The Missionary Diocese of Chicago

Paul D. Carrington

This article is an account of legal education in Chicago in the first decade of this century. It is the story of a failed mission to propagate a false faith, and of the triumph of another, one truer to the American legal tradition.

The prophet of the false faith was Christopher Columbus Langdell, whose meteoric career as a legal theorist lit the academic sky in the 1880s. By 1920, Langdell’s theory of law and legal education was remembered chiefly as an object of scorn, and so it has remained to the present day. His method of teaching law of course survived, but shorn of the purpose he had advanced to explain it. Likewise, his program of lengthening the period of professional law training and imposing on novitiates rigorous academic standards survived and flourished, but no longer justified by his theory.

In 1900, however, his vision (or was it a quixotic dream?) was still alive and well, and his acolytes strove to perpetuate it. They could not, as my story will tend to confirm. The story centers on the careers of three law teachers who remained faithful to the earlier purpose of American law teaching, a purpose that Langdell forsook, but that has now long survived his moment. The three were Ernst Freund, John Henry Wigmore, and Roscoe Pound, almost certainly the most luminous American law teachers born during the decade preceding 1870, the year of Langdell’s appointment as dean at Harvard. All were in Chicago from 1907 to 1910.

While the three proceeded from very different political premises, they shared a purpose in their work that had animated many of their predecessors and would animate many of their successors. I present their experience as

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1. Langdell’s faith was first identified as a religion in Book Note, 14 Am. L. Rev. 233, 234 (1880).


I. Langdell and His Antecedents

I begin with a brief account of Langdell’s theory, its sudden advent and decline, and its enduring influence on the institutions of academic law.

A. The Primitive Sources of “Pure Law”

Langdell’s core belief was that the discipline of law, like algebra, is internally complete: those initiated to its method of reasoning can supply the correct rule for every case, and they need not, indeed should not, be concerned with the practical or political consequences of its application.\footnote{Perhaps the clearest statement of the faith is James Barr Ames, The Vocation of the Law Professor, in Lectures on Legal History and Miscellaneous Legal Essays 354, 368–69 (Boston, 1913); see also Langdell’s Harvard Celebration Speech, 3 Law Q. Rev. 123 (1887).} They therefore have no need for experience or knowledge except that of legal texts and traditions, not even acquaintance with the prevailing moral aspirations of the people in whose name and for whose benefit the law is administered. This faith fit American aspirations in Langdell’s time and place, but was belied by the national experience preceding 1870 and by future conditions then already emerging: it was doomed to subside within a generation.\footnote{Morton J. Horwitz gives it 35 years. The Transformation of American Law, 1870–1960, at 9–31 (New York, 1995). Compare Grant Gilmore, The Ages of American Law 42 (New Haven, 1977): “However absurd, however mischievous, however deeply rooted in error it may have been, Langdell’s idea shaped our legal thinking for fifty years.”}

Morton Horwitz is not wrong to characterize Langdell’s faith as “classical,”\footnote{See Horwitz, supra note 6, at 189. Fundamentalism is also an appropriate term. Jerome Frank, Law and the Modern Mind 49–56 (New York, 1930).} but its roots extend deeper into the past than that term implies: it was more primitive than classical. It was a form of mystification, a technique of government employed by most if not all tribal chieftains, who often entrusted their law’s enforcement to religious ceremony, thereby assuring its association with
other incomprehensible mysteries of life. The attribution of law to divine sources comforts those to whom the lash of the law is applied, for they receive the assurance that their pain or disappointment is the result of a great and impersonal cause, not the malevolence of a hateful despot against whom revenge might be taken. It also elevates to subdivinity those who administer the law’s mysteries and thus diminishes their exposure to private vengeance. It may also supply a shared need of the whole tribe for an institution to absorb the odiun of disputes. A widely used form of mystification, still quite visible in English legal traditions in the eighteenth century, was the regard of legal texts as having semidivine origins and meanings comprehensible only to the law’s initiates, who could explain them only in professional jargon. Because such a belief in the sanctity of legal forms meets the social and political needs for mystification, it has some of the tenacity of original sin. Langdell’s core belief was thus a resurrection of an ancient technique of government adapted to the circumstances of England at the time of the Reformation.

B. Impurities: The Political Quality of American Law

While belief in law as a discipline complete in itself may be in this sense “classical,” there were surely men in republican Rome who were undeceived. Those jurisconsults who devised many of the legal concepts now in use in much of the world met in the baths to discuss the social and political implications of legal doctrine and were quite conscious that they were making law for the citizens of Rome. They aspired to prudence and moral judgment reflecting the hopes and expectations of those they governed.

Likewise undeceived were many American judges and lawyers to whom Langdell preached his primitive faith. Even at the time of ratification of the Constitution, reflective lawyers and judges recognized their profession as one enmeshed in democratic politics. When Tocqueville in 1835 described American lawyers and judges as an aristocracy, he spoke not of their social status, but of their widely accepted political role, conferred by both state and federal constitutions, as the mediators and stabilizers enabling a divided population to share peaceably in the responsibilities of self-government.

Familiar as they were with English law as a received tradition, Americans of the Revolutionary generation were mindful that the political role envisioned

8. Cf. Bronislaw Malinowski, Crime and Custom in Savage Society (London, 1926). The principle was well understood in Saxon and Norman England. Trial by ordeal was last performed in England in 1215; its use was terminated by order of the Pope, who withdrew the clergy from the rituals. Trial by jury replaced trial by ordeal, but was not wholly lacking in religious aspect. See generally John P. Dawson, A History of Lay Judges 35–115 (Cambridge, Mass., 1960).


for courts and lawyers by their constitutions was a role unfamiliar to English lawyers. If there was a model in their minds as they shaped a distinctive American legal profession, the model might have been the *avocats* of France or those jurisconsults of republican Rome. These were two groups familiar to the first Americans; in both instances they could see private professions attentive to public duties, as they hoped American lawyers would be.

Because American courts and lawyers generally acknowledged, even if they did not always ably perform, the political role conferred on them by state and federal constitutions, they recognized their discipline as an expression of a culture distinctive to these shores. To the extent that they indulged in theory, they followed continental theorists such as Montesquieu and Savigny in the belief that law is a cultural artifact, its aim in a republic being to express the moral aspirations of a self-governing people. Few lawyers and judges proceeding from such premises could have believed their discipline to be internally complete and thus wholly autonomous. Eclectic pragmatism was their guiding faith. They honored received legal texts and traditions but interpreted them to make practical moral sense in particular American contexts.

Prudence, they recognized, could be drawn from many sources, not excluding either classical accounts of Roman law or recently shared experiences of Americans. George Wythe, the first American law teacher and the chancellor of Virginia, was recognized as a scholar of Roman law, perhaps the chief American law book of antebellum times, is replete with pragmatic political explanations of why the law seemed to be as it was, frequently documented by references to classical sources. The judicial opinions of John Marshall or Lemuel Shaw, long the chief justice of Massachu-

12. Many a French *avocat* went to the guillotine after echoing the themes of Jefferson’s Declaration of Independence and joining in the early street demonstrations in support of what we now call human rights. See Michael P. Fitzsimmons, The Parisian Order of Barristers and the French Revolution 1–32 (Cambridge, Mass., 1987). The *Ordre des Avocats* was reduced to silence by the government of Napoleon, but it was reestablished during the period of constitutional monarchy beginning in 1814. The reconstituted group quickly became the champions of constitutional governance in France; they were during much of the nineteenth century acclaimed by the people of France for their admirable public virtue. Lucien Karpik, Lawyers and Politics in France, 1814–1950: The State, the Market and the Public, 15 Law & Soc. Inquiry 707 (1988).


settts,19 or George Robertson, long a celebrated chief justice of Kentucky,20 justified decisions by openly accepting judicial responsibility for their practical, social, and political consequences.

Kent, Marshall, Robertson, and Shaw were among the more politically cautious of American lawyers. Jacksonians of their time sought to open the profession to men of all conditions of learning, so that all persons and political factions might secure representation in court.21 They also sought to simplify and demystify the law through legislative codification,22 and to assure judicial fidelity to the popular will by making judicial office elective.23 Few of the partisans on either side of any of these issues raised by Jacksonians could have thought law to be disengaged from political considerations. Moreover, Jacksonian reforms tended to give added weight to local experience as a source of law by diminishing the ability as well as the willingness of many members of the profession to engage in the intricate Anglicized formalism that Langdell would attempt to revive.

Those who taught law in antebellum American colleges were not selected to resemble scholarly William Blackstone, the first English law professor.24 At least until 1870, they were all selected on the basis of their political experience and their demonstrated practical moral judgment.25 Men so chosen prepared law students for shared public responsibility by teaching constitutional law, international law, and sometimes even Roman law, as well as the outline of English common law applicable to private transactions.26 The primary aim of

19. Oliver Wendell Holmes said of Shaw: "[T]he strength of that great judge lay in an accurate appreciation of the requirements of the community whose officer he was. . . . [H]is were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred." The Common Law 105 (Boston, 1881).


25. For a partial list of those who were sitting judges, see Paul D. Carrington, One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776, 44 Fla. L. Rev. 501, 578–79 (1992). Others were college presidents. Id. at 577 n.400.

26. This precisely describes the curriculum presented at the most important law school in the West during many antebellum years. Charles Kerr, Transylvania University's Law Department, 31 Americana 1, 32, 34–35 (1937).
their teaching was not technocratic, but moral. Political ethics was a subtext to much of the instruction, and Francis Lieber's two-volume work on that subject was assigned reading for many students; it drew heavily on classical and contemporary German sources. Only a minor portion of the material taught could be thought to have English origins, and even that had been proudly transformed to serve American needs.

C. Langdell's Fundamentalist Revival

All these accustomed precepts and practices of earlier American law were boldly challenged by Langdell's effort to resurrect a "classical" theory of law. Packaged as "legal science," his new yet primitive faith responded to important aspects of American culture in the decades following the Civil War: a decadence of public morality had degraded politics, while the vibrancy of the industrial revolution had replaced politics with new enthusiasms for science, technology, specialization, human capitalism, and narrow professional training in all fields as keys to a world of luxury for all. America was at that moment ripe with hope for just such ideas as those expressed by Langdell.

Langdell's primitive and Pythagorean faith was thoroughly English. No theorist himself, but an ardent Anglophilé, he might have gotten his theory for separating law and politics from John Austin, the English legal theorist of the previous generation. Austin's ideas about law were formed in an environment assuring virtually absolute power in Parliament and leaving only narrow political responsibility in the judiciary. English barristers practicing before those apolitical courts seldom performed other tasks associated with democratic government. That environment was very different from the American. While perhaps apt for England, Austin's thinking could not be made to fit a judicial system and legal profession organized around the public function of enforcing a written constitution. Nevertheless, Langdell proposed to teach American law from materials that were chiefly English. He dealt with the


29. "The existence of law is one thing; its merit or demerit another." The Province of Jurisprudence Determined, ed. H. L. A. Hart, 3d ed., 184 (London, 1968). The work was first published in 1892, but not circulated in America until 1861. There is no evidence that Langdell read Austin before developing his theory, but Ames certainly did. Langdell did cite Austin much later. See LaPiana, supra note 2, at 122–24.

dissonant reality that American constitutions and statutes were not English by declaring them to be nonlaw and thus not the proper objects of professional learning.\textsuperscript{31} Law as he defined it was what its initiates correctly induced from close readings of English opinions. Unlike his primitive predecessors, he found law not in the stars or in the entrails of sheep, but at least partly in his navel.

Despite its manifest weakness, Langdell's faith had the strengths of "classical" formalism and for a time acquired adherents. Herbert Wechsler has recently recalled for us the true believers of the early decades of this century; he cautions that we cannot "have the slightest conception of what it was like to talk to a lawyer who believed that way, about the way the devout affirm their religious convictions."\textsuperscript{32} The apostle of the faith was James Barr Ames, who in 1895 succeeded Langdell in the Harvard deanship.\textsuperscript{33} Ames, like Langdell, was a political innocent with no experience in public affairs, or even in the practice of law. Unlike Langdell, he was an evangelist. But by the time of his death in 1910 there were no new apostles to take his place.

Although Langdell's faith responded to sentiments widely shared in 1880, it was not in keeping with those already beginning to unfold when he assumed his deanship in 1870. In 1865 leading American law teachers, including some at Harvard, had joined others in forming the American Social Science Association, a group aspiring through the study of education, public health, and economics to develop a program of law reform that would produce in America "an earthly paradise" void of crime, poverty, and unjust discrimination or privilege.\textsuperscript{34} By 1900, America was aboil with such visions of the social progress needed to temper the hard edge of technological progress. Law was seen as an instrument of that social progress.\textsuperscript{35} The temporary aversion of Americans to

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\item Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period, 19 Harv. L. Rev. 151 (1906).
\item The story of the founding is told by Thomas L. Haskell, The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority (Urbana, 1977), and by Mary O. Furner, Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865–1905, at 10–21 (Lexington, Ky., 1975). The reference to paradise comes from a presidential address by Daniel Coit Gilman, who was at the time also president of Johns Hopkins University, 12 J. Soc. Sci. xxiii (1880). Among the founders of the organization were Francis Lieber and Theodore Dwight of Columbia, Emory Washburn of Harvard, and Simeon Eben Baldwin, Francis Wayland, Jr., and Theodore Woolsey of Yale. Some of its more optimistic members believed that legislative improvidence could be cured by means of social science. Furner, supra, at 26. The group actively supported civil service reform. Id. at 281. Even Charles Eliot, Langdell's champion, was active in the association and headed its Department of Education. Id. at 28. Langdell refused to join, disavowing interest in law reform. See LaPiana, supra note 2, at 77. By 1885 the organization was moribund, having been displaced by more narrowly professional organizations.
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politics had all but disappeared. Except perhaps in the backwater South,\textsuperscript{36} lawyers and law teachers were in many places employed in rebuilding our legal and political institutions to fit an industrial age. In such times, Langdell's faith was doomed.

It would for this reason be difficult if not impossible to find a lucid argument made since 1905 for the separation of American law from politics, or for its intellectual isolation from other literatures.\textsuperscript{37} There have of course been judicial decisions justified by formalist interpretations of legal texts.\textsuperscript{38} And scholars offering interpretations have on occasion lapsed into the original sin of mystifying conceptualism.\textsuperscript{39} But judicial formalism disavowing responsibility for social and political consequences has been seen by most American judges and lawyers as deficient professional work. Moreover, the meanings of legal texts have been informed by many sources extrinsic to legal texts, including visible social and political consequences of alternative interpretations and a wide range of other academic disciplines. The Brandeis brief informing a court of social science data bearing on the political wisdom of a decision it was required to make appeared in 1908,\textsuperscript{40} a clear signal that the Supreme Court justices of that time were not true believers in Langdell's faith and that advocate Brandeis knew of their infidelity. In short, despite Langdell, American judges and lawyers never fully departed from the eclectic pragmatism of ante-bellum times. Sophisticates were no more attracted to fundamentalism in law than in religion.

Despite its failure, Langdell's "classical" or primitive illusion has for over a century served as a target of scholarly jeremiads.\textsuperscript{41} Thomas McIntyre Cooley in 1879\textsuperscript{42} and Oliver Wendell Holmes in 1881\textsuperscript{43} each slated the formalist heresy.\textsuperscript{44}

\textsuperscript{36} W. J. Cash described this as a time of "easing tensions" and "quiet" in the former states of the Confederacy. The Mind of the South 189–238 (New York, 1941).

\textsuperscript{37} E.g., Joseph H. Beale, Jr., The Development of Jurisprudence During the Past Century, 18 Harv. L. Rev. 271 (1905). Morton Horwitz marks this date as the terminal point for the spread of the faith. Horwitz, supra note 6, at 33–63. Duncan Kennedy supposes that this idea is still "the intellectual core of the ideology" of contemporary law teachers. Legal Education and the Reproduction of Hierarchy, 32 J. Legal Educ. 591, 596 (1982); see also David Barnhizer, The Justice Mission of Law Schools, 40 Clev. St. L. Rev. 285, 296–301 (1993).

