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# FICTION IN THE CODE: READING LEGISLATION AS LITERATURE

Thomas J. McSweeney\*

## ABSTRACT

One of the major branches of the field of law and literature is often described as “law as literature.” Scholars of law as literature examine the law using the tools of literary analysis. The scholarship in this subfield is dominated by the discussion of narrative texts: confessions, victim-impact statements, and, above all, the judicial opinion. This article will argue that we can use some of the same tools to help us understand non-narrative texts, such as law codes and statutes. Genres create expectations. We do not expect a law code to be literary. Indeed, we tend to dissociate the law code from the kind of imaginative fiction we expect to find in a narrative text. This article will take a historical example, the medieval Icelandic legal manuscript known as *Konungsbók*, and examine it for its fictional elements. This article will examine *Konungsbók* for the ways in which it creates an imagined world, populated by free, equal householders, a world that was very different from the Iceland in which its creator lived. Its creator may have created it less to tell his reader anything about the law as it stood in thirteenth-century Iceland than as an elegy to a world he thought he had lost. It therefore stands as a testament to the law code’s literary potential.

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\* Associate Professor, William & Mary Law School. I have presented earlier versions of this paper at the Fiske Conference on Medieval Icelandic Studies at Cornell University, the Law and Humanities Interdisciplinary Junior Scholars Workshop at the University of Southern California, the American Society for Legal History’s pre-conference workshop in Denver, and in the Faculty Speaker Series at American University’s Washington College of Law. I would like to thank everyone who gave me comments at those presentations, particularly Martha Umphrey, Bob Gordon, Stefan Jurasinski, and Lewis Grossman, who served as commentators. I would also like to thank Oren Falk, Joel Anderson, Helle Vogt, William Ian Miller, Tom Hill, Melissa Winders, Sarah Harlan-Haughey, Eliza Buhrer, Ben Glaser, Danielle Cudmore, Ryan Rowberry, Neal Devins, and Adam Gershowitz, who read and commented on earlier drafts of this article. This article would not have been possible without the help Becky Mazzarella, Lauren P. Seney, Steve Blaiklock, and Sharon J. Smith at the Wolf Law Library provided in acquiring the sources necessary to write it. Finally, I would like to thank the editors at the Georgia State University Law Review for their careful reading and editing of the article.

## INTRODUCTION

One of the major branches of the field of law and literature is often labelled “law *as* literature.”<sup>1</sup> Scholars who write in this subfield use the disciplinary tools of literary analysis to help us understand the law. Some legal texts are more clearly subject to literary interpretation and analysis than others. Scholars in the field tend to apply the techniques of literary analysis to texts that are written in narrative form, texts such as confessions, victim-impact statements, and, above all, judicial opinions.<sup>2</sup> These types of texts share quite a bit in common with the narrative texts—novels and short stories, for instance—that are at the core of literary analysis. Confessions, victim-impact statements, and judicial opinions use literary devices to create legally significant narratives out of the chaotic facts of daily life.<sup>3</sup>

Genres create expectations. Narratives invite us, through their very form, to think about their fictional, or constructed, elements.<sup>4</sup> We can easily see the literary moves in the narrative aspects of a judicial opinion. It is much more difficult to see the literary moves that take place in a statute. We expect statutes and codes to be the truth. They are texts that speak with authority and tell us what “The Law” is.

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1. I adopt Robert Weisberg’s division of the field of law and literature into two broad subfields. As Weisberg describes them, “law-in-literature . . . involves the appearance of legal themes or the depiction of legal actors or processes in fiction or drama,” while “law-as-literature . . . involves the parsing of such legal texts as statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works.” Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1989).

2. See generally PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 4 (2000); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1837 (2005); Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 201–02 (1990). Indeed, one of the earliest pieces written in law and literature, before it emerged as a distinct field in the 1970s, was Justice Cardozo’s work on the style of the judicial opinion. BENJAMIN J. CARDOZO, *LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES* 3 (1931).

3. Greig Henderson has argued that a judge’s choices about narrative perspective and narrative voice, choices about who the judge “empowers to see and say,” often influence the outcome of the case. GREIG HENDERSON, *CREATING LEGAL WORLDS: STORY AND STYLE IN A CULTURE OF ARGUMENT* 3–4 (2015). Henderson examines the judicial opinion as a site where the judge creates “a legal world for others to inhabit.” *Id.* at 4.

4. GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 205 (2000) (“[W]e expect a ‘narrative,’ even if factual, to represent a particular, and often highly imaginative, point of view.”).

Indeed, some scholars have denied that literary theory can be applied to statutes at all. Richard Posner has argued that, although literary theory might be helpful in interpreting and crafting judicial opinions, it is of little use in the interpretation of statutes.<sup>5</sup>

This article will make the case that we can read statutes and codes as literature. Although these texts do not share the narrative form with the judicial opinion and the novel, they do many of the same things that narrative texts do, and use similar techniques to create characters and worlds. In their own, subtle ways, they can tell stories. The title of this article intentionally evokes Natalie Zemon Davis' *Fiction in the Archives*, a seminal work on the relationship between law and storytelling.<sup>6</sup> Davis examined remission letters—letters sent to the King of France requesting pardons—for their fictional elements.<sup>7</sup> By the word “fiction,” Davis does not mean to imply that these remission letters told wholly fabricated or imagined stories.<sup>8</sup> Rather, Davis demonstrates that the stories the repentant killers told in the remission letters were carefully crafted versions of actual events.<sup>9</sup> Davis draws upon the work of Hayden White, who noted that the world does not “present itself to perception in the form of well-made stories, with central subjects, proper beginnings, middles, and ends,” but instead is filled with facts that need to be connected to each other through narrative to be given meaning.<sup>10</sup> In this sense, any narrative is fictional. It is an attempt to put the messy facts of life into some kind of order, according to an organizing principle determined by the narrator.

Davis's texts are narrative texts. Her scheme can be applied to non-narrative texts, however. In this article I will use a historical

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5. Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1376 (1986). Posner was responding to scholars who, critical of the legal profession's focus on legislative intent in interpreting statutes, had turned to literary theories that give primacy to something or someone other than the text's author in assigning meaning to the text. *Id.* at 1375.

6. NATALIE ZEMON DAVIS, *FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE*, at viii (1987).

7. *Id.* at 2.

8. *Id.* at 3.

9. *Id.* at 4.

10. *Id.* at 3; Hayden White, *The Value of Narrativity in the Representation of Reality*, 7 CRITICAL INQUIRY 5, 27 (1980).

example, the manuscript of the medieval Icelandic laws known as *Konungsbók*, to help us understand how statutes and codes can be read as fictional, or constructed, texts. Medieval law is useful to us today in that it can serve as a mirror for modern legal practice. In the middle ages people's fundamental assumptions about law were, in many ways, quite different from our own. The study of medieval law can thus operate as a useful form of comparative law. In law and literature scholarship, the study of medieval law can be particularly useful because the lines between legal and literary genres were not as sharp in the middle ages as they are today.<sup>11</sup> *Konungsbók* breaks down the lines between law and literature. It is an excellent example of how one can apply literary analysis to a law code or a statute because it defies some of the expectations that the genre usually creates. When we pick up a law code, we expect to find a text that will tell us what the law actually was at the time of its writing. We expect it to be a text that would have been useful to someone who, say, wanted to know what his rights were and how to vindicate them. Not all of the provisions contained in *Konungsbók* can be explained in this way, however. *Konungsbók* is written in the form of a code—it claims to be an authoritative collection of actual laws—but it was written at a time when parts of the text would no longer have been good or accurate law. Its creator appears to have gone out of his way to include, in some places, provisions that were archaic at the time of writing. He even includes a few that were never the law in Iceland.

Why would someone create such a text? I will argue that *Konungsbók*'s power lies less in the authority of its prescriptions than in its ability to create a very tangible world for its reader. The world created in *Konungsbók* is populated by small, independent, and roughly equal householders. The imagined Iceland of *Konungsbók* stands in stark contrast to the historical Iceland in which this text was

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11. The twelfth-century author Andreas Capellanus, for instance, wrote a series of fictional cases on the laws of love. He wrote them in the form of jurists' *consilia*, a genre of text current in the Roman- and canon-law tradition of the twelfth century, in which a prominent jurist gives his advice on how to resolve a particularly tricky case. Andreas used this legal genre for entertainment and education, to discuss the same kinds of themes that other contemporary authors would have explored through forms like the romance. ANDREAS CAPELLANUS ON LOVE bk. II, ch. 7, at 271 (P.G. Walsh trans., 1982).

written. When *Konungsbók* was written, the gap between the powerful and the weak had been growing for more than a century, marginalizing the small householders in favor of a class of strongmen. The value of *Konungsbók* to its creator may, therefore, have been less about telling his readers anything about legal practice and more about reminding himself of a world that no longer existed. *Konungsbók* shows us that we can read statutes and codes, as well as judicial opinions, for the characters and worlds they create. In this sense, we can think of the law code as a work of fiction.

This article will proceed in four parts. Part I discusses the ways in which we might apply the tools of literary analysis to nonliterary texts, such as law codes and acts of legislation. In part II, I turn to the text under discussion, the *Konungsbók* manuscript. I will examine the historical context in which *Konungsbók* was created and demonstrate that it was created at a time when some of the most important aspects of the legal system it described were quickly disappearing. Part III describes the legal tradition of medieval Iceland. *Konungsbók* itself suggests that the law of the medieval Icelandic Commonwealth was not so much a set of laws as a legal tradition composed of many different sources, oral and written, that could be combined in different ways by different authors. The creator of *Konungsbók* appears to have made conscious decisions about what to include and what to exclude. Part IV looks at the ways in which he may have crafted his manuscript, arguing that *Konungsbók*'s creator chose to include certain material because it painted a vivid picture of medieval Iceland as a land peopled by free and equal householders. This was not the case by the time *Konungsbók* was written, in the middle of the thirteenth century. Iceland was dominated by powerful territorial lords and was coming under the power of the King of Norway. The creator of *Konungsbók* therefore may have been creating this text for a purpose other than the dissemination of the law. The writing of the text may have been a cathartic exercise, an expression of grief at the world its creator thought he had lost. The conclusion discusses some other medieval legal texts that share these attributes, and the strange

phenomenon that legal genres were used, throughout medieval Europe, to serve purposes that had little to do with the law.

### *I. The Legal Text as Fiction*

The statement “Among them [the Icelanders] there is no king, but only law,” written by the eleventh-century German cleric Adam of Bremen, appears in virtually every work on the medieval Icelandic Commonwealth—the name given to the period of Icelandic history between the settlement of the island in the ninth and tenth centuries and the Icelanders’ final submission to the King of Norway in 1264.<sup>12</sup> Iceland’s status as one of the few places in medieval Europe that had no king and no nobility has led to a great deal of modern interest in medieval Iceland, an interest disproportionate to its population or relative influence on European society, culture, and politics. Medieval Iceland is touted as an exemplar of the rule of law, and modern Icelanders hold up their national assembly, the *Alþingi*,<sup>13</sup> which dates to the early tenth century, as the world’s oldest democratic body.<sup>14</sup> Adam’s quote encapsulates this Icelandic exceptionalism. Historians’ use of Adam’s quote is misleading, however. Rarely does anyone provide a footnote detailing precisely where in Adam of Bremen’s work this quote is found. That may be because it is extremely difficult to find. Adam’s chronicle of the Archbishops of Hamburg-Bremen does indeed say that the Icelanders have “no king, but only law,” but it does so in one of the *scholia*, or later additions, to Adam’s text.<sup>15</sup> Indeed, it is not even clear that this

12. JESSE L. BYOCK, *VIKING AGE ICELAND* 308 (2001); ANDREW DENNIS, ET AL., *LAWS OF EARLY ICELAND: GRÁGÁS I*, at vi (1980) [hereinafter *GRÁGÁS I*].

13. Itamar Even-Zohar, *Textual Efflorescence and Social Resources: Notes on Medieval Iceland*, in *TEXTUAL PRODUCTION AND STATUS CONTESTS IN RISING AND UNSTABLE SOCIETIES* 11, 12 (Massimiliano Bampi & Marina Buzzoni eds., 2013). Old Norse and modern Icelandic contain several letters that do not appear in the English alphabet. The letter thorn (þ) represents the sound of the “th” in *thin*. JESSE L. BYOCK, *VIKING LANGUAGE 1: LEARN OLD NORSE, RUNES, AND ICELANDIC SAGAS* 45 (2013). The letter eth (ð) represents the sound of the “th” in *then*. *Id.*

14. Even historians, who, as a general rule, are suspicious of such anachronistic claims, are at times willing to give Iceland some credit in the realm of democracy. Jesse Byock claims that, although medieval Iceland was “not a democratic system,” it contained “proto-democratic tendencies.” BYOCK, *supra* note 12, at 65, 75–76; Jesse L. Byock, *The Icelandic Althing: Dawn of Parliamentary Democracy*, in *HERITAGE AND IDENTITY: SHAPING THE NATIONS OF THE NORTH* 1, 1 (J.M. Fladmark ed., 2002).

15. ADAM OF BREMEN, *MAGISTRI ADAM BREMENSIS GESTA HAMMABURGENSIS ECCLESIAE*

*scholium* was added by Adam himself. In the primary text, Adam says something very different. There Adam tells us that the Icelanders “hold their bishop as king. All the people respect his wishes. They hold as law whatever he ordains as coming from God, or from the Scriptures or even from the worthy practices of other peoples.”<sup>16</sup> In Adam’s first version, Iceland’s exceptionalism stems not from the fact that it is a kingless or democratic society, but that the Icelanders look to the Icelandic Church as their secular authority and follow its dictates, a marvelous utopia for a diocesan administrator like Adam.<sup>17</sup> This earlier version of Adam’s interpretation of Iceland and its law, the one that actually appears in the main text, is seldom quoted, while the later version, scribbled in the margin, has become a staple of scholarship and has entered into the popular perception of medieval Iceland.<sup>18</sup> It is not difficult to see why. The quote from the main text does not have a modern constituency. It presents us with an Icelandic theocracy, not with Europe’s first democracy.<sup>19</sup>

When Adam described Iceland as a conscientious cleric’s paradise, he was creating an imaginary world through his text. His diocese theoretically had jurisdiction over Iceland, but Adam had never been there himself, and there is no evidence that Iceland was ruled by its bishop in the second half of the eleventh century.<sup>20</sup> The evidence we do have suggests that the bishops were still having a difficult time establishing their authority in Iceland at the time Adam was

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PONTIFICUM 273 (1917) [hereinafter ADAM OF BREMEN, *GESTA*] translated in ADAM OF BREMEN, *HISTORY OF THE ARCHBISHOPS OF HAMBURG-BREMEN* bk. 4, ch. 35, at 217 (2002) [hereinafter ADAM OF BREMEN, *HISTORY*].

