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# The Inquest and the Virtues of Soft Adjudication

*Paul MacMahon*[*]



[*] Assistant Professor of Law, London School of Economics and Political Science. I gained from discussions with Jake Gersen, Matthew Stephenson, Seth Stoughton, Dan Klerman, Josh Chafetz, Jane Stapleton, Fionnuala Ní Aoláin, Peter Pihos, Deirdre Mask, Brian MacMahon, Colin Baran, and participicants in a Climenko Fellows' workshop at Harvard Law School. I owe special thanks to Paul Matthews, Coroner for the City of London, who kindly invited me to attend an inquest over which he presided in July 2012. Thanks, finally, to the staff of the *Yale Law & Policy Review* for helpful edits.

## Introduction

Frank "Sid" Smody, a farmer in rural Missouri, was at home on the night of May 23, 2014. He got a phone call from his daughter, Lori, who lived elsewhere on his property in a mobile home. Lori had seen four or five prowlers and feared for her safety. She had already called the sheriff's department, but also asked her father to get his gun. Sid obliged, and he walked around the property looking for the intruders. Finally finding someone in the darkness, Sid was determined to stand his ground. He fired his gun and advanced toward the unidentified person. When told to drop his weapon, Sid refused, shouting: "I don't know who you are; you are on my property." The unidentified person fired five shots at Sid, one of which entered Sid's left abdomen. But the shooter was not a prowler; he was Sergeant Brandon Lowe from the Butler County Sheriff's Department. Like Sid, he had been searching in the dark for the intruders. Sid Smody was pronounced dead in the early hours of May 24.

On July 16, 2014, a jury was convened at the county courthouse to consider the facts surrounding Sid's tragic death. As more than 100 members of the public looked on, the jury heard testimony from Lori, from Sergeant Lowe, and from five other witnesses, including a doctor who performed an autopsy on the body. Having heard the evidence, the jury ruled the death a justifiable homicide.[1] The jury's verdict, however, was not part of a criminal trial; it did not formally preclude prosecution of Sergeant Lowe on homicide charges. Nor was the verdict the conclusion of a wrongful death suit; the decision does not stop Smody's estate from trying again before a civil jury if the estate sought damages. So what sort of proceeding was this?

The proceeding was an inquest. This Article reintroduces American legal scholars to the inquest, a legal institution designed especially for difficult death adjudications. An inquest is a quasi-judicial proceeding whose purpose is to establish how a person died. Since the twelfth century, inquests have been rendering verdicts on deaths considered suspicious or otherwise difficult to explain. To the extent the inquest survives in the United States, it sometimes involves a judge, but more often, as in Sid Smody's case, entails a jury acting with the assistance of a coroner. Inquests can roam beyond the immediate medical causes of death. Their verdicts sometimes purport to allocate responsibility, but they do much more than that. Medical experts and witnesses testify under oath. Interested parties, who may be represented by lawyers, can make submissions and seek to influence the proceedings. Having considered the evidence, the jury, judge, or coroner deliberates and renders a formal verdict as to the manner of death, classifying it as death by natural causes, an accidental death, suicide, unlawful killing, or justified killing. In a contested case, selection among the possible ways of describing how the deceased met his or her end is a kind of official adjudication.

1. Michelle Friedrich, *Farmer's Death Ruled a Justifiable Homicide*, Daily Am. Republic, July 20, 2014.

Inquests have several unusual features. As the word's etymology suggests, an inquest is an inquisitorial proceeding, and provides a counterexample to the common law's general commitment to adversarialism.[2] What is perhaps most intriguing about inquests is that an inquest verdict generally has no bearing on anyone's legal rights and duties. Inquests may even end inconclusively: in some jurisdictions, the jury may admit defeat and record an "open verdict" where it cannot determine the manner of death. Despite these puzzling attributes, or perhaps because of them, almost nothing has been written about inquests in the United States for decades.[3] And most of the coroners or prosecutors with the power to call an inquest rarely do so. Moreover, many localities are served by medical examiner systems, which generally do not give anyone the power to hold inquests.[4] Nevertheless, I have found recent inquests in eighteen of the United States.[5] As well as retaining a toehold in America, the coroner's inquest plays a highly prominent role in most other common law jurisdictions. Unsurprisingly, there are much healthier literatures on inquests in other common law countries, where inquests are a pervasive aspect of the legal landscape.[6]

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2. *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635 (2009) (contending that the opposition to inquisitorial legal procedures is a core commitment of the American legal heritage).

3. As far as I can tell, one must go back as far as 1970 to find an American law review article that provides an in-depth explanation of the nature and functions of inquests. Comment, *The Rigors of Mortis: Participation by Counsel at Coroner's Inquests*, 43 S. CAL. L. REV. 329 (1970). For a rare recent example of awareness of the historical significance and contemporary potential of the inquest, see D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 883–85 (2011), which suggests that the role of coroners should be revamped to include neutral supervision of the criminal process. Even legal historians have done little work on coroners and their inquests. Lawrence M. Friedman & Paul W. Davis, *California Death Trip*, 36 IND. L. REV. 17 (2003) (providing an exception, but describing the historical literature on American coroners as "scanty"). Lawyers whose practice involves inquests have written occasional articles about them. *See, e.g.*, H. Morley Swingle, *Coroner's Inquests: Modern Usage of the Hue and Cry*, 63 J. MO. BAR 80 (2007) (advising criminal defense lawyers and prosecutors in Missouri to use the coroner's inquest for a speedy resolution of justifiable homicide cases).

4. Exceptionally, some non-coroner jurisdictions allow for a form of inquest presided over by judges or specially appointed lawyers. *See infra* Section I.C.

5. *See infra* Section I.C. I have found recent inquests in California, Colorado, Florida, Georgia, Idaho, Illinois, Massachusetts, Missouri, Montana, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming.

6. For example, the classic treatise on the English law of coroners is continually updated by the Coroner for the City of London, who is also a Professor of Law at King's College, London. *See* PAUL MATTHEWS, JERVIS ON CORONERS (13th ed. 2004) [hereinafter MATTHEWS, JERVIS ON CORONERS]. Recent reforms to the law on coroners provoked a book specifically devoted to inquests in England. JOHN COOPER,

Though inquests are currently rare in the United States, they have many hidden strengths. Because they are held in public, inquests have the capacity to shine a light on public and private wrongdoing, and to provide an independent mechanism for accountability. Another function of inquests is to promote safety and disseminate new knowledge about risks. The inquest, of course, has a serious weakness—its findings do not lead directly to coercive sanctions against those guilty of wrongdoing. And the inquest, of course, is not the only mechanism for achieving the goals I have mentioned. Other legal institutions—criminal law, tort law, administrative agencies—also fulfill one or more of these functions to a greater or lesser extent, while also possessing the capacity to back their conclusions with sanctions.

Paradoxically, however, I suggest that the seeming toothlessness of the inquest is a strength as well as a weakness. Because they impose neither punishment nor liability, inquests operate relatively unencumbered by the restrictive procedures entailed by adversarial proceedings. For this reason, they can aim more squarely at establishing the truth, and so they have the potential to uncover more information and issue more accurate judgments at lower cost. In so doing, inquests may also provide an important springboard for a later criminal prosecution, tort claim, or agency action. And even in cases where no one is to blame for the death, inquests can do things that adversarial litigation is not designed to do: to help the deceased's family come to terms with the death, and to warn the broader community of the dangers of deadly activities while suggesting precautions.

I suggest that American jurisdictions should consider reviving the inquest. Given budgetary constraints and the complexity of the policy issues involved, it would be rash to argue that American jurisdictions should reinstate the general practice of holding inquests across all classes of unexplained death. So my specific focus in this Article is on one class of case where inquests are particularly likely to be useful: deaths at the hands of law enforcement officers. Two recent cases—the deaths of Eric Garner in New York and Michael Brown in Ferguson, Missouri—highlight the deep significance of this class of case. Where the law enforcement action turns out to be justified, as in the Smody case, inquests help people to come to terms with tragic deaths by dispelling myths. In cases of unjustified killing, the inquest can play an even more significant role. Because of the intimate relationship between police and prosecutors, the criminal process is systematically likely to favor officers accused of misconduct, and charging decisions are veiled in secrecy. Tort actions by the victim's family are also subject to notorious weaknesses.

A properly designed inquest can provide a useful independent check on police officers and prison guards by exposing official wrongdoing—but only if the inquest is independent of the bodies investigated. American coroners are now

INQUESTS (2011). Ian Freckelton and David Ranson's treatise, focused mainly on Australia and New Zealand, is also a superb resource. IAN FRECKELTON & DAVID RANSON, DEATH INVESTIGATION AND THE CORONER'S INQUEST (2006).

typically part of the law enforcement apparatus rather than an independent element of local government. For precisely that reason, Clark County, Nevada has experimented with variations on the inquest theme for officer-involved deaths in Las Vegas. At the urging of the ACLU, the County Commissioners enacted an inquest ordinance, whereby a judge, rather than a coroner, conducts an inquest in the case of every officer-involved death. It is a measure of the potential effectiveness of this mechanism that police officers brought a constitutional challenge to the new procedure, which succeeded on technical grounds. The Nevada litigation involves an ongoing battle between competing ideas about the nature of inquests, and hence provides a useful focal point for my discussion.

A further aim of the Article is to show that the inquest is an example of a broader phenomenon of great significance, a phenomenon I call "soft adjudication." By "soft adjudication," I mean official determinations about past events by authoritative decision makers that lack formal binding effect, but may influence other institutions and the public.[7] Other examples of soft adjudication include reports by presidential and national commissions; investigative reports by congressional committees; reports of truth and reconciliation commissions in post-conflict societies; and non-binding determinations by an ombudsman overseeing government departments. Again, I suggest that the non-binding nature of soft adjudication is often an advantage. In some conditions, the coercive aspects of the legal system benefit from soft adjudication's helping hand. And binding decisions supported by coercive sanctions are not the only way that legal institutions contribute to social goals. Soft adjudication can educate the public and shape behavior indirectly. Moreover, soft adjudication responds—and has the capacity to respond better than any other legal institution—to a deep human need to understand troubling events, regardless of whether the imposition of liability is appropriate.

## I. Inquests: Historical Development and Contemporary Landscape

Even more than most legal institutions, the inquest cannot be understood without knowledge of its history. To provide much-needed background, I begin this Part with the inquest's historical roots, before turning to the institution's development in colonial and post-independence America. The American inquest has declined in prominence, particularly in the twentieth century, but I show that inquests are still held in the United States. Looking only at America, one might be forgiven for assuming that the inquest is a slowly dying anachronism. I rebut that assumption by examining the very different recent

7. In this way, I connect the inquest and other similar phenomena to the extensive body of scholarship on "soft law." *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 91–100 (2005); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008).

history of inquests in many Anglo-Commonwealth countries where the inquest remains highly significant.

### *A. The Medieval and Early Modern Coroner's Inquest*

The office of the coroner dates to medieval England.[8] The first firm historical evidence of the coroner's existence is from 1194. In that year, the Articles of Eyre required the justices to see to the election of *custos placitorum coronae*, or "keepers of the pleas of the Crown." These coroners (or "crowners") represented the King in the localities over which they had jurisdiction. Coroners helped to augment the royal purse by forfeiting sureties; by seizing the property of those determined to be felons; and by exercising jurisdiction over royal fish (whales and sturgeon), shipwrecks, and treasure trove. In the early days of coroners, the office holders represented the Norman kings in their attempts to establish royal authority over an often unruly native Anglo-Saxon population. One historian contends that in the thirteenth and fourteenth centuries coroners were the "principal agents of the Crown in bringing criminals to justice."[9] In their medieval incarnations, as today, coroners defied classification in terms of the tripartite separation of powers. In modern terms, they combined executive and judicial functions.

Though early coroners were multi-faceted royal officials, their main business was conducting inquests on dead bodies in the event of a violent or unnatural death. Thirteenth- and fourteenth-century sources reveal procedures for informing the coroner of an "unnatural" death. Witnesses to the death, or those who found the body first, had the duty to raise the "hue and cry" so that a local official, such as the bailiff, would gain notice; the official would then notify the coroner of the dead body.[10] The coroner's jury, like the grand and petit juries, was in many ways the opposite of today's conception of the jury as an impartial decision maker. The jurors were locals: direct witnesses to the post-mortem scene and also knowledgeable about local conditions. Jurors determined whether the death had been caused feloniously, by misadventure, or naturally—and, if feloniously, whether the death was the result of suicide or homicide.[11]

8. The fullest account of the early history of coroners is Hunnisett's. R. F. HUNNISETT, THE MEDIEVAL CORONER (H. A. Holland ed., 1961). The most readily available collection of primary sources is SELECT CASES FROM THE CORONERS' ROLLS, 1265-1413, in 9 SELDEN SOCIETY (Charles Gross ed., 1896) [hereinafter Gross, SELECT CASES].

9. *See* Gross, SELECT CASES, *supra* note 8, at xxiv.

10. *See* HUNISSETT, *supra* note 8, at 10.

11. *See id.* at 20-21.

### *B. Coroners' Inquests in America*

The early American colonists mimicked many English institutions;[12] the coroner was among those introduced into colonial America. As in England, the colonial coroner was responsible for convening an inquest jury to investigate any unexplained death.[13] The practice of holding inquests survived the colonists' decision to sever ties with the King whom "crowners" notionally served.[14] An incident in 1778 illustrates that the norm requiring an inquest in cases of unusual death was well ingrained at the time of the American Revolution. On February 14th of that year, the bodies of two men were found in Cumberland County. A group of local citizens, unable to get hold of an official coroner, decided to appoint one of their number to the office. The newly appointed coroner then selected a jury of twelve men to view the bodies. The makeshift inquest jury decided that "Coald and feateaige" (cold and fatigue) had caused the deaths.[15] Inquests continued to be held in significant numbers in the nineteenth century. To give just two examples: inquest juries ruled on the death of Alexander Hamilton[16] and the gunfight at the O.K. Corral.[17]

The American inquest waned in the nineteenth and twentieth centuries to today's relatively obscure position. Though a comprehensive history of this decline remains unwritten, the inquest appears to have fallen victim to a confluence of two nineteenth-century developments: the rise of specialized medical knowledge and the capture of the office of the coroner by partisan politics.[18] Coroners came under heavy fire, especially from medical writers, for failure to make sufficient use of medical experts to carry out autopsies, and for refusing in many cases to defer to the opinion of doctors about the causes of particular deaths.[19] The ability of coroners to absorb medical knowledge seems to have also been hindered by the need to play politics: the office of the coroner was an elected one. With the widening of the franchise, coroners had to become politi-

12. DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 22 (1958) (noting the colonies were "insistent on allegiance to English institutions").

