The Henfield Prosecution: *Lessons and Questions*

Matthew Boutros
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INTRODUCTION

In the spring of 1793, John Jay, the first Chief Justice of the United States, was riding circuit in Virginia. On May 22, 1793, Jay delivered a charge to the federal grand jury in Richmond that set out the law under which Gideon Henfield would soon be prosecuted. On this occasion, he announced:

> Whoever shall render himself liable to punishment or forfeiture, under the *law of nations*, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture. But this is not all, it is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them.[1]

Jay's words, which the reporter of the Henfield trial reprinted as a statement of the governing law, were instructions to a grand jury regarding a common law crime—more specifically, a crime in violation of customary international law. Contrary to a common misconception, Gideon Henfield was not prosecuted for violating Washington's *Neutrality Proclamation*.[2] Instead, the proclamation instructed federal prosecutors in the first administration to seek legal avenues to enforce Washington's order, leading to this common law prosecution grounded in the law of nations. This case provokes a fundamental question: how could a federal criminal prosecution with no established criminal statute exist? Traditionally, a prosecution must be grounded in a violation of a statute, but in this case, the common law provided the basis for Henfield's prosecution. The trial of Henfield made it evident that a violation of the law of nations could form the basis for a common law crime. Still, it remains unclear how such a crime could sustain prosecution under the American legal system without an explicit federal criminal statute. Jay's charge to the grand jury seems to uphold the premise that federal prosecutors had the power to bring charges under common law in instances where international law had been breached.

This position presupposes that violating the law of nations can be a criminal act under federal law, even without a specific criminal statute. It suggests that the "Executive Power" within Article II of the U.S. Constitution may encapsulate the ability to enforce international law and conduct foreign policy, extending even to domestic affairs like criminal prosecution. The exact interplay between the president's power to enforce international law and domestic affairs remains underexplored.

In addition, the Henfield case was a spectacle in 1793—the O.J. Simpson trial of its day. Henfield's acquittal was celebrated lavishly: French Minister Edmond-Charles Genêt threw a party in the sailor's honor and invited the public to come meet "Citizen Henfield."[3] Though the prosecution and trial of Henfield made waves in the 18th century, its significance seems to have

[1] Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J., charging grand jury) (emphasis added).
[2] *See, e.g.*, Martin S. Flaherty, *The Story of the Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, *in* PRESIDENTIAL POWER STORIES 21, 47 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

been lost on American legal academia. The Henfield prosecution is often relegated to a footnote in books and law review articles analyzing Washington's Neutrality Proclamation and discussing the proclamation's impact on early American society. Perhaps this undeserved relegation went without consequence in the 20th century when the modern administrative state was being constructed, and the powers of the president were only beginning to expand; however, in today's landscape, where every action of the president is scrutinized, and their powers constantly contested, the undeserved relegation of the Henfield case has deprived academic debates over the extent of the president's power to control foreign affairs of valuable context. This academic amnesia matters all the more given originalism's rise and widespread adoption: a potentially valuable historical source has gone largely unexamined.

Ultimately, the Henfield case does not definitively resolve these debates. Instead, it raises questions about the boundaries of the president's power to interpret international law, enforce foreign policy, and prosecute common law crimes. Shedding light on these issues invites deeper scholarly investigation into the extent and boundaries of presidential power under the Constitution. It also serves as a potent reminder of the importance of historical legal cases in shaping our understanding of contemporary constitutional law and the powers of the presidency.