\textsuperscript{38} E.g., Ives v. South Buffalo Ry., 94 N.E. 431 (N.Y. 1911).

\textsuperscript{39} Laura Kalman observed that "conceptualism" was in disfavor in many academic disciplines in the early decades of this century, losing favor to "functionalism." Legal Realism at Yale, 1927–1960, at 15–17 (Chapel Hill, 1986). But some persons given to functionalism in their youth later manifested some of the symptoms of conceptualism. Pound himself offers an example. After launching his broadside attack on "mechanical jurisprudence," e.g., Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908) [hereinafter Pound, Mechanical Jurisprudence], he became rather a taxonomist of legal theories and thus something of a mechanistic himself. For an example, see his The Formative Era of American Law 93–118 (Boston, 1998).

\textsuperscript{40} Muller v. Oregon, 208 U.S. 412 (1908).


\textsuperscript{42} A Treatise on the Law of Torts: or the Wrongs Which Arise Independent of Contract 11–22 (Chicago, 1879).

\textsuperscript{43} Holmes, supra note 19.

\textsuperscript{44} Book Notices, 14 Am. L. Rev. 234 (1880).
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John Chipman Gray, Langdell’s colleague, thoroughly vanquished it in 1909. So did early Progressives. Benjamin Cardozo in 1921 assailed it yet again. Jerome Frank and Karl Llewellyn led the legal realists who killed it repeatedly in the 1930s. They were followed by legal process theorists, and by legal historians. Contemporary theorists armed with the rhetorical tools of literary criticism are still killing it. So is Richard Posner. Law journals yet reverberate with the sounds of firearms being discharged into its corpse. There are significant differences in the premises and motives of these many executioners, but none as to their common victim, a faith that has absorbed fatal beating after fatal beating after fatal beating. It would be a welcome consequence of this article if it encouraged some future executioners to save their munitions for more consequential ideas than the Langdell illusion.

D. The New Dream: Law as Pure Theory

While this tireless chorus has been calling attention to the defects in Langdell’s premise, there have been few to challenge its corollary that “pure” law can, and perhaps even should, be taught by “pure” scholars, i.e., persons lacking political involvement or professional experience, who can be identified by their technical skill in mastering the internal structure of their discipline, who have focused their minds on it perhaps even to the exclusion of all

47. The Nature of the Judicial Process (New Haven, 1921).
48. Frank, supra note 7.
49. E.g., A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431 (1930).
53. Legal Scholarship Today, 45 Stan. L. Rev. 1647 (1993); The Deprofessionalization of Legal Teaching and Scholarship, 91 Mich. L. Rev. 1921 (1993). Judge Posner attributes to all professionalism in law a “deep-seated belief in the autonomy of law as a subject of thought and practice.” Legal Scholarship Today, supra, at 1648. By means of this inference, he is able to declare that the idea remained prevalent until about 1905, i.e., until about the time of his own arrival in the legal academy.
54. Although much less perhaps than the devotees of the several causes may have supposed. Laura Kalman rightly concludes: “As an intellectual movement, legal realism was a fairly unoriginal contribution.” Kalman, supra note 39, at 17. She traces most realist ideas to Holmes, but even Holmes was substantially less original than he seemed. See Carrington, supra note 3.
else, and whose political wisdom and moral judgment remain to be proved. This corollary traveled better than the principle of pure law from which it was derived.

Unlike the premise of pure law, the corollary of pure scholarship was not infected with error obvious to all who could see. Ames was himself a model of what might be hoped for. Despite his inexperience, he proved to be an effective, even inspiring teacher, and no one seemed much to care that his political judgment was embarrassingly poor. It is possible for young scholars to compensate for inexperience, and poor judgment may improve. Also, the price of maturity and practical experience in law teachers can be a narrowing of intellectual range that restricts vision with respect to broader or more remote consequences of law. Thousands of law teachers have been appointed in the present century who, like the author of this article, lacked experience or proven moral judgment, whose qualifications resembled those of Ames, the innocent.

The present malaise I seek to relieve may be linked to this derivative development. As Robert Post has observed, contemporary legal scholarship often seems preoccupied with utopian legal theories lacking roots in the moral values of the people in whose name and for whose benefit the law is administered. Both Anthony Kronman and Harry Edwards have recently remarked as utopianists some who urge economic or literary theories to displace the practical moral judgment that is the traditional core of American law. Marc Galanter has recently observed among such contemporary theorists a tendency to eschew empiricism, a window on disorderly reality distressing to utopianists of all stripes. Mary Ann Glendon has observed the effect of utopianism in disqualifying legal academics for useful public service. Jonathan

55. In his regard for judge-made law, he opposed almost all legislation, even the Uniform Negotiable Instruments Law and code pleading reforms. For details, see Carrington, supra note 4, at 787–88. In this as in much else, Ames followed Langdell, who built his vision in part on the jurocentric sentiments of those lawyers who had resisted the codification movement that almost gained the day in antebellum times. See generally Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Westport, Conn., 1981). One of Langdell’s allies was a leading adversary of codification in New York, James Coolidge Carter. For a brief and derisive account of his work, see Horwitz, supra note 6, at 118–21. Carter argued that a code enacted by a legislature is inherently despotic.

56. Post, supra note 4, at 191. This interest in theory is nurtured by the academic subculture, which rewards novelty more than prudence, and tolerates work that is accessible only to a very small audience. Rubin, supra note 4, at 1886–904; cf. Robert M. Hutchins, The Higher Learning in America 88 (New Haven, 1956); see also Owen M. Fiss, The Death of the Law? 72 Cornell L. Rev. 1 (1986).

57. Kronman, supra note 4, at 161.

58. Edwards, supra note 4.


60. L.A. Daily J., June 15, 1993, at 6. Glendon was commenting on the political difficulties encountered by Robert Bork and Lani Guinier in the confirmation process. Some of Bork’s academic writing raised serious questions about his fitness for the political responsibilities of the Supreme Court. E.g., Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971). Guinier’s academic writing was also disqualifying. E.g., The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 Mich. L. Rev. 1077 (1991). Both authors seemed to exhibit disregard, if not disdain, for the cultural values of the people they sought to govern. See also Post, supra note 4.
Macey, writing of economic theorists, has called attention to a tendency to
conceal prudence in mystifying jargon. 51

These disjunctions between much contemporary law teaching and the
realities of American life and politics may result in part from Langdell’s
influence. Ames was the first “pure” academic to teach American law. The
widespread socialization of law teachers to the academic profession and their
separation from the legal profession might have been less likely to occur, or
might have been less extreme, had not practical experience and moral judg-
ment been so devalued as qualifications for teaching “pure” law. An indirect
legacy of Langdell has been a system of rewards for legal academics that
promotes utopianism and the advancement of mystifying professional jargon
at the expense of humdrum useful service.

Edwards, Galanter, Glendon, Kronman, and Post are correct that the
utopian visions of academic theorists can impede the exercise of prudent
moral judgment that is the defining task of American lawyers. Those liberated
from both empirical and moral realities give free rein to their impulses much
as did the priests of primitive formalism or Langdell, its revivalist. Their
conceptions of Efficiency or Justice are sometimes no less occult than Langdell’s
fundamentalism. In these respects, contemporary utopians may be regarded
as the closest living relatives of the Langdell they scorn.

Freund, Pound, and Wigmore of Chicago offer a contrast to such neo-
Langdellians. They were exemplars of the eclectic pragmatism traditional to
American law. Disbelievers in Langdell’s preachment that law can be sepa-
rated from political and moral judgment, they were personally involved in the
legal and political events of their time and place. Their work reflected the
moral values embedded in American culture. They marshaled all available
sources of prudent moral judgment to guide lawmaking in directions conso-
nant with those values. In these important respects, their careers were quite
different from those of Langdell and Ames.

The vitality of law in Chicago was infectious. Before the end of the decade
of which I write, the evangelism of Ames would be reciprocated. Missionaries
would go east to help open New England to a distinctly American faith in
social progress through law 62 and to the academic lawyer as an active, disinter-
ested, and well-informed political reformer—the role exemplified by the
three wise men of Chicago who are the heroes of my story.

II. Hog Butcher to the World

In 1900, “progress” of all kinds was nowhere more evident than in Chicago,
an instant city pulsating with industrialization and social problems accom-
panying it. Chicago had no abiding traditions to impede its acceptance of
new ideas.

61. See Macey, supra note 4.

62. For an argument that this illusion is no less false than that of Langdell, see Gerald N.
And compare Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American
Fort Dearborn, no more than a stockade, had been built in 1803 at a place then very distant from the closest pioneer American settlements. During the War of 1812, it was abandoned as indefensible against a hostile native population armed with British munitions. Most of the evacuees were captured and many, including women and children, were tortured and killed by their captors. While this served to deter repopulation, the fort was nevertheless rebuilt after the war. A village around it was incorporated in 1833. A few years later, after the Black Hawk War in which Lincoln served, the native population was subdued. The fort was then removed and settlers increased rapidly in number. In 1840, Chicago commenced its meteoric rise, gaining momentum in 1848, when a canal linked Lake Michigan to the Illinois River, a tributary of the Mississippi.

By 1860, Chicago was the eighth largest city in America. By 1890, and for nine consecutive decennial censuses thereafter, it was America's second city. It was the largest railhead in the world, for much the same reason that it continues to have the busiest airport. Central to the richest grain- and meat-producing area on the planet, the Union Stockyards opened in 1865 and the city became "Hog Butcher for the World." It was said that everything but the squeal was turned into a useful product. Chicago's grain markets set the world prices for cereals. The city also became a marketing center for consumer products: Montgomery Ward was established there in 1872, Sears Roebuck in 1893, and for almost a century most retail sales to the rural population of America emanated from Chicago. By 1900, the steel industry was prospering along Lake Michigan to the south. In 1871 the city experienced an epic fire that proved to have no effect on its epic growth. In 1893 it was the site of an epic World's Fair, the Columbian Exposition.

An event of the fair was a Congress on Jurisprudence and Law Reform. There was good reason for Chicagoans to have an interest in that topic, for the administration and enforcement of law in the city was a major public concern. Much of the population filling the city was immigrant, drawn mostly from Europe but also from other continents and from among the freed population of the former slave states. Because it was deeply divided among ethnicities, the city set standards for machine politics in America; corruption was endemic in municipal offices. While the city government had been almost equal to the task of controlling violence resulting from conflicts among the diverse populations, violence in labor disputes was commonplace. And in the very year of

64. The Haymarket strike and riot of 1886 resulted in the deaths of several police officers and a manifold increase in the ranks of the radical Knights of Labor. The story is told in Foster Rhea Dulles, Labor in America: A History 122–26 (New York, 1949). In 1888 there was a troubling rail strike. For an account, see Donald L. McMurtry, The Great Burlington Strike of 1888: A Case History in Labor Relations (Cambridge, Mass., 1950). In 1894 came the Pullman strike, the strikebreaking injunction, and the imprisonment of Eugene Debs for violating such an injunction. The 1894 strike led the president of the American Bar Association to call upon its members to educate their employer clients to their responsibilities to workers and the public. Address of the President, Thomas M. Cooley, 18 A.B.A. Rep. 181 (1894), unpublished as The Lawyer as a Teacher and as a Leader, Forum, Sept. 1894, at 1, and 28 Am. L. Rev. 641 (1894).
the fair, the mayor was murdered by a lawyer angered by his failure to be appointed to a public office, a local reprise to the assassination of President Garfield that had stimulated passage of the Civil Service Act of 1883. 65

The Conference on Jurisprudence and Law Reform occasioned an address by James Bradley Thayer, the Royall Professor of Law at Harvard. 66 His paper is now generally remembered for other reasons, 67 but it evidenced Thayer's standing as a disbeliever in the faith his colleagues, Langdell and Ames, sought to perpetuate. Thayer was a lifelong New Englander 68 who shared Langdell’s Anglophilia, 69 and who edited a two-volume casebook on constitutional law in the Langdell mode. 70 But he was at all times cognizant of the political role of American law.

As a scholar of the Constitution, Thayer generally shared the views of Thomas McIntyre Cooley of the University of Michigan, 71 in his time perhaps the premier teacher of lawyer-politicians. 72 While Cooley and Thayer were cautious in their views regarding the political role of the Supreme Court, they were far from denying that it played such a role. Both had witnessed in their formative years the decision of the Supreme Court in Scott v. Sandford, 73 the case in which the Court had sought to lay the political issue of slavery to rest by declaring that Congress lacked the power to prohibit slavery in territories not yet organized as states. That decision had been notoriously lacking in foundation in legal texts or traditions and was widely and rightly challenged as not merely wrong, but an abuse of power by the Court. It produced the agenda for the Lincoln-Douglas debates of 1858 and mightily diminished the stature of

66. The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1895).
69. E.g., The Teaching of English Law at Universities, in Legal Essays 367 (Boston, 1908). The sentiment is also often reflected in his A Preliminary Treatise on Evidence at the Common Law (Boston, 1889). The civil jury did, of course, have genuine English origins.
71. Cooley also delivered a paper at the Columbian Exposition conference. It was less ambitious and less notable than Thayer’s, but not less mindful of the political role of law. It appears as The Administration of Justice in the United States of America in Civil Cases, 2 Mich. L.J. 341 (1893).
72. The only book Thayer required his students to read was Cooley's 1880 text. Alan R. Jones, The Constitutional Conservatism of Thomas McIntyre Cooley: A Study in the History of Ideas 247 (New York, 1987) (quoting letter from Thayer to Cooley, Mar. 24, 1885). Cooley's law school attracted students from the Midwest and the West; many became politicians ranging across the political spectrum. Cooley was himself politically active all his adult life, first as a Jacksonian, then as a Free Soiler, then as a Lincoln Republican, and finally as a Mugwump Democrat. But for his apostasy, it is likely that he would have been appointed to the Supreme Court of the United States; instead, he concluded his career as the founding chairman of the Interstate Commerce Commission.
73. 60 U.S. (19 How.) 393 (1857).
the Court without achieving any of its intended consequences. Acutely mindful of this experience, Cooley and Thayer advised prudent recognition that the Court has a limited political role to play and cannot bear the weight of primary responsibility for grave public issues. One may perhaps see a common source for Thayer’s caution and Langdell’s vain hope. But no reader of Thayer’s lecture could suppose Thayer to be an adherent of Langdell’s faith in pure law. It plainly voiced the belief that law could and should play a role in the reform of Chicago’s governance, but to be effective would have to take the form of democratic legislation expressing the political will of Chicagoans.

Chicago was not lacking in resources that could be employed in the cause of political and legal reform. It was the city of Jane Addams and her Hull House, and thus the birthplace of the profession of social work. Notwithstanding its brawling character, the city commanded intense loyalty from many of its citizens. The arts emerged and flourished amidst the dust and disorder. It was said of the city by Lincoln Steffens, the perceptive turn-of-the-century muckraker, that it “likes audacity and is always willing to have anybody try anything once; no matter who you are, where you come from, or what you set out to do, Chicago will give you a chance. The sporting spirit is the spirit of Chicago.”

The Chicago Bar Association was among the first in America to organize, in 1874. Its membership did not include all professional lawyers in the city, but only the decent, or socially acceptable; election was, among other things, an invitation to lunch in the group’s dining room. One of the association’s stated aims was to “discountenance[.] the conduct of those members who disgrace the profession”; another was to promote the due administration of justice. One of its founding officers was Lyman Trumbull, who had been an attorney for fugitive slaves, a sometime political rival and associate of Abraham Lincoln, and a United States senator who championed the Thirteenth Amendment and the Civil Rights Act of 1866. Most Chicago lawyers were not members, either because they were excluded or because they chose not to pay dues. Despite its relatively small size, the CBA nevertheless endeavored against odds to resist corruption and incompetence in high places.

