BUTTERFLY EFFECTS: THE POSSIBILITIES OF LAW TEACHING IN A DEMOCRACY*

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INTRODUCTION

New legal institutions are being formed at an astonishing pace in 1992. From Cambodia to Croatia, from Pretoria to Bogotá, in the former territory of the Soviet Union, and the federation taking shape in western Europe, the work of constructing new polities proceeds apace.

It would be far too much to say that all of these developments are proceeding along the lines of our American model; others, of course, think for themselves. Yet it is clear that many of the ideas embraced by Americans in the late eighteenth century are finding favor with many, perhaps most, of the plentiful founders of 1992. Political accountability of the governors to the governed and government limited by law seem, for example, to be generally accepted premises of contemporary governmental reform.

The tradition of American law teaching had its origins in precisely these premises. It seems not unlikely, therefore, that the subject of legal education will reach the agendas of today's founders as well. This Article is therefore written to assist the thinking of those in distant places who may in 1992 or soon thereafter consider the possible role of law teaching as a foundation of restrained democratic government.

* Some of this Article appears in a shorter piece prepared especially for English readers. See Paul D. Carrington, *Aftermath*, in ESSAYS FOR PATRICK ATIYAH 113 (1991).

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It is indeed the thesis of this Article that law teaching has a role in democratic governance, but a modest one. In one breath, I wish to affirm its potential utility and to dispute a recurrent conceit among American law teachers that our own polity not only should be, but is, significantly influenced by what law teachers say. Professor Felix Frankfurter captured the essence of this conceit in 1927 when he wrote: "In the last analysis, the law is what the lawyers are. And the law and lawyers are what the law schools make them."¹ A comparable thought is expressed in the recent, comparative work of Patrick Atiyah and Robert Summers, who appraised law schools as the most important influence on American legal theory and thus on American legal institutions.² And the same conceit underlies many contemporary critiques of American law teaching, whether liberal,³ radical,⁴ feminist,⁵ or black⁶ that assume law teachers to be responsible for the cultural conditions that created them. This conceit is perhaps but a conventional professional egocentricity reflecting the normal propensity of professional groups for self-inflation, but it can mislead. It is a large error, akin to blaming the messenger for the news.

My title employs a metaphor supplied by Edward Lorenz, a founder of the new science of chaology.⁷ Lorenz is a meteorologist who teaches that long-range weather prophecy is impossible, that vast theoretical hypotheses intended for use in weather prediction are probably vain, and that truth, at least in his field, is more effectively pursued at a lower altitude of generalization, with humbler pretensions and expectations, for the reason that the causes of weather are too many and their relation too complex to admit of prediction except at short range.⁸

If Lorenz is right about the weather, then weather is like law and politics: We never know what lies beyond the political horizon. Lorenz

1. RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 156 (1989) (quoting a letter from Felix Frankfurter to "a Mr. Rosenwald regarding lawyers, law schools, and American society" dated May 13, 1927).

2. See PATRICK S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 406-07 (1987).

3. See, e.g., Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988).

4. See, e.g., Alfred S. Konefsky & John H. Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982).

5. See, e.g., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

6. See, e.g., Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. REV. 385 (1986); Derrick Bell & Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

7. See generally JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* (1987).

8. *Id.* at 11-31.

used his butterfly to make a point that has some application to law and politics; he describes a Brazilian butterfly that by beating its wings creates a movement of air that by joining with other currents transforms the weather in Texas.⁹ To predict the Texas weather a month in advance, one would need to time, among other things, each flap of a Brazilian butterfly wing weeks in advance. All the computational capacity in the world (or that could be imagined to exist in the world) could not do that, and so we are doomed in the effort to change next winter in Texas as we might wish.

Lorenz does not of course imply that butterflies or men and women should despair of being useful. His observation should be taken as encouragement to men and women, and to any butterflies that read, to do what they can and not what they cannot. This Zen message seems like good advice for meteorologists, among others.¹⁰ I hold that it is also applicable to law teaching. If not too much is asked of the activity, it is socially useful, perhaps as useful as short-term weather forecasting. But if it pretends too much, its utility becomes doubtful.

I. LAW AND CULTURE

In addressing an audience of persons serving other cultures, I emphasize that it is not my purpose to advocate the transplanting of the customs of American legal education to other countries. American law teaching is indigenous to this continent,¹¹ a consequence of the unique political culture emerging here in the late eighteenth century. There is little reason to assume that its forms deserve replication elsewhere, although its aims seem worthy of attention in such precincts as Minsk and Maastricht.

Law is, of course, everywhere a manifestation of the culture of which it is a part. That relationship was well understood by those who shaped American legal institutions in the eighteenth century. In *The Spirit of Laws*, the most widely read book of that time on the subject of

9. See Edward Lorenz, Predictability: Does the Flap of a Butterfly's Wings in Brazil Set Off a Tornado in Texas?, Address to the Annual Meeting of the American Association for the Advancement of Science, Washington, D.C. (Dec. 29, 1979).

10. Cf. W. TIMOTHY GALLWEY, *THE INNER GAME OF TENNIS* (1974).

11. It has been widely asserted that American legal education was inspired by the English model in the person of William Blackstone. Most widely quoted to this effect has been James Thayer. See James B. Thayer, *The Teaching of English Law at Universities*, 9 HARV. L. REV. 169 (1895); see also ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 29-64 (1921); James B. Ames, *The Vocation of the Law Professor*, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 354 (1913). But see Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 346-59 (1950); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597 (1981).

law and politics,¹² Baron Montesquieu argued, against existing belief, for cultural relativism. He insisted that positive law is good or bad only in relation to the culture of which it is both product and part.¹³ Although the Baron somewhat inconsistently indulged himself in preferring some cultures to others (he did not care for despotism), he was prepared to approve legal institutions in one social and political context (even a little slavery) that he would disapprove in another.

The Baron's relativism startles few contemporary readers.¹⁴ Cultural relativism is a premise of much contemporary American thought, both for those who embrace it to deny claims to abstract justice,¹⁵ and for those who employ it as a reason for resisting injustice said to surround us.¹⁶ Admittedly, there is today a renewed impulse to universalism: the conception of "human rights," i.e., of rights that every civilized nation is bound to recognize. Human rights could be dismissed by an ardent relativist as Eurocentric moral imperialism, depending as it does on values characteristic of cultures having European origins. Nevertheless, despite this competing tendency to universalize, there are few today who would dispute the Baron's chief point, that a nation's law must consist with its culture if it is to be effective. To use a trendy term, law is recognized as "local knowledge."¹⁷

Thus, most of us would, when thoughtful, acknowledge that although law can be a means by which its culture responds to stimuli, adapts, and exercises choice when presented, it is rarely a primary cause of significant change even in the institutions of the law itself, for these are at most times only reactive to impulses generated elsewhere in the culture or coming from an external source. In most times, the interdependence of social and political relationships creates resistance to change and increases the likelihood that planned changes will bring unplanned consequences. The chief exception is for moments of cultural crisis when all relations are in flux; this seems to be such a moment for much of the world. At such moments, it may be possible for law to play a larger role.

12. PAUL M. SPURLIN, *MONTESQUIEU IN AMERICA, 1760-1801* (2d ed. 1969).

13. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* bk. I, ch. 3, paras. 12-14 (Thomas Nugent trans., 6th ed. 1750).

14. For a contemporary treatment of the complexities of cultural relativism, see the work of my colleague, Stanley Fish, especially Stanley Fish, *The Law Wishes to Have a Formal Existence*, in *THE FATE OF LAW* (Austin Sarat & Thomas R. Kearns eds., 1991). For a fuller treatment, see ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

15. See RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989).

16. See BARBARA H. SMITH, *CONTINGENCIES OF VALUE* (1988); Joseph W. Siuger, *Should Lawyers Care About Philosophy?*, 1989 *DUKE L.J.* 1752.

17. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167 (1983).

The role of lawyers in administering law is in like manner controlled by the role of the law within each culture. Few suppose that a shortage of lawyers could anywhere be supplied by an immigration of professionals from another culture because the differences in local knowledge are too great to admit such transfers.¹⁸ By the same token, those working within a legal profession are narrowly confined in their culturally derived roles. They can by an exercise of collective will effect change, but generally only at a glacial rate and in ways that fit the role of law in their culture. And law teaching is, in like manner, derivative from the professional relations of which it is part. Thus, culture controls law teaching far more than the reverse.

The derivative relation of law to culture has been recently demonstrated with emphasis by the comparative work of Atiyah and Summers.¹⁹ They contrast American and English law, which have diverged greatly since the late eighteenth century, despite similarities derived from a common language reinforced by the nominal reception in America of English common law.²⁰ Courts, judges, legislators, and lawyers function quite differently in relation to one another within the two polities, and this is so because law performs quite different roles in the quite different governances of two quite different cultures.

It follows that, in large measure, these cultural differences in legal institutions are determined by causes other than the law itself: The world makes the law more than the law makes the world.²¹ Differences in the English and American professions are dictated by the reality that positive law is far more important in America than in England.²² Among the causes for this enlarged role may be the absence of a genuine aristocracy, the heterogeneity of the population, the unsettling presence in the formative years of the frontier and its interminable land disputes, the continental scale of the national enterprise, and a handful of deliberate choices made in the decade following the Revolution. Few decisions made since 1800 have had a major effect on the deep differences between

18. This is of course not to deny that exceptional persons can make the transition—as many Germans did in the 1930s. A collection of papers on their influence was presented at the University of Bonn in September 1991. They will be edited by Professor Marcus Cotter and published in 1992.

19. See ATIYAH & SUMMERS, *supra* note 2.

20. For a more recent empirical study of the contrasts, see RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988).

21. See LAWRENCE FRIEDMAN, *THE REPUBLIC OF CHOICE* 196 (1990).

22. Indeed, it is probably still true, as Felix Frankfurter asserted in the letter quoted *supra* in text accompanying note 1: "The great, big fact about American national life which differentiates it from that of all Western countries (and of course, also, Eastern countries) is the part played in our affairs by lawyers" JACK & JACK, *supra* note 1, at 156.

American and English polities that were established in the late eighteenth century. This suggests not only that this is a very special moment in nations setting out in 1992 to establish democratic institutions, but it also points to the wisdom of building those institutions out of native and not imported stone, facilitating and not impeding the compromise of conflicts in the evolving values of the resident cultures.

II. THE ROLE OF LAW TEACHING IN AMERICAN CULTURE

Among the legal institutions shaped by the culture of which they are a part are those that train the lawyers who are needed to make democratic government work. Although the new democracies of 1992 have a superior opportunity to use law teachers as instruments in the development of popular self-government, legal education must for any culture be mostly an afterthought, shaped in response to other culturally derived legal institutions.

The degree to which the forms of law teaching are culturally determined is evident in the contrast between English and American traditions in legal education.²³ That contrast is substantial. Atiyah and Summers contend that elite American law schools are "the most important" legal institutions that compete to influence the American legal tradition, in contrast with English "law schools" that they describe as "least important."²⁴ Their assessment is based primarily on the observation that the literature produced by the American legal academy is often cited by persons in authority and can therefore be said by the authors to be the major source of ideas about appropriate legal method, whereas English academic writing is almost never cited.²⁵

I do not question the authors' comparison. In contrast to the English legal academy, the American legal academy can fairly pretend to greater status and greater influence on the legal institutions of which it is a part.²⁶ The traditional attitude of English courts toward English academic literature has been offensively condescending,²⁷ an attitude possibly reciprocated in some respects by a monastic self-isolation of the

23. See ATIYAH & SUMMERS, *supra* note 2, at 384.

24. *Id.* at 407.

25. For a similar assessment, see WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* (1982).

26. But not to be compared to the great influence of academicians on the development of the civil law in Italy after 1200 or in Germany after 1500. At those times and places, law professors became themselves central features of their legal systems, dominating the weak judiciaries. Indeed, these men were often so deeply involved in adjudication that education was a secondary activity. For descriptions, see JOHN P. DAWSON, *THE ORACLES OF THE LAW* 126 (1967) (describing Italy after 1200); *id.* at 199 (describing Germany after 1500).

27. See *id.* at 96-97.

academy.²⁸ The causes of these reciprocal attitudes must lie deep in the English social psyche, a mystery that I do not presume to penetrate.

American law teachers, in contrast, may influence the legal system of which they are a part in at least three ways.²⁹ First, they train the professionals who staff legal institutions, and hence have the opportunity to influence, among other things, the standards of professional conduct that their students bring to their public responsibilities.

Some readers may doubt the prospects for such moral education. Although there may be good reason to doubt the effect of formal moral education on the private or interpersonal morals or the basic values of adult students, there is sufficient basis for hope that mature adults tend to share the standards of professional conduct of those who initiate them into their professional roles.³⁰ Insofar as American law teachers are professional preceptors of their students,³¹ they enjoy an opportunity for influence as role models and in their control of the agenda of professional preparation. This opportunity may carry with it some unwelcome duties.

Second, American law schools provide a pulpit for individual law teachers, who are now afforded, almost luxuriously, the time and job security to enable them to serve legal institutions as ministers without portfolio, bearing obligations only to the common interest as best they can know it. To the extent that individual law professors exploit this special opportunity, they may influence the law.

Third, there is the possible influence of legal scholarship. American legal scholarship has effects, but these may be exaggerated, much as the rooster may exaggerate his effect on the dawn. Superficially influential literature generally expresses currents that operate quite independently of academic expressions. Yet I affirm that even reactive academic writing can marginally affect law, much as editorial writers and political cartoonists can affect politics.

28. Dawson describes such a circumstance of mutual disdain in nineteenth-century France. See *id.* at 390. If such a withdrawal to the monastery occurred in English law, it may be correcting itself with the rising academic interest in empirical study of law. See ATIYAH & SUMMERS, *supra* note 2, at 399.

29. There are perhaps others. For an illuminating and somewhat different taxonomy of the law teachers' means of influence, see David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988). In recent years, as gatekeepers to the profession, American law schools have exercised some influence on the size and demography of the legal profession, and perhaps on the quality of legal services. For reflections on the tension between the schools' responsibilities for the cost of entry into the profession and for the quality of services, see Paul D. Carrington, *The University Law School and Legal Services*, 53 N.Y.U. L. REV. 402 (1978).

30. See generally EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (1983).

31. Cf. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247 (1978).

All these opportunities for influence are themselves the product of the cultural forces that shaped American legal institutions, including the law schools. They sometimes compete for institutional resources and for the commitments of teachers.³² But, before considering each of these means of influence more fully, I propose to put them in historical and cultural perspectives.

III. REVOLUTIONARY ORIGINS

American higher education in law was established as a direct consequence of the American Revolution, its form and content entwined in the post-Revolutionary culture that created the nation's institutions and decreed their operative method and theory. The educational aim was to provide fit leaders for the nation's new legal institutions,³³ an objective that may be timely in many nations in 1992.

The founding instruments of the American legal tradition—the Declaration of Independence and the Constitution—were written in English and executed by men, most of whom bore English names. Many had trained as apprentices in English law as it was administered in colonial America. A few had trained as lawyers in England. A very few had attended English universities. But they were united by their commitment to make a body of public law quite different from what they knew of England's. They had read William Blackstone but reviled his royalism;³⁴ they knew the English aristocracy and did not aspire to replicate it.³⁵

32. Therein lie the difficulties ruefully enumerated in Paul D. Carrington, *Why Deans Quit*, 1987 DUKE L.J. 342.

33. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990); see also McManis, *supra* note 11, at 610-11.

34. See CHARLES M. ANDREWS, *THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION* 209 (1924) ("Blackstone by his famous treatise confirmed the ruling classes of England in their overweening conceit of power and flattered them by expressing entire content with the law and constitution of England, as they then existed."). Most offensive was his definition of law as a prescription of the "supreme power in a state," a power said by American politicians not to exist. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *44. For the reaction of Revolutionaries, see Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 NW. U. L. REV. 629 (1933); see also 1 *THE WORKS OF JAMES WILSON* 77-80 (Robert G. McCloskey ed., 1967). On the other hand, Americans of the time may well have believed that the idea of separation of powers that was the centerpiece of their Constitution had English origins; if so, it is likely that they were misled by Montesquieu, who mistakenly attributed the idea to the English constitution. See MONTESQUIEU, *supra* note 13, bk. XI. That Montesquieu misunderstood the eighteenth-century English constitution was abundantly demonstrated in WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (1966).

35. Abigail Adams expressed an American assessment of English aristocracy in the time of George III:

[R]etiring to our own little farm feeding my poultry and improveing my garden has more charms for my fancy, than residing at the court of Saint James's where I seldom meet with characters so inoffensive as my Hens and chickings, or minds so well improved as my

Their intention to depart from the English legal tradition was, of course, cemented by the blood sacrifice of their neighbors and, in some cases, even their brothers or sons.³⁶

The American Revolution was if nothing else a rejection of a premise of monarchical government, that may survive in modern English government re-centered on an omnipotent legislature. Atiyah and Summers report that the English people:

still think of law as something imposed from above, rather like a command. Although political power may be as diffused in Britain as it is in other democracies, it seems to us that, in the English vision of law, neither law itself nor political sovereignty is conceived of as something that comes from the people.³⁷

That was, of course, the central complaint voiced in the Declaration of Independence,³⁸ a voice whose echo may be heard today in many lands.

The Constitution, most readers know, represented a retreat from at least some of the assertions of the Declaration. It reflects mistrust of popular decisionmaking. The founders were apprehensive about the moral and intellectual capacity of the American people to exercise sovereignty.³⁹ Having been warned by Montesquieu, and having observed the unruliness of fellow citizens, they feared that greed fed by demagoguery would soon lead to despotism. But, in the end, the Constitution did not so mistrust the people that it abandoned the idea of popular sovereignty; rather, the Constitution sought to constrain the popular will, to divide and weaken it, thereby reducing its dangers. It remains a cardinal tenet of the American tradition that law is *not* something imposed or received

garden. Heaven forgive me if I think too hardly of them. I wish they had deserved better at my Hands.

Letter from Abigail Adams to Thomas Jefferson (Feb. 26, 1788), in 12 THE PAPERS OF THOMAS JEFFERSON 624, 625 (Julian P. Boyd ed., 1955). A.Z. Reed had it about right: "The tradition of a self-perpetuating class . . . enjoying special privileges was entirely repugnant . . ." REED, *supra* note 11, at 37.

36. *Cf. infra* note 182. Only the Civil War, among American wars, entailed a greater loss in comparison to the population. Several European countries experienced comparable losses of military personnel in the years 1914-1945.

37. ATIYAH & SUMMERS, *supra* note 2, at 226. Lord Mansfield had put the matter similarly: "The supremacy of the British legislature must be compleat, entire, and unconditional . . ." JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 217 (1943). Accordingly, Mansfield urged that America must either submit to the absolute power of Parliament or become independent. For more of this and other like comments, see *id.* at 201-20.

38. For a lively and comprehensive treatment of the legal premises of the Revolution, see JOHN P. REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1986).

39. Perhaps most ardent in this concern was John Adams. See 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 5-6 (photo. reprint 1971) (1787) ("[F]or the nature of popular government being variable, inconstant, and incapable of conducting itself, the senate and the nobility, who act with more maturity of deliberation, and with interests more united, can generally counterpoise the party of the plebeians . . .").

from above, but comes at least indirectly from the people who are asked to obey it.⁴⁰

Accordingly, the Constitution rejected most features of the unwritten English constitution of 1688 so extolled by Blackstone.⁴¹ Federalism, the limitation of the national legislative power to enumerated purposes, was such a rejection. The separation of the executive power from legislative control to compel compromise between these branches was another such rejection. The division of the legislative power to compel frequent compromise between the houses resembled but did not follow English practice. The system of concurrent judicial responsibilities and jurisdictions requiring cooperation between levels of sovereignty and between judicial powers was another departure.