16. ADAM OF BREMEN, *GESTA*, *supra* note 15, at 273 translated in ADAM OF BREMEN, *HISTORY*, *supra* note 15, bk. 4, ch. 35, at 217–18.

17. ADAM OF BREMEN, *GESTA*, *supra* note 15, at 273 translated in ADAM OF BREMEN, *HISTORY*, *supra* note 15, bk. 4, ch. 35, at 217–18.

18. This *scholium* looks like a (slightly inaccurate) attempt to summarize what was contained in the body of the text rather than a new and different insight on the way Iceland’s government operated.

19. Scholars quoting Adam tend to leave out the second part of the *scholium*: “[A]nd ‘to sin is an abomination; or if they sin the penalty is death,’” sentiments that are presumably unpopular with modern audiences. ADAM OF BREMEN, *GESTA*, *supra* note 15, at 273, translated in ADAM OF BREMEN, *HISTORY*, *supra* note 15, bk. 4, ch. 35, at 217.

20. JÓN JÓHANNESSON, *A HISTORY OF THE OLD ICELANDIC COMMONWEALTH: ÍSLENDINGA SAGA* 140 (Haraldur Bessason trans., Univ. of Manitoba Press 2d ed. 2006).



writing.<sup>21</sup> It is fairly easy for modern readers to see the moves Adam is making in his text because he was writing in the rhetorical mode of description. He wrote these lines about Iceland in a section of his work in which he described the people and customs of the various lands under the authority of the archdiocese, a section that contains even more outlandish claims; Adam says at one point that Greenland acquired its name because “[t]he people there are greenish from the salt water.”<sup>22</sup> In a text like Adam’s *History*, which is patently descriptive, it is easy to see that the author is creating a world through his text. It is especially easy in Adam’s case, since he creates a world that we can identify as a fictional one. Adam used Iceland, this land he had never visited, as a blank slate upon which to draw his ideal society.<sup>23</sup>

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21. Indeed, if there was any way in which Iceland was exceptional in the Middle Ages, it was in openly spurning canon law in certain areas. Although canonical norms did have a strong influence on Icelandic marriage, uncanonical practices like concubinage and open clerical marriage were common for a much longer period in Iceland than they were in continental Europe. More than half of Iceland’s bishops in the twelfth and thirteenth centuries were married at a time when it was extremely uncommon for bishops to be married elsewhere in Europe. Joel Anderson, *Disseminating and Dispensing Canon Law in Medieval Iceland*, 128 *ARKIV FÖR NORDISK FILOLOGI* 79, 87 (2013); Jenny M. Jochens, *The Church and Sexuality in Medieval Iceland*, 6 *J. MEDIEVAL HIST.* 377, 382 (1980). In 1179, the Archbishop of Niðaróss wrote to the Icelanders and explained to them that his episcopal legislation was a matter of God’s law and that the Icelanders had no power to determine whether they would accept or reject it, suggesting that at that time, the Icelanders were not treating the prescriptions of bishops with the respect Adam attributes to them. SVERRE BAGGE, *FROM VIKING STRONGHOLD TO CHRISTIAN KINGDOM: STATE FORMATION IN NORWAY, C. 900–1350*, at 202 (2010).

22. ADAM OF BREMEN, *HISTORY*, *supra* note 15, at 218.

23. Medieval Icelandic law has a long history of appropriation, even within the American academy. Just as Adam painted Iceland as the ideal Christian community, some libertarian scholars—particularly those who describe themselves as anarcho-capitalists—have painted Iceland as an ideal libertarian society, focusing on the fact that the Icelandic Commonwealth operated with only a single public official and according to rules that allowed for self-help within a legal context. David Friedman, for instance, contends that “medieval Icelandic institutions . . . might almost have been invented by a mad economist to test the lengths to which market systems could supplant government in its most fundamental functions.” David D. Friedman, *Private Creation and Enforcement of Law: A Historical Case*, 8 *J. LEGAL STUD.* 399, 400 (1979); *see also* Birgir Thor Runólfsson Solvason, *Ordered Anarchy, State, and Rent-Seeking: The Icelandic Commonwealth 930–1264*, at iii (Summer 1991) (unpublished Ph.D. dissertation, George Mason University), <https://notendur.hi.is/~bthru/contents.html>; Tom W. Bell, *Polycentric Law*, 7 *HUMANE STUD. REV.* (Winter 1991/92), at 1, 2. These modern appropriations of Iceland have a long and distinguished pedigree. In the nineteenth century, scholars of the historical school of jurisprudence, the *Rechtsschule*, sought the origins of representative government in the forests of Germany. Treating law as an expression of a people and their spirit (*Volksgeist*) rather than the expression of the will of a sovereign, scholars of the *Rechtsschule* searched for the ageless spirit of Germanic law in its history. The spirit they found was one of freedom and equality. The American

Adam was engaging in a pretty obvious fiction. He created an Iceland that bore only a tenuous connection to reality. Narrative texts can be fictional in more subtle ways, however. Natalie Zemon Davis, in her pathbreaking *Fiction in the Archives*, examined remission letters sent to the King of France, requesting pardons, for the ways their authors crafted their narratives.<sup>24</sup> People took the facts of ordinary life, which do not have any inherent narrative order, and spun them in particular ways to tell a story that the King of France would accept as a story of pardonable homicide.<sup>25</sup> Davis looks at these records not for information about law at the time or for the information they incidentally provided about material life in early modern France but for information on how people told their stories to the court.<sup>26</sup> By making the story itself the subject of historical inquiry, Davis opens up a whole new range of questions we can ask of a text. Davis's methodology can help us to uncover how people understood their world; Davis discusses what the remission letters can tell us about how people in early modern France related to time,

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scholar Henry Adams, in his 1876 exposition of the Anglo-Saxon law courts, said:

The long and patient labors of German scholars seem to have now established beyond dispute the fundamental historical principle, that the entire Germanic family, in its earliest known stage of development, placed the administration of law . . . in the hands of popular assemblies composed of the free, able-bodied members of the commonwealth.

Henry Adams, *The Anglo-Saxon Courts of Law*, in *ESSAYS IN ANGLO-SAXON LAW* 1, 1 (1876). Some of the best medieval scholarship of the nineteenth century, such as Felix Liebermann's work on the Anglo-Saxon laws, came out of this school of thought. See, e.g., FELIX LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN* (1903). Much of the early work done on medieval Icelandic law was written by German scholars influenced by the *Rechtsschule*. Scholars of the free prose school, one of the two major schools of saga scholarship, argued that the Icelandic sagas, although mostly written in the thirteenth century, were actually written versions of much older texts that had circulated orally for several centuries. Free prose scholars contended that the sagas accurately represented Icelandic society and its values in the earliest period of settlement, and perhaps represented a much older set of pan-Germanic values that the Icelanders brought with them when they settled the country. Konrad Maurer, a nineteenth-century proponent of the free prose school, also wrote on Anglo-Saxon England, viewing both as part of a larger Germanic world. Maurer was also a scholar of Nordic legal texts. Although he generally argued that the surviving legal texts were products of the twelfth and thirteenth centuries, he and others of the school believed that they reflected the Germanic *Volksgeist*. [1 LEGISLATION AND ITS LIMITS] PATRICK WORMALD, *THE MAKING OF ENGLISH LAW: KING ALFRED TO THE TWELFTH CENTURY* 21, 24 (1999).

24. DAVIS, *supra* note 6, at 1–3.

25. *Id.*

26. *Id.* at 4.

for instance.<sup>27</sup> It can also show us how people understood themselves, or were forced to present themselves, through the process of developing oneself as a character in the remission narrative. Thus, when a French subject asked the king for a pardon, she had to tell a story that would be acceptable to the king, drawing herself as a character who was worthy of pardon.<sup>28</sup> She had to present herself as the victim in a story in which someone else ended up dead, which is no small task. The strategies women needed to use to justify their violence to the king were similar to the strategies they used to justify it to their neighbors. They told stories of accidental or spur-of-the-moment killings that happened in ordinary settings.<sup>29</sup> Men had to craft their stories in different ways for the king and for their neighbors, however. Men were used to telling tales of heroism, in which they could gain honor through deeds of violence.<sup>30</sup> But when they asked the king for a pardon, they were forced to tell their tales in the form of tragicomedy, where the killing is an unfortunate event brought on by the antagonist's aggression.<sup>31</sup> The teller had to abandon the language of male honor and instead use the language of self-defense.<sup>32</sup> Indeed, through this particular practice of storytelling, people learned how to tell stories in which they were cast as subjects of the crown. The practice of forcing supplicants to tell these stories in order to receive pardons was an act of state-building.<sup>33</sup>

By transforming the story itself into the object of historical inquiry, Davis opens up new possibilities in the study of texts. Davis's remission letters are narrative texts; they tell the story of the events leading up to the killing for which the author is requesting a pardon.<sup>34</sup> We can apply Davis's insights to texts that take a non-narrative form, as well. Readers are more likely to miss the fictional elements in a non-narrative text, however. Itamar Even-Zohar, in his

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27. *Id.* at 25–35.

28. *Id.* at 57–58.

29. *Id.* at 94, 96.

30. DAVIS, *supra* note 6, at 57.

31. *Id.* at 104.

32. *Id.*

33. *Id.* at 57–58.

34. *Id.* at 2, 4.

work on the Icelandic sagas—narrative texts, many of which are rough contemporaries of *Konungsbók*—discusses the kinds of expectations that genres create and how those expectations influence the way in which we approach texts.<sup>35</sup> Even-Zohar explores the ways in which we might think of narrative texts as instrumental or useful, despite the fact that we are more likely to place them in the familiar, if anachronistic, category of “literature,” which implies that the text has no useful purpose, that its value lay in its ability to entertain or in its aesthetic merits.<sup>36</sup> Even-Zohar argues that the narratives of many of the sagas are crafted in subtle and indirect ways to imbue in their readers a sense of cultural unity.<sup>37</sup>

Even-Zohar notes that it is generally easy to see the instrumental and practical side of texts that take the form of “direct explicit sets of instructions, like compilations of laws and law manuals,” since they purport to be “The Law,” which is meant to be applied in actual disputes.<sup>38</sup> It is more difficult to see the practical side of narrative texts, such as the sagas.<sup>39</sup> But just as narrative genres mislead us into thinking that a text has no useful purpose, texts written in legal genres may mislead us into believing that they have been written solely or primarily for some instrumental purpose when, in reality, their value to their author lies somewhere else. It is more difficult to detect the fiction in a law code than it is to detect it in narrative texts such as the sagas. Codes and statutes speak in the language of command. Many of the provisions contained in *Konungsbók* begin with phrases like “it is prescribed that” (*Þat er mælt*) or “there is to be” (*scal vera*).<sup>40</sup> This gives the reader the impression that the text was intended to be instrumental. It was meant to *do* something. Legislative texts tell us what the law is so that we might obey it or seek redress according to its terms in court.

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35. Even-Zohar, *supra* note 13, at 12.

36. *Id.* at 15–16.

37. *Id.* at 20–21.

38. *Id.* at 15.

39. *Id.* at 16.

40. VILHJÁLMUR FINSEN, GRÁGÁS: ISLÆNDERNES LOVBOG I FRISTATENS TID UDGIVET EFTER DET KONGELIGE BIBLIOTHEKS HAANDSKRIFT 5, 133, 149, 209, 229, 236, 256 (1852) [hereinafter GRÁGÁS (K.)].

This focus on the practical side of the law code can blind us to other possible reasons for its creation. This problem is common to texts that appear, on their face, to be instrumental. In his study of the *Drogon Sacramentary*, a liturgical manual, Niels Rasmussen detected an odd pattern. This high-quality manuscript contains masses both for the bishop and for the village priest but does not contain a full set of masses for the liturgical year for either. Indeed, the liturgies the book provides are so disparate that the book must have been practically useless to any single clergyman; it was as useless to the bishop in his cathedral as it was to the priest in his country parish. Rasmussen concluded from this textual evidence that the sacramentary was not actually intended for liturgical use but served some other function, and the sacramentary was probably copied by a lettered monk for his own or for his patron's edification rather than as a guide to good practice.<sup>41</sup> Had the text not been so useless, however, historians would have been inclined to read it as a text that was created primarily for its utility in saying masses, a text to be used in the liturgical cycle. These problems apply at least as much to prescriptive legal texts like *Konungsbók* as they do to the *Drogon Sacramentary*. We may doubt the veracity of their authors in the specifics. We generally do not doubt that the author meant the text to be read primarily as a guide to practice, however. We assume that he meant for people to apply the knowledge found in the text and generally discount other possible motives for creating the text.

Law codes can use strategies similar to those used in narrative texts to order reality. In his article, *The Value of Narrativity in the Representation of Reality*, Hayden White defines narrativity against written forms that, in his view, fail to attain it.<sup>42</sup> Chronicles—texts that were common in the Middle Ages—are written in the form of a story.<sup>43</sup> The author makes explicit connections between events.<sup>44</sup> White argues, however, that they differ from the narrative in that they

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41. NIELS KROGH RASMUSSEN, *LES PONTIFICAUX DU HAUT MOYEN ÂGE: GENESE DU LIVRE DE L'ÉVÊQUE* 434–39 (1998).

42. White, *supra* note 10, at 6.

43. *Id.* at 9.