74. Thayer, supra note 66, at 149. Cf. Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 159–76 (Boston, 1868); compare Hugh Henry Brackenridge, Modern Chivalry, ed. Claude M. Newsin, 549 (New York, 1937): “[A]ny judicial decision invalidating legislation should be made only in a plain and broad case clearly justifying the decision. A legislature will not and should not be asked to yield to any thing but which will carry the sense of the community with it.” These words were first published in Pittsburgh in 1804. They correspond almost precisely with those uttered by Thayer at Chicago in 1893.


76. There had been bar organizations in earlier times, but almost all had dissolved under the pressure of Jacksonian politics. See generally Pound, supra note 21, at 223–41.


78. See Ralph J. Roske, His Own Counsel: The Life and Times of Lyman Trumbull (Reno, 1979); Mark M. Krug, Lyman Trumbull, Conservative Radical (New York, 1965).
The association was generally supported in its efforts by the *Chicago Legal News* "under the vigorous editorship of the redoubtable Myra Bradwell."\(^7^9\) Her paper was the most widely circulated legal publication west of the Alleghenies; for the decades of her editorship, it informed readers on scores of law reform issues. Her energy was evidenced at the time of the great fire of 1871: despite the total destruction of her facilities, not a single issue was delayed and the *News* organized a national effort to replace the city's law libraries.\(^8^0\)

Among the most widely known of Chicago lawyers was Clarence Darrow, who had given up a prosperous practice as a railroad lawyer to represent labor organizers and persons accused of crime. A former student of Thomas Cooley, Darrow was a man of extraordinary eloquence, capable of moving even a judge to tears with his powerful appeals to juries.\(^8^1\) He and others of a spirit more radical than Trumbull and other founders of the Chicago Bar Association organized the Chicago Council of Lawyers, a group that could be relied upon to support a wide range of social reforms, including the reform of courts and law.\(^8^2\)

Among the CBA's achievements (with the Chicago Women's Club), was the establishment in 1899 of the first juvenile court in America, then perceived to be a great advance in the administration of justice. For over two decades, the CBA urged the abolition of minor courts staffed by lay judges whose compensation depended on the fines they levied; defeated in the legislature, it secured results by constitutional amendment in 1904. It supported a reform government that in the first decade of the twentieth century provided a moment of reversal of the primitive machine politics practiced in the city for a half century. Steffens wrote with astonishment:

> I saw [Walter L. Fisher], a reform boss, perform exactly like a regular political boss, browbeat and control a various lot of (honest and dishonest) politicians, and then send them out, watched and controlled, to represent what they all knew or agreed was the best interest of the whole people of Chicago.\(^8^3\)

By 1900, the CBA's Grievance Committee was actively seeking the disbarment of dishonest lawyers by initiating proceedings in the Supreme Court of Illinois. It was also advocating the elevation of standards for admission to the bar, a theme ardently voiced by Bradwell in her journal: she described the training of lawyers as "crude and vulgar," and a "means of placing the names

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79. Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* 67 (Chicago, 1987); see also Jane M. Friedman, *America's First Woman Lawyer: The Biography of Myra Bradwell* 27–41 (Buffalo, 1993). Whether Bradwell was or was not the first woman lawyer, she was unmistakably the world's first female editor of a legal periodical. Frederic B. Crossley, *Courts and Lawyers of Illinois* 264 (Chicago, 1916).

80. She also turned a profit from increased advertising of law books. Friedman, *supra* note 79, at 90.


of many very poor lawyers upon the role of the profession.\textsuperscript{84} She had a point, although some and perhaps many of the "crude and vulgar" were recent immigrants trying to speak for their kinsmen, who were in some eyes even cruder and more vulgar than themselves.\textsuperscript{85}

### III. Northwestern University: The Arrival of John Henry Wigmore

On account of the concern expressed by Bradwell and Trumbull, the Chicago Bar Association took an interest in the education of lawyers. There had been an effort by Baptists to establish a University of Chicago in 1859; Senator Stephen Douglas, Lincoln's adversary, was its nominal president.\textsuperscript{86} It had a building on Dearborn Street and a law school founded by Thomas Hoyne,\textsuperscript{87} who was later also a founder of the bar association and sometime national president of the YMCA; the school had two teachers, of whom Henry Booth was said to be "the life and spirit of the institution."\textsuperscript{88} Booth was a graduate of the Yale Law School; he taught law at Chicago for more than thirty years, while also serving as a judge. Myra Bradwell herself had been his student.\textsuperscript{89} In 1872 this law school, needing additional support, became the Union College of Law, gaining a connection with Northwestern University, a new Methodist institution. In 1886 the "old University of Chicago" was forced to close its doors when its property was seized by creditors. The law school then became in 1891 the Northwestern University School of Law.

The collapse of the old University of Chicago coincided with the arrival at Northwestern of Henry Wade Rogers as president; he came to the city from Michigan, where he had succeeded Thomas Cooley, his mentor, as dean of the law school.\textsuperscript{90} With support from the CBA, he commenced an effort to improve the newly christened Northwestern school with the appointment in 1893 of Nathan Abbott, who also came from Michigan, and John Henry Wigmore. It seems almost certain that Wigmore was appointed on the advice of James Bradley Thayer, the World's Fair speaker; theirs was a close teacher-

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84. Kogan, \textit{supra} note 77, at 30; Friedman, \textit{supra} note 79, at 96.

85. On the later role of ethnic lawyers in Chicago, see Jerome E. Carlin, \textit{Lawyers on Their Own: A Study of Individual Practitioners in Chicago} (New Brunswick, 1962). Despite the efforts of Bradwell and her supporters, there were in the 1950s still an ample number of lawyers who would have attracted her scorn.


87. Hoyne was a pioneer lawyer from New York who reached Chicago in 1837, two years after the incorporation of the city. He was first city clerk and then went on to hold a series of public offices including judge of probate and United States attorney. His autobiographical essay is \textit{The Lawyer as Pioneer}, in Chicago Bar Association Lectures, 22 Fergus Historical Essays 63 (Chicago, 1882).

88. Frank L. Ellsworth, \textit{Law on the Midway: The Founding of the University of Chicago Law School} 13 (Chicago, 1977) (quoting Thomas M. Hoyne, Jr.).

89. Her biographer records no information about her experiences as a student. See Friedman, \textit{supra} note 79.

student relationship. Abbott soon moved on to Stanford, but the appointment of Wigmore was one of enduring consequence.

Wigmore was the son of an English-born matriarch and her Irish-born husband. He seems to have acquired his mother’s autocratic temperament. His father owned timberland and sold lumber in San Francisco. The son was born in that city in 1863 and attended school there, until his mother decided that he should enroll at Harvard College and become an Episcopal priest. So that she could keep an eye on Harry while he was attending college, she moved to Cambridge with the whole of her large family, except for one older son left to run the lumber business in California. When Harry graduated, she brought them all back to San Francisco, where Harry started to work in the lumberyard and contemplated his mother’s plan that he would be an Episcopal priest.

Defying his mother, Wigmore took an interest in urban reform politics and returned to Harvard to study law. There he was taught by Gray, Langdell, Thayer, and young Ames. While in law school, he was a cofounder of the Harvard Law Review. He also earned some money as a political writer for California newspapers, and published two short articles in the American Law Review that won the praise of Oliver Wendell Holmes, then a justice of the Supreme Judicial Court of Massachusetts, and a critic of Langdell.91

On graduating in 1887, Wigmore remained in Boston, near the home of his future wife, Emma, and far from his domineering mother. He strove to establish a law practice, but his efforts met with little success; he best remembered the cold January night when his work required him to go door to door through a suburban city trying to persuade citizens to sign a statement that they did not mind the smell of a neighboring glue factory. He also did some work assisting in the judicial duties of Charles Doe, a notable member of the New Hampshire Supreme Court.92 Desperate to earn enough money to marry, he undertook the authorship of a digest of the decisions of the state’s Board of Railroad Commissioners. He competed for and won a small prize for an essay on circumstantial evidence in poisoning cases. But he also pursued his interest in political journalism and in 1889 published his first book, advocating as a remedy for corrupt politics the secret ballot, an institution recently devised in Australia.93

In 1889, he was offered an appointment as professor of Anglo-American law at Keio University in Tokyo, with a salary adequate to enable him to marry. Against much advice, including the assurance of Harvard’s President Eliot that there was no interest in comparative law in America and that he would

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93. The Australian Ballot System as Embodied in the Legislation of Various Countries with an Historical Introduction, 2d ed. (Boston, 1889).
therefore not be employable after a sojourn in Japan, he took the opportunity. First performing the superhuman feat of mastering the Japanese language in four months sufficiently to teach students who knew no other tongue, he went on to learn German as well, in order to work with new Japanese law drawn from German sources. He played shortstop on the first baseball team organized in Japan and, according to his wife, acquired competence in fencing. He taught one course in torts and equity, and another in Roman law and evidence. He complained only that his students were "sullen on the question of Japanese translations of Roman law terms."  

Wigmore continued working as a political journalist for American newspapers, not from an exotic venue. His political writing appeared even in one Japanese newspaper. But he also devoted intense effort to the study of Japanese legal history, gathering an enormous mass of material on indigenous law that was still the object of study by scholars at Keio many decades later. His purpose in leading this enterprise was to provide an antidote for what he perceived to be an excessive preoccupation of Japanese students with foreign law and institutions; he sought to instruct them that their law was the product of its culture and could not be interpreted or evaluated except in regard to its cultural sources.

Wigmore would devote much of his adult life to the effort to transmit a similar message to American students. In this theme of his work, he followed in the path of Francis Lieber, the first American comparatist. He also reflected the teaching of Gray and Thayer, but not that of Langdell and Ames. In their historicism and relativism, Lieber, Gray, Thayer, and Wigmore not only adhered to continental traditions, but also shared common ground with the emerging "ethical economics" of contemporary social scientists who were lending their energy and support to the development of a political program to achieve the millennial aims of the American Social Science Association.

Despite the pessimism of President Eliot, there were opportunities for Wigmore to teach law in the United States on his return in 1893. He accepted

97. Roalfe, supra note 94, at 28, 267-68.
98. E.g., On Civil Liberty and Self-Government (Philadelphia, 1853). The premise was, of course, not original to Lieber, but was fully developed by Savigny and by Montesquieu, both of whose ideas can be traced to much earlier sources. See generally Jurgen Herbst, The German Historical School in American Scholarship: A Study in the Transfer of Culture (Ithaca, 1965).
the position at Northwestern. Ever the Bostonian, Eliot congratulated him on finding a "missionary diocese,"\textsuperscript{100} carefully failing to specify the faith that Wigmore was expected to preach.

President Rogers quickly came to rely on Wigmore as the most forceful of those persons connected with his law school. Most of Wigmore's colleagues were Chicago lawyers teaching on an adjunct basis, while Wigmore, on the model of Langdell and Ames, was a full-time teacher and scholar. One of his adjunct colleagues was his law school classmate, Julian Mack, later a distinguished federal judge; another was Blewett Lee, also a Harvard graduate, who declined an offer of a faculty appointment at Harvard. Rogers supported Wigmore's efforts to induce his colleagues to adopt the case method. Wigmore also persuaded the faculty and the university to extend the law program to a three-year course, President Rogers explaining to the trustees that a two-year course was no longer "in keeping with the dignity of the University."\textsuperscript{101} In these respects, Wigmore was indeed a missionary from Harvard.

Wigmore also began at once to establish himself as a luminous scholar. Within two years of his appointment, he had written a series of notable articles on the emerging subject of torts; these appeared in the \textit{Harvard Law Review} but can in no way be characterized as "pure law," for Wigmore called attention to the social and economic consequences of the doctrines he wrote about.\textsuperscript{102} By 1899, he was the author-editor of the sixteenth edition of \textit{Greenleaf on Evidence}.\textsuperscript{103} He had also pursued his interest in comparative law in a widely admired essay on the law of pledges in cultures around the world,\textsuperscript{104} and in essays on Japanese law and culture.\textsuperscript{105} And he was known as the author of an unlikely work of critical bibliography entitled \textit{List of Legal Novels},\textsuperscript{106} a product of his own very wide reading. As became increasingly clear, Wigmore like many others found virtues in the Langdell reforms, but not in the ideology advanced to explain them.

Despite Wigmore's achievements, Northwestern's law school languished for a time. The university was not well endowed, and financial support for the law school had not been forthcoming. In 1900 Rogers resigned the presidency of the university; shortly thereafter he accepted the deanship of the Yale Law School. Northwestern, especially its vulnerable law school, was faced

\textsuperscript{100} Roalfe, \textit{supra} note 94, at 33. Wigmore accepted the designation and referred to himself as a missionary. Chase, \textit{supra} note 51, at 36.

\textsuperscript{101} Roalfe, \textit{supra} note 94, at 39 (quoting University Trustee Minutes, June 11, 1895).

\textsuperscript{102} Responsibility for Torts, Its History (pts. 1–3), 7 Harv. L. Rev. 315, 383, 441 (1894); The Tripartite Division of Torts, 8 Harv. L. Rev. 200 (1894); A General Analysis of Tort Relations, 8 Harv. L. Rev. 377 (1895).


\textsuperscript{104} The Pledge-Idea: A Study in Comparative Legal Ideas (pts. 1–3), 10 Harv. L. Rev. 321, 389 (1897), 11 Harv. L. Rev. 18 (1897).

\textsuperscript{105} E.g., \textit{The Administration of Law in Japan}, 36 Am. L. Reg. (n.s.) 437 (1897).

\textsuperscript{106} 2 The Brief (Phi Delta Phi) 124 (1900); an expanded version appeared as \textit{A List of One Hundred Legal Novels}, 17 Ill. L. Rev. 26 (1922).
with keen, perhaps overwhelming competition from the new University of Chicago.

IV. President Harper's "New" University of Chicago

The new University of Chicago had been established in 1892 with a large gift from John D. Rockefeller, a faithful Baptist intent on redeeming the honor of his denomination. William Rainey Harper, a theologian who had won the support of Rockefeller, was its president.\textsuperscript{107} Like so many of his peers of that time, he desired a law school for his university. His stated reasons were (like those of Jefferson and other earlier founders of American law schools) political, but with a market economy twist; in 1899, speaking at the University of California, he had proclaimed:

Another quarter of a century of deterioration, another quarter of a century without radical modification of the present plan, will put popular government in a position which will be embarrassing in the extreme. Thus far democracy seems to have found no way of making sure that the strongest men should be placed in control of the country's business.\textsuperscript{108}

In planning a law school that would improve democratic government by placing "the strongest men in control," Harper obtained elaborate advice from at least three diverse sources.

One adviser was Thomas J. Lawrence, a professor of international law at Cambridge University, who urged that the object should be to train students to become "leaders of the bar and ornaments of the bench, inspiring teachers, scientific writers and wise reformers, rather than to produce the greatest possible output of eager youths, quick to pick up the professional technicalities and careless of aught beyond professional emolument."\textsuperscript{109} The curriculum Lawrence envisioned gave emphasis to public law and comparative law. Two professional historians were to be major contributors to the law program; one, previously enticed to Chicago from the University of Freiburg, was to provide an international dimension, and another also already in residence would teach constitutional history. Perhaps stimulated by Lawrence, Harper for a time envisioned an institution chiefly devoted to legal research.

Harper received equally radical advice from a member of the Chicago bar: Adelbert Hamilton was critical of Langdell's Harvard Law School as an institution that had "lost touch with great leaders among jurists and lawyers."\textsuperscript{110} He, too, urged the importance of public law and international law, and "social economics" or "principles of statesmanship" for lawyers, a course that

\textsuperscript{107} Harper was perhaps more an academic than a theologian. He was awarded a Yale Ph.D. at the age of 18 and soon identified himself as a teacher. Thomas W. Goodspeed, William Rainey Harper, First President of the University of Chicago 18–51 (Chicago, 1928). He was a professor at Yale at the time of his Chicago appointment.