Most important for present purposes was the role created for the federal judiciary in enforcing this complex scheme of divided responsibilities and authority, a role alien to the English judiciary⁴² or perhaps to any other then known.⁴³ Although Edward Coke, among others, had heralded the idea that the king might be bound by the law,⁴⁴ Americans were the first to make this notion operative. This sizeable political role necessarily followed from the several divisions of power, for these could not be maintained without an enforcement mechanism. The revolutionaries thus subjected American politics to law, thereby conferring novel political responsibilities on American legal institutions.

Moreover, in separating powers and dividing the legislature into houses substantially equal in power, the founders impeded efforts of

40. The declining rate of participation of Americans in elective politics, and the reduction of campaigning to competition between television commercials and sound bites may, however, suggest a weakening of this conviction.

41. It may be that the Declaration of Independence was intended to claim for colonists the rights of Englishmen as described by Blackstone. See George W. Wickersham, *Presentation of Blackstone Memorial*, 10 A.B.A. J. 511, 576 (1924). But see Waterman, *supra* note 34, at 651.

42. See ATIYAH & SUMMERS, *supra* note 2, at 228. Americans were of course familiar with the "vague flourishes" of Blackstone on the matter of judicial review. See 1 BLACKSTONE, *supra* note 34, at *91. More significance was attached to Coke's dictum in *Bonham's Case*, Co. Rep. 118a (1610), and to his romantic enlargement of the significance of Magna Carta. See Philip B. Kurland, *Magna Carta & Constitutionalism in the United States: "The Noble Lie"*, in *THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* 50 (Samuel Thorne et al. eds., 1965). For a recent review of the literature, see JACK M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* 7 (1989).

43. A possible exception is the highly political Parliament of Paris as it operated in the decades preceding the French Revolution. See DAWSON, *supra* note 26, at 358.

44. In his famous 1608 confrontation with James I, Coke apparently affirmed that the king was protected by the law. This was regarded by the king as treasonous and Coke appeared on his way to the Tower had not Robert Cecil intervened and had not Coke humbly sought forgiveness. The story is told in CATHERINE D. BOWEN, *THE LION AND THE THRONE* 302-06 (1957). By 1688, it was clear that the crown was under the protection of Parliament, but there remained no role for the judiciary in sorting out disputes between the two.

American lawmakers to achieve coherence in their enactments. No American legislative system is structurally capable of acting regularly with the singleness of purpose and coherence often achieved by an omnipotent Parliament led by its own executive.⁴⁵ This cumbersomeness of formal American lawmaking was deliberately designed in 1787 to forestall implementation of policy gaining momentary acceptance in the corridors of power. In so assuring the impotence of American legislation, the revolutionaries created a vacuum often embodied in indeterminate texts of legislation that would inevitably be occupied by the other two branches of government. Thus, in this respect as well, the founders quite consciously assured that American judges should often make decisions laden with social and political consequence.

In subjecting politics to law, the founders necessarily subjected law to politics. Who amongst the American people were fit to hold a political/judicial office? Not those with social status. Only in Virginia⁴⁶ and South Carolina⁴⁷ was there even a semblance of a social elite who could have lent to American judicial institutions any status of the kind long enjoyed by the English judiciary. Although there were perhaps more than a few pretenders, there was no American aristocracy. It was inevitable that the selection of the federal judiciary would quickly become and remain a political battleground.

The appointment of John Marshall to the Supreme Court was, of course, a politically contentious act of the outgoing President Adams. It does not surprise us even today that the successor President was inclined to remove Marshall and some of his colleagues by impeachment.⁴⁸ Marshall's troubles with President Jefferson were but the beginning of a major, familiar, but unique feature of our law: political disputation over the personnel of the judiciary. Only in America, at least among Western nations, must a lawyer generally be a person of some political attainment to secure a judicial office. This is, of course, especially true of the judiciaries of many states, partly as a result of the efforts of nineteenth century Jacksonians and Populists to secure direct popular election of judges, but few readers need to be reminded of the politics of federal judicial appointments, which flourished again in 1991.

45. See ATIYAH & SUMMERS, *supra* note 2, at 400. The authors also suggest that American legislators and administrators may be relatively less competent than their English counterparts. See *id.* The absence of party discipline also contributes to this incapacity.

46. See generally RICHARD B. DAVIS, *INTELLECTUAL LIFE IN JEFFERSON'S VIRGINIA, 1790-1830* (1964).

47. See 1 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL* 109-11 (1908).

48. The story is fully told in RICHARD ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971); see also GEORGE L. HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 205-45 (1981).

The politicized nature of our courts dictated a legal method and theory that elevated substance over form.⁴⁹ If such courts were to win and maintain public trust and acceptance for decisions having grave political consequence, they had to persuade the people to be governed that they were deciding for reasons that commanded respect if not agreement. Indeed, to be persuasive in justifying the exercise of the judicial power on the scale conceived by Madison and the other architects of American government, it would be necessary to explain decisions so that they could be understood, to rest them insofar as possible on the first principles or premises of the political scheme, and not on arbitrary selections among possible interpretations of the available legal texts. Formalism that separates the legitimate exercise of power from the expression of the social and political values bearing on the decision could not serve the need of our courts to justify themselves with respect to decisions of political importance, however comfortable such formalism might have been to those familiar with English legal traditions. Moreover, political influence being a necessary credential for the judicial appointment, it would be surprising if American judges were inclined, even if they were able, to justify their decisions in formalist, technocratic, avowedly apolitical terms. It would even seem to require a reversal of character for elected judges in American state courts to make a full embrace of the politically sterile style embraced so heartily by their English brethren.⁵⁰ Thus, by the design of the politicized judicial office, the founders of American courts rendered it unlikely that the formalism becoming the fashion in England⁵¹ would be the customary style of American case law. They made it more likely that what Karl Llewellyn was later to name the Grand Style⁵² would be over time the predominant American legal method, even if formalism might hold sway for a few decades.

This became apparent as soon as the politically embattled Marshall Court was required to decide cases of political consequence on the basis of opaque Constitutional texts, which were themselves the products of

49. The Constitutional structure thus cut against the influence of Blackstone and English common law. For Blackstone, the royalist, the pursuit of self-interest was the source of natural law and the basis therefore of all English law. For comment, see DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 52-53 (1941). Thus it was that Blackstone's readers were adjured to admire the common law, and to refrain from changing any part that they did not understand well enough to admire. Cf. EDMUND BURKE, *AN APPEAL FROM THE NEW TO THE OLD WHIGS* 137 (John M. Robson ed., Bobbs-Merrill 1962) (1791) ("We ought to understand [the law] according to our measure; and to venerate where we are not able presently to comprehend.").

50. See DAWSON, *supra* note 26, at 80-99.

51. Formalism is a troublesome term; I here use it in the manner prescribed by Atiyah and Summers. See ATIYAH & SUMMERS, *supra* note 2, at 28.

52. See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 64-72 (1960).

intensely contested political compromises. The situation forced Marshall to lead, for good or ill, toward a legal theory and method that engaged the Court in the overt consideration of first principles and basic political values.⁵³ The very preservation of the republic demanded a substantive or "pragmatic instrumentalist"⁵⁴ legal theory and method, and Marshall's style answered that demand of reality.

It was in this necessitous circumstance that Marshall invented the opinion of the Court, i.e., the practice of giving a single opinion as that of the whole Court.⁵⁵ To gain moral and political stature, his Court often acted unanimously,⁵⁶ with Marshall or a colleague giving a reasoned and authoritative exposition of the law underlying each decision. Implicit in this practice was an obligation of all members of the Court not only to pursue the national common interest, but to maintain institutional coherence in that pursuit, and to sacrifice pride of opinion to institutional, national, or community need. The professional morality embodied in the practice of delivering a single opinion for the whole Court visibly differed from that of the English judiciary of the time, who were entrenched in the custom of *seriatim* expression of their individual views, a custom that disavowed shared responsibility.

The effectiveness of the opinion of the Court as an instrument enhancing the political weight of the judiciary was recognized at once, with hostility by Thomas Jefferson,⁵⁷ with appreciation by his close ally James

53. On the relation between the American constitutional scheme and legal method, see LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940). See also Lon L. Fuller et al., *Jurisprudence*, 13 *ENCYCLOPEDIA BRITANNICA* 149, 152 (1965).

54. This is the term applied in ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982), to describe an approach to legal theory that subsumes but antedates and survives Legal Realism. Summers describes it as "our only indigenous general theory of law." *Id.* at 35. For a fuller account of the development of American instrumentalism in the post-Revolution period, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977).

55. The first appearance of the opinion of the court came in the first decision rendered after the appointment of Marshall. The story is told in HASKINS & JOHNSON, *supra* note 48, at 382-89. There was a precedent for such a device in the opinions of the Privy Council giving advice to the crown, but the Council was not primarily a judicial institution, at least until the Privy Council Appeals Act of 1832 and the Judicial Committee Act of 1833. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 462-63 (1908); see Judicial Committee Act, 1833, 3 & 4 Will. 4, ch. 41 (Eng.); Privy Council Appeals Act, 1832, 2 & 3 Will. 4, ch. 92 (Eng.) (repealed). See generally John P. Dawson, *The Privy Council and Private Law in the Tudor and Stuart Period: II*, 48 *MICH. L. REV.* 627 (1950).

56. The Court was not so unanimous as may appear. It was the tradition of the Court in those years of fragility to suppress dissent. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 186 (1988).

57. See Letter from Thomas Jefferson to W. Johnson (Oct. 27, 1822), in 10 *WRITINGS OF THOMAS JEFFERSON* 222, 223-25 (Paul Ford ed., 1899).

Madison,⁵⁸ and with the admiration of emulators in the courts of every American state. Indeed, it was the development of this institution that confirmed for most Americans the belief that a single opinion of a court is itself a source of law,⁵⁹ a belief not then held in England⁶⁰ or on the Continent, where judicial opinions were not then considered to be authoritative legal texts, but mere signs of what might be the omnipresent law.

This belief in the importance of judicial opinions in turn created a market for reliable reportage that seems not to have existed except in America. Official reporters of judicial decisions were in place in most American jurisdictions in 1815, decades before such a function was known to England,⁶¹ France,⁶² or Germany.⁶³

The compelling need of the American judiciary to reassure its public also indicated the use of the broadest possible range of authoritative materials. As Thurman Arnold explained, American judges needed and sought the appearance of learning as a substitute for red robes and wigs.⁶⁴ Classical learning, including Roman law, was often advanced to justify judicial action.⁶⁵ No doubt, especially in the formative decades, this broader learning was more than a costume and sometimes structured the thinking of American judges.

In addition to shaping the legal method and literary style of the courts, the American scheme of government also sustained the development of a legal profession bearing the stamp of these politicized courts.

58. Great was the difference between the views of Madison and Jefferson toward the role of American judges. See, e.g., Letter from James Madison to Thomas Jefferson (June 27, 1823), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 326-27 (1865). Thus, although Madison joined Jefferson in his negative reaction to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (taking expansive view of power of Congress to provide for the general welfare), it was on quite contrary grounds, including the use of the opinion of the court in a case that Madison regarded as better suited to *seriatim* treatment. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 99-100 (1989).

59. See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959). This is not to say that this theoretical issue was easily or fully settled in America.

60. See DAWSON, *supra* note 26, at 78; SIR CARLETON K. ALLEN, *LAW IN THE MAKING* 207 (1958).

61. An official reporter was not appointed in England until 1865. DAWSON, *supra* note 26, at 82; see also John H. Baker, *Records, Reports and the Origins of Case-Law in England*, in JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 15 (1989) [hereinafter JUDICIAL RECORDS].

62. French case law was made regularly accessible by private reporters in the 1830s. DAWSON, *supra* note 26, at 402; see also Alain Wijffels, *Legal Records and Reports in the Great Council of Malines (15th to 18th Centuries)*, in JUDICIAL RECORDS, *supra* note 61, at 181.

63. Regular annual reports commenced in Prussia in 1847. DAWSON, *supra* note 26, at 438.

64. See THURMAN K. ARNOLD, *FAIR FIGHTS AND FOUL* 252 (1965).

65. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 72-78 (1984).

Given the nature and importance of decisions being made in American courts, it was all but certain that the officers of those courts would become a political elite, as Tocqueville soon observed them to be.⁶⁶ It was a related event that all but two of the men elected President of the United States from 1796 to 1868 were lawyers.⁶⁷ It was not unrelated that many men of American letters were also lawyers.⁶⁸

Not least of the consequences of the Constitution for the legal profession in America has been the right to jury trial. In creating in the Constitution such a politically powerful judiciary, the founders evoked a popular outcry. To secure ratification of the Constitution, it was necessary to set in constitutional cement the right to a jury in civil as well as criminal proceedings in federal courts.⁶⁹ This represented yet another division of power, this one within the judicial branch between the professional judge and the lay jury, each having their assigned roles, the purpose being to limit the awesome political power of the federal judge.

In significant respects, the civil jury is no longer the same institution as that established two centuries ago.⁷⁰ But the civil jury was an institution quickly entrenched within the American legal tradition as a means of diffusing responsibility and gaining popular support for the making of many public decisions.⁷¹ This institution contributes directly to the substantive, non-formalistic character of American law.⁷² It has also powerfully shaped the personae of the American bar. Jury argument, or in some minds jury demagoguery, is for most laypersons and many professionals the paradigm of American law practice.⁷³ It also dictates the main outlines of civil procedure, including, for example, the discovery rules designed to enable counsel to prevent surprise at dramatic trials. In so shaping the bar and the courts, the right to jury trial has also materially affected thinking about legal method and theory. The law of torts is in important respects an outgrowth of the civil jury.

66. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 296-300 (Henry Reeve trans., 1904).

67. Generals Benjamin Harrison and Zachary Taylor were the exceptions.

68. See generally FERGUSON, *supra* note 65.

69. The right to jury trial in criminal cases is assured by the Sixth Amendment, see U.S. CONST. amend. VI; in civil cases, by the Seventh Amendment, see *id.* amend. VII. For expression of the views of those opposing ratification, see THE ANTIFEDERALISTS 49-51 (Cecelia M. Kenyon ed., 1966).

70. See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33.

71. On the role of the American jury in deciding questions of law arising in civil litigation, see *id.* at 43-47.

72. See ATIYAH & SUMMERS, *supra* note 2, at 174-77.

73. See generally Carrington, *supra* note 70, at 67-71.

Almost as an afterthought to these many portentous decisions, the revolutionary generation established the precursors to American university law schools. Law teaching in America was a response to the fear that the Revolution would dissolve into disorder and despotism, the same fear that gave rise to the Constitution. A republic could stand only as long as the people maintained a measure of mutual trust. This appeared to require, at the very least, leadership that would merit general public trust. To win such trust, it was believed, the legal and political elite would need to pursue the classical republican virtue of making and supporting public decisions based on selfless concern for the interests of all. Divisions of power alone, the founders recognized, would not suffice if the leaders were ideologues or demagogues unsuited to compromise and accommodation of competing values, or unable to articulate the first principles by which claims of right might be evaluated by their fellow citizens.

Montesquieu had emphasized the special need of a republic for education,⁷⁴ presumably conducted by the republican family,⁷⁵ that would inculcate this morality of civic virtue in all republican citizens. It was Jefferson's contribution to suggest that such moral education could be reinforced if not provided in the existing American colleges. It was his hope, shared by many others (including even Jefferson's political adversary, Alexander Hamilton, and Hamilton's academic ally, James Kent⁷⁶) that a legal and political elite, if not the people at large, could be socialized to a sense of shared public responsibility and trained to persist in the attempt at disinterested analysis of public issues. The goal of law teaching was therefore to create a class of public men fit to occupy judicial and other high office, who would gain the trust of all the governed. Their claim to status would derive not from technocratic competence, income, or social status, but from their morality with respect to public affairs. Such an elite as that envisioned appears to have had no particular English origins; if there was a foreign model, it was in the traditions of the Roman jurists who advised Roman courts and lent intellectual authority to Roman legal institutions⁷⁷ and whose work was well known to Jefferson and many other Revolutionaries, almost all of whom were trained in

74. See MONTESQUIEU, *supra* note 13, bk. V, chs. 2-5.

75. See *id.* bk. IV, ch. 1, § 1; *id.* ch. 5, §§ 5-7.

76. See Kent's *Introductory Lecture*, 3 COLUM. L. REV. 330, 338 (1903). The lectures were delivered in 1796.

77. See DAWSON, *supra* note 26, at 109-11. Comparison could also be made to the *ghulams*, the elaborately educated slaves who served the Ottoman Sultans. For a brief description, see Vernon J. Parry, *Elite Elements in the Ottoman Empire*, in GOVERNING ELITES: STUDIES IN TRAINING AND SELECTION 68-72 (Rupert Wilkinson ed., 1969).

the classics.⁷⁸ But those jurisconsults performed the more limited role of stabilizing private law; the American innovation was to confer a substantial public role on such a profession.

IV. ACHIEVEMENTS OF TEACHING REPUBLICAN MORALITY

American colleges were, then, called to validate the status of this elite by teaching them public law.⁷⁹ Academic law teaching was initially undertaken to effect moral education—to transmit republican virtue to democratic leaders. Early law teachers were thus prophets of democracy.⁸⁰ Moral education, the first of the three means of public influence of law teachers, was primary. The roles of the law teacher as public person and as scholar/author were distinctly secondary.

American colleges, then as now, were part of an academic tradition or system quite apart from law, but like it, integral to the culture. They were not ill-suited to the task of moral education. Indeed, they were actively engaged as a primary mission in preparing young men for the clergy, and it was perhaps a modest step for them to train a secular clergy, the priests of public virtue who would protect the electorate from the selfish and destructive factional bickering to which it would be prone. The role proved no less attractive to fledgling *public* colleges that were striving to justify a claim on the public purse. William and Mary, an Anglican institution, was the first college to assume this role, doing so in 1779 at the command of Governor Jefferson. It appointed as "Professor of Law and Police" the Governor's mentor in law, George Wythe, a signer of the Declaration. William and Mary was soon followed by most American colleges.⁸¹ For the first century, law teaching in American colleges, with rare exception,⁸² had as its clear aim preparation for public leadership deserving of public trust. Most of the teaching was performed by men of some public attainment; many of them were judges, and several of those had distinguished public careers apart from their work as law teachers. For example, Wythe was a judge and concluded his career

78. George Wythe, the first law professor, was recognized as the American most learned in Roman law. WILLIAM WIRT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 43 (1850).

79. Carrington, *supra* note 33, at 532.

80. See THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 177-83 (1981).

81. Including Yale, Princeton, Pennsylvania, Columbia, North Carolina, Brown, and Dartmouth in the eighteenth century, and Maryland, Dickinson, Transylvania, Georgia, Middlebury, and Vermont in the early years of the nineteenth century before the War of 1812.

82. Before the appointment of Joseph Story, the Harvard Law School was one. See ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 43-91 (1967).

as Chancellor of Virginia.⁸³ His successor at William and Mary, St. George Tucker, was also a sitting judge who concluded his career as a member of the highest court of the Commonwealth.⁸⁴ Professor James Kent of Columbia was Chief Justice and then Chancellor of New York.⁸⁵ The first law professor at the University of Pennsylvania was Justice James Wilson of the U.S. Supreme Court.⁸⁶ The first professor of law at Harvard was a member of the Supreme Judicial Court of Massachusetts⁸⁷ and was succeeded by Justice Story.⁸⁸ Perhaps the professionally least-experienced young man appointed to teach law in an American college in the first century was Henry Clay, who soon went on to pursue perhaps the most significant American political career of the first half of the nineteenth century;⁸⁹ he was succeeded by a series of judge-professors, including George Robertson, the Chief Justice of Kentucky.⁹⁰ Several of the most distinguished college presidents of the antebellum era personally undertook to provide instruction in law; some of them, such as Ezra Stiles of Yale⁹¹ and Samuel Stanhope Smith of Princeton,⁹² were in fact clergymen who studied the Constitution and public law to enable themselves to contribute to the public morality of the nation.⁹³ The line between professional training and general education was seldom clearly drawn; the classics, Shakespeare,⁹⁴ and political economy were also seen

83. For biographies, see IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* (1981); ALONZO T. DILL, *GEORGE WYTHE: TEACHER OF LIBERTY* (1979).

