized factors and a belief in distributive justice.²¹¹

V. CONTEMPORARY EXAMPLES OF CASTING LOTS: THE MASKING FUNCTION AND THE DECEPTIVENESS OF THE NOTION OF JUSTICE BY LOTTERY

Scholars and lawyers have laid a foundation for a property interest in a minimal level of education.²¹² Thus, it is timely to discuss the role

²⁰⁶ *Id.* at 144.

²⁰⁷ *Supra* Parts II and III; Elster, *Unresolved Problems*, *supra* note 183, at 183.

Human beings do not simply have material and emotional needs. They also have, for whatever evolutionary reasons, intellectual needs. One such need is the need to find meaning and patterns in the events we observe. This need is satisfied by genuinely scientific theories, but also by pseudoscientific views of all sorts. . . . Another is the need to have and be able to cite reasons for our actions and decisions. Sometimes we know that we could find the decision that would have been optimal if found costlessly and instantaneously. By investing more time, effort and money we may be able to rank the options. We may also know, or be in a position to know that the benefits from finding out are small compared to these costs. Yet because of what one might call *an addition to reason* we do not use a lottery but go on looking for reasons, until eventually we find one.

Id.

²⁰⁸ *Supra* Part IV; Elster, *Unresolved Problems*, *supra* note 183, at 183.

²⁰⁹ *The Antelope*, 23 U.S. 66 at 130.

²¹⁰ *Id.* at 131-32; NOONAN, *supra* note 20, at 97-98.

²¹¹ POSNER, *supra* note 3, at 313. Posner disavows the notion that distributive justice can be achieved by lottery; rather, according to Posner, achieving distributive justice requires distribution based upon merit. *Id.*

²¹² *See, e.g.*, Reich, *supra* note 1, at 771.

Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle,

of casting lots as a means of securing distributive justice in the public school education context. Achieving distributive justice in public school education requires attention to myriad issues.²¹³ For example, initial education reform litigation focused on eliminating dual education systems based upon race²¹⁴ and the inherent inequalities in

the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.

Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.

Id. In this same vein, Professor Reich lays the foundation for an argument in support of a property interest in an adequate public education. *Id.* at 737. William P. Quigley, *Due Process Rights of Grade School Students Subjected to High-Stakes Testing*, 10 B.U. PUB. INT. L.J. 284, 295 (2001).

Appellate courts in the First, Second, Third, Fifth, Sixth, Eighth and Tenth Circuits, along with other district courts, have all proceeded under the assumption that students possess protected due process property rights in academic issues. These courts have found property interests in academic matters based in interpretations of state law or based on implied mutual understandings on behalf of the educational institution and the student.

Id.; Paul T. O'Neill, *HIGH STAKES TESTING LAW AND LITIGATION*, 2003 BYU EDUC. & L.J. 623, 636.

Denial by the government of a benefit to which a person has a legitimate claim of entitlement encroaches on a property interest and therefore requires procedural due process. This right is just as applicable in a school setting as elsewhere: "Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause. . . ."

Id.; Martha I. Morgan et al., *Establishing Education Program Inadequacy: The Alabama Example*, 28 U. MICH. J.L. REFORM 559, 567 (1995) (discussing a right to an adequate education as a guarantee of the Alabama Constitution as well as of the Federal Constitution).

²¹³ *E.g.*, Morgan et al., *supra* note 197, at 567; Stewart G. Pollock, *Address: School Finance in the Courts*, 1998 ANN. SURV. AM. L. 133, 138 (1998) (discussing equality theory and adequacy theory approaches to public education justice concerns); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (discussing an equality theory approach by successfully challenging the doctrine of separate but equal public educations for minority and nonminority students); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (discussing attempts to ameliorate the effects of racial discrimination in hiring teachers such as the negative impact on students of lacking minority role models).

²¹⁴ *See* JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 164 (2000) (stating generally that the status quo results in part from past discrimination). Singer suggests that the legal system should not defer to systems, preferences, and divisions of wealth and entitlements predicated on racial discrimination; rather, the legal system should be committed to changing such biased systems toward the end of becoming more just. *Id.* Change, lasting change, reflects the exercise of sound and unbiased judgment, not arbitrariness. *See, id.* at 165 (analogizing the toss of a coin to arbitrary decision-making as contrasted with the exercise of judgment).

educational opportunities that attended the dual system.²¹⁵ Later, education initiatives focused on equality (also referred to as equity) and adequacy approaches to distributive justice.²¹⁶ Under a purely formal equality theory, a school system may be found legally sufficient under a distributive justice analysis if available educational resources are equitably distributed among all students, even if the quality of the education each receives is objectively poor.²¹⁷ When people demand equal or equitable treatment under the law they desire two things: “that the laws should be administered in a non-discriminatory way and that the laws themselves should be non-discriminatory.”²¹⁸

²¹⁵ *E.g.*, Morgan et al., *supra* note 197, at 559; *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *e.g.*, Segregated schools result from many forms of de jure and de facto discrimination. For example, blacks have historically been limited in their ability to gain access to the better neighborhoods in which the better public schools are located. “The spatial isolation of black Americans was achieved by a conjunction of racist attitudes, private behaviors, and institutional practices. . . . Discrimination in employment exacerbated black poverty and limited the economic potential for integration, and black residential mobility was systematically blocked by pervasive discrimination and white avoidance of neighborhoods containing blacks.” DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 83 (1993).

²¹⁶ *Supra* notes 144-146 and accompanying text (discussing equal division as intricate to the distributive justice analysis); *e.g.*, Morgan et al., *supra* note 197, at 560; Pollock, *supra* note 198, at 138.

²¹⁷ *E.g.*, Morgan et al., *supra* note 197, at 560; *supra* notes 198-200 and accompanying text (discussing equity theory); *cf.* Been, *supra* note 102, at 1064-65 (“[I]f a siting process is more attentive to the interests of wealthier or white neighborhoods than to the interests of poor or minority neighborhoods, that process illegitimately treats the poor and people of color as unequal.”); RAWLS, *COLLECTED PAPERS*, *supra* note 137, at 165.

[T]he principle of redress holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality. In pursuit of this principle greater resources might be spent on the education of the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school.

Id.