\textsuperscript{109} Ellsworth, supra note 88, at 35.

\textsuperscript{110} Id. at 42–43.
contemplates a definition of social progress and its laws, a thorough grounding in the principles of economic production and distribution, and an exposition of the principles of practical statesmanship, which shall unfold the meaning of the doctrine of laissez faire and protection, define the nature and functions of the state, formulate the principles of international trade and of economic taxation, show the relation of the state to the development of industrial organizations, and indicate the correlation of the law with the principles of sociology so far as the latter have been worked out.111

The third counselor to Harper was Ernst Freund, already a member of the new political science department. Freund was a native of New York, born in 1864 (a year after Wigmore) of German Jewish parents who soon returned with him to Germany. In 1884 he achieved a doctorate in law at Heidelberg, but then chose American citizenship and returned to New York on his own. He studied at Columbia for two years, and practiced law in the city for eight more. While practicing, he continued studying politics at Columbia in the department established by one of Lieber’s disciples, John William Burgess.112 Freund studied chiefly with Frank J. Goodnow,113 who acknowledged Freund’s assistance on his seminal 1893 treatise, Comparative Administrative Law,114 a work manifestly descended from Lieber’s work on comparative constitutional law.115 On Goodnow’s recommendation, Freund was appointed at Chicago, where he, too, would be a missionary, but for a different faith from that contemplated by President Eliot.

In 1893, before his arrival at Chicago, Freund had published an article in the Political Science Quarterly in which he became the first advocate for allowing

111. Id. at 45.

112. The department was an offshoot from the law school. Burgess, the successor to Lieber on the law faculty, was dissatisfied with his role and what he perceived to be the unduly technocratic teaching of his colleague and leader, Theodore Dwight. For a brief account of the relation of Burgess and Dwight and of the relation between law and political science at Columbia, see A History of the School of Law, Columbia University, ed. Julius Goebel, 44–134 (New York, 1955). For the story of the founding of the school of political science, see R. Gordon Hoxie et al., A History of the Faculty of Political Science, Columbia University 3–44 (New York, 1955). For an account of the role of Lieber as a founding spirit of American political science, see Dorothy Ross, The Origins of American Social Science 38–42 (New York, 1991). On Burgess, see id. at 66–77.

113. Frank Johnson Goodnow was a graduate of Amherst and of the Columbia law school. He trained as a lawyer in the office of James Forrest: Dillon, who had won recognition as a federal judge and law teacher in Iowa before joining the Columbia law faculty and serving as general counsel to the Union Pacific Railroad. Dillon was also an adherent of the historical jurisprudence of Savigny and Lieber. See his The Laws and Jurisprudence of England and America (Boston, 1895). In addition to serving as a cofounder of the Columbia School of Political Science, Goodnow taught administrative law to Dwight’s law students. He was an advocate of broader training than Dwight was inclined to provide. Private Rights and Administrative Discretion, 41 A.B.A. Rep. 408, 423 (1916). He held a chair in public law at Columbia and concluded his career as president of Johns Hopkins University. Arthur W. MacMahon, Frank Johnson Goodnow, in 2 Supp. to Dictionary of American Biography, ed. Dumas Malone, 250 (Chicago, 1941); see also Furner, supra note 34, at 284–91. On his influence on American political science, see Ross, supra note 112, at 274–88.

114. 1 Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France and Germany at vi (New York, 1893). This work was published in two volumes.

115. Lieber, supra note 98.
claims to be brought against a government for harms resulting from the negligence of its officers, an idea that would not gain acceptance for five decades, while the public fisc remained under the protection of the English doctrine of sovereign immunity. Following his arrival in Chicago, he published his Columbia doctoral dissertation, *The Legal Nature of Corporations*, a work based in part on German legal literature and presaging the development of long-arm jurisdiction of state courts over corporate defendants. In it he argued against the equation of corporate rights with individual rights. The next year, he took time to share with James Bradley Thayer public opposition to the war with Spain, and to the acquisition of an American empire.

In opposition to the advice of Lawrence, Freund opposed the idea of a research institute and urged that the university seek to reach the practicing profession. He later recalled:

> There was quite a demand at the time that the school should not be "merely professional," but should set itself up as a school of jurisprudence; but those who made the issue were not entirely clear as to its implications. President Harper wisely concluded that the vital thing was the establishment of the highest professional standards, leaving the question of jurisprudence in abeyance.

Freund saw no conflict between his teaching of public law and the aims of professionalization, but held that all the university's resources should be applied to "broadening and deepening the law-consciousness of the legal profession, and indirectly thereby, of the community." Freund’s ideas about curriculum were traditional in comparison with those of Lawrence or Hamilton; they differed from the Harvard curriculum chiefly in requiring constitutional and international law in the first year. What Freund most admired about Harvard Law was the "earnestness and devotion to their chosen work" on the part of its students. His advice was supported by some members of the Chicago bar who volunteered to Harper that Chicago needed "a law school like that of Harvard."


118. Chicago, 1897.

119. Horwitz, supra note 6, at 71.

120. This work may also have had broader consequences with respect to the theoretical underpinnings of corporation law. See id. at 101–03.

121. E.g., The Control of Dependencies Through Protectorates, 14 Pol. Sci. Q. 19 (1899); see also Empire and Sovereignty, in 4 U. Chi. Decennial Pub. 257 (Chicago, 1905). Thayer's position was stated in Our New Possessions, 12 Harv. L. Rev. 464 (1899).

122. Law School and University, 18 U. Rec. 143, 149 (1932).

123. Id. at 152.

124. Storr, supra note 107, at 299.

125. Ellsworth, supra note 88, at 49.
Harper announced in 1901 that the new law school would open in 1902. While his vision and his advisers', and that of the Chicago trustees, more nearly resembled in its aims and content the defunct law department of Transylvania University than Langdell's Harvard, Harper nevertheless, on Freund's advice, sought help from Harvard.

When Dean Ames was consulted, he called attention to the existing institution at Northwestern. Harper replied that he would simply take the best people away from Northwestern "and that will be the end of that school." He was indeed prepared to offer Northwestern's star, Wigmore, the deanship of the new school, an idea endorsed by Ames. But Harper sought the professional respectability of Harvard, and entered into negotiations to secure the temporary assistance of a Harvard professor as founding dean. Addressing the Harvard law faculty, Harper sought missionary help, quoting words addressed to the apostle Paul: "Come over into Macedonia and help us."

Attention fastened on Joseph Beale as the apostle to be sent to Chicago. He had been a classmate of Wigmore's (and another co-founder of the Harvard Law Review) and had returned from practice to the Harvard faculty just a few years earlier. Harvard, at Ames's direction, approved a leave for Beale on condition that Chicago "have ideals and methods similar to [those of] the Harvard Law School." This arrangement encountered difficulty when Ames and Beale saw the draft announcement of the program prepared by Freund and Harper, and brought by Freund to Cambridge for their approval. It proposed a first-year curriculum that would include international law taught by a political scientist It also contemplated close affiliation with the social science departments in the university, and graduate work in legal history and legislation.

Ames was appalled. He wrote Harper: "We have no such subjects in our Curriculum, and are unanimously opposed to the teaching of anything but pure law in our department. . . . [N]or would the transfer of such subjects to a post-graduate year in the School accord with our conception of the true fashion of a law school." Beale echoed these sentiments, denouncing Columbia for its practice of allowing and even encouraging law students to do work in political science with Burgess and Goodnow. Moreover, Harvard insisted that the faculty must consist "solely of persons who teach law in the strict sense of the word," and that instruction must be exclusively by the case

127. Roalfe, supra note 94, at 46.
131. Id. at 69.
132. Id. at 70 (quoting Beale).
method. Finally, Beale could and would come only if all the teachers employed for the school were to agree with him on these points.

Harper humbly accepted the Harvard strictures, and Beale came to Chicago for two years. Among Beale’s first steps was to partly reverse his position with respect to Freund and enlist him as the initial teacher of the basic course in property. Offers were made to three Northwestern teachers, all of them Harvard law graduates: Wigmore, Blewett Lee, and Julian Mack. Lee and Mack accepted, weakening Northwestern almost to the point of collapse. But Wigmore declined, and instead accepted the Northwestern deanship. This embittered Harper toward Wigmore; he concluded that Wigmore “lacked the ideals” that would suit him to the University of Chicago and would not hear Beale’s entreaties that a second effort be made to secure him.133

Chicag0 also recruited two teachers from the new law school at Stanford. One of these, James Parker Hall, was also sought by Harvard, but with a less generous offer:144 Floyd Mechem, then perhaps the most widely published member of the Michigan law faculty, was also recruited, to commence a year later.155 The cast was completed with the appointment of Harry Bigelow, a scholar of established eminence who came from Boston University.156 The Mechem appointment troubled Ames, because Mechem had pioneered in empirical work (thereby perhaps implying that he did not regard Ames’s sort of work as science) and had admitted that he was not ideologically committed to the case method. He had edited a casebook and written several treatises, but one was innovative, A Treatise on the Law of Public Offices and Officers,157 there being “no such subject” at the Harvard Law School of Dean Ames.158

The University of Chicago Law School prospered, and the constraining influence of Harvard on its curriculum was not long felt. Unlike Harvard, the school not only fostered relations with scholars working in other disciplines

133. Id. at 77–78.
134. On the competition for Hall, see id. at 85–90. Hall was the youngest of the new faculty, having been born in 1871; he was not at the time of his appointment widely published. He later earned a reputation in constitutional law.
135. Mechem was born in 1858. Among his works were Elements of the Law of Partnership (Chicago, 1896) and A Treatise on the Law of Sale of Personal Property (Chicago, 1901). Mechem was also instrumental in organizing an elaborate practice court program at Michigan. Brown, supra note 90, at 254. He was later the first reporter for the Restatement of Agency.
136. Bigelow was born in 1846 and thus was the senior member of the group. Like Freund, he held a German doctorate. He was at the time of his appointment at Chicago the dean at Boston University. He had revised for republication much of the work of Joseph Story. Among his own works were Treatise on the Law of Estoppel and Its Application in Practice (Boston, 1872); Elements of Equity for the Use of Students (Boston, 1870); Elements of the Law of Torts for the Use of Students (Boston, 1882); Elements of the Law of Bills, Notes and Cheques (Boston, 1895); and The Law of Wills for Students (Boston, 1898).
137. Chicago, 1890.
138. Bruce Wyman had commenced teaching administrative law at Harvard in 1900, during Ames’s deanship. Wyman’s early lectures made no reference to Goodnow’s work and proclaimed sovereign immunity as the overriding principle of Anglo-American administrative law. See Chase, supra note 51, at 64–65.
than law, but it also enlisted the help of several respected members of the Chicago bar to provide applied instruction, especially in the field of procedure. And in one respect the school even outdid Harvard: it was more faithful to the teaching of President Eliot that in higher education demand could be enlarged by raising the price (in academic effort exacted, more than coin) and thereby elevating the status of those who completed the program. Its academic standards were quickly recognized as at least the equal of Harvard’s. And it honored its students with a degree presumptively even higher than that offered by Harvard: Chicago invented the Juris Doctor degree. All this contributed to a quickly growing enrollment 139 that soon redeemed President Harper’s promise to the trustees that a law school of quality could be established with minimal drain on the university’s scarce resources.

V. The Scholarship and Politics of Ernst Freund

A centerpiece of the law faculty was Ernst Freund. Even before the arrival of Dean Beale, and in contravention of the understanding between Ames and Harper, the Faculty Senate of the University of Chicago had formally recommended a curriculum for the law school that not only covered the fields of private law and American constitutional law, but extended to international law and “principles of legislation,” and directed that work in the latter field should grow from affiliation of the school with the departments of social science and with the school of commerce. The university had already acquired an excellent, even an ornamental, faculty in the related fields of economics, 140 history, political science, and sociology; by stages, the law curriculum was extended to enlist the services of many of those whose interests embraced the law. Beale may have impeded this initiative, led as it was by Freund, but in a short time interdisciplinary work became an important feature of the school.

Indeed, Freund earned for himself a place on a very short list of those American law teachers most deserving of memory. Felix Frankfurter, a sometime rival, would acclaim him as “one of the most distinguished of all legal scholars in the whole history of the legal professoriate.” 141 Although Frankfurter may sometimes have been given to excess in such matters, he was not in this assessment wrong.

139. Ellsworth, supra note 88, at 138.

140. Oddly, in light of subsequent developments, there was little early association between the economics department and the law school. The economics department was in its early years battle-scarred. Its leader was J. Laurence Laughlin, formerly of Harvard, who was a formidable adversary of Richard T. Ely and the ethical economists. Harper sought to balance the department with the appointment of Edward W. Bemis, a disciple of Ely. Because of Laughlin’s opposition, Bemis was located in the adult education program. His public involvement with the labor movement and the political program of Governor John Peter Altgeld quickly evoked the hostility of wealthy supporters of the university. Bemis’s departure from the university resulted in a controversy embarrassing to Harper. See Furner, supra note 34, at 165–88; see also William J. Barber, Political Economy in an Atmosphere of Academic Entrepreneurship: The University of Chicago, in Breaking the Academic Mold: Economists and American Higher Learning in the Nineteenth Century, ed. William J. Barber, 241 (Middletown, 1988). For an account of Altgeld’s role, see Ginger, supra note 82. Thorstein Veblen was also a member of Laughlin’s department in its early years.

Freund continued in political science, pursuing interests at the intersection of law and politics not distant from those previously explored by his mentor, Frank Goodnow, and by his mentor's mentor, Francis Lieber. Perhaps because he himself earnestly desired to preserve a solid professional identity for the law school, or perhaps because of the concerns of his colleagues, he was constrained to teach to undergraduates courses in legislation and legislative programs that he might have preferred to teach in the law school. On the other hand, it is also likely that Freund had no wish to surrender his identity as a professor of politics as well as law. In 1903, he was a cofounder of the American Political Science Association, and in 1916 he was elected its president.

In 1903, while Beale was in residence, Freund began teaching Administrative Law in the law school, to second-year students. He was agreeable to the use of the case method (he published the first casebook in administrative law in 1911), but was something less than a master of that form of instruction. Some of his students regarded him as a mere "continental or civil lawyer," for his discussions were prone to focus on broader theories and principles than the conventional law school case discussion of the time. Yet Morris Cohen also attributed to Freund the professional lawyer's "natural revulsion against the nebulous speculation that often passes as legal philosophy." And Freund was himself to question: "Is jurisprudence something better than law? Is scientific different from professional law?"

In 1904, shortly after Beale's return to Harvard, Freund published _The Police Power: Public Policy and Constitutional Rights_. This substantial work defined for a generation the limits of states' power to regulate the conduct of firms and citizens. It was cited by courts and others as a welcome corrective for the misuses to which Thomas Cooley's work had been employed to justify judicial restraints on legislative enactments punishing various forms of antisocial...

142. Chase describes the environment in the law school as "hostile" to Freund's work in administrative law. Chase, _supra_ note 51, at 58. There is no evidence that Freund thought it to be hostile, although his views on the curriculum did not always prevail.

143. _Id._ at 51. Dean Hall in 1907 opposed the inclusion of Social and Economic Legislation and Principles of State Government in the law curriculum. _Id._ at 95.

144. The first president of the association was Freund's mentor, Frank Goodnow. MacMahon, _supra_ note 113.

145. But was a skeptic at the time of his visit to Harvard. Storr, _supra_ note 107, at 294.


149. Freund, _supra_ note 122, at 152.

150. Chicago, 1904.
conduct, particularly those arising in economic relations. On the other hand, Freund praised judicial intervention to limit the growing practices of racial discrimination by law, which he found to be irreconcilable with the Constitution. And he was among the first to contend that the Equal Protection Clause implied an obligation of the state to assure women equal pay for equal work. Writing in 1941, William Seagle appraised the book as "the constitutional classic of its period."