84. For a full biography, see MARY H. COLEMAN, *ST. GEORGE TUCKER: CITIZEN OF NO MEAN CITY* (1938); see also William H. Bryson, *The Tuckers*, in *LEGAL EDUCATION IN VIRGINIA 600* (William H. Bryson ed., 1982) (diagram of a family tree).

85. His biography is found in JOHN T. HORTON, *JAMES KENT, A STUDY IN CONSERVATISM 1763-1847* (1939).

86. There appears to be no full biography of Wilson; his life is summarized in Robert G. McCloskey, *Introduction* to 1 *THE WORKS OF JAMES WILSON*, *supra* note 34, at 8.

87. Isaac Parker is described in SUTHERLAND, *supra* note 82, at 47-54.

88. Story's biography is R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* (1985).

89. A recent account and evaluation is MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE* (1987).

90. For a biography of Robertson, see Samuel M. Wilson, *George Robertson*, in 4 *GREAT AMERICAN LAWYERS* 365-406 (William D. Lewis ed., 1908).

91. For an excellent biography, see EDMUND S. MORGAN, *THE GENTLE PURITAN, A LIFE OF EZRA STILES 1727-1795* (1962). For a brief account of his role as law teacher, see 1 WARREN, *supra* note 47, at 165-69.

92. See MARK A. NOLL, *PRINCETON AND THE REPUBLIC 1768-1822*, at 99-183 (1989). Smith's lectures were published. See SAMUEL S. SMITH, *THE LECTURES, COLLECTED AND IMPROVED, WHICH HAVE BEEN DELIVERED FOR A SERIES OF YEARS IN THE COLLEGE OF NEW JERSEY ON THE SUBJECT OF MORAL AND POLITICAL PHILOSOPHY* (1812).

93. E.g., Stiles and Woolsey at Yale, Smith at Princeton, Nisbet at Dickinson, Holly at Transylvania, Wayland at Brown, Swain at North Carolina, Cooper at South Carolina, and Bishop at Miami.

94. Francis Lieber observed that American lawyers were blessed in their access to Shakespeare: "A public man cannot read him too much." 2 FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS*

as part of a young man's preparation for public life. Only Harvard and Yale referred to their law programs as independent "law schools."

Early American law students were often required by their teachers to develop forensic competence by means of class participation. The literature assigned them to read often included Blackstone, but generally in an American edition, which might have been that of Professor St. George Tucker who edited Blackstone's royalisms and provided his own insights into American public law.⁹⁵ In time, Blackstone was generally replaced by Kent, whose work as judge and writer diminished the influence of the English law of property in America.⁹⁶ Primary emphasis was given to the study of American constitutional law, *The Federalist* often serving as a basic text. All Princeton students, and perhaps others, were for a time required to memorize and recite the text of the Constitution.⁹⁷ Often included in the curriculum were International Law, Comparative Law, and Political Economy. Only a few of the small number of law teachers from the era between the Revolution and the Civil War wrote other than as judges, but the works of David Hoffman,⁹⁸ Thomas Cooper,⁹⁹ James Kent, and Francis Lieber¹⁰⁰ are impressive for their intellectual breadth. Hoffman's elaborate and widely acclaimed outline for law study¹⁰¹ confirms the aspiration of those training this political elite to give their students the broadest possible intellectual experience in order

292 (Theodore D. Woolsey ed., 2d ed. 1875). Abraham Lincoln agreed, claiming to have read Macbeth "as frequently as any unprofessional reader." JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 11 (1960).

95. Tucker's edition was published in 1803. For a contemporary review, see WHITE, *supra* note 56, at 81-87.

96. See JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826). But Kent was scarcely an Anglophobe and in fields other than property, he was prone to adopt English precedent: "Though the guns along Niagara might boom their defiance of England, they failed to drown the voices of the English judges who from Bracton to Mansfield were speaking all the while through the mouth of Kent . . ." HORTON, *supra* note 85, at 196. On matters of public law, his court early invalidated democratic legislation adversely affecting property rights. *Dash v. Van Kleeck*, 7 Johns. Rep. 477, 500 (1811). By such decisions, Kent earned a reputation for both great professional ability and stubborn political reaction.

97. 2 SMITH, *supra* note 92, at 392.

98. See DAVID HOFFMAN, LEGAL OUTLINES (1836); Thomas L. Shaffer, *David Hoffman's Law School Lectures 1822-1833*, 32 J. LEGAL EDUC. 127 (1982).

99. Cooper was perhaps at his best as an editor, producing American editions of works in Chemistry, Political Economy, and Roman Law, translating major works from German, French, and Latin. See generally DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER, 1783-1839 (1926). Jefferson described him before he went to South Carolina as the "greatest mind in America." *Id.* at 237.

100. See, e.g., FRANCIS LIEBER, CIVIL LIBERTY AND SELF GOVERNMENT (1854); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS (1839) [hereinafter HERMENEUTICS]; 2 LIEBER, *supra* note 94.

101. DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY (1836). For the acclaim, see Joseph Story, *Book Review*, N. AM. REV.,

to enhance their receptivity and their capacity for making public decisions. The patterns of legal education thus tracked the Grand Style adopted by the judiciary.

The early institutions of higher education in law were few and small. In the 1840s, a major American university (above four hundred students), with among the largest enrollments in its law department (sixty) and the largest law faculty (three) was Transylvania University in Lexington, Kentucky.¹⁰² This institution, in many ways a reflection of its trustee and former professor, Henry Clay, enjoyed significant if now forgotten prominence. It was the flagship of the American colleges' efforts to train a legal and political elite to lead the exercise of popular sovereignty and prevent its tendency to excess.

By graduating as many as thirty U.S. Senators, Transylvania may have provided Clay with an extra personal bond to political adversaries that enabled him to assemble the great compromises of 1820, 1833, and 1850, which prevented the premature collapse of the federal union. Three of its teachers (not including Clay) were authoritatively identified in 1908 as among the seventy-seven "Great American Lawyers" whose lives were worthy of biography.¹⁰³ What Transylvania sought to do, and may have succeeded in doing by its teaching, was to impart to students headed for public careers a moral tone and a commitment to the national interest. It is even possible that Transylvania's success in this endeavor provided the margin of public dedication that enabled the nation to survive.

This is so because nationhood was a fragile condition. As late as 1832, John Marshall expressed amazement that the nation had lasted as long as it had.¹⁰⁴ First the West¹⁰⁵ and then New England¹⁰⁶ had flirted

Nov., 1817, at 76, reprinted in WILLIAM W. STORY, MISCELLANEOUS WRITINGS OF JOSEPH STORY 66 (1856).

102. See ROBERT PETER, TRANSYLVANIA UNIVERSITY: ITS ORIGIN, RISE, DECLINE AND FALL 168-70 (1896); see also REED, *supra* note 11, at 451. See generally Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 MERCER L. REV. 673 (1990).

103. See 2 GREAT AMERICAN LAWYERS, *supra* note 90, at 221 (John Boyle); 4 *id.* at 365 (George Robertson); *id.* at 299 (Thomas Marshall).

104. See Letter from John Marshall to Joseph Story (Oct. 22, 1832) ("[The] union has been prolonged thus far by miracles."), in *Letters of Chief Justice John Marshall to Timothy Pickering and Joseph Story*, 14 PROC. MASS. HIST. SOC'Y 320, 352 (2d ed. 1900).

105. Western dissatisfactions with the union vanished as the first generation of settlers were replaced by their children, who were the first generation born as Americans, and as statehood came. But in the earliest years, the West suspected the East of not defending with sufficient ardor the right to navigate the Mississippi. The region was extremely isolated until the advent of the canals, beginning about 1815. See GEORGE R. TAYLOR, THE TRANSPORTATION REVOLUTION, 1815-1860 (Henry David et al. eds., 1951). Kentucky was the first state, in 1798, to suggest the interposition of state sovereignty against the federal government, when its legislature in 1798 declared the Alien and

with disunion. Those with Clay who wrought the Compromise of 1820 were faced with the reality that failure would have resulted in a disunion that no one would risk life or property to prevent.¹⁰⁷ There would have been two nations approximately equal in wealth and population, one slave and one free. When at last disunion was attempted in 1861, there were many then willing to take mortal risks to prevent it; something important had happened in the meanwhile.

Even in 1861, after the North had become a much wealthier and more populous area than the South, successful disunion was a very near thing. Here and there, for want of a nail, the southern cotton-slavery culture lost its war for survival.¹⁰⁸ If disunion had come in 1850, the will and capacity to resist would have been less, and the outcome could easily have been otherwise.¹⁰⁹ Thus, Clay's Compromise of 1850 may have been pivotal not only in saving the union for another decade, but saving it at all, and in bringing slavery to an end. That Compromise was itself also a very near thing, regarded at the time as an almost miraculous achievement of the aging Clay.¹¹⁰ We will never know how to measure the role played by law teachers at Transylvania in nurturing the commitment to American law and institutions of those numerous Transylvania

Sedition Act unconstitutional. See the *Kentucky and Virginia Resolves* approved by two state legislatures in that year. See JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 169 (1951). At the time of the Louisiana Purchase in 1803, it was widely supposed that a new nation should be formed in the West, perhaps with the cooperation of Spain. On relations of early Kentuckians with Spanish Ambassador Gardoqui, see JOHN M. BROWN, *THE POLITICAL BEGINNINGS OF KENTUCKY* 124-56 (1889). Aaron Burr came West to exploit that sentiment and attempted to establish the Republic of West Florida, leading in due course to his trial for treason. For an account of the time, see WILLIAM PLUMER, *MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807*, at 548 (Everett S. Brown ed., 1923).

106. The Hartford Convention of 1814 was essentially a protest against "Mr. Madison's War," which was a commercial disaster for New England. There was antecedent talk of disunion and the Convention did align the Federalist Party with the Jeffersonian Resolutions of 1798 in approving the notion of "interposition," and it was long held against Daniel Webster that his relation to the event manifested disloyalty to the union. The story is briefly told in PETERSON, *supra* note 89, at 42-44. For a fuller account, see 1 GEORGE T. CURTIS, *LIFE OF DANIEL WEBSTER* 134-35 & n.1 (1893).

107. See WILLIAM PLUMER, JR., *THE MISSOURI COMPROMISE AND PRESIDENTIAL POLITICS 1820-1825* (Everett S. Brown ed., 1926); GLOVER MOORE, *THE MISSOURI CONTROVERSY, 1819-1821* (1953).

108. See JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 858 (1988). The clearest example came at Antietam when, on September 13, 1862, two Union soldiers found a copy of General Lee's order of battle wrapped around three cigars. It is unlikely that General McClellan would have joined battle but for that advantage. Had he failed to do so, Lee would have taken Baltimore or Philadelphia, and the war might well have been concluded in favor of the Confederacy. *Id.* at 537.

109. See HOLMAN HAMILTON, *PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850* (1964); THELMA JENNINGS, *THE NASHVILLE CONVENTION: SOUTHERN MOVEMENT FOR UNITY, 1848-1851* (1980).

110. The story is briefly told in PETERSON, *supra* note 89, at 455-62.

alumni who supported Clay's miracle. We can only say that whatever Transylvania achieved was the product of its teaching, not its scholarship.

Transylvania was an offspring of William and Mary, a posthumous grandchild of George Wythe. Wythe could safely be said to have had the most important teaching career since Socrates. Before his academic appointment, he had tutored young Jefferson, becoming his "second father." Among his first students at William and Mary was John Marshall.¹¹¹ After he left the professorship, Wythe tutored Henry Clay, acquiring a grandparental relationship to him. Others of the 200 or so students he taught served in high office, and several founded the Transylvania Law Department. Wythe had been trained in the classics by his Quaker mother, and was thereafter self-educated in law and politics, mastering Roman law and the literature of England, France, Germany, and Italy. As a lawyer, it was said that "no dirty coin even got to the bottom of George Wythe's pocket."¹¹² As a judge, he was compared with Aristides or with an angel, so great was his reputation for disinterestedness.¹¹³ He was in these respects exceptionally well qualified to provide training in republican virtue. By his fruits one would suppose that he did that well. In this respect, as a teacher, his influence on American law and politics was as great as any person's will ever be.

The tradition of American legal education established by George Wythe abides. Although Wythe himself left behind meager writings,¹¹⁴ an articulation of the political premises of such teachers in revolutionary times can be found in the writings of Hugh Henry Brackenridge, a Jeffersonian, the founder of the University of Pittsburgh, and a Justice of the Supreme Court of Pennsylvania,¹¹⁵ whose popular novel, *Modern Chivalry*, sought to emphasize the need of a democratic polity for the services

111. Wythe was less close to Marshall, but a decade after Marshall's student days, Chancellor Wythe declared unconstitutional an enactment of his former student sitting as a member of the Virginia legislature, thus providing a model for Marshall's own later decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

112. BROWN, *supra* note 83, at 35.

113. John Randolph said of Wythe that "he lived in the world without being of the world; . . . he was a mere incarnation of justice—his judgments were all as between A and B; for he knew nobody; but went into court as Astaea was supposed to come down from heaven, exempt from all human bias." 1 GREAT AMERICAN LAWYERS, *supra* note 90, at 275.

114. For one of the few, see GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS REVERSING SOME OF THOSE DECISIONS (1795).

115. Brackenridge was brought from Scotland to Pennsylvania as a child in 1753. A Princeton classmate of James Madison, he was a Presbyterian chaplain in Washington's army. He thereafter trained as a lawyer, moved to Pittsburgh when it was the merest village, campaigned as a Jeffersonian, wrote his novel serially, and served on the state Supreme Court. His biography is found in CLAUDE M. NEWLIN, THE LIFE AND WRITINGS OF HUGH HENRY BRACKENRIDGE (1932).

of men educated to public responsibility.¹¹⁶ Wythe's teaching aims and those of his followers were, however, not clearly and fully stated until the 1837-1838 work of Francis Lieber, then of the University of South Carolina.¹¹⁷ In short, Lieber extolled reasoned disinterest and willingness to engage in mutual sacrifice or compromise to save the integrity of the polity. Although no law teachers today would adhere to the whole of Lieber's teachings, it is still an important if seldom stated aim of American university law teaching to train students for public responsibilities in a democracy. This is evidenced in casebooks or the "cases and materials" that invite the balanced assessment of competing interests each claiming an entitlement to public concern, and in the traditional classroom discussion designed to prod most students to active engagement in disinterested or balanced discussion of significant disputes.

V. TEACHING VIRTUE: TRAVAILS OF TWO CENTURIES

Undeniably, the aim of teaching republican virtue has been bruised and crowded over the two centuries of the American experience, but generally by causes that have been external to the institutions of legal education, and indeed even external to America. I here note four difficulties encountered along the way by those who would teach law as a means to the public morality needed to sustain democratic institutions. Each of the four reflects influences set in motion on the far side of the Atlantic.

A. *The French Revolution*

One powerful influence on American legal institutions in the eighteenth century, as it is on events in Eastern Europe in 1992, is the explosive cultural force released in France. The barbarism and genocide that followed the French Revolution¹¹⁸ confirmed the worst fears of the revolutionaries regarding the disintegrative tendency of republican government¹¹⁹ that had given rise to the establishment of legal education. In

116. See HUGH H. BRACKENRIDGE, *MODERN CHIVALRY* 392 (1937) ("But of all things under heaven, the most contemptible and the least sufferable is that of incompetency to a trust and the aspiring to a place for which the candidate is unqualified."); see also *id.* at 19:

There is in every government a patrician class against whom the spirit of the multitude naturally militates; and hence a perpetual war, the aristocrats endeavoring to detrude the people and the people contending to detrude themselves. And it is right it should be so, for by this fermentation, the spirit of democracy is kept alive.

117. See LIEBER, *supra* note 94; HERMENEUTICS, *supra* note 100. The first edition of the latter work appeared serially in 1837 in *The American Jurist*.

118. See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 786-92 (1989) (elaborating these horrors, including the systematic poisoning of wells in the Vendee region by the revolutionary "government").

119. American reaction to that event was not far different from that of Edmund Burke. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790).

this respect, the mayhem underscored the need that law teaching was intended to meet.

At the same time, it was sometimes thought that the event served as a model for the widespread disorder that infected American colleges in the early years of the nineteenth century; Princeton, for example, was seized by "Jacobinic" students in 1800, and in 1807 the college expelled seventy of its 125 students for riotous conduct.¹²⁰ Endemic disorder broke into riot at Harvard in 1791 when the Board of Overseers dared to subject the students to a public examination; it resulted in the rustication of numerous students,¹²¹ and in 1834, Harvard called in a grand jury, indicted some of its students and dismissed the entire sophomore class for a year.¹²² President Caldwell of North Carolina was admired by the trustees for his physical strength and foot-speed that enabled him to control unruly students.¹²³ The student disorders in America in 1964-1972 were generally tame in comparison to those of "Jacobinical" times. Those earlier disorders weakened the already fragile institutions of higher education in America.

Another effect of the Revolution was to chill any taste for things French, and to rekindle the remaining embers of Anglophilial sentiments, especially in New England.¹²⁴ Americans stopped reading Montesquieu. It became less fashionable to speak hopefully of transmitting republican virtue to the people, as even such New Englanders as John Adams had,¹²⁵ for virtue was a term that was frequently on the lips of those who manned the guillotine, Marat, Danton, St. Just, and Robespierre.¹²⁶

Less clear in its relationship, but also a likely reaction to events in France, was the steady rise in American anti-elitism leading ultimately to the emergence of Andrew Jackson in 1828.¹²⁷ There was an unmistakably elitist pretension in the Revolutionaries' idea of American law teaching that was reflected in Tocqueville's characterization of American

120. NOLL, *supra* note 92, at 290-96.

121. SAMUEL E. MORISON, *THREE CENTURIES OF HARVARD 1636-1936*, at 171-78 (1937).

122. *Id.* at 252-53.

123. 1 KEMP P. BATTLE, *HISTORY OF THE UNIVERSITY OF NORTH CAROLINA* 173 (1907).

124. In Federalist New England, "the mark of a wise and good man was that he abhorred the French Revolution, and believed democracy to be its cause." HENRY ADAMS, *HISTORY OF THE UNITED STATES DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON* 63 (Ernest Samuels ed., 1967).

125. See 2 ADAMS, *supra* note 39, at 5-6.

126. Lieber, a German emigre and a Francophobe, writing in 1837, wrote three volumes that essentially defined classical civic virtue in the contemporary American context, without ever using the term "virtue." He wrote of "patriotism." LIEBER, *supra* note 94.

127. See generally ARTHUR SCHLESINGER, *THE AGE OF JACKSON* (1945).

lawyers as "an aristocracy."¹²⁸ Wythe and his fellow Whigs emerged from a culture in which *noblesse oblige* was a piece of the moral furniture¹²⁹ and the teaching tradition he established was laden with that impulse. And Jacksonian democracy was hard on such pretensions.