13. Helen Brock & Catherine Crawford, *Forensic Medicine in Early Colonial Maryland, 1633–83*, *in* LEGAL MEDICINE IN HISTORY 27 (M. Clark & C. Crawford eds., 1994).

14. JEFFREY JENTZEN, DEATH INVESTIGATION IN AMERICA 17-18 (2009).

15. *Id.* at 12.

16. *See* ALEXANDER HAMILTON: THE MAN WHO MADE MODERN AMERICA 37 (2004) (noting that the verdict in the Hamilton inquest was "willful murder" by Aaron Burr).

17. STEVEN LUBET, MURDER IN TOMBSTONE: THE FORGOTTEN TRIAL OF WYATT EARP 66 (2004) (holding as a verdict that three men died "from the effects of pistol and gunshot wounds inflicted by Virgil Earp, Morgan Earp, Wyatt Earp and one Holliday, commonly called Doc Holliday").

18. *See* JENTZEN, *supra* note 14, at 19, 23.

19. *Id.* at 16–24.

cians, and in many places the office became part of the "spoils system."[20] In New York City, for example, coroners during the Tammany Hall era had a dreadful reputation. Coroners were paid per body; one story has rival coroners from Manhattan and Brooklyn fighting over an unclaimed body that was floating in the East River, whacking each other with oars.[21]

Progressives turned to a typical remedy for the excesses of democracy: they sought to turn power over to experts. The critique of elected coroners appears to have much in common with the critique of elected judges, which resulted in a backlash against partisan elections.[22] So it was that many elected coroners were replaced by appointed medical examiners. Unlike coroners, medical examiners typically must be medical doctors; in addition, they are civil servants rather than elected office holders.[23] The first state to abolish coroners was Massachusetts in 1877, replacing them with medical examiners who were required to be physicians.[24] The abolition of the New York City coroner was a particularly significant event in the history of the inquest's decline.[25] When the Tammany Hall era came to an end in 1914, one of the new Mayor's early priorities was replacing the office of the coroner with the medical examiner system. In 1918, the Mayor appointed the city's first Chief Medical Examiner; in the same year, New York created the first toxicology laboratory in the United States.[26] The process of reform continued throughout the twentieth century to the point where approximately half of the population of the United States—including those living in almost every major city—is served by a medical examiner system.[27] The result of the partial wave of reform is a complicated patchwork of death-investigation systems across the United States.[28] Some American states have abolished the of-

20. Julie Johnson, *Coroners, Corruption, and the Politics of Death: Forensic Pathology in the United States*, *in* LEGAL MEDICINE IN HISTORY, *supra* note 13, at 271.

21. MICHAEL M. BADEN & JUDITH A. HENNESSEE, UNNATURAL DEATH: CONFESSIONS OF A MEDICAL EXAMINER 51 (1989).

22. *See generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

23. *See* COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 248 (2009) ("[M]edical examiners are almost always physicians, are appointed, and are often pathologists or forensic pathologists.").

24. *See* JENTZEN, *supra* note 14, at 4, 22.

25. *See* BERNARD HIRSCHHORN, DEMOCRACY REFORMED: RICHARD SPENCER CHILDS AND HIS FIGHT FOR BETTER GOVERNMENT 99 (1997) (noting that New York's law served as a "prototype for legislation in other jurisdictions").

26. Ayn Embar-Seddon & Allan D. Pass, *Forensic Medicine*, *in* 1 THE ENCYCLOPEDIA OF POLITICAL SCIENCE 566 (Jack R. Greene ed., 3d ed. 2007).

27. RANDY HANZLICK, DEATH INVESTIGATION: SYSTEMS AND PROCEDURES 89 (2007).

28. For an attempt to describe this patchwork, see *id.* at 89–98.

fice of the coroner wholesale and replaced it with a medical examiner system; in others, the type of system varies with the locality.[29] Overall, the balance between medical examiners and coroners is now fairly stable, with few conversions in recent years.[30]

Whether served by a coroner or a medical examiner, localities have officials who certify and classify deaths, lending an official imprimatur to a particular version of the truth about how and why someone died. To some extent, these death-deciding officials play a supporting role in the administration of criminal, tort, property, and contract law: they gather, preserve, and analyze evidence of the circumstances surrounding the death, and parties to criminal and civil proceedings may use that evidence. Yet coroners and medical examiners are not simply adjuncts to other legal institutions. They maintain a consistent practice of delivering their own official findings on the cause and manner of death, regardless of whether that information has consequences for anyone's legal rights and duties.

For the most part, these officials carry out their work without holding inquests. In many locations, the inquest was abolished along with the coroner. Because medical examiners are rarely lawyers, they are not typically equipped to preside over a quasi-judicial procedure or to instruct a jury. Medical examiner systems, then, usually have little or no room for the inquest.[31] Massachusetts provides a counterexample: it has no coroners, but, where the Attorney General or district attorney decides that an inquest is necessary, a sitting superior court judge must hold one.[32] In Massachusetts, then, as well as in some other jurisdictions, the inquest has been unbundled from the office of the coroner, though most American inquests are still held by coroners.

The American inquest, then, survives. Inquests are still held regularly, mostly in rural counties with coroner systems. Inquests are far from rare in the United States. Having monitored newspaper reports for approximately the past two years, I have found recent examples in California,[33] Colorado,[34] Florida,[35]

29. *See id.* In many states, urban counties are served by a medical examiner, while rural counties retain a coroner system. Sometimes officials named "medical examiners" have more of the characteristics of coroners; in other places, officials called coroners are more like standard medical examiners. Some localities are served *both* by a statewide medical examiner system and by local coroners. *Id.* at 89-98.

30. Randy Hanzlick, *The Conversion of Coroner Systems to Medical Examiner Systems in the United States: A Lull in the Action*, 28 AM. J. FORENSIC MED. & PATHOLOGY 279, 280 (2007).

31. *See, e.g.*, JENTZEN, *supra* note 14, at 20 (noting that an influential 1928 National Research Council report recommended the replacement of the office of the coroner together with the abolition of inquests).

32. MASS. GEN. LAWS ch. 38, § 8 (2014).

33. *See, e.g.*, Matthias Gafni, *Unusual Coroner Inquest Decision: Jury Rules Antioch Detectives Accidentally Shot Parolee to Death*, CONTRA COSTA TIMES, Aug. 31, 2012 (Contra Costa County, California).

Georgia,[36] Idaho,[37] Illinois,[38] Massachusetts,[39] Missouri,[40] Montana,[41] Nevada,[42] Ohio,[43] Pennsylvania,[44] South Carolina,[45] South Dakota,[46] Texas,[47] Washington,[48] Wisconsin,[49] and Wyoming.[50] Still, the numbers are small. Many coroners simply do not exercise their power to hold inquests.

34. *See, e.g.*, Karen Abbott, *In Colorado, Coroner's Inquests Are Seldom Used*, ROCKY MTN. NEWS, Jan. 5, 2002.

35. *See, e.g.*, Meg Laughlin, *Startling Shot of Deadly Force*, ST. PETERSBURG TIMES, Aug. 1, 2010.

36. *See, e.g.*, M. Elizabeth Neal, *Coroner's Inquest Launched in Roark Death*, EATONTON MESSENGER, Dec. 19, 2012.

37. *See, e.g.*, *Jury Says Police Shooting of Teen Was Justifiable Homicide*, ASSOCIATED PRESS, Nov. 18, 2005.

38. *See, e.g.*, Edith Brady-Lunny, *Jury: Man's Drug-Related Death Accidental but Avoidable*, PANTAGRAPH, Apr. 23, 2013; Phyllis Coulter, *Mom Warns Teens About Deadly Game at Memorial for Her Son*, PANTAGRAPH, Apr. 5, 2013.

39. *See, e.g.*, Lane Lambert, *Amy Bishop Inquest Judge Questioned Former Braintree Police Chief's Claims*, PATRIOT LEDGER, Feb. 26, 2013.

40. *See, e.g.*, Martha Shirk, *In Quest of Justice: Officials Square Off over Death of Toddler*, ST. LOUIS POST-DISPATCH, Oct. 8, 1995; *see also* Swingle, *supra* note 3.

41. *See, e.g.*, *Inquest: Deputy Justified in Plentywood Shooting*, ASSOCIATED PRESS, Feb. 22, 2013; Gazette Staff, *Coroner's Inquest Scheduled for Deputy Involved Shooting*, BILLINGS GAZETTE, June 13, 2012; *Park County Holds Inquest in Shooting Death of Florida Man*, ASSOCIATED PRESS, July 13, 2011.

42. *See, e.g.*, Carri Geer Thevenot, *Shooting Death by Henderson Police Last Month Ruled Justifiable*, LAS VEGAS REV. J., July 23, 2010.

43. *See, e.g.*, *Brown County Coroner Judith Varnau To Hold Inquest into Death of Zachary Goldson*, WCPO CINNINATI, Dec. 20, 2014; Stephen J. Pytak, *Holman Supports Coroner's Plan To Pursue Inquests*, REPUBLICAN-HERALD, Jan. 17, 2014.

44. *See, e.g.*, Pyeritz v. Commonwealth, 956 A.2d 1075, 1077 (Pa. Commw. Ct. 2008); Jennifer Reeger, *Coroners Defend, Deride Inquests*, PITTSBURGH TRIB. REV., Feb. 17, 2008.

45. *See, e.g.*, Joe Borlik, *SC Coroner's Inquest Blames Baby Sitter for Death*, ASSOCIATED PRESS, Oct. 6. 2012.

46. *See, e.g.*, Chuck Clement, *Lake County, Sheriff's Office Named in Civil Rights Lawsuit*, MADISON DAILY LEADER, Apr. 18, 2012.

47. *See, e.g.*, Erin Quinn, *Justices of Peace Have Leeway in Dealing with Death Issues*, WACO TRIB. HERALD, Feb. 7, 2010; Linda Byrne, *JP Rules Death a Suicide; Family Criticizes Response*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 2010.

48. *See, e.g.*, Meghann M. Cuniff, *Coroners Say Inquests Offer Transparency*, SPOKESMAN REV., Dec. 19, 2010.

49. *See, e.g.*, Gina Barton & Lydia Mulvany, *Charge Three Officers, Derek Williams Inquest Jury Recommends*, MILWAUKEE J. SENTINEL, Feb. 22, 2013, http://www

### *C. The Contemporary Anglo-Commonwealth Inquest*

By contrast, the inquest continues to flourish in most other common law countries.[51] In Canada and Australia, for example, coroners regularly use inquest verdicts as a means of communicating safety hazards to the public.[52] The inquest is also particularly important in post-Troubles Northern Ireland, where the coroner is currently playing a significant role in examining cold cases from the 1970s, 1980s, and 1990s.[53] But here, I focus mainly on England and Wales.

The English inquest evolved differently from its American counterpart, partly because of differing institutional incentives. Until the 1880s, coroners were elected by the freeholders of the county, but since then they have been appointed by local governments.[54] Coroners—unlike their American counterparts—thus became relatively insulated from the politics of the newly widened franchise. Despite this shift in selection procedures, coroners did not become ordinary bureaucrats. Coroners have continued to hold office under the Crown; they preside over institutions called "Coroners' Courts."[55] Like ordinary courts, they continue to conduct their business in public, except where national security concerns require a private session.[56] And like ordinary courts, they have the power to punish for contempt of court.[57]

The purpose of the English coroner is plainly distinct from the purposes of the criminal justice system. A 1971 government report on the coronial system made clear that "the Coroner's primary function . . . is to help establish the

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.jsonline.com/news/milwaukee/milwaukee-police-inquest-custody-death-derek-williams-088s909-192306071.html.

50. *See, e.g.*, Josh Rhoten, *Inquest Finds No Answer in Frye's Death*, WYO. TRIB. EAGLE, Apr. 17, 2012.

51. The coroner's office is inextricably linked with the development of the common law and civil law countries appear not to have any special death proceedings like the coroner's inquest. *See* MATTHEWS, JERVIS ON CORONERS, *supra* note 6. Comparativists sometimes use the word "inquest" when describing autopsies in civil law countries. *See, e.g.*, Robert B. Leflar, *"Unnatural Deaths," Criminal Sanctions, and Medical Quality Improvement in Japan*, 9 YALE J. HEALTH POL'Y L. & ETHICS 1, 25-31 (2009) (describing Japan's "problematic death inquest system").

52. *See* FRECKELTON & RANSON, *supra* note 6, at 720-21.

53. *See, e.g.*, Christopher K. Connolly, *Seeking the Final Court of Justice: The European Court of Human Rights and Accountability for State Violence in Northern Ireland*, 9 SAN DIEGO INT'L L. REV. 81 (2007).

54. Municipal Corporations Act, 1882, 45 & 46 Vict., c. 50, § 171; Local Government Act, 1888, 51 & 52 Vict., c. 41, § 5.

55. COOPER, *supra* note 6, at 22.

56. Coroners Rules, 1984, R. 17.

57. *See, e.g.*, R v. West Yorkshire Coroner, *ex parte* Smith, [1985] 1 All ER 100.

cause of death in a wide range of situations, few of which have any criminal or even suspicious overtones."[58] The power of the English Coroner's Court to indict a suspect for homicide was finally abolished in the 1970s,[59] thus fully severing the formal link between criminal law and coroners. Indeed, the Coroners' Rules state that a determination "may not be framed in such a way as to appear to determine any question of (a) criminal liability on the part of a named person, or (b) civil liability."[60] A coroner can, however, return a verdict of "unlawful killing," without naming the killer.[61]

An English inquest is plainly an inquisitorial proceeding. An inquest is neither a prosecution nor a lawsuit; though "interested parties" may attend, there are formally no parties to an inquest. Coroners do not adhere to the adversarial conception of a judge's role as a neutral umpire. Particularly in uncontested cases, the coroner may depart from the traditional austere vision of an English judge, and may meet informally with the bereaved family before the inquest to explain how the inquest will be conducted.[62] The coroner, having already conducted an informal investigation with the aid of his staff, decides which witnesses to call, decides what evidence should be adduced on the record, and conducts most of the questioning himself or herself.[63] Interested parties (the family, alleged wrongdoers) may be represented and may put questions to the witnesses,[64] though aggressive cross-examination of matters already covered by the coroner is generally off limits.[65] The coroner's decisions as to the scope of the inquiry are subject to judicial review in the High Court, which naturally gives the coroner a large degree of latitude.[66]

58. REPORT OF THE COMMITTEE ON DEATH CERTIFICATION AND CORONERS (Cmnd. 4810, 1971).

59. Criminal Law Act, 1977, c. 45, § 56(1).

60. For the most recent version of this rule, see Coroners and Justice Act, 2009, c. 25, § 10(2).

61. A formal link between the Coroner's Court and the criminal process has been reestablished in an attenuated way. Now, in the event of a verdict of unlawful killing by a Coroner's Court, the Director of Public Prosecutions is under an obligation to explain her decision if she decides not to prosecute. R v. DPP, [2006] EWHC (QB) 3211 ("[W]here an inquest jury has found unlawful killing the reasons why a prosecution should not follow need to be clearly expressed."); *see also* R v. DPP *ex parte* Manning, [2001] Q.B. 330 ("Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing . . . the ordinary expectation would naturally be that a prosecution would follow.").