HISTORICAL BACKGROUND

In the early 1790s, the United States was caught between the rival powers of Great Britain and France as the French Revolutionary Wars intensified. As a fledgling nation, the United States was determined to avoid entanglement in European conflicts and to uphold its status as a neutral party. Opposing this desire was the 1778 Treaty of Alliance, a defensive alliance between the United States and France's previous government.[4] It was against this backdrop that President Washington announced the *Proclamation of Neutrality*. This formal announcement declared the nation neutral in the conflict between France and Great Britain and sparked a legal debate that has continued from its own time into the modern era.[5] Central to this debate is the extent of the president's power to manage the country's foreign affairs, particularly in the absence of explicit constitutional authorization or accompanying congressional legislation.[6] Relevant to our analysis, Washington announced:

> [W]hosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, […] and further, that I have given instructions to those officers, to whom it belongs, *to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations*, with respect to the powers at war, or any of them.[7]

[3] Christopher J. Young, *Connecting the President and the People: Washington's Neutrality, Genet's Challenge, and Hamilton's Fight for Public Support*, 31 J. EARLY REPUBLIC 435, 451 (2011).

[4] Treaty of Alliance, Fr.-U.S., Feb. 6, 1778, 8 Stat. 6.

[5] George Washington, Neutrality Proclamation (Apr. 22, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/05-12-02-0371 [hereinafter Neutrality Proclamation].

[6] Flaherty, *supra* note 2, at 25.

[7] Neutrality Proclamation, *supra* note 5 (emphasis added).

In 1793, the French Minister to the United States, Edmond-Charles Genêt, arrived in Charleston, South Carolina. He began commissioning American ships as privateers to seize British vessels, an action that directly contravened the U.S.'s stance of neutrality.[8] Gideon Henfield was one of the American citizens who joined these French privateers. When the French privateer on which Henfield served captured a British vessel, the *William*, Washington had his chance to put his words into action.[9] Henfield's actions threatened the delicate balance struck by Washington's *Proclamation of Neutrality* and provoked a British protest, pressuring the United States to uphold its executive decree.[10] Frustrated with Gideon Henfield's flagrant disregard for the Neutrality Proclamation, George Washington asked his cabinet whether Henfield should be prosecuted. As recorded in Jefferson's notes, Washington asked Jefferson, Hamilton, and ultimately the whole cabinet whether the government should pursue criminal prosecution for Henfield.[11] From Jefferson's notes:

> Our citizens who have joined in these hostilities against nations at peace with the US. are they punishable? E.R. gave an official opinion they were. Th:J. H. and K. joined in the opinion. All thought it our duty to have prosecutions instituted against them, that the laws might pronounce on their case.[12]

With the cabinet's agreement, Jefferson instructed—or at least suggested with some authority—that William Rawle, the U.S. District Attorney for Pennsylvania, prosecute Henfield, writing:

> By the inclosed papers you will perceive there is reason to believe that certain citizens of the United States have engaged in committing depredations on the property and commerce of some of the nations at peace with the United States. I have it in charge to express to you the desire of the Government that you would take such measures for apprehending and prosecuting them as shall be according to law. I am not able to point out to you the individuals against whom suggestions have been made but take the liberty of referring you to Mr. Deblois and Mr. Sharpe Delany who may give you information on the subject. I am with great esteem Sir Your most obedient and most humble servant.[13]

Jefferson sent this letter only after the cabinet had unanimously approved it and George Washington had signed off on its dispatch. Rawle promptly began the prosecution.[14] In addition to the cabinet's insistence, the Attorney General, Edmund Randolph, expressed the president's desire

[8] Memorial from George Hammond (May 8, 1793), *in* 25 THE PAPERS OF THOMAS JEFFERSON 686, 686-87 (John Catanzariti ed., 1992).
[9] *Id.*
[10] Cabinet Opinion on French Privateers (June 1, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 1, 1-3 (Christine Sternberg Patrick ed., 2007).
[11] Thomas Jefferson, Notes on Neutrality Questions (July 13, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 498, 498-99 (John Catanzariti ed., 1995).
[12] *Id.*
[13] Letter from Thomas Jefferson to William Rawle (May 15, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 40, 40-41 (John Catanzariti ed., 1995), *available at* https://founders.archives.gov/documents/Jefferson/01-26-02-0032.
[14] Memorial from Edmond Charles Genet (May 27, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-26-02-0119.