Not least among the anti-elitist effects was the election of judges in many states, an institution removing those offices from the grasp of the few who participated in higher education or could afford private professional training. Although Jacksonian judges were generally able to read, they were less likely to be receptive to arguments supported by citations to the classics, by foreign notions, or by economic or political theory that appealed to the academic class. In such times, colleges were disadvantaged in their efforts to persuade prospective students of their utility to any career in law, public or private. To say that antebellum colleges practiced open admissions is to understate the matter.¹³⁰

An astute contemporary observer of this collision between law and populism was James Fenimore Cooper. While celebrating the values of the Revolution in his earlier work, Cooper returned from seven years in Europe in 1833 to find cause for concern. Pleading with his fellow citizens to practice virtue,¹³¹ Cooper was apprehensive; the lawyers he created in fiction were generally self-seekers, or cunning pettifoggers, although one at least was merely a harmless pedant.¹³² In *Home as Found*, Cooper expressed the fear that America was "a runaway carriage crashing downhill"¹³³ and decried the "leveling process" that is "insensibly taking the place of the ancient laws of propriety."¹³⁴ The antihero of this novel was a status-hungry lawyer who is proud to be American, but who has no idea of any commitments that this condition might entail. The antihero is described as a "compound of shrewdness, impudence,

128. 1 TOCQUEVILLE, *supra* note 66, at 297-307. As Geoffrey Hazard has observed, Tocqueville was using the term to describe a balance wheel for democracy, not to imply generational continuity. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1268-73 (1991).

129. The debates in the Virginia House of Burgesses are fully recorded; one reader observed that among Virginians at the close of the eighteenth century:

men of the first class were equal to any standard of excellence known to history. Their range was narrow, but within it they were supreme. . . . Social position was a birthright, not merely of the well born, but of the highly gifted. . . . Law and politics were the only objects of Virginia thought; but within these bounds the Virginians achieved triumphs.

1 ADAMS, *supra* note 124, at 98-99.

130. Pennsylvania took students at the age of 12, EDWARD P. CHEYNEY, *HISTORY OF THE UNIVERSITY OF PENNSYLVANIA 1740-1940*, at 186 (1940), Georgetown at age 8, JOHN M. DALEY, *GEORGETOWN UNIVERSITY: ORIGIN AND EARLY YEARS* 226 (1957).

131. See JAMES F. COOPER, *THE AMERICAN DEMOCRAT* (1838); JAMES F. COOPER, *A LETTER TO HIS COUNTRYMEN* (1831). For a fictional statement of the aristocratic views expressed in these political tracts, see JAMES F. COOPER, *HOMEWARD BOUND* (1838).

132. See FERGUSON, *supra* note 65, at 300.

133. JAMES F. COOPER, *HOME AS FOUND* 56 (1838).

134. *Id.* at 189.

common-sense, pretension, humility, cleverness, vulgarity, kind-heartedness, duplicity, selfishness, law-honesty, moral fraud, and mother-wit."¹³⁵ In his final novel, Cooper betrayed what must be accounted a missynchronizaton with his times by making his heroine a brilliant lawyer, perhaps the equal of Portia herself.¹³⁶ Perhaps this turn in Cooper's later work was the product of dyspepsia, but it seems intended as a reflection of the moral decline in public affairs that he observed in the state around him. Similar observations were being made by such men as Kent,¹³⁷ Lieber,¹³⁸ and Story,¹³⁹ who despised Jackson and warmly supported his adversary, Henry Clay, the former law teacher.

Nevertheless, the tradition in legal education established by Wythe was not irreconcilable to Jacksonian democracy, nor did it exclude Democrats. There was no purpose in the still emerging tradition of American law teaching to exclude anyone from the responsibilities of governance, or to assign any value to intergenerational continuity such as might be implied from Tocqueville's term, "aristocracy." The credo of public duty was hardly a monopoly of social class.¹⁴⁰

This was made evident when a member of the Jackson cabinet, Benjamin Butler, himself a "barnburner,"¹⁴¹ was assigned to organize the curriculum for the law department at New York University. The aims he chose to pursue at least loosely corresponded to the moral aims of Wythe and Lieber, for he, too, acknowledged the need for trained leadership in a democracy at the same time that he supported the election of judges.¹⁴² Thus, just as the Revolutionary idea of American law teaching

135. *Id.* at 10.

136. See FERGUSON, *supra* note 65, at 302-03. The novel was JAMES F. COOPER, *THE WAYS OF THE HOUR* (1850).

137. On January 9, 1835, Kent wrote to Henry Clay: "I sympathize with you in all your public feelings & Doings since the beginning of the reign of the present Dynasty." Letter from James Kent to Henry Clay (Jan. 9, 1835), in 8 *THE PAPERS OF HENRY CLAY* 755 (Robert Seager II ed., 1984).

138. See Letter from Francis Lieber to Henry Clay (Nov. 8, 1834), in 8 *THE PAPERS OF HENRY CLAY*, *supra* note 137, at 750 ("We are already in a revolution, as nations so often are long before they know it."). To which, Clay replied that he, too, would despair "if we were not forbidden to entertain that sentiment." Letter from Henry Clay to Francis Lieber (Dec. 3, 1834), in 8 *THE PAPERS OF HENRY CLAY*, *supra* note 137, at 752.

139. See WILLIAM W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 85-89 (William W. Story ed., 1851); see also NEWMYER, *supra* note 88, at 182 (praising Clay).

140. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 71 (1988).

141. The term applied to radical New York Democrats, after the farmer who burned his barn to kill the rats. SCHLESINGER, *supra* note 127, at 398.

142. In 1835, Benjamin F. Butler, then the U.S. Attorney General, agreed to develop a plan for the establishment of a faculty of law at recently established New York University. RONALD L. BROWN, *THE LAW SCHOOL PAPERS OF BENJAMIN F. BUTLER: NEW YORK UNIVERSITY SCHOOL OF LAW IN THE 1830S*, at 7 (1987). Butler's plan was approved and he accepted an appointment to commence in 1837. *Id.* The university was modeled on the new institution in London, and was accordingly much influenced by Bentham. Butler was, with his friend and political colleague, David

had been shared by Jefferson and Hamilton, so it could be shared by the supporters of Clay and Jackson.

B. *The World Price of Cotton*

A second and more troublesome impediment to law teaching as training in public morality came with the resurgence of the blight of slavery. Montesquieu had proclaimed that the institutions of slavery could not co-exist with the institutions of a republic,¹⁴³ and the Revolutionary generation of Americans recognized this to be so. The incongruity of slavery among a people that had uttered the Declaration of Independence was obvious. Indeed, slaveowners had protested the language of the Declaration at the time of the utterance.¹⁴⁴ There can be no doubt that Jefferson intended his words to apply to each and every slave as well as to free men.¹⁴⁵ His choice of the phrase "pursuit of Happiness" as a modification of John Locke's triadic entitlements of life, liberty, and *property*¹⁴⁶ was not an accident.¹⁴⁷

Dudley Field, an adherent of Bentham's proposals for codification of the common law. He also advocated the popular election of Supreme Court Justices, an idea generally accepted by state constitutional conventions dominated by Jacksonians. Despite his populism, Butler's ambition as an educator was to advance the development of a legal profession that would serve as a political elite, who would practice the public morality necessary to sustain the trust of the people in popular institutions. See Benjamin F. Butler, *The Usefulness of the Legal Profession; and the Necessity and Importance of Providing Additional Means for Instruction in Legal Science: An Inaugural Address*, in BROWN, *supra*, at 168.

143. See MONTESQUIEU, *supra* note 13, bk. XV, ch. 1, § 3.

144. Criticism came from Robert Carter Nicholas, a leading Revolutionary. A response from another Revolutionary slaveowner came from Edmund Randolph, who replied:

Perhaps with too great an indifference to futurity, and not without inconsistency, that with arms in our hands, asserting the general rights of man, we ought not to be too nice and too much restricted in the delineation of them; but that slaves, not being constituent members of our society, could never pretend to any benefit from such a maxim.

EDMUND RANDOLPH, *HISTORY OF VIRGINIA* 253 (1970).

145. Jefferson's opposition to slavery in 1776 cannot be doubted. His first draft of the Declaration of Independence included the importation of slaves as one of the important offenses committed by the English crown. 1 DUMAS MALONE, *JEFFERSON AND HIS TIME* 222 (1951); see also THOMAS JEFFERSON, *NOTES ON VIRGINIA* 162 (1781). He was, at the same time, somewhat racist in his reactions, although perhaps less so than most Virginians of his generation. See FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 157-59 (1974) (providing examples of Jefferson's racist view toward Blacks, nonetheless concluding that his errors were less deplorable than the errors of eighteenth century society). In his last years, Jefferson appears to have been alarmed at the idea of emancipation and its consequences. See 6 DUMAS MALONE, *JEFFERSON AND HIS TIME* 316-27 (1981).

146. The term appears in the initial stated reason for the revolutionary act: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

147. Some of the early constitutions of southern states corrected Jefferson's departure from Locke's triad to assure protection of slave property. See, e.g., LA. CONST. of 1812, art. I, § 2.

It was but three years after his authorship of the Declaration that Jefferson established American law teaching. It would be too much to infer that the aim of law teaching was to affirm the inalienable human rights to "Life, Liberty, and the Pursuit of Happiness." But there was a visible connection between education and democracy, as Montesquieu had seen. Although lending the force of law to all such claims to "inalienable rights" would have been a form of moral imperialism that no one was prepared to accept from officers of the law, it was obvious that a republic deriving its legitimacy from the consent of the governed could not long recognize and enforce exclusions that would result in the justifiable withholding of consent by many of those to be governed.

For this reason, the Revolutionary generation spoke freely of the emancipation of the slaves.¹⁴⁸ Under the leadership of David Howell and Nathan Dane, the Continental Congress by the Northwest Ordinance of 1787 prohibited slavery in the region north of the Ohio River;¹⁴⁹ Howell was later professor of law at Brown;¹⁵⁰ Dane was later the patron of Harvard Law School responsible for its rebirth under the leadership of a Jeffersonian, Justice Story.¹⁵¹ Benjamin Rush, who also established Dickinson College as a "temple of justice,"¹⁵² led the emancipation movement in Pennsylvania. Ezra Stiles, the Jeffersonian President of Yale who studied law to teach republican virtue, led the emancipation movement in Connecticut.¹⁵³ In New Jersey, the movement was led by William Paterson, a staunch Federalist, with the support of fellow Princetonians such as Samuel Stanhope Smith, also a divine who had become a law teacher.¹⁵⁴ Professor George Wythe, acting on such thoughts, emancipated his slaves when in 1782 that became permissible in Virginia. And his successor, Professor St. George Tucker, led the

148. Albeit not universally; advocates of slavery could be heard not only in the South, but elsewhere in America and abroad. See LARRY E. TISE, *PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA, 1701-1840*, at 12-40, 75-123 (1987).

149. DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823*, at 153-56 (1975); see also *id.* at 153 n.74 (describing the roles of Howell and Dane).

150. Howell's role at Brown is described in WALTER C. BRONSON, *THE HISTORY OF BROWN UNIVERSITY, 1764-1914*, at 38 (1914); see also 9 *DICTIONARY OF AMERICAN BIOGRAPHY* 301 (1932).

151. Dane's role at Harvard is described in SUTHERLAND, *supra* note 82, at 92-98.

152. JAMES H. MORGAN, *DICKINSON COLLEGE: THE HISTORY OF ONE HUNDRED AND FIFTY YEARS 1783-1933*, at 41 (1933).

153. See MORGAN, *supra* note 91, at 452.

154. JOHN E. O'CONNOR, *WILLIAM PATERSON: LAWYER AND STATESMAN, 1745-1806*, at 29, 212-13 (1979). The New Jersey emancipationists were, to say the least, gradualist in approach. See DAVIS, *supra* note 149, at 315.

emancipation movement in Virginia, publishing an elaborate plan considered by the Virginia legislature in 1792.¹⁵⁵ Henry Clay and others associated with the Transylvania Law Department led the emancipation movement in Kentucky, although opposed by George Nicholas, the first person appointed to teach law at that institution.¹⁵⁶ There was no opposition when President Jefferson in 1809 led Congress to the abolition of the slave trade on the first day that this could be done under the terms of the Constitution.¹⁵⁷

By 1809, however, the institution of slavery was clearly gaining strength.¹⁵⁸ It had been buttressed in some degree by the contagion of fear spread by the French Revolution, and especially by its aftermath in Santo Domingo—where slaveowning families had been butchered and their survivors driven out, many of them to New Orleans, soon to become an American city.¹⁵⁹ A frightening echo of this event was the South Carolina uprising led by Denmark Vesey.¹⁶⁰ Such events led the aging Jefferson to note in 1820 that the South had a “wolf by the ears.”¹⁶¹

But the driving force behind the rise of slavery was the invention of the cotton gin in New Haven in 1793 and the resulting demand in Europe for cotton with which to manufacture clothing.¹⁶² The rise in the world price of cotton increased the value of slaves, and of the land in southern states on which cotton could be grown with slave labor.¹⁶³ The resulting prosperity of cotton agriculture renewed the enthusiasm of southern planters for slavery, turning the old tobacco states into breeding states that exported slaves to the cotton states emerging in the southwest,

155. See ST. GEORGE TUCKER, *A DISSERTATION ON SLAVERY WITH A PROPOSAL FOR THE GRADUAL ABOLITION OF IT IN THE STATE OF VIRGINIA* (1796).

156. Nicholas's support for slavery is described in BROWN, *supra* note 105, at 228-31. Nicholas did not in fact teach law at Transylvania because he died shortly after his appointment in 1799. See generally Charles Kerr, *Transylvania University's Law Department*, 31 *AMERICANA* 7, 27 (1937).

157. Too much can be made of this enactment; one of its effects was to enhance the value of slaves already in America. It was for this reason that opposition was slight among slaveowners. See DAVIS, *supra* note 149, at 324-29.

158. See TISE, *supra* note 148, at 41-74.

159. See C.L.R. JAMES, *THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (2d ed. 1963).

160. See DAVIS, *supra* note 149, at 309-10.

161. See Letter from Thomas Jefferson to John Holmes (April 22, 1820), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 249 (Albert E. Bergh ed., 1907) (“[W]e have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale, and self-preservation in the other.”).

162. THOMAS E. DRAKE, *QUAKERS AND SLAVERY IN AMERICA* 100-01 (1950).

163. See DOUGLAS C. NORTH, *THE ECONOMIC GROWTH OF THE UNITED STATES, 1790-1860*, at 62-68 (1961).

and developing a distinctive cotton culture not only more financially rewarding to slavemasters, but also even more harsh to slaves than the tobacco culture had been. Many of the southern advocates of antislavery, especially the Quakers, found the situation so distasteful that they emigrated to the Northwest.¹⁶⁴ Meanwhile, of course, the northern economy was growing still more rapidly than that of the South, and the moral revulsion to slavery was becoming more intense from the hostility of workers selling labor in a free market to the competition of slaves. The two courses of development pointed to the near inevitability of disaster.

The disaster was foreseen by most of those teaching law, who were engaged in transmitting to students a sense of public duty or "patriotism" as some came to describe republican virtue.¹⁶⁵ They generally supported Henry Clay, their one-time co-venturer in law teaching and his program for compensated emancipation of slaves.¹⁶⁶ In hindsight, this was clearly the program that would have best served the nation; the enormous carnage of the Civil War far exceeded in cost the burdens associated with the emancipationist program, to say nothing of what it would have spared the South. Yet it was opposed with equal ardor by slaveowners committed to preserving the culture of cotton slavery¹⁶⁷ and by some abolitionists who preferred immediate disunion to any compensation of slaveowners whom they proclaimed to be morally degraded,¹⁶⁸

164. See DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823*, at 199 (1975).

165. See Carrington, *supra* note 33.

166. Clay and Madison were founders of the Colonization Society. The program was one of gradual emancipation of the type effected in northern states, with the freemen to be voluntarily resettled in Africa, Central America, or the Western United States. Clay described the program for the Kentucky Society. See 8 *THE PAPERS OF HENRY CLAY*, *supra* note 137, at 138-58. The Colonization Society was not without its critics, many of them severe in their judgments. Some accused Clay and his supporters of trying to make slavery more secure by removing the free blacks. See, e.g., WILLIAM L. GARRISON, *THOUGHTS ON COLONIZATION* (1832). Numbered among the severe critics was Clay's student at Transylvania, James Birney, who organized the Alabama branch of the Society. See 5 *THE PAPERS OF HENRY CLAY*, *supra* note 137, at 120 ed. n. In 1834, Birney concluded that Clay "had no conscience about the matter, and therefore, that he would swim with the popular current." 8 *id.* at 748 n.1. Birney ran against Clay for President in 1844, declaring Clay to be "of all our public men, the most dangerous, because the boldest or the most insidious, according to the exigency, and always the most plausible in his attacks on the cause of human freedom." 2 *LETTERS OF JAMES GILLESPIE BIRNEY 1831-1851*, at 898 (Dwight L. Dumond ed., 1938). Birney polled 60,000 votes, which was just enough to deny Clay the electoral votes of New York and the election. PETERSON, *supra* note 89, at 366. The result was the election of James K. Polk, the candidate of proslavery.

167. Border state representatives refused compensated emancipation in 1862 on the very eve of the Emancipation Proclamation. MCPHERSON, *supra* note 108, at 503.

168. The Garrisonian premise seems to have been that disunion and aggressive support of fugitives would bring down the house of slavery without extreme violence. Meanwhile, the Constitution supported by most law teachers was a pact with the devil. See DWIGHT L. DUMOND, *ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA* 307-25 (1961); AILEEN KRADITOR, *MEANS AND*

and even though disunion would probably have left the cotton-slavery culture intact.

As readers know, the fugitive slave issue gave rise to much of the increasing bitterness on both sides. The text of the Constitution obligated all states to honor the property claims of slaveowners,¹⁶⁹ but the entitlements of the fugitives were also obvious to those who heeded either the text of the Declaration of Independence or the republican imperative of securing the assent of all those governed. Law teachers, like judges, were trapped between the moral imperatives of saving the nation by enforcing the law, and of redeeming the nation's legitimacy by bringing slavery to an end.

No active law teacher appears to have participated in the effort to achieve liberation of slaves through legal or extra-legal action in support of fugitives that denied validity to the Constitution or threatened to cause disunion,¹⁷⁰ although many colleges harbored stations on the underground railroad.¹⁷¹ On the other hand, only one law teacher¹⁷² appears to have supported the dehumanizing rationalization of fugitive slave law advanced by Chief Justice Taney in *Dred Scott v. Sandford*.¹⁷³ One law teacher who was also a judge was dismissed by Harvard on account of his

ENDS IN AMERICAN ABOLITIONISM: GARRISON AND HIS CRITICS ON STRATEGY AND TACTICS, 1834-1850, at 102-08, 178-224 (1969); JOHN L. THOMAS, THE LIBERATOR: WILLIAM LLOYD GARRISON 326-37 (1963).

169. See U.S. CONST. art. I, § 2, cl. 3; *id.* art. IV, § 2, cl. 3.

170. For a description of antislavery litigation, see ROBERT M. COVER, JUSTICE ACCUSED (1975).

171. See WILBUR H. SIEBERT, THE UNDERGROUND RAILROAD: FROM SLAVERY TO FREEDOM 115 (1968) (citing Oberlin College, Western Reserve College, and Geneva College as three examples).

172. James P. Holcombe taught Constitutional Law at the University of Virginia as a colleague of John Barbee Minor. His parents had freed their slaves and moved from their Virginia home to Indiana. He thereafter attended Yale, Virginia, and Staunton and practiced law in western Virginia and in Cincinnati. While in Cincinnati, he had published a simplified version of *Story on Equity* and several other works, including one ambitiously entitled *Rise of Intellectual Liberty*. In his teaching, he advocated a proslavery position. He resigned in 1861 to seek election to the Confederate Congress. After the war, he conducted a preparatory school and edited a successful collection of *belles lettres*. E. Lee Shepard, *James Philemon Holcombe*, in LEGAL EDUCATION IN VIRGINIA 1779-1979, at 291-95 (W. Hamilton Bryson ed., 1982). Two earlier supporters of slavery were N. Beverley Tucker, the professor at William and Mary from 1834 to 1851, and Thomas Cooper. Tucker was the second and prodigal son of St. George Tucker; his older brother had the more distinguished career as judge and as teacher at the University of Virginia. See ROBERT J. BRUGGER, BEVERLEY TUCKER: HEART OVER HEAD IN THE OLD SOUTH (1978); Robert J. Brugger, *Nathaniel Beverley Tucker*, in LEGAL EDUCATION IN VIRGINIA 1779-1979, *supra*, at 643-56. Thomas Cooper, the President at South Carolina from 1822 to 1834, was in his youth in England an ardent critic of the slave trade and an admirer of the French Revolution. After moving to South Carolina, he became the academic spokesman for slavery. MALONE, *supra* note 99, at 284-90.