62. COOPER, *supra* note 6, at 16.

63. MINISTRY OF JUSTICE, GUIDE TO CORONER SERVICES 18-19 (2014).

64. The Coroners (Inquests) Rules, 2013, R. 21(b).

65. COOPER, *supra* note 6, at 18.

66. *See, e.g.*, Goodson v. H.M. Coroner for Bedfordshire & Luton, [2004] EWHC (Admin) 2931 (stating that in reviewing a coroner's decision as to the sufficiency

Most English inquests are routine affairs, but others have assumed major public importance. The inquest into the deaths of Princess Diana and Dodi Al-Fayed, for example, was conducted by a judge of the Court of Appeal, the second-highest court in England and Wales.[67] Diana and Dodi died in a car crash in Paris in 1997; at the time of the crash, their car was being pursued by paparazzi. A decade after the deaths, an inquest began in London. The inquest lasted six months and heard testimony from 250 witnesses. In 2008, the jury returned a verdict of unlawful killing, concluding that the death had resulted from gross negligence by the deceased's chauffeur (who also died in the accident) and from negligence on the part of those driving vehicles pursuing the car.[68] The jury also noted another contributing factor: the victims were not wearing seat belts. The inquest helped to quell conspiracy theories: the British tabloid press had published allegations that the couple had been assassinated by the British security services at the direction of the Royal Family.[69] As another example, the inquest into the "7/7 bombings" in London in 2005, in which fifty-two people died, was also conducted by a senior judge. The inquest concluded with a series of recommendations for emergency planners, the security services, and the London transport authorities for how to deal with future acts of terrorism.[70]

The English inquest process has had its share of problems in recent years. A government-ordered 2003 review of coroners recommended various reforms.[71] The quality of coroners is variable and subject to the idiosyncrasies of particular office holders.[72] One particular failing came with the case of Dr. Harold Shipman, who is thought to have murdered at least 250 of his elderly patients. The coroner system failed to detect Shipman's serial murders; a subsequent official inquiry stressed the weakness of the reporting system and proposed better

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of an investigation "the court must take account of its own lack of medical expertise and must pay an appropriate degree of deference to the judgment of the coroner, who is more experienced in these matters and was closer to the actual evidence in the case").

67. A judge may exercise the jurisdiction of a coroner "by virtue of his office." Coroners Act, 1988, c. 13, § 33(1).

68. Angela Balakrishnan, *Chauffeur and Paparazzi To Blame for Diana Death, Jury Finds*, GUARDIAN, Apr. 7, 2008.

69. *Id.*

70. *Coroner's Inquests into the London Bombings of 7 July 2005*, HM GOV'T (May 6, 2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97988/inquest-7-7-progress-report.pdf.

71. *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003*, SECRETARYY OF STATE FOR THE HOME DEPARTMENTT, http://webarchive.nationalarchives.gov.uk/20131205100653/http:/www.archive2.official-documents.co.uk/document/cm58/5831/5831.pdf [hereinafter *Fundamental Review*].

72. COOPER, *supra* note 6, at 15; *Fundamental Review*, *supra* note 71, at 70-71.

training for coroners.[73] More generally, some coroners' offices are underfunded and lack adequate physical and staffing resources.[74] But rather than allow the inquest to fade into obscurity, as American jurisdictions have largely done, the English response to these difficulties has been to reinvigorate the coronial system and to re-establish the centrality of the inquest. In 2009, Parliament passed the Coroners and Justice Act—"the most fundamental reform of the Coroner's Court for centuries."[75] Henceforth, newly appointed coroners must be qualified lawyers; previous legislation also permitted medical practitioners to serve as coroners.[76] This change reinforces the quasi-judicial nature of the role. The new Act creates an office of the chief coroner to provide leadership for coroners as a whole, as well as some degree of consistency. The first holder of that office—Judge Thornton QC—assumed office in September 2012, and is now at work creating new national standards for coroners and their inquests.[77]

## II. The Value of Inquests

It is perhaps impossible to give a comprehensive account of the value of a social practice, but this Part explores what can be said in the inquest's favor. The kind of inquest I have in mind (i) conducts its business in public; (ii) has the power to compel testimony (subject to the witness's constitutional privilege against self-incrimination); (iii) hears testimony under oath; and (iv) makes findings about the circumstances of the deceased's death that (v) are distinct from, and do not decide, the question of criminal or civil liability. This model is consistent with almost all surviving American inquests and with contemporary Anglo-Commonwealth versions. I discuss the inquest as a whole without reference to its personnel: as circumstances permit or demand, an inquest might be presided over by a coroner, by a sitting judge, or by a lawyer appointed ad hoc to conduct the inquest. The verdict might be rendered by the presiding officer or by a jury. Of course, inquests have potential downsides, too: they cost money, for example, and they may do harm where they render erroneous verdicts. In this Part, however, I focus on the benefits that inquests can bring.

73. *The Shipman Inquiry: Second Report: The Police Investigation of March 1998*, Secretary of State for the Home Department & Secretaryy of State for Health (2003), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/273226/5853.pdf.

74. Paul Gallagher, *Backlog in Coroners' Courts: Bereaved Families Wait up to Seven Years for Inquests*, Indep., Apr. 12, 2014.

75. Cooper, *supra* note 6, at 1.

76. *See* Coroners Act, 1988, c. 13, § 2(1)(b).

77. *See* Owen Boycott, *New Chief Coroner To Overhaul Inquests*, Guardian, May 22, 2012.

Why hold such a proceeding when a person dies?[78] Inquests certainly have costs: they occupy the time of presiders, witnesses, jurors, and, sometimes, lawyers. So why, aside from morbid curiosity, would legal systems think to conduct a public inquiry into a death that concludes with non-binding findings of fact? For this purpose, deaths can be divided into avoidable and unavoidable deaths. For avoidable deaths, a practice of holding inquests can contribute to the process of holding wrongdoers accountable, and can help to warn the wider public of risks, particularly new risks to their safety. Even for unavoidable deaths, an inquest and the information it uncovers can help the deceased's family and friends come to terms with the trauma of bereavement. And, in cases of uncertainty, an inquest itself helps us to understand whether a given death was avoidable or unavoidable.

But what, one might ask, makes death different from other kinds of harm? If we think inquests on death are a good idea, why not have inquests in cases of serious injury? Part of the answer is that death is typically an exceptionally serious form of harm.[79] In addition, death cases are special in that the deceased can no longer speak for herself. In many cases of death, the deceased would be uniquely able to explain what happened, but can no longer tell her story. Moreover, in cases of potential wrongdoing, the deceased can no longer commence suit or invoke other mechanisms for accountability and redress. The deceased's family members cannot necessarily be relied upon to represent her interests—they may be indifferent, may lack sufficient resources, or may be responsible for the death themselves. The inquest proceeding can help to fill the representation gap by serving as a sort of representative for the deceased.

Like so many questions about the value of legal institutions, however, the question is comparative. Inquests are not the only mechanism that contributes to any of these goals. Most obviously, the criminal law and tort law systems hold to account people responsible for deaths, and also deter future wrongdoing. These systems also yield information about risks and wrongs. Moreover, when a death is deemed newsworthy, the media help to uncover information about it. And, for many, religion, rather than municipal authorities, provides the main institutional source of comfort in the wake of a traumatic death. So we must focus on the potential advantages that inquests provide over other social mechanisms for responding to troublesome deaths. As

78. My account draws in part on the Report of the Broderick Committee in England, which listed five purposes for inquests: "(i) to determine the medical cause of death; (ii) to allay rumours or suspicion; (iii) to draw attention to the exercise of circumstances which, if unremedied, might lead to further deaths; (iv) to advance medical knowledge; and (v) to preserve the legal interests of the deceased person's family, Heirs or other interested parties." *See* COOPER, *supra* note 6, at 8.

79. Treating death as harmful is, I stress, perfectly compatible with the claim that people have a legitimate interest in dying in the way that they choose, or at least in avoiding indignity in the manner of their deaths. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 233–39 (1993).

I elaborate below, inquests provide a relatively unconstrained search for the truth; they can make unique contributions to accountability for wrongdoing; they have distinct advantages when it comes to uncovering systemic risks and problems; and sometimes the official recognition that an inquest verdict provides is especially helpful for families and communities in overcoming loss.

### *A. The Inquest as a Search for the Truth*

To the extent we seek access to the truth about a death or class of deaths, the inquest—an inquisitorial proceeding—has significant potential advantages. I do not claim that inquisitorial proceedings are inherently superior; party-driven adversarial proceedings have many strengths. But their proceedings tend to be distorted by imbalances in resources among the parties and are frequently characterized by wasteful duplication of effort.[80] By assigning investigating authority to a neutral party, a well designed inquisitorial system has the capacity to avoid these downsides of party-driven proceedings.

More fundamentally, a criminal prosecution or civil action is, at best, only partly a search for the truth about a given event.[81] In litigation, courts only address questions relevant to the parties' legal rights and duties. And to the extent that criminal and civil litigation aim at getting at the truth at all, they are severely constrained by various countervailing reasons: considerations of economic cost,[82] personal privacy, individual dignity, personal liberty, and the value of ending conflict and letting sleeping dogs lie.[83] In criminal cases, erroneous convictions are generally thought to be more troublesome than erroneous acquittals;[84] the presumption of innocence and the burden of proof are accordingly

80. The literature on adversarial and inquisitorial modes of procedure is vast and complex. For sources stressing the value of inquisitorial forms of proceeding and the weaknesses of adversarial modes, see ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); and Robert P. Mosteller, *Failures of the American Adversarial System To Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319, 362 (2011). For defenses of the adversary system, see, for example, STEPHAN LANDSMAN, THE ADVERSARY SYSTEM (1984) and J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099 (2014).

81. *See* Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1998); *see also* Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 167-68 (2003).

82. *See, e.g.*, FED. R. EVID. 403, 408 (permitting exclusion of probative evidence on grounds of "undue delay"); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999).

83. Damaska, *supra* note 81, at 304–05 ("Situations can even arise in which truth can engender hatred. *Veritas odium parit.*" (quoting TERRENCE, ANDRIA ACT 1, SC. 1)).

84. WILLIAM BLACKSTONE, 4 COMMENTARIES *357 ("Better that ten guilty persons escape, than that one innocent suffer."). For a recent discussion of the "Blackstone

designed to protect the defendant in ways that deliberately obstruct the search for truth. Both in civil and in criminal cases, the rules of evidence are designed with many goals in mind aside from increasing the accuracy of adjudication.[85] Moreover, litigation, even if it runs its full course, ends in a judgment, not with a statement of the true facts.[86] In any event, litigation usually ends with compromise—plea bargains in criminal cases, settlements in civil cases—rather than with a finding by a court about what happened.[87] Proceedings that finish with agreed dispositions are often strikingly uninformative to the aggrieved party, to the public at large, or to both.[88]

Inquests are different. To be clear, an inquest is not, and should not be, a pure search for the whole truth about why a person died. It would be fanatical to maintain a legal institution to maximize our knowledge of the causes of death without regard to the countervailing reasons to not hold such an examination. Investigations by officials and deliberation at inquests use scarce societal resources that might be deployed elsewhere. And, other things being equal, the state should avoid the risk of making false factual determinations that hurt reputations; though reputational damage does not suffice to ground a constitutional due process claim,[89] it is a significant consideration when designing and operating the legal system. An inquest can indirectly contribute to a deprivation of individual liberty or property because its findings may ultimately help to provoke a criminal prosecution or tort claim. And sometimes, perhaps, it is better to leave the uncertain circumstances of a death in the past rather than reignite an old conflict.

Still, inquests differ qualitatively from criminal and civil litigation. Inquests necessarily end with a public verdict, never with a secret settlement; they pursue truth and disseminate it to the public. Because they aim squarely at figuring out the truth about a given death, they are not limited to finding facts relevant to individual liability.[90] So inquests can yield information about deaths for which

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Principle," see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015).

85. *See* David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797, 800 (1992).

86. Weigend, *supra* note 81, at 169.

87. ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 522 (2012) ("Since the 1930s, the proportion of civil cases concluded at trial has declined from about 20% to below 2% in the federal courts and below 1% in state courts.").

88. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593 (2005).

89. *See infra* Section III.C.

90. R v. City of London Coroner, *ex parte* Barber, [1988] Q.B. 467 ("[A]n inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other.").

no one is to blame. Where blame is in issue, inquest verdicts do not directly threaten an erroneous deprivation of personal liberty or property; at most, they may lead to a criminal or civil proceeding, with their attendant procedural protections. Inquests are also relatively insulated from the moral hazard often involved in a tort action, whose ultimate result could be large amounts of compensatory or punitive damages for the plaintiff.[91] Accordingly, they are generally free of restrictive evidentiary rules, including the rule against hearsay, and of evidentiary presumptions.[92] It is precisely because they are non-coercive, then, that inquests can hold their place as inquisitorial proceedings in otherwise adversarial systems.

### *B. The Inquest's Contribution to Accountability for Wrongdoing*

Inquests aim directly at establishing the truth, rather than imposing liability. Indeed, in modern law, inquest verdicts are not even admissible as evidence in subsequent civil or criminal proceedings.[93] But the practice of holding inquests nevertheless contributes in significant ways to accountability for wrongdoing. Inquests yield information relevant to judgments of responsibility and inquest verdicts frequently express disapproval of individual or institutional actions. And especially where the wrongdoing of government actors is at stake, a well designed inquest procedure[94] provides an independent check on other state actors. To take a recent example, a high-ranking judge has been holding an inquest into the death in London of Alexander Litvinenko, who was seemingly poisoned by Russian agents. The government, at the urging of the British intelligence services, would have preferred to suppress the investigation; under pressure from the coroner, however, the government has

91. I say "relatively insulated" because, as I discuss *infra*, it is possible that the deceased's family may use the inquest as a springboard for later action for damages.

92. R v. City of London Coroner, *ex parte* Barber, [1988] Q.B. 467. As an exception to the generalization in the text, English law provides that an unlawful killing or suicide or finding at an inquest must be based on proof beyond reasonable doubt. For criticism, see Paul Matthews, *The Coroner and the Quantum of Proof*, 12 CIV. JUST. Q. 279 (1993). Other Anglo-Commonwealth jurisdictions reject this rule. *See, e.g.*, *En re* Beckon (1992), 93 D.L.R. 4th 161 (Can. Ont. C.A.).