²¹⁸ II BRIAN BARRY, *JUSTICE AS IMPARTIALITY: A TREATISE ON SOCIAL JUSTICE* 227 (1995). The ideal lottery is accordingly characterized by an impartial procedure and, simultaneously, the unequal treatment, measured by outcome, of the individual participants. GOODWIN, *supra* note 2, at 103; RAE, *supra* note 162, at 83. Professor Rae describes distribution by lot as one method of attaining equality of opportunity. One of the salient characteristics of his construct of equality of opportunity is that the results of the outcome are unaffected by the characteristics or qualities of the participants. RAE, *id.* at 83-91; GOODWIN, *supra* note 2, at 198. To the extent inequality exists, the primary issue is whether the inequality between and among people in terms of their relations is defensible. Elster,

In comparison to a purely formal equality theory, adequacy theory inquires not only into the level of education students receive relative to other students but, equally as important, adequacy theory holds that all students are entitled to, in absolute terms, a minimal level of education sufficient to prepare them to pursue post-secondary educational opportunities or to directly enter the workforce and contribute meaningfully to society.²¹⁹ Adequacy and equality theories should be considered jointly when addressing distributive justice in public education.²²⁰

This Part inquires into distributive justice and the illusion of justice in the allocation of public education opportunities primarily by considering *Belk v. Charlotte-Mecklenburg Board of Education*,²²¹ a recent Fourth Circuit case in which the court considered the propriety of using a weighted lottery to integrate the public schools. While there are innumerable public education litigation cases,²²² *Belk* is particularly compelling because of the significant role of the lottery in achieving and maintaining a just educational system.

Beginning in 1971, the Charlotte-Mecklenburg Schools (“CMS”) functioned under a desegregation plan that was supervised and monitored by the federal courts.²²³ For almost twenty years, CMS maintained racial balance in its public schools; however, demographic changes and population growth threatened that balance.²²⁴ In response, CMS decided to implement a program based upon volunteerism, a magnet school program, “because CMS ‘wanted to attract more white youngsters into the inner city schools’

Unresolved Problems, *supra* note 183, at 181.

²¹⁹ Morgan et al., *supra* note 197, at 560; Pollock, *supra* note 198, at 138; Robert M. Jensen, *Advancing Education through Education Clauses in State Constitutions*, 1997 BYU EDUC. & L.J. 1 (discussing various cases and litigation approaches relying on equality and/or adequacy rationales and arguing that education litigation is most successful when plaintiffs rely on the education clauses of state constitutions to specifically allege that the quality of public education is both inadequate and of poor quality); *cf. supra* note 87 and accompanying text (citing Calabresi and Bobbitt and their criticism of pure lotteries as emphasizing governments inability of unwillingness to create an absolute right to adequate resources; BARRY, THEORIES, *supra* note 134, at 356 (“[W]hen we look at educational institutions from the point of view of justice, what we will tend to focus on is the role that they play in the transmission of occupational positions from generation to generation.”)).

²²⁰ Morgan et al., *supra* note 197, at 560.

²²¹ 269 F.3d 305 (4th Cir. 2001), *cert. denied*, 2002 Lexis 2367 (2002).

²²² Quigley, *supra* note 197, at 295.

²²³ *Belk*, 269 F.3d at 311.

²²⁴ *Id.* at 336.

in order to meet CMS' racial-balance goals."²²⁵ CMS sought a forty percent black, sixty percent white ratio under the magnet school program with an acceptable deviation being plus or minus fifteen percent.²²⁶ To achieve these goals, CMS' admissions process required that CMS first fill seats by granting preferences to students living in close geographic proximity to the school and to those with a sibling already attending the particular magnet school.²²⁷ Next, CMS would "fill[] the remaining seats by selecting students from a black lottery and a nonblack lottery until the precise racial balance [was] achieved."²²⁸ If sufficient numbers of white or black students did not apply and therefore did not fill the seats allotted to their respective racial group, the seats remained vacant.²²⁹ A white student challenged CMS' magnet school admissions policy. The district court found that CMS' race-conscious magnet school admissions program violated the Equal Protection Clause because the program "was not narrowly tailored to achieve the compelling state interest of remedying past discrimination."²³⁰ The Fourth Circuit Court of Appeals reversed the district court's decision.²³¹ The court of appeals acknowledged that CMS had

²²⁵ *Id.* (citation omitted).

²²⁶ *Id.* at 337.

²²⁷ *Id.* One of the vulnerabilities of weighted lotteries is that the factors used to weight the lotteries do not necessarily reflect relevant, substantive criteria. *Supra* notes 104-108; *infra* note 249 and accompanying text (discussing desert, need, position, fitness, and productivity as relevant, substantive criteria); *infra* Part IV and accompanying text (discussing the elusive benefits of the lottery taking account of the impact of weighting).

²²⁸ *Belk*, 269 F.3d at 337 (citation omitted).

²²⁹ *Id.* "Though some exceptions were made, Superintendent Eric Smith testified that CMS generally adhered to the policy." *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 370.

At the outset, we note that it is undisputed that this expanded magnet schools program differs in critical respects from all race-based student assignment plans that have been held to be in conflict with the Equal Protection Clause. Unlike school districts found to have violated the Constitution, CMS adopted the challenged program while operating a dual, segregated school system, under a myriad of court orders commanding the Board to eliminate the unlawful segregation.

.....

In concluding that the expanded magnet schools program violated the Constitution, the district court committed two fatal errors. Initially, it ignored the extent of the protection afforded an entity governed by federal court orders. Then, the district court refused to recognize the broad directives and expansive terms of the controlling court orders, and so failed to appreciate that the Board expanded its magnet schools program in good faith to

achieved an integrated, unitary school system, in contrast to the historically segregated school system it once operated.²³² But the court of appeals also found that, prior to the district court's decision, no court had determined that CMS had achieved unitary status.²³³ Thus, at the time CMS implemented its magnet school admissions program, CMS' status was "as a dual school district under multiple court orders to desegregate its schools."²³⁴ The court of appeals stated the following regarding CMS' obligations and duties given its status:

A person or entity subject to a judicial decree or injunction (as CMS indisputably was when operating its dual, segregated school system) must comply with that decree or injunction, notwithstanding its possible unlawfulness. Thus, the Supreme Court has clearly and unequivocally directed that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order."²³⁵

The court of appeals concluded by finding that CMS was authorized to use ratios in making student assignments and that it was also empowered to use "race-conscious assignment policies for 'appropriately integrated optional schools.'"²³⁶

comply with these orders, and thus cannot be held to have violated the Constitution. The dissent replicates both errors.