173. 60 U.S. (19 How.) 393 (1857).

judicial action returning a slave to an owner;¹⁷⁴ his dismissal was accomplished despite his support by law teaching colleagues who recognized his action as a performance of judicial duty.¹⁷⁵ Those same colleagues soon encouraged their students to go to Kansas to support the Free Soil Movement in that state.¹⁷⁶

In addition to Clay, there was one sometime law teacher who was active on the slavery issue in an official role. He was Charles Sumner, a favorite student of Joseph Story and sometime instructor at Harvard, who as a Senator from Massachusetts was outspokenly hostile to the cotton culture and was paid for his efforts by a nearly fatal caning on the Senate floor inflicted by Senator Preston Brooks of South Carolina.¹⁷⁷ Equally outspoken as the War approached was Francis Lieber, then at Columbia,¹⁷⁸ and a personal friend of Sumner.¹⁷⁹

174. In 1853, Edward G. Loring was recommended by the faculty for appointment as professor of law at Harvard. The overseers turned down the appointment because Loring also planned to continue as a commissioner of the federal court, but appointed him as lecturer, a duty he performed to the considerable satisfaction of the students. A year later, he was dismissed for his judicial act in ordering the return of a fugitive to a person claiming to be the fugitive's owner. For an account of the litigation, see LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 105-06 (1957).

175. See 2 WARREN, *supra* note 47, at 196-200. His defenders insisted that the Harvard Law School:

has been a very powerful instrument in removing and softening sectional prejudices. . . . If you meet with a Southern lawyer or politician who is a secessionist, or a nullifier, or a hater of New England, you will rarely find that he was educated at Dane Law College.

Is it worth while to turn this current of [southern] students from our doors? What is to be gained by it? Is it worth while to proclaim through the land or to allow others to proclaim, that our Law School is never to admit into one of its chairs of instruction any person who has acted simply as a magistrate in the rendition of a fugitive slave?

Id. at 198.

176. By 1856, both Professors Parker and Parsons had become politically active in the Free Soil movement that sought to prevent the introduction of slavery to Kansas. One student reported:

I at once enlisted in the cause and was so encouraged in it by the Professors, that when I proposed to go to the front in Kansas, the Faculty immediately said to me, "Yes, go, and we will take care of you here, and in due time will send your diploma to you." The promise was kept, and the document was forwarded to me in the summer of 1857, when my class graduated. This act shows how the big hearts of these dignified and conservative professors and learned judges responded to freedom's call.

Id. at 209.

177. The event led to a public occasion at the Harvard Law School, where Professor Parker spoke, concluding:

For myself personally I am perhaps known to most of you as a peaceable citizen, reasonably conservative, devotedly attached to the Constitution, and much too far advanced in life for gasconade; but under the present circumstances, I may be pardoned for saying that some of my father's blood was shed on Bunker Hill, at the commencement of one revolution, and that there is a little more of the same sort left, if it shall prove that need be, for the beginning of another.

Id.

178. See FRANK FREIDEL, *FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL* 305-07 (1947).

179. See FRANCIS LIEBER, *LIFE AND LETTERS OF FRANCIS LIEBER* (1882). The slavery issue interrupted their friendship for a time. See *id.* at 261-62.

Lieber's relation to the issue is instructive. He taught Constitutional Law at South Carolina from 1834 to 1857 as a full-time teacher and scholar, perhaps the only antebellum American who could be so described. Lieber was a German emigré, once declared an enemy of the Prussian state for his radical politics, but later rehabilitated and invited to return as advisor to the king.¹⁸⁰ Lieber despised slavery, but declined the offer to return to Berlin and remained in South Carolina. Although he left his students in no doubt that his own public duty ran first to America, not South Carolina, he did not dare publicly address the issue of slavery. Yet he did (many years before the advent of academic tenure) conclude a private communication to his U.S. Senator, John C. Calhoun: "It is not the *North* that is against you It is mankind, it is the world, it is civilization, it is history, it is reason, it is God, that is against slavery."¹⁸¹

It became at last apparent that there was no balanced, disinterested position for a virtuous republican to maintain with respect to the central legal and political issue of the time. One casualty of the resulting stress may have been the Transylvania Law Department, which closed its doors in 1858, no longer able to maintain its transsectional position.

As a consequence of the general intransigence to apply the appropriate remedy of emancipation favored by those who were attentive to the public interest, over one million young men were killed or maimed. In proportion to the population, this was one of the greatest bloodbaths of the last millenium. The death total almost equalled that of all other wars fought by the United States from 1776 to 1991 combined. The casualties were borne by a population roughly that of California's today, but with a median age of eleven years, resulting in the loss of more than one fourth of the white males of military age.¹⁸² Had the people listened to many law teachers, the result would likely have been very different.

One cannot say, of course, what would have happened to slavery in the South had the cotton gin not been invented for a few more decades, and there had been no spike in the world demand for cotton. When and how would the demise of slavery come? Slavery did disappear in Latin America without need for the enormous carnage suffered in North America, and presumably would have come to an end on this continent as well, and perhaps before 1863. But, alas, the demand for cotton had revitalized slavery in this country, postponed its demise, and magnified

180. Lieber's account of the event is set forth *id.* at 185-88.

181. FREIDEL, *supra* note 178, at 241.

182. Few now are cognizant of the relative horror of that war. The following Table compiles data from the *Statistical Abstract of the United States*. To provide comparability, the slave population was excluded.

beyond possibility the task of those striving to practice and transmit republican virtue.

In addition to this direct effect on law teaching, there was another derived from a secondary reaction to the fugitive slave issue. Most judges, perhaps especially the unionists, recoiled from a substantive analysis of the legal status of slaves, and were driven by events to adopt a sterile formalism in the disposition of fugitive slave cases.¹⁸³ Not only was the text of the Constitution clear on the main issue, but those considering non-enforcement looked into the open grave of the union when considering recognition of the human rights of slaves.

This impact of slavery on American legal method by no means ended with the Civil War. Among the enduring legacies of the immense carnage was a time, decades in length, when Americans endured a general anxiety about disorder. An eminent historian of the time has described post-Reconstruction America as engaged in a consuming "search for order."¹⁸⁴ An effect of that social condition on the law was described

AMERICAN WARS: CASUALTY RATES

	Pop. (000)	Males 15-24 (000)	Men in Arms (000)	Dead (000)	W'nded (000)	Total C'ty (000)	C'ty as % of Males 15-24	C'ty as % of Men in Arms
Revolution 1776-1783								
1790 Pop:	3200	190	200	25	8	33	18	17
War of 1812 1812-1815								
1810 Pop:	7200	540	287	9	4	13	2	4
War with Mexico 1846-1848								
1850 Pop:	19800	3350	79	13	4	17	1	22
Civil War 1861-1865								
1860 Union:	21500	3000	2400	350	272	622	21	26
Civil War 1861-1865								
1860 Confed:	7000	1000	1200	260	200	460	46	38
War with Spain 1898								
1900 Pop:	76000	7250	307	2	2	4	0	1
World War I 1917-1918								
1920 Pop:	106000	10200	4743	117	204	321	3	8
World War II 1941-45								
1940 Pop:	132000	11750	16354	407	671	1078	9	6
Korean War 1950-1953								
1950 Pop:	147000	10850	5764	54	103	157	2	3
Viet Nam War 1964-73								
1970 Pop:	203000	17500	8744	58	153	211	1	2

183. Cf. William E. Nelson, *The Impact of the Anti-Slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

184. ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

by Grant Gilmore as the "law's black night,"¹⁸⁵ by which term he referred to a failure of the judicial heart for the Grand Manner that had previously characterized American judicial lawmaking. The American judiciary, reflecting the dispirited American morale, seemingly feared to exercise its accustomed political responsibility and took general refuge in the pretense of apolitical formalism.¹⁸⁶ A formal style was manifested by the Supreme Court in the late nineteenth century, and was for a time the dominant style of state courts dealing with private law questions.¹⁸⁷ This change in the style of courts may well have influenced the forms of advocacy, and thus, too, the patterns and content of law teaching.

In addition, of course, there was Jim Crow, the unsightly vestige of slavery that emerged after Reconstruction had dissolved. During the "law's dark night," the dilemma posed to American law teachers by the institutions of slavery and the fugitive slave continued, albeit in moderated form. No longer was the existence of the nation in question, nor were those seeking to preserve it called upon to return innocent captives to a cruel fate. But the South remained almost a nation apart, divided between black and white, and neither division quite a member of the whole. There, much of the black population of America was held in a state of bondage only marginally more humane than the slavery from which it had emerged.

Because a devastated nation lacked the political will to complete Reconstruction, the remnant of the cotton-slave culture was able to maintain a caste system that not only imposed continuing restrictions on black citizens, but also thereby withheld democratic legitimacy from the legal institutions operating in the South in much the way that slavery had. Law teachers seeking to inculcate commitment to the national polity were still burdened to explain even to themselves why democratic institutions deformed in this way were appropriate objects for the kind of loyalty required of virtuous republicans or lawyer-patriots. But if the courts were impotent to deal with the caste system in the South,¹⁸⁸ law teachers,

185. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 41 (1977).

186. See ATIYAH & SUMMERS, *supra* note 2, at 248-49. For a discussion of the effect of this period on the structure and administration of the federal courts, see Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411 (1987).

187. See LLEWELLYN, *supra* note 52, at 41. Llewellyn reports that the Formal Style was still evident in Maryland and Massachusetts as late as 1939. See *id.*

188. For an account of the legal status of segregation, see William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 317 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

at least in the North, were free to protest and some did,¹⁸⁹ although with little apparent effect.

Only in the mid-twentieth century, after the migration of black Americans from the cotton fields of the South had begun in earnest and World War II had made racism unacceptable, was it possible to marshal the political will to face Jim Crow. When the time came, one of the first groups to call for its demise were the law teachers, by then organized in the Association of American Law Schools, and eager to support the claims of southern blacks to equal access to the legal profession.¹⁹⁰ But the open sore was not so easily healed as that.

C. *The Rise of Professionalism*

A third external force striking against the Revolutionary conception of law teaching as moral education appeared in a nation still convalescing from that gruesome Civil War, with its legal system very much in a nocturnal state.

189. Little if any of the meager supply of Constitutional Law scholarship written during the "law's black night" was devoted to any social problems regarding race or otherwise. However, as the student-edited journals began to take their place in this century, there was a growing chorus of criticism of the failures of Constitutional Law to transform race relations law in the South. For examples, see the law review notes on the issue of the right of African-Americans to vote in "white primaries" decided in *Nixon v. Herndon*, 273 U.S. 536 (1927) and *Nixon v. Condon*, 286 U.S. 73 (1932); Morton Milman, Comment, *Constitutional Law: Elections: Exclusion of Negroes from Primaries*, 15 CORNELL L.Q. 262 (1930); Note, *Rights of Negroes to Vote in State Primaries*, 43 HARV. L. REV. 467 (1929); Comment, 25 ILL. L. REV. 699 (1930); Recent Cases, 14 MINN. L. REV. 83 (1929); Alvin J. Feldman, Note, *Constitutional Law—Elections—Racial Discrimination in the Party Primary*, 8 N.Y.U. L. REV. 309 (1930); see also F. Earl Lamboley, Note, *Exclusion of Negroes from Democratic State Primary Election*, 4 NOTRE DAME L. REV. 341 (1929); Recent Case Notes, 39 YALE L.J. 423-24 (1930). Southern law review editors tended to be defensive. See, e.g., Travis Brown, Comment, *Constitutional Law—Elections—Race Discrimination—Party Rules Excluding Negroes from Voting in Primaries*, 9 N.C. L. REV. 207 (1930). Some were extremely so, one such note concluding:

It cannot be denied that the effect of this statute is practically to deny to the negro the right to vote. However, the fact that this is the practical effect hardly seems to be enough to justify it being declared unconstitutional. The negro can still form his own party and vote in his own primary. The fact that he could never elect his own candidate does not change his right.

Note, 16 VA. L. REV. 193, 197 (1929). One must wonder what that student's teacher in Constitutional Law thought of that note; it was worthy of the teaching of James Holcombe. See *supra* note 172. On the other hand, some dissatisfaction or unease with southern tradition is manifested in Note, 9 TEX. L. REV. 439 (1930) and Cases, 5 TULANE L. REV. 309 (1930). The Texas note was written by Joseph C. Hutcheson III, the son of the judge who decided one of the white primary cases in the district court. See *Grigsby v. Harris*, 27 F.2d 942 (S.D. Tex. 1928).

190. The efforts of the Association were led by John Frank, then of Indiana, Erwin Griswold, the Harvard dean, and Edward Levi, the Chicago dean. See Jonathan L. Entin, *Sweatt v. Painter, The End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3 (1986). Their brief in *Sweatt* was published in *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education*, 34 MINN. L. REV. 289 (1950).

Post-Civil War America, with much of the world, almost suddenly grasped the ideas of division of labor and technology as the promise of release from all human bondages.¹⁹¹ This conception seems to have first struck the English public at the Crystal Palace, where an array of technologies presented to visitors to the Great Exhibition of 1851 moved Victoria to conclude: "We are capable of doing anything."¹⁹² By 1870, this optimism about technology had penetrated American minds. In medicine, engineering, law, economics, and a dozen new fields, many of them serving to facilitate the entry of American women into public and professional life (such as education, nursing, social work, and librarianship) there was a contagion of interest in technocratic professionalism, in the development of almost any kind of skill that could be said to have roots in what was loosely called science. Professional organizations, such as the American Bar Association,¹⁹³ appeared in number and came to exercise increasing regulatory power over career opportunities in the several professional fields, often using higher education credentialing as the measures of qualification.¹⁹⁴

In hindsight, we can now see that the movement to meritocratic professionalism was very powerful. It may simply have throttled Marxism as a political force in its infancy. Widespread land ownership and the frontier had, with the very important exception of slavery, prevented the development of a substantial underclass until the urban laborers appeared in force in mid-century. But even then, there was no serious prospect of class war in a society dominated by landowners and providing substantial social mobility through open professions. The urban middle class was aborning, and the hope if not the fact of prosperity was offered to almost all. Succeeding waves of immigrants populated urban ghettos for a generation as their children (especially the males) moved on to be technocrats of one kind or another.

By creating a demand for a vast range of professional services and professional training, the impulse to technocracy transformed American universities. Universities became in part what we now recognize as the

191. See MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 141-45 (1977). For the special effect on law, see *id.* at 166-76.

192. JAMES MORRIS, *HEAVEN'S COMMAND: AN IMPERIAL PROGRESS* 196 (1973).

193. For a comprehensive history of the American Bar Association, see EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* (1953).

194. Alfred Z. Reed was commissioned by the Carnegie Foundation to study legal education at the urging of the American Bar Association, in the disappointed hope that it would lead to an increase in requirements corresponding to those established for medical education. See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 172-90 (1983).

factories of human capital run by educational entrepreneurs,¹⁹⁵ and they commenced about 1890 a boom that resulted in higher education becoming a major national industry that is perhaps only now beginning to slow.

With respect to law, the technocratic impulse set in motion a still-growing demand for legal services that has attracted into law study many whose career aims are directed chiefly at the private sector law firms and corporate offices that respond to that demand. Technocratic law teaching thus sold well because America wanted and perhaps needed a technocratic legal profession, one that would seem in its intellectual substructure and academic status respectable in comparison to the other rising professions. That profession, as all can observe, emerged in the century following 1890 to become a significant component of the American national economy and even a noticeable feature of international markets.

So it was that the almost world-wide impulse to technocracy reinforced the shift in American legal method and theory, sustaining and magnifying the moment of apolitical formalism. To seem a technocrat, not a politician, was an ambition widely shared among judges and lawyers.¹⁹⁶ This ambition fed the aspiration to decide legal matters on the basis of internal logic divorced from social context or political responsibility. That moment of formalism cut deeply against the grain of American political arrangements set in Constitutional concrete, and hence was doomed to be short-lived, but it survived for long enough to affect law teaching significantly.

The impulse to technocratic professionalism and the moment of formalism in American law provided just the right environment to reward the initiative of Christopher Columbus Langdell. Seeking the approval of a generation of technocrats as well as to sell his wares to students otherwise likely to train for legal careers as apprentices, Langdell's eye hit upon the ore of case law embodied in currently reported opinions of American courts—that manifestation of post-Revolutionary politics. He was soon able to devise a process of refinement of this ore that borrowed heavily from judicial formalism and that could with some success be passed off as a new science of law.¹⁹⁷

195. For a description and a defense of the American "multiversity" as it had become by mid-century, see CLARK KERR, *THE USES OF THE UNIVERSITY* (1963). Kerr wrote as the President of the University of California on the eve of substantial disorder from which his institution may yet be convalescing.

196. There was also an increase in the rigid formalism of the judicial method in England in the last four decades of the nineteenth century. See DAWSON, *supra* note 26, at 90-91.

197. Romans had so spoken of law, and Blackstone claimed no less for the law of his kingdom than that it was rooted in scientific verity. BOORSTIN, *supra* note 49, at 11-31.

Langdell and his academic heir, James Barr Ames, made little effort to extend this pseudo-science to the study of constitutional or other public law. Private law could often be examined "scientifically," in accordance with its presumed internal symmetry and in disregard of its social and political consequences,¹⁹⁸ where public law seldom could. Contracts thus became the queen science of the law school for the reason that the law of contracts so seldom intersected social or political issues that might impair the disinterest of the legal scientist.¹⁹⁹ In part, this was because almost any person or firm that made promises might break them. Accordingly, it was possible to put contracts doctrine into a politically anti-septic format.

Langdell, Ames, and their adherents therefore demoted Constitutional Law in their curriculum and left the writing of it largely to Thomas McIntyre Cooley of Michigan,²⁰⁰ and others not averse to the soil of politics.²⁰¹ An adverse consequence of this technocratic emphasis was isolation of law study from broader intellectual efforts directed at other social phenomena bearing on the law.²⁰² Political economy and Shakespeare were banished from the minds of legal professionals; a knowledge of such immaturities could be presumed on the part of those credentialed by an undergraduate institution.

Similar isolation befell other fields of academic endeavor, but it was especially unfortunate for a profession trained as a political elite. The admirable intellectual breadth brought to their work by educated antebellum lawyers trained by men such as Wythe, Tucker, Hoffman, Kent, the Transylvanians, or Lieber was treated as a lesser attainment, or at least separate from the goal of the professional lawyer-technocrat.

198. See, e.g., CHRISTOPHER C. LANGDELL, SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880); see also Thomas C. Gray, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

199. But cf. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979) (arguing that making the distinction between "public" and "private" law is a very deceptive activity).

200. See, e.g., THOMAS M. COOLEY, COMMENTARIES ON THE CONSTITUTION (1873); THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW (1880); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868); see also CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW (1954). Cooley was also the architect of the Sherman Act and first chair of the Interstate Commerce Commission.

201. These included James Bradley Thayer of Harvard, although Thayer's view of the role of the judiciary was decidedly cautious. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

202. See Paul D. Carrington, *Book Review*, 72 CAL. L. REV. 477, 485-89 (1984) (reviewing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983)); cf. Calvin Woodard, *Progress and Poverty in American Law and Legal Education*, 37 SYRACUSE L. REV. 795, 806-12 (1986) (arguing that Langdell's methods brought order to the chaos of our common law system).