But Freund did not limit his professional commitment to scholarship and teaching. As one of his students was later to say:

To him the mastery of legal principles was an incomplete accomplishment until dedicated to the progress of society. . . . While many good men sit at home not knowing that there is anything to be done, nor caring to know, cultivating the feeling that politics are dirty and that government is ruled by vulgar politicians, Ernst Freund remembered that, if the government is not to be mastered by ignorance, it must be served by intelligence.

In 1905 Freund served as draftsman for the Illinois legislation obligating employers to compensate workers for job-related injuries. The next year, he joined Louis Brandeis of Boston in founding the American Association for Labor Legislation, a group committed to preparing laws protective of workers and securing their enactment. In 1908 he was elected president of that organization, a position he retained for many years.

In 1906 Freund as draftsman rewrote the Chicago city charter, working with the reform government of Walter Fisher. In the course of this work, he became an advocate of municipal home rule. In 1920 he represented the city of Chicago in the state constitutional convention and drafted the provi-

151. Cooley's Constitutional Limitations was first published in 1868. See supra note 74. He produced a new edition at intervals of three or four years. Clyde E. Jacobs places on Cooley responsibility for laissez faire. Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law 27 (Berkeley, 1954). That judgment seems to have been conventional among New Deal historians and rests on little more than that the Supreme Court often cited Cooley. Jones, supra note 72, at 122–65; accord, Howard Gillman, The Constitution Besieged: The Rise and Denial of Lochner Era Police Powers Jurisprudence 55–59 (Durham, 1993). Gillman notes that on at least one occasion Freund, too, was cited perversely. Id. at 166 (discussing State v. Crowe, 197 S.W. 4, 8 (Ark. 1917) (McCulloch, C.J., dissenting)).

152. Freund, supra note 150, at 721.

153. See id. at 298–99.


156. Id. at 5.

157. Id. at 5, 50–59.

158. Id. at 4.

159. He was also following the leadership of his mentor, Frank Goodnow, who drafted a charter for New York in 1800 and led the home rule movement in that state. MacMahon, supra note 113.
sions bearing on municipal government. His interest in municipal government was later reflected in yet another prescient work questioning the use of zoning boards, newly invented, to advance the interests of more prosperous citizens at the expense of those less fortunate.

In 1908 he was a cofounder of the Immigrant Protection League, another organization that he was to lead. In that work, he lobbied against laws requiring the registration of aliens, and against their deportation without judicial process. He later, in 1921, took a particular interest in the rights of immigrant women.

Also in 1908, he was appointed by the governor to represent Illinois on the National Conference of Commissioners on Uniform State Laws. He was a commissioner for twenty-four years, served as president of the conference in 1920, and drafted numerous statutes proposed for enactment by state legislatures. He took a special interest in laws to protect the interests of illegitimate children and in the enforcement of obligations for child support. His work in this field and in the field of immigration was animated by his association with Jane Addams, and he served as champion within the university for the establishment of the school to train professional social workers who would emulate her pioneering work. She was later to say of him, "He never once failed to be sensitive to injustice and preventable suffering."

In 1919 Freund supported his fellow Chicagoan, Eugene Debs, when Debs was convicted for utterances in opposition to the war effort. When the conviction was affirmed in the Supreme Court, Freund was so critical of the Court's opinion that its author, Holmes, acknowledged that the criticism had "cast gloom over his life." In the same year, Freund rose to the support of victims of Attorney General Palmer's "Red Raids" against persons identified as "dangerous aliens" and was appointed to a Committee of Twelve who investigated the attorney general and found his actions unjustified. In 1921, he supported efforts to provide a defense for Sacco and Vanzetti.

All of these public involvements informed Freund's research and teaching. In 1917, he published Standards of American Legislation: An Estimate of Restrictive and Constructive Factors. In 1928, he published Administrative Powers over

162. Kraines, supra note 155, at 5.
163. See id. at 5–6, 60–63.
164. Quoted in id. at 148.
167. Kraines, supra note 155, at 201–02 n.466.
168. Chicago, 1917.
Persons and Property: A Comparative Survey. And in 1932, Legislative Regulation: A Study of the Ways and Means of Written Law. These three volumes, together with a number of short articles generally subsumed in the longer works, constitute a major contribution to the intellectual development of American public law.

With respect to legislation, Freund's work reflected his Progressive political views but was much more than a lawyer's brief in support of Progressive legislation. Although acknowledging that the constitutional scheme of separation of powers muddled responsibility for clarity in the writing of legal texts, he sought to devise means to assure a higher level of professional competence in drafting statutes. He elaborated principles for the guidance of professional draftsmen. He argued for the use of social science as a predicate to enactment, insisting that regulatory legislation should come at the end of an analytical process. He frequently reiterated the law of unintended consequences—that any legal text, however carefully expressed, can and probably will affect the behavior of citizens in its secondary and tertiary consequences in ways that were never intended by the draftsman. He argued for legislative reference services such as that being developed at the University of Wisconsin, and for legislative procedures that assured competing interests an opportunity to be heard on pending matters.

Freund argued that legislation was preferable to case law in its potential for thoughtful treatment of social and political issues. He wrote:

Most of the common law has developed in that atmosphere of indifferent neutrality [to social consequences] which has enabled courts to be impartial, but also keeps them out of touch with vital needs. When interests are litigated in particular cases, they not only appear as isolated and scattered interests, but their social incidence is obscured by the adventitious personal factor which colors every controversy. If policy means the conscious favoring of social above particular interests, the common law must be charged with having too much justice and too little policy.

He therefore decried "the common-law attitude toward legislation, looking upon it as an inferior product of the non-legal mind to be tolerated and minimized in its effects," a position totally at odds with Langdell's. Yet he urged the need for judicial responsibility and deliberation in interpretation.

169. Chicago, 1928.
171. See Maurice T. Van Hecke, Ernst Freund as a Teacher of Legislation, 1 U. Chi. L. Rev. 92 (1933).
172. E.g., Legislative Drafting (Indianapolis, 1916). Freund concerned himself with such humdrum matters as the ambiguity inherent in the use of shall. Freund, supra note 170, at 225.
173. He even went so far as to suggest the need for empirical treatment of the law of future interests. Arthur H. Kent, Ernst Freund (1864–1932)—Jurist and Social Scientist, 41 J. Pol. Econ. 145, 149 (1933).
175. Id. at 312.
"to balance legislative inadvertence."\(^{176}\) He was skeptical of judicial efforts to detect legislative intent from records of legislative deliberations, observing that such intent is in reality a fiction.

Echoing Lieber, Freund urged the perpetual need to seek prudent compromise in legislative responses to social problems: "the choice between the second best and nothing at all is the normal situation."\(^{177}\) He broadly opposed legislation bearing on moral conduct occurring in private, for he viewed such laws as impractical, ineffective, and a waste of legislative influence. He argued for what he described as the sound principles of legislation:

[the] non-partisan policy of justice in legislation, the observance of the limits of the attainable, the due proportion of means to ends, and moderation in the exercise of powers which by long experience has been shown to be wise and prudent, though it may be temporarily inconvenient or disappointing in the production of immediate results.\(^{178}\)

In his work on administrative law, Freund was preoccupied with the problem of administrative discretion. His deep concern for individual rights, which for him included the right to own and enjoy property, led him to be mistrustful of officials, and concerned for "the shady and corrupt aspects of government."\(^{179}\) He favored legislative prescriptions that limited the prerogatives of administrators as narrowly as possible within the limits of the legislature's wisdom to foresee the application of its texts to individual matters. He argued that administrators exercising power over individual rights were obliged to be consistent and to develop standards guiding future dispositions, much as courts evolve standards through the evolution of common law.\(^{180}\) He contended that courts should review administrative decisions to assure that officers making them are exercising powers authorized by legislation and to assure that the decisions reflected not only the policy embodied in enabling legislation, but also its elaboration through administrative rules and decisions. He argued for closer review of administrators' determinations on which the exercise of their jurisdiction was based, providing the theory of review of jurisdictional facts that was expressed by the Supreme Court in 1932 in *Crowell v. Benson*.\(^{181}\)

In his concern for administrative discretion and standards, Freund's thinking was consonant with the contemporary practices of American courts, which were generally reluctant to review administrative decisions except on the

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180. See generally id.
narrowest of grounds. Particularly in an age that celebrated technical competence above almost all else, courts were generally deferential to the supposed expertise of executive officers, and reluctant to engage in the openly political process of evaluating the substance of administrative decisions, even where individual rights were at stake. This tendency of the courts was possibly in some measure reinforced by the more technocratic vision of law that was radiating from the Harvard Law School; among its champions were Bruce Wyman, Felix Frankfurter, and James Landis, themselves all of Harvard and all fearful of the intrusions of judges into administrative lawmaking and enforcement. Their view would flourish during the era of the New Deal, only to have its weaknesses fully revealed. Freud’s views would by midcentury prevail, embodied in part in the Administrative Procedure Act.

Freud was often prescient in other matters. As Felix Frankfurter observed, his book on The Police Power was a much better forecast of the Constitution that was to be than was the decision of the Supreme Court a year later in Lochner v. New York. He foresaw the rise of the labor movement and was among the nation’s first advocates for safety regulation and compulsory health insur-


185. E.g., The Administrative Process (New Haven, 1938).

186. Landis’s The Administrative Process, supra note 185, was aptly reviewed in a nutshell by Arthur Sutherland as an eloquent declaration of faith in discretionary government carried on by an assumed enlightened and apolitical elite. The only serious shortcoming of the book is its author’s neglect of the possibility that a governing elite might be neither enlightened, nor apolitical, nor wisely selected. Time was to disconcert many men, including Landis, by demonstrating this possibility.

187. For an excellent account of the midcentury transformation of American administrative law, see Horwitz, supra note 6, at 213–46. Freud’s prescience may have been a cause of the failure of some later scholars to take full notice of his influence. For example, Calvin Woodard perceived Frankfurter as the person rousing academic interest in administrative law and legislation. The Limits of Legal Realism: An Historical Perspective, 54 Va. L. Rev. 689, 724 n.73 (1968). Woodard cites Frankfurter’s The Task of Administrative Law, supra note 184, a work openly derived from Freud’s. Although attentive to Freud’s work in other areas, Horwitz takes no notice of Freud as a source of midcentury thought and practice.


189. 198 U.S. 45 (1905).
ance, as well as government tort liability. For this reason, even today, his work enjoys "continuing relevance."

VI. The Scholarship and Politics of Wigmore

While Chicago and Ernst Freund prospered, Wigmore's Northwestern managed to survive the challenge and even to flourish. A new building was provided, and Holmes came to dedicate it. Elbert Gary of United States Steel funded a library to match that provided Chicago by Rockefeller. In the early years of his deanship, Iowa, Columbia, and Yale each made generous offers to Wigmore to entice him away from Northwestern. Indeed, all but perhaps Harvard, it seems, tried to move him. Yet he remained. He continued to teach a full load, including not only Torts and Evidence, but also International Law, the subject so unwelcome to Ames. In 1907 he offered a new course of his own design entitled Practical Problems in Contemporary Legislation. Its aim, like the "principles of statesmanship" course proposed at Chicago, was to introduce his students to the literature of political economy and of social science as these bore on current legal issues. The course was widely heralded; one person expressing interest and admiration for the initiative was Frankfurter, then a new recruit to the Harvard faculty. Finally, Wigmore devised another course, The History of the Bench and Bar, which was designed to make students mindful of the opportunities afforded by the law for useful public service. In that course, students read biographies, not cases. Indeed, even his torts casebook was "impure," being the first example of that literary genre to include excerpts from novels, plays, and poems to "help convince the student of law that he must extend his outlook."

Although the Northwestern law school remained downtown to be near the profession, the Wigmores lived in Evanston among the university faculty. On a big porch overlooking the lake, Wigmore devoted most of his summers to writing. In 1904–05, he published the first edition of his own Treatise on Evidence, built upon the earlier works of Simon Greenleaf and Wigmore's mentor, James Bradley Thayer. It established him as one of the premier legal

190. Kraines, supra note 155, at 50–59.
192. See his Address at the Dedication of the Northwestern University Law School Building, Chicago, October 20, 1902, in Oliver Wendell Holmes, Collected Legal Papers 272 (New York, 1920).
193. By 1927, Wigmore would have been unacceptable to the Yale faculty even if available. Kalman, supra note 39, at 109.
194. Realf, supra note 94, at 52.
195. Id. at 53.
196. Id. at 54–55.
197. 1 John Henry Wigmore, Select Cases on the Law of Torts, with Notes, and a Summary of Principles, at ix (Boston, 1912).
198. The full title of this work, which was initially published in four volumes, was A Treatise on the System of Evidence in Trials at Common Law (Boston, 1904–05) [hereinafter Wigmore on Evidence].
scholars of his time. In four volumes, he restructured the substantial body of legal doctrine that had evolved as an excrecence of the institution of trial by jury. His work was historical, but informed by contemporary social science. It proceeded from rationalist premises most fully developed three generations earlier by Jeremy Bentham. It was critical, pointing at many places to the need for reform, yet was at bottom a stirring defense both of the jury system and of the principles worked out to govern the conduct of jury proceedings and confer on the professional judge authority to assure fidelity to law.

Wigmore wrote with an oracular style that required respect even where there was disagreement. His manner of command was present throughout the work; he was given to the expression of strong moral judgments. Illustrative was his treatment of the duty of citizens to give evidence when called:

It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to.

... [The] inconvenience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of truth, no man has any knowledge that is rightly private.

Wigmore then proceeded in almost 200 sections, each a lengthy essay, to examine in utmost detail the limited exceptions to the duty to give evidence when called.

The treatise was marred by Wigmore's seemingly irresistible impulse to coin technical phrases, such as "viatorial privilege," "autoptic preference," and "retrospectant evidence." Reviewers and courts took him to task for this, one court noting that, "while 'autoptic' is a good word, with pride of ancestry, though perhaps without hope of posterity, the word 'preference' is a glossological illegitimate, a neologistic love-child, of which a great law writer confesses himself to be the father." Nonetheless, over a period of half a century, this treatise played an important role in the evolution of the law of evidence and the shaping of jury trials.

Wigmore followed the treatise with an elegant shorter work, Principles of Judicial Proof, devoted not to legal texts or principles, but to the psychology


202. The full title was The Principles of Judicial Proof: As Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials (Boston, 1913). It was intended for use by students in a course preliminary to a course on the rules of evidence. As a course book, it was "a lead balloon." Twining, supra note 199, at 164.
of persuasion. It drew on broad reading that included works of history and literature. It also reflected a confidence, misplaced at least in degree, in the ability of science to resolve issues of fact.203 Wigmore twice rewrote both this book and the treatise.204

By the 1940 edition, the treatise had reached ten volumes; it was comprehensive, including almost all that had ever been usefully said on its subject; it was historical, comparative, and cross-disciplinary. It was acclaimed a masterpiece; one knowledgeable reviewer rated it "the greatest legal treatise ever written,"205 another as "the best work ever produced on any comparable division of Anglo-American law."206 No one has questioned this assessment, and few if any works have since been produced that could be regarded as its equal in ambition and execution.207

But Wigmore did not limit his scholarship to the law of evidence. In 1909 he initiated a national conference on Criminal Law and Criminology, which resulted in the formation of a national institute and a journal that yet survive. Wigmore long urged that lawyers working with the criminal law should be acquainted with the whole range of disciplines that seek to illuminate antisocial conduct. It distressed him that the legal profession was preoccupied with legal doctrine and procedure and so little concerned with behavior. He was for many years a contributor to the Journal of Criminal Law and Criminology, and in 1929 caused a laboratory for criminal investigation to be established at Northwestern.208

Wigmore also edited a three-volume collection of essays on legal history; a fifteen-volume set, Modern Legal Philosophy,209 and an eleven-volume set of translations, Continental Legal History.210 In 1928 he published a three-volume work on comparative law based on lectures, complete with many illustrations; in A Panorama of the World's Legal Systems211 he explored the hypothesis that legal systems emerge only through the initiatives of "a highly trained professional class."212 Panorama, not alone among Wigmore's endeavors,213 was writ-

203. At the same time, Wigmore was dismissive of the work of Hugo Muensterberg, who in On the Witness Stand: Essays on Psychology and Crime (New York, 1908) argued that psychologists should be used in court to evaluate the testimony of witnesses. See Professor Muensterberg and the Psychology of Testimony, 3 Ill. L. Rev. 399 (1909).

