

# The Teaching of Legal Classics\*

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*"I teach them correct principles  
and they govern themselves."*<sup>1</sup>

## INTRODUCTION

The study of legal classics invites participants to consider profound concepts that have shaped our society and its intellectual framework.<sup>2</sup> The course *Legal Classics* offers undergraduate legal studies students, law students, and graduate students of literature or history the opportunity to read and reflect upon some of the great works of Western

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\* This Article is dedicated to the late L.F.E. Goldie, Professor Emeritus at Syracuse University College of Law, and to the late Alan Bloom, Professor at the University of Chicago.

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1. Joseph Smith, Jr., one of the founders of the Church of Jesus Christ of the Latter-day Saints (the Mormon faith), *as told by* John Taylor, *THE MILLENNIAL STAR*, Nov. 1851, vol. 13, at 339, *available at* Brigham Young University Library, Provo, Utah; *also found in* *THE WISDOM OF JOSEPH SMITH 20* (compiled by D. Cannon, 1983).

2. Although this Article was written initially for law teachers (inside and outside of law schools), it should be of value to teachers of literature, English, the classics, government, history, economics, and sociology. Lawyers and lay readers also may wish to become reacquainted with these great minds, or to meet them for the first time. Classical liberals will be welcomed home by some writers, as will true conservatives of a Burkean or Hamiltonian bent. Critical legal studies proponents (Crits) will have the opportunity to meet, and perhaps know and even love, their "enemy."

legal thought.<sup>3</sup> This Article maintains that the canons are worthy of teaching in their own right, and describes the creation and teaching of a course on some of the important classics of Western legal thought at Syracuse University College of Law.<sup>4</sup>

At the outset, we tried an experiment in American legal education. The canons of Western legal and political thought do not seem to be taught with any regularity anywhere in American law curricula. The faculty who created this course concluded that it was inappropriate to assume that law students have a common intellectual foundation or background. It is folly to assume that contemporary students are as well-educated or well-read as the lawyer of yesteryear.<sup>5</sup> Such American

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3. The title "Legal Classics" undoubtedly was inspired by the Legal Classics Library, a collection sold by Gryphon Editions, Inc., Birmingham, Alabama. For a number of years, I have collected these handsomely bound facsimile editions of great legal works. I also have been attracted to classic political and legal documents, such as the writings of Aristotle.

4. It is not my intention to slight the contributions of non-Westerners to legal thought and philosophy. The course models proposed here are based upon materials with which I have greater familiarity. As will be seen, their development followed the path of least resistance to create a new offering for Syracuse University College of Law, drawing upon the talents and interests of a number of faculty members, and appealing to the broadest segment of scholarly law students—hence, the decision to create a "Western" legal classics course. This course structure could be adapted easily to study great legal works of other cultures or to a comparative literature course, but teaching the Western classics first is strongly urged.

5. This phenomenon is not restricted to law colleges. We merely inherit the poorly educated and poorly equipped students from our colleges and universities. L. Pearce Williams, Senior Professor at Cornell University, observed recently in an open letter to new students:

The assumption of the faculty [in abolishing requirements pertaining to Western Civilization] was that all of you were thoroughly saturated with the values of Western Civilization. You had read and appreciated the plays of the Hellenes; understood Aristotle's philosophy of morals, politics and nature; had discussed the political theories of Thomas Aquinas, Machiavelli, Harrington, Hobbes, Locke, Robespierre, Marx, Jefferson, Hitler, Stalin and Dworkin; found meaning in the words of Moses, Jesus, Luther and Calvin; thrilled at the science of Newton, Lavoisier, Faraday, Maxwell, Planck and Heisenberg; appreciated the social theories of Rousseau, Sorokin and Parsons; and, finally, had been moved by Sophocles, Chaucer, Montaigne, Shakespeare, Byron, Conrad and Mailer. There was, therefore, no reason to require courses from you that would introduce you to these familiar thinkers. There is, to underline my point, no *Western Civilization requirement*, even though you will move and live throughout your lives in that intellectual environment, *knowledge of which leads to empowerment*

lawyers as Joseph Story, Daniel Webster, John W. Davis, and William O. Douglas were well-grounded in their culture and intellectual history.<sup>6</sup> Before teaching the course, all involved had concluded independently that the moral issues espoused, and the poetry of language found in the selections we offered, would enhance the lives of our students and make them better citizens.

*The teaching of Legal Classics creates a marketplace of ideas.* An informal survey of present literature and law college catalogues reveals that the literature contained in *Legal Classics* is *not* typically taught at law schools. The ideas and authors in our curriculum of *Legal Classics*, however, will expose both students and faculty to the marketplace of ideas, where ideas are tested and contested. Although many of the contemporary critical legal studies proponents (Crits), feminists, Marxists, and others would dismiss Edmond Burke, William Blackstone, or Aristotle as irrelevant and dangerous, we contend that they are worthy of study. Indeed, Karl Marx, Georg Wilhelm Hegel, and Roberto Unger (whom we have included) most certainly deserve attention.<sup>7</sup> Marxism is in retreat, except in academia. Yet, even if Marxism were in retreat everywhere, it still would be entitled to intelligent study, as Marx was important for his times and ours.<sup>8</sup> If Marx should be studied, then so too should Burke, Blackstone, and Alexander Hamilton, among others currently neglected—and not merely because Western democracy appears to be in ascendancy.

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*and upward mobility.*

L. Pearce Williams, *Campus Watch: Focus: The New Multiculturalism Requirement—A Guide for the Perplexed*, CORNELL AM., Aug. 1992, at 20 (emphasis added).

6. Other great Americans likewise have understood and loved their culture. Although neither Presidents Eisenhower nor Truman were lawyers, both were very well-read citizens. They knew Shakespeare, the Bible, and American and world history. *See generally*, STEPHEN AMBROSE, *EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890-1952*, at 31-33, 38-55 (1983); DAVID McCULLOUGH, *TRUMAN*, at 42-43, 44-45, 48, 52, 54, 58-62, 64, 65 (1991).

They used their knowledge to enhance their own lives; their broad-based and profound love of learning enabled them to make terrible decisions with confidence and humility. Lawyers, too, should have the intellectual depth and moral background to advance the concerns of their clients and causes within a principled framework.

7. Some authors were omitted because of time constraints and faculty preferences, but they *all* are worthy of serious reflection and study.

8. His ideas in play during the Russian Revolution and the breakup of the Soviet Empire certainly are significant. Marx's economic analysis and thought offers explanation for much of human behavior.

The great Western legal and political minds should be studied and appreciated for the same reasons that make Chinese art and Chinese history important. It is not that I prefer the present system of Chinese communism or wish the return of the dynasties; but the well-informed citizen, and certainly, the well-educated scholar, cannot neglect landmark Chinese achievements. China has created governmental structures worthy of attention which have lasted five millennia. Eastern art, although very different from that of the West, has influenced our Western culture.<sup>9</sup> Great works of the East stand in their own right and are important as parts of the heritage of humanity.