Partly no doubt to emphasize the elevated status of the professionals trained at Harvard, Dean Langdell's school increased admission requirements to admit only college graduates.²⁰³ This allowed the school to assume that its students had already been taught what they needed to know of the classics and political economy and to concentrate on law as technocracy, thereby increasing the isolation. In this respect, the Harvard educational style widely used in the late-nineteenth century threatened to unfit law graduates for public service, by imparting to them an insular notion of their discipline.

By extending the course of academic law study to three years,²⁰⁴ Dean Langdell ingeniously, or perhaps even unwittingly, conformed to the growing ambition of students to enhance the value of their services by investing in exclusive professional training. Thus, elite university legal education has in recent decades been seen, at least in important part, as an investment by students on which they expect a handsome return.²⁰⁵ Most contemporary American law students borrow heavily to finance their costly professional training. Relative incomes of many American professions have risen steadily over the last century (but none perhaps more than law) and have made this kind of investment financially sound.

Within the legal profession, a disparity in income expectations between those who serve the public and those who serve private interests has grown apace, perhaps particularly in the last two decades.²⁰⁶ As a result, students thinking of themselves as prospective public servants and leaders are a declining portion of those studying law in America and are less influential in setting the tone of the American law school environment.

This acquisition of human capital by financial investment in professional training can dilute the impact of moral education. At best, financial motives are a distraction. No one who has been in a contemporary American law school during the placement season can doubt the powerful short-term effect of that process on the moral values and sensibilities of the students. Loan forgiveness, student-funded fellowships, and public

203. The requirement was first proposed by Langdell in 1875, but not fully implemented until 1909. See JOEL SELIGMAN, *THE HIGH CITADEL* 41-42 (1978); WARREN, *supra* note 47, at 394-98.

204. See STEVENS, *supra* note 194, at 36-37.

205. See John R. Kramer, *Will Legal Education Remain Affordable, By Whom, and How?*, 1987 DUKE L.J. 240, 248-50.

206. At the time of the 1990 enactment to increase federal judicial salaries, it was widely observed that the young law clerks working at the elbows of Supreme Court Justices would in their first year in the private sector earn more than an associate judge of the United States Supreme Court. Joseph Deitch, *New Jersey Q & A: Harold A. Ackerman; Seeking a Raise for Federal Judges*, N.Y. TIMES, Aug. 20, 1989, at 12NJ3.

service externships are widespread efforts to correct the effect. Nevertheless, that effect may well dwarf the efforts of teachers to inculcate appropriate expectations as to how lawyers and judges think and behave in their professional roles.²⁰⁷ It assuredly weakens, at least for an important time, the students' shared sense of public purpose if most hope and expect to do corporate mergers or other highly remunerative work involving little or no service, or perhaps even requiring disservice, to the public interest. Partly for this reason, too, some of the opportunity for moral education has passed from the law schools to the law firms who initiate students to the profession while they perform summer or part-time employment, for it is there that students are more likely to meet "real lawyers" engaged in the careers to which they aspire. This is so despite Bar-imposed requirements that law schools teach the law governing lawyer conduct.²⁰⁸

The profit motive of law students is quite possibly enhanced by a vestige of the teaching of Langdell and Ames: The first year curriculum conventional to American law schools centered on private law doctrine. It is a legitimate radical critique of the curriculum that it emphasizes not only the technocratic, but also the private service aspects of professional work in law, and may thereby reinforce the expectations of students that service to private paying clients is what they are training to do.²⁰⁹

In addition to this regrettable effect of the practice of human capitalism, there is another of broader significance. This rise of technocratic professionalism made law study an exclusive activity, more elitist in a different sense than formerly. Beginning in 1926 when the American Bar Association began to accredit law schools, state supreme courts began to require periods of academic study as a condition for admission to the bar.²¹⁰ University law schools were thus positioned as gatekeepers, a role that became significant in the second half of the present century as the number of persons seeking entry into the profession increased exponentially.

In some minds, credentialism was a deliberate effort to exclude certain persons from the legal profession. Some of those advocating higher professional standards in the early twentieth century did so for the stated

207. See Roger C. Cramton, *Change and Continuity in Legal Education*, 79 MICH. L. REV. 460, 462 (1981). Efforts to establish clinical legal education in the early 1970s were in some degree a response to this problem. See, e.g., David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87, 87-88 (1990).

208. A requirement enforced by a national multiple-choice test. For a brief description, see Francis D. Morrissey, *The Origins and Usefulness of the MPRE*, 50 B. EXAMINER 24 (1981).

209. See Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983).

210. See STEVENS, *supra* note 194, at 173-74.

purpose of excluding from the profession recent immigrants, most notably Jewish immigrants,²¹¹ for such persons were believed by the exponents of exclusivity to be less trustworthy, and less capable of the commitment to the public good required by public virtue. This was a very different, even a competing aim, to that animating the origins of American law teaching in the eighteenth century.

Insofar as the purpose was to effect an exclusion of Jews from membership in the bar, the increase in credentials requirements was a total failure. Neither did it work, if it was so intended, for Catholics, who found the means of credentialing their own by establishing many Catholic law schools. With respect to these groups, the use of academic credentials as qualifications opened the profession for those entrants who might otherwise have had difficulty in finding a suitable mentor or patron to vouch for their apprenticeship training. More than a few offspring of immigrants and other poor entered the competition for meritocratic academic credentials and prevailed over the sons of the overprivileged to secure professional opportunities that would not otherwise have been open to them. But those academic requirements surely did also have some exclusionary effect on some visible groups, notably women and blacks, who were less likely to be found among those making the investments in professional training required in increasing portions.

The absence of significant numbers of women and blacks among judges, other legal officers, and the practicing bar called attention to the endemic problem of legitimacy. Law teachers with entirely white male classes had reason for anxiety in their shared hope that the interest of the whole public would weigh heavily in the making of democratic decisions, or that widespread trust could be evoked by their students from whom so large a segment of the people were visibly excluded. There is perhaps a caution in this experience for democracies emerging in 1992: Care should be taken to assure access to legal training for members of all groups within the polity, and unduly rigorous academic standards can be an impediment to such access.

This is not to say that many American law schools ever embraced an aim to exclude members of any group from the legal profession, except those in the South that were parts of cultures that oppressed black citizens. Yet the increased credentialing requirements surely contributed to the slowness with which black Americans entered the legal profession in number. Concentrated as they were until mid-twentieth century in rural circumstances in the southern cotton culture remaining as a vestige

211. *See id.* at 100-01.

of slavery, few blacks had the opportunity to prepare themselves for prolonged and elevated professional law study.²¹² Law schools outside the South were open to black students, as indeed most were open to any person with a few years of college. Tuitions were universally modest, but financial aid was almost non-existent. There were a few law schools organized to train a black bar, but of these only Howard established itself.²¹³ To make the necessary investment in legal training, one needed to be sold on the reality of professional opportunity as a reward, and it seems unsurprising if few blacks were convinced of that opportunity. Even for those blacks who were not in the South, there was no career counseling, as indeed there was none for anyone, white or black, male or female. Thus, only a trickle of black students found their way into the legal profession, and the rise in technocratic requirements was a contributing cause.

A similar effect on the entry of women may be observed. There had been a small number of women entering law schools in the years following the Civil War,²¹⁴ and by 1890 almost all gender barriers to admission had been dropped except at the few male colleges, such as some in the Ivy League.²¹⁵ The Harvard Law faculty voted to admit women students in 1899, but they were defeated by vote of the Corporation.²¹⁶ James Bradley Thayer spoke for a majority of the faculty in saying that "he should regret the presence of a woman in his classes, because he feared it might affect the excellence of the work of the men; but he could not deny the inherent justice of the claim."²¹⁷ Joseph Beale, no radical, opened a law school for women in Cambridge in 1915,²¹⁸ announcing that it would be "as nearly [as possible] a replica of the Harvard Law School."²¹⁹

But few students enrolled in his school, or at the Portia School of Law in Boston, an institution also founded to serve women.²²⁰ In part,

212. For an account of the state of most American blacks prior to mid-twentieth century, see NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 1-58 (1991).

213. For a brief account of the establishment of Howard, see STEVENS, *supra* note 194, at 81.

214. Notwithstanding the decision of the Supreme Court in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), the legal constraints on women in law practice had largely disappeared by 1880. See Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276 (1971).

215. This was not, of course, a change wrought without resistance. It had been necessary for Clara Foltz to sue to gain admission to the state law school in California. See THOMAS G. BARNES, *HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY* 47-57 (1978); Barbara A. Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 700-14 (1988).

216. 2 WARREN, *supra* note 47, at 468.

217. *Id.*

218. *Cambridge Law School*, 5 WOMEN LAW. J. 15 (1915).

219. STEVENS, *supra* note 194, at 84. The school failed, in part for want of demand, and in part because Beale's daughter married and gave up law. *Id.*

220. *Id.* at 83.

this was surely because career opportunities for women were not good,²²¹ and the competing impulse to form families was so widely and strongly reinforced in the culture. These factors may have made the growing investment of time and foregone income required for the completion of professional law study a greater deterrent for women than for men. Women came soon to predominate in many of the professions requiring shorter periods of study and surer employment opportunities.²²² The tendency of women to avoid law study may have been encouraged by some law teachers whose manners reflected gender roles deeply rooted in the surrounding culture, but the length of formal education required was almost certainly a more important impediment than any sexism detected by those who did choose to study law. In any case, even though open to women, most law schools remained substantially masculine in ambience, and there was in such environments, we must suppose, ample sexist banter. The relative number of women entering the legal profession may actually have diminished in the early decades of this century.

It is, however, by no means clear that the number of women and black lawyers would have been much larger but for the elevation of academic credential requirements. Surely the causes of these phenomena were numerous, and it is uncertain how university law teachers as they worked before mid-twentieth century could realistically have done anything that they did not do that would have materially altered the demography of the profession.²²³ If law schools had stayed with two years of study instead of three or had tried harder to recruit or finance women and minority students,²²⁴ or dampened the masculinity of the environment, it seems unlikely that the demographic differences would have

221. A strong market bias against women lawyers only began to recede after World War II. See generally RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* (1985).

222. See LARSON, *supra* note 191, at 173.

223. There were, to be sure, steps that could have been taken that might have made a little difference. Today, we can imagine, for example, a law dean in 1920 manifesting the spirit of Branch Rickey (who broke the color line in organized baseball in 1946) who might have selected a black law teacher, say Charles Hamilton Houston, the teacher of Thurgood Marshall at Howard. Houston, a favorite student of Roscoe Pound, was certainly qualified to teach elsewhere. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 125-31 (1976); Woodard, *supra* note 202, at 820-23. In 1920, this would have required a rare degree of political and cultural heroism, far more than that required of Rickey in 1946. In the South, where it might have made a significant difference, it would have required epic heroism on the part of both teacher and dean. To measure some of the cultural disincentives from a contemporary criticism, see WILLIAM J. CASH, *THE MIND OF THE SOUTH* (1941). Cash describes a society in which a professor was in danger of dismissal for expressing admiration for Booker T. Washington. See *id.* at 323-24.

224. Louis Toepfer, appointed at Harvard in 1946, was the first such administrator. See Louis A. Toepfer, *Admissions: Procedures, Policies, Views*, 8 HARV. L. SCH. BULL., Feb. 3, 1957, at 3.

been great. Until the mid-twentieth century, given their modest admission standards, university law schools had too small a gatekeeping function, and too little influence on the demography of the profession to matter significantly.

Whatever these secondary consequences of the increase in academic credentials requirements, treating professional education as a financial investment is not otherwise directly at odds with the aims of moral education as practiced by persons such as Wythe or Lieber. It is certainly not demonstrable that lawyers in the past were more honorable in their participation in public affairs than they are today as a result of the malign influence of the marketplace. Even lawyers seeking wealth are unlikely to find it if they do not understand the moral premises of the legal tradition in which they work. Most contemporary American law students are therefore generally willing to accept as part of their professional training the discipline of disinterested thinking about specific and important public issues. Moreover, teachers of public virtue are necessarily preoccupied with issues of contemporary significance, so their interests must sometimes coincide with those of even the most narrowly careerist students. In addition, even the most technocratic students may in time find themselves in public careers, and those who do may be influenced in their public morality by their experience in the university.

Finally, it was no aim of Langdell or Ames to forsake moral education.²²⁵ There is no reason to believe that their own aims were to advance the financial well-being of their students or of the legal profession; to the contrary, their own aspirations appear to have been simply to improve the law by separating it from politics. Although their efforts on that score were at best only partly successful, the systematic study of reported cases advocated by them as a teaching device was and is a useful method for the inculcation of public virtue. This is so because case discussion, at least if conducted as Langdell envisioned, forces the impersonal weighing and balancing of competing values to resolve particular problems.²²⁶ It develops reasoning to persuade a public audience and habits of analysis rooted in the general public interest. Rewarded is the ability to think disinterestedly about highly contentious matters; punished is the passionate insistence on one's own idiosyncratic values or interests, or adherence to abstract theory yielding unwelcome results in

225. Cf. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) (To facilitate the learning and understanding of the law, one must view it as separate from morality. Law is not "a deduction from principles of ethics or admitted axioms or what not," but rather "prophecies of what the courts will do in fact.").

226. For a review of the costs and benefits of this mode of teaching, see Carrington, *supra* note 202, at 489-91.

application. Passions are disciplined. Students experiencing a heavy dose of such instruction are changed by it, and in some ways, they are made more fit for public responsibility. This is more likely to be true if the judicial opinions that are the grist of discussion reflect the American judicial tradition, or the Grand Manner, that displays balanced consideration of first principles than is the case where the opinions available to be studied manifest a crabbed formalism unduly attentive to the flyspecks in legal texts.

D. *Academization*

As technocratic professionalism engulfed modern society, there developed in the increasingly prosperous universities a meta-profession of those sustaining the learning from which the status of the professions derived. By 1890, the academic profession had taken on an independent life in America, taking forms established in Germany. Academicians began to transform law teaching.

The development of the full-time, career law teacher has likely had a significant effect on law teaching as moral education. The most obvious consequence was apparent at the outset, the creation of distance between law teachers and the institutions and relationships that comprise the law.

For some, this distance is benign because it facilitates disinterest. Those actively engaged in public affairs, as most law teachers were in the first century, acquire intellectual and moral baggage that can be an impediment to detached evaluation of the public good that is the discipline of republican virtue. Francis Lieber boasted that he "belonged to no party" when teaching,²²⁷ and well he may not have, but such virtue is not easily maintained by one who is a partisan when not teaching. Such tension is less likely to arise when the teacher's involvement is judicial, as it generally was, but even judges acquire intellectual investments in their decisions that encumber their consideration of interests and values in conflict with those decisions. The professional academic may be less encumbered in this way. Not least among the reasons that this is so was the emergence of academic freedom and tenure, providing job security for law teachers uttering thoughts unwelcome to those in power.²²⁸

227. FRANCIS LIEBER, *THE ANCIENT AND THE MODERN TEACHER OF POLITICS* 12 (1860); see also Letter from Francis Lieber to Oscar Lieber, in LIEBER, *supra* note 179, at 313.

228. Two highly developed features of the German tradition of academic freedom that presented two sometimes conflicting visions were the *lehrnfreiheit*, the individual professor as autonomous and subject to the control of no hierarchy, and *Freiheit der Wissenschaft*, the freedom of the faculty to govern itself. See generally Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269-71 (1988).

There are many examples of law teachers who have exploited the opportunity afforded by the academic environment to achieve a high level of virtuous disinterest in their writing while rooting it in concern for practical consequences. As an exemplar whose work has lately resurfaced, Harry Kalven comes to mind. Living virtually his entire life in the academic environment of Hyde Park, this "least doctrinaire of men"²²⁹ devoted his career to "severe questioning of the things he loved best,"²³⁰ ever mistrustful of his own generalizations and of all theory.²³¹

On the other hand, an excess of distance from real affairs can weaken the law teacher's judgment about public affairs. The discipline of republican virtue entails consideration of real public interests realistically evaluated;²³² persons who lack experience in public affairs may have greater difficulty in leading students to make mature assessments of those realities. It is not without cause that academic life is often spoken of as a cloister.

No better example of a sheltered intellect can be found than James Barr Ames, who was the first pure academician to teach law at Harvard. Ames was employed to teach law immediately after completing the requirements for his degree, and devoted his entire career to teaching in the Harvard cloister.²³³ There is no doubt that he was a stimulating classroom teacher and a man of consummate virtue, loved and admired by both students and colleagues. One of my own teachers, Austin Scott, who was a student of Ames, paid Ames a very high compliment in 1955 when he said to me and others that he had not felt the need for a course in professional ethics because he had known James Barr Ames.

Nevertheless, despite his many admirable qualities, Ames must be reckoned a man of deplorable judgment on issues of public import. I offer three examples. First, as a teacher of Civil Procedure, he emphasized the Hilary Rules as sound law that his students should master. The Hilary Rules had been adopted in England in 1834 and quickly repealed in 1848 because they made unrealistic demands on the skill and information of counsel and produced much injustice.²³⁴ He held out as a model

229. HARRY KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* xxii (Jamie Kalven ed., 1988).

230. *Id.* (characterization attributed to Ramsey Clark).

231. *See id.* at xvi.

232. *See* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 18-19 (1986).

233. SUTHERLAND, *supra* note 82, at 184.

234. *See generally* W.S. Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMBRIDGE L.J. 261 (1923).

of good professionalism the late Baron Parke,²³⁵ who was said to have boasted of his ability to decide cases under the Hilary Rules without reaching the substantive merits, and who on that account was ridiculed by later judicial law reformers.

Second, Dean Ames also often taught Negotiable Instruments. He did not learn of the existence of the Commission on Uniform State Laws, an important national institution established in 1890, until its efforts had resulted in the adoption of its Negotiable Instruments Law by four states, a reform of considerable advantage to banks and others dealing regularly in commercial paper and imposing no apparent disadvantage on anyone. On learning of this development, Ames set to the task of derailing adoption of the Law in other states, arguing to legislatures that it would be better to allow the case law in the area to "work itself pure" over a few more decades of litigation.²³⁶ His argument was unpersuasive to almost everyone who heard it.²³⁷

Third, while Dean Ames was asked to approve the appointment of his colleague, Joseph Beale, as a visitor to help found the University of Chicago Law School. At the time, a most distinguished member of the Chicago faculty was Ernst Freund, a political scientist highly regarded for his writing on the subject of Legislation. Ames conditioned his approval of Beale's visit on a requirement that Freund not be permitted to teach in the new law school, lest Chicago students be poisoned with the unprofessional insights of this admirable scholar. Beale made the visit, and Freund was permitted to teach law students, while Ames had meanwhile demonstrated a preposterous ambition to impose intellectual isolation on law students.²³⁸

Thus, for all of his admirable attributes, Ames may stand as a paradigm of the legal scholar who failed to ground his work in reality and who devoted his career to a romance with ideas that did not work. His were the "brilliant" ideas unsuited to the real experience of ordinary people.²³⁹ That later observers perceived this to be a general problem with

235. Ames's admiration for Parke was recorded by Louis Brandeis. See ALPHEUS T. MASON, *BRANDEIS: A FREE MAN'S LIFE* 37 (1946). For a ridiculing of Parke, see Serjeant Hayes, *Crogate's Case: A Dialogue in the Shades on Special Pleading Reform*, quoted and discussed in Holdsworth, *supra* note 234, at 271-73.

236. See SUTHERLAND, *supra* note 82, at 212-13. For Ames's initial argument against the Law, see James B. Ames, *The Negotiable Instruments Law*, 14 HARV. L. REV. 241 (1900).