44. *Id.*

lack an organizing principle, what White calls the moral, which can give closure to the series of events they recount.<sup>45</sup> Thus, although a chronicle tells a story, the story does not lead to any particular end point.<sup>46</sup> In White's words, chronicles do "not so much conclude as simply terminate" and represent historical reality "as if real events appeared to human consciousness in the form of *unfinished* stories."<sup>47</sup> Real events have no clear endings, but the narrative has an ending that brings closure to the story and gives it meaning. The modern reader of a chronicle, used to the narrative form, finds the chronicle's missing moral jarring. The annals—a type of text that consists of a list of events in chronological order, not written in the form of a story at all but simply in the form of a list—are a further step removed from narrative since, in addition to lacking a moral, they lack any commentary on the connections between events.<sup>48</sup>

White's article spurred theoretical debate about both the nature of narrative and the universality of narrative as a form of human expression. In response to White's article, Marilyn Robinson Waldman mounted a defense of the annals. Waldman called into question White's assertion that the annals lack a moral and his assumption that a text like the *Annals of St. Gall* "tells no story because it does not make that story explicit, formally organized, and finished."<sup>49</sup> She argues that the "empty years" of the *Annals of St. Gall*, those years for which the author recorded no events, show us that the author did have some way of ordering reality, even if he was not organizing his facts into a story in the conventional sense, with plot, characterization, and other tools of narrative writing.<sup>50</sup> The author instead tells "implicit 'stories' . . . through key elements of the listing strategy, such as ordering, juxtaposition, selection, association, and omission," much as the author of a modern textbook is forced to choose which events to emphasize, deemphasize, include, and

45. *Id.*

46. *Id.*

47. *Id.*

48. White, *supra* note 10, at 6.

49. Marilyn Robinson Waldman, "The Otherwise Unnoteworthy Year 711": A Reply to Hayden White, 7 CRITICAL INQUIRY 784, 786 (1981).

50. *Id.* at 787.

exclude.<sup>51</sup> The author of the annals shows us how he ordered his reality by picking, out of an open universe of an almost infinite number of events that could be recorded, those events that are important enough to include and, even more importantly, excluding those that he did not deem to be important.<sup>52</sup> The empty years in annals can thus be as telling as the ones for which there are entries. Waldman's critique of White's narrativity thesis shows us some of the ways that one might tell a fictional—in Davis' sense of crafted—story in a non-narrative form.

Might an author use a form that does not express events at all, however, as a way of expressing his or her reality? Even-Zohar may give us a model for thinking about how a text such as a law code could express reality. Even-Zohar argues that narrative is superior to instruction or command when one wishes to use a text to create cultural unity.<sup>53</sup> Its underlying, partially-concealed themes operate indirectly on the reader, in subtle ways, not by direct and heavy-handed instruction or command, as a law code would, but by “providing representations of possible situations . . . function[ing] as models for matters allowed, possible, or prohibited.”<sup>54</sup> Narratives can thus instruct their readers in ways that are not so obvious and not so easy to reject. The stories present possibilities for behavior as well as the limits of those possibilities, instructing their readers, by subtle and indirect means, in what they may do and what they may not.

Texts like *Konungsbók*, texts that speak directly to the reader in the language of command, telling her what she may and may not do, can also work indirectly, however. While statutes and law codes command action directly, they may also contain partially-concealed themes that operate indirectly on the reader. There is much to be gleaned from what the code tells us indirectly. Legal texts create their own kinds of worlds, populated not by individuals with their complex webs of relationships, but by abstract owners and possessors, criminals and victims, obligors and obligees. This can be both a

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51. *Id.* at 785–86.

52. *Id.* at 788.

53. Even-Zohar, *supra* note 13, at 20.

54. *Id.* at 16.

virtue and a vice of legal texts. On the one hand, they make disputes easier to resolve through strategies of simplification. If the court only needs to understand the parties before it in their capacities as obligor and obligee, it has a much easier job to perform than if it considers them in all their complexity. At the same time, in choosing how to simplify those relationships, the law must take a position. It must determine which elements of the relationship are material to deciding the issue and which are not. The legal text therefore represents reality in a particular way.<sup>55</sup>

## II. *Writing Law in Troubled Times*

This article will be concerned with one particular legal text, a thirteenth-century manuscript known as *Konungsbók*. *Konungsbók* contains a copy of the medieval Icelandic laws known as *Grágás*.<sup>56</sup> It was likely derived from several earlier sources, some of them legislative texts, others possibly the work of legal experts.<sup>57</sup> *Konungsbók* gives us a fascinating look into Iceland's thriving medieval legal tradition. Iceland's laws contained many features that were unique in medieval Europe.<sup>58</sup> *Konungsbók* is also interesting for when it was written, however. At the time this manuscript was created, many of those unique features of Iceland's law, features described in *Konungsbók*, were becoming less and less relevant to the average Icelander.<sup>59</sup> A good deal of the law described in *Konungsbók*

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55. See Monika Fludernik, *A Narratology of the Law? Narratives in Legal Discourse*, 1 CRITICAL ANALYSIS L. 87, 95 (2014).

56. The *Konungsbók* manuscript is available in a critical edition. GRÁGÁS (K.), *supra* note 40. It is also available in a facsimile. THE CODEX REGIUS OF GRÁGÁS, MS. NO. 1157 FOL. IN THE OLD ROYAL COLLECTION OF THE ROYAL LIBRARY, COPENHAGEN (1932) [hereinafter Gl. kgl. Sml. 1157 fol.]. Translations in this article will come from the two-volume translation of *Konungsbók*. GRÁGÁS I, *supra* note 12. The other major manuscript of *Grágás*, called *Staðarhólsbók*, is also available in a critical edition and a facsimile. VILHJÁLMUR FINSSEN, GRÁGÁS: EFTER DET ARNAMAGNÆANSKE HAANDSKRIFT NR. 334 FOL., STÁÐARHÓLSBÓK (1879) [hereinafter GRÁGÁS (ST.)]; STÁÐARHÓLSBÓK: THE ANCIENT LAWBOOKS GRÁGÁS AND JÁRNSÍÐA, MS. NO. 334 FOL. IN THE ARNA-MAGNÆAN COLLECTION IN THE UNIVERSITY LIBRARY OF COPENHAGEN (1936) [hereinafter AM 334 fol.]; ANDREW DENNIS ET AL., LAWS OF EARLY ICELAND: GRÁGÁS II (2000) [hereinafter GRÁGÁS II].

57. JÓHANNESSON, *supra* note 20, at 90–91.

58. GRÁGÁS II, *supra* note 56, at 9.

59. See JÓHANNESSON, *supra* note 20, at 90.



would not have been terribly useful to someone looking for a guide to legal practice at the time it was written.<sup>60</sup>

The sagas and the medieval legal manuscripts present Iceland's legal order in a very particular way, and the picture they paint is unique in medieval Europe. The country contained forty-eight chieftaincies, which were treated as personal property.<sup>61</sup> Chieftaincies could be bought, sold, and inherited.<sup>62</sup> The chieftains (sg. *goði*, pl. *goðar*) presided over the local and regional assemblies, selected the panels of judges that decided cases at those assemblies, and convened courts to confiscate the property of the outlawed.<sup>63</sup> Every householder (*bóndi*, pl. *bændr*) had to be sworn to a chieftain, although he could choose which chieftain.<sup>64</sup> In theory, the chieftaincy bore very little relationship to the land. Although most men would, for practical reasons, choose the chieftain who lived closest to him, the only restriction placed upon the *bóndi*'s choice was that he must choose a chieftain who lived within his own geographical quarter.<sup>65</sup> Householders could switch their allegiance at certain prescribed times of the year.<sup>66</sup> The chieftain, as described in *Grágás* and the sagas, was therefore not like the lord of thirteenth-century continental Europe. Although chieftains, in theory, owed very few legal obligations to their thingmen—those *bændr* who were attached to them—they often played roles that were not prescribed by the laws.<sup>67</sup> Chieftains had to work to maintain their followings of *bændr*. The weaker a chieftain became relative to neighboring chieftains, the weaker he was likely to become as householders jumped ship. Chieftains largely kept their followings by acting as advocates for their thingmen.<sup>68</sup> Since Iceland's legal system was based largely on self-help, the chieftain's role was an important one; the support that

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60. GRÁGÁS II, *supra* note 56, at 9–10.

61. WILLIAM IAN MILLER, BLOOD TAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND 23 (1990); GRAGAS I, *supra* note 12, at 179.

62. MILLER, *supra* note 61, at 24.

63. *Id.*

64. *Id.* at 22.

65. *See id.* at 23.

66. *Id.*

67. BYOCK, *supra* note 12, at 126–27.

68. *Id.* at 127.

the chieftain and the rest of his following could provide was crucial to prosecuting a legal case and to recovering against a wrongdoer.<sup>69</sup>

The country was divided into quarters, each of which held its own assemblies that heard and decided disputes.<sup>70</sup> It was united by the *Alþingi*, a national assembly held once a year during the summer.<sup>71</sup> At the *Alþingi*, the chieftains sat together in the law council (*lögrétta*) as a legislative body.<sup>72</sup> Iceland's one public official was the lawspeaker (*lögsögumaðr*), elected for a three-year term by the *Alþingi*, whose job, according to *Konungsbók*, was to recite the entirety of the laws at the *Alþingi* over three summers and to serve as a sort of human legal encyclopedia.<sup>73</sup>

This picture is probably too neat. Scholars have questioned whether the number of chieftaincies was ever limited to forty-eight, for instance.<sup>74</sup> But even supposing that the sagas and the laws do present us with an accurate picture of the Icelandic Commonwealth in the earlier years of its existence, this system was clearly disappearing by the twelfth century. By the second half of the twelfth century, a small group of families were creating new power structures, partly based on their control of multiple chieftaincies—which was illegal, according to *Konungsbók*—but also based on other forms of social control, such as loyalty oaths and permanent, armed followings of men.<sup>75</sup> These new power structures are known as *ríki* (domains, kingdoms), and their holders have been referred to by historians using terms like *stórgoðar* (big chieftains) and *höfðingjar*

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69. *Id.* at 119–23. Chieftains were not the only people who acted as advocates. There is no reason why a thingman who had a problem would need to turn to his chieftain, who did not possess any particular legal powers that would make him an especially good advocate. Anyone in Icelandic society could take on this role. If the chieftain had maintained his following in such a way that they would likely obey his commands, his thingmen might serve as an effective support group in a feud or in a case before the law courts, putting chieftains in a particularly good position to act as advocates. Kin could also serve this role, as could any powerful and respected person, however. *Id.* at 119–26.

70. *Id.* at 177.

71. MILLER, *supra* note 61, at 17–18.

72. BYOCK, *supra* note 12, at 174.

73. MILLER, *supra* note 61, at 18–19.

74. See JÓN VÍÐAR SIGURÐSSON, CHIEFTAINS AND POWER IN THE ICELANDIC COMMONWEALTH 40–62, 82 (Jean Lundskær-Nielsen trans., 1999).

75. *Id.* at 14.

(princes).<sup>76</sup> By the thirteenth century, the *ríki* were the primary form of social organization.<sup>77</sup> If Icelanders had ever really been able to choose their leaders, by 1200 they were bound to territorial lords who extracted oaths and enforced them with threats of violence.<sup>78</sup>

By the third decade of the thirteenth century, the big chieftains were in a state of near-constant war.<sup>79</sup> This chaotic situation gave the kings of Norway an opening to involve themselves in Icelandic politics. As early as the 1230s, Icelandic chieftains were becoming royal retainers, a relationship which the chieftains exploited in their own internal conflicts and which the king exploited to gain a foothold in Iceland.<sup>80</sup> By 1250, the king had actually acquired the majority of the chieftaincies in Iceland and was appointing Icelanders to exercise the power of those chieftaincies on his behalf.<sup>81</sup> In 1258, King Hákon IV appointed an earl to rule over Iceland.<sup>82</sup> Sources of the thirteenth and fourteenth centuries recount the men of Iceland's various fjords and quarters swearing allegiance to the king and promising to pay tribute to him starting in 1256, until the entire country had submitted to the king at the *Althingi* of 1264.<sup>83</sup> Icelanders did not necessarily view the king's growing involvement in negative terms—as a play for power. Rather, texts of the thirteenth and fourteenth centuries

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76. BYOCK, *supra* note 12, at 341, 347; Gunnar Karlsson, *Goðar and Höfðingar in Medieval Iceland*, in 19 SAGA-BOOK OF THE VIKING SOCIETY 358, 366 (1977). Miller notes that in the sagas, the terms *höfðingi* and *goði* are used interchangeably for a powerful person who holds a chieftaincy. When a strong man does not hold a chieftaincy, however, he is not referred to as *goði*, only as *höfðingi*, suggesting that saga authors were fairly precise in their use of the terms, using *goði* to refer to a person with legally sanctioned authority and *höfðingi* to refer to someone with de facto power. This usage also suggests that the two types of power could be separated. MILLER, *supra* note 61, at 6 n.17.

77. BYOCK, *supra* note 12, at 347.

78. *Id.* at 347; see also SIGURÐSSON, *supra* note 74, at 14.

79. SIGURÐSSON, *supra* note 74, at 71.

80. JÓHANNESSON, *supra* note 20, at 242–43, 247.

81. SIGURÐSSON, *supra* note 74, at 74–76.

82. *Id.* at 74.

83. PATRICIA PIRES BOULHOSA, ICELANDERS AND THE KINGS OF NORWAY: MEDIAEVAL SAGAS AND LEGAL TEXTS 91–102 (2005); Jana K. Schulman, *Introduction* to JÓNSBÓK: THE LAWS OF LATER ICELAND, at xviii (2010); JÓHANNESSON, *supra* note 20, at 273. The Icelanders are said to have sworn allegiance to the king at the *Althingi* of 1262. The *Alþingi* on 1262 was only attended by the men of the northern and southern quarters, however, and it was not until the *Alþingi* of 1264 that the submission was accepted by representatives of all four quarters. JÓHANNESSON, *supra* note 20, at 277, 280.

tend to portray the king as an arbitrator who helped to alleviate the endemic violence caused by the ambitions of the big chieftains.<sup>84</sup>

After the Icelanders' submission, the king made some important changes to the structure of the Icelandic polity. Although the king may have promised to retain the laws of the Commonwealth—a body of law known today as *Grágás*—he does not appear to have meant that they would remain unchanged.<sup>85</sup> The lawspeaker continued to be elected until 1271, when he was replaced with a royal judge called the *lögmaðr*, who was, until the end of the thirteenth century, a Norwegian.<sup>86</sup> In 1271, Hákon's son, King Magnús Lagabœtir (lawmender), already a noted lawgiver in Norway, presented the Icelanders with a new code, known today as *Járnsíða*, which diverged from previous practice in significant ways.<sup>87</sup> By 1281, that law code had been replaced by another, *Jónsbók*, which would, with modifications, last into the seventeenth century.<sup>88</sup> By the time *Jónsbók* was written, the crown had abolished the office of chieftain, so important to the workings of the assemblies in the Commonwealth period, and replaced them with royal officials called *valdsmenn* or *sýslumenn*.<sup>89</sup> The law council had been transformed from a legislative

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84. BOULHOSA, *supra* note 83, at 100–01.