Id. at 397, 399.

²³² *Id.* at 398-99.

²³³ *Belk*, 269 F.3d at 398-99.

²³⁴ *Id.* at 398.

²³⁵ *Id.* at 398-99. "Moreover, a court order need not mandate specific or precise procedures to compel obedience." *Id.* at 399.

²³⁶ *Id.* at 402; The administrators in *Belk* weighted the lottery to provide a geographic preference and a sibling preference. *Id.* at 337. Although not present in *Belk*, courts of appeal such as the Ninth Circuit in *Scott v. Pasadena Unified School District* have recently considered weighted admissions lotteries in which the weighting criteria accounted for factors such as "gender, race, or ethnicity, socioeconomic status, language and special educational needs." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002). The Pasadena Unified School District Board of Education approved an "Integration Policy and Quality Schooling Plan." *Id.* at 649. The policy allowed the Board to use a lottery system to assign students to voluntary schools. The Board only used the lottery if a school had fewer available spaces than applications. *Id.* The court reversed the district court granting the plaintiffs summary judgment and dismissed all plaintiffs claims for failure to establish Article III jurisdiction.

Even assuming the appropriateness of the first-order decisions leading to segregated and inadequate schools, the second-order criteria used to weight the lottery should be scrutinized to determine their efficiency²³⁷ and justness in combination with the lottery method.²³⁸ The preferences discussed in *Belk* as weighting factors—geographic, sibling, and racial preferences—may be incorrect criteria for privileging students, or even when correct, these criteria could be applied inappropriately in the lottery context and could result in an irrational allocative decision.²³⁹ Other criteria with a history of use in weighting public education lotteries include, in addition to the ones used in *Belk*, gender, ethnicity, socioeconomic status, and language.²⁴⁰ The harm of the masking effect of casting lots is that, without transparent and responsible decision-making, the weighting criteria could, in a deceptively innocuous manner, privilege information flow or other factors and de-emphasize the importance of the child in the selection process. Attention would be deflected away from important concerns such as whether the particular school is an appropriate fit for the individual child or whether an appropriate

²³⁷ See DAVID W. BARNES & LYNN A. STOUT, *CASES AND MATERIALS ON LAW AND ECONOMICS* 4 (1992). “Allocative efficiency means using scarce resources to the greatest possible advantage Whether a particular use is efficient will depend, by definition, on what exactly one wants to gain or accomplish.” *Id.* at 6.

Focusing on efficiency rather than fairness does not make economics a neutral and unbiased exercise. Directing resources to their most valuable uses and measuring value according to willingness and ability to pay biases allocations towards those with the greatest ability to pay. Among individuals with equally strong desires to own a certain house, the individual with the greater willingness and ability to express that desire by giving up money or other resources is judged the highest valuing user; allocating the resource to his use is, by definition, allocatively efficient. Because efficiency analysis proceeds from a preexisting set of endowments of wealth, it does not question whether the initial distribution of “abilities to pay” is proper.

Id. at 1.

²³⁸ *Infra* notes 223-229 and accompanying text. *But see* Hapgood, *supra* note 2 (discussing the benefits of lotteries in the educational context).

²³⁹ See Shapiro, *Biomedical Advances*, *supra* note 184, at 47. “A nonrational decision could be either choosing incorrect criteria for distinguishing persons; applying the criteria incorrectly (*e.g.*, using the wrong test instrument to measure differential abilities); or more controversially; abandoning differential criteria altogether, leaving persons ‘fungible’ for the purposes at hand.” *Id.*; see *Gutter v. Bollinger*, 123 S. Ct. 2325, 2345 (2003) (stating that employing a lottery system would sacrifice either diversity or the academic quality of students gaining admission or both); see, *e.g.*, *Whiting v. Hamden Bd. of Educ.*, 24 Conn. L. Rptr. 331 (Conn. Super. Ct. 1999) (discussing elimination of sibling preference policy).

²⁴⁰ *E.g.*, *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646 (9th Cir. 2002).

level of adequacy has been achieved.²⁴¹ Thus, the lottery masks not only the historical decisions to create a scarcity of adequate educational opportunities, it also masks the children's helplessness. An example of the shortcomings of using second-order criteria to weight public education lotteries might be useful in illustrating the point that casting lots does not predictably result in distributive justice. As mentioned earlier, education litigation initially focused on dismantling dual educational systems resulting from racial segregation.²⁴² Using race-conscious, pre-lottery selection criteria in public education arguably addresses some distributive justice concerns from the perspective of justice as fairness and the elimination of arbitrary and unjustifiable inequalities.²⁴³ It does nothing to focus attention on problems of educational scarcity resulting from inadequate funding and contributes minimally, if at all, to a meaningful dialogue about how to elevate, for all students, the overall quality of their public school education.²⁴⁴ Essentially, in this scenario casting lots deflects attention away from questions of scarcity and adequacy that are fundamental to the development of a just public education system.

Moreover, applying Rawls' "veil of ignorance" theory, few decision-makers in an "original position" would advocate for casting lots, regardless of the weighting criteria, as opposed to advocating for increased educational standards and resources for all public school students.²⁴⁵ Such a decision-maker in the "original position" would not know whether the decision-maker would have a child participating in the lottery or whether such a child would be a lottery winner, by being selected to attend an academically strong magnet school, or a lottery loser, by failing to secure a slot. Also, the decision-maker would not know whether, in the event of a losing result, he or she could afford to privately educate the child, thereby

²⁴¹ *Supra* Part V.

²⁴² *Supra* note 199 and accompanying text.

²⁴³ *Supra* Part IV.A. and accompanying notes and text.

²⁴⁴ *Supra* Part IV.A.; *supra* notes 203-204 and accompanying text (discussing adequacy theory); *infra* notes ____ and accompanying text (discussing the state of Alabama as one example of a state attempting to address public school difficulties by improving public school funding); *but cf* ____ (discussing findings which dispute the assertion that insufficient funding is a major cause of the difficulties affecting public education).