237. The Negotiable Instruments Law was the Commissioners' first effort and its most successful before the Uniform Commercial Code. It was adopted in every state. JAMES WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 3 (3d ed. 1988).

238. See FRANK L. ELLSWORTH, *LAW ON THE MIDWAY* 68-73 (1977).

239. Cf. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986) (arguing that brilliant, paradigm-shifting legal theories are generally useless and false).

academic law was a major impetus to the development of clinical law teaching in the 1970s.²⁴⁰

In addition to creating the distance between law teachers and the actual world of law that produced this type of thinking, the academization of the law teacher can also have the effect of redirecting interest and energy. Much of the modern American university's tradition and ideology is centered on the German institutions of the graduate school and the Ph.D. degree. German ideas about higher education arrived in Cambridge with the return of George Ticknor and Edward Everett in 1819.²⁴¹ It reached apogee with the founding of the graduate school at Johns Hopkins University in 1876.²⁴² It emphasized intellectual specialization, hierarchical preoccupation with status, pursuit of abstraction, and withdrawal from concerns with the practical applications of learning.

An effect of the rising status of the academic profession on law has been to socialize law teachers to these, and perhaps other, academic values. By 1920, it was already questionable whether some law professors were teaching law, or perhaps pursuing some other discipline. By 1980, that was no longer a question, for it was clear that many had opted for a different professional identity than lawyer and had as academics chosen to pursue inquiries a considerable distance removed from law. As Francis Allen has put it,²⁴³ the academically elite law school is increasingly a colonial outpost of the graduate school, dominated by persons whose primary interests are in almost any other discipline than law.²⁴⁴

As Charles Collier has recently observed in the pages of this Journal, academization is readily observed in the titles of articles published in distinguished periodicals.²⁴⁵ Little of today's legal scholarship resembles Brandeis and Warren on *The Law of Ponds*, Beale on *Tickets*, or Williston on *Successive Promises of the Same Performance*.²⁴⁶ Contemporary

240. See generally William Pincus, *The Clinical Component of University Professional Education*, 32 OHIO ST. L.J. 283 (1971). For current comment, see Barnhizer, *supra* note 207. It is not clear that clinical education has served this purpose. To the contrary, it may have excused non-clinical law teachers from the burdens of concern for practical reality by enabling them to leave that to the clinicians.

241. See VAN W. BROOKS, *THE FLOWERING OF NEW ENGLAND: 1815-1865*, at 89-104 (1936).

242. The academic profession first gained its distinct identity with the establishment of the graduate school and the Ph.D. degree at Hopkins. See HUGH HAWKINS, *PIONEER: A HISTORY OF THE JOHNS HOPKINS UNIVERSITY, 1874-1889*, at 81, 122-24 (1960). These innovations had appeared at the University of Berlin in the post-Napoleonic era.

243. See Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 183, 184-85 (Peter Hay & Michael H. Hoeflich eds., 1988).

244. See Arthur A. Leff, *Law and*, 87 YALE L.J. 989 (1978).

245. See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 196 (1991).

246. See *id.* at 198.

work is much longer, more heavily documented, and much more prone to pursue any intellectual trails leading into other professional literatures. Almost a parody is the new journal very recently announced, *Law &*, a scholarly publication that will publish papers on any topic as long as the paper is not limited to law.²⁴⁷

The consequences of this reorientation of law teachers on moral education is not clear.²⁴⁸ Interdisciplinary interest that is not too far removed from the realities that are the law's proper concern relieves the intellectual isolation created by the technocratic impulse that infected it, and provides an opportunity for the rediscovery of the relationship of law to all learning that bears on the culture of which it is a part. Such broader learning, exemplified in the work of Kalven and others, is the proper domain of public persons and would have been welcomed by Jefferson, Wythe, and Lieber, and especially by David Hoffman.²⁴⁹ Yet there is a difference between the broad range of inquiry appropriate to public decisionmaking and academic discourse. Where the virtuous public person is a consumer of usable information that can be applied to this day's decision, the true academic is a creator of information with limited regard for its utility except to other truthseekers. Thus, even in its interdisciplinary aspect, the academization of law presents some tension with the mission of law teaching.²⁵⁰ The scholar's truth competes with the citizen's virtue as a sovereign value for law teaching, perhaps as much as does the aim of the lawyer's competence.

This competition is manifested in a tendency of the academic profession to glory in the worldly irrelevance of its deepest insights.²⁵¹ "Today," we are told, "everyone is talking about theory."²⁵² In this, the Prussianized American academic profession sometimes seems to be an

247. The announcement brochure was distributed in February 1992 by the University of Southern California Law School.

248. For other assessments, see Francis A. Allen, *Legal Scholarship: Present Status and Future Prospects*, 33 J. LEGAL EDUC. 403 (1983); David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109 (1989); Philip C. Kissam, *The Decline of Law School Professionalism*, 134 U. PA. L. REV. 251 (1986); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988).

249. Cf. DAVID HOFFMAN, A COURSE OF LEGAL STUDY RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES 32-33 (1817) (recommending that a course of study of the law include a broad range of subjects, including moral and political philosophy).

250. For an expression of the glib assumption that the academic enterprise necessarily reinforces good teaching, see Carrington, *supra* note 29, at 406-11. For a recent review of the problem, see Marin R. Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367 (1990).

251. For an expression by an American lawyer that "metaphysics" is "the highest wisdom," and therefore the first aim of higher education, see ROBERT M. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 98 (1936).

252. Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 1 (1986).

almost perfect complement to the English legal profession, which is said to glory in its aversion to theory.²⁵³ Academic pursuit of abstraction may be not merely a digression from pragmatic concerns, but may sometimes be associated with a tendency to intellectual effort that is ideologically dogmatic and hence harmful to the pursuit of republican virtue. Ideological dogmatism can result from inattention to the messy details that so often distress theory. But public virtue, like God, is in the details; sweeping statements like some of those made here are seldom the means for finding the common ground that resolves public issues with results that fairly evaluate competing interests and thereby save the whole. To write this article, for example, may be deemed something less than an act of public virtue: What is more theoretical than to decry theory?

In any case, it seems that where the line of American law teachers following Wythe have taught pragmatism, those recently following intellectual trails into economics or the humanities seem often to manifest a disinclination to that mode of thought.²⁵⁴ Increasingly partisan dogmatism is evident in the American academy today,²⁵⁵ and may now be affecting law teaching. Although moral education can proceed from a considerable range of partisan commitments, republican virtue is critically impaired by partisanship that makes severe moral judgments about rival views.²⁵⁶ The effect of the intolerance of contemporary "political correctness" on the willingness or ability of students to practice the traits of virtue is uncertain, but seems unpromising. Strong is the contrast with the Wythe tradition.

There is yet another hazard in academization. By creating distance between the law teacher and the realities of law, it can increase the effective distance between teacher and student. A teacher who is seen by students to be disengaged from political reality and the humdrum affairs of professional life may be disadvantaged in the effort to inculcate moral standards applicable to professional thinking and conduct in public roles. Thus, a professor of literary or economic theory, however able, will not be a professional role model for novice public lawyers, however much the professor manifests the appropriate intellectual skills.

253. See PATRICK S. ATIYAH, *PRAGMATISM AND THEORY IN ENGLISH LAW* 3 (1987).

254. Professor Collier seems an example of one who is reconciled to the absence of worldly consequence to the institutional pursuits he favors. See Collier, *supra* note 245, at 271-72.

255. For a brief description of the phenomenon, see John Searle, *The Storm over the University*, N.Y. REV. BOOKS, Dec. 6, 1990, at 34. For a broadside, see DINESH D'SOUZA, *ILLIBERAL EDUCATION* (1991).

256. Cf. Michael I. Swygert, *Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803, 820 (1989) ("A moral perspective looks with hope to the future without being overly judgmental about the past.").

If the founders of 1992 choose to inculcate republican virtue in academic institutions in order to stabilize democratic politics, they will need to achieve a proper balance between theory and practice. As Jefferson envisioned, a university law school has an exceptional opportunity to bridge the worlds of ideas and affairs, supporting traffic in both directions to bring academic thought into contact with reality and practical governance into contact with disinterested inquiry, with benefits flowing in both directions.²⁵⁷ Such a bridge requires footings at either end, but there seems to be some operative law of physics that causes the one end or the other of such bridges to become dismoored. It is therefore a major challenge of contemporary founders who would train public leaders in academic institutions to engineer the prevention of that effect.

E. *Other External Influences*

These four impulses from abroad do not exhaust the list of those that have influenced American law teaching. World War II was an enormous social force. Jim Crow may well have died on the battlefields of Europe, for the struggle against Nazism carried a strong message to the victors regarding race relations. Segregation would surely have faded in time in any case, but its demise was hastened by the increased intolerance of most Americans for the southern tradition of racial oppression. The Civil Rights Act of 1964 was an expression of that development and thus, in part, a reaction against Hitler.

Law schools were predictably receptive to the inclusion of African-American and women students, and, after 1964, their numbers increased rapidly.²⁵⁸ But it would be unjust to claim this effect as the product of law school policies. Although law schools played a role by exercising their newly acquired gatekeeping functions to provide more minority lawyers, the opening of the legal profession to minorities and women was chiefly a triumph of American culture, a prevailing of the spirit of the Declaration of Independence. It was more a product of the teaching of George Wythe than of the efforts of any law leaders living in the twentieth century.

It also seems that the Vietnam War was a manifestation of another current having significant effects on American culture and hence on American law teaching. It is too soon to judge how that influence will play out, but the alienation and hostility that the war and related events engendered in many young Americans can now be seen to abide in the

257. I am confident that this metaphor comes from Karl Llewellyn, but I have not found the source.

258. Data is published annually by the American Bar Association Section on Legal Education and Admissions to the Bar.

literary efforts of some middle-aged law teachers. To the extent that the moral education favored by Wythe and his descendants entailed moral commitment to public institutions, law teaching in America may have declined in quality as a result of the alienation caused by those external events.

Meanwhile, despite these numerous travails, it is at least possible that American university education in law is still performing the mission that was assigned to it by Thomas Jefferson and others, most fully articulated by Francis Lieber, and performed by George Wythe, his students at Transylvania, Joseph Story, and now countless others. If so, law teachers are to that degree exercising the influence through their students that the Revolutionaries intended them to exert. But that influence is manifestly subordinate to the great winds of change that circumnavigate the planet; like Lorenz's butterflies, law teachers may make a difference, but we are foolish to think that the world awaits the direction of law teachers in matters of political morality.

VI. THE LAW TEACHER AS PUBLIC PERSON

A second means by which American law teachers may influence the course of law and public affairs is through direct public or political activity. In their public activities, law professors act as individual citizens. The means to influence open to law professors are mostly the same as those open to non-academic lawyers or, in some cases, laypersons. In some circumstances, law teachers may have an edge derived from their professional status and from the "contacts" acquired through their alumni and former students, but this is not always so. In some circumstances, to be an academician is an impediment to gaining attention. These opportunities for service include political activity at the local, state, and federal levels; work with the organized bar or other organizations having a stake and an active program of involvement in public affairs; consultation with local, state, and federal legislative bodies; and professional service advocating causes before all manner of forums. An appointment to an American law faculty is a license to engage in all of these activities on one's own terms, provided one can earn a welcome in the appropriate precincts.

There are disincentives to participation in such activities. To acquire the welcome essential to be useful, it is often necessary to associate on friendly terms with persons who are not always of sufficient status to confer honor on those who associate with them. One must go to meetings and not only talk, but also listen politely, often more than once to the same bad idea. One must study and think about issues and problems that are of immediate concern to others, and not only those issues most

attractive to one's own interests. The issues to be addressed are often distastefully narrow. To be effective, one must compromise and accommodate. One must repeat one's self. One must risk the sting of visible defeat. To secure the best opportunities, one must sometimes first win trust by bearing the most unwelcome burdens, performing prosaic tasks that do less honor to one's talents than one might wish, for, alas, to be an admiral in law and politics, one must generally spend some time in the boiler rooms of legal and political institutions.

For the most part, however, those individual American law professors who have in the twentieth century influenced the development of American law have not been daunted by these disincentives and have achieved influence at least partly by these conventional means open to all. By such common means more than a few law professors have effected change in the law. Others have secured high judicial or other public office where they performed virtuous service. By their labors, they may also have incidentally transmitted to other lawyers and to their students the moral message that the concerned Revolutionaries of the eighteenth century would have us learn regarding the need for disinterested public service. Many have taught public morality by example.

This source of influence of American legal education on the law has been significant. It is, however, threatened by both late nineteenth-century pursuits of the investor's human capital and of the scholar's truth. Technocratic law and the financial rewards associated with large investments in professional education can be a threat to the participation of law teachers in public affairs if professors, like some students, become chiefly engaged in maximizing their marginal revenue in lieu of pursuing the common good as private ministers without portfolio. Endangered in American universities is the example of Louis Pasteur who applied his science to a series of public problems without leaving the main themes of his work or becoming "consultant to silkworm growers, wine makers, brewers, or poultry men."²⁵⁹ Income maximization by law professors may also infect the public with mistrust of motives: Law professors who sell the trademark of their universities to express in a court or other forums professional opinions agreeable to those who pay for them endanger both the repute and the reality of academic disinterest. Those academic lawyers who establish regular relations with clients or firms sacrifice disinterest and thereby diminish their ability to perform the public mission to which Jefferson and Wythe called them.²⁶⁰

259. ABRAHAM FLEXNER, *UNIVERSITIES: AMERICAN, ENGLISH, GERMAN* 132 (1930).

260. Cf. Bruce A. Ackerman, *The Marketplace of Ideas*, 90 YALE L. J. 1131 (1981) (urging law schools to avoid compromising their integrity as scholarly communities by refusing to publish "party commissioned scholarship" in their law reviews).

Likewise, academization threatens the public role of the law teacher, but in quite different ways. Involvement in public affairs fits poorly with the reward systems of the academic profession. The disincentives to public involvement that I enumerated may be especially unattractive to genuinely academic persons. It is also possible that persons who select themselves to be fully committed to the more purely academic profession and its values are less suited to public activities and thus unlikely to enjoy much success in any event. There does seem at times to be, as Woodrow Wilson observed, a "perennial misunderstanding between men who write and men who act."²⁶¹

For these reasons, there is but little room in the American academy today for the likes of the judge-teachers of the past. It is indeed not certain that the influence achieved by such law teachers in their roles as public persons can or will be maintained by their successors; possibly American law teachers will in time be as withdrawn from public affairs as their English counterparts. Any founders of 1992 who seek to inculcate standards of conduct suitable for democratic leadership may therefore question whether there are not better ways to link those teaching law to the contemporary concerns of public life.

VII. THE INFLUENCE OF ACADEMIC LITERATURE ON AMERICAN LAW

The third possibility for influence is through academic authorship. Academic literature played a very small role indeed in the formative first century of American law. William Blackstone had an influence on the American legal profession almost contrary to his purpose in writing, for his work was used chiefly to enable untrained persons to perform legal services.²⁶² St. George Tucker's contribution in editing Blackstone was substantial. James Kent's *Commentaries on American Law*²⁶³ were undeniably influential, at least in the formation of American property law. Parts of the extended work of Justice Joseph Story²⁶⁴ may have influenced his brethren on the Court. George Sharswood of the University of Pennsylvania wrote a widely read work on professional ethics.²⁶⁵ Simon

261. NICHOLAS J. DEMERATH ET AL., *POWER, PRESIDENTS, AND PROFESSORS* 27 (1967).

262. See JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 256-57 (1950); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

263. KENT, *supra* note 96.

264. See JOSEPH STORY, *COMMENTARIES* (1832).

265. GEORGE SHARSWOOD, *PROFESSIONAL ETHICS* (1854).

Greenleaf's *Evidence*²⁶⁶ was read by lawyers and judges across the country, and was cited by more than a few courts. Of these authors, only Tucker and Greenleaf can be counted as genuine academicians. While writing at Columbia, Kent's relation to the university was nominal, and the impact of his work derived largely from his decades-long role as the intellectual leader of the highest court in the most important state, New York. The work of Justice Story, although written at Harvard while Story was lecturing regularly, can also be largely discounted for similar reasons. The authority of Sharswood's work derived largely from his prominence as a judge and public figure. Any of these works if written by a genuinely academic author might well have achieved unmarked obscurity.

George Wythe, the greatest teacher, made no contribution at all to academic literature. George Robertson, the most important teacher at Transylvania, wrote little²⁶⁷ other than judicial opinions, and his work is now long forgotten. Professor Timothy Walker of the University of Cincinnati wrote an excellent one-volume work on American law that saw six antebellum editions.²⁶⁸ It was addressed to a lay audience, and although useful had no visible influence on the development of the law. The most intellectually ambitious body of work on American law in the era before the Civil War was the work of Francis Lieber.²⁶⁹ Although much of his work was widely read and admired by men such as Kent and Story, it is difficult to trace any consequence to his work until he served actively in the War Department during the Civil War. There, he was the author of General Orders 100, controlling the conduct of Union troops in occupied territory, an Order adopted in the same words by the Prussian army in 1870, and adopted in 1907 by a Hague Convention as the international law of war.²⁷⁰ In this role, he was a person of large and genuine influence, not only on the events of his own time, but of our own as well—as manifested by the world reaction to the mistreatment of prisoners taken in 1991.

266. SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* (1848). The thirteenth edition of this work appeared in 1876.

267. See GEORGE ROBERTSON, *SCRAP BOOK ON LAW AND POLITICS, MEN AND TIMES* (1855).

268. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (1837). The eleventh edition of this work appeared in 1905.

269. See FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* (1880); FRANCIS LIEBER, *ON CIVIL LIBERTIES AND SELF-GOVERNMENT* (1874); FRANCIS LIEBER, *PROPERTY AND LABOR* (1840). Lieber can be said to have been the first American scholar of law-and-economics and also the first of law-and-literary criticism.

270. See generally FREIDEL, *supra* note 178; ELIHU ROOT, *ADDRESSES ON INTERNATIONAL SUBJECTS* 89-103 (1916).

One academic author possibly having a material influence on legal thought in antebellum America was Thomas Cooper, sometime President of the University of South Carolina,²⁷¹ and immediate predecessor to Francis Lieber. Cooper was in his youth "an English Jacobin."²⁷² After coming to America, he served a prison term for sedition against President Adams, published books on chemistry, bankruptcy law, libel law, and political economy, and edited the American edition of Justinian.²⁷³ He also earned the condemnation of Daniel Webster as the "Schoolmaster of Slavery," for he was thought to be the author or chief propagator of the rationalization that slavery is a necessary condition of a free society.²⁷⁴ Cooper's theory (if indeed it was his) was that an underclass is inevitable, and the preservation of republican freedom for the overclass depends on effective control and nurture of that inevitable underclass, a condition maintainable over time only by means of the institution of slavery. This thesis was assuredly heard on the lips of many an antebellum politician. Cooper's possible importance as a source of this theory illustrates how academic authors can be "influential" by uttering theory that is congenial to their cultures.

As noted, there was at the outset of the second century of American law a major shift in theory and method animated by both the post-War search for order and the global impulse to technocracy. To attribute that moment of formalism to the efforts of positivist legal theoreticians such as Ames would deny the effects of the overwhelming cultural force that underlay the development. The most that might be conceded is that the moment was a bit longer on account of their efforts.

Indeed, the Langdell "scientific" theory of law was never accepted by thoughtful contemporaries.²⁷⁵ Not even Ames's colleagues at Harvard, James Bradley Thayer²⁷⁶ and especially John Chipman Gray,²⁷⁷ were seriously infected by the momentary spirit of formalism. Formalism was bitterly denounced by Oliver Wendell Holmes, Jr, in

271. See generally MALONE, *supra* note 99.

272. *Id.* at 34-72.

273. *Id.* at 119-36, 211-47.