*Legal Classics* invites just such enlightenment, observation, and comparison in its forum. The marketplace of ideas is truly inclusive and requires intellectual triumphs from all cultures in its canons.

*Legal Classics sets the foundation for a balanced appreciation of diversity.* Much of the attack on the canon is the ill-founded concept that diversity and an appreciation of diverse cultures and ideas is somehow strengthened by ignoring or deriding Western culture; but, American students and citizens cannot understand true diversity without understanding our own culture—the common heritage of the West. Western civilization itself is valid.

History is not inevitable.<sup>10</sup> The Western democracies' apparent triumph was not preordained.<sup>11</sup> There are few historic examples of democratic or republican government, and all come from the West.<sup>12</sup> Our founders were aware of this tragic history. We who know little history may soon forget this truth and suffer surely for our ignorance. Now

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9. For example, Eastern art had a great influence on the works of such diverse talents as Frank Lloyd Wright and James Whistler. Even if it had not, its beauty and the minds which produced it earn our respect and recognition.

10. This is true despite Karl Marx's pronouncements on the inevitability of the triumph of communism.

11. Hitler almost destroyed European civilization. The Soviet state was unsuccessful in its attempt to destroy freedom because it failed its people, and the West resisted at great cost—Korea, the Berlin Blockade, Kennedy's adroit handling of the Cuban Missile Crisis, the Afghan War, and the Reagan arms buildup all played their parts.

The teach-ins and good feelings of the 1960s did not liberate the Communist bloc. Western technology, culture, and economic freedom pointed out the abject failures of the Communist totalitarian state. Military strength (and a willingness to do battle) also were fundamental in unseating communism. Ultimately, the emperor had no clothes!

12. See DONALD KAGAN, *PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY* Introduction (1991).

that the world seems to be embracing liberal democracy and the market economy, it is doubly important to understand our roots.

Western culture can be embraced as good and other cultures still can be respected. I admire the Chinese culture. I appreciate Chinese painting and sculpture. I enjoy learning about China's history. I admire the people. I respect what China has done for five millennia—it has been a world power by any definition and one of the world's great cultures. While being the most populous state in the world throughout its history, it has managed to have a stable society and feed its people (most of the time). But China has accomplished this at great expense. The bureaucracies, which have sustained China through the ages, also have stifled freedom and science.<sup>13</sup> China's ethnocentricity and culture have closed its peoples' minds and thwarted scientific investigation.<sup>14</sup>

The West ultimately may follow like the Chinese emperors if its self-imposed ignorance and intellectual smugness cause it to abandon research, logic, proof of argument, and scientific enterprises such as space exploration. Domestic problems will always exist.<sup>15</sup> They, quite

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13. Cf. DANIEL J. BOORSTIN, *THE DISCOVERERS* 60, 74-75, 333, 562 (1983).

14. It is not by accident that China is referred to as the Middle Kingdom and that the Chinese, like many other peoples, are xenophobic and ethnocentric. This has had its costs.

For example, in the 15th century, Chinese maritime technology was equal to, or better than, that of the West. Chinese fleets roamed the Indian Ocean and followed the East African coastline. In contrast to the tiny fleets of Columbus, Magellan, and Vasco da Gama, the Chinese emperors launched huge fleets of up to 27,500 officers and men. These magnificent fleets conducted a two-year expedition which established diplomatic relations or tributary states with 20 realms from Java to Mecca to the southern coast of East Africa. Chinese interests were not mercantile or military, as were those of the Western states. Rather, the Chinese sought to impress other peoples with their splendor.

The Chinese eventually turned back, not because they could not afford the enterprise, but because they decided that the rest of the world was not worth exploring or taking. *Id.* at 186, 190-96, 199-200.

The Chinese state did not encourage the spirit of discovery. Had it, the New World might have been "discovered" and colonized by the Chinese. After the Chinese turned their backs on the world, their technology declined. *Id.* Within centuries, "barbarians" from the West subdued the superior Chinese, and China is still recovering from that encounter.

15. America has great problems such as poverty, racial discrimination, and inadequate health care. But none of these poses as grave a threat to our nation as Hitler, thermonuclear war, slavery, or the attempt to dissolve the Union. A nation capable of surviving those soul-testing struggles and landing on the moon should be able to put its present house in order.

appropriately, demand our attention and resources. When a people becomes too focused upon itself, it loses its spirit, vitality, and perspective. We cannot afford that selfish indulgence. A broad and deep grounding in our civilization will help maintain our focus on progress and ordered liberty.

Our final assumption was that a familiarity with the canon is desirable for lawyers. We believed that when students read the texts, understood the historic context of the writings, and intelligently and with intellectual integrity and vigor challenged the theses, the discipline attained would promote clear thinking and good habits of citizenship. Lawyers and citizens exposed to these thinkers are more able to articulate positions and expose fallacies in the search for truth. They will not assume the rectitude of their positions, nor will they blithely permit error to triumph.<sup>16</sup>

*The canon represents a standard and argues for the best that humanity can be.* The Western thinkers have their faults and were presented that way; but the canon was there in all of its comprehensible and often eloquent glory to challenge and be challenged.<sup>17</sup>

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16. Cf. William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988). Professor Wiecek has argued with force that the Supreme Court, through ignorance and deliberate misdirection, ignored history in a number of important matters. Three things must be stated unequivocally: First, to employ history properly, it must be learned; second, the truth is crucial; and, third, it is immoral to falsify history for most political ends.

However, this author does accept the need for great myths. In the telling of the founding of states, liberties are often taken. For example, the Athenians taught that their progenitors sprang from the earth. This allowed the Athenians to imagine that they were fundamentally different from their Attican neighbors—not bound or limited by others' traditions and beliefs—and to capitalize ultimately upon their distinctness. Similarly, the English with their Glorious Revolution and Magna Carta, and we Americans with our break from Europe, have nurtured myths of distinction from which freedoms have sprung.

Athens was different. Until the modern era, it was one of the few democratic states. See generally KAGAN, *supra* note 12. In Greece, only its colonies adopted democracy; its major rivals, such as Sparta and the Persian Empire, were militaristic states. Perhaps Athens' myths had something to do with its noble heritage.

Athens, our American myths about the Revolution, and the like notwithstanding, it is important for citizens to understand their history and character. It is evil for politicians, and would-be statesmen, to distort history and lie for banal purposes.

17. The great writers we presented do have their failings. For example, we studied Thomas Jefferson, and some might have taken him to task for being unenlightened and wrong about slavery. He was a product of his time. His thoughts, notwithstanding his

The challenge of the canon is a necessary and effective educational tool. The canon uniquely provides a standard to judge political, legal, moral, and economic conduct.<sup>18</sup> Standards exist to be challenged—but they make challengers and advocates accountable to a measurable ideal which can be examined and tested.<sup>19</sup> This is a marked departure from much of the modern subjective orthodoxy. The argument for the canon asserts that some ideas and ideals are more worthy than others. This assertion is not made lightly. It should only arise after the canon has been subjected to rigorous challenge—intellectual and practical.