204. The third edition was retitled The Science of Judicial Proof, as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials (Boston, 1937).


207. Grant Gilmore gave the palm to his teacher, Arthur Linton Corbin, for his monumental treatise on Contracts. Gilmore, supra note 6, at 79–80.

208. This was a response to the St. Valentine's Day Massacre of that year; the story is told in Fred E. Inbau, John Henry Wigmore and Scientific Evidence: A Personal Note, 75 NW. U. L. Rev. 8 (Supp. 1981).


212. Id. at 1129 (emphasis omitted).

213. See also A Kaleidoscope of Justice: Containing Authentic Accounts of Trial Scenes from All Times and Climes (Washington, 1941).
ten for a nonprofessional audience; William Twining describes it as “a Cook’s tour of all Law in the style of the National Geographic Magazine.”

By his stellar career, Wigmore assured Northwestern of a position of status and attracted financial support from Chicagoans. His success in this endeavor was owed in part to his faithful participation in the work of the Chicago Bar Association. During his tenure as dean, the law faculty lunched at the CBA on Tuesdays; those who were negligent in attending could expect a note from the dean.

Wigmore was much more than a teacher, writer, and dean. He had a large capacity for friendship, even with persons providing janitorial services in his building, and without regard for differences of race, and he was to many an excellent companion. For almost any public occasion, he was ready with a song written for the event, or perhaps some doggerel. He was attentive to the needs of his students and professionally supportive, especially to those who were female.

Wigmore applied his substantial talent for influencing others to a wide array of causes. Throughout his career, he sought to improve the courts of Illinois and of the United States. Some of this effort was connected to the treatise and was directed at the reform of evidence law; over the years, he wrote hundreds of letters to judges commending decisions that he thought to be correct. But his interests in law reform were far wider than the law of evidence. He keenly favored apolitical or “merit” selection of judges. He decried the tendency of judicial elections to produce judicial “Pilates” given to “truckling to the demand of the multitude.” But he also lashed out at the federal politics of judicial appointment, referring to the United States Senate “with its feet in the political trough, [which] has sullenly refused to cease munching the husks of partisan provender.”

214. Twining, supra note 199, at 110 (footnote omitted).
216. On one occasion, he braved a severe storm to attend a funeral in the South Side black ghetto, and wrote a moving memorial about the deceased janitor’s contribution to the law school. When a Filipino student contracted tuberculosis, Wigmore was solicitous far beyond the call of his dean’s office. Id. at 67. One of his black students, James Nabrit, went on to teach at Howard and to serve as an important acolyte to Thurgood Marshall in the early years of the civil rights movement. Nabrit concluded his career as president of Howard University. Rayford W. Logan, Howard University: The First Hundred Years, 1867–1967, at 451–538 (New York, 1969).
217. Rolfe, supra note 94, at 178. Some of this was published in Lyrics of a Lawyer’s Leisure (Chicago, 1914).
218. When University of Chicago students invited Northwestern law students to a party designated as a stag affair, Wigmore protested and refused to attend, with the result that the few women law students were invited. Rolfe, supra note 94, at 67. While he appointed Nell McNamara to direct his legal clinic, he did not otherwise preside over the appointment of a woman to his faculty. The Correspondence Between Leon Green and Charles McCormick, 1927–1962, eds. David W. Robertson & Robin Meyer, 85 n.72 (Littleton, Colo., 1988).
221. Rolfe, supra note 94, at 296.
Wigmore also actively supported the making of procedural rules by the courts, even arguing that legislation regulating judicial procedure violates the principle of separation of powers. In this effort, he helped set the stage for 1929 Illinois legislation conferring rulemaking power on the state supreme court, and for the similar Rules Enabling Act enacted by Congress in 1934. He was early an advocate for publication of administrative regulations that were a form of secret national law until enactment of the Federal Register Act in 1935. He was also an early advocate for the establishment of public defenders to represent and counsel persons charged with crime. And he was one of the founders of the Chicago Legal Aid Society, to provide indigent persons with representation in civil matters. As a member of the National Conference of Commissioners on Uniform State Laws, he was instrumental in developing model statutes on a range of matters.

As a teacher of international law, Wigmore played an active role in supporting the League of Nations, the establishment of the World Court, and the disarmament treaties of the 1920s. He freely expressed his rage at what he perceived to be the irresponsible isolationism that gripped the country from 1919 to 1939. When the Senate failed to act on treaties that he deemed important to the national interest, he observed: "Buzzards look like eagles, and may well be mistaken for them, when soaring far aloft in the vast void of the empyrean. But on close inspection, as they sit wrangling around their prey, one is disillusioned."

In 1929, Wigmore caused the establishment of the Institute of Air Law at Northwestern and the initiation of a journal on air law. In consequence of that interest, he was recruited to work out the plans for federal regulation of aviation traffic.

Despite his many efforts to change and improve the world in which he lived, Wigmore was generally regarded as politically conservative. During World War I, he performed military service in Washington; ever after, he was pleased to be addressed as "Colonel Wigmore." The autocratic streak that this seems to reveal may also be evident in his position favoring broad administrative powers. He was fiercely patriotic and contemptuous of pacifists. He supported the red-baiting of Attorney General Palmer. He attacked Frankfurter (but apparently not Freund) for defending Sacco and Vanzetti.


225. Roalfe, supra note 94, at 257.
226. Id. at 240–43.
227. Id. at 148. On Wigmore's military service, see id. at 120–43.
228. Id. at 151–52.
also attacked the professional ethics of Clarence Darrow. He favored capital punishment. He often took issue with the American Civil Liberties Union. His first impression of Mussolini was favorable, although he soon formed the wish that Il Duce might be "touched by the angel of fate." And he declined to denounce the aggression against China by the militarists who took control of Japan in 1931. On the other hand, he was not given in personal relations to racial bigotry or sexism, and except for fascination with his military rank he seldom indulged in self-importance or pretensions of class. Seldom did he support conservative Republican candidates for national office.

VII. The Chicago Sojourn of Roscoe Pound

An early recruit to the law faculty first of Northwestern, and then of Chicago, was Roscoe Pound, a quintessential Midwesterner. In 1910 he was forty years old and one of the most heralded of American law teachers, famed not only as a procedural law reformer, but also as a leading assailant of the faith in pure law.

Pound was born in 1870 in the frontier village of Lincoln, Nebraska, 500 miles west of Chicago. Except for one year, he lived there until moving to Chicago in 1907. Pound's father, Stephen, a graduate of Union College, had been a lawyer in upstate New York and had come to Lincoln in 1867; he prospered as an attorney and was elected a judge. Like Wigmore, Roscoe Pound was the son of an exceptional mother. Laura Pound was an alumna of a coeducational college in Illinois; she had taught school in upstate New York and come to Nebraska in 1869 as Stephen Pound's bride. She conducted school in her home for Roscoe and his two sisters. It was one of the sisters who was most elegantly educated: Louise Pound earned a Ph.D. at Heidelberg and taught with such distinction at the University of Nebraska that Roscoe acknowledged himself to be in Lincoln best known as Louise Pound's brother. Because there were German immigrants settling in Lincoln, Laura Pound taught all her children to read and speak their language.

The novelist Willa Cather followed three years behind Roscoe Pound at the preparatory academy and at the university. She described their fellow students as "straight from the cornfield with only a summer's wages in their pocket," but exceedingly earnest in their studies. Their English professor was fond of

229. Id. at 271.

230. He did in Chapter 19 of The Principles of Judicial Proof explore the bearing of such matters as gender or race on the reliability of testimony. Wigmore found no evidence that gender or race had such a bearing, but his discussion would likely offend contemporary readers who make no allowance for differences of time and place. Wigmore was without question a Victorian. Twining, supra note 189, at 172. For an attack on his use of data respecting corroboration in rape cases, see Leigh B. Bienen, A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence, 19 Cal. W. L. Rev. 235 (1983).

giving the counsel to all that "Life is a hard grind." Roscoe shared his mother's attraction to botany, and that was his primary interest as a student at the university, although he also mastered the classical languages. He became associated with Charles E. Bessey, a distinguished scientist then at Nebraska, and as his student was coauthor (with Frederic E. Clements) of *Phytogeography of Nebraska*, a compendium and ecological analysis of the state's vegetation. A path-breaking work, it won Pound the university's first Ph.D., awarded in 1897.

Meanwhile, however, Pound was studying and practicing law. While an undergraduate, he had received some instruction in law from a Lincoln lawyer who ran a proprietary school. At his father's insistence, he spent the academic year following his graduation from college, 1889–90, at the Harvard Law School. He at first resisted reading cases but soon concluded that it was a sound practice, even if, he wrote, "I can not think that the Case system of instruction has anything to do with the [underdeveloped] status of philosophy of law." Pound came under the influence of John Chipman Gray, who introduced him to Roman law and to German legal literature, thus exposing him to the relativist tradition first fully articulated in America by Lieber. Pound also acquired from James Bradley Thayer (and indirectly from Thomas Cooley) a conviction that judicial self-restraint is essential to the health of democratic institutions. He followed Cooley and Thayer in favoring legislative, not judicial, responsibility for divisive political issues. He also acquired while at Harvard sympathy with efforts to elevate the standards of the legal profession.

After Pound returned to Nebraska in 1890, he rode circuit trying cases in small Nebraska counties, generally representing a railroad. He was troubled by the lack of suitable dignity in proceedings, and was cheered when the federal judiciary decided to return to the traditional practice of wearing robes. He judged the Populism of Nebraska Democrats to be nonsensical utterances of stupid men. He published an effective dismissal of the Populists' free-silver proposal, concluding that the state of the currency "had no more to do with the price of wheat than it has to do with the prevalence of cholera." Yet, although his politics were otherwise close to those of the McKinley administration, Pound did not subscribe to the Social Darwinism that had claimed the minds of the many Republicans who had persuaded themselves that it is both inevitable and desirable that only the fit survive.

In 1895 Pound accepted the assignment of teaching a single course in Roman law in the university's law school; in 1899 he was appointed to a full-time position as an assistant professor. In 1900 he was a cofounder of the Nebraska Bar Association. He hoped that it would elevate public concern about the administration of justice, urging that "a worthy judiciary is abso-

233. Lincoln, 1898.
lute dependent on a worthy bar. At the urging of the new association, the legislature created a special commission to help the Supreme Court of Nebraska clear its backlog. Pound, then thirty years old, was appointed to the commission, and for three years he performed that work while continuing his botanical survey and teaching Roman law.

In his work as a judge, Pound took his cases as occasions for pragmatic examination of the social costs and benefits of alternative interpretations of legal texts, not as opportunities for the application of logic to a closed system. Although he developed misgivings about the collective intelligence of the Nebraska legislature, he resolved any doubts in favor of legislative authority. He gave broad construction to the police power of Nebraska cities to protect the health and regulate the morals of Nebraskans. He also manifested a keen interest in procedural issues, and missed no opportunity to diminish tactical gamesmanship as a feature of civil adjudication.

In 1903, on the eve of the completion of his judicial duties, Pound was informed that he had been chosen dean of the law school. He had been selected by E. Benjamin Andrews, a university president who had recently come to Nebraska from the presidency of Brown. He had left Brown amidst a dispute with the trustees over his advocacy of free trade and bimetallism, policies distasteful to certain of Brown's supporters. Andrews was aggressively building a university along the lines proposed by Francis Wayland, an antebellum Brown president who had been among the first to advocate higher education in applied disciplines, and who had thus helped to set the stage for the Morrill Act of 1862, from which the University of Nebraska derived financial support.

Pound had misgivings about Andrews' plans: like Thomas Cooley's Michigan and other public law schools in the West, the Nebraska law school was open to all comers, conducted a two-year program, and lacked pretense of academic rigor. But he accepted and immediately began to elevate admi-

236. Id. at 82.
237. E.g., In re Anderson, 96 N.W. 149 (Neb. 1903).
238. The story is told by Furner, supra note 34, at 205–22. Andrews was an economist of the historical, "ethical" stripe, a moderate follower of Richard T. Ely. Andrews was publicly supported in the controversy by President Harper of Chicago. Id. at 209.
239. Francis Wayland, Thoughts on the Present Collegiate System in the United States (Boston, 1842). Wayland's son, the law dean at Yale, had tried to mediate the dispute between the Brown trustees and Andrews. Furner, supra note 34, at 219.
240. Ch. 130, 12 Stat 503.
241. Michigan charged no tuition to residents and little to nonresidents. Any high school graduate could enroll in its law school. The law school was established to pursue the Jeffersonian aim of training democratic leaders, but with a Jacksonian emphasis on classlessness. See Brown, supra note 90, at 4–6; James V. Campbell, On the Study of Law (Ann Arbor, 1859); Address of Thomas McIntyre Cooley and Poem by D. Bethune Duffield on the Dedication of the Law Lecture Hall (Ann Arbor, 1863). The school was widely emulated in the Midwest.
242. For an account of the University of Kansas School of Law and a defense of Populist ideas about education, see Paul D. Carrington, Legal Education for the People: Populism and Civic Virtue, 45 Kan. L. Rev. 1 (1994).
sion requirements and persuaded the university of the need for other full-time faculty. He also created an elaborate system of practice courts. Instruction in legal history, political economy, international law, and jurisprudence was provided. Arthur Sutherland has remarked: "One stands in awe of the Nebraska high school graduate of 1905, who brought to Pound's course in jurisprudence an ability to cope with such matters as 'Development of the conception and definition of law from Grotius to Kant,' via Montesquieu, Hobbes, Burlamaqui, Rousseau, Savigny, and Ihering." That wonderment was based on the Outline of Jurisprudence which Pound placed in the hands of his Nebraska students. It was the first expression of Pound's purpose to bring to law his skill as a taxonomist. The theories classified, however, were traditional ones. Pound predictably allied himself with Jhering, an Austrian whose work had been called to his attention by Gray. Jhering rejected as absolutist the delusion that law is a system of mathematics, without any higher aim than a correct reckoning of conceptions. Pound was thus solidly identified with the historicism and relativism that marked the thinking and the work of Lieber, Gray, Wigmore, and Freund. He emphasized that social order depended on the realization of the individual "for the purposes of the whole" and contended against the Social Darwinist idea that universal pursuit of selfish interests can produce the optimal social results.

Pound also came under the influence of two Nebraska colleagues. Edward Alworth Ross came to Nebraska from Stanford; he was "a militant crusader for social science and social reform." He had been fired by Mrs. Leland Stanford, the sole trustee of the university, because of his advocacy against the gold standard, in favor of the presidential candidacy of William Jennings Bryan, and against Chinese immigration. He was also the author of Sin and Society: An Analysis of Latter-Day Iniquity, a widely noted essay explaining standards of moral conduct as sociologically derived. George Howard had returned to Nebraska, also from Stanford, and was a strenuous advocate for

243. These were all subjects not included in the Harvard curriculum of Dean Ames. They had been taught by George Wythe at William and Mary, were part of the curriculum of Henry Clay's Transylvania University, and were available to law students at Columbia and Michigan.