to pursue the prosecution to Rawle three days before Jefferson made his direct request. He wrote to Rawle:

> [The] President ... is sincere & unequivocal in his profession [and] desires that you will be extremely watchful over those infractions of neutrality which are punishable under our laws; and that you will prosecute them without distinction of persons.[15]

Rawle understood this series of communications to be an order from the executive branch to prosecute Henfield. In a letter dated May 17, 1793, from Rawle to Hilary Baker, then a Philadelphia alderman, Rawle wrote:

> I have received information that a citizen of the United States, named Gideon Henfield, late of Salem, Massachusetts, has arrived at this port in the quality of an officer of a privateer, lately fitted out in Charleston, So. Carolina, on board a British vessel, taken as prize by the said privateer.
>
> As I have received orders to prosecute, in every instance, those who commit breaches of the neutrality, declared to exist on the part of the United States, during the present war between the European Powers, it is my duty to request that you will be pleased to summon Mr. Lewis Deblois to appear before you, and if he verifies the above information upon oath, to issue your warrant for apprehending the said Gideon Henfield, in order that he may be dealt with according to law.[16]

On July 27, 1793, the grand jury returned an indictment against Henfield.[17]

THE LAW OF NATIONS AS THE LAW OF OUR NATION

The Washington administration framed the incident as a legal issue and sought to address it accordingly. Henfield's arrest in May prompted protests from French Minister Genêt, who argued that Henfield should be considered a French citizen and thus exempt from prosecution.[18] In response to Genêt's claims, Jefferson sought advice from Attorney General Edmund Randolph on the legality of Henfield's prosecution.[19] Randolph asserted that Henfield could be prosecuted without citing specific legal authorities and doubted whether the French Minister had any right to interfere.[20] Furthermore, and more pointedly, Randolph expressed confidence that Henfield could be prosecuted for violating the law of nations. Randolph wrote:

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[15] Letter from Edmund Randolph to William Rawle (May 12, 1793) (on file with the Historical Society of Pennsylvania, William Rawle Papers).
[16] FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 51 (1849).
[17] *Id.* at 52-66.
[18] Edmund Randolph, Opinion on the Case of Gideon Henfield (May 30, 1793), *in* 26 THE PAPERS OF THOMAS JEFFERSON 145, 145-46 (John Catanzariti ed., 1995), *available at* https://founders.archives.gov/documents/Jefferson/01-26-02-0135.
[19] *Id.*
[20] *Id.*

> But Henfield is punishable; because treaties are the Supreme law of the land; and by treaties with three of the powers at war with France, it is stipulated, that there shall be a peace between their subjects, and the citizens of the United States. […] He is indictable at the common Law; because his conduct comes within the description of disturbing the Peace of the United States.[21]

Randolph's position on "disturbing the peace" is derived from the position that the neutrality of states and individuals is a baseline rule of the law of nations. In addition, it must be recognized that Randolph's position presupposes that the law of nations is indeed the law of the United States.

In 1800, John Marshall commented on whether Henfield's crime of disturbing the peace is punishable, writing, "I believe it is not controverted […] [this crime] is clearly punishable in the federal courts."[22] In his independent notes on the common law of the United States, Edmund Randolph also stated, "the law of nations not only exists as an operative law independent of special adoption but is specially adopted by the Constitution."[23] Furthermore, Jefferson, in a letter to Gouverneur Morris, stated, "[N]o foreign power or person can levy men, within it's territory, without it's consent; and he who does, may be rightfully and severely punished."[24] Though letters from founders are persuasive, John Jay's grand jury charge, which the reporter printed with the Henfield proceedings, is the most precise and well-articulated evidence for the position that the law of nations served as common law in the United States.