Western civilization and ideals are being embraced as totalitarian and former authoritarian societies throw off their yokes of oppression. Indeed, although now much maligned in many quarters,<sup>20</sup> Western ideals and methods have given rise to and nurtured the present debates. Western ideals engender enlightenment and, although far from perfect, these ideals provide an open, accessible framework and support for progress. However, their very openness permits challenges. Proponents of classical Western liberalism must actively insist upon open, vigorous, and intellectually honest debate.

*It is self-evident that good and informed citizenship is promoted when a people knows and reveres its culture.*<sup>21</sup> If *Federalist* No. 10<sup>22</sup>

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imperfections by the modern standards, hold up well and have been seldom matched for their beauty, eloquence, or power. The same could be said of many of the authors on the list we studied. Reflection on context (both past and present) proved stimulating to both faculty and students.

18. Adam Smith's writings on the market and moral education provide a point of departure for all contemporary debates on the role of economics and law. *See generally* ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991).

19. This dialogue may remind some readers of the ideal Socratic method many hope to employ in the classroom search for truth. That Socrates did it better does not stop us from trying.

20. Many Critics, radical feminists, and Marxists found in the groves of academe have little respect for classic Western intellectual thought. Yet, it is classic liberalism which tolerates and encourages informed dissent.

21. Our American canon was very selective—much was left out due to time constraints—*e.g.*, John C. Calhoun, Chancellor Kent, the Lincoln-Douglas debates, the Gettysburg Address, and the writings of Cardozo and Brandeis. We believe that if students are exposed to the bare minimum of our curriculum and methodology, they will be in a position to further investigate and learn.

22. *THE FEDERALIST* (Alexander Hamilton, John Jay, and James Madison) (1787-88); *THE FEDERALIST* No. 10, at 56-65 (James Madison) (Jacob E. Cook ed., 1961).

were known and understood, Americans would comprehend how far the nation has departed from James Madison's great republic experiment. His factions were cabined by the great state in which geography and competing interests neutralized the factions' mischief.

Now, our special-interest politics and single-issue politics paralyze the government and make a mockery of representative government. Alexander Hamilton and James Madison could not have imagined political action committees (PACs) from Massachusetts buying southern representatives, or southern planters influencing the elections in Philadelphia, Boston, or New York. Madison's system of checks and balances and *responsible* government neutralized the raw and vicious power of factions—they were not intended to result in perpetual divided government. As a nation, we have allowed, both wittingly and unwittingly, our representative form of government to deteriorate and become crippled.<sup>23</sup>

Only when we use Madison as a standard and look to our history can we begin to think about principled reform. Madison was essentially correct. We have so tinkered with the system, however, that we have allowed special interests to emasculate the political process while dominating the state houses and the Congress. If we Americans understood our constitutional roots as the Framers did, at least we could begin a moral dialogue to right the ship of state and prevent it from foundering. Without standards and judgment, we will continue to make great mistakes.

In *Legal Classics*, major emphasis was placed upon reading the texts as fresh, living works.<sup>24</sup> The course positioned the authors and their

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23. The American people apparently want a Congress that will spend without abatement and a President who will wield an unprincipled veto. They do not appear to want to discuss the hemorrhaging of the national economy or the mortgaging of their children's and grandchildren's futures.

Although we, as a people, may have achieved a government worthy of ourselves, this author certainly hopes and believes that the rational, general principles espoused by many of the authors, and the good habits and discipline brought about by studying these great thinkers, may educate the nation, its leaders, and voters.

24. What do these great minds say to us? What does Lincoln say? After all, he was a product of his time and would have deferred the battle over the evils of slavery if it would have avoided disunion. He was not enlightened by the standards of our benevolent day; yet, he was principled. He made great and terrible decisions based upon his appreciation of morality and civilization. His body of work shows a disciplined,

writings in their own times and also in the context of general legal thought. The objective was to give students first-hand experience with great thinkers grappling with such issues as order, justice, the effect of legislation, who is the final judge,<sup>25</sup> succession of governments, rights, economic development, and more.

*Words are terribly important.*<sup>26</sup> I agree with the Critics and feminists. Naming is important and we, as lawyers and educated citizens, must understand the grave impact of words. It is because words and lawyers' use of them are so attractive, fraught with meanings (conscious and subliminal), and powerful, that we wordsmiths must be able to appreciate their power and purpose.

*Legal Classics exposes students to good writing.* We dared to hope that this exposure would engender better writing. Elegant, unencumbered, and lean writing, such as we commended to our students, is readily susceptible to checks and challenges.<sup>27</sup>

These writers provide a standard for ideas and good expression. There is a sheer beauty to the language we have chosen deliberately. Compare, for example, Edmund Burke's thoughts on ordered liberty<sup>28</sup>

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principled mind whose thoughts and deeds transcend the centuries.

Although I do not subscribe to the ideas of Karl Marx, he was a great thinker who still speaks to us, and will for generations if those future generations are liberal enough to accept a broad foundation of knowledge and are willing to challenge those very stones after having studied the principles of engineering.

25. For a contemporary article on the issue of the last judge that occupied Blackstone, the Founding Fathers, and others, see John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963 (1989).

26. The Gettysburg Address, Washington's Farewell Address, and the Declaration of Independence are three American texts of supreme importance, yet they are seldom studied today. Anyone seeking to inspire warriors or political action must read Henry V's speech on the eve of Agincourt by William Shakespeare. WILLIAM SHAKESPEARE, *THE LIFE OF HENRY THE FIFTH* act 4, sc. 3, lines 18-67 (R.J. Dorius ed., Yale University Press 1955). The paucity of our public language and debate shows that great literature and rhetoric is no longer part of the canon.

27. Unlike much modern scholarly prose, or the language of obfuscating bureaucrats, the writings that we presented were chosen for their clarity and grace. Undoubtedly, the authors aimed to seduce, but they were not put off by employing style or elegance as they made their points.

28. Good order is the foundation of all good things.

. . . But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness without tuition or

and Alexander Hamilton's expounding a vigorous government<sup>29</sup> to almost any modern writer or politician. Certainly, styles are different. We are less eloquent with a purpose. (We don't want excellence. We don't wish to stand out or call attention to ourselves. We exalt the common man and become common.) Sometimes, we use our impoverished style because we know not better; but, often, we write to confuse and obfuscate, and seek to destroy meaning.<sup>30</sup>

The authors we selected generally have not fallen prey to bad writing which is unpleasant, ponderous, and dense.<sup>31</sup> The writers have not sought to obscure truth or manipulate. They have not spoken in jargon to make others (including those nominally literate and informed) expend great effort to learn the "tongue."<sup>32</sup>

restraint. . . . To make a government requires no great prudence. Settle the seat of power; teach obedience: and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a *free government*; that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 262, 263 (Dolphin Books 1961) (1790) (emphasis in original) [hereinafter REFLECTIONS ON THE REVOLUTION IN FRANCE].