93. *See, e.g.*, Spiegel's House Furnishing Co. v. Indus. Comm'n, 123 N.E. 606, 609-10 (Ill. 1919) (overruling previous decisions to the contrary); Bird v. Keep, [1918] 2 K.B. 692 at 699 (Eng. C.A.) (stating that although "at different periods of our history other views on this subject have prevailed . . . the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as prima facie evidence against any person of the facts found by the jury"). Inquest testimony, however, can be used on cross-examination to impeach a witness who also testifies at a subsequent trial. People v. Byers, 278 N.E.2d 65 (Ill. 1972).

94. I will explore the requirement that an inquest be "well designed" in Part III when I consider inquests after deaths at the hands of the state.

now announced a public inquiry into the death (a sort of super-inquest that will be conducted by the same judge who was presiding over the original inquest).[95] I pursue the theme of governmental accountabilty further in Part III, where I argue that inquests are particularly useful for scrutinizing deaths at the hands of law enforcement.

The inquest is useful for uncovering and explaining both private and public wrongdoing. Historically, inquests had the power to charge a defendant with homicide; for the most part[96] inquests have been deprived of that power as they have become less intertwined with the criminal process. Nevertheless, a finding of unlawful killing, and the information the inquest uncovers along the way to such a finding, can provide a springboard for legal sanctions via the criminal or civil law. In English medical negligence cases, for example, plaintiffs' lawyers frequently attend the inquest to discern whether a subsequent tort claim is worthwhile. The English case of Carol Savage, a woman suffering from paranoid schizophrenia who escaped from detention in a hospital and threw herself in front of a train, provides an example of an inquest as a springboard for future coercive proceedings. After a thorough investigation by the coroner, the inquest jury found that the "the precautions in place on 5 July 2005 to prevent Mrs. Savage from absconding were inadequate."[97] Following the inquest, the family brought a successful damages action against the hospital trust.[98]

Inquests can also contribute to accountability for wrongdoing even if they do not result in a subsequent criminal prosecution or civil action. Sometimes the public finding of responsibility is sufficient to satisfy the need for accountability, obviating the need for adversarial litigation. Moreover, an inquest's finding often results in reputational sanctions against the wrongdoer. For example, in July 1968, Senator Edward Kennedy drove a car off a bridge and into a tidal channel at Chappaquiddick.[99] Senator Kennedy swam to safety, but his passenger, Mary Joe Kopechne, drowned. Just seven days later, the Senator pleaded

95. Robert Booth, *Alexander Litvinenko: Public Inquiry To Be Held into Spy's Death*, GUARDIAN, July 22, 2014 (stating that the government's decision to hold a public inquiry "follows pressure from [the coroner] and Litvinenko's widow").

96. In Pennsylvania, exceptionally, the inquest retains the power to indict a defendant. *See, e.g.*, *N.E. Pa. Woman Ordered To Stand Trial in 2011 Shooting Death of Boyfriend*, ASSOCIATED PRESS, Nov. 13, 2013. But the Pennsylvania courts stress that "the coroner's findings do not constitute a trial on the merits and are binding on no one as a judgment." Commonwealth v. Martin, 727 A.2d 1136, 1141-42 (Pa. Super. Ct. 1999), *rev'd on other grounds*, Commonwealth v. Mouzon, 812 A.2d 617 (Pa. 2002).

97. Savage v. South Essex Partnership NHS Foundation Trust, [2009] 1 AC 681 (Eng. H.L.).

98. Savage v. South Essex Partnership NHS Foundation Trust, [2010] EWHC 865 (Eng. Q.B.).

99. *See* RICHARD L. TEDROW & THOMAS L. TEDROW, DEATH AT CHAPPAQUIDDICK (1976).

guilty to a charge of leaving the scene of an accident after causing injury, and received a suspended sentence from Judge Boyle, who said that Senator Kennedy had already been punished enough. But this quick solution failed to resolve questions about the extent of the Senator's responsibility for Ms. Kopechne's death. At the request of the district attorney, the same judge who sentenced Senator Kennedy conducted an inquest at Edgartown on Martha's Vineyard.[100] Over the course of four days, the judge heard testimony from twenty-seven witnesses, including the Senator. In a written report, a very different picture of the incident emerged.[101] The judge indicated that he did not credit several aspects of Senator Kennedy's testimony and concluded that "[t]here [was] probable cause to believe that Edward M. Kennedy operated his motor vehicle negligently . . . and that such operation appears to have contributed to the death of Mary Jo Kopechne."[102] Again, as is typical of inquest verdicts, the inquest finding was not binding on the district attorney. Senator Kennedy was not charged with homicide, and the Kopechne family did not bring suit against him. But his presidential hopes never fully recovered.

### *C. The Inquest and Public Safety*

Coroners frequently examine the circumstances of preventible deaths, so it is no surprise that the inquest has been used for various public health and safety purposes. Holding an inquest greatly increases a coroner's capacity to grab the public's attention, providing an event worthy of news coverage that can serve as a focal point for discussion about a deadly hazard. In other common law countries, coroners typically have a statutory power to make recommendations to hospitals, emergency responders, care homes, safety regulators, licensing agencies, and other authorities. In England, these reports are now known as Prevention of Future Death Reports, and the government now collates and summarizes them in accessible form.[103] Canada, especially Ontario, is exemplary in this regard. Coroners in Canada are typically medical practitioners;[104] one court has said that "[t]he unique value of an inquest is that it is conducted by men and women with a medical orientation who bring to their task their medical experience and their situation-sense of patients, families, illnesses,

100. *See* George Lardner, Jr., *Chappaquiddick, 1989: 20 Years Later, New Facts, New Suspicions*, WASH. POST, July 16, 1989.

101. JAMES A. BOYLE, INQUEST RE MARY JO KOPECHNE, DUKES COUNTY, COMMONWEALTH MASS. (1970).

102. *Id.*

103. *See Reports To Prevent Future Deaths*, CTS. & TRIBUNALS JUDICIARY, https://www.judiciary.gov.uk/related-offices-and-bodies/office-chief-coroner/pfd-reports.

104. FRECKELTON & RANSON, *supra* note 6, at 75.

medical record confidentiality, medical institutions, and medical care."[105] But even in cases that lack a medical dimension, "inquests [in Ontario] have evolved . . . as effective forums that permit the community to focus its attention on these tragic circumstances and to speak directly to the need for change as a result."[106] Inquests often result in "systemic, policy and regulative or legislative changes."[107] Australian coroners, though they generally lack medical training, frequently warn the public of hazards and often make recommendations to regulatory agencies and legislators. For example, one coroner in New South Wales has spoken out on fire risks,[108] unfenced swimming pools,[109] drug addiction in prison,[110] carbon monoxide poisoning,[111] and gun ownership.[112]

There are so few American inquests that the institution's potential public safety function remains undeveloped. But it is certainly possible to find examples of inquests publicizing safety problems. In May 2012, a two-year-old boy named Ja'Marr Tiller was mauled to death by dogs in Charleston, South Carolina.[113] It appears he was killed by two stray dogs that a member of his family was regularly feeding. The coroner held an inquest. "We know the cause of death, but are interested in the jurors' ruling regarding manner of death in this very complicated case," the coroner said.[114] "Tiller's death was not natural or a suicide, but is it appropriate to say it's an accident or to charge someone with neglect? The jury's finding won't bind the [prosecutor] in any way, but it's very compelling."[115] After hearing testimony from various witnesses, including a forensic odontologist, the six-person jury ruled that the case was one of "death by

105. People First of Ontario v. Porter, Reg'l Coroner of Niagara (1991), 5 O.R. 3d 609 (Can. Ont. Div. Ct.), *rev'd on other grounds*, (1992) 6 O.R. 3d 389 (Can. Ont. C.A.).

106. Alfred J.C. O'Marra, *The Impact of Inquests on the Criminal Justice System in Ontario: A Decade of Change*, 10 CAN. CRIM. L. REV. 237, 237 (2006).

107. *Id.*

108. Jamelle Wells, *Coroner Wants Warnings over Wheat Bag Fire Risk*, A.B.C. NEWS (Apr. 30, 2013).

109. *Coroner Recommends New Offence for Swimming Pool Deaths*, SYDNEY MORNING HERALD, Apr. 10, 2010.

110. *Coroner Recommends Random Searches of Prison Cells After Lockdown in Wake of Sydney Inmate's Death*, A.B.C. NEWS (June 16, 2014).

111. Margaret Scheikowski, *Coroner Warns of Gas Heater Dangers*, A.A.P. (July 18, 2011).

112. Andrew Drummond, *Coroner Recommends Mental Health Tests for Gun Owners*, A.A.P. (Jan. 10, 2014).

113. News Release, Charleston County Coroner's Office, Coroner To Hold Inquest on Aug. 10 for Fatal Dog Mauling of East Cooper 2-Year-Old (July 27, 2012), http://www.charlestoncounty.org/news/2012/3467.pdf.

114. *Id.*

115. *Id.*

mischance."[116] The coroner, who presided over the inquest, accepted the verdict and stated her hope that the inquest would raise community awareness of the dangers posed by stray dogs.[117] Another coroner who holds regular inquests has used her office to call public attention to the dangers of prank calls to services[118] and life-threatening levels of intoxication at fraternity parties.[119]

### *D. The Inquest and the Grieving Process*

This account of the value of inquests has primarily focused on the interests of potential future victims. But inquests can also serve the interests of those left behind after a death, especially those who were closest to the deceased.[120] By resolving uncertainties, inquests can aid the healing process. Inquests can also provide a form of catharsis by allowing those left behind to have their say and vent their feelings. And an inquest provides a form of recognition of the significance of the death, expressing the value of the human life lost. I do not claim that inquests are the only form of legal proceeding that assists the grieving process. Civil and criminal proceedings *sometimes* provide the same benefit. But many deaths, rightly or wrongly, result in no civil or criminal proceedings. A practice of holding inquests in broad classes of traumatic death thus has the capacity to meet a social need that would otherwise go unmet.

There is plenty of evidence to suggest that inquests aid the grieving process in all of these ways. An empirical study of English inquests concluded that "most families derived some benefit from the inquest. For some it helped to answer their questions, and many felt that the inquest acted as a memorial to the deceased."[121] No similar study has been carried out in the United States, but an article about Sue Fiduccia, the coroner of Winnebago County, Illinois, provides anecdotal evidence. Fiduccia is one of the few American coroners who makes the most of the inquest procedure; she holds an inquest in every "unnatural" death in the county, about 225 per year.[122] Her account of the

116. *Id.*

117. Prentiss Findlay & Andrew Knapp, *Jury Rules Mount Pleasant Toddler's Dog-Mauling Death an Accident*, POST & COURIER, Aug, 11, 2012.

118. Chris Green, *Winnebago County Coroner Sue Fiduccia: Stop the Nonsense Ambulance Calls*, ROCKFORD REG. STAR, June 6, 2014.

119. Lenore Sobota, *Frat's Charter Could Be Revoked*, PANTAGRAPH, May 19, 2012.

120. *Fundamental Review*, *supra* note 71, at 78 ("The inquest has a potentially important role in improving safeguards and reducing the risks to life. But it also has a role in enabling the family and the public to find out 'what happened' where there are significant uncertainties and conflicts of evidence which need a judicial process to resolve.").

121. GWYNN DAVIS ET AL., HOME OFFICE RESEARCH DEV. & STATISTICS DIRECTORATE, EXPERIENCING INQUESTS, at v (2002).

122. Jeff Kolkey, *At Winnebago County Coroner's Inquest, Healing Trumps Justice,* ROCKFORD REG. STAR, Dec. 23, 2012 ("[T]he inquest isn't about justice. It's about

inquest stressed its therapeutic features: "I think the inquest is more for families to be able to vent and talk and relive the incident . . . . Then that gives them a little bit of closure."[123] "Closure" is a common theme of newspaper reports on inquests: time and again, family members of a deceased person say that the inquest verdict brings them "closure."[124]

In some cases, it is certainly possible that holding an inquest may hinder rather than help the grieving process. In clear-cut suicide cases, for example, it may do nothing but aggravate the suffering of family and friends to have the circumstances of their loved-one's death aired in public.[125] Moreover, some argue that the practice of holding inquests in suicide cases, when combined with media reporting of those inquests, helps to encourage others to take their own lives, or to transmit knowledge about suicide methods that would be best kept quiet.[126] Others contend that openness is better policy because it calls societal attention to the problem of suicide.[127] These considerations counsel at least sensitivity on the part of the official charged with the decision to hold an inquest, but they do not detract from the therapeutic value of many inquests.

More broadly, an inquest can help a community come to terms with a traumatic event by showing that no one was at fault and by exonerating supposed wrongdoers. The Smody inquest, which concluded that Sergeant Lowe's

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healing wounds that can only be cured by facing the cold, hard facts of a loved one's death.").

123. *Id.* (internal quotation marks omitted).

124. For some recent examples, see, *Boat Tragedy Family Demand Closure with Inquest*, LANCASHIRE EVENING POST, Apr. 1, 2014; *Burns' Inquest Findings Give Family "Some Closure,"* DAILY ADVERTISER, May 12, 2014; *Eric Leighton Inquest Declares Death Accidental*, OTTAWA SUN, Apr. 3, 2014 ("Thursday's end to the nearly two-week-long inquest seemed to bring clarity, closure and satisfaction from all sides."); and *Inquest into Timothy Cowen's Death "To Give Closure,"* BBC NEWS (Apr. 19, 2014).

125. B.M. Barraclough & D.M. Shepherd, *The Immediate and Enduring Effects of the Inquest on Relatives of Suicides*, 131 BRIT. J. PSYCHIATRY 400, 401-04 (1977) (presenting survey evidence that inquests aggravate the distress of bereavement by suicide). For a very recent op-ed criticizing the practice of holding inquests automatically in suspected suicide cases in Ireland, see Ciaran Austin, Op-Ed., *Legal Requirement for an Inquest After a Suicide Needs to be Reviewed*, IRISH TIMES, Aug. 13, 2014.

126. *See* B. Barraclough et al., *Do Newspaper Reports of Coroners' Inquests Incite People To Commit Suicide?*, 131 BRIT. J. PSYCHIATRY 528, 530 (1977) (finding a statistical association between reports of suicide in a local newspaper in England and subsequent suicides).