In his grand jury charge, Chief Justice John Jay highlighted the centrality of the law of nations to the legal fabric of the United States. He emphasized the obligations of the United States, as a neutral power, to adhere to the laws of nations.[25] This adherence entails respecting the rights of other nations and refraining from actions that could potentially harm them. Moreover, it extends to the duty of the United States to prosecute and punish its citizens who violate these laws. Jay stated in his charge:

> By the laws of nations, the United States, as a neutral power, are bound to observe the line of conduct indicated by the proclamation towards all the belligerent powers, and that although we may have no treaties with them. […] It is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them.[26]

This duty, as articulated by Jay, highlights the domestic applicability of the law of nations and the responsibility of the U.S. government to enforce these laws within its jurisdiction. Lastly, Jay reminded the grand jury of the importance of maintaining neutrality during war between other

[21] *Id.*
[22] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995) (quoting Letter from John Marshall to St. George Tucker (Nov. 27, 1800), *in* 6 THE PAPERS OF JOHN MARSHALL 23, 23-25 (Charles F. Hobson ed., 1990)).
[23] Edmund Randolph, Notes on the Common Law (ca. Sept. 1799), FOUNDERS ONLINE, https://founders.archives.gov/documents/Madison/01-17-02-0170.
[24] Letter from Thomas Jefferson to Gouverneur Morris (Aug. 16, 1793), FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-26-02-0629-0005.
[25] Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J., charging grand jury).
[26] *Id.*

nations.[27] According to Jay, this neutrality is not merely a matter of national policy but a requirement under the laws of nations.[28] In addition to the Henfield case, the law of nations was invoked as common law in the United States on numerous other occasions between 1793 and 1799.[29]

The 1790s also saw two cases concerning raids into then-Spanish Florida. In response to American southerners mounting raids against the colony, Attorney General Lee concluded that the raids were "an offense against the law of nations" and that because "Congress had passed no act yet upon the subject, [the raiders] are only liable to be prosecuted in our courts at common law."[30] Around the same time, the Attorney General also concluded that Senator William Blount's planned attacks on Spanish Florida and Louisiana were misdemeanors prosecutable under common law.[31]

The year 1795 saw another common law prosecution, this time for criminal libel against a foreign diplomat. The federal court in New York, spurred by Attorney General Randolph, indicted Greenleaf, the editor of the New York Journal. Although the case was initially dropped, the editor was again indicted in 1797 for the same crime and convicted by a court presided over by Chief Justice Oliver Ellsworth. The court found that publishing a statement defaming an ambassador violated the law of nations subject to federal common law prosecution.[32] During the same year, a federal grand jury in Virginia presented Congressman Samuel J. Cabell for the common law crime of seditious libel.[33] However, the matter was dropped for political reasons. In 1798, prior to the passage of the Sedition Act, prosecutions for seditious libel were initiated against Benjamin Bache and John Daly Burk.[34] Both were brought under common law, illustrating the use of common law principles in early American judicial proceedings.[35]

UNDERSTANDING EARLY COMMON LAW PROSECUTION UNDER THE LAW OF NATIONS

In the same year as Henfield's prosecution, a federal grand jury indicted Joseph Ravara, a consul from Genoa, for attempting to extort money from a British diplomat.[36] William Rawle, who prosecuted Henfield, led the prosecution of Ravara. A chief concern of the case, and a question raised by Ravara's defense, was whether Ravara's indictment could be sustained despite the absence of a congressional law against extortion.[37] At least one modern scholar has called this argument "nonsense" because section 28 of the Act for the Punishment of Certain Crimes criminalized "offers" of personal violence to a public minister.[38]

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[27] *Id.*
[28] *Id.*
[29] *See generally* CASTO, *supra* note 22, ch. 5.
[30] *Id.* at 136-37.
[31] *Id.*
[32] *Id.* at 137 (citing ALEXANDER DECONDE, ENTANGLING ALLIANCE: POLITICS & DIPLOMACY UNDER GEORGE WASHINGTON 218, 283-96 (1958); Introductory Note, *in* 15 THE PAPERS OF ALEXANDER HAMILTON 233, 233-39 (Harold C. Syrett ed., 1969)).
[33] Presentment of the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1797), *in* 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 181 (Maeva Marcus ed., 1990).
[34] BERNARD A. WEISBERGER, AMERICA AFIRE: JEFFERSON, ADAMS, AND THE REVOLUTIONARY ELECTION OF 1800, at 218 (2000).
[35] *Id.*
[36] United States v. Ravara, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122).
[37] *Id.*
[38] Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 303 (1986).