85. BYOCK, *supra* note 12, at 352–53. It is not clear whether the king made this promise to the Icelanders at their submission or not. It is included in the texts known as *Gamli sáttmáli* and *Gizurarsáttmáli*, which purport to be agreements between the Icelanders and the King of Norway made at the time of the submission. BOULHOSA, *supra* note 83, at 144. Patricia Pires Boulhosa argues that these texts are fabrications of the fifteenth century, however, and are not true representations of a deal struck in the thirteenth century. *Id.* at 87–88, 144. Texts that were written closer to the time of the submission, sagas and annals, focus on the Icelanders' agreement to pay tribute and give their allegiance to the king. They do not mention a promise on the king's part to maintain Iceland's laws. *Id.* at 91–102.

86. BOULHOSA, *supra* note 83, at 121–22; Schulman, *supra* note 83, at 3 n.1. This parallels developments in Norway, where a local official called the *lagmann*, who gave legal advice at the regional assemblies, was transformed into a royal judge. BAGGE, *supra* note 21, at 199.

87. *Járnsíða* was adopted gradually by the Icelanders, over a period of two years. Lena Rohrbach, *Construction, Organization, Stabilization: Administrative Literacy in the Realm of Norway, The Case of Iceland*, in *REX INSULARUM: THE KING OF NORWAY AND HIS 'SKATTLANDS' AS A POLITICAL SYSTEM C. 1260–C. 1450*, at 227, 231 (Steinar Imsen ed., 2014). Only about 17% of the material in *Járnsíða* came from Icelandic sources. Schulman, *supra* note 83, at xiv. The rest was derived from Norwegian codes. *Id.*

88. A few provisions of *Jónsbók* are still on the books in Iceland. Schulman, *supra* note 83, at xi n.1.

89. BOULHOSA, *supra* note 83, at 121–22; Schulman *supra* note 83, at xxxii.

assembly into a court, and the chieftains who had once sat on it were replaced by men chosen by the *valdsmaðr*.<sup>90</sup>

The two major manuscripts of *Grágás*, known as *Konungsbók* and *Staðarhólsbók*, were written in these uncertain times. Both manuscripts date to the second half of the thirteenth century. Scholars date *Konungsbók* to the period between about 1250 to 1270 and date *Staðarhólsbók* approximately ten years later, to about 1260 to 1280, although neither dating is precise.<sup>91</sup> This places them both at the very end of the Commonwealth period.<sup>92</sup> The timing is curious. Portions of both manuscripts may have been dead letter at the time they were written. It is possible that when the *Konungsbók* manuscript was created, for instance, the chieftains who play such an important role in it no longer existed. At the very least, they had been marginalized by the rise of new power structures first dominated by the big chieftains and later by the king.<sup>93</sup> Passing one's hours of literary production making law codes that are dead letter seems like an odd thing to do, even in a country where the winters are long and dark. So why were they created?

Some scholars have posited that the *Grágás* manuscripts were created to inform new legislation.<sup>94</sup> If Magnús Lagabætir wanted to create a new royal law book for Iceland, he may have wanted to know about the existing laws of the island. He relied on prior compilations of regional law when he created a new royal law code for Norway in the early 1270s.<sup>95</sup> The second royal lawbook promulgated for Iceland, *Jónsbók*, did, in fact, draw on a now-lost

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90. Schulman, *supra* note 83, at xxxii, 12–15; GRÁGÁS I, *supra* note 12, at 189–93.

91. GRÁGÁS I, *supra* note 12, at 13–14; Hans Fix, *Grágás*, in *MEDIEVAL SCANDINAVIA: AN ENCYCLOPEDIA* 234 (Phillip Pulsiano et al. eds., 1993). Lárússon notes that *Konungsbók* cannot be earlier than 1216. Ólafur Lárússon, *On Grágás—The Oldest Icelandic Code of Law*, in *ÞRIÐI VÍKINGAFUNDUR: THIRD VIKING CONGRESS* 77, 81–82 (Kristján Eldjárn ed., 1958). While some have dated it as late as 1326, most prefer a date in the middle of the thirteenth century based on paleographical evidence. *Id.*

92. See Rohrbach, *supra* note 87, at 229.

93. BOULHOSA, *supra* note 83, at 122.

94. This explanation was first advanced by nineteenth-century scholars of Icelandic law. *Id.* at 46; Lena Rohrbach, *Matrix of the Law? A Material Study of Staðarhólsbók*, in *THE POWER OF THE BOOK: MEDIAL APPROACHES TO MEDIEVAL NORDIC LEGAL MANUSCRIPTS* 99, 100 (Lena Rohrbach ed., 2014).

95. Schulman, *supra* note 83, at xiii.

text of *Grágás*.<sup>96</sup> *Staðarhólsbók* may very well have served as a template for later legislation. Indeed, it may have been designed to serve as a model for royal legislation. It omits material found in *Konungsbók* that would have been moot after 1264.<sup>97</sup> Lena Rohrbach has convincingly argued that *Staðarhólsbók* is laid out in a way that is unusual for Icelandic texts of the period.<sup>98</sup> The text of *Grágás* in the manuscript includes tables of contents—which were common in Norwegian manuscripts of the period, but not in Icelandic manuscripts—before certain sections.<sup>99</sup> Rohrbach suggests that *Staðarhólsbók* was created for use by a person who was not terribly familiar with Iceland's legal tradition, perhaps a Norwegian legislator, who could use these paratextual aids to find material more easily within the manuscript.<sup>100</sup> She also argues that the creators of this manuscript may have placed the tables of contents strategically.<sup>101</sup> They all appear in front of sections of the law that deal with subject matter that had been changed substantially in the *Járnsíða* compilation, which had adopted very little of *Grágás*.<sup>102</sup> The creators of the manuscript may have wanted to draw attention to these sections, in the hope that a new royal code would incorporate more of the legal tradition of the Commonwealth.<sup>103</sup> There is a tantalizing entry in two medieval annals that the bishops and the king's *lögmaðr* travelled from Iceland to Norway with a "new book" in the year 1280.<sup>104</sup> It is possible that the annals refer to *Staðarhólsbók*, on its way to Norway to be used in the drafting of *Jónsbók*.<sup>105</sup>

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96. About 43% of the provisions contained in *Jónsbók* are derived from *Grágás*. *Id.* at xiv to xv.

97. The assembly procedures section, the lawspeaker's section, and the law council section, all of which describe institutions or procedures that were no longer current after 1271, are absent from *Staðarhólsbók*. GRÁGÁS I, *supra* note 12, at 15.

98. See Rohrbach, *supra* note 94, at 101, 107, 118, 123.

99. *Id.* at 116–17.

100. See *id.* at 118, 123.

101. See *id.* at 113.

102. See *id.* at 124.

103. See *id.* at 125.

104. Rohrbach, *supra* note 87, at 230.

105. *Id.*

*Konungsbók* is not constructed in this manner, however, and shows no particular sign of having been compiled to inform new legislation. This article will offer another possibility for *Konungsbók*. While the unknown creator of *Konungsbók* may have created his text partly as a guide to legal practice, he may have also, or even primarily, intended it to be a work of memory, a repository for Icelandic identity in a time of rapid change. He and his readers may have prized the text not so much for its ability to serve some instrumental purpose as for its ability to evoke an Iceland they thought they had lost. If this is correct, then *Konungsbók*'s creator was, in a sense, doing what Adam of Bremen was doing: painting a picture of an imaginary Iceland, using law as his medium. We might, therefore, think of *Konungsbók* as a work of fiction.

### III. "Our Law": The Legal Tradition of the Commonwealth

Using the single term *Grágás* to refer to the law contained in these two manuscripts makes for a neat parallel to Iceland's later, royally sanctioned law codes, *Járnsíða* and *Jónsbók*, which are indeed discrete texts of royal legislation.<sup>106</sup> It is problematic, however, because it creates a sense of unity that probably did not exist for Icelandic law before the adoption of *Járnsíða* by the *Alþingi* in 1271 and 1272.<sup>107</sup> Some contemporary sources, including the *Konungsbók* manuscript, suggest that Icelandic law before the royal codes was an inchoate set of texts, oral and written, that could be combined in different ways for different purposes.<sup>108</sup> Medieval Iceland had a thriving and highly-developed legal culture but apparently nothing like a single, authoritative code.<sup>109</sup> The Icelanders had no clear, contemporary term for their body of law, apart from *vár lög* ("our law"), a term that they also used for their polity more generally.<sup>110</sup>

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106. *Id.* at 231. Those two texts each appear to have had a fixed content, which could only be changed by amendment. *See id.* at 232.

107. *See id.* at 231.

108. BOULHOSA, *supra* note 83, at 118; *see also* JÓHANNESSON, *supra* note 20, at 90.

109. Rohrbach, *supra* note 87, at 229.

110. KIRSTEN HASTRUP, CULTURE AND HISTORY IN MEDIEVAL ICELAND: AN ANTHROPOLOGICAL ANALYSIS OF STRUCTURE AND CHANGE 121-22 (1985).

The name *Grágás*—which simply means “gray goose” and has nothing to do with the substance of the laws—was only applied to the law of the Commonwealth period in the sixteenth century.<sup>111</sup> We might therefore think of *Grágás* not as a code, but as a legal tradition: a set of texts and ideas that could be combined in different ways and expounded upon by different authors. The *Konungsbók* and *Staðarhólsbók* texts are two manifestations of that tradition.

The first law that we hear of for Iceland is one based on the law of the Norwegian *Gulaping* and introduced by a man named Úlfljótr at the first *Alþingi* in 930.<sup>112</sup> We have no evidence that this law was ever written down and, indeed, the story of Úlfljótr introducing a body of law to Iceland may simply be a legend. The law seems to have remained purely oral until the twelfth century.<sup>113</sup> The *Konungsbók* manuscript tells us that the lawspeaker was tasked with reciting the law every year at the *Alþingi*.<sup>114</sup> He was to recite the assembly procedures section every year and split the rest of the law over the three years of his term, so he would have recited “all the sections of the law over three summers.”<sup>115</sup> *Konungsbók* does not appear to envision the law as a set text, however. Different lawspeakers might recite different versions of the law, as the text tells us that the lawspeaker “shall recite the sections so extensively that no one knows them more extensively.”<sup>116</sup> If the lawspeaker’s “knowledge does not stretch so far,” *Konungsbók* provides that he is to meet with five or more “law men” (*lögmenn*) twenty-four hours before reciting the law to learn as much law as he can.<sup>117</sup> These

111. GRÁGÁS I, *supra* note 12, at 9; DIETER STRAUCH, MITTELALTERLICHES NORDISCHES RECHT BIS 1500: EINE QUELLENKUNDE 236 (2011).

112. LÁRUSSON, *supra* note 91, at 77; ARI ÞORGILSSON, THE BOOK OF THE ICELANDERS (ISLENDINGABÓK) 49, 61 (Halldór Hermannsson trans., 1930).

113. LÁRUSSON, *supra* note 91, at 88.

114. *Id.* at 78.

115. GRÁGÁS I, *supra* note 12, at 187, 193; GRÁGÁS (K.), *supra* note 40, at 209; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 83. Although it is customary to refer to manuscripts by folio, rather than page, the *Konungsbók* manuscript has been numbered by page throughout, and I use the page numbers written by hand in the top right-hand corner of each manuscript page for ease of reference to the facsimile.

116. GRÁGÁS I, *supra* note 12, at 188; GRÁGÁS (K.), *supra* note 40, at 209; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 83.

117. GRÁGÁS I, *supra* note 12, at 188; GRÁGÁS (K.), *supra* note 40, at 209; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 83.



provisions seem to assume that there is a set number of sections (*þættir*) of law. They do not appear to assume that those sections have a standard content, however. The sections may have more or less content depending on who is reciting them.

In the twelfth century, the law was recorded in writing for the first time.<sup>118</sup> Ari Þorgilsson says in his *Íslendingabók*, a chronicle of Iceland's early centuries, that in 1117 the *lögrétta* charged several wise men with the task of recording the laws in a book over the following winter.<sup>119</sup> The manuscript produced as a result of this process was called *Haflíðaskrá* after Haflíði Másson, the chieftain who hosted the law-writing sessions at his home during the winter of 1117–1118.<sup>120</sup> Sometime after the laws were written down, law writing seems to have become fairly common, although the legal texts interacted with oral law for a long period of time.<sup>121</sup> The author of the *First Grammatical Treatise*, writing sometime in the middle of the twelfth century, noted that it was “now the custom in this country” to write “both laws and genealogies . . .”<sup>122</sup> The writing process was probably not just a process of writing down texts that had been passed down orally. Scholars who have looked for evidence of orality in *Grágás* have largely been disappointed; the laws have very little of the rhyme, alliteration, and assonance that are usually taken as signs of oral transmission.<sup>123</sup>

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118. GRÁGÁS I, *supra* note 12, at vi.

119. ÞORGILSSON, *supra* note 112, at 70.

120. LÁRUSSON, *supra* note 91, at 79; JÓHANNESSON, *supra* note 20, at 228–29.

121. Agnes S. Arnórsdóttir, *Legal Culture and Historical Memory in Medieval and Early Modern Iceland*, in MINNI AND MUNINN: MEMORY IN MEDIEVAL NORDIC CULTURE 211, 216 (Pernille Hermann et al. eds., 2014).

122. Translation found in GÍSLI SIGURÐSSON, THE MEDIEVAL ICELANDIC SAGA AND ORAL TRADITION: A DISCOURSE ON METHOD 54 (Nicholas Jones trans., English translation ed. 2004).

123. Michael P. McGlynn, *Orality in the Old Icelandic Grágás: Legal Formulae in the Assembly Procedures Section*, 93 NEOPHILOLOGUS 521, 521–24 (2009). Lisi Oliver has shown that the absence of these marks does not rule out the possibility that the text was transmitted orally. Legal texts can contain other types of mnemonic devices, particularly structural ones, that allow for accurate oral transmission. LISI OLIVER, THE BEGINNINGS OF ENGLISH LAW 36–37 (2002). Other scholars have, however, argued that the texts of *Grágás* have a literary look to them. Arnórsdóttir, *supra* note 121, at 214; Lárusson, *supra* note 91, at 87. Hans Hoff has recently argued that the earliest written Icelandic legal texts were influenced by Roman legal texts. HANS HENNING HOFF, HAFLÍÐI MÁSSON UND DIE EINFÜSSE DES RÖMISCHEN RECHTS IN DER GRÁGÁS (2012).