127. The recent death by suicide of Robin Williams, and the coroner's decision to release the details at a press conference, has provoked a similar debate. *See, e.g.*, *Report the Truth—the Whole Truth—on Robin Williams' Death*, L.A. TIMES, Aug. 19, 2014 (defending the decision to publicize the details of suicides).

action was justified, provides one example—one internet bulletin board was full of false information about the killing before the inquest gave a more accurate account of the officer's actions.[128] As in the Princess Diana case, the inquest finding helped to suppress rumors and dispel myths. Another example comes from Walla Walla, Washington where, on May 4, 2012, a store owner fatally shot a twenty-two-year-old man who had broken into the store in the middle of the night.[129] The store owner shot the intruder with a shotgun.[130] The Walla Walla County coroner convened an inquest to examine the circumstances of the death and asked the coroner of neighboring Franklin County to preside.[131] After hearing the evidence, the six-member jury deliberated for about two and a half hours, before concluding that the killing was justified. Afterwards, the presiding coroner noted that the jury's verdict was not binding; the prosecutor could still have brought charges against the store owner.[132] Nevertheless, the inquest accomplished something: "[T]he facts were aired in a public forum and the public can make their own opinions now. There were so many rumors swirling around."[133] The coroner conceded that the rules for inquests in Washington were antiquated, but he was, in the main, satisfied with the inquest.[134] The only thing the coroner regretted was that he held the inquest in a police station conference room, instead of a real courtroom.[135]

## III. A Specific Case for the Inquest: Death at the Hands of the State

The inquest has many virtues, but it is not without drawbacks. It would be rash for me to suggest that American jurisdictions should emulate other common-law jurisdictions and instigate a general practice of holding inquests where the circumstances of death are unclear. So I focus on one particular class of case where instituting a regular practice of holding inquests would be especially valuable—cases in which a person dies at the hands of the state. The recent deaths of Michael Brown in Ferguson, Missouri (a suburb of St. Louis) and Eric Garner in New York, and the social unrest these deaths have provoked, display the urgent need to consider innovative institutional arrangements to deal with offi-

128. *See Cop*, Poplar Bluff Forum, http://www.topix.com/forum/city/poplar-bluff-mo/TFNAS2ULAM1GDG0RO (last accessed April 19, 2015).

129. *See* Paula Horton, *Inquest Jury Says Walla Walla Shooting Justified*, Tri-City Herald, Aug. 11, 2012.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

cial killings.[136] The inquest, I suggest, has the capacity to provide a significant remedy for the notorious lack of transparency surrounding officer-involved deaths. And, as I explain below, some American jurisdictions are beginning to experiment with the inquest for just this purpose. To be effective, however, inquests should be automatic for deaths at the hands of the state and should involve a jury aided by a presiding officer who is independent of law enforcement.

### *A. A Special Need for Independent Public Review*

Where a person dies at the hands of police officers or prison guards in contested circumstances, there is a heightened need for an independent review, and the inquest satisfies this need.[137] In this area especially, inquests have the potential to contribute meaningfully to each of the four values identified in Part II: the search for the truth, accountability for wrongdoing, public safety, and the grieving process. When lethal force is deployed for supposedly public purposes, members of the public understandably wish to uncover the truth about how that force was exercised in their name. Inquests in this class of case can contribute to the goal of public safety by educating the police and members of the public about the dangers of encounters with armed officers. With respect to the grieving process, uncertainty about the circumstances surrounding police deaths is traumatic not just for the deceased's family but for community members more generally, leading to a special need for the sort of public catharsis that an inquest can supply.

What is perhaps most urgently needed in this field, however, is a functioning system of accountability for wrongdoing. Here, too, inquests have the potential to play a significant role. In its most basic sense, a demand for accountability requires the officer to provide an account of her actions to the victim and to the wider public.[138] Criminal prosecutions and civil lawsuits are the law's best

136. Unfortunately, neither St. Louis County nor New York City has a provision for inquests; each jurisdiction is served by a medical examiner system that lacks an inquest component. *See* MO. ANN. STAT. § 58.720 (West 2008) (making a provision for death investigations in those counties in Missouri that, like St. Louis, have medical examiner systems, but not providing for inquests); N.Y. CITY ADMIN. CODE tit. 17 ch. 2 (providing for a medical examiner but no inquest).

137. Recent events should be sufficient to convince the reader at least of the need to do something about how localities handle investigations into deaths at the hands of police officers. Inquests, I suggest, should be part of the solution. *See* Josh Voorhees, *Our System for Prosecuting Cops Is Broken*, SLATE, (Dec. 10, 2014 6:59 PM), http://www.slate.com/articles/news_and_politics/politics/2014/12/michael_brown_darren_wilson_inquest_a_better_way_to_pursue_justice_when.html (invoking an early draft of this Article in support of the claim that localities should revive the inquest in officer-involved deaths). For prison deaths, see Steve J. Martin, *Staff Use of Force in United States Confinement Settings*, 22 WASH. U. J.L. & POL'Y 145 (2006).

138. On accountability generally, see Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC

known ways of providing accountability, but they suffer from severe limitations when the potential wrongdoing of law enforcement is at stake.

The criminal law cannot deal alone with officer-involved deaths. Generally, criminal law's heavy-handed sanctions and its accompanying procedural protections make it a blunt instrument for examining finely balanced questions about the appropriate use of force. More specifically, insiders to the criminal justice system are famed for their insularity and for their determination to avoid public scrutiny.[139] Local prosecutors typically control grand juries and are often reluctant to procure charges against members of the very police forces with whom they work on a daily basis.[140] The inadequacy of the grand jury as an institutional response in this class of case has recently been highlighted by the cases of Michael Brown in Ferguson, Missouri, and Eric Garner in New York City, each of whom was killed by a police officer in contested circumstances. In each case, the grand jury declined to indict the officer.[141] In the Ferguson case, prosecutors even took the highly unusual step of releasing transcripts of the grand jury proceeding, with the aim of combating allegations of bias.[142] Nevertheless, regardless of one's views as to the correctness of the grand jury decisions in the Brown and Garner cases, it is plain that both verdicts lacked legitimacy in the eyes of large swathes of the public.[143] After each verdict, large numbers of people

ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 117-26 (M.W. Dowdle ed., 2006).

139. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 956 (2006).

140. Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 466 (2004) (noting that "police and prosecutors have an identity of interest in investigating and prosecuting crime and an accompanying need to maintain good professional relationships, which may create disincentives for filing criminal cases against cops").

141. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES, Nov. 24, 2014, http://www.nytimes.com/2014/11/25/us/ ferguson-darren-wilson-shooting-michael-brown-grand-jury.html; J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 3, 2014, http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html.

142. Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision To Release Ferguson Grand Jury Materials*, N.Y. TIMES, Nov. 25, 2014, http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html.

143. Numerous op-eds responding to the Brown and Garner cases identified the structural tendency of local grand jury proceedings to favor officers over victims. *See, e.g.*, Jay Sterling Silver, Op-Ed., *Fixing the Conflict of Interest at the Core of Police Brutality Cases*, WASH. POST, Dec. 4, 2014, http://www.washingtonpost.com/opinions/jay-sterling-silver-fixing-the-conflict-of-interest-at-the-core-of-police-brutality

took to the streets to protest, claiming that the grand jury process was systematically biased towards the officers whose conduct was in question.[144]

Civil actions provide a theoretically significant alternative to criminal prosecution. But in practice civil rights suits under § 1983 are remarkably difficult to win; individual officers are protected by qualified immunity, and various doctrines make it difficult to pursue supervisors or localities for damages suits except in the most egregious cases.[145] Even where a suit is strong, police departments and prisons can buy their way out of negative publicity by settling cases out of court. Rather than viewing liability as an admonition for wrongful conduct, many state actors regard damages payments as a cost of doing business.[146] Moreover, given that damages and settlements are paid from the public purse, it is far from clear that the prospect of having to make a payout to a victim's family, standing alone, provides an incentive for government actors to change their behavior.[147] And criminal and civil litigation are notably ineffective at combating organizational problems, allowing systemic problems to be attributed to the misbehavior of individual officers.[148]

Government agencies are more likely to answer to political pressures than to damages suits,[149] but the political process cannot work effectively unless it is well informed.[150] Inquests have the capacity to help build what one scholar calls "the ecology of transparency,"[151] spurring political action by disclosing the facts about government misconduct. The inquest, then, can be viewed as an information-gathering arm of the political process.[152] Inquests, as I argued

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-cases/2014/12/04/0233e6e2-7b1d-11e4-b821-503cc7efed9e_story.html (noting the "inherent conflict of interest in giving local prosecutors so much control over the decision whether to charge police for allegations of bias or excessive use of force" and advocating for the use of special prosecutors).

144. Davey & Bosman, *supra* note 141; Goodman & Baker, *supra* note 141.

145. Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 9-10 (2009).

146. Armacost, *supra* note 140, at 474-75; *see also* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 193-216 (1993) (presenting evidence that Los Angeles Police Department officers viewed damages payouts merely as a cost of doing business).

147. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV 345, 367-68 (2000).

148. Armacost, *supra* note 140, at 464.

149. Levinson, *supra* note 147, at 457.

150. Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1121 (2013).

151. Seth Kreimer, *The Freedom of Information Act and the Ecology of Transparency*, 10 U. PA. J. CONST. L. 1011, 1016 (2008).

152. Another way to understand the inquest's role is as a greatly enhanced version of the civilian review board. On civilian review boards, see Armacost, *supra* note 140,

above, have significant advantages over litigation for producing information,[153] and this information can be used for various purposes.[154] Inquests, because they deal repeatedly in a public manner with allegations of officer misconduct, also have a greater capacity to uncover and make credible recommendations about systemic police and prison-officer failings than other available review mechanisms. Inquests serve an agenda-setting function: they help to keep wrongful deaths in the news cycle and on the political agenda when powerful law enforcement interests would prefer to make them go away. And even where an inquest exonerates rather than excoriates, a public investigation conducted by independent officials helps to remove the public's natural suspicion that information is being withheld.

Moreover, adversarial litigation and the inquest are better seen as partners, not rivals. Litigation does things that the inquest cannot: most obviously, it can end with coercive sanctions against wrongdoers. An inquest proceeding, where it uncovers otherwise hidden evidence of wrongdoing, provides a much-needed helping hand to the criminal and civil litigation processes, helping to preserve important evidence about the death, and indicating to potential prosecutors and plaintiffs whether they have a winnable case.

The Derek Williams case is a recent and relatively rare American example of an inquest scrutinizing high-profile police misconduct. On July 6, 2011, Williams was arrested for robbery by the Milwaukee police and placed in the back of a squad car.[155] He repeatedly told officers that he could not breathe.[156] The

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at 538-41. Though almost all American police departments are subject to some sort of complaints review process, it is rare for such processes to be fully independent. *See* DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 83 (1994).

153. For an account of the weaknesses of litigation as an information-gathering tool in the specific context of policing, see Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 874-87 (2012). Inquests, of course, would not provide a panacea. For example, however one designs an information-gathering procedure, jurors may not reach a consensus about the "facts" of a highly-charged event, because people perceive events in light of their previous commitments. *See* Dan M. Kahan et al., *"They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Decision*, 64 STAN. L. REV. 851, 883-84 (2012). Still, well designed procedures can help to quell partisan disagreements over past events by providing accurate information about them.

154. A vigorous system of inquests would help generate accurate data on officer-involved deaths. For the importance of information on police accountability, see Harmon, *supra* note 150. For the importance of collating information on prison deaths, see Matt Lloyd, Note, *Dormant Data: Why and How To Make Good Use of Deaths in Custody Reporting*, 39 AM. J. CRIM. L. 301 (2012).

155. Gina Barton, *Death in Squad Car Leaves Trail of Anger, Doubt*, MILWAUKEE J. SENTINEL, Mar. 11, 2012, http://www.jsonline.com/watchdog/watchdogreports/death-in-squad-car-leaves-trail-of-anger-doubt-5g4821g-142232715.html.

156. *Id.*

officers rubbed his chest and opened the car's windows, but declined to call for medical assistance until after Williams had slumped over and lost consciousness.[157] He died in the squad car.[158] The District Attorney declined to prosecute the officers.[159] But, after a newspaper investigation into the case, the District Attorney eventually ordered the holding of an inquest into the death.[160] A judge, sitting with a jury and acting with the assistance of a special prosecutor, presided over the inquest.[161] On February 13, 2013, seven members of the Milwaukee police department were called to testify, but refused to do so, asserting their Fifth Amendment privilege against self-incrimination.[162] Two officers ultimately did testify at the inquest.[163] Eight days later, the jury concluded that three members of the force had negligently failed to render aid to Williams and recommended misdemeanor charges.[164]

After the verdict in the Derek Williams case, the Milwaukee alderwoman who had pushed for the inquest said "unequivocally" that it was "a worthwhile endeavor."[165] "The public," she said, "is much more aware of the series of events that led up to Derek Williams' death, and they have seen firsthand as the wheels of justice begin to turn."[166] Despite the jury's findings, no officer has been charged with a criminal offense in connection with the death. On the one hand, this result illustrates the weakness of the inquest, because it was not able to induce a criminal prosecution; but, on the other hand, the Williams case reveals the strength of the inquest. In addition to informing the public about Williams's death, the inquest uncovered various weaknesses both in police protocol and the investigation into Williams's death, and it spurred several policy chang-

157. *Id.*

158. *Id.*

159. Barton & Mulvany, *supra* note 49.

160. Gina Barton, *Derek Williams Prosecutor Sees "No Reasonable Likelihood" of Convictions*, MILWAUKEE J. SENTINEL, Mar. 30, 2013, http://www.jsonline.com/news/milwaukee/derek-williams-special-prosecutor-no-likelihood-of-convictions-769brbg-200628711.html.

161. Gina Barton, *Inquest Jurors To See Derek Williams Squad Car Video*, MILWAUKEE J. SENTINEL, Jan. 25, 2013, http://www.jsonline.com/news/milwaukee/inquest-jurors-to-see-derek-williams-squad-car-video-nj8h581-188403931.html.

162. John Diedrich, *Police Officers Invoke Fifth Amendment During Inquest into Derek Williams' Death*, MILWAUKEE J. SENTINEL, Feb. 13, 2013, http://www.jsonline.com/news/crime/third-day-of-derek-williams-inquest-begins-with-mothers-testimony-gv8p080-191018881.html.

163. Barton & Mulvany, *supra* note 49.

164. *Id.*

165. *Id.*

166. *Id.*

es. Medical examiners are now required to review police reports and video.[167] Police officers are now given a set of strict guidelines for when to call an ambulance and they receive additional training about the symptoms of respiratory distress.[168]

The Williams inquest was a one off, and it required an extraordinary degree of political pressure from the deceased's family. To capture the full benefits of inquests will require something much more systematic. To that extent, English law is exemplary. In recognition of the special need for independent oversight, English law automatically requires an inquest where there is reason to suspect that the deceased "died in custody or otherwise in state detention."[169] Where the deceased died in custody and the cause of death was violent, unnatural, or unknown, or where the death resulted from an act or omission by the police, the coroner must sit together with a jury of seven to eleven people.[170] The requirement of a jury combats the potential bias that coroners might have toward the police and prison staff; though the coroner is essentially independent of the police, many members of the coroners' investigative staff are former police officers.[171] Recent developments in European human rights law have only underscored the requirement of a public investigation by an independent official body where the state is implicated in a citizen's death. Inquests in such cases are not limited to the individual accountability of the police officers, prison guards, or other state employees. Rather, coroners have a duty to inquire into systemic problems in police forces and other government agencies.[172] Coroners have the power to report in writing to those in authority, stating that certain steps should be taken to prevent reoccurrence of similar fatalities.[173] Although such a direc-

167. Gina Barton, *Derek Williams Case Exposed Deficiencies*, MILWAUKEE J. SENTINEL, Feb. 1, 2014, http://www.jsonline.com/watchdog/watchdogreports/derek-williams-case-exposed-deficiencies-b99169245z1-243111101.html.