244. Sutherland, supra note 33, at 237.


246. He would move on to Wisconsin in 1907. For a biography of this colorful figure, see Julius Weinberg, Edward Alworth Ross and the Sociology of Progressivism (Madison, 1972).

247. Wigdor, supra note 234, at 111. As to his politics and place in the history of social science, see Ross, supra note 112, at 229–33; Furner, supra note 34, at 235–59.

248. Ross's opposition to Chinese immigration annoyed Mrs. Stanford because her husband had employed Chinese workers to lay rails. She had been physically defended by some of them during a riot in 1877. Furner, supra note 34, at 235–36. It also led Ross to racist utterances that he repeated in his autobiography, Seventy Years of It: An Autobiography of Edward Alworth Ross 273 (New York 1936). Ross did, however, enjoy wide support in his dispute with Mrs. Stanford. Albin Small declared that "the Dowager of Palo Alto has captured the booby prize." Furner, supra note 34, at 243.

249. Boston, 1907.

250. He, too, had been fired for lending support to Ross. Furner, supra note 34, at 239–40.
applied knowledge; science or truth for its own sake, he argued, was "very much of a humbug." 251

In 1906 Dean Pound was invited to address the annual meeting of the American Bar Association at St. Paul. He took the occasion to deliver a broadside against the existing state of judicial administration, entitled The Causes of Public Dissatisfaction with the Administration of Justice. 252 Pound was critical not only of legislatures, but of the judiciary and the bar. He decried the "sporting theory of justice." he found to have survived the reform movement led by David Dudley Field. 253 He accused courts of being "agents and abettors of lawlessness," the lawyers of bearing "the yoke of commercialism." He described contemporary procedure as antiquated: "Law is often in very truth a government of the living by the dead." The audience was shocked, and some members were offended. The event had the desired effect of galvanizing efforts at judicial law reform, and it also made Roscoe Pound of Nebraska a prominent national figure.

One of those present for the delivery of this address was John Henry Wigmore. Wigmore promptly lent his formidable support to Pound's call for reform and, with others, prevented those who were bent on denouncing him in the name of the association. By 1908 the ABA had come around to supporting some of Pound's proposals; 254 in a time of progress, it was unwilling to mark itself as "an antisocial force." In 1909 the ABA president, adopting Pound's diction, called for a sociological jurisprudence 255 thereby marking the association's rejection of Langdell's quixotic ideology.

Shortly after Pound's 1906 address, Wigmore invited Pound to move to Northwestern and make Chicago the center of his reform activities. Pound did so and the two formed a close relationship, 256 Wigmore saluting his new colleague in his customary doggerel as the Moses who would lead American law out of bondage into the promised land. 257

Wigmore encouraged Pound to take a leading role in the reform of criminal law. It was Pound who organized and led the 1909 conference at Northwestern that resulted not only in the formation of the Journal of Criminal Law and Criminology, but also in the Modern Criminal Science series, a body of translations of continental works on criminology brought to completion in part through the collaborative efforts of Pound and Wigmore. 258

251. Wigdor, supra note 234, at 113.
252. 29 A.B.A. Rep. 95 (1906).
256. Wigdor, supra note 234, at 134.
257. Id. at 135.
In connection with that effort, Pound established professional ties to many people working in other disciplines. Perhaps through Ross as well as Wigmore, Pound soon became known to the Social Science Club of the University of Chicago, the center of what was the most energetic and advanced work done in the Progressive Era.259 The dominant figure in that club was Albion Woodbury Small, then one of the premier figures in American sociology.260 Like Ernst Freund, Small was in important respects an intellectual descendant of Francis Lieber.261 Lieber had been perhaps the first American academic to engage in empirical study, working in the field of penology. Through Lieber, Small had become interested in German sociology and had made creative use of German work in his study of American institutions. Small gave Pound strenuous encouragement and brought him into contact with the most advanced American thought in social science.262

But the Social Science Club was not the only Chicago institution to make its mark on Pound. He also encountered in Chicago Edith Abbott, who had been his student at Nebraska.263 Abbott introduced him at Hull House, the center of Jane Addams’s activities.264 There, Pound became a member of the Juvenile Court Committee, working with Addams and Freund. In pursuing this relationship, Pound was following in the footsteps not only of Freund, but of John Dewey, who had formed some of his pragmatism while working in the same venue.265 These early social workers, led by Addams, seem to have had a powerful effect in elevating the social consciousness of their colleagues.266 George Herbert Mead, a sociologist, and Charles Merriam, a political scientist,267 were other distinguished members of the Hull House group.

259. See Steven J. Diner, A City and Its Universities: Public Policy in Chicago, 1892–1918 (Chapel Hill, 1980).
260. Small had first trained as a Baptist minister. He was the first scholar in America to hold a chair in sociology. See generally Vernon K. Dibble, The Legacy of Albion Small (Chicago, 1975). For an evaluation of Small, see Ross, supra note 112, at 224–27.
262. Wigdor, supra note 234, at 141.
263. One of Pound’s students at Chicago was Florence Ellinwood Allen, who became the first woman to serve in the federal judiciary. Allen apparently felt that Pound had discouraged her and her three female classmates from pursuing legal careers. Given his relation to his mother, sisters, Abbott, and Addams, it seems likely that Pound did no more than caution his female students about the difficulty to be faced in building a practice at a time when almost all lawyers were solo practitioners making very little money, and when there was cultural bias against women in a combative role. Clarence Darrow was at the time advising women lawyers to undertake the uncompensated defense of indigent persons accused of crime. Allen’s experience is related in Jeanette E. Tewe, First Lady of the Law 21 (Lanham, Md., 1984).
266. See Mary Jo Deegan, Jane Addams and the Men of the Chicago School, 1892–1918 (New Brunswick, 1988); see also Ross, supra note 112, at 226–27.
In 1907 Pound addressed the American Political Science Association (recently organized by Freund) on the subject of criminal law and its administration. He expressed skepticism about the effectiveness of law as a deterrent. He also advocated two positions soon to be developed more fully by Freund: that law is ineffective in changing private morals, and that criminal legislation should be informed by empirical work of the sort already being done in Wisconsin by the legislative reference bureau.\textsuperscript{268} Whether these positions were derived from Freund or worked out together with him is not known.

In 1909, despite desperate efforts by Wigmore to keep him at Northwestern, Pound accepted an offer to move to Chicago. Northwestern matched the Chicago salary offer, but only by offering to pay Pound more than Wigmore, a condition that Pound was unwilling to accept.\textsuperscript{269} It was probably also a factor in Pound's decision that Chicago's law school was located in the midst of a strong university; there, Pound would be close not only to Freund and his law school colleagues, but also to Small and Dewey and their like, and to Addams and Hull House, whereas the Northwestern school was located downtown and was connected to a less luminous university. Although at first upset, Wigmore soon accepted Pound's move with admirable grace.

During his three years in Chicago, Pound became a leader in the campaign for judicial law reform. He had domesticated the American Bar Association, and it followed him in issuing a series of committee reports proposing remedies for various procedural abuses.\textsuperscript{270} Pound was even able to gain the support of William Howard Taft, a sometime law teacher and dean at Cincinnati and then the president of the United States.\textsuperscript{271} He led Taft and others to decry formalism in procedure, and to insist that procedure should be the servant of substance. He was effective in working not only with the ABA, but also with the Chicago and Illinois bar associations. With Wigmore, he argued for the authority of courts to make their own rules of procedure, for the simplification of court organization to prevent needless hassling of jurisdictional issues, for the harmless error principle, and for the eradication of needless technicality.\textsuperscript{272} His work was employed in judicial reform initiatives in many states, most notably Wisconsin and Kansas, and found favor with the U.S. Supreme Court when it gave its approval to the Federal Equity Rules of 1912,\textsuperscript{273} the precursor to the Rules Enabling Act of 1934 and the Federal Rules

\textsuperscript{268} Wodgor, supra note 234, at 142.
\textsuperscript{269} Id. at 146.
\textsuperscript{270} Austin Wakeman Scott, Pound's Influence on Civil Procedure, 78 Harv. L. Rev. 1568, 1574 (1965).
\textsuperscript{271} Alpheus T. Mason, William Howard Taft, Chief Justice 88–120 (New York, 1965).
\textsuperscript{272} E.g., Some Principles of Procedural Reform, 4 Ill. L. Rev. 491 (1910).
\textsuperscript{273} The Court was empowered to regulate proceedings in equity by the Practice Conformity Act, ch. 255, 17 Stat 196 (1872). See generally Wallace R. Lane, Federal Equity Rules, 35 Harv. L. Rev. 276 (1922).
of Civil Procedure. By 1910 he was known as the premier reformer of judicial institutions.

Also by 1910 Pound had formulated what became known as his “sociological jurisprudence,” a pattern of thought set forth in the article published in 1911. That article clearly reflected what Pound had learned studying with John Chipman Gray and reading under Gray’s tutelage the work of Jhering. Even more clearly did it reflect the influence of Ross and of Pound’s Chicago colleagues, Wigmore and Addams and Small and Freund. What Pound added to Gray’s work was a flourish of enthusiasm for social science as an instrument for informing the political work of judges and legislators. There was little if anything in Pound’s sociological jurisprudence that would have surprised or disappointed Francis Lieber, the intellectual grandparent of Small and Freund, or, for that matter, such earlier writers as Joseph Story, James Kent, Timothy Walker, David Hoffman, or St. George Tucker, all of whom were unfamiliar with the claims of social science but fully understood the political role of American judges as set forth in the work of Gray.

What made Pound’s jurisprudence most interesting to his contemporaries was his assault on what he described as “mechanical jurisprudence,” which he courteously failed to attribute directly to his teachers, Langdell and Ames. He emphasized that “science” in law was at best a description of a method, not a goal, for there could be no truths to discover such as those he had pursued as a botanist. He argued for judging legal doctrines by their social results. Freund correctly assessed Pound’s jurisprudence as sound, but lacking novelty.

Pound gave clearer meaning to his jurisprudence with an attack on the artificial conception of liberty of contract that underlay much of the labor law developed by judges who, in the spirit of Langdell and Ames, disavowed responsibility for the social consequences of their decisions. Social Darwinists had given impulse to the idea that no man could later complain of any

276. His Commentaries (Boston, 1832–45) were almost in their entirety a political tract as well as a legal one.
277. See generally his Commentaries on American Law, 1st ed. (Boston, 1825), especially volume 1.
278. Introduction to American Law (Boston, 1837). An eleventh edition of this work appeared in 1905. It is replete with moral judgment employed in the evaluation of legal institutions.
279. E.g., A Course of Study Respectfully Addressed to the Students of Law in the United States (Baltimore, 1817).
280. In 1803, Tucker edited the first American edition of Blackstone, eliding its royalisms and adding notes to reflect American conditions. The work was published in Philadelphia.
281. Gray, supra note 45.
282. E.g., Pound, Mechanical Jurisprudence, supra note 39.
283. See Freund, supra note 122, at 150.
arrangement to which he had given his assent, almost without regard to any means employed to secure that assent. A particularly perverse application of the idea was embodied in a decision of the Supreme Court of Illinois striking down a state law that regulated the conditions of employment of women in the garment industry.285 Fortifying its decision with an argument that would resonate more favorably a century later, the court observed that women were being denied a freedom given to men to sell their labor on such terms as might be agreeable to themselves. Pound scorned the belief that all citizens were equally free to bargain. His attack on freedom of contract as a sovereign entitlement suggests the influence of Freund, the premier advocate of humane labor law. Pound attributed the doctrine he attacked to ignorance resulting from the detachment of judges from the realities of life in industrializing America. They were, he said, invoking "academic theory" unacquainted with "practical conditions."286 This ignorance had led them to "exaggerate private right at the expense of public interest."287

Pound's work in Chicago could not have found favor with Dean Ames. Not only did Ames oppose any connection between the law school at Chicago and interested members of other faculties in that university, but he opposed procedural reform. As a teacher of pleading, Ames had celebrated the achievements of the English Baron Parke, who was said to have boasted that he could decide most cases without considering the merits of the parties' contentions.288 Ames also opposed the work of Freund and Wigmore in the National Conference of Commissioners on Uniform State Laws, arguing that even in such fields as negotiable instruments law, "pure" judge-made law is superior to anything that politicized legislative bodies might hope to accomplish.289

VIII. Missionary Work in the East

Given the presence of Freund, Pound, and Wigmore, there is no question that Chicago was the center of American legal scholarship at the close of the century's first decade. Whatever may have been the ideological needs of the heathens by Lake Michigan at the beginning of the century, the city and its region were within a decade to send forth missionaries of their own.

Even Joseph Beale was in a modest way a missionary from Chicago to Harvard.290 He returned to Harvard with a new interest in public utility law and soon published a work on that subject in cooperation with his junior colleague, Bruce Wyman.291 He did also, in 1905, publish an article that comes

286. Pound, supra note 284, at 457.
287. Id. at 460.
289. Sutherland, supra note 33, at 212–13. Ames was then appointed a commissioner. Id. at 213–14.
290. But see Kalman, supra note 99, at 25–27. Kalman quotes Jerome Frank as describing Beale as "the right wing of the right wing." Id. at 26.
291. The Law of Railroad Rate Regulation with Special Reference to American Legislation (Boston, 1906). A second edition was prepared by Wyman and published in 1915.
as close as any to a full defense of the Langdell theory of pure American law.\textsuperscript{292} And he continued striving to develop a "vested rights" theory of conflict of laws with which he hoped to enable courts to make choices of law without regard for the substance of the laws chosen.\textsuperscript{293} That work could be characterized as a failed search for pure law; Walter Wheeler Cook subjected it to a scathing broadside attack.\textsuperscript{294} Nevertheless, it is significant that Beale did not present his vested rights theory as an application of a broader theory of pure law. What he sought unsuccessfully to do in his work on conflict of laws was to employ mechanical tests as a means of simplifying complex legal issues in the hope of reducing legal costs.\textsuperscript{295} He thus made himself the target or even the punching bag for more clever intellects who revealed him as the reductionist that it seems he was. But his search for simplicity, however offensive it may be to those who cherish complexity, ought not be mistaken for the simple-mindedness that could be seen in the impossible dream of Langdell. It seems that Beale’s years in Chicago awakened him to the flaws of the Harvard ideology of 1870.

It remained, however, for Pound to be the chief counter-missionary. The path opened when Ames died just as Pound was putting the finishing touches on sociological jurisprudence. Ames’s successor was Ezra Ripley Thayer, the son of James Bradley Thayer, Wigmore’s primary mentor. Almost the first decision of Dean Thayer was to send out a call to Pound. Samuel Williston, then a junior member of the Harvard law faculty, was later to recall that it was Pound’s theoretical articles on sociological jurisprudence that had called him favorably to Harvard’s attention.\textsuperscript{296} Thus, less than two decades after Wigmore found a “missionary diocese” and less than one decade after President Harper had invited an apostle to visit the heathens, it was Harvard that was receiving a reciprocal mission from the West in the person of Roscoe Pound. The effect of Pound on Harvard and of Harvard on Pound is a story for another time,\textsuperscript{297} but it may be said that Pound’s arrival signaled the triumph at Harvard of Gray’s (and James Bradley Thayer’s) pragmatism and relativism over the oddly constricted vision of pure law that had been fashioned by their revered associates, Langdell and Ames.\textsuperscript{298}

\textsuperscript{292} Beale, supra note 37.

\textsuperscript{293} A Treatise on the Conflict of Laws (New York, 1935); Restatement of Conflict of Laws (1934). The treatise is an extended commentary on the Restatement for which he served as draftsman.

\textsuperscript{294} The Logical and Legal Bases of the Conflict of Laws (Cambridge, Mass., 1942).

\textsuperscript{295} For an expression of this purpose by Beale’s closest ally, see Williston, supra note 28, at 198–216.