The *Konungsbók* manuscript of *Grágás* itself tells us that “what is found in books is to be law.”<sup>124</sup> But even with the advent of written law, *Konungsbók* does not imply that the law will be uniform. *Konungsbók* tells us:

And if books differ then what is found in the books which the bishops own is to be accepted. If their books also differ, then that one is to prevail which says it at greater length in words that affect the case at issue. But if they say it at the same length but each in its own version, the one which is at Skálaholt [Iceland’s senior episcopal see] is to prevail. Everything in the book which Haflíði had made is to be accepted unless it has since been modified, but only those things in the accounts given by other legal experts which do not contradict it, though anything in them which supplies what is left out there or is clearer is to be accepted.

If there is argument on an article of law and the books do not decide it, the Law Council (*lögrétta*) must be cleared for a meeting on it.<sup>125</sup>

This provision assumes that law is a textual activity. It subordinates nontextual sources, like the *lögrétta*, which only come into play when all of the possible textual sources have been exhausted.<sup>126</sup> There is no single, authoritative version of the law,

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124. GRÁGÁS I, *supra* note 12, at 190. “*Þat er oc at þat scola lög vera alandē her sem áscrām standa.*” GRÁGÁS (K.), *supra* note 40, at 213; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 85.

125. GRÁGÁS I, *supra* note 12, at 190–91.

*EN ef scrár scilr á oc scal þat hafa er stendr a scröm þeim er byscopar eigo. Nu scilr en þeirra scar á. þa scal sv hafa sitt mal er lengra segir þeim orðom er male scripta með monnom. En ef þær segia iafn langt oc þo sitt hvar. þa scal su hafa sit mal er iscalahollti er. Þat scal alt hafa er finz a scrö þeirre er haflíðe let gera nema þocat se siþan. En þat eitt af anara lög manna fyrir sögn er eigi mæli því igeign. oc hafa þat alt er hitzug leifir eða gløgra er. Nu prætā menn vm lögmāl. oc má þa ryðia loqrétto til. ef eigi scera scrár ór.*

GRÁGÁS (K.), *supra* note 40, at 213; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 85.

126. Gísli Sigurðsson has argued that Icelanders of the twelfth and thirteenth centuries understood the law to be located in the memory of legal experts, such as the lawspeaker, and that the creation of legal texts was “the first step in a movement by the allies of the Church to encroach upon the secular domain of the lawspeakers . . . .” SIGURÐSSON, *supra* note 122, at 58. This theory does not necessarily conflict

however; the books that the bishops have in their possession may treat the material "each in its own version."<sup>127</sup> *Haflíðaskrá* has a special status, although even this original law book can be supplemented by clearer explanations by "other legal experts" (*annara lög manna*).<sup>128</sup> In the less authoritative law books, the book that discusses the topic at greater length has more authority.<sup>129</sup> The rule of clarity and the rule of length (i.e., that the clearer and longer explanation of the law is the more authoritative) imply that the author of this text did not think that the law was contained in a particular formulation of words.<sup>130</sup> Rather, the words were used to embody a law that existed outside of the individual text and could embody it with greater or lesser clarity and at greater or lesser length.

This provision should inform the way we approach *Konungsbók*. It gives us a sense of how that text's creator might have understood the legal tradition of the Icelandic Commonwealth. Moreover, this provision may reflect medieval Icelanders' understanding of their legal tradition more generally. The *Konungsbók* and *Staðarhólsbók* manuscripts of *Grágás* are not identical to each other. The similarities between the two texts confirm the assertions of Ari and of the *Konungsbók* author himself that there was some common legal tradition. On the level of organization, for instance, the two manuscripts contain many of the same section divisions. Ari's *Íslendingabók* and two sections of the *Konungsbók* manuscript agree that the section (*þáttir*, pl. *þættir*) was the basic unit of the law, both before and after the law was first written down.<sup>131</sup> The section

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with the *Konungsbók* text's hierarchy of authorities. Although *Konungsbók* subordinates oral tradition to written law, it does so in a way that demonstrates that the author of this provision thought about law as a fluid tradition, of which each text was merely a single manifestation.

127. GRÁGÁS I, *supra* note 12, at 190; GRÁGÁS (K.), *supra* note 40, at 213; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 84.

128. GRÁGÁS I, *supra* note 12, at 191; GRÁGÁS (K.), *supra* note 40, at 213.

129. GRÁGÁS (K.), *supra* note 40, at 57. The rule of length appears in other parts of the *Konungsbók* manuscript. The lawspeaker is to recite the laws as extensively as anyone can. GRÁGÁS I, *supra* note 12, at 188. If two groups of witnesses disagree with each other, then the group "who give[s] longer testimony, in words that affect the case between them" will win. *Id.* at 68; PETER FOOTE, *Some Lines in Lögrettubáttir: A Comparison and Some Conclusions*, in AURVANDILSTÁ: NORSE STUDIES 155, 157 (Michael Barnes et al. eds., 1984).

130. See FOOTE, *supra* note 129, at 157.

131. ÞORGILSSON, *supra* note 69, at 70; GRÁGÁS I, *supra* note 12, at 188, 1980; GRÁGÁS (K.), *supra*

divisions, then, may have been set by at least the beginning of the twelfth century, when Ari was writing.<sup>132</sup> The common core of Icelandic law went beyond a common set of section divisions, however. Substantively, *Konungsbók* and *Staðarhólsbók* are similar enough that they must have drawn upon at least one common written source.<sup>133</sup>

But while the similarities between the texts show us that they draw from a common tradition, the differences show us that their creators used their own judgment in crafting their texts. *Konungsbók* and *Staðarhólsbók* clearly draw upon some common source for many of their provisions; in places, they reproduce some of the same scribal errors.<sup>134</sup> In others, they appear to be drawing upon a common, pre-existing legal tradition but not from the same manuscript. Divergences appear even in places where the two manuscripts seem to be drawing from a common source.<sup>135</sup> Generally the *Staðarhólsbók* text is longer and more complete in these portions of the text.<sup>136</sup> If

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note 40, at 209.

132. It is worth noting, however, that many, but not all, of the major sections of *Konungsbók* are labelled *þættir*. Patricia Pires Boulhosa, *Layout and Text Structure in Kongungsbók*, in *THE POWER OF THE BOOK: MEDIAL APPROACHES TO MEDIEVAL NORDIC LEGAL MANUSCRIPTS* 75, 76 (Lena Rohrbach ed., 2014).

133. Peter Foote, *Oral and Literary Tradition in Early Scandinavian Law: Aspects of a Problem*, in *ORAL TRADITION, LITERARY TRADITION: A SYMPOSIUM* 47, 52 (Hans Bekker-Nielsen et al. eds., 1977). Lárusson identified this common written source with *Haflíðaskrá*. Lárusson, *supra* note 91, at 84. This is certainly a possibility. Both texts contain versions of the homicide section, seemingly derived from the common source. Ari Þorgilsson claimed that the homicide section was written down in *Haflíðaskrá*. Per Norseng, *Law Codes as a Source for Nordic History in the Early Middle Ages*, 16 *SCANDINAVIAN J. HIST.* 137, 141 (1991). It is therefore possible that *Haflíðaskrá* was the common source, but it is equally possible that the common source was a text derived from *Haflíðaskrá* or a text completely unrelated to it.

134. Foote, *supra* note 133, at 52.

135. As an example of both divergence and convergence, in one part of the homicide section, *Konungsbók* has “*Þat er mælt. er maðr stendr fyrir þeim manne eða veitir lið er man hefir vegin eða særðan. aþeim vetvangi oc varðar þat scog gang.*” GRÁGÁS (K.), *supra* note 40, at 146. *Staðarhólsbók* has “*Ef maðr stendr fyrir þeim manne er man hefir vegit. eða a manne hefir unít. eða veitir hann honom lið a þeim vettavangi. oc varðar þat scog gang.*” GRÁGÁS (ST.), *supra* note 56, at 300. The *Staðarhólsbók* text lacks the initial “*Þat er mælt*” (it is prescribed). Up to the first “*manne*,” the two texts maintain the same spelling, apart from the substitution of *ef* for *er*, possibly a scribal error. This is despite the fact that Old Norse did not have a standard orthography at the time. This suggests that the two texts share a common, written source. After the first “*manne*,” however, the texts diverge in a substantive way before converging at the end.

136. See Foote, *supra* note 133, at 52; GRÁGÁS (K.), *supra* note 40, at 146; GRÁGÁS (ST.), *supra* note 56, at 300.

greater length makes a text more authoritative, we might be tempted to say the creator of *Staðarhólsbók* had an incentive to add to the material that was present in the common source, but there is good reason to believe that, where the texts diverge, *Staðarhólsbók* is the more faithful reproduction of the common source.

There is some evidence indicating that the creator of *Konungsbók* was quite intentional in his decisions to omit certain material from his manuscript. *Konungsbók*'s creator did not just omit material; he often left a mark in his manuscript to show us that he knew that material existed and that he was omitting it deliberately.<sup>137</sup> The *Konungsbók* scribes, at times, only copied the title or first few words of a law, omitting the text of the law itself. The homicide section of *Konungsbók* contains the words, "[i]f men save the life of assailants," but then contains nothing on the laws concerning what happens when men save the lives of assailants.<sup>138</sup> The homicide section of the *Staðarhólsbók* manuscript contains an article that begins, "A new law. If men save the life of an assailant . . ." and then continues with a full paragraph of material.<sup>139</sup> The *Konungsbók* scribe left this heading as evidence of an article that existed in his source but which he did not copy.<sup>140</sup> The *Konungsbók* scribes also, at times, copied the beginning and end of an article but omitted the material in the middle. "If that man inherits . . . all the way to . . . kinship was mistaken," is a fairly common pattern.<sup>141</sup> The words of the law itself are in Norse, but the Latin *usque* (all the way to) is added in the

137. Rohrbach, *supra* note 87, at 253.

138. GRÁGÁS I, *supra* note 12, at 140. "*Ef menn forða fiörvi frum hlavps manz.*" GRÁGÁS (K.), *supra* note 40, at 146; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 60.

139. GRÁGÁS I, *supra* note 12, at 209. "*Nymæli. Ef menn forða fiörvi frum lavps manz.*" GRÁGÁS (ST.), *supra* note 56, at 300. The beginning of the homicide section of the *Konungsbók* manuscript is heavily truncated. It appears to be a summary of the first few chapters of the homicide section in *Staðarhólsbók*.

140. It is likely that he did this deliberately. This sentence and the one after are set off by capital letters, showing us that the scribe knew what he was doing when he omitted this material; if it was a mistake, he likely would have noticed that he had written an article that comprised a single line. Gl. kgl. Sml. 1157 fol., *supra* note 56, at 60.

141. GRÁGÁS II, *supra* note 56, at 4. "*Ef sa maðr tecr arf usque kyn var villt.*" GRÁGÁS (K.), *supra* note 40, at 220–21; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 87. Material appears in brackets in Finsen's edition where the *usque* appears in the manuscript. Finsen supplied this material from *Staðarhólsbók*.

middle to indicate that the copyist has omitted text.<sup>142</sup> The *Staðarhólsbók* scribe included the same passage in his text, with the same beginning and ending words but also included the material in-between.<sup>143</sup> Thus, where the texts follow the common source, the *Staðarhólsbók* scribe appears to copy everything—or at least more than the *Konungsbók* scribe—while the *Konungsbók* scribe omits some material and, at least in some places, makes it clear that he is omitting it.<sup>144</sup> Why did the creator of *Konungsbók* do this? It is not always clear. At times, it is fairly clear that he simply omits material that is covered elsewhere in the manuscript to avoid repetition. The omissions cannot always be explained in this way, however. These changes demonstrate that the creator of *Konungsbók* did not simply copy his source material blindly. They demonstrate that he felt that he had license to omit material. This makes those parts of the text that he chose to include, even when they were archaic by the standards of his time, more significant.

#### IV. *Imagining Medieval Iceland*

##### A. *A Land of Free Farmers*

The assembly procedures section—which explains how the various assemblies are to be run, how one prosecutes a wrong, what types of juries and panels are allowed for different types of wrongs, and how one collects after winning one's case—appears only in the *Konungsbók* manuscript, although portions of what can be found in the *Konungsbók* manuscript appear in other sections of *Staðarhólsbók*.<sup>145</sup> Of course, if scholars are correct in dating

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142. GRÁGÁS (K.), *supra* note 40, at 220–21; GRÁGÁS II, *supra* note 56, at 4.

143. GRÁGÁS (ST.), *supra* note 56, at 76.

144. Peter Foote notes that comparison to one other source, a fragment of Icelandic laws that was probably written in the twelfth century and has been designated AM 315 D fol. at the Árni Magnússon Institute for Icelandic Studies, shows us that the creator of *Konungsbók* was streamlining what he found in other sources. AM 315 D fol. contains portions of the land claims section, but they are more complete than those found in *Konungsbók*. Peter Foote, *Reflections on Landabrigðisþátr and Rekabátr in Grágás*, in *TRADITION OG HISTORIESKRIVNING: KILDERNE TIL NORDENS ÆLDSTE HISTORIE* 53, 58 (Kirsten Hastrup & Preben Meulengracht Sørensen eds., 1987).

145. JÓHANNESSON, *supra* note 20, at 92.

*Konungsbók* to the 1250s or 1260s and *Staðarhólsbók* to the 1270s or 1280s, this would make a certain amount of sense, since the assemblies that the section describes had been completely transformed by the early 1270s. After 1271 there was no lawspeaker, for instance.<sup>146</sup> But even in the 1250s and 1260s, many of the laws in this section could only have been wishful thinking. The assembly procedures section tells us that one cannot own or administer more than one chieftaincy and that a chieftain cannot have thingmen outside of his own quarter.<sup>147</sup> Both of these laws had been openly flouted since the beginning of the thirteenth century as the big chieftains had turned multiple chieftaincies into their own territorial principalities.<sup>148</sup> Some chieftains even became powerful enough to abolish their local assemblies.<sup>149</sup> Likewise, *Grágás* requires all chieftains to attend the *Alþingi* and other assemblies or forfeit their chieftaincies, but in reality, assembly attendance declined markedly over the course of the thirteenth century, with no known consequences for the chieftains.<sup>150</sup>

While Even-Zohar would classify legal texts as “directly instrumental,” or texts that act as “sets of instructions,” the value of the assembly procedures section in the 1250s or 1260s was likely not in the instructions it provided.<sup>151</sup> The assembly procedures section might have been valuable to the creator of *Konungsbók* for what it says indirectly, however. It does not work through stories and examples, as the sagas do, but the assembly procedures section nevertheless contains subtle messages about Icelandic society in the way the legal provisions are presented and organized.<sup>152</sup> The

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146. *Id.* at 47.

147. *GRÁGÁS I*, *supra* note 12, at 136.

148. JÓHANNESSON, *supra* note 49, at 237–38. Snorri Sturluson held at least five chieftaincies in the early thirteenth century and controlled chieftaincies in both the South and West Quarters. His men from the West Quarter attended the South Quarter assembly to be with their chieftain rather than the assembly of the quarter to which they belonged. *Id.* at 234, 238. This suggests that the principality was a much more significant form of social organization than the assembly quarter.

149. A chieftain named Guðmundr dýri is said to have abolished one of the assemblies in his district in 1190. MILLER, *supra* note 61, at 22.

150. *GRÁGÁS I*, *supra* note 12, at 116; JÓHANNESSON, *supra* note 20, at 238–39.

151. See Even-Zohar, *supra* note 13, at 15.

152. *Id.* at 16.

assembly procedures section creates a very tangible, concrete world. In particular, a subsection titled “On Residences” (*um heimilis föng*) uses textual strategies to highlight independence as an Icelandic virtue and to present the small, independent *bóndi*, not the chieftain, as the quintessential Icelander.<sup>153</sup> The text prescribes that everyone in Iceland will either be a *bóndi* or will be attached to a *bóndi*’s household.<sup>154</sup> The title mostly regulates the relationship between *bóndi* and household member: how much the household member can demand in wages and how much work he must do.<sup>155</sup> But before the text discusses these restrictions placed on the household member, it emphasizes his freedom of choice. It begins with several paragraphs on changing households. We are told that “[a] male sixteen winters old or older [may] arrange his own residence. An unmarried woman of twenty or more may also arrange her own residence.”<sup>156</sup> The rhetorical move of first discussing the freedom of the man to choose his household makes freedom appear to be the primary thrust of the title.

This emphasis on free choice is repeated a short while later when the author discusses the position of the *bóndi*. The creator of *Konungsbók* emphasizes the freedom and equality of the *bændr* rather than the hierarchical aspects of Icelandic society. We are told that “[a] man who starts householding in the spring shall say he is joining an assembly group, *whichever one he pleases*,” and “[a] man is to say at the General Assembly . . . that he is joining the assembly group of a chieftain, *whichever one he . . . pleases*.”<sup>157</sup> Just as the household member is free to choose his *bóndi*, the *bóndi* is free to choose his *goði* and assembly group.<sup>158</sup> He is a free man who can

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153. See GRÁGÁS I, *supra* note 12, at 125–28; GRÁGÁS (K.), *supra* note 40, at 128.

154. See GRÁGÁS I, *supra* note 12, at 125–26.

155. See *id.* at 125–27.

156. *Id.* at 126. “Karl maðr xvi. vetra gamall skal raða sialfr heimilis fangi sino eða ellre. Mær .xx. eða ellre skal oc siálfr raða heimilis fangi sino.” GRÁGÁS (K.), *supra* note 40, at 129.

157. GRÁGÁS I, *supra* note 12, at 132 (emphasis added). “Maðr sa er bv görir um vár skal segia sic íþing þar er hann vill . . . Maðr skal segia sic íþing a alþingi eða a varþingi ef hann vill. við þa<sup>N</sup> goða er hann vill.” GRÁGÁS (K.), *supra* note 40, at 136–37.

158. GRÁGÁS I, *supra* note 12, at 126, 132.



choose whom he will follow, not a vassal permanently bound to a lord by an oath of fealty.

The creator of the *Konungsbók* manuscript chose to include the assembly procedures section and these specific provisions, which lined up so poorly with the practices of his time. Indeed, he went further than simply choosing to include the subsection on residences in his manuscript. He chose to emphasize this subsection in ways that it may not have been emphasized in his source text. The material on residences was probably drawn from a source that *Konungsbók* shared in common with *Staðarhólsbók*. It appears, in the same words and the same order, in the section of *Staðarhólsbók* titled “On the Hire of Property” (*um Fiárleigor*).<sup>159</sup> *Konungsbók* and *Staðarhólsbók* parallel each other, almost perfectly, in the discussion of residences.<sup>160</sup> But the scribe who copied the portion of the text on residences into *Konungsbók* did something to mark off these articles—which, recall, would have been largely moot when the manuscript was created—as important: he included a large, floriated initial and a rubric—a heading written in red ink—marking off the beginning of the section “On Residences.”<sup>161</sup> The creator of the manuscript used several different sizes of initials. Particularly large ones, often floriated, mark off the largest divisions of the text, such as the assembly procedures section itself.<sup>162</sup> Although it is not quite

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159. This section begins at page 210 of GRÁGÁS (ST.), *supra* note 56.

160. GRÁGÁS (K.), *supra* note 40, at 128–39; GRÁGÁS (ST.), *supra* note 56, at 264–73. It is important to note that, while the text of *Konungsbók* is very close to that of *Staðarhólsbók* in this section, the layout of the manuscript is not. In both, the material on changing residences begins with a large, floriated F. After that, however, the *Konungsbók* and *Staðarhólsbók* scribes placed their large capitals in different places, which suggested to the manuscripts’ editor, Finsen, that they adopted different schemes for dividing the section into articles. Finsen may be correct that the *Konungsbók* and *Staðarhólsbók* scribes were copying from a common source and made their own decisions about where to place the section breaks. It is also possible that they were copying from different manuscripts, which had already adopted different schemes. See Gl. kgl. Sml. 1157 fol., *supra* note 56, at 54; AM 334 fol., *supra* note 56, at 91. Since *Konungsbók* and *Staðarhólsbók* both contain the floriated F at the beginning of this material, there is a strong possibility that the decision to begin this material with a floriated initial was made by the editor of some predecessor manuscript. The fact that the two manuscripts otherwise diverge in their organization of this material makes it possible, however, that the decision to mark off this material with a floriated initial was made independently by the creators of *Konungsbók* and *Staðarhólsbók*. Gl. kgl. Sml. 1157 fol., *supra* note 56, at 54; AM 334 fol., *supra* note 56, at 91.

161. Gl. kgl. Sml. 1157 fol., *supra* note 56, at 54; Boulhosa, *supra* note 132, at 77, 85.

162. Boulhosa, *supra* note 132, at 87–88.

the size of the floriated initial that begins the assembly procedures section, it is larger than the other initials that begin articles, or subsections, of the assembly procedures section and, unlike them, it is floriated.<sup>163</sup> This initial, therefore, appears to have been intended to signal that something important was happening in the text. Larger-than-normal initials, combined with rubrics, are used in the text to signal changes in subject but are also, at times, used to simply signal that the material was important.<sup>164</sup> It is not clear which the scribe intended to signal with this initial; the material on residences is somewhat distinct from what comes before it in the assembly procedures section, although it continues a common theme: the relationship between one's residence and one's assembly affiliation.<sup>165</sup> The scribe may have attached particular significance to this material. He also included a smaller capital M—of the type classed by Boulhosa as “minor initials,” which mark off article breaks—at the beginning of the sentence where he describes the *bóndi*'s freedom to choose his assembly group and chieftain.<sup>166</sup>

The homicide section (“*Vígslóði*”) likewise invites its reader to imagine an Iceland of small, independent householders. This section appears in both the *Konungsbók* and *Staðarhólsbók* manuscripts.<sup>167</sup> This particular section division appears to be very old; it is the only section mentioned by name in *Íslendingabók*'s account of the writing of the laws in the early twelfth century.<sup>168</sup> The material is ordered differently in the two manuscripts, but they were clearly drawing from a common source in places because they use identical language for many provisions.<sup>169</sup> Nevertheless, the homicide section contains

163. *Id.* at 84–85. Boulhosa counts this initial among the “major initials” of the text, those initials in the same category as the initials that begin section divisions. *Id.* at 84.

164. *Id.* at 84–85.

165. *Id.* at 92–93. Boulhosa has suggested that the material in the section on residences was drawn from a different manuscript source than the material that comes immediately before it. The layout of the text in the manuscript changes at this point. *Id.*

166. Gl. kgl. Sml. 1157 fol., *supra* note 56, at 57; Boulhosa, *supra* note 132, at 81. This may be because there was some similar mark in the common source. Boulhosa, *supra* note 132, at 92–94. This sentence is introduced by a large, floriated initial in *Staðarhólsbók*. AM 334 fol., *supra* note 56, at 94.

167. See GRÁGÁS (K.), *supra* note 40, at 145; GRÁGÁS (ST.), *supra* note 56, at 309.

168. ÞORGILSSON, *supra* note 112, at 56, 70.

169. See Boulhosa, *supra* note 132, at 94.

significant evidence of deliberate omissions on the part of the creator of *Konungsbók*; *Konungsbók*'s version of this section contains many hanging chapter headings.<sup>170</sup> The legal provisions associated with these headings can be found in *Staðarhólsbók*.<sup>171</sup> One such omission could be chalked up to the scribe's negligence, but since hanging chapter headings keep appearing over and over throughout the section, it appears to have been a much more intentional move on the part of the scribe.

When the creator of *Konungsbók* discusses the qualifications to be a member of a panel (*kviðr*)—essentially a jury called to assess responsibility for an injury—he defines the community of people who are eligible for panel membership and places the emphasis on the small householder:

It is prescribed that neighbors are to be called who have such property that they have to pay assembly attendance dues. And the men who have to pay assembly attendance dues are those who for each household member who is a charge on them own a debt-free cow or its price or a net or a boat and all the things which the household may [not] be without. Household members who are a charge on a man are all those he has to maintain and those workmen he needs to provide the labor to enable him to do so.

A householder who works single-handed is rightly called to serve on a panel if he has such property that for each household member who is a charge on him he owns twice the price of a cow. He is not single-handed if he takes on someone at the moving days for a whole year's stay and has him at the time of the General Assembly . . . .<sup>172</sup>

170. See, e.g., GRÁGÁS I, *supra* note 12, at 140, 143, 150; GRÁGÁS (K.), *supra* note 40, at 191.

171. GRÁGÁS (ST.), *supra* note 56, at 309.

172. GRÁGÁS I, *supra* note 12, at 150.

*Þat er mælt. at þa skal bva qveðia er fe eigo sva at þeir eigo at giallda þingfarar cavy. En þeir eigo at gialda þingfarar cavy er sculda hiona hvert hefir havfot kú sculda laúsa eða ku gilde eða net eða scip oc búz boluti alla þa er þat bu ma eigi þermlaz. Sculda hiu hans ero þeir menn allir er hann*

According to the first paragraph, to be eligible for a panel, the householder must have a cow, a net, or a boat for each member of his household.<sup>173</sup> This could be a rather high threshold. One could imagine a household of several dozen people with several dozen cows being required for panel membership. The author begins to indicate that the threshold is rather low, however, when he tells us in the second paragraph that a man who works “single-handed,” in other words, a man who has no servants, but who owns “twice the price of a cow” for each member of his household, is qualified for a panel.<sup>174</sup> The author shows us that his concern is to lower the threshold for panel membership as he explains that a man who supports a single shepherd, or even a single worker hired on for a limited period of time, is not considered single-handed and therefore can qualify as a panel member under the lighter, one-cow requirement.<sup>175</sup> Theoretically, a *bóndi* who had one temporary servant plus either a cow, a boat, or a net could qualify under this provision. It seems like a property qualification that any independent *bóndi* could meet, particularly when one considers that the average family farm in medieval Iceland is thought to have had five to eight cows.<sup>176</sup> By continually lowering the threshold, the author draws the reader’s attention to the small householder as the quintessential panel member. Of course, independence is the *sine qua non* of panel membership; the laborer who works someone else’s farm is ineligible. But the *bóndi* need only own a very small amount of property to be considered legally independent.<sup>177</sup>

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*afram at fera oc þeir verc menn er þar þurfo fyrir at viNa. Einvirke er réttir  
 iquoð ef hann a sva fe at scullda hiona hvert hliote .ii. ku gillde. Sa er eigi  
 einvirke er hann tekr maN at fardögom til ii. missera vistar. Oc hefir vm  
 alþingi karlman xii. vetra gamlan eða ellra sva hravstan at se mallavne eða  
 betr.*

GRÁGÁS (K.), *supra* note 40, at 159.

173. GRÁGÁS I, *supra* note 12, at 150.

174. *Id.*

175. *Id.*

176. Árni Daniel Júlíusson, *Signs of Power: Manorial Demesnes in Medieval Iceland*, 6 *VIKING & MEDIEVAL SCANDINAVIA* 1, 15 (2010).

177. Of course, this provision could be interpreted in a more cynical way. Just as jury service in medieval England was a burden that was pushed off onto people lower and lower on the social scale, panel membership in Iceland may have been seen as a burden that should be borne by the poorest of the

Given the fact that the creator of *Konungsbók* chose to exclude other parts of the homicide section—in fact, he leaves hanging chapter headings shortly before this material—his choice to include this material may be significant.<sup>178</sup> Through their decisions about what to include and what to exclude in the sections on assembly procedures and homicide, the person or group of people who compiled the *Konungsbók* manuscript may have intended to claim that a special relationship existed between the small-time *bóndi* and the law. The text impresses upon the reader that the *bændr* were the true heirs to Iceland's history and laws.

The text does not emphasize the centrality of the *bændr* through simple polemic, however. It does so by creating a world. *Konungsbók* invites its reader to enter into a world populated by free smallholders of relatively equal status. Law codes and statutes often de-personalize their subjects; a criminal code “envisions not individuals but a class of possible miscreants” who are detached from any particular place or time.<sup>179</sup> But *Konungsbók*, even when it refers to a generic “man,” turns that man into a more specific type. He owns a cow, a net, or a boat and has a household to support.<sup>180</sup> *Konungsbók* presents us with an imagined geography of Iceland, an Iceland that is a collection of small farms, headed by independent *bændr*, and of communal assemblies where these *bændr* congregated. This imagined world stood in stark contrast to the reality of Iceland of the 1250s and 1260s, where the topographical focal points were not small farms or assembly places, but the fortified strongholds of powerful chieftains and princes, modeled on the manors of the Norwegian aristocracy.<sup>181</sup> The world of *Konungsbók* was not a world of *ríki* but a world of farmsteads, quarters, and assemblies.

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*bændr*.

178. See GRÁGÁS I, *supra* note 12, at 140–41, 143.

179. Fludernik, *supra* note 55, at 93.

180. GRÁGÁS I, *supra* note 12, at 150.

181. Snorri Sturluson's fort at Reykholt, built in the 1220s, was designed in imitation of the dwellings of Norwegian nobles. See Guthrún Sveinbjarnardóttir, *Reykholt, A Centre of Power: The Archaeological Evidence*, in REYKHOLT SOM MAKT- OG LÆRDOMSSENTER: I DEN ISLANDSKE OG NORDISKE KONTEKST 25, 34 (Else Mundal et al. ed., 2006).

### B. Slavery and Freedom

“*Baugatal*,” a section that appears only in *Konungsbók*, lists the payments that must be made to various relatives of a slain man by the slayer.<sup>182</sup> Sections like “*Baugatal*,” in which compensation payments for killings and various types of injuries were listed, were common in the law codes of the early Middle Ages, although less common by the time *Konungsbók* was being written.<sup>183</sup> “*Baugatal*” differs from other lists of compensation payments—also known as wergilds—in one important respect, however. Where most law codes are concerned with the rank of the slain man and the price that the killer must pay based on that rank, “*Baugatal*” does not differentiate among free men according to rank. All free Icelanders are of one rank and receive the same payment.<sup>184</sup> The text concerns itself with family relationships, one of the major focuses of many sections of both the *Konungsbók* and *Staðarhólsbók* manuscripts. It is primarily about which relatives of a slain man are to receive the wergild and which relatives of the slayer are responsible for paying it.<sup>185</sup> The formulae become very complex because different members of the kin group give and receive different amounts.<sup>186</sup>

Historians have debated the role similar wergild values played in actual disputes. The wergild amounts in Anglo-Saxon law codes—which could vary greatly depending on the status of the person and the nature of the injury—are treated by many historians as a starting point for negotiation rather than fixed amounts.<sup>187</sup> While Alfred’s code, for instance, makes bright-line distinctions between a person worth 200 shillings, a person worth 600 shillings, and a person worth 1,200 shillings, contemporary accounts show negotiations for

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182. GRÁGÁS I, *supra* note 12, at 175; GRÁGÁS (K.), *supra* note 40, at 193; Gl. kgl. Sml. 1157 fol., *supra* note 56, at 76.

183. Lists of payments for killing or injuring another person exist in law codes from Francia, Saxony, Anglo-Saxon England, Frisia, Lombardy, and Visigothic Spain, among others. LISI OLIVER, *THE BODY LEGAL IN BARBARIAN LAW* 227 (2011).

184. See GRÁGÁS I, *supra* note 12, at 175–76.

185. *Id.* at 175–77.

186. *Id.* at 175–81.

187. PAUL R. HYAMS, *RANCOR AND RECONCILIATION IN MEDIEVAL ENGLAND* 88–89 (2003).

different amounts based on the party's rank.<sup>188</sup> We see a similar phenomenon in Icelandic sagas. Free men killed in *Njal's Saga* are compensated for with wergilds of 100, 200, and 600 ounces of silver, depending on their rank, not with the forty-eight ounces laid out in "*Baugatal*."<sup>189</sup> The complex discussions of who is required to pay and who will receive the wergild, so central to the discussion of wergilds in *Konungsbók*, are absent from the sagas.<sup>190</sup> It may be that the sagas reflect the actual practice poorly and that *Konungsbók* is correct, but based on the saga evidence and the evidence from other feud societies that used wergild payments, it seems far more likely that, when they were negotiating, slayers and the kin of the slain figured the slain person's rank and prestige into the amount of the compensation. Indeed, William Ian Miller has suggested that "*Baugatal*" was not a legislative act but instead "has the look of a legal training exercise."<sup>191</sup>

Why did the creator of *Konungsbók* include "*Baugatal*" in his manuscript? There are many possible reasons. He might have copied blindly from another manuscript. He might have been looking for a legal training exercise. I would like to suggest that "*Baugatal*" might have had another value to someone copying a legal manuscript in the second half of the thirteenth century: it presents a vision of Iceland that is quite different from the Iceland of his own time. It presents a

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188. See THE LAWS OF THE EARLIEST ENGLISH KINGS 77 (F.L. Attenborough ed. and trans., 1922); HYAMS, *supra* note 187, at 88–89.

189. MILLER, *supra* note 13, at 7.

190. *Id.* at 76, 200, 215; MILLER, *supra* note 61, at 144–45; BERTHA SURTEES PHILLPOTTS, KINDRED AND CLAN IN THE MIDDLE AGES AND AFTER 14, 37 (1913); P.H. SAWYER, KINGS AND VIKINGS: SCANDINAVIA AND EUROPE, A.D. 700–1100, at 44 (1982). Miller has argued that a party's "moral quality" played a role in deciding the party's wergild. MILLER, *supra* note 61, at 184.

191. MILLER, *supra* note 61, at 228; see PHILLPOTTS, *supra* note 190, at 13–14, 37; SAWYER, *supra* note 190, at 44. Other scholars have argued that "*Baugatal*" does represent an earlier tradition of wergild, going back to the early period of the Commonwealth and perhaps before. Peter Foote notes that the text contains language that would have been archaic in the thirteenth century. Foote, *supra* note 144, at 55. He also notes that the method of distribution laid out in "*Baugatal*" may have been abandoned as Iceland's expanding kin-groups made payments unworkable, leading to situations where a single ounce of silver would be divided among a potential group of 1,296 people. *Id.* at 63. The rule of equal wergilds may indeed represent an earlier tradition of Germanic law. Lisi Oliver has argued that the sections of the earliest Anglo-Saxon laws that have to do with the loss of particular body parts, which do not distinguish between people on the basis of rank, probably predate those sections that give wergilds for the whole person, which do. See OLIVER, *supra* note 183, at 227.

world in which all free men merit the same wergild. “*Baugatal*” may have been valuable to the creator of this manuscript, at least in part, because it asserts that free Icelanders are all equal.<sup>192</sup>

Not everyone is equal in “*Baugatal*.” Only free men merit the highest wergild. “*Baugatal*” is one of several sections of the *Konungsbók* manuscript that discusses the law concerning slaves and freedmen. The primary payment for a freedman is half that for a man who is born free.<sup>193</sup> The slave’s wergild is expressed in a different unit of measurement—one whose value is unknown—than the free man’s or the freedman’s, and is presumably a smaller amount than either of them.<sup>194</sup> “*Baugatal*” thus does not present Iceland as a perfectly level society; it does have important social distinctions. But the social distinctions it contains were not salient distinctions in the thirteenth century, when “*Baugatal*” was copied into *Konungsbók*. There were no slaves in Iceland in the thirteenth century.<sup>195</sup> Neither *Járnsíða* nor *Jónsbók* included laws about slaves, and the contemporary sagas—those sagas that describe events of the thirteenth century—do not contain any mention of slaves.<sup>196</sup> The last literary reference to a slave is in a saga that takes place around 1050 or 1060.<sup>197</sup> Debt bondage may still have existed in the thirteenth century, but *Konungsbók* carefully distinguishes between the slave (*þræll*) and the debt slave (*lögskuldarmaðr*).<sup>198</sup> And yet slavery curiously appears in many sections of *Konungsbók*.<sup>199</sup>

It is difficult to make a case from “*Baugatal*” that the creator of *Konungsbók* included slaves intentionally. “*Baugatal*” is not found in *Staðarhólsbók*—or in any other source for that matter—so no other version against which to compare it exists. Additionally, “*Baugatal*” lacks the signs of editing that we find in other parts of *Konungsbók*.

192. See GRÁGÁS I, *supra* note 12, at 175–76.

193. *Id.* at 181.

194. *Id.* at 181–82, 261.

195. RUTH MAZO KARRAS, *SLAVERY AND SOCIETY IN MEDIEVAL SCANDINAVIA* 135 (1988).

196. *Id.* Karras also notes that *Konungsbók* is missing elements of slave law that one would expect to find, based on other Scandinavian codes, such as slave family relationships. *Id.*

197. *Id.*

198. See GRÁGÁS (K.), *supra* note 40, at 171; GRÁGÁS (ST.), *supra* note 56, at 399.

199. See GRÁGÁS (K.), *supra* note 40, at 171; GRÁGÁS I, *supra* note 12, at 181–82.



There are no *usques*, no hanging chapter headings. When the creator was cutting material from his source and replacing it with an *usque*, a summary, or a heading, he was likely doing something intentional, as he was diverging from the text in front of him. A decision to copy what was in front of him did not necessarily require any thought or intention on the scribe's part, however. "*Baugatal*" therefore provides us with no evidence that the creator of *Konungsbók* intervened to edit the text as he copied it into his manuscript. He may have included the material on slaves because he thought it was important, or he may simply have found a complete text and copied it in its entirety without any thought for what he was copying. "*Baugatal*" is not the only section of *Konungsbók* that discusses slaves, however, and in other parts of the text their inclusion appears to have been much more deliberate.

The creator's deliberate inclusion of laws concerning slaves comes out very clearly near the end of the homicide section ("*Víglóði*"). Recall that the creator of *Konungsbók* showed quite a bit of intentionality in the construction of the homicide section.<sup>200</sup> In *Konungsbók*, the homicide section ends with two detailed articles on slaves. The first article addresses the killing of a man's slave, which follows from the other material on homicide in the section.<sup>201</sup> The second article is more significant; it describes the manumission process, by which a slave becomes a free man.<sup>202</sup> The first article, on the killing of a man's slave, appears in *Staðarhólsbók* as well as in *Konungsbók*, but this second article does not appear in *Staðarhólsbók*.<sup>203</sup> *Staðarhólsbók*'s homicide section continues after the material on the killing of a man's slave with a discussion of outlaws and ends with several sections on making truces.<sup>204</sup> If the creators of these two manuscripts were drawing from a common source, the creator of *Konungsbók* took a great deal of liberty with

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200. See discussion *supra* notes 170, 178.

201. GRÁGÁS I, *supra* note 12, at 172–73.

202. *Id.* at 173–74; GRÁGÁS (K.), *supra* note 40, at 191.

203. See GRÁGÁS I, *supra* note 12, at 172–174; GRÁGÁS (ST.), *supra* note 56, at 395–97.

204. GRÁGÁS (ST.), *supra* note 56, at 397–407. The material on outlaws appears in *Konungsbók*, but it appears before the material on slaves. See GRÁGÁS I, *supra* note 12, at 170–72.

his source material. He cut all of the material on truces and also seems to have cut some of the material he found in the common source on the killing of a man's slave; this article is longer in the version found in *Staðarhólsbók* than in the version found in *Konungsbók*.<sup>205</sup>

There are several reasons to believe the creator of *Konungsbók* added manumission to material he found in an earlier text. First, manumission has nothing at all to do with homicide and is therefore out of place in the homicide section. The article on manumission's only connection to the homicide material around it is that the article on manumission follows another article on slaves. Second, the article on manumission appears to be a composite, drawn from several different sources, thrown together hastily and without much attention to the material's relevance to Iceland. One mysterious provision in this article refers to a freed slave who "holds an earl's farm" or "holds a king's farm."<sup>206</sup> Scholars have supposed that this was taken from a Norwegian source.<sup>207</sup> The scribe seems to have thought this material on slaves was important as well. Both articles on killing a man's slave and on manumissions begin with floriated initials, which appear occasionally in the homicide section to signal the beginnings of articles.<sup>208</sup> Large, plain initials are much more common at the heads of articles, however.<sup>209</sup>

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205. GRÁGÁS I, *supra* note 12, at 235–36. It may be that the creators of the two manuscripts were drawing from different sources here. Although the content of the article on the killing of a man's slave is identical in both texts, there are slight differences in word choice and spelling. The sections on the killing of a man's slave begin with sentences that carry the same meaning but that do so in different words. See GRÁGÁS (K.), *supra* note 40, at 190; GRÁGÁS (ST.), *supra* note 56, at 395. Other sentences in this section are identical, or nearly so. See GRÁGÁS (K.), *supra* note 40, at 191; GRÁGÁS (ST.), *supra* note 56, at 397. *Konungsbók* does appear to have drawn from a multitude of sources, as writing styles change within the text. Parts of the assembly procedures section look like they were meant to be recited by the lawspeaker at the *Alþingi* because those portions refer to what will happen "today" or "tomorrow." GRÁGÁS I, *supra* note 12, at 54–55, 59. Others read like acts of legislation. It is therefore possible that *Konungsbók* and *Staðarhólsbók* drew from two different sources for the homicide section, despite their similarities. It may also be that one of the scribes modified the text. Even if the creators of the two manuscripts did draw from different sources in this part of the text, it still appears that the *Konungsbók* creator, or the creator of the manuscript he was working from, added material to the end of the homicide section that does not belong there.

206. GRÁGÁS I, *supra* note 12, at 174.

207. *Id.* at 174 n.169.

208. See Boulhosa, *supra* note 132, at 88.

209. Gl. kgl. Sml. 1157 fol., *supra* note 56, at 74–75; Boulhosa, *supra* note 132, at 87.

The creator of the *Konungsbók* manuscript appears to have gone out of his way to include this material that was not in the source text. But why include this material? It was irrelevant to the issue of homicide. It was clearly archaic. Moreover, some of it was not even Icelandic. One reason a compiler might include archaic material in his text is that it is still technically on the books. If slavery died a slow death in Iceland, there is no reason to believe that laws on slaves were ever repealed by some explicit act, and an author of the thirteenth century might have considered them to still be a valid part of the Icelandic legal tradition. That does not explain, however, why the provisions on the earl's farm and the king's farm, taken from Norwegian law, appear here. They were likely never a part of the Icelandic legal tradition. The compiler went hunting for material on an institution that was long dead in Iceland and brought in additional material pertaining to it, a strange thing to do.