168. *Id.* In another recent case, a coroner's inquest in Missouri called attention to deficiencies in training for officers in the state's newly merged Highway and Water Patrol. Heather Hourigan, *Lack of Training After Merger of Missouri's Highway and Water Patrol*, ABC 17 NEWS (Dec. 22, 2014, 8:04 PM), http://www.abc17news.com/news/lack-of-training-after-merger-of-missouris-highway-and-water-patrol/30346178.

169. *See* Coroners and Justice Act, 2009, c. 25, §§ 4, 6.

170. *Id.* § 7(2). In parallel with the general decline of the jury outside serious criminal cases, the vast majority of English inquests sit without juries and verdicts are rendered by a coroner sitting alone.

171. COOPER, *supra* note 6, at 24. The position of the English coroner, however, is totally different from the position in American jurisdictions. English coroners are appointed by, and receive their funding from, local government authorities. But, unlike in the United States, local government is almost entirely distinct from the police force.

172. *See* R (JL) v. Home Secretary, [2006] EWHC (Admin) 2558, [32] (Eng.).

173. Coroners' Rules, Rule 43.

tion has no direct legal effect, it does have other effects. For example, a direction would be significant evidence in a tort action against the authority for a subsequent death that resulted from a failure by the authority to implement the suggested precaution.

An English coroner is "bound to recognize the acute public concern rightly aroused when death occurs in custody" and must "ensure that the relevant facts are exposed to public scrutiny."[174] The duty of the coroner is "to ensure that the facts are fully, fairly, and fearlessly investigated."[175] An inquest verdict must include a "determination of whether the force used was justified or unjustified."[176] The purposes of inquests in such cases are

> to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.[177]

Two recent English examples help to illustrate the value of inquests in this kind of case. In one—arising from the death in police custody of a mentally ill man named Sean Rigg—an inquest jury succeeded in uncovering wrongdoing where the official police complaints system had failed to do so, concluding that the police had used "unsuitable" force for "unnecessarily" long.[178] In another case, that of Mark Duggan, whose controversial death at the hands of police sparked the London riots of 2011, the jury concluded that the use of force was justified.[179] The verdict did not satisfy all interested parties,[180] but it did ensure that the circumstances surrounding his death were scrutinized in a public forum.

In this class of case, then, inquests are likely to add special value. Sensing this, some jurisdictions have taken steps toward using inquests in this way.

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174. *Id.*

175. R (Takoushis) v. Her Majesty's Coroner for Inner North London, [2005] EWCA (Civ) 1440, [46] (quoting *ex parte* Johnson, [1995] Q.B. 1 [26]).

176. Z v. United Kingdom, (2002) 34 EHRR 3 [95].

177. R (Amin) v. Secretary of State for the Home Department, [2004] 1 A.C. 653 [31].

178. Nina Lakhani, *The Story Behind Sean Rigg's Death in Custody*, INDEP., Aug. 2, 2012, http://www.independent.co.uk/news/uk/crime/the-story-behind-sean-riggs-death-in-custody-7999485.html.

179. Tom Rowley et al., *Mark Duggan Was Killed Lawfully, Inquest Decides*, DAILY TELEGRAPH, Jan. 8, 2014, http://www.telegraph.co.uk/news/uknews/law-and-order/10558699/Mark-Duggan-was-killed-lawfully-inquest-decides.html.

180. Mr. Duggan's family has sought, so far unsuccessfully, to have the inquest verdict overturned. R. (Duggan) v. Her Majesty's Coroner for the Northern District of Greater London, [2014] EWHC (Admin) 3343.

Montana already has a rule requiring a coroner's inquest in officer-involved deaths and prison deaths.[181] Also sensing the institution's potential, the police ombudsman of Spokane, Washington called last year for automatic inquests where a person dies at the hands of a police officer.[182] Morevoer, as I explain below, civil rights campaigners in Clark County, Nevada have sought to reinvigorate the inquest in officer-involved deaths.

### *B. How To Design Inquests for Officer-Involved Deaths: The Las Vegas Experiment*

In American jurisdictions served by coroners, it is doubtful whether the inquest, in its current form, will supply the requisite independent check on law enforcement.[183] The American coroner is usually very different from his or her quasi-judicial English cousin—for one, the American coroner is elected. Perhaps some elected coroners have "the necessary autonomy and independence to pursue controversial sociopolitical cases aggressively."[184] Often, however, even those coroners who are elected directly are likely to be deeply embedded in law enforcement—too deeply embedded to provide independent oversight. And because the coroner decides what evidence to bring before the jury, the presence of a jury is insufficient to overcome the coroner's natural partiality. Indeed, the inquest seems to have been finally banished from major American cities in the late 1960s because coroners in places like Los Angeles[185] and Chicago[186] conducted inquests so as to steer juries toward justified killing verdicts.

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181. MONT. CODE ANN. § 46-4-201 (2014). The Montana Code also provides an extra degree of independence by disqualifying any coroner who also serves as a peace officer from presiding over an inquest into a death at the hands of a peace officer or in prison. *Id.* §46-4-201 (2014).

182. Jonathan Brunt, *Burns Asking for Inquests: Ombudsman Recommends Public Inquiries in Deaths Tied to Police*, SPOKESMAN-REV., Feb. 27, 2013, http://www.spokesman.com/stories/2013/feb/27/burns-asking-for-inquests.

183. One way to solve the institutional design problem is to appoint a lawyer in private practice to preside over the inquest (as in the Williams case) or to have judges fill the role (as in Massachusetts).

184. Cyril H. Wecht, *Book Review*, 32 J. LEGAL MED. 129, 133 (2011) (stating that coroners "possess the legal procedural armamentarium to deal more forthrightly and unhesitatingly with troublesome matters like medical malpractice, police-related deaths, and other potential societal 'hot potato' cases, than do medical examiners").

185. James N. Adler, *Coroners' Inquests: The Impact of Watts*, 15 UCLA L. REV. 97, 104 (1967) (detailing the weakness of coroners' inquests in Los Angeles in cases of officer-involved deaths and pointing out that "[t]he coroner is unlikely to disagree with police authorities since he works so closely with them").

186. JENTZEN, *supra* note 14, at 211 ("Only the repercussions of the Black Panther shootout were enough to sway public opinion to abolish the coroner system.");

Clark County, Nevada, which includes Las Vegas, has recently wrestled with this institutional design problem in ways that are highly illuminating for the purposes of this Article. The county has a high rate of deaths involving police officers and its previous system of coroners' inquests had come under fire for its poor record in such cases.[187] Though the previous law sensibly required an automatic inquest for officer-involved deaths, these proceedings were both cursory and one-sided. Jurors would hear testimony only from the officers involved in the death.[188] Unsurprisingly, the results of these inquests were one-sided, too; juries swiftly returned verdicts of justified killing in almost every case.[189]

After a push for reform by the ACLU of Nevada, the Clark County Commissioners passed a new Ordinance in December 2010.[190] For non-officer-involved deaths, the procedure as amended by the Ordinance is, and remains, essentially a classic coroner's inquest. An inquest is defined as "an inquiry . . . into the death of a person where the circumstances support reasonable grounds to suspect that the death has been occasioned by unnatural means."[191] The power to call inquests is allocated to the coroner, but she must call one if requested by the district attorney's office or by a district court judge in Clark County. The coroner is not required to call an inquest where the death was "manifestly" the result of natural causes, suicide, accident, or when the death was publicly known to have been caused by a person already in custody.[192] Generally, the presiding officer under the Ordinance is an "inquest hearing officer" designated by the Board of County Commissioners.[193] These officers serve at the pleasure of county commissioners, and must either be an attorney with three years' courtroom experience or some other person with "sufficient judicial [or] quasi-judicial experience or have experience as an administrative hearing officer."[194]

The new Ordinance also had several special rules for officer-involved deaths to guarantee the independence and effectiveness of the inquest. In particular, the Ordinance made inquests mandatory in all officer-involved deaths when "circumstances support reasonable grounds to suspect" that the death

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Victor Levine, *Medical Examiner Replaces Coroner in Cook County*, 31 PROC. INST. MED. CHI. 188 (1977) (detailing weaknesses of Cook County coroners, including their failure to challenge police officers).

187. For more on the previous Clark County inquest regime, see Michael J. Gayan, *Judge Dredd: Hollywood Fiction or Las Vegas Reality?*, 8 NEV. L.J. 698, 715-21 (2008).

188. *Id.*

189. *Id.*

190. CLARK COUNTY, NEV., CODE OF ORDINANCES § 2.12 (2011).

191. *Id.* § 2.12.010(a), (c).

192. *Id.* § 2.12.080.

193. *Id.* § 2.12.010(k).

194. *Id.* § 2.12.020(d).

was "unnatural."[195] Instead of leaving the inquest in the coroner's hands, the Ordinance allocated the task of presiding over such an inquest to a justice of the peace, who was also required to be an attorney.[196] In addition, the presider was given the power to appoint an "inquest ombudsperson" to represent the deceased's family.[197] The Ordinance required the presiding officer to "insure that the inquest is conducted as an investigatory and not an adversarial proceeding."[198] The rules required the inquest panel's findings to "deal only with questions of fact," not with "questions of fault or guilt."[199] Clark County's revised system—with justices of the peace presiding over such inquests—promised a more independent and effective mechanism for examining the circumstances of the death, even though the inquest's findings would not be binding on the district attorney's office or have any preclusive effect in any subsequent criminal or civil proceeding.[200]

It is a measure of the Ordinance's potential effectiveness that the police unions opposed it fiercely and eventually succeeded in having it struck down. Before it could come into force, several police officers involved in recent deaths commenced suit. The defendants removed one action to federal court;[201] another stayed in state court and proceeded to the Supreme Court of Nevada.[202] The Supreme Court of Nevada invalidated the Ordinance in December 2012.[203] The challengers prevailed on the relatively technical ground that Clark County lacked the power to confer jurisdiction on justices of the peace; only the Nevada legislature could do that.[204] As a result, the officer-involved deaths portion of the Ordinance violated the Nevada Constitution, and was excised from the law.[205]

The politicians and campaigners behind the original Ordinance suggested a simple fix in response: re-enact the Ordinance, but select independent presiders other than justices of the peace. But, by that time, the political will to oppose the police unions had evaporated. A majority of the Clark County Commis-

195. *Id.* § 2.12.010(c).

196. *Id.* § 2.12.010(m), (l).

197. *Id.* § 2.12.075(a).

198. *Id.* § 2.12.080(m).

199. *Id.* § 2.12.140(a).

200. *Id.*

201. Zaragoza v. Bennett-Haron, 828 F. Supp. 2d 1195, 1205, 1209-11 (D. Nev. 2011) (dismissing due process and equal protection claims on their merits and remanding separation of powers claim to state court).

202. Hernandez v. Bennett-Haron, 287 P.3d 305 (Nev. 2012).

203. *Id.*

204. *Id.* at 314-17.

205. *Id.*

sioners decided to eviscerate the inquest system with a different, and less effective, process for officer-involved deaths. The new procedure is called the Police Fatality Public Fact-Finding Review Process (PFPFRP).[206] Instead of judges, the new procedure uses presiding officers who are chosen from a list of approved presiding officers, who must be attorneys. The PFPFRP retains some of the features of the inquest: the review process, for example, will do its work in public. Once the district attorney makes a preliminary decision not to prosecute the officer, a presiding officer and an ombudsman will be appointed. The ombudsman represents the public and the victim's family, will have access to documents, and may share those documents with the victim's families.

The new process, however, involves a severe watering-down of the inquest system. The proceedings are essentially controlled by the district attorney, as he decides which witnesses to call. In this respect, the PFPFRP reverts to the same kind of lack of independence as the County's previous coroner's inquest system. The district attorney will have already decided not to prosecute the officer, so it is difficult to imagine that prosecutors will provide an unbiased presentation of the evidence. A second major change arguably makes the PFPFRP even worse than the old coroner's inquest—there is no jury. By removing citizen participation from the death investigation process, the County Commissioners have effectively ensured that the new system will lack the potency of the inquest Ordinance.

Nevertheless, the attempt to bring real reform to the system for investigating officer-involved deaths in Las Vegas serves as an important example for other jurisdictions. Responding to a concern that police officers were repeatedly killing without justification, and realizing that the existing institutional configuration was ill equipped to deal with the problem, lawmakers in Clark County sought an innovative institutional solution. Rather than jettisoning the inquest, they improved it by adding independent presiders. Another significant feature of the inquest Ordinance was that it required an inquest in every case of a doubtful officer-involved death, depriving the coroner of discretion not to hold an inquest in such cases. It is a measure of the potential effectiveness of the inquest Ordinance that police unions used every means at their disposal to oppose it. The Las Vegas system, despite its defeat in the courts, provides a model for other jurisdictions convinced of the need for officer-involved deaths.

### *C. Constitutional Objections*

The Las Vegas solution foundered on a technicality, a technicality that might have been remedied with relative ease. But there are also more fundamental objections to using inquests on death to pursue officer accountability, or, indeed, for any inquest that seeks to adjudicate questions of serious wrongdoing.

206. *See, e.g.*, Conor Shine, *Commission Shelves Coroner's Inquests for New "Police Fatality Review Process,"* LAS VEGAS SUN, Jan. 7, 2013, http://www.lasvegassun.com/news/2013/jan/07/commission-shelves-coroners-inquests-new-police-fa/.

Those at risk of being found to have engaged in wrongful conduct may raise three major kinds of constitutional objections. First, they may contend that a government body ought not to declare that a person is guilty of unjustified killing without giving her the procedural protections to which she would be entitled in a criminal trial. Second, to the extent that a member of the judiciary presides over the inquest, objectors may contend that inquests involve judges performing what are properly considered executive-branch functions. In other words, objectors may raise due process and separation of powers objections.[207] Each of these arguments was raised in the Las Vegas case, though neither was accepted by the courts; future attempts to adopt similar inquest procedures are likely to face similar objections. In addition, I consider a third objection to holding inquests in this class of case: the concern that inquest verdicts adverse to an officer will poison the jury pool against the officer, rendering a fair criminal trial impossible.