Nevertheless, Rawle argued for, and the court ultimately relied on, the common law of Pennsylvania to sustain Ravara's indictment.[39] In his article *The Federal Common Law of Crime*, Robert C. Palmer argues that Pennsylvania common law was not the only way for this case to have concluded in a conviction.[40] Palmer proffers that Rawle could have cited Vattel, the most prominent scholar on the law of nations, to support Ravara's conviction. In his magnum opus, *The Law of Nations*, Vattel states, "Whoever offends and insults a public minister, commits a crime the more deserving of severe punishment, as he might thereby involve his country and his sovereign in very serious difficulties and trouble."[41] Palmer makes his argument more compelling by stating that the court could have relied on the law of nations because it had already been incorporated into the law of Pennsylvania.

Four years before the Constitution's ratification, the Court of Oyer and Terminer at Philadelphia heard the 1784 case, *Respublica v. De Longchamps*. The court pronounced, "[The law of Nations], in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers."[42] In this case, De Longchamps was accused of assaulting François Barbé-Marbois on a Philadelphia street; Consul General of France to the United States. This assault was undoubtedly a violation of the law of nations as an attack on a consul and in violation of Vattel's restatement.[43] The court sustained the indictment and conviction of De Longchamps and reasoned that the law of nations was part of the law of Pennsylvania because it was simply "incorporated" into the common law of the state. The common law of Pennsylvania, like that of other states, was derived from the common law of England, which included the law of nations; as such, the law of nations was part of the common law of Pennsylvania and was enforceable in its courts.[44]

In seeking to understand further the legal precedent that formed the backbone of the prosecution's argument in *De Longchamps*, it is essential to delve into the history and implications of the 1764 case of *Triquet v. Bath*, which had far-reaching consequences in asserting the incorporation of the law of nations within the fabric of English common law.[45] *Triquet v. Bath* presented the judiciary with a legal question about diplomatic privileges, providing the perfect canvas for injecting international law into common law.[46] The legal dispute arose when Bath, the English secretary of the Bavarian minister to Great Britain, was arrested at the suit of Triquet and others and claimed diplomatic privilege from arrest.[47] This situation undeniably brought the law of nations into the mix, given the diplomatic protections afforded to diplomats and their staff under international law.

Lord Mansfield, quoting Lord Talbot, declared in the *Triquet* case that "the law of nations, in its full extent, was part of the law of England."[48] This bold assertion brought the international legal matter into the domestic arena, suggesting that the arrest contravened not just the law of

[39] *Id.*
[40] *Id.*
[41] EMER DE VATTEL, THE LAW OF NATIONS bk. IV, ch. 7, § 80 (1758).
[42] Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. Ct. Oyer & Terminer 1784).
[43] *Id.* at 114; VATTEL, *supra* note 41.
[44] *De Longchamps*, 1 U.S. (1 Dall.) at 117 (discussing Lord Chief Justice Holt and the Court of King's Bench in "the noted case of the Russian ambassador").
[45] CASTO, *supra* note 22, at 132.
[46] *Id.*
[47] Triquet v. Bath (1764) 97 Eng. Rep. 936, 937-38 (K.B.); 3 Burr. 1478.
[48] *Id.*

nations but also English domestic law. Indeed, the arrest appeared to run afoul of an act of Parliament designed to enshrine diplomatic privileges outlined in the law of nations, a seeming violation of codified law.[49] In retrospect, *Triquet v. Bath* emerged as a paradigmatic example of a case that consolidated the law of nations within the English common law. This incorporation of international law into domestic legal structures created the path for future prosecutors, including those handling *De Longchamps*, to rely on the law of nations as a legal instrument enforceable within their jurisdictions.