²⁴⁵ *Supra* Part IV.A. and accompanying notes and text.

compensating for the loss by funding an adequate educational experience out of the decision-maker's own pocket. State and local governments' most critical function is to provide a system of adequate public schools. "[I]t is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."²⁴⁶ Having laid this foundation, it is evident that admission into CMS magnet schools was a very valuable "benefit" for parents of public school children.²⁴⁷ Failure to obtain admission through the lottery process resulted in an irreplaceably lost opportunity for losing children and their parents.²⁴⁸ Thus, in a society that adopts an idea of justice which holds that all children should receive an adequate education, the notion that some children will be selected as "losers" in the lottery represents a tragic choice.²⁴⁹ The current status of public education in this country reflects many first- and second- order choices by government.²⁵⁰ Thus, government has contributed to disparities in educational opportunities and to inadequacies where they exist.²⁵¹ The choice to

²⁴⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also* *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (reaffirming its statement in *Brown v. Bd. of Educ.* of the importance of adequate public school education); Reich, *supra* note 1, at 737 ("The most important public service of all, education, is one of the greatest sources of value to the individual.").

²⁴⁷ *Supra* note 16 and accompanying text (discussing magnet schools in general); Reich, *supra* note 1, at 737 (discussing education in the context of a limited property interest).

²⁴⁸ ELSTER, SOLOMONIC, *supra* note 78, at 105. Elster notes that any allocation of a burden can simultaneously be represented as the allocation of a good—meaning the exemption from a burden. *Id.* He further notes that lotteries are more willingly used to allocate gains than losses. *Id.*

²⁴⁹ ECKHOFF, *supra* note 79, at 218; *see also* Reich, *supra* note 1, at 737 (discussing education as one of the greatest societal values).

²⁵⁰ National Education Association, *Rankings & Estimates: Rankings of the States 2002 and Estimates of School Statistics 2003*, at <http://www.nea.org/edstats/images/03rankings.pdf> (May 2003). "Public education in the United States is a joint enterprise between local, state, and federal governments. Yet, progress in improving public education stems primarily from the efforts of state education agencies, local districts, and individual schools." *Id.* at vii.

²⁵¹ *Supra* Part V and accompanying text and notes; MASSEY & DENTON, *supra* note 199, at 36-41 (discussing the role of local government, local communities, and real estate boards in creating legally enforced housing segregation). Government's role in promoting housing segregation helped further entrench segregated schools into the American landscape and resulted in concentrated pockets of disadvantage. *Id.* at 141.

The organization of public schools around geographical catchment areas, in other words,

allow governments, federal, state, and local, to be unaccountable and irresponsible is a decision to create an environment in which future difficult decisions, tragic choices, must be made in the public education arena. Raising public consciousness about the process of achieving distributive justice in education by creating adequate and equal school systems is necessary for increased citizen confidence in government.²⁵² Unless and until government is more responsible, citizens are hesitant to increase government empowerment.²⁵³ This hesitation may be reflected in a number of ways such as rejection of proposals to increase public education funding at the expense of taxpayers or challenges to remedial efforts aimed at addressing historically unequal and discriminatory treatment in the provision of public education opportunities.²⁵⁴ If society values predictable outcomes and believes every child is entitled to an equal and adequate public education, casting lots is not the optimal decision-making device for determining which children shall benefit and which shall do without.²⁵⁵

reinforces and exacerbates the social isolation that segregation creates in neighborhoods. By concentrating low-achieving students in certain schools, segregation creates a social context in which poor performance is standard and low expectations predominate.

Id.; *infra* notes 237-238 and accompanying text (discussing inadequate school funding specifically in Alabama as an example of government's role in public school development).

²⁵² *Supra* Part V; *infra* Part VI and accompanying text and notes (discussing the need for government accountability, openness, honesty, and responsiveness).

²⁵³ Congressman Artur G. Davis, Address at The University of Alabama School of Law, Law Democrats meeting (Mar. 1, 2004); *e.g.*, *Riley Calls for Session on Reforms Proposes Cuts, Funds for Reading Initiative*, BIRMINGHAM NEWS, Feb. 4, 2004, § A, at 1, 9 (stating that Alabamians want government to be open, honest, and responsive); *We Must All Do People's Work*, BIRMINGHAM NEWS, Feb. 4, 2004, § A, at 10 (discussing the importance of government accountability).

²⁵⁴ *Supra* Part V and accompanying text and notes; *see e.g.*, *Hubbert: State Must Try Again to Raise Revenue*, BIRMINGHAM NEWS, Sept. 11, 2003, § B, at 2. Paul Hubbert, executive secretary of Alabama's Education Association responded to the 2 to 1 defeat of Governor Bob Riley's proposed \$1.2 billion-a-year tax and accountability referendum, nearly one-half of which was promised for public schools, by stating that, next time, government must "be able to show voters how the money will be used. . . ."; *see also Nation's Top Teacher Upset Over Tax Rejection*, BIRMINGHAM NEWS, Sept. 11, 2003, § B, at 2 (stating that National Teacher of the Year, Betsy Rogers, was angered by the defeat of the Governor's proposed tax and accountability plan).

²⁵⁵ *But see* ECKHOFF, *supra* note 79, at 305. Random selection is most desired if the outcome is either very important or very unimportant to the participants. *Id.* If the outcome is very important, randomness is desirable because of (1) the decision-maker's need to be absolved of decision-making responsibility and of any guilt associated with the outcome as well as because of (2) the participants' need to feel they are protected from bias, which assumes that there is no cheating and all incentive effects are controlled. *Id.* at 305; *see also*

VI. THE ALTERNATIVE TO RANDOMNESS

If lotteries are antithetical to rational, responsible decision-making and if the latter type of decision-making promotes socially desirable qualities such as government accountability and distributive justice, what is the “better” alternative to lotteries? Generations of citizens have struggled, unsuccessfully, to develop a distributive system that: (1) reflected the society’s basic values and morals, whatever they happened to be at the time; and (2) was capable of being framed within a legal regime that procedurally allowed the system to be implemented consistently.²⁵⁶ What does the lack of solutions to the problem of achieving predictable distributive justice in resource allocation, particularly in instances of scarcity, reflect? Perhaps it reflects a reality which holds that “there is in principle no set of conclusions that could properly be called a solution—if by ‘solution’ we mean some process and outcome that satisfies all our basic values.”²⁵⁷

The alternative to randomness that this article offers is that heightened emphasis should be placed on increasing governments’ and citizens’ awareness of historically unnoticed or under-emphasized moral and ethical considerations, instead of focusing on developing specific substantive and procedural processes that will result in distributive justice in all imaginable situations. A renewed commitment to recognizing moral and ethical considerations as an indispensable component of decision-making would result in advancing progress toward rational and responsible decision-making.²⁵⁸ It would also serve as a guard against suppressing information regarding important characteristics and traits of individuals who will be impacted by the decision-making process. Certainly, one of the vulnerabilities of emphasizing individual characteristics and traits is that decision-makers will “unfairly” account for characteristics and traits so that the advantaged groups will become further entrenched in their privilege and the

infra notes 254-255 and accompanying text (discussing incentive effects). If the outcome matters little, then no one will be bothered by the fact the results were arrived at by using simple techniques. *Id.*

²⁵⁶ Shapiro, *Biomedical Advances*, *supra* note 184, at 14-15; *supra* Part IV.