\textsuperscript{296} Id. at 188–90.

\textsuperscript{297} Pound was not himself, particularly in later life, known for his prudence and sound judgment. By the 1930s, even Beale was complaining that Pound was "growing nuttier and nuttier." Wigdor, supra note 294, at 251.

\textsuperscript{298} The triumph was not universally recognized. Particularly at Yale in the ensuing decades, it was fashionable to suppose that the Harvard law faculty was in thrall to Langdell’s legal theory. Kalman, supra note 30, at 145–46. The Yale realists generally remained outside the American Law Institute and decried the Restatements as Langdellist. Id. 26–28. In fact, such lions of the Harvard Law School as Austin Scott and Samuel Williston were reformers, if less
Pound and Beale were not the only missionaries to come east at that time. They were preceded by Henry Wade Rogers, the disciple of Cooley and colleague of Wigmore, who became the dean at Yale in 1903. And he was soon followed by Walter Wheeler Cook, Ernest Lorenzen, and Underhill Moore, who had spent their formative years in the public law schools of the West, especially under the tutelage of the progressive Eugene Gilmore at Wisconsin, a person who like Cooley and Wigmore and Freund could never have been beguiled to think that American law is or could be distinct from politics. Gilmore’s younger associates were to become important participants in the activities of legal realists at Columbia and Yale.

IX. Common Themes in Three Careers

Freund, Pound, and Wigmore were alike, but different from Langdell and Ames, in several important respects. The Chicagoans were jurists, a term applied to the medieval glossators of the continental tradition and their successors in that tradition. They were themselves scholars and teachers of Roman law. Each was in some sense an intellectual descendant of Francis Lieber, who had first brought to America German ideas about law, and who thought of himself as an American jurist. In embracing some German ideas, they were running on a parallel track with leading American economists, who were moving away from English ideas to German.

radical than some, and the Restatements were progressive in their conception. See N. E. H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 Law & Hist. Rev. 55 (1990).


300. Eugene A. Gilmore was appointed professor of law at the University of Wisconsin in 1902. He was an early leader in the conservation movement and wrote on an array of contemporary public issues. E.g., Insurance as a Commodity, 18 Green Bag 142 (1906); The Wisconsin Public Utilities Act, 19 Green Bag 517 (1907); The Relation of Law and Economics, 25 J. Pol. Econ. 69 (1917); The Wisconsin Idea of Sociology, 4 Philippine L.J. 271 (1918); The Department of Markets—Creation—Powers—Duties, 1 Wis. L. Rev. 361 (1920). He promoted empirical work in numerous areas. E.g., The Need of a Scientific Study of Crime, Criminal Law and Procedure—The American Institute of Criminal Law and Criminology, 11 Mich. L. Rev. 50 (1912). Like Freund and Wigmore, he became a force in the National Conference of Commissioners on Uniform State Laws. He later served as president of the Association of American Law Schools and as president of the University of Iowa. On his role in the founding of the American Law Institute, see Hull, supra note 298, at 67-70.

301. See Brainerd Currie, The Materials of Law Study (pt. 3), 8 J. Legal Educ. 1 (1955). Cook was regarded by Yale’s Dean Swan as “the best teacher of law in the country” when he was appointed at Yale in 1916. Kalman, supra note 59, at 101. Lorenzen joined him at Yale in 1917. Id. On the large role of these three at Yale in the third and fourth decades of this century, see id. ch. 4.

302. This was the term employed by Francis Lieber to describe his career as the first full-time American academic to teach law. On his career, see Carrington, supra note 261, at 356-58.

303. Williston also, seemingly ignorant of the work of Freund and Lieber, credited Pound with being more attuned to German legal thought than any American teacher had ever been. Williston, supra note 28, at 189.

Like classical Roman jurists, but quite unlike Langdell\textsuperscript{305} and Ames, Freund, Pound and Wigmore were lawyers and politicians as well as scholars—not candidates for public office, to be sure, but actively engaged as partisans in many public causes. All three spent much of their careers in patient association with lawyers and judges, and even legislators.\textsuperscript{306} All three spent much time in public meetings debating the merits of public issues. They listened as well as spoke, but all entered the lists of partisanship to struggle on the side of law and justice. Their writing was done in the quiet hours between battles, much of it as expressions of their political partisanship, but balanced by recognition of competing claims and interests. They accepted as reality that “the results of bargaining” are not necessarily “inferior to those of adjudication.”\textsuperscript{307} Their professional quests were not for abstract, disembodied Truth, the siren of the truly academic spirit, but for public virtue,\textsuperscript{308} or perhaps, as some prefer, justice.\textsuperscript{309} They were, in short, lawyers within the academy, not academics doing law.

Freund, Pound, and Wigmore were more faithful to American tradition than were the Anglophiles, Langdell and Ames, in their intellectual eclecticism. They employed insights from any source informative about the culture in which they worked: for them, anthropology, art, economics, history, literature, philosophy, psychology, sociology, were all respected sources of profes-

\textsuperscript{305} Langdell was described as “a bookworm if ever there was one.” For an account of his extremes, see Joel Scigman, The High Citadel: The Influence of the Harvard Law School 30–31 (Boston, 1978).

\textsuperscript{306} Albeit not in the baths, as did the classical jurists.

\textsuperscript{307} Marc Galanter, The Portable Soc 2; or, What to Do Until the Doctrine Comes, in General Education in the Social Sciences: Centennial Reflections on the College of the University of Chicago, ed. John J. MacAlloon, 246, 259 (Chicago, 1992).

\textsuperscript{308} Montesquieu had proclaimed the need to instruct the people of a republic in “virtue,” which he equated with a love of their laws. Montesquieu, supra note 14, bk. V, chs. 2–5. Early American legal education was a response to that need. Paul D. Carrington, The Revolutionary Idea of University Legal Education, 31 Wm. & Mary L. Rev. 527 (1990). The term virtue fell into disuse when it was so often heard on the lips of executioners in the aftermath of the French Revolution. 2 Lieber, Political Ethics, supra note 27, at 292. Lieber substituted the term patriotism. Thomas McIntyre Cooley employed manhood as a term to describe the same traits. The Lawyer’s Duty to Be Faithful to His Own Manhood (Ann Arbor, 1878).

\textsuperscript{309} Justice is a term that none of the three seems to have employed as a description of his professional aim, perhaps because it may be taken to imply transcultural norms. They proceeded from the premise that American law should express values conventional to American culture, not a presumably more elevated set of values envisioned by disengaged academics. For that reason, they might have resisted contemporary calls for teaching justice. See, e.g., Barnhizer, supra note 87, at 296–301; Anthony D’Amato, Rethinking Legal Education, 74 Marq. L. Rev. 1 (1990).
sional judgment in assessing the problems of their day. This breadth in intellectual interests, although it distinguished them from Langdell and Ames, was not unusual for American law teachers, for it was shared by such antecedents as George Wythe, St. George Tucker, David Hoffman,310 and James Kent.311 That intellectual breadth was not characteristic of English lawyers or law teachers.312

Despite their wide-ranging interests, Freund, Pound, and Wigmore were faithfully attentive as professionals to the meanings of legal texts. In this way, they affirmed the existence of law as a discipline having its own distinctive focus. Yet they recognized, as thoughtful American lawyers almost always had, that legal meaning is a result of culture and politics. They understood that contested meaning could seldom be resolved by wholly technocratic means, and they regarded any means of understanding cultural and political sources of law as useful to their work. What made law for them a distinctive study was its concern with a professional culture or morality internal to legal institutions, a morality that is one among others informing the meaning of legal texts.313

In their intellectual breadth, Freund, Pound, and Wigmore were all consumers if not producers of empirical work. Freund emphasized the need to erect legislation on the rock of empirical reality and repeatedly took his own counsel in working with the governments of Chicago, Illinois, and the United States. Pound lent support to social scientists and even persuaded the American Bar Association to advocate empiricism. Wigmore and Pound, in their call for the study of criminology in American law schools, sought to share with students, and with the American public, the demonstrable reality that law influences human conduct only in limited circumstances and then to a limited degree. In his work on proof, Wigmore made critical use of the empirical work of others and gained the admiration of social psychologists as a synthesist of their work. In this respect as well as in the Roman-German connection, all three shared the impulses of Francis Lieber314 and his associates in the American Social Science Association.315 In their genuine interest in the measurable effects of law, they shared the impulses of Bentham, not Austin, and reflected the rationalism marked and admired by Max Weber.316

Freund, Pound, and Wigmore were in all these respects practitioners of classical civic virtue and of the traits that Lieber had described as "patrio-

313. A modern statement is Lon L. Fuller, The Morality of Law (New Haven, 1964). Freund’s work was especially pervaded by a concern for principles such as those stated by Fuller.
315. See supra note 94 and accompanying text.
tism." Imperfect citizens, we cannot doubt: each must on occasion have departed from the standard of disinterest that Lieber prescribed and that George Wythe was said to meet. But there was no thought that any of the three failed to meet high standards of integrity while engaged in public advocacy. All three would have been quick to identify and discount self-interest in public matters. All would have been scandalized by the sale of ostensibly disinterested scholarly opinion for use in public debate; indeed, Pound would at Harvard be instrumental in the dismissal of Bruce Wyman for a single offense of privately accepting compensation for testimony presented to a legislative body as the product of scholarly disinterest. It likely could have been said of any of the three, as it was said of Wythe, that "no dirty coin ever got to the bottom of his pocket."

All three Chicagoans exhibited the virtuous trait of moral courage. Working at a time when the right of academics to speak their minds was far from settled, they shouldered their way into one public imbroglio after another, risking not only public censure but the disfavor of professional colleagues and disadvantage in their careers.

Nevertheless, while they shared a role and an intellectual framework, Freund, Pound, and Wigmore held very different views on many, perhaps most, political issues. There was no single vision of justice or the good society that animated them, only a sense of responsibility for the shared interests of the community and nation. Whatever their views on the creation or distribution of wealth or other vital political issues, they united in regarding law's role with respect to these matters as secondary to its function as an expression of the primary moral premises of the social order.

The three accepted those premises, sharing Chicagoan Charles Merriam's belief "that American nationalism was built firmly and irrevocably on the Constitution of 1787; that the Civil War confirmed that conviction; that American government had already stood the severest tests of modernization and would endure"; and that "[t]his antirevolutionary reformism is an ideology shared by reactionaries trying to prevent change, by liberals promoting progress, by radicals calling for major restructuring of social and economic institutions, and by generations of men and women who considered themselves good practical problem solvers."

In sharing this idea, their diverse politics were subject to a centripetal pull that was itself a significant part of their professional qualification. Freund explained:

317. See supra note 308.
318. The story is told by Sutherland, supra note 35, at 217.
321. Karl, supra note 267, at x.
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[T]he best professional education in law has always assumed the existing social order as the foundation of legal justice. It is not possible to work a [legal] system successfully if its fundamental justification is constantly questioned; or putting it the other way, a great system that has established itself will convert its disciples from skeptics into votaries, or will quickly get rid of them. Law, like other human institutions, is a working compromise, and the very fact that it is an appeal to reason demands assumptions that must not be too closely questioned. Every law teacher realizes this, and will not in his class work press the inquiring spirit too far. He is in a very different position from a teacher of medicine where the relentless pursuit of truth can never be an obstacle to professional training. 322

As teachers, all three sought to nurture like sensibilities in their students and in this sense to transmit to them that “love” of the republic’s laws that, Montesquieu had counseled, is essential to democratic government. 323 For them, law teaching was primarily a moral, not a technocratic, activity.

In these many respects, the three Chicanos were performing the mission that Jefferson hoped to achieve in securing the appointment of Wythe in 1779 and Hamilton in securing the appointment of Kent in 1799. But they were not merely echoes of the American past; had the term then been in use, the three wise men of Chicago might in 1910 have been dubbed “realists”—the term generally employed to describe the intellectual leadership of the succeeding generation of American law teachers. 324 While it would be too much to designate them as patron saints of today’s law and society movement, 325 their

322. Freund, supra note 283, at 150. For a similar expression by one of Freund’s successors at Chicago, see Harry Kalven, Jr., Some Comments on the Law and Behavioral Science Project at the University of Pennsylvania, 11 J. Legal Educ. 94, 95 (1958). Kalven is another exemplar of effective use of the opportunity for service afforded by an academic appointment in law. Although less active in politics than Freund, he thought and wrote about political realities and as a result exercised a measure of benign influence on the culture of which he was a part. See also Daniel A. Farber & Suzanna Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 Stan. L. Rev. 647, 655 (1994).

323. Montesquieu, supra note 14, bk. IV, ch. 5, § 2.

324. The term applies insofar as realism is distinguished by concern for the real effects of law. But see Underhill Moore, Rational Basis of Legal Institutions, 23 Colum. L. Rev. 609 (1923) (chastising a work by Wigmore and his colleague, Albert Kocourek, for their disregard of empiricism). Moore was a leading realist-empiricist of the time. Some later “realists” were distinguished by their preoccupation with the real or psychological causes of judicial behavior. Kalman, supra note 39, at 19. Freund, Pound, and Wigmore were not realists in that sense. Some self-described realists disavowed interest in law reform. E.g., Hessel Yntema, The Rational Basis of Legal Science, 31 Colum. L. Rev. 943 (1931). Others doubtless agreed with Leon Green, who did not use the word: “while I have no prejudice against it, I do not know what it means.” Innocent Misrepresentation, 19 Va. L. Rev. 242, 247 (1933). For an effort at a tight definition of realism, see John Henry Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 Buff. L. Rev. 459 (1979); see also G. Edward White, From Sociological Jurisprudence to Realism; Jurisprudence and Social Change in Early-Twentieth-Century America, 58 Va. L. Rev. 959 (1972); Woodard, supra note 187. For an account of the realists’ problem of self-identification, see Horwitz, supra note 6, at 182–85.

325. See generally Lawrence M. Friedman, The Law and Society Movement, 38 Stan. L. Rev. 763 (1986); see also Schlegel, supra note 324. Some persons associated with the movement may have lost patience and joined the abstract theorists envisioning law for a world that does not exist but may accrue from “transformative” politics. See the exchange between David M.
careers exhibit the continuity of that movement and of much contemporary law teaching with the original, moral aims of American law teaching, from which the thinking of Langdell and Ames was perhaps but a momentary deflection.

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The effort of Langdell and Ames to separate American law from politics was a blip, a "mere sand bar in the course of a great river, destined to be swept downstream at the next rising of the current." While the educational reforms they advocated were readily accepted by an American culture alienated from democratic politics and momentarily steeped in hopes for human progress derived from technocratic professional advancements, the theory offered to explain those reforms was not salable to anyone who thought seriously about American law. (At least nobody in Chicago, perhaps the most American city.)

The three wise men of Chicago were not deceived by the impossible dream and helped awaken others to its foolishness. They exemplified academic lawyers as broadly informed and disinterested political activists whose work responded to the visible needs of the bar, the bench, and the public. They thus fulfilled the hopes of their earliest antecedents in American law teaching. Their examples have been followed by many others in this century.

Yet Langdell and Ames, the politically disengaged pedants, succeeded in planting the seed of an academized and cloistered profession of legal scholars. Some law teachers so sheltered have, like them, remained "pure," in the sense of being untouched by the untidy realities of law and politics. Those today sporting their acquaintance with Pareto or Wittgenstein to theorize about a nonexistent world may be Langdell's true coreligionists, sharing with him as they do a willingness to employ the arts of mystification to substitute their own preferences for the moral aspirations of the people in whose name and for whose benefit the law they profess is made and administered. There is therefore irony in their participation in the ever-singing chorus that denounces Langdell's false faith. In the teaching and scholarship of some theorists, Langdell and Ames may have had a last laugh on those three wise men of Chicago who helped dispel their impossible dream.

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326. Carrington, supra note 4, at 799.