Returning to *Henfield*, one might find the link between a Pennsylvania court's ruling on Pennsylvania common law and a proceeding in federal court tenuous. Unfortunately, court reporting from this era is scant and often does not contain the complete picture of what was argued; however, we know that Rawle cited *De Longchamps* in arguing *Henfield*.[50] Robert Palmer believes this to be evidence that the court did not hear *Henfield* under the jurisdiction of federal common law but instead under the jurisdiction granted by the Judiciary Act of 1789.[51] Section 34 of the Judiciary Act of 1789 reads:

> And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.[52]

The language of this act implies that when no federal law, treaty, or constitutional provision was applicable, the laws of the individual states, including their adopted common law principles, would serve as the "rules of decision." Consequently, if one accepts Palmer's interpretation, the court's jurisdiction to apply the law of nations as part of the common law in Henfield's case was anchored in Section 34 of the Judiciary Act of 1789 and the underlying state common law principles recognized therein. Indeed, Randolph suggests this is what happened in the *Henfield* case.

> This must have been the idea, if I meant to say that he was triable at common law in the federal court; that the treaties, by stipulating for peace with the U.S., in substance prohibited the citizens of the U. S. from engaging in a war against the nations with whom the treaties subsisted: that treaties being the supreme law, *and the judicial act having provided that the laws of the States should be the rule of decision, that they should apply: the laws of Pennsylvania*, within whose boundaries the offence was committed, comprehending the common law, would aid the treaty, which had specified no penalty for Henfield's crime, by one of its general principles, namely, that when a statute forbids a thing to be done, without annexing a penalty, the common law makes it indictable and punishable, as a

[49] *Id.*
[50] Palmer, *supra* note 38, at 293.
[51] *Id.* at 295.
[52] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

> misdemeanor. This, I believe, was the doctrine which I urged at the trial.[53]

In a broader context, the interplay of common law, the law of nations, and federal jurisdiction exhibited in *Henfield's* case presents an intriguing dimension of early American jurisprudence. Though *De Longchamps* plays a vital role in understanding the injection of the law of nations into the common law of Pennsylvania, other early scholars and jurists had different explanations for incorporating the law of nations.[54] In addition, the *De Longchamps* ruling is influential in the Commonwealth of Pennsylvania because it has the weight of precedent; however, it leaves unexplained how the law of nations applied in courts across the country and whether a common law prosecution could be sustained elsewhere.

Justice Iredell, one of the judges who sat in the *Henfield* trial, seemed to have taken Rawle's arguments citing *Triquet* and *De Longchamps* seriously. In his independent charge to a grand jury in South Carolina, Justice Iredell stated his position on why the law of nations is integrated into federal common law and why a prosecution is "maintainable" under the common law.[55] In his grand jury charge, Justice Iredell first goes to the heart of this paper: the common misconception in academia that Henfield was prosecuted for violating Washington's neutrality proclamation. Iredell dispels this misconception:

> No one needs to be informed that a Proclamation cannot change the law: the days of such folly are past: but every one knows that in all countries there are critical occasions when it is material for individuals to be reminded of their duty, and that special directions should be given for carrying on prosecutions in which the public prosperity is more than ordinarily interested.[56]

He then goes on to state that he had "considerable doubts" about whether "a right of prosecution exists in cases where the Legislature of the United States has made no special provision."[57] Nevertheless, Iredell was seemingly convinced by Rawle's argument, laying out four reasons why prosecution is "maintainable for such offences."[58]