29. "[T]he vigour of government is essential to the security of liberty." THE FEDERALIST No. 1, at 5 (Alexander Hamilton) (Jacob E. Cook ed., 1961). Anyone wishing to see a crisply written economic plan need only turn to Alexander Hamilton, *Report on Manufactures*, in 10 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1966). Compare this to the recent dissembling of both major parties' platforms, neither of which managed to produce an intelligible plan for the economy.

30. This destruction of meaning is not in the manner of James White's *When Words Lose Their Meaning*. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984). That is, meaning changes legitimately when the culture changes so much that a new era has dawned.

It is instructive that Professor White's book discusses the language of authors ranging from Homer to Thucydides to Jane Austen to Burke to the American Founders. There is not a slothful or disingenuous writer in the lot.

31. This generous generality applies to most of the authors and texts selected. To my taste, and even those of his adherents, Unger is most often obtuse and impenetrable. This *is not* desirable nor advantageous. Yet, it is another standard.

32. Much modern political, legal, and cultural criticism seems designed to exclude the novice and average reader. The language makes most readers feel stupid, ignorant, deficient, and uniformed. Ultimately, these readers and students (and often citizens in the political realm) are excluded from the "loop." Their political and cultural insecurity is intentionally inflicted by writers with a powerful agenda.

Further, indirect writing makes it difficult to pin down the author's meaning. Through misdirection and obfuscation, it becomes difficult to contest the author's position. The writers chosen in *Legal Classics* permit students and readers to hold up selected texts, writings, theories, and judicial opinions to the clear mirror of learning. There is no hiding the ball.<sup>33</sup>

*Legal Classics develops and refines students' reasoning skills.* Ultimately, a number of our law students attested that *Legal Classics* did just that. They reported that this course placed many of their other substantive courses in a theoretical framework. Although no one contended the course made sense of tax complexities, corporate reorganizations, or employment discrimination law, they indicated that the readings and discussions gave them a jurisprudential structure which enabled them to see that modern law was still grappling with eternal issues. They further indicated that *Legal Classics* helped them to set their own philosophical houses in order.

A delightful byproduct of this process was that contemporary students came away with a firmer grasp of ethics and overarching moral principles, despite the fact that many of the texts used were "ancient."<sup>34</sup> Another objective, which was amply satisfied for law students and should be pursued with undergraduates, was the honing of legal writing and research skills. *Legal Classics* required students to conduct detailed research on a theme or author chosen from those discussed in class.<sup>35</sup>

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33. The writing in our course is pleasant to read and easily accessible. That is quite deliberate. If the writing is not lean and elegant, if it is not designed to educate, then it may be used to control by obfuscation, complexity, and misdirection.

34. We started with the Talmud, proceeded through Roman law and the development of common law, and concluded with a sampling of important 20th century writers. Many students found that the international law of Pufendorf and Grotius is the bedrock of much modern thought; that Burke and Blackstone still speak to conservatives, but not to neo-conservatives; and that the Talmud, as many rabbis and Jewish lawyers have long known, is excellent training for the bar and modern legal thinkers.

35. For example, one of our students, Ms. Margaret Babb, Syracuse University College of Law, J.D. 1990, was intrigued by the French Revolution and wrote on the revolutionary themes contained in Beaumarchais's works such as *The Barber of Seville* and *The Marriage of Figaro*. Margaret Babb, *Burke and Beaumarchais: Two Perspectives on the Eve of Revolution* (1989) (unpublished manuscript on file with the author at Syracuse University). A year later, another student, Mr. Donald Griffith, delved deeply into the jurisprudence of Justice Story and its contribution to American legal thought. Donald Griffith, *Justice Joseph Story and American Equity: An Analysis of the Commentaries on Equity Jurisprudence* (1990) (unpublished manuscript on file with the author at Syracuse University).

*Legal Classics* gave faculty participants the opportunity to teach some of their favorite legal writers and thinkers, without taking them away from their major substantive interests, or requiring any one professor to become the expert on legal jurisprudence, philosophy, history, economics, or other specialty areas. If the course is team-taught, as it was at our law college, actual faculty commitment can be tailored to fit any college or professor needs. The commitment may be as high as regular attendance, preparation, and discussion, or as minimal as preparation for the assigned class sessions and assistance with any pertinent research proposals.

Lastly, *Legal Classics* exposed students to many different teaching styles, outlooks, and approaches, notwithstanding the common themes present in the course. Many students reported that they found this aspect of the course enlightening and beneficial. Likewise, the faculty enjoyed observing others teach, and gained insight from the observations and friendly criticisms which often followed.

## I. LEGAL CLASSICS FOR LAW STUDENTS AND OTHER GRADUATE STUDENTS

### A. Course Creation

For a number of years, another Syracuse University faculty member, Professor William M. Wiecek, and I discussed offering some type of reading seminar in which faculty and students would explore some of the law's great writings. We had hoped to meet every other week for a couple of hours and try to interact among ourselves and with the students as much as possible. The catalyst for the creation of this course was the arrival, in 1988, of our dean, Michael H. Hoeflich, who had a strong background in legal history and an interest in legal literature as well.

Bill and I began to envision a course where participating faculty and students would be able to bring their views, expertise, and knowledge to the seminar table. We sought to have somewhere between five and seven faculty join us, which would require that each professor be responsible for two or three classes, depending upon how many expressed interest and volunteered. We decided that the faculty would be encouraged to select readings of 100 to 200 pages per class, which would yield excerpts of sufficient depth for a reasonable degree of immersion, yet

would not discourage detailed and thoughtful reading.<sup>36</sup> Students would have the option of a research paper or a final exam.<sup>37</sup>

With a nucleus of three committed professors, we discussed what areas we might wish to teach and who might be available and interested to fill in the gaps. Bill Wiecek agreed to do *The Federalist*<sup>38</sup> and other legal thinkers of the nineteenth century. Mike Hoeflich, a glutton for punishment in his first year as dean, graciously agreed to prepare classes on The Talmud,<sup>39</sup> Gaius,<sup>40</sup> and authors who wrote about and were influential in legal education.<sup>41</sup> I was interested in teaching some of the classic legal and political writers such as Aristotle and Plato, as well as eighteenth century writers such as Blackstone and Edmund Burke. Both

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36. We received pleasant surprises. In many instances, not only did the students do the assigned readings and come to class prepared, they drew heavily upon their exposure to other writers of the era or writings on the same themes. Often they read more of the assigned author, and critiques of the texts. The reading load seemed an appropriate one for the course at the graduate level. See *infra* notes 220-28 and accompanying text for the undergraduate syllabus and reading load.

37. In the two classes we have held, no students exercised the examination option. Had some opted for it, I believe that an examination could have been constructed by having each professor create a question or questions on his readings. The coordinator would then have edited the questions and perhaps combined some themes. The professors would have graded their particular questions, and the coordinator would have been responsible for compiling the results and scaling the scores. If necessary, all of the faculty could be polled on the curve, etc.

The undergraduate proposal, described in Section II, *infra*, suggests two models: a small class or seminar model that uses research papers, and a large class offering that requires two short papers and a final exam. Thematic questions, which could be used for testing purposes, are set forth in the undergraduate model.

38. THE FEDERALIST, Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 48, 49, and 51 (James Madison).

39. Dean Hoeflich made the following assignments: BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS 128-75 (Barry W. Holtz ed., 1984) [hereinafter BACK TO THE SOURCES]; JACOB NEUSNER, INVITATION TO THE TALMUD 87-169 (1984); ABRAHAM COHEN, EVERYMAN'S TALMUD 298-345 (1932).

40. Dean Hoeflich assigned the following: THE INSTITUTES OF GAIUS: TEXT AND TRANSLATION 20-123 (W.M. Gordon & O.F. Robinson trans., 1988) [hereinafter TRANSLATION, INSTITUTES I]; *Gaius Noster: Substructures of Western Social Thought* 619-648, in HISTORY, LAW AND THE HUMAN SCIENCES (Donald R. Kelley ed., 1984) [hereinafter *Gaius Noster*].

41. Daniel Mayes, Blackstone, Benjamin F. Butler, and others. See THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES (Michael H. Hoeflich ed., 1988) [hereinafter THE GLADSOME LIGHT OF JURISPRUDENCE].

Bill and Mike suggested that Professor Kenneth J. Pennington of the History Department at the Maxwell School of Citizenship, an expert on Roman law and canon law, be invited to participate. Ken agreed to teach classes on medieval Roman law and the development of English common law. Word of our discussions spread, and several more volunteers appeared. Professor L.F.E. Goldie volunteered to conduct classes on great writers concerned with international law. Professor Richard Schwartz offered to teach Austin, Maine, Unger, and Weber. Professor Samuel J.M. Donnelly rounded us out by agreeing to cover Holmes and Pound. In each instance, the professor who volunteered had an affinity for the texts and authors covered, and had thought about how these characters fit into the scheme of legal thought and history.

Once the faculty had indicated their interests and volunteered, the schedule and the syllabus fell neatly into place.<sup>42</sup> As course coordinator, administration of such a course proved to be fairly easy. Some flexibility was needed because of conferences and other faculty obligations. Beyond the schedule, each professor was responsible for selecting his readings and ordering the books (or copies), or placing the readings on library reserve. The team teaching format is ideally suited to presenting material such as legal literature, as it enables the college to include many diverse talents and interests without great burden in either faculty time or overhead.<sup>43</sup> The same format could be used to study texts used in

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42. Our syllabus and reading list are found *infra* in Table 1. A suggested syllabus for the one-semester, undergraduate version of the course is found *infra* in Table 3.

43. Team teaching is fairly economical. Faculty are free to concentrate their energies on one or two class sessions. The major burden lies with the course administrator, who must ensure a reasonable schedule and assignments for all concerned.

Exposure of both faculty and students to the various teaching styles and approaches to legal thought and great writing is a unique benefit of team teaching of *Legal Classics*. Most students felt that this asset was one of the highlights of the course, and often, their legal education at Syracuse. Faculty also benefit from exposure to other teachers and observing how they handle discussions and lectures.

A course such as this can be offered easily without reliance upon one or two jurisprudential experts to carry the load. For example, our instructors had very diverse teaching and research interests. Our team of instructors included a sociologist, several legal historians, an expert in canon law, a bankruptcy and commercial transactions specialist, a real estate finance/tax maven, and others, as the brief faculty biographies below indicate.

traditional law and literature courses.<sup>44</sup>

### B. Guidelines for Teaching the Legal Classics Texts

1. *The Talmud*.—The Talmud is a logical starting point for a course covering basic texts of Western legal thought. The Talmud requires

Thus, a course like this probably can be tailored to be successful at any school if there is the inclination and a modest amount of will.

#### *Staff of Legal Classics*

Christian C. Day, Professor of Law. Courses: Corporations, Real Estate Transactions and Finance, Professional Responsibility, former Moot Court Advisor. Research: Corporations, Real Estate Finance and Taxation, Foreign Policy and National Defense, Land Use and Economic Issues.

Samuel J.M. Donnelly, Professor of Law. Courses: Commercial Transactions, Creditors Rights, Jurisprudence. Research: Commercial Transactions, Bankruptcy, Jurisprudence.

L. Frederick E. Goldie, Emeritus Professor of Law. Courses: International Law and International Business Transactions. Research: Public International Law, Law of the Seas.

Michael H. Hoeflich, Dean, Professor of Law, and Professor of History. Courses: Contracts, Real Estate Finance, Legal History, Legal Literature, Taxation, Pensions. Research: Contracts, Real Estate Finance, Legal History, Legal Literature, Taxation, Pensions.

Kenneth J. Pennington, Professor of History. Courses: Roman Law, Medieval History. Research: Medieval History, Legal History, Canon Law.

Richard D. Schwartz, Ernest I. White Professor of Law, and Professor of Sociology. Courses: Law and Society, Criminal Law. Research: Law and Society, Criminal Law.

William M. Wiecek, Chester Adgate Congdon Professor of Public Law and Legislation, and Professor of History. Courses: Civil Procedure, Constitutional Law, Corporations, Legal History. Research: American Constitutional Law, Legal History, Nuclear Power.

A final benefit of exposure to the thoughts and presentations of other faculty is that an instructor can acquire the knowledge and confidence to offer *Legal Classics* as a solo instructor. The professor will have witnessed experts who have already compiled a list of readings and resources and conducted effective classroom experiences. Having collaborated with my colleagues for two academic years, I am ready to present an undergraduate version of this course for our new undergraduate Legal Studies Program, knowing that I will be able to call upon them as guest lecturers and as advisors from time-to-time.

44. I will use this bully pulpit to suggest one more variation of the traditional law and literature format. In Table 2, *infra* I have constructed a course that combines legal literature of the kind that is the focus of *Legal Classics* with such literary works as Sophocles's *Antigone* or histories of the period under consideration. Thus, students can explore legal and political theories and contrast them with issues and problems confronted in great and entertaining literature. James Boyd White's *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* would be an excellent place to shop for ideas to supplement these thoughts. See WHITE, *supra* note 30.

students to undertake textual studies and to focus on the continued vitality of the *text*.

Dean Hoeflich began the course by presenting the Talmud,<sup>45</sup> the most ancient of the texts studied, and one which has enjoyed a strong influence on both secular lawyers and religious scholars for ages.<sup>46</sup> Interestingly, the Talmud is not case law, nor statute, nor sacred text.

Well, what is the Talmud? "It is not in heaven."<sup>47</sup> The Talmud is mundane, a 2,000-year-old secular conversation which invites thought, consideration, wit, and wisdom in applying Jewish standards of the past to one's own time and place.<sup>48</sup> Yet, Talmud is solely text-centered, a highly revered collection of immutable conversations which contained all of the "law" that a Jew needed to operate in his society successfully, if only he could comprehend its nuances. Modern Americans hold the Constitution in similar esteem, recognizing its unchangeable contents,<sup>49</sup>

45. His assignments are set forth *supra* note 39.

46. Throughout this Article, many of the observations and comments will be based upon my lecture notes and asides, which were created as I listened and learned from my colleagues and students when we studied the texts. I will not attempt to document each and every comment. However, I will provide appropriate citations to the texts we employed and references that we used to enable others develop their materials.

47. In a typical passage from Talmud, Rabbi Eliezer makes a point that is not accepted. He says that if he is not right, trees will prove it. Trees are flung. His friend and rival, Rabbi Joshua, says that any magician could do it. The river changes course. Still no proof. The hut will show him to be correct. The walls bend at 45-degree angles. God intervenes. "How dare you trouble me?," Rabbi Joshua says. "It [the answer, i.e., the Talmud] is not in heaven!" God has spoken and goes away. The Torah had been given. The body of law received. Thence onward, men must interpret the Torah and create Halacha (law). God is quiet. Men create the Talmud. See, e.g., ADIN STEINSALTZ, *THE ESSENTIAL TALMUD* 27-28 (1976).

Somewhat parallel is our application of the Constitution. It is the basic text. We now create laws to give it life. The Talmudic conversation among men never ends. Rules for living can be interpreted in any form. The Constitution/statute analogy is not perfect, however. The Talmud's two millennia dialogue is also similar to common law dialogues amongst judges.

48. Jews are "people of the book." After the Babylonian captivity ended in 538 B.C., exiled Jews were permitted to return to Palestine. ERNEST R. TRATTNER, *UNDERSTANDING THE TALMUD* 3 (1955). The Babylonians sent Ezra to reestablish Jewish life. MORRIS ADLER, *THE WORLD OF THE TALMUD* 20 (2d ed. 1963). Ezra and his colleagues introduced the Midrash form of the Talmud. *Id.* A consequence of Ezra's efforts was a new class of interpreters and expounders to teach the Torah. These men were known as "Soferim" or "Men of the Book." *Id.* at 21-22.

49. See, e.g., U.S. CONST. art. V. The Constitution of 1789 remained intact until

timeless, yet infinitely applicable to everyday questions of law and society.

Style and consistency, elegance and wit were prized among Talmud authors.<sup>50</sup> Their skill in dialogue not only illuminated religious and social issues—it encouraged a level of argument studied and imitated by lawyers for ages.

Talmudic guidelines suggested acceptable behavior without being codes of laws, yet they carried the weight of law. Ignorance of Talmud (or variation from it) cut one off from one's community. Talmudic law was personal,<sup>51</sup> not territorial, and an outcast would be a truly stateless person.<sup>52</sup> Consequently, Talmudic standards provided and nurtured a strong sense of community throughout many persecutions and diaspora.

Dean Hoeflich introduced the Talmud to the students by first giving a brief history of it.<sup>53</sup> The Talmud is rooted in 2,000 years of Jewish religious thought. The Talmud is often seen as a supplement to the Torah. It applied the Torah's basic teachings to human conditions in its own age, and offered procedures for facing the problems that challenged the Jews in new eras. Its foundations were traditionally laid by Ezra and his associates who returned from Babylonian exile to Palestine in the fifth century B.C. Through the Talmud, these rabbis brought the

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the Civil War, when state sovereignty and federalism clashed. The balance of power shifted conclusively in favor of federalism and the Civil War amendments ratified a new, stronger federal arrangement. For an excellent book on President Lincoln's use of language to fashion a new state see GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992). An excellent one-volume book on the remaking of the American state is by the historian James M. McPherson. See JAMES M. MCPHERSON, *ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION* (1990).

50. Elegance and style, too, were prized by Roman lawyers.

51. Most of us in modern, secular society think of law as being territorial. That is, there is American law, the law of New York State, French law, and so on. It was not always so. Much law developing in the early Middle Ages was personal law. That is, people were obligated to follow the laws and customs of their ethnic group regardless of their place of residence. Thus, much of the Jewish law developed in the Frankish Empire was separate and apart from the law of the Franks. After the destruction of the Jewish state in 70 A.D. by the Romans, the framework of oral law and traditions provided by the Talmud permitted the Jewish community to retain its sense of identity and survive. Roman law also survived in much the same manner, despite the destruction of the Roman Empire. See PAUL VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* (1961).

52. Ostracism was a horrible penalty, as the banished Jew was cast out from his community and abandoned to the often hostile Christian society. In times of persecution it could mean death.

53. For a more detailed history of the Talmud than will be provided, see STEINSALTZ, *supra* note 47, at 3-85. See generally ADLER, *supra* note 48, at 16.

teachings of the Temple into the daily lives of the community.<sup>54</sup>

Talmudic teachings are found in two distinct layers: the *Mishnah* (or "study") and *Gemara* ("teaching" or "study"). The *Mishnah* states the rabbis' teachings. It consists of six main sections that are divided into sixty-three tractates. These tractates are divided into individual chapters, and the chapters contain paragraphs or *mishnayot*. In the third century A.D., the *Mishnah* was edited in its present form. (The *Mishnah* was extended by supplements in Palestine (350-400 A.D.) and Babylon (500-600 A.D.) when the Babylonian and Palestinian *Gemaras* were created.)<sup>55</sup> The *Mishnah* is a succinct summary of what the ancient sages thought about a subject and, thus, is the oldest layer of text. The *Gemara* is a later commentary and elaboration that introduces new subjects and problems. The *Gemara* also cites the thinking of later authorities.

Eventually, the Babylonian Talmud became the principal source of the European tradition. From the sixth to eleventh centuries A.D., there was little active anti-Semitism. During this period in the Middle Ages, much of Talmudic law developed in the Jewish communities in the Frankish Empire, as well as in other parts of the world, including Toledo, Khartoum, Wurm, and Mainz. However, with the coming of the Crusades, which fueled anti-Semitism, Jewish scholars began to codify the Talmud to protect the Jewish religious heritage from destruction. Printed compilations began in the fifteenth century, with one of the first editions published in Soncino, Italy. Because of persecution and expulsion from England, France, and Spain, Jewish communities were forced to flee to Eastern Europe, where the Vilna and Slavuta editions were published. These mid-eighteenth century compilations continue in importance to the present day. Indeed, the last editions of the Vilna Talmud were printed in this century, and the number of photographed editions based on the Vilna run in the hundreds.<sup>56</sup>

Dean Hoeflich then turned to the original text to illustrate how the Talmud is studied. He noted that the text is read like an archeological site, with the basic tract surrounded by later commentaries.<sup>57</sup>

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54. For example, Jews were required to adopt procedures that priests followed for consecrated food.

55. THE TALMUD: SELECTED WRITINGS 9-10 (Ben Zion Bosker trans., 1989).

56. STEINSALTZ, *supra* note 47, at 74-80.

57. See BACK TO THE SOURCES, *supra* note 39, at 140-141, which provides an illustration of the first page of the Tractate Berakhot. The *Mishnah*, which is the central text, is followed by the layer of *Gemara*, comments by Rashi, a leading scholar, and then, moving ever outward as the layers are revealed, by later scholars.

On the first page of *Mishnah Berakhot*,<sup>58</sup> was a seemingly simple issue: when do you say prayer (Shema)? Yet, the answer is one of complexity which gives rabbis a basis for formulating opinions. The text of the Talmud presumes detailed knowledge of Jewish life by the reader. To solve this question, the student must know that Shema is a required prayer. Rabbi Eliezer says that one can pray from the time the priests eat their Heave-offering until the end of the first watch. The Sages say to pray until midnight. Rabbi Gamaliel says until dawn. The *Gemara* refers the reader to the Bible. People live from morning to evening, but the Bible starts with evening. Students reconstruct the arguments by reading and reliving the actual oral arguments. Is it prayer-time when the priests eat the Heave-offering or when the poor man eats? Understood in the light of the religious practices of the people, the question now offers a universal measure which pertains to every student of the Talmud. The poor man works until the stars come out, and then eats. The emergence of the stars is a common time and *could* be the answer. Opinions of specific rabbis support solutions, yet the Talmud stimulates thought without directly answering.<sup>59</sup>

The “answer” is 1,000 years of opinions, somewhat similar to the precedents of judges which present possibilities to craft a new rule for the clever or sympathetic court. There is internal consistency within in the teaching of each rabbi. It is also important that the views of the question be rigorously expressed. But a final rule is not developed in the common law sense in which judges announce a rule which is accepted or, if not accepted, interpreted away. Thus, Talmudic study is always dynamic and pertinent to each Jewish scholar’s life and times.

Talmudic guidelines enable each new generation to start its inquiry at the Bible and fashion standards and interpretations which speak to the present. Each subsequent interpretation modernizes. The Talmud provides for, and encourages, an ongoing debate on the text (the Talmud and the Pentateuch [the Mosaic books of the Bible]). While the system remains eternal, the debate continues, enabling students to find a way to interpret the law in accordance with everlasting truths.<sup>60</sup>

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58. *Id.* at 132-33.

59. It is certainly not *Gaius’s Institutes* nor the “Blackletter Law” of our contemporary students where the rule is easily accessible and readily apparent.

60. Despite the terrible persecution of the Jews, the study of the Talmud was a unifying force that helped their communities to survive (notwithstanding the censorship

## 2. *Roman Law.*—

### a. *Gaius's Institutes*

The course next proceeded to Roman law, which was taught by Dean Hoeflich and Professor Pennington.<sup>61</sup> Roman civilization has had a profound influence upon not only Western culture, but the culture of the whole world. Rome is recognized for its systems of engineering and warfare, but its major contribution was in its system of laws. Although much of Roman culture was derivative of the Greeks, law emerged from Rome as:

a thoroughly scientific subject, an elaborately articulated system of principles abstracted from the detailed rules which constitute the raw material of law. . . . It was the strength of the Roman lawyers that they not only had the ability to construct and manipulate these abstractions on a scale and with a complexity previously unknown, but had also a clear sense of the needs of social and commercial life.<sup>62</sup>

Civil law derived from Roman law remains the basis for legal systems in such far ranging places as Sri Lanka, South Africa, and Scotland. Indeed, American water law is based upon Roman water law.

Codification and legal systems for administration of city-states and empires were not unknown in the Western world before the emergence of Roman law. Roots of Roman law may be traced to the ancient Middle East, where compilation and codification were present in Babylon by 1000 B.C. In Palestine, the Kings (or Judges of Judea) had a primary secular task of law giving and law collecting. These laws were fundamentally pragmatic and not abstract. Substantive subject matter covered

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and destruction of the Talmud by Christian authorities). Although the lack of political power denied the Jewish community sanctions to enforce laws and mores, the Jewish observation of the obligations found in the Talmud defined the community. Separation from the community for failing to adhere to the Talmudic standard was a powerful punishment. Exile from the community cut the Jew off from his people. He was indeed a stateless person with no community to return to and unable to be accepted by the Christian community without undergoing conversion. Thus, although Talmudic traditions did not have the force of positive law and the community was without civil or criminal sanctions that would be enforced by the state, the Talmud had implicit authority derived from the great social pressure exerted upon the Jewish community's members.

61. For an excellent primer on Roman law, see BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* (1962).

62. *Id.* at 1.

the concerns of a predominately agrarian society, for example, "If your ox is gored . . . then . . . ." Despite the philosophic bent of Greece, ancient Greek laws, too, were basic, "If X, then Y."

Although grounded in these relatively simplistic codes, Roman law successfully incorporated the pragmatic agrarian rules into a code of working principles with the flexibility to adapt to an increasingly diverse urban and mercantile society. After the founding of Rome in 753 B.C., commissions were sent to Athens to study Solon's law. The Romans were able to build on an extant system of law devised to regulate that agricultural society. As Rome became more complex, so did its set of laws. For example, in torts, the measure of damages was fairly sophisticated, even by our standards. If an animal was destroyed, damages were assessed at the highest market value within thirty days of the animal's death.

During the third century B.C., a new class of Roman men developed who used the law to acquire wealth and power. They realized that law could be used to maintain a governing class, and used as a political tool with great effect. For example, Cicero (106 B.C.-43 B.C.) made many of his great speeches as a defense lawyer in political trials.

Through the second and first centuries B.C., Roman law grew and developed. Lawyers were recognized as experts, and accorded respect. *Advocati* (advocates) such as Cicero achieved political prominence. By 50 B.C., many commentaries (books on law) existed, and Rome had a cadre of professional lawyers. As the Millennium approached and the Republic declined and died, the Empire recognized the utility of law to maintain imperial control. Having realized the value of governing through at least the appearance of constitutional and legal principles, Emperor Augustus retained the *forms* of the old Republic. But imperial control of the law was essential. To centralize power and create a monopoly over law, government lawyers wrote the law in the Trajanic-Hadrianic period (98-138 A.D.).

The classic period of Roman law flourished through the third century. Law became more complex to accommodate expanded trade and mercantile interests. The Emperor produced a body of public law for the Empire, and with it, a permanent bureaucracy to assist him. Lawyers developed specialties to deal with opinion letters, petitions, and appeals. During this period, legal education reached its height and law schools were established.<sup>63</sup> Gaius, Paulus, Ulpian, and Modestinus wrote both

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63. Two of the leading law schools were in Beirut and Constantinople. A five-

commentaries and books. *Institutes* were written as basic handbooks or treatises for law students.

During the fourth and fifth centuries, the Roman Empire continued to decline and began to dissolve. As barbarians overran the West, the capital was moved to Constantinople to consolidate power and salvage a portion of the Empire. Roman law in Gaul was now vastly different from Roman law in the East. Throughout the period of decline, the emperors maintained the Empire with law in the Roman classic tradition. The most famous undertaking, and rightly so, is that of Justinian, who commissioned a major codification in 529-534 A.D. His commission produced the *Pandex* or *Digest* (juristic opinion), the *Codex Justinian* (imperial laws), the *Institutes* (basic text for first year law students based upon *Gaius's Institutes* with some changes), and the *Novels* (new laws). Tribonouis's commissioners went back to *Gaius* in compiling the *Institutes*. *Gaius*, as a basic text, was written in simple and easily understood Latin. It provided well-organized coverage of substance and procedure—something the *Codex* and *Digest* sorely lacked. *Gaius's* greatest contribution was that he made Roman law accessible. The Roman law of his time was massive and complex. *Gaius's* presentation made the law broachable, and his *Institutes* became the primary vehicle for studying Roman law.

Rules, as law students and lawyers need them, were not given in the *Digests* or juristic opinions; but *Gaius* was the Blackletter law of his epoch. His text was a series of rules that were easy to understand and memorize.<sup>64</sup> Once the basic scheme was understood, more advanced law study was possible. This entree to Roman law provides the same entree today.

After the fall of Rome in the West, Roman law continued to be studied in Europe. But with time, important aspects fell by the wayside. The *Pandex* was no longer studied, and between 600 and 1100

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year curriculum was featured. During the first year, students studied *Gaius's Institutes*. *Gaius* was a provincial and a government lawyer. Little is known about him personally, and no accounts of his life survive. He was a teacher of unknown quality who gave the elementary law school lectures. He survives because *Justinian's Institutes* were extensively plagiarized from his treatise.

64. This may be seen in the following: "116. It remains for us to describe what persons are in bondage. 117. All children, whether male or female, who are in the power of their father can be emancipated by him . . . ." TRANSLATION: *INSTITUTES I*, *supra* note 40, at 79.

A.D., the *Digest* was erased and religious texts “written over” it. *Codex Justinian* was little used. Fortunately, *Justinian’s Institutes* was never lost. It was studied in Pisa and Florence in the twelfth century for the same reasons that lawyers of earlier centuries had used it: accessibility, simplicity, and organization. Although *Justinian’s Institutes* continued to play a role in the development of emerging European law, Gaius disappeared and remained submerged until 1816, when the historian Barthold Georg Niebuhr came across a manuscript in Verona, a text from St. Jerome which had been written over an earlier work. He told his friend Friedrich von Savigny about the palimpsest,<sup>65</sup> who ultimately recognized traces of Gaius from the *Justinian Institutes*.<sup>66</sup>

The discovery of *Gaius* permitted Savigny and others to understand and theorize about law in its historical context. Savigny and other scholars were now able to compare *Gaius* with *Justinian’s Institutes* and later versions of the *Institutes*. Thus, they used *Gaius* as a benchmark to show how law evolved and changed. *Gaius’s Institutes* can comprise a philosophic backbone for the belief that complex legal systems can be categorized, organized, and reduced for the beginner. Gaius’s influence via *Justinian’s Institutes* undoubtedly led to the format and organization of *Blackstone’s Commentaries*. Consequently, even our modern categories depend upon his thinking and organization. The circle had been completed: from law school text to imperial tool, then lost, and finally found serendipitously to illuminate much of what we now understand as Roman law of the classic period.

#### *b. Roman law in medieval Europe*

After having completed the rise and fall of the Roman Empire and the Roman law of the Imperium, Professor Kenneth Pennington led the class through Roman law’s survival and adaptation in the barbaric states of medieval Europe.<sup>67</sup> The *Codex Justinian* had survived, but had been transmuted into *epitomes*.<sup>68</sup> In southern France, translations of the *Codex*

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65. This is a manuscript in which the earlier writings have been overwritten and, sometimes, scratched out. Christians of the early Middle Ages often reused the velum and obliterated the underlying pagan writings. Through careful restoration, the earlier layers can be revealed and studied.

66. See *Gaius Noster*, *supra* note 40.

67. The primary text was VINOGRADOFF, *supra* note 51.

68. *Epitomes* epitomized the *Codex* and made it shorter.

*Justinian* weathered the collapse of Rome in the West; yet, this statutory law of the Roman Imperial system was of very little utility for the medieval jurist attempting to learn the law.

Roman codifications persisted during the sixth to eighth centuries, and *compilations* (or private codifications) came into existence. In the Germanic kingdoms, codifications of Germanic customary laws were written. These Germanic codifications not only included Germanic customs, but also incorporated some still useful aspects of Roman law. On the whole, however, the absorption and use of Roman law by the new rulers were rather limited in the early Middle Ages: society had reverted to a more primitive state; Roman law did not speak to the traditions of the invaders; and its sophisticated concepts were not readily accessible.<sup>69</sup>

So, what remained of Roman law? The Justinian codification had no real influence until the twelfth century. Meanwhile, Roman law influence persisted via the epitomes and Germanic codifications. The Roman law in the Germanic codifications was derived from the earlier codification of the Theodosian Code (fifth century). The *Justinian Digests* were practically unknown.<sup>70</sup>

Roman law tradition was in a state of steep decline until the eleventh century, when a revival occurred. Roman law was formally studied in 1075, in Bologna, which became an important center for Roman and canon law. *Digests* were required for the formal study of Roman law. Lecture notes from Inerius (1080-1125) showed that texts and glosses were in existence in Bologna.<sup>71</sup> Analysis of the teaching of Roman law

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69. Remember that these attempts to employ Roman law used the poorly organized *Codex* (the imperial laws). Roman law neophytes resorted to the *Institutes*, rather than wade through the *Codex*, which even experienced Roman lawyers found confusing.

70. Again, this makes sense as the *Digests* were juristic opinions, which lacked the organization and simplicity of the *Institutes*. The *Digests* spoke to men of a remote and complex time, and had little relevance to the emerging law of the Middle Ages. These medieval legal codes and codifications of customs made great sense because they rationalized the existing laws and customs. They were both useful and understandable to those involved with the law.

71. Bologna was the site of first European university, which began as a law school. Roman law was initially the province of clerics, and all students were clerics. Consequently, Roman law and canon law were studied and developed together in the university setting. The first laymen taught at the university in 1270.

An interesting aside to legal education of the Middle Ages is that medieval law professors were paid by the number of students they taught. Faculty rented the lecture

at Bologna reveals that it took about a century for the lawyers teaching the law to understand its full complexity. *Littera Bononesis* (Bolognese text) (eleventh and twelfth centuries) is a very different version of Roman law from the Justinian Code;<sup>72</sup> its *Digest* is divided into three parts (Justinian's had fifty).<sup>73</sup>

By 1140-1150, Roman law was used in some courts of law. But its influence remained distant and foreign to the minds of many medieval lawyers. Medieval concepts of the state, law, and government were primitive when compared with even the late Roman Empire. For example, *Justinian's Code* was a very sophisticated device of codification. This was an act of *public* law (as both moderns and Romans would understand the term) by the sovereign. This concept of public enactment by the sovereign would not have been envisioned by the creators of *Littera Bononesis*.

The dominant use of compilation remained private during this period. For example, Gratian (a leading clerical teacher of canon law in 1150) completed a private compilation of Roman law, yet its very compilation affected the papacy. Roman law, however, produced a procedural legacy<sup>74</sup>

rooms. There was an economic incentive for finishing the material, as faculty who failed to complete the material were fined for not concluding classes in a timely manner. Bologna was also student-governed. Student government provided students considerable freedom. When they were unhappy with the quality of instruction they simply migrated. This migration produced some great ventures. Cambridge broke off from Oxford. