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Law and Fiction in Medieval Iceland: The Story in the Gragas Manuscripts

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Writing Fiction as Law: The Story in *Grágás*
By Thomas J. McSweeney[1]

Abstract

Medieval Icelandic law has been appropriated for modern purposes as diverse as creating a history for European democracy and proving that a libertarian legal system can work in practice. It has been put to so many modern uses because it presents us with a picture of the Icelandic Commonwealth (ca. 930-1262) as a society of free and relatively equal farmers who operated with no king, no nobility, and minimal government. The laws represent Iceland as an exceptional polity, strikingly different from the monarchies and hierarchical societies that dominated Western Europe in the middle ages. This exceptionalism resonates strongly with modern audiences.

In this article, I suggest that one of the major surviving sources of Icelandic law, the body of legal texts we collectively refer to as *Grágás*, is a work of fiction. The manuscripts of *Grágás* that have come down to us were written in a period when the Icelandic Commonwealth had been replaced by a hierarchical and centralized society under the control of the king of Norway. The authors of the two *Grágás* manuscripts set out to critique that society. The *Grágás* authors took material from a prior legal tradition and—through strategies of inclusion, exclusion, and organization—selected and emphasized certain legal material from the Commonwealth period to present it as a time of freedom and equality.

Introduction: Appropriating Icelandic Law

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

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medieval Icelandic Commonwealth.[2] Iceland's status as one of the few places in medieval Europe that had no king, no nobility, and minimal government 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. Adam's quote encapsulates a sense of Icelandic exceptionalism that appeals to modern audiences.[3] It appeals to people concerned with the rule of law because it presents Iceland as a land where law literally was the ruler. Supporting Adam's quote about the law is a line from *Njal's Saga*, one of the most famous of the medieval Icelandic sagas, "With laws shall our land be built up," which is now the motto of the Icelandic police force and the Faroe Islands and, I have been told, is written above the entrance to the law school at the University of Copenhagen.[4]

While focus on the second half of Adam's sentence has allowed modern Icelanders to tout Iceland as the origin of rule of law in Europe, emphasis on the first half, "they have no king among them," has also allowed some to tout Iceland as Europe's oldest democracy. Iceland replaced its king with an assembly of free men and Iceland does indeed hold up its national assembly, the *Alþing*,[5] as the world's oldest democratic body.[6] In other circles Iceland is not haled as the herald of the modern democratic state, but instead as an example of completely

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[2] Jesse L. Byock, *Viking Age Iceland*(London: Penguin Books, 2001), 308. Andrew Dennis, Peter Foote, and Richard Perkins, eds., *Laws of Early Iceland: Grágás I*(Winnipeg: University of Manitoba Press, 1980), vi.

[3] Although the one area in which medieval Iceland has had a lasting cultural impact is in its literary production. The Norse sagas, which are still read today in many countries outside of Scandinavia, were mostly written in Iceland. One should not discount the fact that the first Europeans to visit North America were probably Icelanders, although they left no lasting outposts in the New World and their exploits seem to have been unknown to later generations of European explorers.

[4] *Njál's Saga*, trans. Magnús Magnússon and Hermann Pálsson, The Penguin Classics (Baltimore: Penguin Books, 1960), 159.

[5] 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*. The letter eth (ð) represents the sound of the "th" in *then*.

[6] 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 while medieval Iceland was "not a democratic system" it contained "proto-democratic tendencies." Byock, *Viking Age Iceland*, 65, 75-6. See also Jesse Byock. "The Icelandic Althing: Dawn of Parliamentary Democracy." In *Heritage and Identity: Shaping the Nations of the North*, ed. J. M. Fladmark, pp 1-18. The Heyerdahl Institute and Robert Gordon University. Donhead St. Mary, Shaftesbury: Donhead, 2002, pp. 1-18.

stateless society. Adam's quote can be used, after all, to show that law can exist without an executive. Libertarian scholars, particularly those who describe themselves as anarcho-capitalists, have looked to Iceland as a pristine society that operated with only a single public official and according to rules that allowed for self-help within a legal context.[7] David Friedman 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."[8] A web search for "medieval Iceland" and "libertarian" will bring up a dozen websites, articles, and discussion boards discussing what medieval Iceland has to offer as a historical case for modern libertarianism, many of them quoting Adam of Bremen to represent the view that Iceland had law without any executive office to enforce it.[9]

For historians, Icelandic nationalists, and libertarian scholars, Adam of Bremen's quote is central to showing that Iceland was an exceptional place in the middle ages. Their use of the quote, however, is misleading. Rarely does anyone provide a footnote detailing precisely where in Adam of Bremen's work this quote can be found. That may be because it is extremely difficult to find. Adam did indeed say that the Icelanders "have no king, but only law" in his chronicle of the archdiocese of Hamburg-Bremen, but he did so in one of the *scholia*, or later additions, to his text.[10] In the primary text he 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

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[7] David D. Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8, no. 2 (1979). Birgir T. Solvason, Ordered Anarchy and Rent-Seeking: The Old Icelandic Commonwealth, 930-1262 [Fairfax, VA: George Mason University Department of Economics Doctoral Dissertation, http://notendur.hi.is/bthru/contents.html; response, Jared Diamond, Living on the Moon, New York Review of Books; Tom W. Bell, Polycentric Law, Humane Studies Review Volume 7, Number 1 Winter 1991/92, http://mason.gmu.edu/~ihs/w91issues.html

[8] Friedman, 400

[9] See, for example, http://www.lewrockwell.com/orig3/long1.html

[10] Adam of Bremen, *History of the Archbishops of Hamburg-Bremen*, trans. Francis Joseph Tschan(New York,: Columbia University Press, 1959), 217-8.

practices of other peoples."[11] In Adam's first version, Iceland's exceptionalism stems not from the fact that it is a kingless, democratic, or stateless society, but that the Icelanders look to the institutional Church as their secular authority and follow its dictates, a marvelous utopia for a diocesan administrator like Adam. Adam's original vision of Iceland was as an ideal Christian community, not a proto-democracy or a libertarian community. This earlier version of Adam's interpretation of Iceland and its law, the one that actually appears in the main text, is not quoted in any secondary source on Iceland that I have come across, while the later version, which Adam scribbled in the margin, has become a staple of scholarship and has entered into the popular perception of medieval Iceland. 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. "There is no king, but only law," on the other hand, provides a pithy statement upon which to build either a democratic national history or a libertarian past.

Moderns like to talk about medieval Iceland as a place of unique freedom and equality. The problem, however, is that apart from a few early statements like Adam's, all of the evidence we have for a system where Icelanders were free and equal comes from a period when they were not. The texts we use to reconstruct the Icelandic commonwealth were mostly written in the thirteenth century and later, the period when Icelandic society was subject to vast inequalities and when Icelanders were becoming subjects to ever more powerful chieftains and, finally, the king of Norway. Texts written in the thirteenth century may not reflect Icelandic legal practice of the tenth, eleventh, and twelfth centuries so much as they reflect thirteenth-century anxieties, concerns, and desires. In this article, I suggest that one of the major surviving sources of Icelandic law, the body of legal texts we collectively refer to as *Grágás*, is a work of fiction.

[11] Ibid., 217-18. (Ch. 35, *Episcopum suum habent pro rege; ad illius nutum respicit omnis populus; quicquid ex Deo, ex scripturis, ex consuetudine aliarum gentium ille constituit, hoc pro lege habent*.).

Scholars have relied on *Grágás* as a source of law for the Commonwealth period. Even scholars that reject the sagas as historical sources on the ground that they are primarily works of fiction written in the thirteenth century, and cannot provide firm ground for historical analysis, generally accept *Grágás* as a reliable source for the legal system of the Commonwealth.

This is partly because of the expectations that genres create. We expect a narrative text like a saga to be fictional. The law code is a genre that we expect to be truthful. Even if we cannot assume that the code perfectly reflects practice, we assume that it reflects the laws as they were laid down. This article suggests that the Icelanders who wrote the *Grágás* manuscripts were constructing legal texts that were meant to serve not as practice manuals, but as statements of who they were as Icelanders in a period when their identity was being challenged by an ever more aggressive Norwegian monarchy. The two full manuscripts of *Grágás*— both written in the second half of the thirteenth century, when the Icelandic Commonwealth was falling apart—tell a story of a Commonwealth composed of and ruled by free, independent, and relatively equal farmers. At the time the manuscripts' authors put pen to parchment, the Norwegian crown and the "big chieftains" were introducing large inequalities and strong ties of hierarchical dependence into Icelandic society. Farmers who owned their own land were becoming beholden to more powerful people. My aim in this article is to show that the authors of the *Grágás* manuscripts, given the political environment in which they were writing, had reason to distort the picture of how Icelandic law actually worked. They did so in order to critique the perceived failures of the society in which they were living. They used the *Grágás* texts to tell a story about an Iceland that may never have existed. We therefore need to be careful about relying on these texts as raw data for arguments about the way Iceland operated in the middle ages. They surely tell us something about Icelandic law between the settlement in the ninth century and the fall of

the Commonwealth in the 1260s, but they do so to serve a thirteenth-century purpose. Their authors did not invent Icelandic law, but they did present it in a way that emphasized the freedom, independence, and equality that they believed they lacked. In this limited sense, the *Grágás* texts are works of fiction.

Grágás

The term *Grágás* does not refer to a single text or even a particular, authoritative body of rules. It is a collective term for the body of law used by Icelanders before 1271. It is not even a contemporary term: 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 Icelandic Commonwealth in the 17th century.[12] Two full texts of this law survive, *Konungsbók* (hereinafter K.) and *Staðarhólsbók* (St.), as well as several small fragments. Both full manuscripts date to the second half of the thirteenth century.

The great mystery of the two surviving texts of Icelandic law before the Norwegian takeover is why they were written. Paleographers date K. to the period between about 1250 to 1270 and date St. approximately ten years later, to about 1260 to 1280.[13] The Icelanders gradually submitted to the Norwegian Crown between the years 1262 and 1264. In 1271, *Grágás* was replaced with a new law code, *Járnsíða*, which diverged from previous practice in significant ways. By 1281, that law code had been replaced by another, *Jónsbók*, which would, with modifications, last into the eighteenth century.[14] There is thus a strong possibility that our

[12] Dennis, Foote, and Perkins, *Grágás I*, 9.
[13] 1 Dennis, *supra* note 10, at 13-14; Hans Fix, *Grágás* in MEDIEVAL SCANDINAVIA: AN ENCYCLOPEDIA 234 (Phillop Pulsiano ed., 1993). Larusson notes that K. cannot be earlier than 1216. While some have dated it as late as 1326, most prefer a date in the middle of the thirteenth century based on paleographical evidence. Ólafur Lárusson, "On Grágás—the Oldest Icelandic Code of Law," in *Þriði Víkingafundur: Third Viking Congress*, ed. Kristján Eldjárn(Reykjavík: Ísafoldarprentsmiðja, 1958), 81-2.
[14] Hans Fix, *Jónsbók* in MEDIEVAL SCANDINAVIA: AN ENCYCLOPEDIA 346 (Phillop Pulsiano ed., 1993).

two surviving manuscripts were written *after* the new laws were introduced by the king of Norway, meaning they would have been of little value to someone who actually wanted to know what the law was at the time they were made. By the time the surviving manuscripts were written, *Grágás* was most likely dead letter. If that is the case, these texts would have been worthless as practice manuals. They must have been made to serve some other purpose.

Using the single term *Grágás* to refer to the texts of the law makes for a neat parallel to Iceland's later, royally sanctioned law codes, *Járnsíða* (1271) and *Jónsbók* (1281). It is problematic, however, because it creates a sense of unity that did not exist for Icelandic law before 1271.[15] In reality, Icelandic law before *Járnsíða* was an inchoate set of texts, oral and written, that could be combined in different ways for different purposes. We should therefore think of *Grágás* not as a code, but as a legal tradition. It is like canon law in the twelfth century, before the great authoritative collections of the thirteenth century were made and given papal approval: a set of texts and ideas that could be combined in different ways and expounded upon by different authors.

The first law that we hear of for Iceland is a law, based on the law of the Norwegian *Gulaþing*, introduced by a man named Úlfljótr at the first *Alþing* in 930.[16] We have no evidence that this law was ever written down. Instead, the law seems to have remained purely oral for the next two centuries. The K. manuscript tells us that the lawspeaker, the Icelandic community's only public official, was tasked with reciting the law every year at the *Alþing*. 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 that he would have recited "all the sections (*þáttr*) of the law over three summers."[17]

[15] Hans Fix, *Jónsbók* in MEDIEVAL SCANDINAVIA: AN ENCYCLOPEDIA 346 (Phillop Pulsiano ed., 1993).
[16] Lárusson, "On Grágás," 77; Ári Þorgilsson, *The Book of the Icelanders*, trans. Halldór Hermannsson(Ithaca, N.Y.,: Cornell University Library, 1930), 49, 61.
[17] 1 *id.* at 187.

K. does not 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 (*þáttr*) so extensively that no one knows them more extensively."[18] If the lawspeaker's "knowledge does not stretch so far," K. provides that he is to meet with men learned in the law twenty-four hours before reciting the law to learn as much law as he can.[19] These provisions do not even present uniformity as an aspiration: the law is a set of sections or topics that 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. Ari Thorgilsson says in *Islendingabók*, a chronicle of Iceland's early centuries, that, in 1117, the law assembly charged several wise men with the task of recording the laws in a book over the following winter:

> The first summer which Bergthor recited the law, the innovation was made that our law should be written in a book at Haflidi Marson's during the following winter according to his dictation and counsel, and that of Bergthor, and of other wise men who were designated for the task. They were to make new provisions in the law wherever they considered such to be better than the old ones. The laws were to be recited the next summer in the Lögrétta, and all those to be enacted which the majority of the people then did not oppose. And this came to pass that the Manslaughter section and many other portions of the law were written down and recited by clerics in the Lögrétta the following summer. And all were well pleased with it, and no one spoke against it.[20]

The manuscript produced as a result of this process was called *Hafliðaskrá* after Hafliði Másson, the chieftain who hosted the law-writing sessions at his home during the winter of 1117-1118 and who, ironically, comes close to overthrowing the law by riding with a huge force to the *Alþing* in *The Saga of Thorgils and Hafliði*.[21]

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[18] Dennis, Foote, and Perkins, *Grágás I*, 188.
[19] Ibid.
[20] Þorgilsson, *Book of the Icelanders*, 56, 70.
[21] Lárusson, "On Grágás," 79; Jón Jóhannesson, *A History of the Old Icelandic Commonwealth: Íslendinga Saga*, trans. Haraldur Bessason(Winnipeg: University of Manitoba Press, 1974), 228-9.

Sometime after the laws were written down, written law became the norm. The writing process was apparently not just a process of writing down texts that had been remembered orally in their entirety. 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.[22] The K. manuscript of *Grágás* itself tells us that "what is found in books is to be law" and refers to *Hafliðaskrá*, as well as several others:[23] But even with the advent of written law, K. does not imply that the law will be uniform. The K. author tells us:

> It is also prescribed that in his country what is found in books is to be law. 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 is to prevail. Everything in the book which Hafliði 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.
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> If there is argument on an article of law and the books do not decide it, the Law Council must be cleared for a meeting on it.[24]

This provision assumes that law is a textual activity.[25] Non-textual sources (i.e., the Law Council) only come into play when all of the possible textual sources have been exhausted. There is no single code, however. *Hafliðaskrá* has a special status, although even this original law book can be supplemented by clearer explanations by "other legal experts."[26] In the less authoritative law books, the book which discusses the topic at greater length has more

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[22] Michael P. McGlynn, "Orality in the Old Icelandic *Grágás*: Legal Formulae in the Assembly Procedures Section," *Neophilologus* 93, no. 3 (2009): 521-4. These marks do not necessarily guarantee oral transmission even when we find them in written texts because oral conventions are often adopted as literary conventions with the advent of writing.

[23] 1 LAWS OF EARLY ICELAND: GRAGAS 190 (Andrew Dennis et al. trans. and eds., 1980).

[24] Dennis, Foote, and Perkins, *Grágás I*, 191; Vilhjálmur Finsen, ed. *Grágás Islænernes Lovrog I Fristatens Tid, Udgivet Efter Det Kongelige Biblioteks Haandskrift*(Copenhagen: Brødrene Berlings Bogtrykkeri, 1852), 213.

[25] Peter Foote, "Some Lines in Lǫgréttuþáttr: A Comparison and Some Conclusions," in *Aurvandilstá: Norse Studies*, ed. Peter Foote(Odense: Odense University Press, 1984), 156.

[26] Dennis, Foote, and Perkins, *Grágás I*, 191; Finsen, *Grágás: Konungsbók* 213.

authority.[27] The rule of clarity and the rule of length (i.e., that the clearer and longer explanation of the law is more authoritative) show us that the Icelanders did not think that the law was contained in a particular formulation of words. 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.

By the end of the commonwealth, Icelanders had been developing their law for over three centuries. For the last century and a half, they had had a written legal tradition. We have two surviving manuscripts that purport to record that legal tradition, both of which come from the very end of the Commonwealth period. The similarities between the two texts of *Grágás* confirm the assertions of Ari and of the *Grágás* authors themselves that there was some common legal tradition. The texts share enough in common that there must have been a core from which both authors could draw. On the level of organization, for instance, the two manuscripts contain many of the same section divisions. Ari's *Islendingabók* and two sections of the K. manuscript agree that the section (*þáttr*) was the basic unit of the law, both before and after the law was first written down.[28] The section divisions, then, were probably set by at least the beginning of the twelfth century, when Ari was writing. The common core of Icelandic law went beyond a common set of section divisions, however. Much of it likely developed after the law had become written. In fact, K. and St. probably have some common written source, an ancestor text that is in both of their lines of transmission, since they both include some of the same scribal errors.[29]

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[27] The rule of length appears in other parts of the K. manuscript. The lawspeaker is to recite the laws as extensively as anyone can. Dennis, Foote, and Perkins, *Grágás I*, 188.If two groups of witnesses disagree with each other, then the group "who give longer testimony, in words that affect the case between them" will win. Ibid., 68; Finsen, *Grágás: Konungsbók* 57; Foote, "Some Lines in Lǫgréttuþáttr," 157.

[28] Ari Þorgilsson, *The Book of the Icelanders (ÍSlendingabóK)*, trans. Halldór Hermannsson, vol. 20, Islandica (Ithaca, N.Y.: Cornell University Library, 1930), 70; Dennis, Foote, and Perkins, *Grágás I*, 188; Finsen, *Grágás: Konungsbók* 209.

[29] Peter Foote, "Oral and Literary Tradition in Early Scandinavian Law: Aspects of a Problem," in *Oral Tradition, Literary Tradition: A Symposium*, ed. Hans Bekker-Nielsen, et al.(Odense: Odense University Press, 1977), 52.

But while the similarities between the texts show us that they draw from a common tradition, the differences show us that the authors used their own creativity and judgment to craft their texts. They were not merely copying from an earlier source. K. contains more sections than St., but St. provides more detail in the sections it contains (which, ironically, would have made it the more authoritative text according to the author of K.).[30]

Writing Fiction as Law

The sagas, texts of narrative historical fiction mostly written in the thirteenth century, display subtle and not-so-subtle criticism of the changes that were taking place in the thirteenth century. Sagas are more accessible to us than the legal texts because the fictional-historical genre encourages us to look for literary themes and political critiques that we would not look for as readily in a legal text like *Grágás*. As a result, the sagas have a longer history of textual criticism than *Grágás*. Opinions of the sagas coalesced in the nineteenth and twentieth centuries into two different schools of saga scholarship, called free prose and book prose, the former of which sees the sagas as essentially accurate accounts of historical events and the latter of which sees them largely as works of historical fiction, the product of the active imagination of thirteenth-century saga authors.[31] The debate thus focuses on whether sagas can tell us anything about the earlier centuries of the Icelandic Commonwealth, or only about the century in which they were written. The type of skepticism applied by book prose scholars to sagas has not been applied to *Grágás*.

[30] Lárusson, "On Grágás," 84.
[31] Theodore M. Anderson and William Ian Miller, *Law and Literature in Medieval Iceland: Ljósvetninga Saga and Valla-Ljót's Saga* (Stanford: Stanford University Press, 1989), viii. Hermann Pálsson, an advocate of book prose, even saw the origin of Iceland's unique literature in its unique political and legal system. He argued that "[b]y liberating the Icelanders from the restrictive bonds of absolute monarchy, the Althing created unique conditions for a unique kind of imaginative literature." Hermann Pálsson, *Oral Tradition and Saga Writing*(Vienna: Fassbaender, 1999), 102.

The authors of *Grágás*, however, saw the potential of the legal genre to tell a story of Icelandic ideals that may have largely been products of the thirteenth century.

Law and literature scholarship, like the scholarship on medieval Iceland, has placed most of its emphasis on narrative texts, particularly the trial and the legal opinion. This emphasis is understandable. The trial, and particularly the criminal trial, "most fully engages the public's narrative desires and the scholar's narrative speculations."[32] Lawyers, witnesses, and the press all produce their own trial narratives. In the realm of fiction, the trial, again the criminal trial in particular, is the subject of narratives in books, movies, and television. While it does not serve the same purposes as the trial narrative, the judicial opinion likewise has been a popular locus for law and literature scholarship because of the key role opinions play in Anglo-American common law as authoritative texts and as teaching tools. Judges use narrative and rhetorical strategies to paint their decisions as reasonable or even inevitable. Some medieval authors actually used the legal case format purely for entertainment. In his *De Amore*, a humorous manual addressed to a young nobleman seeking advice about women, the twelfth-century cleric Andreas Capellanus included an entire section of cases on the laws of love written in the form of jurists' *consilia*.[33] The use of the legal form to write about love, apparently to entertain the reader, was common for several centuries, and was institutionalized in organizations of lawyers who wrote briefs in this genre, called the "gay science," in sixteenth-century France.[34] Andreas and the authors in the gay science tradition were not writing law codes. They were writing about cases, which any first-year law student can tell you can be entertaining even when the legal format is being used for a practical purpose**.**

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[32] Paul Gewirtz, "Narrative and Rhetoric in the Law," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz(New Haven: Yale University Press, 1996), 3.
[33] ANDREAS CAPELLANUS, ANDREAS CAPELLANUS ON LOVE 251-271 (P.G. Walsh trans., 1982)(Bk. II, c. 7).
[34] Peter Goodrich, *Gay Science and Law*, in RHETORIC AND LAW IN EARLY MODERN EUROPE 104, 116 (Victoria Kahn and Lorna Hutson eds., 2001).

Codes, on the other hand, have not drawn nearly as much attention as narrative or rhetorical works for the simple reason that they generally do not have colorful plots like narrative or make persuasive arguments like rhetoric. Because they are written in a very matter-of-fact style that bears little resemblance to fictional genres, we tend to take them at face value and believe that, even if law codes do not accurately represent legal practice at the time they were written, they at least represent society's ideals of conduct. Genres create certain expectations. William Ian Miller recognized this when he observed that there is an "unspoken sense that the truth value of a source varies inversely with how much pleasure it gives the reader."[35] Miller was speaking about scholars' tendency to discount the historical value of the sagas, but his observation could apply equally to the scholarly tendency to give too much credence to *Grágás*. We expect legal texts to be true; we expect fiction, even historical fiction like the sagas, to be invented. We are thus less inclined to look to texts like *Grágás* for the story they are trying to tell.

This is a problem common to "practical" works. 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 was probably copied by a lettered monk for his own or for his patron's

[35] William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland*(Chicago: University of Chicago Press, 1990), 45.

edification rather than as a guide to good practice.[36] *Grágás* is not so different from the Drogon sacramentary. Neither text is a work of narrative fiction or of high analytical theory. They both appear, on their face, to be eminently practical texts, meant to guide the reader through a process and to show him how to do something.

The medieval Icelander, who was accustomed to think of the polity in which he lived as *vár log*—our law—would have been better equipped to see *Grágás* less as a statement of his society's laws and how to navigate them than as a subtle critique the values of the late thirteenth century.[37] The *Grágás* authors certainly did not sit down to write a wholly fictional law code, the product of their own imaginations; they were drawing upon an earlier tradition of written law. Given that prior tradition, however, they did have the ability to modify the way it was presented at the margins through strategies of inclusion, exclusion, and ordering. These strategies could change the way that system appeared to the readers of the text. The people who created the *Grágás* manuscripts picked certain legal provisions from a larger universe of legal texts. They may have intentionally arranged them so as to present Iceland as a land composed of free, independent farmers who were beholden to no king. In doing so, they reflected a world that may only have existed in the minds of those thirteenth-century Icelanders who were displeased with the way their society was operating. The Icelandic exceptionalism that is so well-known today could thus have been, at least in part, a construct of thirteenth-century authors and a recognition that the system was not actually working that way.

[36] NIELS KROGH RASMUSSEN, LES PONTIFICAUX DU HAUT MOYEN ÂGE: GENESE DU LIVRE DE L'ÉVEQUE 434-9 (1998).
[37] KIRSTEN HASTRUP, CULTURE AND HISTORY IN MEDIEVAL ICELAND: AN ANTHROPOLOGICAL ANALYSIS OF STRUCTURE AND CHANGE 121 (1985).

St. is generally the better-edited text.[38] The author of that manuscript was more deliberate in what he chose and how he presented it. The St. author cuts much of the archaic material found in K.: St., for instance, lacks the sections on the lawspeaker and the law council, neither of which existed at the time of its writing. The author did not purge all references to archaic institutions—some of the material on the procedures of the now-dead *Alþing* appear in sections on other matters—but he did seemingly choose to remove the least relevant material. There are signs that the author of K. was deliberate as well, although in different ways. The K. manuscript is more comprehensive than St.: it contains the archaic sections on the lawspeaker and the law council as well as a great deal of other material that the St. author cut. The St. author was inclined to cut entire sections of the law that he found to be of little value and to treat those that he kept at greater length. The author of K. was inclined to retain sections, but to cut specific material. K. contains many passages that either simply contain the title or first few words of the law, omitting the law itself.[39] "If that man inherits…and so on to…kinship was mistaken," is a fairly common pattern.[40] The words of the law itself are in Norse, but the Latin *usque* (and so on to) is added in the middle to indicate that the copyist omitted text.[41] The St. author included the same passage in his text, with the same beginning and ending words, but also included the material in-between.[42]

[38] Foote, Gragas I, 15; K. contains many repetitions and some strange organization. See Gragas I 110, 112, 117-118. It also seems to be drawn from several, preexisting sources, which had different styles. Gragas I, 54, 55, 59 (references to things to be done "today and tomorrow," which may have come from the lawspeaker's recitation at the Alþing), Gragas I 109 (brief summary of the material that comes before, something found only in a few parts of the text), Gragas I 174 (part of the text that appears to be a provision of Norwegian, rather than Icelandic, law).
[39] Some have suggested that these omissions must have been in the ancestor text from which the K. author was drawing, and show evidence of blind copying. Gragas I, p. 14. That may be the case, but I see no reason to assume that the omissions occurred in an earlier source. The chapter headings that appear in K. often appear in identical words in St. with the entirety of the chapter that the heading refers to retained in the latter text. There must have been some common source that recorded the entirety of the passage. We know in other places that the K. and St. authors inherited the same scribal errors from a prior source. Perhaps they were drawing on the same source and the K. author was making conscious decisions about what to include and what to cut.
[40] Gragas II, 4; K. pp. 220-221
[41] Some have suggested that this is evidence that the copyist was copying blindly from a text that originally omitted the material. It may also be evidence of deliberateness
[42] St. p. 76, bottom of the page (tecr arf)

Both authors made decisions about what to include and what to exclude. Some of those decisions may have had no significance beyond the scribe's desire to retire for the evening while he had a long and boring passage before him. Others may be signs of a general plan for the texts and that the authors of K. and St. set out to tell particular stories.

St., in many ways, appears to leave the past behind. It looks to the future, omitting those passages that have to do with institutions, like the Alþing, the lawspeaker, and the law council, that had been rendered irrelevant by decades of strife and the Icelanders' final surrender to the king of Norway. Its author seems to be primarily concerned with two things: disorder and property. While he omitted much other material from the Icelandic legal tradition, he included material on homicide and other wrongs, as well as on inheritance, land claims, investments, and relationships that implicate family wealth.[43] Whether this reflected a concern with the disorder of the last few decades or simply a judgment on the part of the author that these were the issues most relevant to an Icelander living under the law of the Norwegian king is anyone's guess. K. is more interesting in this respect. The author of K. certainly knew how to cut specific portions out of his text, how to turn a chapter into an "*usque*." And yet he left quite a bit of material that would have been archaic by the 1250s, let alone the 1280s. Although his organization is rough and his themes are difficult to follow, the author of K., in his decisions about what to include and what to exclude, tells a story about an Iceland of free and equal farmers.

Freedom, Equality, and the Rise of the Big Chieftains

The wergild ring list (*Baugatal*) is a section included in the K. manuscript but excluded from St.[44] It lists the payments that must be made to various relatives of a slain man by the

[43] Gragas I, 15-6
[44] Gragas I, 175; K. p. 193

slayer. Sections like *Baugatal* were common in the law codes of the early Middle Ages, although less common by the time K. was being written. *Baugatal* differs from wergild lists in other law codes 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 freemen according to rank. All free Icelanders are of one rank, and receive the same payment.[45] The text concerns itself primarily with family relationships, one of the major concerns of many sections of both *Grágás* 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. The formulae become very complex, as different members of the kin group give and receive different amounts.[46] The K. manuscript therefore reflects the equality of Icelanders. Historians have debated about the role similar wergild evaluations played in actual disputing. 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 most historians as a starting point for negotiation.[47] While Alfred's code, for instance, makes a distinction between a person worth 200 shillings, a person worth 600 shillings, and a person worth 1,200 shillings, contemporary accounts show us negotiations for different amounts based on the party's rank.[48] We see a similar phenomenon in Icelandic sagas. The rules spelled out in K. are not followed in feuds as they are related in the sagas. Freemen killed in Njal's saga are compensated for with wergilds of 100, 200, 400, and 800 ounces of silver, depending on their rank, and the complex discussions of who is required to pay and who will receive the wergild, so central to the discussion of wergilds in K.,

[45] Gragas I, 175
[46] Gragas I, 175-181
[47] Alfred's code spells out the difference in wergild between the striking out of a canine tooth and a back tooth and the difference between the cutting off of an ear when it causes the injured party to go deaf in that ear and when it does not. Attenborough, 85-93. CITE TO WORMALD FOR THESE JUST BEING STARTING POINT FOR NEGOTIATION
[48] Attenborough, 73, 77; **WORMALD**

are absent in the sagas.[49] It may be that the sagas reflect the actual practice poorly and that K. is correct, but 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.

While all free men merit the same wergild, slaves and freedmen are treated differently in K. The primary payment for a freedman is half that for a man who is born free.[50] 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, but is presumably a smaller amount than either of them.[51] *Baugatal* thus does not present Iceland as a perfectly flat society; it does have important social distinctions. Those social distinctions were not very important by the time K. was written, however. The very fact that slavery is mentioned in the text is curious, because slavery had likely been dead for over a century and a half in the 1250s.[52] Debt bondage may still have existed, but K. carefully distinguishes between the slave (*þræll*) and the debt slave (*lögskuldarmaðr*).[53] And yet slavery appears not only in *Baugatal*, but in many sections of K. An author who cut some material kept material that was obviously archaic by the time he was writing. Why include slaves and freedmen in K.?

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 dependence upon the powerful chieftains who were coming to dominate Icelandic life and threaten the very legal institutions that the law code purports to describe. Slavery appears as an important foil to freedom in *Grágás*. It is key in defining the Icelandic *bondi* as an independent farmer, free from the domination of others.

[49] Friedman provides the citations at 413
[50] Gragas I, 181
[51] Gragas I, 182, 261
[52] CITE FOR END TO SLAVERY
[53] See K. p. 171 (sec. 96) and St. sec. 381, p. 399

These two themes, freedom and equality, are central to *Baugatal*, a section the author of K. chose to keep. The author must have known that he was copying material that had little relevance to legal practice in his time; wergilds were negotiable and there were no slaves in Iceland. He chose to keep them anyway. These two elements of Icelandic society are important to both the democratic and libertarian views of Icelandic society. Friedman emphasizes freedom and equality because they are necessary for his model to work. Friedman's primary focus is on the system of private enforcement of law in the commonwealth period. There is little reason to doubt that Icelandic institutions were generally as Friedman describes them. There is, however, reason to doubt that the rosy picture of those institutions as institutions that worked well for the average Icelander that we find in the thirteenth-century sources is accurate. The sources agree that Iceland had no king and no hereditary nobility. Instead it had a system of chieftains and regional assemblies, which made and enforced law. Iceland contained forty-eight chieftaincies, offices which could be bought, sold, and inherited.[54] Every farmer who had his own household (*bǫndi*, pl. *bœndr*) had to be attached to a chieftain (*goði*, pl. *goðar*), although he could, in theory, choose which chieftain and could change his allegiance from one chieftain to another.[55] The chieftaincy bore no relationship to the land. Although most men would, for practical reasons, choose the chieftain who lived closest to them, they could potentially choose from among any of the chieftains in their quarter. Like much of Europe in the period, Iceland had periodic regional assemblies. The assemblies were primarily judicial bodies, convened for the hearing of legal cases. Each chieftain convened an assembly in the fall, each of the four quarters into which Iceland was divided convened one every spring, and the *Alþing*, the assembly for all

[54] Byock, *Viking Age Iceland*, 179.
[55] Miller, *Bloodtaking and Peacemaking*, 23.

of Iceland, was held every summer. Chieftains were required to attend the *Alþing* and sit in the *lǫgrétta*, the council that made new laws.[56]

A chieftain's primary role was to act as an advocate for his thingmen, those *bœndr* that were in his allegiance. If a thingman was wronged, he would expect his chieftain to back him, possibly arbitrate the dispute, and support him in a feud, which might or might not involve going to the courts.[57] Advocacy was important because the Icelandic system of law required the plaintiff to take most of the burden of prosecution and enforcement upon himself. Many stages in the legal process required a large retinue. If we imagine a twelfth-century Icelander, Bjarni, who wanted to bring a case against Gizur for killing his father, Bjarni would need to marshal a significant retinue of men in order to press his claim. To initiate a lawsuit, Bjarni was required to summon Gizur to court at Gizur's home, a dangerous proposition.[58] It would be much safer for Bjarni to do the summoning in force. Once Gizur was summoned, Bjarni would make his case before a panel of judges at one of the assemblies. The sagas suggest that this went more smoothly when the plaintiff had a large retinue with him to show support or, more cynically, to intimidate. Finally, if the court decided in Bjarni's favor, it would not order Gizur to pay damages or arrest Gizur for homicide. Instead it would issue a judgment outlawing Gizur. That placed Gizur outside of the protection of the law, allowing anyone who wanted to do so to kill him. Bjarni was now free to kill Gizur and to hold a confiscation court, liquidating Gizur's property, settling his debts, and transferring half of what was left to the men of Gizur's quarter.[59] Bjarni got to keep the other half. There were no police, however, to make sure that Gizur did not show up at the confiscation court and kill Bjarni; he had every incentive to try now that he was

[56] Ibid., 24.
[57] Byock, *Viking Age Iceland*, 120-3.
[58] Miller, *Bloodtaking and Peacemaking*, 232-3.
[59] Cite to Byock or Miller

an outlaw. Bjarni would have to bring his own retinue to protect himself and to capture Gizur and his property. For that, he would need the help of someone powerful, and thingmen tended to look to their chieftains. Bjarni's chieftain would be able to draw on his own household as well as his other thingmen to help in the prosecution of Bjarni's claim. He would then generally receive either a gift from Bjarni or a cut of whatever Bjarni recovered.[60] Much of the value in the chieftain's office came from the fact that he coordinated action, helping out his thingmen in exchange for gifts in a culture where the dominant medium for exchange of resources was by gift. If Bjarni could not coordinate action on his own, or if his chieftain refused to help, he could also sell his cause of action to someone. It acted as a property right. Bjarni could thus sell his action to Kjartan, a person with the manpower necessary to kill Gizur and confiscate his property, presumably for some amount less than what Bjarni would have received had he been able to enforce the judgment himself. Icelandic procedure has appealed to libertarian scholars because law enforcement was largely privatized through the culture of advocacy. One could imagine the person in Kjartan's position becoming a law enforcement entrepreneur, buying judgments from people who have been wronged, and using his expertise to enforce them efficiently.

By the thirteenth century, the system was breaking down as half a dozen families fought each other for dominance.[61] The heads of these families, most of whom controlled several chieftaincies at once, came to be known as big chieftains (*storgoðar*) and built their own territorial lordships, which contemporaries referred to as *ríki* (kingdoms).[62] The *bondi*'s ability to choose his own chieftain, if it had ever really existed in practice, was fast disappearing. At the same time the king of Norway was becoming involved in the struggles of these chieftains and

[60] Cite to Byock or Miller
[61] Jóhannesson, *Old Icelandic Commonwealth*.
[62] Byock, *Viking Age Iceland*, 343, 46-7.

was trying to assert his own dominion over Iceland. 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.[63] Warfare became endemic and assemblies stopped being held in various districts.[64] At the end of the conflict, the King of Norway came out the winner. In 1258, King Hákon appointed an earl to rule over Iceland. At the *Alþing* of 1264 he succeeded in convincing all of the Icelanders to pay tribute to him.[65] This is the context, the fall of the Commonwealth, in which both of the *Grágás* manuscripts were written.

Freedom and equality are important for Friedman's thesis about Icelandic law. The system can only work if a wronged party has some freedom of choice, first of all. If Bjarni cannot enforce the judgment himself, he must be able to choose who is going to enforce it. If Kjartan is his only possible choice, then privatization is not a good option even in economic terms because Bjarni is subject to a monopoly. Kjartan need not give him very much for his cause of action. Equality is a concern for similar reasons. If there are some people who are far more powerful than others, they may essentially be judgment proof. If Gizur is the most powerful man in Iceland, then your average Bjarni will have a hard time getting any Kjartans to try to enforce a judgment against him. The costs of coordinating lots of less powerful men to stand up to Gizur may be very high. The rise of the big chieftains is therefore of concern to Friedman, and he would himself admit that, in the thirteenth century, Icelandic law was not operating as it ideally should have been.[66] The question, then, is whether there was ever a period when the Icelandic legal system worked as Friedman argues it does, when freedom and equality

[63] Jóhannesson, *Old Icelandic Commonwealth*, 242-3, 47.
[64] Cite for elimination of assemblies
[65] Jóhannesson, *Old Icelandic Commonwealth*, 273, 80.
[66] CITE TO FRIEDMAN

(or near equality) were commonplace. The surviving sources for Icelandic law certainly do not disprove the thesis that Iceland in the tenth, eleventh, and twelfth centuries was a place of freedom and equality, but because of problems with the texts—namely that they were written in the thirteenth century and may represent thirteenth-century concerns—they certainly cannot prove that Iceland was a place of freedom and equality either.

Although the wronged party, the person in Bjarni's position, did not have to choose his own chieftain as the person who would enforce his claim—he could ask others to help him prosecute it or sell it to someone else entirely— the sagas indicate that Bjarni would ordinarily turn to his chieftain for this kind of support. He might not have other choices readily available. Historians, relying on *Grágás* and the sagas, have emphasized the power of the *bondi* in the *bondi –goði* relationship. Since he could vote with his feet, the *bondi* could have quite a bit of power over his chieftain. This is at least the picture of the relationship that many of the sagas present us with. As we will see, it may deliberately overemphasize the power of the *bondi* for political reasons.

Despite the fact that most of the sagas probably issued from the chiefly class that was dominating Icelandic politics at the time of their writing, they do not represent a simple relationship of domination between chieftains and *bœndr*. The *bondi*'s independence and the chieftain's duties towards his *bœndr* are important themes in the sagas. The chieftains, fearful for their own independence, may have wanted to emphasize independence as an Icelandic virtue. They may also have wanted to present the system as one that was essentially fair, where chieftains were servants rather than masters. In *Hrafnkell's Saga*, a saga set in the middle of the tenth century but written at the end of the thirteenth, two brothers who hold a chieftaincy jointly give advice to a new chieftain, Samr, on how to be a good chieftain. They "advised him to be

kind and generous to his thingmen, and a useful supporter for anyone who needed him," so that, when he had need of his thingmen, "they won't be real men if they don't follow you."[67] The author of this saga presents the chieftain's position as a precarious one, in which he must, in essence, shame his men into giving him support when he needs it by showering them with gifts and giving them his support. Likewise, in *The Tale of Thorstein Staff-Struck,* the chieftain Bjarni's wife Rannveig goads him into action by claiming that his inaction in the face of the killing of three of his men may lead to the loss of his thingmen because they "do not think they can count on you for support as long as this goes unavenged."[68] The authors of these texts presented chieftains as inhabiting a world where the chieftain was as much a servant as a ruler; either the chieftain saw to the needs of his thingmen, or he was abandoned in favor of someone who would.

The assembly procedures section of *Grágás* —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 K. manuscript. Of course, if K. was written in the 1250s or 1260s and St. in the 1270s or 1280s, this would make a certain amount of sense, since the assemblies were still in existence in the 1250s and had been made completely defunct by the 1270s. We might forgive the author of St. for omitting the assembly procedures section; it may have been simply an expedient to save valuable parchment, since the author need not spend extra space on something that did not exist anymore. Even for the K. author, though, including the assembly procedures section would have been a stretch. Many of the laws in this section could only have been wishful thinking to someone writing in the 1250s or 1260s. The assembly procedures section tells us that one cannot

[67] Sagas of the Icelanders, 454.
[68] Sagas of the Icelanders, 680

own or administer more than one chieftaincy and that a chieftain cannot have thingmen outside of his own quarter.[69] Both of these laws had been openly flouted since the beginning of the thirteenth century.[70] Likewise, *Grágás* requires all chieftains to attend the *Alþing* and other assemblies or forfeit their chieftaincies, but in reality assembly attendance declined markedly over the course of the thirteenth century.[71] Of course, laws are made to be broken, but these laws had been so far out of practice for such a long period of time when the K. manuscript was made that to include them in the assembly procedures section was to make a point.

What point was the author of the assembly procedures section trying to make? A title within the section called "On Residences" gives us some indication: the author uses textual strategies to highlight independence as an Icelandic virtue. The text prescribes that everyone in Iceland will either be an independent householder (*bondi*) or will be attached to a *bondi*'s household; everyone must have a set residence and have some *bondi* who is responsible for him. The title mostly regulates the relationship between *bondi* and household member: how much the household member can demand in wages and how much work he must do.[72] Before the text discusses these restrictions placed on the household man in terms of wages and working conditions, however, 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."[73] The later parts of the title on residences tell us what a man is not entitled to do, that he "is not to take more pay than half a mark in six-ell ounce-units before midsummer," that he is "to work for

[69] Dennis, Foote, and Perkins, *Grágás I*.
[70] Jóhannesson, *Old Icelandic Commonwealth*, 237-8. 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 quarter they belonged to. Ibid., 234, 38.
[71] Dennis, Foote, and Perkins, *Grágás I*, 99, 116; Jóhannesson, *Old Icelandic Commonwealth*, 239.
[72] Dennis, Foote, and Perkins, *Grágás I*, 125-8.
[73] Ibid., 126.

his householder right on to winter and do whatever he wants of him except shepherding…to earn his food," and that if he "prices himself dearer than told earlier and similarly if he hires himself out at a dearer rate, the penalty is a fine of three marks for each."[74] While this title largely restricts the household man, the benefit of its provisions accruing primarily to the *bondi* to whom he is attached, the rhetorical move of discussing the freedom of the man to choose his household first 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 *bondi*. 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*" (emphasis mine).[75]

We see the same emphasis on freedom, combined with an emphasis on equality, in the homicide section. When the author discusses the qualifications to be a member of a panel, he defines the community of people who are eligible for panel membership and places the emphasis on the small farmer:

> 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.[76]

[74] Ibid., 126-7.
[75] Ibid., 132.
[76] Gragas I, 150

According to the first paragraph, to be eligible for a panel, the *bondi* must have a cow, a net, or a boat for each member of his household. It is hard to say how high a threshold this is without external knowledge of the Icelandic family. Did a householder—often, but not always, a man—usually have a large family of many dependents? How many children lived in the average household? Did parents live with their adult children? Did adult siblings live together? And how many servants were necessary to support the family members? All of these are social questions for which the text provides no answers. 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, though, when he next 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.[77] 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.[78] Theoretically, a farmer 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 *bondi* could meet. By continually lowering the threshold, the author draws the reader's attention to the small farmer 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 *bondi* need only own a very small amount of property to be considered legally independent. The K. and St. manuscripts present the small, but independent, *bondi* as the bedrock of the Icelandic legal community.

[77] *Id.*
[78] *Id.*

The K. and St. authors' choice to include the section on homicide, and to include particular portions of the section on homicide, serves a narrative purpose, and a narrative purpose that matches the narrative of the sagas written within a generation or two of the *Grágás* manuscripts. The author sought to emphasize political participation by small, independent householders in a time when the participation of these householders in Icelandic politics was becoming increasingly irrelevant in light of the rise of the big chieftains. By the thirteenth century most of the chieftains were great territorial lords whose positions were threatened much less by their own thingmen than by rival chieftains. The rule that the *bondi* could choose his chieftain, if it was ever practiced in reality, was a thing of the past by the 1250s. Authors of sagas set in the thirteenth century speak as if chieftaincies were territorial lordships that carried rights over the men of a particular district.[79]

These new territorial lords were getting into bigger feuds than their predecessors, or at least were perceived as doing so by the authors of the sagas. In the family sagas, which are set in Iceland's early centuries, feuds are generally much smaller than those in the contemporary sagas, which are set in the thirteenth century. In *Njal's Saga*, a saga that describes the years around the conversion in the year 1000, the numbers of people actively involved as combatants in the feud between the main antagonists of the latter half of the saga are in the low dozens on each side.[80] *Hrafnkel's Saga* similarly posits groups of around forty to seventy men being involved in the defeat of a powerful chieftain.[81] The *Saga of Thorgils and Hafliði* and the *Saga of Guðmund dýri*, however, which both take place sometime in the early- to mid-twelfth century, describe

[79] JOHANNESON, 237
[80] *See* NJAL'S SAGA 273, 325, 346 (Magnus Magnusson and Hermann Pálsson, trans, 1960)(c. 131, 146, 157).
[81] Sagas of the Icelanders, 445, 451

groups of hundreds of men on each side.[82] The later parts of the *Sturlunga saga*, which describes the struggles of the big chieftains of the thirteenth century, look more like all-out war.[83]

The authors of these sagas clearly thought there was reason to be concerned about this development. The law as described in the family sagas appears to keep society in a delicate balance by channeling feuds in ways that prevents them from forever escalating. These larger conflicts, on the other hand, threatened to overthrow the law altogether. The narrative of the latter portion of the *Saga of Thorgils and Hafliði* largely revolves around the problems inherent in the growing power of the big chieftains, to the degree that the individual arrogance of two of those chieftains could threaten war between large armies. The author expresses his concern through his characters, speaking with the voices of men who are reluctant to ride to the *Alþing* with so many men, which, according to one follower of Thorgils, would only serve "to show your arrogance and to lead many men into this great peril."[84] This leads to a war that comes close to entering the hallowed space of the *Alþing* and overthrowing the law.

The emphasis on freedom and equality found in K. might simply be a continuation of a much earlier tradition of thinking about Icelandic society. People in the eleventh century may have thought about Icelanders as particularly independent people, but these emphases in the sagas and the laws appear as the mirror images of the historical events that were unfolding in Iceland. Independence begins to appear as a major theme in the texts just as Icelanders are starting to feel its lack. Norway becomes an issue as the king of Norway becomes involved in Norwegian politics. The Icelandic spirit is constructed at the moment when it is disappearing; Icelanders create identities around what they wish they had.

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[82] *Saga of Thorgils and Hafliði* in 2 STURLUNGA SAGA 59 (Julia H. McGrew and R. George Thomas, trans., 1974)(c. 23); *Saga of Guðmund dýri* in 2 STURLUNGA SAGA 202 (Julia H. McGrew and R. George Thomas, trans., 1974).
[83] Johanneson
[84] *Thorgils and Hafliði*, *supra* note 21, at 59.

Conclusion: Reading *Grágás* as Literature

I have suggested that *Grágás* does not so much represent eleventh- or twelfth-century legal practice as it does thirteenth-century ideals of what that practice should have been like. It is meant to tell a *story*, albeit in a non-narrative form. We are used to other types of legal texts serving functions apart from simply telling us what law is. Cases, for instance, can be entertaining. A case generally contains a story with characters and with a beginning, a middle, and an end. Texts like *Grágás*, written in the dry format of legislation, are different. Law codes, to put it mildly, are not page-turners. If the authors of *Grágás* were writing for the purpose of entertainment, the legal compilation would be a poor choice of genre.

There are purposes other than practice and entertainment, however, for which one might choose to write in the genre of legislation. Legislation has a certain cachet to it. The words in law codes are weighty and have authority, even if they are archaic. The laws of Edward the Confessor, the last Anglo-Saxon king, gained such prestige in England after the Norman Conquest that William the Conqueror and every King and Queen from Edward II to the Glorious Revolution swore at their coronations to uphold these archaic laws.[85] Thomas Jefferson kept a copy of the *Leges Edwardi Confessoris* on his shelf because of the connection—made by supporters of parliamentary liberties in the 17th century—between that text and English liberty.[86] *Grágás* could well have served a similar purpose for its authors. In an age when the sagas tell us that Icelandic society had come to be dominated by a small oligarchy of all-powerful chieftains, when those chieftains had made the *Alþing* almost meaningless, and when the king of Norway had abolished most of the powers of the *Alþing* and replaced Icelandic law with a foreign code, a

[85] H.G. Richardson, "The English Coronation Oath," *Speculum* 24, no. 1 (1949): 59-60.
[86] BRUCE R. O'BRIEN, GOD'S PEACE AND KING'S PEACE: THE LAWS OF EDWARD THE CONFESSOR 126 (1999). The *Leges Edwardi* was actually a twelfth-century production parading as the authentic laws of the eleventh-century king.

book alleging to be a record of the law of a golden age of free farmers could be an important repository for Icelandic identity.

This is not to say that *Grágás* was entirely an invention of the thirteenth century. Nor is *Grágás* like Andreas' *De Amore*, which uses legal forms for entertainment. My claims for *Grágás* are more limited: that it is the product of a process of picking and choosing what to include and to exclude, what to cover at greater length and at lesser length, what to place first and what to place last. It is in these elements of choice that we see the thirteenth-century authors constructing *Grágás* from previous legal traditions and using it to tell a story. As the sagas are combinations of fiction and history, so is *Grágás* a combination of fiction and law.

What does this mean for using the *Grágás* texts as historical sources? My own prejudice is that we must be very careful about treating any legal text of the twelfth and thirteenth centuries—a period when legal treatise-writing was exploding across Europe—as an expression of ancient law. The practice of treatise-writing seems to have owed much to a pan-European legal culture that was relatively new at the time. That *Grágás* is written in the vernacular should not fool us into thinking that it is archaic and represents true ancient practice. Rather, the *Grágás* texts are evidence of a thirteenth-century mentality that wanted Iceland to be exceptional in a way that it may never have been. The authors of these manuscripts wanted Iceland to be a place where the small, independent *bondi* had the freedom to choose his chieftain, settled his own scores, and paid tribute to no king. The Icelanders who compiled the two texts known as *Grágás* were claiming that a special relationship existed between the *bondi* and the law. The *bondi* were the true heirs to Iceland's history and laws.

In essence, the Icelanders who compiled the *Grágás* manuscripts were doing the same thing as libertarian scholars who hold up Iceland as proof that a society with minimal

government can work. They were creating a golden age that probably bore very little resemblance to any period of Iceland's actual history. The society reflected in *Grágás* and in so many of the family sagas represents thirteenth-century Icelanders' vision of what society should be like. In an age when they were beholden to powerful chieftains and made to pay tribute to a king, some *bondi* thought that a free and equal society looked ideal and played up these aspects of their laws and their history. While the first half of Njal's quote, "With laws shall our land be built up," has become a motto for law and order in Scandinavia, its second half, "but with lawlessness laid waste," is largely forgotten.[87] To the people who wrote the saga and to the people who compiled the *Grágás* manuscripts, it was probably the more important half. The *storgoðar* and the king of Norway had perverted Iceland's traditions by ignoring the ancient laws and, as a result, the land was laid waste.

If *Grágás* is meant to construct a golden age that never actually existed, its usefulness to libertarian scholars as evidence for a working stateless community must be called into question. Indeed, the two *Grágás* manuscripts are better evidence that the stateless community was *not* working. But we can use them for evidence of the mindset of the late thirteenth century. They show us, as the sagas do, that some people thought that Icelandic society was in trouble, and looked to the past to fix it. Of course, the society of free, equal, and independent farmers became subject to the Norwegian crown, but the mythical golden age remained an important part of the Icelandic identity and is what makes those of us in the democratic West still interested in medieval Iceland today.

[87] *Njál's Saga*, 159.