### 1. Due Process

The Las Vegas officers' primary contention was that the inquest proceeding would violate their entitlement to due process.[208] They claimed the Ordinance did not to give them an adequate right to put questions to witnesses, granting discretion to the presiding officer to determine whether a particular line of questioning was worthwhile.[209] The officers also complained that, in cases concerning the potential wrongdoing of multiple officers, only a single attorney would represent them.[210] The preliminary doctrinal question is whether an adverse inquest finding deprives the claimant of "liberty" or "property." An inquest verdict that rules a particular person culpable for a death certainly has a negative effect on the person's reputation. But the U.S. Supreme Court has rejected the idea that stigma is sufficient to implicate constitutional procedural protections. Government actors may speak ill of citizens without triggering the

207. The officers also claimed, unsuccessfully, that the Ordinance violated their rights to equal protection and that it was void for vagueness. *See* Zaragoza v. Bennett-Haron, 828 F. Supp. 2d 1195, 1209-12 (D. Nev. 2011) (rejecting these claims).

208. In *Zaragoza*, the officers relied on both the federal and state due process clauses. In *Hernandez*, the officers relied solely on the Nevada Constitution's own clause. The Nevada clause's wording almost identically replicates the federal standard, and Nevada courts generally follow federal precedent when interpreting the clause. *See, e.g.*, *In re* Candelaria, 245 P.3d 518, 523 (Nev. 2010) ("The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard." (internal quotation marks omitted)).

209. Appellants' Opening Brief at 53-54, *Hernandez*, 287 P.3d 305 (No. 59861).

210. *Id.*

Due Process Clause, so long as they do not deprive the defendant of a "tangible interest."[211]

The principle that stigma alone does not constitute a deprivation of liberty of property was applied more than fifty years ago in *Hannah v. Larche*,[212] a case concerning fact-finding proceedings somewhat similar to inquests. *Hannah* involved a due process challenge to the rules of procedure of the United States Commission on Civil Rights. The Commission had called election officials and private citizens to appear before it to answer questions about alleged denials of the right to vote.[213] Several of those called contended that they could not be required to attend, on the ground that the Commission's rules protected the identity of complainants and denied the witnesses the opportunity to cross-examine them.[214] In his majority Supreme Court opinion, Chief Justice Warren accepted for the sake of argument that the Commission's proceedings might cause public disgrace, loss of jobs, and even criminal prosecution to those under suspicion of vote suppression.[215] But such "collateral consequences," even if they were to flow from the Commission's investigations, "would not be the result of any affirmative determinations made by the Commission."[216] The Commission's function was "purely investigative and fact-finding" because "[i]t does not hold trials or determine anyone's civil or criminal liability. . . . Nor does it indict, punish, or impose any legal sanctions . . . [or] make determinations depriving anyone of his life, liberty, or property."[217] The Court concluded that "[t]he only purpose of [the Commission's] existence is to find facts which may subsequently be used as the basis for legislative or executive action."[218] The Commission was therefore not required to allow cross-examination of witnesses.

But the U.S. Supreme Court has not exempted all fact-finding bodies from the requirements of the Due Process Clause. Roughly a decade after *Hannah*, in *Jenkins v. McKeithen*,[219] the Supreme Court held that the proceedings of a Louisiana body called the Labor-Management Commission of Inquiry (LMCI) was subject to the Due Process Clause. The stated purpose of the LMCI was "the investigation and findings of facts relating to violations or possible violations of criminal laws . . . arising out of or in connection with matters in the field of la-

211. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976) (ruling that harm to reputation alone does not implicate the Due Process Clause unless it entails a setback to some "tangible interest" of the plaintiff).

212. 363 U.S. 420 (1960).

213. *Id.* at 426.

214. *Id.* at 427-28.

215. *Id.* at 443.

216. *Id.*

217. *Id.* at 441.

218. *Id.*

219. 395 U.S. 411 (1969).

bor-management relations."[220] Upon referral by the Governor of Louisiana, the LMCI was to proceed by public hearing to establish the facts pertaining to alleged criminal law violations.[221] The LMCI could compel the attendance of witnesses.[222] Those under investigation had the right to be represented by counsel, but their ability to cross-examine complaining witnesses was limited—a witness could submit a list of questions to the LMCI, which would then decide which questions to ask.[223] Though its findings were not admissible as prima facie or presumptive evidence in subsequent civil or criminal proceedings, the LMCI had the duty to make public findings as to whether there was probable cause to believe violations of the criminal laws had occurred, and, if so, to inform the relevant prosecuting authorities.[224]

In *Hannah*, the Civil Rights Commission was not explicitly linked to the criminal law, and the court had ruled that the mere possibility of a causal link between government-sponsored fact-finding and subsequent criminal prosecution was not sufficient to trigger the protections of the Due Process Clause. The LMCI was different because its essential purpose was to serve as the first step in the criminal process. According to Justice Marshall's plurality opinion,[225] the difference between the Civil Rights Commission in *Hannah* and the LMCI was that the former's authority was specifically limited to pursuing individuals who were guilty of violations of the criminal law.[226] In the case of the LMCI, however, "everything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals."[227] The LMCI clearly had "an accusatory function"; its purpose was "to find named individuals guilty of violating the criminal laws . . . and to brand them as criminals in public."[228] In such circumstances, the accused should have the opportunity to confront and cross-examine the witnesses against her.[229]

220. *Id.* at 414.

221. *Id.* at 415.

222. *Id.*

223. *Id.* at 417-18.

224. *Id.* at 416-17.

225. Justice Marshall's opinion was joined by Chief Justice Warren and Justice Brennan. Justices Douglas and Justice Black concurred in the result. Both had dissented in *Hannah* and would have overruled it. *Id.* at 432-33.

226. *Id.* at 426-27.

227. *Id.* at 427.

228. *Id.* at 427-28.

229. *Id.* at 428-29. The plurality stated that its analysis did not apply to every body with an accusatory function and also noted that the LMCI lacked independence from the executive branch of government. *Id.* at 430. Unlike the grand jury, the LMCI was not an independent branch of government; its members served at the pleasure of the Governor. *Id.* at 430-31.

Drawing on this case law, the federal district court and the Supreme Court of Nevada rejected the Clark County officers' due process challenge.[230] The distinction between *Hannah* and *Jenkins* is admittedly a fine one; it depends in large part on whether the rules creating the body in question direct it to make findings pertaining to criminal liability. Given *Hannah* and *Jenkins*, the officers' argumentative strategy was to associate inquests with potential criminal proceedings that might follow an adverse inquest finding. But the courts found that the revised inquest proceedings would "only serve a fact-finding and investigatory function"; the proceedings "would not result in an adjudication or determination of any of [the officers'] legal rights."[231] Crucially, the inquest was not tasked with determining whether was probable cause that a crime had been committed, and it was specifically barred from adjudicating questions of guilt.[232] Moreover, as I have stressed in Part II, inquests have a variety of functions, many of which have little or nothing to do with the criminal law. These features were sufficient to exempt the inquest from the due process clause.

The court's reasoning in the Las Vegas case illustrates two points that I have stressed in this Article. First, the inquest can be sufficiently disentangled from the criminal process to avoid problems with the due process clause. To avoid these problems, future inquest ordinances should follow the Clark County Commissioners' lead by directing the inquest to refrain from pronouncing on the question of criminal guilt.[233] Future designers of inquests in other jurisdictions who nevertheless wish to direct juries to evaluate officers' conduct would be well advised to direct the proceedings toward whether a particular death was an "unjustified" or "wrongful" rather than an "unlawful" killing. Second, it is precisely because the inquest is detached from the criminal law that it can justifiably use more flexible procedures. Certainly, inquest procedures should give interested parties an opportunity to participate in the inquest. But those designing inquest procedures need not be restrained by procedural protections necessary for criminal and civil litigation.

230. Zaragoza v. Bennett-Haron, 828 F. Supp. 2d 1195, 1209 (D. Nev. 2011); Hernandez v. Bennett-Haron, 287 P.3d 305, 317 (Nev. 2012). As explained below, the Supreme Court of Nevada found that the inquest ordinance was invalid because the County Commissioners lacked the power to expand the jurisdiction of justices of the peace. The court nevertheless rejected the due process argument explicitly.

231. *Hernandez*, 287 P.3d at 313.

232. *Id.* Indeed, the Las Vegas inquest was even forbidden from passing on questions of fault, an activity that would not seem to trigger due process protections.

233. For a similar rule in English law, see Coroners and Justice Act, 2009, c. 25, § 10(2) (stating that the verdict of a coroner's court "may not be framed in such a way as to appear to determine any question of (1) criminal liability on the part of a named person, or (2) civil liability").

### 2. Separation of Powers

The Las Vegas police officers also argued that the Ordinance governing officer-involved deaths violated the Nevada Constitution's separation of powers doctrine.[234] The Ordinance gives members of the Nevada judiciary—justices of the peace—the power and the duty to preside over inquests. The officers sought to characterize that power as an executive function, one that cannot be allocated to judges. On the officers' view, a judge presiding over an inquest would "serve[] as an adjunct, advisory, and investigating instrumentality of the executive branch."[235]

No court ever ruled on the officers' separation of powers argument,[236] but it seemed likely to fail. As with the due process argument, much depends on how one characterizes the point of an inquest. To the extent that inquests pursue a narrow goal of identifying criminal wrongdoing for the sole purpose of initiating prosecutions, it might well be troublesome to make a judge the chief inquisitor: the judiciary's institutional independence from the prosecutorial authorities is generally considered a core commitment of the common law system of criminal adjudication.[237] But the conception of the inquest I have defended in this Article is far from prosecutorial. Inquests pursue a broad range of purposes, only some of which are connected to the criminal process. It should be clear by now that a judge presiding over an inquest does not do the work of a prosecutor; the inquest's purpose is to find out the truth, not to pursue punishment.

234. Unlike the U.S. Constitution, the Nevada Constitution explicitly provides that members of one branch of government cannot exercise powers belonging to another. NEV. CONST. art. III, § 1. Though separation of powers questions are governed by state law, state courts may look for inspiration to the federal constitutional law of separation of powers, which restricts the extent to which federal judges can be given nonadjudicatory powers. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 388 (1989) ("Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."); Morrison v. Olson, 487 U.S. 654, 680-81 (1988) (the U.S. Constitution's prohibition upon the courts' exercise of nonjudicial powers helps maintain the "separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches"); Buckley v. Valeo, 424 U.S. 1, 123 (1976) ("[E]xecutive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art. III of the Constitution.").

235. Appellants' Reply Brief at 7, *Hernandez*, 287 P.3d 305 (No. 59861).

236. The Nevada courts found it unnecessary to decide the separation of powers question. *Hernandez*, 287 P.3d at 314. The federal district court declined to rule on the separation of powers issue under the doctrine of abstention. Zaragoza v. Bennett-Haron, 828 F. Supp. 2d 1195, 1204 (D. Nev. 2011).

237. *See* Sklansky, *supra* note 2, at 1686 (noting that common law systems have generally valued "the detachment and institutional independence of the judge").

On this basis, future reforms that place judges at the helm of inquests—a task for which judges are well suited—should survive separation of powers challenges.

### 3. Contaminating the Jury Pool

I have suggested that inquests may sometimes spur subsequent criminal prosecutions. But an inquest verdict adverse to an officer may create constitutional problems for a subsequent criminal trial. The Sixth Amendment requires a jury willing and able to decide the case on the basis of the evidence before it.[238] The Constitution, then, prohibits adjudication by jurors who begin the trial with a "fixed opinion" of the defendant's guilt.[239] A prior inquest verdict indicating that the killing was unjustified might make it difficult to empanel a jury without such fixed opinions. In some cases, this difficulty may be a serious one, and it supports the wisdom of the English rule that an inquest should wait until the conclusion of a criminal investigation.[240] But the problem is far from insurmountable. In most cases, a sufficient number of members of the jury pool are likely to be unaware of the inquest verdict. And even those jurors who are aware of a prior proceeding can be told that different standards apply to different forms of legal proceedings. The acquittal of O.J. Simpson, followed by the subsequent wrongful death verdict against him, provides an illustration.[241] At most, in high-profile cases, an inquest finding might give rise to a presumption of prejudice, requiring the judge overseeing jury selection to weed out those jurors who are both aware of the inquest verdict and unable to put it to one side. Rigorous screening of potential jurors during the voir dire process, including through the use of pretrial questionnaires, should suffice to meet this concern.

## IV. Soft Adjudication

To gain a broader perspective on what inquests can do, it is helpful to draw on the literature on "soft law." It is notoriously difficult to define soft law,[242] but

238. Smith v. Phillips, 455 U.S. 209, 217 (1982).

239. *See* Irvin v. Dowd, 366 U.S. 717, 727-28 (1961); *see also* Skilling v. United States, 561 U.S. 358 (2010).

240. Coroners and Justice Act, 2009, c. 25, §§ 1-2, sch. 1.

241. B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. Times, Feb. 11, 1997, http://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html.

242. Andrew T. Guzman & Timothy Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 171 (2011) ("Although the concept of soft law has existed for years, scholars have not reached consensus on . . . whether 'soft law' is a coherent analytic category."); Dinah Shelton, *Introduction: Law, Non-Law, and the Problem of "Soft Law"*, *in* Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System 2 n.4 (D. Shelton ed., 2003) (noting that partici-

the term is generally used to refer to quasi-legal norms that lack fully binding legal force. Despite, or perhaps because of, this lack of analytical clarity, the idea of soft law has "taken the legal academy by storm,"[243] especially in the fields of international law[244] and domestic public law.[245] In international law, prominent examples of soft law include the Universal Declaration of Human Rights and General Assembly resolutions. In domestic public law, examples include presidential signing statements and congressional resolutions. The softness of soft law is generally considered to consist of two related features: soft law does not comply with the full procedural requirements for enacting "hard law"; accordingly, it is not fully binding in the manner that hard law is. Soft law exists on a continuum between, on the one hand, hard law, and, on the other, mere political activity.

The connection between soft law and the inquest should by now be clear. In one sense, inquest verdicts are relatively formal, in the sense that they are rendered solemnly by officials and juries. As we saw in the last section, inquests need not comply with the procedural requirements of criminal or civil trials, precisely because their verdicts lack the binding force of criminal or civil judgments. However, two general lessons from the soft law literature suggest that although soft law is neither binding nor directly coercive, it can lead to beneficial change. First, the fact that a legal norm is "soft" does not mean it is ineffective. Soft law norms affect behavior without directly threatening coercion. As Jacob Gersen and Eric Posner point out, one way that soft law norms may affect behavior is that "others take the statements as credible expressions of policy judgments or intentions that, at some later point, might be embodied in formally binding law and reflected in the coercive actions of executive agents."[246] So soft law may be effective because those to whom it is addressed believe that it may become hard law at a later time. In addition, soft law can be enforced via non-legal mechanisms like retaliation and reputational sanctions. Similarly, I have argued that inquest verdicts have the capacity to change behavior even though they are not directly backed by coercion.