274. The idea had solid English origins dating from 1701. See TISE, *supra* note 148, at 97-123.

275. See, e.g., *Report of the Committee on Legal Education*, 15 REP. A.B.A. 317 (1892). Langdell's fate in this respect was much the same as that of the Sophist, Protagoras, who purported to teach a science of politics, but whose discipline was in time recognized as lacking substance. See Robert R. Bolgar, *Training of Elites in Greek Education*, in GOVERNING ELITES: STUDIES IN TRAINING AND SELECTION, *supra* note 77, at 38-40.

276. See, e.g., James B. Thayer, *Law and Logic*, 14 HARV. L. REV. 139 (1900). In an earlier work, Thayer went so far as to contend that constitutional rights reside primarily in the culture, not in legal texts, nor in the powers of the judiciary. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

277. See JOHN C. GRAY, *THE NATURE AND SOURCES OF LAW* (1910).

1897.²⁷⁸ It seems not to have impeded the avowedly politicized efforts of Cooley at the University of Michigan, a judge-professor cut in the antebellum mold, whose work on American Constitutional Law was widely cited by the Supreme Court,²⁷⁹ albeit at times in support of decisions in which he might not have concurred. And assuredly the moment did not control the early-twentieth-century teaching of Eugene Gilmore at the University of Wisconsin, a committed political Progressive,²⁸⁰ whose ideas became the Legal Realism of Columbia and Yale a few decades later.²⁸¹ Nor did it seem to bear on the work of the California Progressives who founded the School of Jurisprudence at Berkeley.²⁸² By the time of Roscoe Pound's deanship in 1915, the moment of apolitical formalism was in full retreat.²⁸³ He was appointed as dean despite a sentiment he owned about his colleagues' teaching that would do honor to contemporary radicals, and incidentally reflected his exaggerated conception of the influence of American law teaching:

[T]he conflict between our law and those who are working for social progress has its roots ultimately in our teaching of the law. . . . [I]t is

278. See Holmes, *supra* note 225.

279. American academicians have seldom been subject to the monstrous discourtesy of being treated as unworthy of judicial attention. One never needed to die to be cited. See DAWSON, *supra* note 26, at 97.

280. For a chronicle of Progressivism and the politics of the times, see RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955). The Progressive Movement was in some respects a renewal of the democratic impulse, an effort to engage the people actively in governing at all levels.

281. Gilmore's interests spanned environmental law, criminology, and law-and-economics. For an expression of his views, see Eugene Gilmore, *Some Criticisms of Legal Education*, 7 A.B.A. J. 227 (1921). For an account of his role in the founding of the American Law Institute, see N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 67-70 (1990). Underhill Moore, Ernest Lorenzen, and Walter Wheeler Cook were junior associates of Gilmore's at Wisconsin. On the subsequent careers of this trio at Yale, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); John H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459 (1979). For an account of the movement in which they had earlier engaged at Columbia, see Brainerd Currie, *The Materials of Law Study*, 8 J. LEGAL EDUC. 1 (1955).

282. See generally Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall* (1979) (unpublished Ph.D. thesis, University of California at Berkeley).

283. In retreat, it may have attracted some overreactions, exemplified by the expression of radical "realist" views such as those suggesting that judges stop publishing opinions. See, e.g., Joseph W. Bingham, *What Is the Law?*, 11 MICH. L. REV. 1 (1912); see also Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 434-35 (1969) (noting some commentators' opinions that judges' deciding law results in government of men rather than law or even in tyranny or despotism).

not recall of judges or recall of judicial decisions that should be invoked, but rather recall of law teachers, or at least recall of a great deal of law teaching.²⁸⁴

The moment of formalism probably gave heart to the efforts of great academic treatise writers: Wigmore, Williston, Scott, and a few others. But even these worthy scholars were seldom deceived by antiseptic formalism. Their work was, as intended, useful to courts and lawyers in comprehending whole fields of American private law that had never before been synthesized. Some judicial users of such works may have treated them in a formal way, much as an English court might have treated a Parliamentary enactment. But the authors were not so innocent as to suppose an absence of political content in their work, except insofar as they, as virtuous citizens of the republic, eschewed partisanship.

Just as Langdell and Ames can scarcely be credited or blamed for the moment of formalism, so its demise can scarcely be attributed to the literary efforts of Roscoe Pound, Karl Llewellyn, and other academics.²⁸⁵ It was only a moment, a mere sand bar in the course of a great river, destined to be swept downstream at the next rising of the current. Pound and Llewellyn, however they may have seen themselves, were less the cause than the manifestation of its disappearance.

As it happens, both Pound and Llewellyn had more consequential work to perform, Pound as one of the most influential judicial law reformers of the twentieth century,²⁸⁶ and Llewellyn as the draftsman of the Uniform Commercial Code.²⁸⁷ Although each produced academic literature associated with his reform endeavors, much of it could have been regarded by the most elite academic standards as more pedestrian than Pound's writings on Sociological Jurisprudence²⁸⁸ or Llewellyn's on Legal Realism.²⁸⁹ On the other hand, Llewellyn especially came to see his own legal theory as essentially anti-general, anti-ideological, even

284. Roscoe Pound, *Taught Law*, PROC. ASS'N AM. L. SCHS., Aug. 26, 27, 1912, at 55, 60; see also Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Peter W. Martin, 'Of the Law and the River,' and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985).

285. Cf. John P. Dawson, *Legal Realism and Legal Scholarship*, 33 J. LEGAL EDUC. 406, 407 (1983). Atiyah and Summers are cautious, but seem to attach more consequence to the corrective writing of the Realists than circumstances warrant. See ATIYAH & SUMMERS, *supra* note 2, at 251-52.

286. See PAUL SAYRE, *THE LIFE OF ROSCOE POUND* (1948).

287. WHITE & SUMMERS, *supra* note 237, at 3-6.

288. See, e.g., ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1954); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

289. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

anti-theoretical.²⁹⁰ In this, he manifested a kinship with earlier American legal pragmatists such as Jefferson and the antebellum law teachers.

No sooner did legal academic writing appear in America than it became an additional source of authority for judicial decisions that needed to be explained to a doubting public. But such citation was often use, not influence. One must generally express thoughts agreeable to authority, as Cooley, for example, often did, to merit frequent citation. To take a more recent example, Richard Marcus has pointed to an admirable article by Abram Chayes as much cited because it struck a welcome note;²⁹¹ whether its content actually influenced events seems very dubious.²⁹² American courts had long cited almost anything to justify their decisions, and social science data were soon to be used in the same way.²⁹³ But academic argument or analysis, or even stubborn data,²⁹⁴ leading to an unwelcome conclusion is likely to be ignored by judges when engaged in self-justification. Legislative committees and administrative agencies often use academic work in much the same way.

Still influential are treatise writers who provide structure for the thinking of lawyers and judges about legal doctrine. The structure they provide enables legal discourse to proceed more effectively. But many, perhaps most, contemporary treatises are written by lawyers, not academicians. Unlike the classical private law treatises, most find their subject and their structure in legislation, and serve to synthesize judicial exegesis of legislation. This is very useful work, and the person who does it earns and receives a measure of influence with judges and lawyers. Seldom, however, is this form of influence now achieved by the academic elite,²⁹⁵ who tend to scorn such humdrum work,²⁹⁶ and some of whom seem even to have concluded that the opinions of politically uncongenial judges less

290. See KARL N. LLEWELLYN, *JURISPRUDENCE* (1970).

291. See Richard Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647, 648 (1988) (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976)).

292. See *id.*

293. Louis Brandeis filed his historic data-filled brief in *Muller v. Oregon*, 208 U. S. 412 (1908). This may be taken as a sign that in that year Brandeis believed that the sitting Justices recognized their political responsibility and were interested in the social consequences of their decisions.

294. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); see also Paul D. Carrington, *Foreword: The Scientific Study of Legal Institutions*, LAW & CONTEMP. PROBS., Summer 1988, at 1.

295. See A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981). Excellent counterexamples include ARTHUR LARSON, *WORKMEN'S COMPENSATION FOR OCCUPATIONAL INJURIES AND DEATH* (1972); GEORGE E. PALMER, *RESTITUTION* (1980); CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* (1969).

296. See, e.g., HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* 32 (1972).

lettered than themselves are unworthy of close attention.²⁹⁷ Although this may be a corrective for an excessive preoccupation with the work of judges that may have characterized academic writing in the past,²⁹⁸ it marks as well a surrender of potential political influence. One hears too infrequently today Harry Kalven's repeatedly uttered reminder that academic work is "so much easier and less responsible" than is that of men and women who are obligated to decide.²⁹⁹

An example of the influence of academic writing is provided by the development of American tort law. There has been much academic writing on the subject in the twentieth century and tort law has evolved substantially over that time. Whether the change in the law is the consequence of the excellent, pungent academic writing done by persons such as Leon Green³⁰⁰ seems doubtful.³⁰¹ Surely a bigger factor has been the political activity of labor unions, trial lawyers, and others who amplify the stark fact that American law made in the nineteenth century was in twentieth-century minds appallingly inconsiderate of accident victims. One did not need to read Green to see that something had to be done. On the other hand, in order to *do* something about the law of torts, it helped for the professor to become a Justice, as Professor Roger Traynor did.³⁰²

What was in fact done to the law of torts may be no credit to anyone, for we have designed a monstrously expensive system of compensation that benefits lawyers more than victims. It is unlikely in the extreme that any other nation would wittingly adopt American tort law. Professors Robert Keeton and Jeffrey O'Connell, as academic ministers without portfolios, have led an assault on that system.³⁰³ To the extent that they have been effective, it has been because they have worked within the

297. For another view of the continuing importance of the "unity of discourse" between law teachers and judges, see Rubin, *supra* note 248, at 1859-65.

298. Cf. Graham Hughes, *The Great American Legal Scholarship Bazaar*, 33 J. LEGAL EDUC. 424, 427 (1983); Mark Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 YALE L.J. 1205 (1981).

299. See KALVEN, *supra* note 229, at xxiv.

300. See, e.g., LEON GREEN, JUDGE AND JURY (1930); LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927); LEON GREEN, TRAFFIC VICTIMS, TORT LAW AND INSURANCE (1958); cf. G. Edward White, *The Impact of Legal Science on Tort Law 1890-1910*, 78 COLUM. L. REV. 213 (1978).

301. But see George Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). Cf. GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

302. As a Justice of the Supreme Court of California, Roger Traynor played a significant role in the transformation of American tort law. It is perverse to contend that Traynor's judicial efforts are a manifestation of academic influence. See ATIYAH & SUMMERS, *supra* note 2, at 402.

303. See ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); cf. Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

political system. Their academic literary product was an expression of direct political initiatives and seldom burdened their readers with theoretical exegesis.

It is, however, for legal academics an unwelcome reality that there is often a choice to be made between work that can and may be applied usefully to current public issues and work that is intellectually more ambitious, more personally gratifying, and more likely to win recognition among academicians. For scholars who write literature not confronting in practical terms issues of current concern to persons making decisions, their certain fate is to be ignored by those whom they ignore.³⁰⁴

Although the relationship is far from exact, it may be true within the operative limits that intellectual ambition and political influence are negative correlates. This is so because persons who make public decisions often welcome authoritative advice on narrower issues that can be resolved with little concern for broad social and political values, but are seldom influenced by the politics or philosophies of academics, or even of their law clerks fresh from the academy. The possibility that much academically fashionable interdisciplinary legal scholarship will ever find application in the corridors of power seems remote. Those working in the stratosphere of economic theories of law, or who debate the congruence of constitutional doctrine with classical political theory, or who deconstruct such discourses, have made a choice to remove themselves for at least a time from the arena in which direct influence on real events is possible. As Tocqueville observed in this very context: "The world is not led by long or learned demonstrations: a rapid glance at particular incidents, the daily study of the fleeting passions of the multitude, the accidents of time, and the art of turning them to account, decide all its affairs."³⁰⁵

For this reason, theorizing about law is perhaps the activity of law professors least likely to bear on the course of events; abstraction is often the enemy of influence.³⁰⁶ Perhaps political inconsequentiality is the ultimate fate of all philosophy. But it is in any case true for America and presumably for other legally constrained democracies that large public decisions are seldom strongly influenced by legal theory. Broad precepts are almost always subordinated to the practical considerations that control decisionmaking in such polities. Indeed, for America it is true that

304. See Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986).

305. 2 TOCQUEVILLE, *supra* note 66, at 43.

306. Cf. H.F. Jolowicz, *Utility and Elegance in Civil Law Studies*, 65 LAW Q. REV. 322 (1949); Farber, *supra* note 239, at 917 (arguing that "'paradigm shifting' work should be abandoned in favor of the more pedestrian activity of 'normal science'").

our complex constitutional structure was designed to prevent the political implementation of great dogmas that may from time to time hold sway over the minds of those with fleeting power.³⁰⁷ In this American condition, much public decisionmaking must inevitably be fact-bound and compromised. Theoretical coherence is not a plausible expectation.

Other complex unions and commonwealths that seek in 1992 to cabin politics by law may consider the implications of this observation in planning the training of lawyers to staff their governance. A course worth considering is to seek legal scholarship having more limited sights, more like those set with increasing frequency in contemporary science.³⁰⁸ Until recently, the badge of sovereignty in the hierarchy of science (like that of academic law) has been work of transcendent abstraction. Such work is now less likely to be regarded as "cutting edge" stuff. Rising in science is an appreciation of work that rediscovers reality in the homely details of familiar natural occurrences. Increasingly fashionable in science is preoccupation with minor disorders in data, especially older data that bear on functions and relations long deemed orderly. Data ignored or discounted as irregularities of measurement are now being re-examined to see if there are not smaller patterns previously unnoticed by scientists bent on testing larger hypotheses.

In this vein, the political and educational founders of 1992 might seek law teaching that attends not merely to the legal texts generated by our effusive governments, but also to empirical research. As Caleb Foote observed some years ago, American law teaching has oscillated between fanaticism and failure in the employment of empirical methods.³⁰⁹ Few law teachers are themselves competent to engage in such work³¹⁰ except at the most prosaic levels,³¹¹ yet many are quite competent if assisted by an empiricist or two. Such work not only often requires collaboration,³¹² but is generally labor-intensive. It tends to require a degree of benign acceptance of the basic political structure and premises that one aims to reform; thus, Harry Kalven sounded a useful note of caution in explaining the numerous large scale failures in empirical work:

307. Tocqueville observed Americans to be generally preoccupied with instances and averse to theory. 2 TOCQUEVILLE, *supra* note 66, at 411.

308. See GLEICK, *supra* note 7, at 35-63.

309. See Caleb Foote, *The Law and Behavioral Science Project at the University of Pennsylvania: Family and Criminal Law*, 11 J. LEGAL EDUC. 80, 81 (1958).

310. See Franklin E. Zimring, *Where Do the New Scholars Learn New Scholarship?*, 33 J. LEGAL EDUC. 453 (1983).

311. See, e.g., Paul D. Carrington, *United States Appeals: A Field and Statistical Study*, 11 HOUS. L. REV. 1101 (1974).

312. This need was apparently the source of Lon Fuller's opposition to "project" research. See Robert S. Summers, *Fuller on Legal Education*, 34 J. LEGAL EDUC. 8 (1984).

[T]hese were heroic prospectuses by men who were in flight from law, who were out to revolutionize it. And they started with the premise that anything must be better than what we have now. The vision was, you know, large and generous, a sort of crusade to bring finally a little sense into the priesthood that we are all in. In brief, these were calls for a revolution of law. And, of course, that approach has two great difficulties. The first is it obviously alienates everybody else in the field, as they are quick to indicate. The second and more serious is that it is fundamentally wrong; it is a view that denies the considerable wisdom and sense and rationality of the legal system as it now is.³¹³

But even among those who have observed this caution and designed projects, as Kalven urged, that were reformist and not radical in their premises, the rate of failure among American legal empiricists has been high.³¹⁴ Indeed, some contemporary empiricists seem to despair of the enterprise of measuring the effects of legal institutions as an activity too lacking in "transformative" effects to merit the effort required; hence, they seek a "post-modern" empiricism unburdened of the noisome connection of science to reality.³¹⁵ On the other hand, if conceived to influence decisions of others, with appropriate modesty of ambition, empirical work can achieve its aim.³¹⁶ Yet no one should proceed down that path unwarned,³¹⁷ for it, too, presents perils of irrelevance.³¹⁸

In any case, as Jefferson emphasized, times of political crisis and renewal call not for elegance of theory but practicality of judgment; not for expressions of natural law or justice or other elevated abstractions, but for compromises that work. To be effective in helping to erect democratic legal systems, law teachers should be encouraged to forsake the cloister at times to dig in the soil of popular politics that they may know

313. Harry Kalven, *Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania*, 11 J. LEGAL EDUC. 94, 95 (1958).

314. See Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986); Schlegel, *supra* note 281; John H. Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

315. See David M. Trubek & John Esser, *Critical Empiricism in American Legal Studies: Paradox, Program or Pandora's Box*, 14 LAW & SOC. INQUIRY 3 (1989); Austin Sarat, *Off to Meet the Wizard: Beyond Validity and Reliability in the Search for a Post-empiricist Sociology of Law*, 15 LAW & SOC. INQUIRY 155 (1990).

316. David Chambers's work offers a sterling recent example. See DAVID CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979); see also Paul D. Carrington, *Foreword: The Scientific Study of Legal Institutions*, LAW & CONTEMP. PROBS., Autumn 1988, at 1.

317. For a current treatment of the relationship of social science to legal theory, see DONALD BLACK, *SOCIOLOGICAL JUSTICE* (1989). For a review citing the self-appraisals of empiricists working on law, see Austin Sarat, *Donald Black Discovers Legal Realism: From Pure Science to Policy Science in the Sociology of Law*, 14 LAW & SOC. INQUIRY 765 (1989).

318. But see George Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437 (1983). Before justifying the expense entailed by Professor Priest's proposals, law teachers must demonstrate a far greater utility to their research than can presently be claimed.

the competing moral claims to be reconciled, and so that they may adequately reflect the cultures of which their institutions are to be a part.

The reader will recognize pretentiousness in presuming to utter such a call for modesty of aspiration among those founding or revitalizing institutions of legal education in 1992. Just as there is irony in posing an educational theory against theory, so there is pretense in calling attention to the pretenses of others. Nevertheless, such a call seems worth uttering even to American colleagues, some of whom may be ready to despair of cosmology. Yet it would be unwise to expect much change: It is doubtful whether many law teachers could return to the farm of prosaic legal problems after seeing the vast city of philosophy.

VIII. CONCLUSION

University legal education has a special but modest place in many of the new governments now being established. That place will be specific to each culture to be governed, but at this time, the possibilities and the American experience merit thought in many places.

Whichever of the three means law teachers may be directed or permitted to employ to influence the law and the culture that creates them, it is important to know that the enterprise is as speculative as that of the forester whose plantings will become trees or not largely as a consequence of forces and events completely beyond her control, most of them occurring long after she has retired from the scene. It is unlikely in the extreme that a mere law teacher will have an effect on the main currents of any law or culture that are materially greater than Professor Lorenz's Brazilian butterfly, and she would have about the same chance of forecasting what any such effect might be. What Learned Hand said of professional work in law abides:

We are the workers in the hive; we shall not be missed, nor shall we be able to point at the end to any perceptible contribution. But the hive goes on, an entity, a living thing, a form, a reality. So far as we cannot severally sink our fate in its fate, we shall not have our reward.³¹⁹

Perhaps that is well. Whether the world would be improved if individual law professors really were affecting many large political results may itself be a large question. Would there be credit received or blame borne? It should be a comfort to most of us that even Nietzsche bears neither credit nor blame for the twentieth century, but was merely a product of his time and place.

319. LEARNED HAND, *To Yale Law Graduates, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 84, 89 (Irving Dilliard ed., 1952).