I would suggest that the creator of *Konungsbók* went out of his way to include slaves in his manuscript to provide contrast to the free men who are the text's primary subject. If slavery was not an issue in the thirteenth century, freedom certainly was. We might be justified in supposing that the real issue underlying the discussion of slaves is not actual slavery—although it appears as literal, legal slavery in the work—but, depending on whether the text was written before or after 1264, dependence upon the big chieftains or the King of Norway. References to an imaginary slave class—a group of people who existed at one time but who had ceased to be part of the Icelandic landscape by the thirteenth century—could actually reinforce the freedom and equality of Icelanders. The free part of Icelandic society is presented in *Konungsbók* as homogenous; all free men are valued at the same wergild. Slaves might have been crucial in the creator's mind to defining the typical Icelander as an independent householder, free from the domination of the big chieftains and the King of Norway.<sup>210</sup>

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210. Peter Sawyer has made the opposite argument for the provisions on slavery in the Norwegian laws. Sawyer argues that the Norwegian laws contained provisions on slavery in order to reinforce the social hierarchy. One thirteenth-century narrative held that the hierarchy existed because "kings . . . had tyrannically deprived many men of their ancestral rights." The laws were meant to create a counter-

### C. *A Lost World*

Recent scholarship has suggested that the new technology of writing, which was gaining ground in twelfth- and thirteenth-century Iceland, opened up new possibilities for contention. Gísli Sigurðsson has argued that access to the technologies of reading and writing, gained through connections to the Church, allowed some people of relatively humble backgrounds to wrest control of the office of lawspeaker from powerful families, who had passed their knowledge orally.<sup>211</sup> The Haukdælir family, closely associated with the see of Skálholt and with its book-learning, first saw one of its members appointed lawspeaker in 1181 and secured a monopoly on the office for a short time, before the Sturlungar came onto the scene.<sup>212</sup> Sigurðsson argues that it was at least partially the Sturlungar's mastery of the written word, acquired when Snorri Sturluson, the most famous member of this lineage, was fostered by Jón Loftsson at Oddi, that allowed them to rise to prominence and challenge the Haukdælir for the office.<sup>213</sup> The office of lawspeaker then alternated between the two families for the rest of the Commonwealth period.<sup>214</sup> Axel Kristinsson has likewise argued that writing was a new tool to be used in the family disputes of the turbulent thirteenth century. Kristinsson demonstrates that the family sagas—sagas that tell stories about Iceland's early settlers—written in the thirteenth century are geographically limited in scope and hail from regions where new families were rising to prominence as territorial overlords.<sup>215</sup> Where territorial principalities were long-established, family sagas did not arise.<sup>216</sup> Kristinsson argues that the new principalities needed the technology of writing and the medium of saga literature to create

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narrative in which the majority of the people were descended from slaves. The fact that the majority of people were now free, albeit subject to certain legal disabilities, actually represented an improvement in their circumstances. SAWYER, *supra* note 190, at 41.

211. SIGURÐSSON, *supra* note 122, at 63, 91.

212. *Id.* at 89–90.

213. *Id.* at 63, 91.

214. *Id.* at 91.

215. See Axel Kristinsson, *Lords and Literature: The Icelandic Sagas as Political and Social Instruments*, 28 SCANDINAVIAN J. HIST. 1, 6–8, 10–13 (2003).

216. *Id.* at 6.

cultural solidarity among the people of their regions.<sup>217</sup> In his work, Kristinsson also features the Sturlungar as a family that quickly rose to prominence from relative obscurity in the thirteenth century, partly because of their ability to use the written word to create solidarity.<sup>218</sup> *Egils Saga*, for instance, possibly written by Snorri Sturluson himself, claims that Snorri's ancestor, Skallagrímr, acquired vast tracts of land in Borgarfjörður, the district in which Snorri was building a territorial principality in the early thirteenth century.<sup>219</sup> Other Icelandic sources, such as *Landnámabók*, assign Skallagrímr a much more modest role in the settlement of the district.<sup>220</sup> The Sturlungar are only one example of this phenomenon; Kristinsson sees it repeated throughout Iceland.<sup>221</sup>

Kristinsson also posits a change in Icelandic literature that appears to have taken place around the time the Icelanders submitted to the King of Norway in the 1260s. Written works seem to shift from sites of contention to sites of Icelandic solidarity. While sagas of the early thirteenth century are limited in their geographical scope and tend to focus on certain families, sagas written later often range over the whole of Iceland and focus on major events in the history of the island.<sup>222</sup> The Icelanders' submission to the King of Norway and the associated abolition of the principalities and the chieftaincies had obviated the need for regional solidarities and had created a need for a national identity, particularly at moments of conflict between the king and the Icelanders.<sup>223</sup>

*Konungsbók* fits this model rather nicely. *Konungsbók* does not represent the interests of one region or one family. Rather, it presents a homogenized view of Iceland as a land of faceless equal and free *bændr*. *Konungsbók* could have been conceived by its creator as a work of cultural memory, designed to emphasize the solidarity of the

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217. *Id.* at 8.

218. SIGURÐSSON, *supra* note 122, at 60–63.

219. Kristinsson, *supra* note 215, at 10.

220. *Id.*

221. *Id.* at 10–13.

222. *Id.* at 14–15. *Njal's Saga*, with its focus on the Icelanders' communal conversion to Christianity, is one example of this new literary emphasis. *See id.* at 14.

223. *Id.* at 14–15.

Icelanders. But why write a legal text as a site for cultural memory? One answer is that, in a country where people referred to their polity as “our law,” group identity was likely to be mediated through law.<sup>224</sup> There are serious limitations to the use of the legal text as a site of cultural memory and solidarity, however. A legal text may have a great deal of cultural prestige, but legal texts were unlikely to be disseminated as widely as sagas. We have evidence for sagas being read aloud as entertainment in thirteenth-century Iceland.<sup>225</sup> Legal texts were presumably not read aloud in the evening to entertain guests. Their audience would have been much more limited. We do not know who made *Konungsbók*. We only know its provenance from the sixteenth century onwards.<sup>226</sup> Manuscripts were expensive to produce, and *Konungsbók* is an impressive and probably costly manuscript that contains colorful, floriated initials, hinting that its patron was someone wealthy.<sup>227</sup> We do know a bit about one of the scribes who copied the manuscript. Two separate scribes were involved in *Konungsbók*’s creation, one who wrote only the first few folios and another who wrote the bulk of the text.<sup>228</sup> The scribe who wrote the bulk of the text may have been one of the scribes who worked on *Staðarhólsbók*.<sup>229</sup> Knowing the scribe only gets us a bit closer to the identification of the patron, however. The scribes were probably professional writers. Other manuscripts demonstrate that the

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224. HASTRUP, *supra* note 110, at 121. Law seems to have been fairly central to cultural identity throughout the Norse world. *Id.* at 121–22. The use of the term “Dane law” to refer to the area in Northern and Eastern England that had seen substantial Norse settlement hints that law was central to regional identity there as well. 2 JOHN HUDSON, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 871–1216, at 67 (2014). This phenomenon of using the word “law” to mean something more general was not confined to Scandinavia. The Latin word *lex* was, at various times, used to mean something akin to “religion.” Peter Biller, *Words and the Medieval Notion of ‘Religion’*, 36 *J. ECCLESIASTICAL HIST.* 351, 362 (1985). The Old French *lei* is also used in medieval sources to mean “religion,” as in phrases like “*la chrestienne lei*.” See, e.g., *LA CHANSON DE ROLAND* 30, 34, 40, 58, 68, 236 (Ian Short trans., 2d ed. 1990).

225. Even-Zohar, *supra* note 13, at 25.

226. Páll Eggert Ólason, *Introduction to THE CODEX REGIUS OF GRÁGÁS*, MS. NO. 1157 FOL. IN THE OLD ROYAL COLLECTION OF THE ROYAL LIBRARY, COPENHAGEN 5, 7 (1932).

227. Lars Lönnroth, *Sponsors, Writers, and Readers of Early Norse Literature*, in *SOCIAL APPROACHES TO VIKING STUDIES* 3, 5 (Ross Samson ed., 1991).

228. Rohrbach, *supra* note 94, at 117–18.

229. *Id.* at 118, 123. Þórarinn kaggi, a cleric who was a member of the powerful Sturlung family, has been proposed as a possible candidate for this scribe. *Id.* at 123.

same professional scribes worked for both the Icelandic Church and for wealthy laymen in the thirteenth century.<sup>230</sup> Snorri Sturluson had clerics in his circle to whom he appears to have dictated the texts he composed.<sup>231</sup> Monasteries and the episcopal sees produced texts for their own use, but they also cooperated with laymen, loaning books to them and taking commissions for copying.<sup>232</sup> The patron is more likely than the scribe to be the mind behind the text's creation, the one who knew what he wanted out of this text. He may have given instructions to the scribes on how to construct the manuscript.<sup>233</sup> Apart from the probability that he was a wealthy elite, we know nothing of him, whether he was cleric or layman, Icelander or Norwegian.

We also know nothing about how, or even if, *Konungsbók's* creator imagined it would be used. In the early thirteenth century, we have evidence of people learning the law, perhaps from books, through the institution of fosterage, and *Konungsbók* may have been intended to be read by young men being fostered by the text's creator.<sup>234</sup> Even after the fall of the Commonwealth, a wealthy Icelander might want the young men he fostered to know his country's traditional laws. It may not have been important to *Konungsbók's* creator, however, that anyone read it. Books in the Middle Ages, as today, were prestige objects, and the *Konungsbók* manuscript is a very fine, expensive manuscript.<sup>235</sup> The act of producing the text might have been more important to its creator than the final product. The process of producing the text may have been

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230. Lönnroth, *supra* note 227, at 5.

231. *Id.* at 9.

232. *Id.* at 10–11. One scribe of the early fourteenth century copied a canon law treatise, a Norse translation of a letter of St. Bernard of Clairvaux, and parts of several sagas. Anderson, *supra* note 21, at 81.

233. See Lönnroth, *supra* note 227, at 5–6. Boulhosa suggests, based on the placement of initials within the text, that either *Konungsbók* or its sources were laid out by people who had some legal knowledge. Boulhosa, *supra* note 132, at 93.

234. See, e.g., SIGURÐSSON, *supra* note 122, at 63.

235. Lönnroth, *supra* note 227, at 3. Michael Clanchy has argued, for instance, that Domesday Book's function "was symbolic rather than practical." M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307, at 32 (2d ed. 1993). The book, which was not easy to search and was rarely used by the royal administration for the first two centuries after it was created, was, in Clanchy's view, a symbol of royal power, judgment, and knowledge. *Id.* at 32–33.

an act of catharsis. The physical object itself might stand as a representation of the idealized world contained in those laws, an elegy to a world its creator thought he had lost.

Even if the book was not meant to disseminate knowledge of the laws, its creator does seem to have been concerned with its contents, as we saw in the material on slaves in the homicide section. And the content of the written legal tradition as it existed at the time *Konungsbók* was written presented Iceland in a particular, idealized way, as a country represented by free and relatively equal independent householders. The big chieftains and the princes are absent from the text; the king plays a very small role, as the ruler of a foreign land. Even the power of the chieftains, who appear throughout *Konungsbók*, is minimized in favor of the *bændr*. This may have been the reason for choosing to preserve the laws, which present Iceland as unified and independent.

#### CONCLUSION

The creator of the *Konungsbók* manuscript was probably drawing on authentic material from an earlier period of Icelandic history. He was, however, making decisions about what from that earlier tradition to include and what to exclude, what to emphasize with floriated initials, and what to leave undifferentiated from the rest of the text. In this sense, *Konungsbók* is evidence of a thirteenth-century mentality that wanted Iceland to be exceptional in a way that it may never have been or, at the very least, had not been for at least a century. Indeed, the text's primary value to its creator may have been that it did not represent reality. Instead, it represented an imagined historical past. The creator of the *Konungsbók* manuscript wanted Iceland to be a place where the small, independent *bóndi* had the freedom to choose his chieftain, settled his own scores, and paid tribute to no king. The creator of *Konungsbók* was not so much a preserver of Icelandic law as an early appropriator of it, like Adam of Bremen.



This reading of *Konungsbók*, as a legal text that was written for purposes other than—or perhaps in addition to—the instrumental or practical, has the potential to open up questions about European legal culture in this period. *Konungsbók* was not unique in using the legal format for something other than informing legal practice. Similar texts were being produced throughout Europe in the twelfth and thirteenth centuries. Bruce O'Brien has pointed to the odd fact that virtually all of the manuscripts of Anglo-Saxon laws that survive date to the twelfth century.<sup>236</sup> Something in that period sparked enough interest in the Anglo-Saxon past to lead to the production of texts like *Quadripartitus* and the *Textus Roffensis*, both of which copied genuine Anglo-Saxon material to serve the purposes of the twelfth century.<sup>237</sup> It also led to the production of the *Leges Edwardi Confessoris*, which claims to be a statement of the law of the time of England's second-to-last Anglo-Saxon king, but which does not draw from any genuine pre-Conquest material, and the *Leges Henrici Primi*, a strange text drawn from many sources that purports to be a work of royal legislation.<sup>238</sup>

It could be that these texts were made for the purpose of restoring the law. It could also be that they were not made to make any overt political point but rather to create a shared literary space where readers could enter into an idealized and unrealized legal world. Was there some reason, applying equally to England, Iceland, and continental Europe, that would cause people to turn to legal genres—instead of, say, genres like saga, romance, or polemic—to make these points? Perhaps it was because the legal genre had the power to mask the text's political moves. Perhaps authors of medieval legal texts knew that their audiences would expect the legal text to represent truth in a way they would not expect a narrative to.

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236. See Bruce R. O'Brien, *An English Book of Laws from the Time of Glanvill*, in *LAW, LAWYERS, AND TEXTS: STUDIES IN MEDIEVAL HISTORY IN HONOUR OF PAUL BRAND* 51, 51–52 (Susanne Jenks et al. eds., 2012).

237. See WORMALD, *supra* note 23, at 236–53.

238. See BRUCE R. O'BRIEN, *GOD'S PEACE AND KING'S PEACE: THE LAWS OF EDWARD THE CONFESSOR* 31–38 (1999); *LEGES HENRICI PRIMI* 2–3 (L.J. Downer ed. and trans., 1972).

We need not limit such inquiries to medieval texts, however. The lines between legal and literary genres were certainly less stark in the Middle Ages; people could imagine using law codes and sagas for similar purposes in a way that they probably would not today. Nevertheless, texts that speak in the language of command still tell their own stories. They are certainly not identical in form to narrative texts, but they share some characteristics in common with them. The characters are not as finely drawn, and the worlds are not as richly textured as they are in works of narrative fiction. But the people in the code are constructed characters, and the worlds they inhabit are, in some sense, fictional worlds.