Firstly, Justice Iredell pointed to the influence of English common law, asserting, "The Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations."[59] Even the legislature, Iredell added, was "bound by the dictates of moral duty to the rest of the world" not to transgress the law of nations.[60]

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[53] MONCURE DANIEL CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE AND PAPERS OF EDMUND RANDOLPH 185 (1888) (emphasis added).
[54] CASTO, *supra* note 22, at 133.
[55] James Iredell, Charge to the Grand Jury of the Circuit Court for the District of South Carolina (May 12, 1794), *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 454, 467 (Maeva Marcus ed., 1989).
[56] *Id.* at 458.
[57] *Id.* at 467.
[58] *Id.* at 467-70.
[59] *Id.* at 467.
[60] *Id.*

Secondly, Justice Iredell emphasized the historical persistence of these principles, stating, "It will not be denied that this part of the Common Law subsisted in full force in this state previous to the Revolution."[61]

Justice Iredell's third point highlights the resilience of common law, asserting, "The change in the government could not do away the Common Law in this particular."[62] This is the same reasoning that allowed Rawle and Randolph to cite *De Longchamps*, a pre-Constitution case, in the *Henfield* case, a post-Constitution case.[63]

Finally, Justice Iredell discussed the impact of key documents, namely the Articles of Confederation and the Constitution of the United States.[64] He believed that the Constitution and the Articles did not vacate state laws relating to common law prosecution. Instead, they gave Congress the power to establish courts and modify laws as required by the changing circumstances. He contended that while Congress had not explicitly legislated against common law prosecutions, it had passed enabling legislation—specifically, Section 34 of the Judiciary Act of 1789—which allowed the operation of state common law in federal courts.[65]

Echoing this sentiment but adding another layer, Justice Paterson advanced a compelling argument in a draft opinion.[66] In his opinion, Paterson theorized that the common law was not only connected to the people at the state-level assemblies but also persisted when they combined to create the United States.[67] He arrived at this position by challenging critics suggesting that common law disappeared or was forfeited when the states came together. He challenged this view, asking, "Was this the intention of the people, when they adopted the constitution? Is this the sound construction of the instrument itself?" Asserting a contrary viewpoint, Paterson contended that the ratification of the Constitution effectively integrated relevant portions of the common law into federal law.[68]

IMPLICATIONS AND CURRENT STATE OF COMMON LAW AND THE LAW OF NATIONS

To summarize what has been discussed so far: Notable cases of prosecution for violations of the law of nations occurred as common law prosecutions. The prosecutions we have discussed derive their authority from integrating the law of nations into state common law because of the *Triquet* and *De Longchamps* line of cases. The notable cases that occurred in federal court resulted from jurisdiction granted to federal courts under Section 34 of the Judiciary Act of 1789. With all that said, where does that leave us today?

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[61] *Id.* at 468.
[62] *Id.*
[63] Palmer, *supra* note 38, at 293.
[64] Iredell, *supra* note 55, at 468.
[65] *Id.* at 469.
[66] "The common law attached to the people, whether they met partially as of a state, or generally as of the United States . . . . All the parts, separately, are entitled to the common law as a common right, but when all these parts unite, this common law is [by the argument of the opponents] instantly destroyed or lost. Was this the intention of the people, when they adopted the constitution? Is this the sound construction of the instrument itself? Just the reverse I take to be true position." William Paterson, Draft Opinion (ca. 1793-94), *reprinted in* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 525-30 (1986).
[67] CASTO, *supra* note 22, at 136.
[68] *Id.*

Between *Henfield* and today, two significant cases have changed the landscape and application of common law in the United States. The first is *United States v. Hudson and Goodwin*.[69] In this case, the defendants were indicted for libel against the President and Congress in their newspaper. The question presented was whether the federal courts had the power to exercise common law jurisdiction in criminal cases, in other words, independent of specific statutes enacted by Congress that define and punish such crimes. The Supreme Court held that federal courts do not have the power to exercise criminal jurisdiction over common law offenses. Instead, the Court noted that only Congress had the authority to define and punish crimes under federal law.