²⁵⁷ Shapiro, *Biomedical Advances*, *supra* note 184, at 15.

²⁵⁸ *Id.* at 23; *supra* Part IV.

disadvantaged, relative to the advantaged and in an absolute sense, will become even more disadvantaged.²⁵⁹ Government can address this difficulty by directing resources to ensuring that the criteria used to make individualized decisions are rationally and equitably related to the resources or burdens being allocated.²⁶⁰ Also, and perhaps most importantly, the societal scrutiny and monitoring that accompanies transparent decision-making would serve a policing function, holding all of us responsible for the good and for the bad decisions we make. The alternative is randomness and the reality is that most lotteries employ subjective criteria already.²⁶¹ The harm that can result from combining substantive considerations with the lottery is that the impact of the weighting effect of the substantive considerations is de-emphasized and the randomness, perceived as fairness, of the lottery is at the forefront.²⁶² Thus, attention is diverted away from the important question of whether the chosen substantive criteria in any way undermine the fairness and justice of the lottery.²⁶³ Furthermore, society's ability to police decision-makers and their distributions is diminished because of the lack of transparency.²⁶⁴

Essentially, the distinction between rational decision-making and random decision-making is not the use of subjective criteria accounting for desert, need, position, fitness, and productivity because both mechanisms consider subjective criteria.²⁶⁵ The

²⁵⁹ The use of substantive criteria is vulnerable to criticism predicated upon the choice of which criteria are assigned weight and which are not. *Supra* notes 211, 223 and accompanying text.

²⁶⁰ *Infra* notes 250-252 and accompanying text.

²⁶¹ *Infra* Parts II.B and IV and accompanying text (discussing weighted lotteries).

²⁶² *Id.*

²⁶³ *Supra* note 223 and accompanying text (stating that both choosing incorrect criteria or choosing correct criteria but applying them incorrectly can result in undesirable and irrational decisions).

²⁶⁴ *Id.*

²⁶⁵ *E.g.*, ELSTER, SOLOMONIC, *supra* note 78, at 67.

There are two ways in which substantive criteria such as need, productivity and merit can be used in combination with lotteries. First they can be used to define the pool from which the random selection is made or, less frequently, to eliminate some of the randomly chosen candidates. *I know of no lottery without some preselection or postselection scrutiny on the basis of need, merit and the like.*

Id. at 67-68 (emphasis added).

difference is that rational decision-making promotes public dialogue and accountability in a way that casting lots does not and has not.²⁶⁶

[E]ven where laws and institutions are unjust, it is often better that they should be consistently applied.

In this way those subject to them at least know what is demanded and they can try to protect themselves accordingly; whereas there is even greater injustice if those already disadvantaged are also arbitrarily treated.²⁶⁷

Government must be accountable and responsible to its citizens in allocating resources and responsibilities and must not be perceived as an arbitrary decision-maker.²⁶⁸ Accountability is not possible without transparent decision-making; and, randomness does not promote transparency.

VII. CONCLUSION

The device of casting lots cannot be adjusted to account for diverse types of difficult allocative decisions.²⁶⁹ Arguably, ignorance of the lottery's final outcome can reduce incentive effects,²⁷⁰ wasteful and dishonest behavior, by those with discretionary power to alter their behavior in response to nonrandom selection systems.²⁷¹ But, society must not pretend that lotteries are unbiased or that they generally result in unbiased distributions of resources and burdens.²⁷² *The Antelope* is a striking example of the attempt to use casting lots to decide which Africans would receive the benefit that, according to the law of the time, should have accrued solely to those who had previously been captive on board of the *Exchange*.²⁷³ The influence of the first- and second-order decisions on the proposed weighted lottery process certainly would have prevented the lottery from being completely random but, even more importantly, it is evident that the first- and second-order decisions would not have resulted in a lottery

²⁶⁶ *Supra* Parts III-V and accompanying notes and text.

²⁶⁷ RAWLS, COLLECTED PAPERS, *supra* note 137, at 141.

²⁶⁸ *Supra* Part II.B.; RAWLS, THEORY, *supra* note 138, at 51.

²⁶⁹ CALABRESI & BOBBITT, *supra* note 3, at 44.

²⁷⁰ ELSTER, SOLOMONIC, *supra* note 78, at 39 (defining incentive effects as essentially motivation to engage in wasteful and opportunistic conduct).

²⁷¹ ELSTER, SOLOMONIC, *supra* note 78, at 110-11.

²⁷² *Supra* notes 202-03 and accompanying text.

²⁷³ *Supra* Part II.

that produced a distributively just allocation.²⁷⁴ As discussed previously, distributive justice fundamentally is about fairness and the minimization of unjustified inequality.²⁷⁵ Applying Rawls' "veil of ignorance" theory, in their original positions none of the participants, whether defined as the Africans or as the owners in the relevant nation states, would have elected the casting of lots knowing the severity of the burden imposed on the losers. All likely would have preferred the mechanism adopted by the Supreme Court as it afforded the greatest chance for freedom.²⁷⁶

Likewise, in *Belk*, the pre-lottery criteria were suggested, in combination with the lottery, as a way to redress historical injustices that produced a segregated, dual public school system.²⁷⁷ Just as in *The Antelope* though, decision-makers, unaware of their station in life, unaware of their color, not knowing whether they could afford to privately educate their children should they lose in the lottery, would likely reject the casting of lots as a way to distribute such a precious entitlement. What would they have opted for instead? Perhaps such decision-makers, in their original positions, would have chosen a different social and political course in constructing their first-order choices so as to avoid segregated public school systems and so as to provide adequate public schools for all children, thereby obviating the need to cast lots.

To the undiscerning, the lottery is a noble device that makes the very difficult decision of who shall be freed, in *The Antelope*, and which children shall benefit from potentially life-changing educational experiences, in *Belk*.²⁷⁸ The more accurate view of casting lots is as a device that: (1) obscures the invidious effects of society's unwillingness to engage in transparent and therefore responsible

²⁷⁴ *Supra* Parts III and IV (discussing first- and second-order decisions and distributive justice, respectively).

²⁷⁵ *Supra* Part IV.

²⁷⁶ *Supra* Part II and accompanying text.

²⁷⁷ *Supra* Part V.

²⁷⁸ The blind element of the lottery and the ability it affords to choose not to choose are essential to the lottery; the blind element, however, also creates a sense that participants are being treated as though interchangeable which often leaves lottery losers feeling helpless. CALABRESI & BOBBITT, *supra* note 3, at 134 (further stating that the lottery offers a computer chance, not a human one).

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decision-making,²⁷⁹ and (2) diverts attention away from the first- and second-order decisions that necessitate tragic choices.

²⁷⁹ *Supra* Part V and accompanying text.

Appendix²⁸⁰**Case of the Antelope otherwise the Ramirez and Cargo, May 11, 1821; Vol. 103, Minute Book 1816-1823, pp. 192-98; Div. Savannah, Georgia; Off. Circuit Courts; Records Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta).**

The subjects of the suits are the brig Antelope and her cargo, consisting of about two hundred & fifty Africans. 1st The parties are, Capt Jackson suing on behalf of the United States & the officers & crew of the Dallas cutter, who claim the vessel and cargo as forfeited under the act of the 20th April 1808, or under the modern law of nation, on the subject of the slave trade 2, the Spanish vice consul who claims the vessel and one hundred & fifty of the slaves in right of the original owners Spanish subjects; 3^d the Portuguese vice consul who claims one hundred & thirty of the slaves in behalf of the Portuguese owner from whom they were captured: 4th an under claim of the captain & crew of the Dallas cutter depending upon the event of restitution to the Spanish and Portuguese claimants. There was also a claim filed in the court below in behalf of John Smith the captain of the Antelope who affected to command her under the name of the General Ramirez by virtue of a commission from General Artigas.

It appears from the evidence that the captain & crew of the Antelope were originally of the ships company of a privateer called the Columbia or Arrogonta sailing under a Venesuelean commission. That in the character she entered the port of Baltimore in the year 1819, & there clandestinely and illegally shipped a crew of thirty or forty men. That she proceeded to sea, hoisted the Artigan flag, & prosecuted a cruise along the coast of Africa, during which she took a number of negroes from Portuguese vessels, and twenty five from an American vessel said to have been the Exchange of Bristol, Rhode Island. That at length she fell in with the Antelope having a number of slaves on board and made prise of her as a Spanish vessel. To the Antelope all the slaves were transhipped, & Capt. Smith was placed on board her to command her under the name of the General Ramirez as an Artigan privateer. The two vessels then proceeded to the coast

²⁸⁰ All words in the original documents contained in the Appendix are spelled as they appear in such documents. Some spellings are considered misspellings in the present.

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of Bazil obviously with a view to effect a clandestine sale of the slaves, but here the *Arrogonta* being shipwrecked, and her captain drowned, the *Antelope* proceeded northwardly, and after vainly attempting to sell the slaves among the islands at length came off the coast of Florida for the [same object], for it could be for no other. While off that coast she was [??] to the revenue cutter as a vessel of piratical appearance, and Capt. Jackson **193** furnished with a reinforcement of soldiers, proceeded to attack her. On boarding her and finding her full of slaves and under command of a man holding an American [], tho' professing to act as a commissioned cruiser of Artigas took possession of her & brought her into an American port for adjudication.

Under this view of the case the pretensions of the several parties shall be considered.

And first, It is unquestionable that Capt. Smith cloak of an Artigan commission could not protect him from the penalties incurred in the relation of an American citizen. Law would be nugatory if they would be thus evaded. The relation between government and its citizens is founded in contract, and the duties arising from that relation are not to be arbitrarily dispensed with at the will of either party. If therefore the case rested here there would be no difficulty in adjudging the vessel forfeited for taking these Africans on board at sea with intent to dispose of them as slaves. But this, altho perhaps literally within the provisions of the statute is obviously not within its intent and meaning. This vessel while taking on her own cargo from the coast was not an object of the laws of this government, and when afterwards she came under the command of Smith it was by violence. There was then a want of that actual or imputed will and consent which is undispensible to constitute crime. But as far as Smith had acquired an interest so far it is obvious that the property became the subject of forfeiture and this leads to the question what interest had Smith acquired in her.

An actual belligerent capture does produce a change of right and this is the foundation of the interest pretended to by Smith. But here the reiterated decisions of the American courts apply, that a capture made under an American illegal outfit is not belligerent, but void and producing no change of right, and from this it follows that Smith had no interest on which the forfeiture inflicted by law for this offence

could attach. And from these considerations it results both, that under the statute no forfeiture attaches, and that the original owners, whoever they were must be restored to their preexisting interests. But a much more sweeping principle is for the first time [insisted] in this court, and it is contended that under the modern law of nations **194** both the vessel must be condemned and the slaves discharged as free, because the trade is violative of the laws of nature and humanity and the claimants have not shown that it was either sanctioned or prosecuted, or prosecuted as sanctioned by the laws of their respective countries.

It is true that the British courts of admiralty have of latter years asserted a doctrine of this nature, & early and long fostered habit still turns our attention towards British decision, with a deviation scarcely consistent with judicial or national independent mental subjection is perhaps the last that man ever dares to throw off. But in this instance it is not venturing beyond my usual limited pretense to maintain that the British doctrine is altogether an assertion of power and policy, and an interference in the family concerns of others in which no nation has a right to volunteer. I feel no inclination to justify or even [fralliate] the trade. I thank God that I have lived to see it receive its death blow. But it was from religion or policy, not from national humanity that the blow was received. On the contrary, British policy struggled against the effort to abolish it, and all the effort of the Quakers the methodists & W. Welberforce proved abortive until the [horrors] acted in St. Domingo opened the eyes of government to consequences that became political to guard against. From that time philanthropy like the [] up vapour began freely to diffuse itself, & extended its spread even to the British courts of vice admiralty. Whenever a nation that has fostered its trade or agriculture by dealing on slaves abolishes that trade it becomes a matter of necessity that it should purchase persuade or compel the discontinuance of it in other nations for it is not only the profitable employment of shipping or capital that is to be apprehended in fostering a rivals prosperity, but all the consequences flowing from a sensible change in the price of labour to the prejudice of the country that has relinquished the trade. And hence the Jamaica planter of sugar & coffee could not have sustained a competition with her rival of Cuba, or the Brasils while the latter could procure slaves and the