Second, a major advantage of soft-law norms is that, because they need not comply with hard law's procedural formalities, they can better communicate the lawmaker's intent.[247] Soft law is "a useful regulatory instrument that allows governments to obtain policy goals without resorting to [hard] law, which is sometimes too costly, crude, and inflexible."[248] This idea is analogous to my

pants in a project on soft law "debated the appropriateness of using the term 'soft law,' given its ambiguity and questionable correctness as a legal term").

243. Gersen & Posner, *supra* note 7, at 574.

244. *See, e.g.*, Guzman & Meyer, *supra* note 242, at 171.

245. *See* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 742-68 (2012) (examining Congress's soft powers); Gersen & Posner, *supra* note 7, at 578.

246. Gersen & Posner, *supra* note 7, at 577.

247. *Id.* at 595.

248. *Id.* at 621.

claim that inquests are freer than criminal or civil courts are to pursue and convey the truth about how the deceased met her fate. The inquest, more than any other institution, is charged with pursuing the truth—sometimes including the moral truth. Inquests, for example, often ask whether or not the person's conduct was justified. But whether or not a person's conduct was justified is distinct in important ways from the question of whether or not the person should be held criminally responsible or liable to pay damages.

Still, an inquest verdict differs from much soft law activity in the sense that its fundamental character is closer to adjudication than to legislation. An inquest's subject is a particular past death over which the coroner or other presider has jurisdiction. While an inquest verdict may have implications for a class of future cases, an inquest is primarily a review of a specific event. Inquests thus belong to a distinct subset of soft law activity that deserves its own label: soft adjudication.[249] Soft adjudication, as I define it, involves a formal pronouncement about a particular past event that lacks binding legal effect, though it may influence other legal decision makers and the public. Soft adjudication has the power to go beyond simple fact finding: the decision maker, in an appropriate case, renders a normative judgment about responsibility for an event or the absence of responsibility.[250]

249. The phrase "soft adjudication" is very rarely used. *See* TURKI ALTHUNAYAN, DEALING WITH THE FRAGMENTED INTERNATIONAL ENVIRONMENT: WTO, INTERNATIONAL TAX AND INTERNAL TAX REGULATIONS 213 (2010) (proposing "soft adjudication" of breaches of international tax agreements). I have found two sources using the phrase to mean something quite different from what I have in mind. Henry H. Perritt, Jr., *The Internet Is Changing International Law*, 73 CHI.-KENT L. REV. 997, 1024 (1998) (using "soft adjudication" to describe attempts to reach agreed solutions to disputes through mediation); Peter Robson, *Judicial Review and Social Security*, *in* JUDICIAL REVIEW AND SOCIAL WELFARE 90, 91-92 (Trevor Buck ed., 1998) (using "soft adjudication" to describe informal, bureaucratic—yet binding—decision making on welfare entitlements in Britain).

250. Admittedly, my use of the term "adjudication" is broader than some definitions of the term. Lon Fuller, for example, stated that "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). Fuller's conception of adjudication has, however, been the subject of some criticism among commentators for its excessive focus on the participation of affected individuals. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (criticizing a "traditional conception" of adjudication similar to Fuller's); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 42 (1979) (stating that Fuller's definition "is not supported by a presentation of the evidence and it is contradicted by a great deal of the reality or experience that we would consider to be adjudication"). Inquests probably do fall within Owen Fiss's own (judge-centric) definition of adjudication as "the social process by which judges give meaning to our public values." *Id.* at 2.

Armed with this definition of soft adjudication, it is easy to find many other examples beyond the inquest. For example, various institutions created to deal with significant deaths are functionally similar to inquests and derive their value from similar considerations. For example, the Warren Commission was established to discern the truth about President Kennedy's assassination and to quell conspiracy theories.[251] Likewise, in the aftermath of the space shuttle disaster, the President instituted a Commission whose focus was on preventing future similar accidents;[252] the Commission made a series of recommendations with which NASA largely complied.[253] The 9/11 Commission is another example of the federal government using soft adjudication to deal with loss of life.[254] Unlike previous investigatory commissions, the 9/11 Commission "engaged in a different mode of truth telling, one associated not with technical experts but with ordinary individuals transformed by the violence of September 11."[255] The Commission "accomplished what appeared to be the impossible: an authoritative investigation, a widely-read final report, and direct influence on signifiant legislation."[256] Jonathan Simon, reviewing the 9/11 Commission's work, argues that investigatory commissions—notwithstanding their lack of enforcement powers—"may represent an effective supplemental check on the power of the Executive."[257]

This institutional form seems to appear with great frequency in response to traumatic events. Investigations by the National Transportation and Safety Board (NTSB), for example, also exemplify soft adjudication.[258] The NTSB is an independent federal agency to which Congress has given the task of investigating every civil aviation accident in the United States; every railroad accident involving a passenger train, a fatality, or serious property damage; major marine accidents; and certain highway accidents.[259] The NTSB can hold public hearings

251. PRESIDENT'S COMM'N ON THE ASSASINATION OF PRESIDENT KENNEDY, REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY ix-x (1964).

252. REPORT TO THE PRESIDENT BY THE PRESIDENTIAL COMMISION ON THE SPACE SHUTTLE CHALLENGER ACCIDENTS 1 (1986).

253. *See* JULIANNE G. MAHLER & MAUREEN HOGAN CASAMAYOU, ORGANIZATIONAL LEARNING AT NASA: THE CHALLENGER AND COLUMBIA ACCIDENTS 57-60 (2009).

254. *See* Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L.J. 1419 (2005).

255. *Id.* at 1421.

256. Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1239 (2008).

257. Simon, *supra* note 254, at 1421.

258. For a description of the NTSB investigation process see, for example, John F. Easton & Walter Mayer, *The Rights of Parties and Civil Litigants in an NTSB Investigation*, 68 J. AIR L. & COM. 205 (2003).

259. 49 U.S.C. § 1131 (2006).

and subpoena witnesses in the service of its function to "determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof."[260] In the same way that inquests are distinct from criminal prosecution, the NTSB's remit does not include bringing prosecutions against airlines or other transport providers. That function is fulfilled (for airlines) by the FAA, from which the NTSB is independent. Indeed, the NTSB has no enforcement powers; its only coercive power is to mandate cooperation with its investigations.[261] By congressional order, NTSB reports are inadmissible in subsequent civil trials.[262] The NTSB's most important function is producing safety recommendations, the vast majority of which have resulted in voluntary compliance by transportation providers or a regulatory response.[263]

Further examples abound. In its earlier history, the United States Commission on Civil Rights, whose work we encountered above when considering due process objections to inquests,[264] engaged in a substantial program of soft adjudication, identifying civil rights violations while leaving it to other bodies to impose sanctions.[265] Around the world, recent years have seen the proliferation of national human rights commissions, privacy commissions, information commissions, and election commissions, many of which engage in soft adjudication.[266] Debates over how post-conflict societies should deal with wartime atrocities implicate similar questions. Is it better to proceed by "hard" adjudication, for example, via the International Criminal Court or by "soft" adjudication through a Truth and Reconciliation Commission?[267] In all these areas, soft

260. 49 C.F.R. § 831.4 (1997).

261. *See* 49 U.S.C. § 1151(a) (2000).

262. *Id.* § 1154 ("No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report."). Some courts, however, have found ways around this exclusionary rule. *See* Easton & Mayer, *supra* note 258, at 218-29.

263. *Fact Sheet – FAA & NTSB's "Most Wanted" Recommendations*, FED. AVIATION ADMIN. (Feb. 18, 2010), https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=11186 ("Of literally *thousands* of safety recommendations made to the FAA [by the NTSB], the Board has classified about 82 percent "Closed — Acceptable Response," and approximately 6 percent remain open in "Acceptable" status.").

264. *See supra* Section III.C.

265. Jocelyn C. Frye et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449, 458 (1987).

266. *See generally* Christopher S. Elmendorf, *Advisory Counterparts to Constitutional Courts*, 56 DUKE L.J. 953 (2007).

267. *See, e.g.*, Mirjan Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, 36 N.C. J. INT'L L. & COM. REG. 365, 376 (2011) ("Probing into contextual issues transcending concerns with specific crimes could be entrusted, for example, to truth commissions, or similar institutions better equipped to deal with the quicksand of history.").

adjudication harnesses the expressive power of adjudication[268] without incurring the downsides entailed by coercive enforcement mechanisms.

The idea that soft adjudication falls outside the legal domain, and thus has been neglected by legal scholars, flows from a longstanding and tenacious error in legal thought—identifying law with orders backed by a system of centrally organized coercive sanctions for breach.[269] The error is well known to students of jurisprudence. Jeremy Bentham[270] and, more forcefully, his student John Austin,[271] defined "law" as an order backed by a threat, thus excluding non-coercive activity from the realm of "law." The idea that the existence of law is conceptually dependent on sanctions was finally demolished by Hart.[272] As Hart showed, the sanction theory of legal duty is radically incomplete as an explanation of the role that law plays in the practical reason of those to whom it is addressed. Those who take the "internal point of view" on a legal system's directives will accept the law and obey it just because it is the law, regardless of the possibility of a sanction for breach. A similar sanction theory of law is also associated with Oliver Wendell Holmes's "bad man" perspective, according to which the existence and content of legal norms depends on the application of coercive sanctions for their breach.[273] But even the bad man has reason to care about soft adjudication, both because it may ripen into hard adjudication and because it may spur non-legal sanctions.

These thoughts on the value of soft adjudication both in and beyond the field of death also have implications for hard adjudication. I have highlighted the potential for soft adjudication to uncover the truth about past events, to

268. *See generally* Richard H. Adams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043.

269. In a very different context, I identify several reasons why the enforcement of legal norms does not—indeed, should not—always track those norms. Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Norm*, 99 MINN. L. REV. (forthcoming 2015).

270. JEREMY BENTHAM, OF LAWS IN GENERAL 1, 133-48, 196-98 (H.L.A. Hart ed., Athlone Press 1970) (1782).

271. JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 311-20, 357-64 (Robert Campbell ed., Kessinger Publishing 2007) (1861). H.L.A. Hart was not the first to challenge the sanction theory from within the analytical jurisprudence tradition. C.A.W. MANNING, SALMOND ON JURISPRUDENCE 236 (8th ed. 1930). ("The essence of a legal wrong consists in its recognition as a wrong by the law[,] not in the resulting repression or punishment of it.").

272. H.L.A. HART, THE CONCEPT OF LAW 18-25 (3d ed. 2012).

273. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ( "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."). For a recent reassessment of Holmes's "bad man" theory, see Marco Jimenez, *Finding the Good in Holmes's Bad Man*, 79 FORDHAM L. REV. 2069 (2011).

raise awareness about risks, and, sometimes, to facilitate a broader societal process of dealing with a traumatic past event. But the same is often true of conventional forms of litigation. Many of the valuable effects of legally binding adjudication are distinct from the courts' judgments about accountability and the coercive effects of their final decisions. Sometimes these other effects are neglected. For example, theorists of tort law, whether they rest their understanding on efficiency or on corrective justice, tend to justify the substantive law of tort, while overlooking the value of tort litigation.[274] The institution of tort law does more than require defendants to make payments to plaintiffs. Giving injured parties the right to sue and adjudicating their claims in public courts provides several distinct benefits, including the informational value of providing answers to the family of the deceased[275] and the catharsis of a public conversation about what we owe to each other.[276] Any account of adjudication that omits these benefits is incomplete.

## Conclusion

Before reading this Article, you might have been forgiven for thinking that the inquest was of purely historical significance. I have tried to show, however, that this thirteenth-century institution should serve as the site of twenty-first century institutional innovation. I suggest that American localities adopt a practice of holding automatic inquests every time a person dies at the hands of the state. Because they lack independence from law enforcement, it no longer makes sense for American coroners to preside over inquests concerning officer-involved deaths. But the inquest can be conducted by a sitting or retired judge presiding over a jury. Such inquests should be directed toward the question of whether the killing was justified, rather than to any question of legal liability.

Moreover, the attempt to explain why it might be worthwhile to maintain a practice of formal, non-coercive, legal judgments turns out to illuminate legal practices far beyond the inquest. Providing an official judgment on past events serves a complex mix of purposes. In any given field of human interaction, these purposes may be best served by soft adjudication, by hard adjudication, or by no adjudication at all. These are difficult and fascinating questions, to which I hope this Article has made a useful contribution. By focusing on cases in which official adjudication is avowedly non-binding, I have sought to call attention to the many ways that all kinds of adjudication can contribute to the achievement of valuable goals. Adjudication contributes indirectly as well as directly to the process of holding wrongdoers accountable; it often provides information about past events and future risks that would otherwise remain un-

274. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 68-69 (2010).

275. *Id.* at 72–73.

276. *Id.* at 74.

known, and it sometimes helps us to deal with difficult events better than purely private processes would allow.

In the process of exhuming the inquest, I have also sought to contribute to the scholarly literature on how legal systems deal with death. Criminal procedure scholars have sometimes discussed the contribution of medical examiners and coroners in the specific field of forensic evidence in criminal trials.[277] Death investigation has also been the subject of some excellent work by sociologists;[278] and medical examiners and coroners have themselves produced some useful literature on their institutions and practices.[279] But much more work remains to be done. Death is not likely to cease raising difficult moral and regulatory issues, as debates over the property, end-of-life care, physician-assisted suicide, and organ donations show.[280] Regardless of one's views on the value of inquests, the legal and procedural frameworks for dealing with death are ripe for deeper re-examination.

277. For example, scholars have considered medical examiners tangentially while discussing the doctrinal controversy over whether the Confrontation Clause of the Sixth Amendment bars introduction of a written lab report that the prosecution wants to introduce in live testimony by a forensic scientist. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009) (holding that lab reports were "testimonial" under the Sixth Amendment and that defendants thus had the right to be confronted in court by the forensic expert).

278. *See* STEFAN TIMMERMANS, POST-MORTEM: HOW MEDICAL EXAMINERS EXPLAIN SUSPICIOUS DEATHS (2007).

279. *See, e.g.*, HANZLICK, *supra* note 27; JENTZEN, *supra* note 14; Michael J. Panella, *Death Investigation Liability of Medical Examiners and Coroners: Proposed Recommendations To Mitigate Legal Risks*, 32 J. LEGAL MED. 449 (2011); Barbara C. Wolf, *The Changing Role of the Medical Examiner: Forensic Evidence in Medicolegal Investigations*, 1 QUINNIPIAC HEALTH L.J. 23 (1996).

280. *See generally* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010).