The second case is *Erie Railroad Co. v. Tompkins*, which effectively abolished general federal common law, replacing it with the law of the state where a federal court sits.[70] Today, scholars generally agree that customary international law was a part of United States common law during the early years of our country.[71] Most famously, Justice Gray wrote in *The Paquete Habana*, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[72] What is not generally agreed upon is to what extent *Erie* abolished the use of customary international law in the federal courts.[73] In the aftermath of *Erie*, two primary schools of thought have emerged, each offering a distinct interpretation of the role of customary international law in U.S. domestic law: the modernist and the revisionist positions.[74]

The modernists posit that federal law incorporates customary international law, arguing that this incorporation evolved into a distinct enclave of federal common law post-Erie.[75] They contend that federal courts possess the inherent authority to incorporate customary international law into federal law, negating the need for explicit congressional authorization.[76] Contrastingly, the revisionists assert that federal common law has never incorporated customary international law.[77] They maintain that post-Erie, customary international law can only become part of federal common law when Congress explicitly authorizes its incorporation.[78] The revisionists view the law of nations as historically part of the general common law, but they dispute the notion that it ever became part of federal common law.[79] The debate and dichotomy between the two positions are fierce and ongoing.

Bringing this back to *Henfield*, *Hudson* and *Erie* do not represent a complete foreclosure on the possibility of a common law prosecution grounded in the law of nations because *Henfield* and *De Longchamps* stand for the position that these prosecutions are state common law matters, not products of federal common law. Indeed, evidence suggests that state common law prosecutions remain alive and well today.

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[69] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).
[70] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[71] Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998).
[72] The Paquete Habana, 175 U.S. 677, 700 (1900).
[73] Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472 (1997).
[74] Gwynne Skinner, *When Customary International Law Violations Arise Under the Laws of the United States*, 36 BROOK. J. INT'L L. 205, 229 (2010).
[75] Goodman & Jinks, *supra* note 73.
[76] *Id.*
[77] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).
[78] *Id.*
[79] *Id.*

In her article, *The Myth of Common Law Crimes*, Carissa Byrne Hessick contends that the legal landscape shifted significantly between the late nineteenth and early twentieth centuries, as statutes displaced the common law as the predominant source of criminal law in most states.[80] This transition represented a move towards a more codified and uniform criminal law system, with legislators defining crimes and punishments in written laws.[81] However, despite this shift, the influence of the common law did not completely fade away. Hessick claims that, in the modern era, several states have maintained a role for common law crimes in their criminal justice systems.[82] For example, judges in Maryland uphold the common law offense of indecent exposure. Judges in North Carolina maintain the common law offense of robbery, even though no statute defines the offense.[83] In addition, Alabama, Connecticut, the District of Columbia, Florida, Idaho, Michigan, Mississippi, New Mexico, North Dakota, Rhode Island, South Carolina, Virginia, and Washington still allow for common law prosecutions and convictions.[84]

These findings leave us in an interesting position, straddling the shell of common law prosecutions that still exists in many states and the proscriptive nature of *Erie* and *Hudson*. The logical conclusion from all this research is that a common law prosecution under the law of nations may be maintainable in a state that still allows for common law offenses. Which specific crimes under the law of nations could be prosecuted this way is a question that requires more research. One salient question that must be answered is what the law of nations looks like today. Research into whether the common law of the law of nations has progressed past Vattel's eighteenth-century account would require an in-depth historical investigation into the application of the law of nations in all states. Regardless, the topic deserves more analysis and scrutiny. At the least, we know that the current understanding of *Henfield* and its lessons is ripe for an update in legal academia.

[80] Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 980 (2019).
[81] *Id.*
[82] *Id.* at 980-81.
[83] *Id.* at 982.
[84] *Id.* at 980-82.