former could not unless at a value enhanced by all the risks of smuggling. That slavery is a national evil no one will deny except him who would maintain that national wealth is the Supreme national good. But whatever it be it was entailed upon us by our ancestors & actually **195** provided for in the constitution first received from the lord proprietors under which the southern colonies were planted. During the royal government it was fostered as the means of improving the colonies and affording a lucrative trade to the mother country; and, however revolting to humanity may be the reflection, the laws of any country on the subject of the slave trade are nothing more in the eyes of any other nation than a class of the trade laws of the nation that enacts them. On what principle is it then that a national court which in a thousand instances has disclaimed all right to notice the violations of the trade laws of other countries should assert the right to prosecute and punish in this. The truth is that a citizen has an interest even in the criminal code of his own country; it is of his own making and the only one he has consented to be bound by. What right have I to punish the blow that is govern to another! In another government it is usurpation, in the one offended against an exercise of right. Nor can governments look with indifference upon these encroachment upon their [] rights and duties; Most of them retain the right of pardoning and the benefit of forfeiture; with what justice can those rights be superseded or appropriated by another. The vessel condemned in the case of the [Amidie] (Acton 240) was at that moment the property of the American government under the act which attaches the penalty of forfeiture to the foreign slave trade carried on by its citizen. And even if we concede that under cover of the sacred cause of humanity the British cruiser might have interfered so far as to break up the voyage, it is difficult to find a justification for giving either the vessel to the cruiser, or the slaves to his majesty. But the court does not veil the grounds on which it found its decision “We do [nor] (in the language of the Judge, and did at the time of this capture take an interest in preventing that traffic in which this ship was engaged. I must until better advised assume an opposite language. Until some better reason can be assigned I must maintain that it is a question altogether “inter alios” whether the Spanish & Portuguese nations had authorised the traffic in which their vessels were engaged. Not

so as to the American vessel I have a law to direct me as to that, and the slaves taken out of her must be liberated. **196** I would that it were in my power to do perfect justice on their behalf. But this is now impossible. I can decree freedom to a certain number, but I may decree that to A which is the legal right of B. It is impossible to identify the individuals who were taken from the American vessel. And yet it is not less certain that the benefit of this decree is their right and theirs alone. Poor would be the consolation to them to know that because we could not identify them we have given away their freedom to others. Yet shall we refuse to act because we are not vested with the power of devination?

We can only do the best in our power, the lot must decide their fate, and the Almighty will direct the hand that acts in the selection. But I cannot consent to reduce this number from twenty five to nine. For this depends upon testimony that was interested to deceive, since in these twenty five Smith could have no hope to sustain his claim, tho he might succeed as to the residue. The reduction of the number must therefore be averaged upon a scale with the rest, and as they consisted of twenty three men & two boys the lot must select them accordingly from the men & boys.

Some doubts have been stated as to the national character of the vessel and as to the Spanish and Portuguese interest in the slaves. On the vessel I entertain no doubt, she was captured as Spanish and the evidence is sufficient to prove the Spanish interest in her and the slaves taken on board her must necessarily follow her fate. But I am induced to think that the evidence preponderates to prove that there were but ninety three and that number also must be reduced by the general scale of loss. Concerning the residue the evidence appears so inconclusive that reluctant as I feel to keep the case open, I cannot adjudge them to the Portuguese consul without further proof.

The claim of Capt Jackson to salvage remains to be considered. On those adjudged to the government he of course received his twenty five dollars per head. As to the residue the principal difficulty is waived as it appears from the decree below that it was admitted to be a case for salvage & the quantum only remained to be adjusted. I will content myself therefore with entering a caveat against this being cited as an adjudged case. This vessel had not incurred the forfeiture inflicted by the act under which she has been libeled, and

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although Smith citizenship furnished a reasonable **197** excuse for detention yet there is no statute which in fact authorised her seizure and detention. Our courts have restored property peaceably coming into our port where the capture has been made upon illegal outfits, but this has been altogether on general principles or perhaps on early precedent. But they have never hitherto sanctioned a seizure on the high seas on this ground. And it would be difficult to say what course this court must have pursued if this prize had been claimed by a legal agent of the Venezuelan public. It has not been so claimed and the claim preferred under the Artigan commission has been feebly sustained & ultimately abandoned. We are therefore constrained to yield to the claims that have been preferred. But as a right cannot grow out of a wrong, upon general principles I will not stand committed to the decision that this is in law a case of salvage. In estimating the quantum of salvage I have felt all the difficulties which the case presents. The interest in which the salvors claim to participate is that which the owners derive from their services. The slaves are not worth to the owners the price which they would sell for hire, for the owners receive them subject to all the expences risks & inconveniences attendant upon the necessity of transporting them to no one knows where. The real value therefore cannot be ascertained by any possible rule, it is altogether a subject of speculation and as the salvage cannot be raised by a sale, after paying their money it may in the event turn out that they have paid it for nothing. Yet they cannot get their property until every expence is paid.

All which considerations taken into view I cannot feel myself justified in giving to the salvors more than fifty dollars per head on all the negroes that shall finally be actually restored to them from the custody of the law.

A decree to the following effect will therefore be entered. That so far as relates to the vessel the decree of the district court be affirmed & so far as relates to the slaves that it be reversed & annulled. That as to the slaves the number taken from the American vessel the Exchange be ascertained by a ratio stated from the whole number on board the Antelope when she left the coast, the number actually surviving when the separation takes place & the number found on board the Exchange **198** and that the number so found being

seperated by lot among the men and boys, the individuals thus selected delivered up to the United States. That the residue be detained in the hands of the marshal until the next term at which they shall be divided by lot between the Spanish & Portuguese claimants according as they shall make their several interests appear on further proof.

That the sum of twenty five dollars per head be paid to Capt Jackson & crew, according to law, on the number of slaves delivered over to the United States, under this order, and the sum of fifty dollars per head upon the residue whenever they shall be delivered over but that the manner in which this latter amount be distributed to the [] be reserved for the future consideration of this court, on hearing the parties.

And that the Spanish & Portuguese claimants pay all costs (except those on the claim of John Smith) in the ratio in which the slaves shall be finally divided among them.

But that the number which will result from the ratio to ninety the Spanish claim may forthwith be established and the slaves delivered over to the attorney in fact of the claimant upon complying otherwise with this decree, & giving bond to the amount of four hundred dollars per head to take them forthwith out of the country and land them at some permitted foreign port in a specified time to wit three months after the date of the bond.

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Opinion of U.S. Supreme Court, December 14, 1825; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, pp. 133-36; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta)

United States of America

The President of the United States of America. To the Honorable the Judges of the Circuit Court of the United States for the Sixth Circuit and District of Georgia

Greeting:

Whereas, lately, in the Circuit Court of the United States for the District of Georgia before you, or some of you, in a cause wherein Charles Mulvey Vice Consul of Spain & others were Libellants against 150 African Negroes, Part of the Cargo of the Vessel called the Antelope, otherwise called the General Ramirez claimed by the United States and also in a cause wherein Francis Sorrell Vice Consul of Portugal and others were Libellants against 130, **134** African Negroes likewise part of the Cargo of the said Vessel called the Antelope otherwise called the General Ramirez claimed by the United States, a Decree was made by the said Circuit Court in the words following []. “That so far as relates to the Vessel the Decree of the District Court be affirmed, and that so far as relates to the Slaves, that it be reversed and annulled. That as to the slaves, the number taken from the American Vessel the Exchange be ascertained by a ratio taken from the whole number on board the Antelope when she left the Coast, the number actually surviving when the separation takes place and the number found on board the Exchange and that the number so found being separated by lot from among the men and boys, the individuals thus selected be delivered up to the United States. That the residue be retained in the hands of the Marshall until the next Term at which they shall be divided by lot between the Spanish and Portuguese Claimants according as they shall make their several interests appear on further proof. That the sum of twenty five dollars per head be paid to Captain Jackson and Crew according to law, on the number of slaves delivered over to the United States under this order and the sum of fifty dollars per head upon the residue whenever they shall be delivered over, but the

manner in which this latter amount be distributed to the salvors be reserved for the future consideration of this Court upon hearing the parties interested; and that the Spanish and Portuguese Claimants pay all costs (except those on the claim of John Smith) in the ratio in which the slaves shall be finally divided among them. But that the number which will result from the ratio to ninety three the Spanish Claim may forthwith be established and these delivered over to the attorney in fact of the Claimant upon complying otherwise with this Decree, and giving bond to amount of four hundred dollars per head to take them forthwith out of the Country and land them at some permitted foreign Port in a specified time, to wit, three months after the date of the Bond.” And at a subsequent Term of the said Circuit Court, another and further decree was made in said Causes in the words following to wit: “Ordered and decreed that the residue of the negroes imported in the General **135** Ramirez be divided between the Spanish and Portuguese Claimants in the ratio of one hundred and sixty six on behalf of the Spanish Claimants & one hundred and thirty on behalf of the Portuguese Claimants and that they be delivered up to the agents of the Individuals as soon as their respective powers of attorney shall be duly authenticated and filed with the Clerk of this Court, and they shall respectively comply with the Decretal order of this Court in paying the expenses incurred on said negroes in the ratio above stated and in giving bond & security as therein directed for transporting them beyond the limits of the United States to some permitted Port allowing however six months from the date of the bond instead of three months as in that decretal order specified & that the proceeds sales of the Vessel after deducting the costs of Court exclusive of the Marshal’s bill for maintenance be paid over to the Spanish Claimant” as by the inspection of the Transcripts of the Records of the said Circuit Court which were brought into the Supreme Court of the United States by virtue of two appeals agreeably to the Act of Congress in such case made & provided, fully and at large appears. And whereas, in the present term of February in the year of our Lord one thousand eight hundred and twenty five the said causes came on to be heard before the said Supreme Court, on the said transcripts of the Records, & even argued by Counsel; On Consideration whereof, this Court is of opinion that there is Error in so much of the sentence and decree of

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the said Circuit Court as directs restitution to the Spanish Claimant of the Africans in the proceedings mentioned, in the ratio which one hundred and sixty six bears to the whole number of those which remained alive at the time of pronouncing the said Decree, and also in so much thereof as directs restitution to the Portuguese Claimant, and that so much of the said Decree ought to be reversed and it is hereby reversed & annulled; and this Court proceeding to give such Decree as the said Circuit Court ought to have given doth direct and order that the restitution to be made to the Spanish Claimant shall be according to the ratio which ninety three instead of one hundred and sixty six bears to the whole number comprehending as well **136** those originally on board the Antelope as those which were put on board that vessel by the Captain of the Arrogante after making the apportionment according to this ratio, and discounting from the number the rateable [lots] which must fall on the slaves to which the Spanish claimants were originally entitled, the residue of the said ninety three are to be delivered to the Spanish Claimant on the terms in the said Decree mentioned; and all the remaining Africans are to be delivered to the United States to be disposed of according to law; and the said Decree of the said Circuit Court is in all things not contrary to this Decree affirmed. You therefore are hereby commanded that such proceedings be had in said causes as according to right and justice, and the Laws of the United States ought to be had the said appeal notwithstanding. Witness the Honorable John Marshall, Chief Justice of said Supreme Court, the first Monday in February, in the year of our Lord one thousand eight hundred and twenty five.

J. Caldwell Deputy Clerk Sup. Ct. U. States

Libel Decree, United States v. Africans of the Cargo of the Antelope or General Ramirez, May 9, 1826; Vol. 104, Minute Book 1823-1834, U.S. Circuit Court, Southern District, Georgia, Savannah, p. 180-81; Div. Savannah, Georgia; Off. Circuit Courts; Record Group 21, United States District Court; National Archives and Records Administration—Southeast Region (Atlanta)

The United States

v.

The Africans of the Cargo of the Antelope or General Ramirez

Tuesday, 9 May 1826

180 On the motion **181** of the District Attorney in behalf of the United States, it is ordered that the Spanish Claimant in the above case do on or before the next Term of this Court, designate by proof to the satisfaction of the Court, the Africans of the above Cargo, not exceeding fifty in number which by the decree of the Supreme Court of the United States made at February Term 1825 and the explanatory decree of the said Court made at February Term 1826 the said claimant claimed to be entitled to. And it is further ordered that in taking and procuring such evidence the same Rules shall be observed and the same notices given to the District Attorney as are usual in regulating the taking of testimony in this Court.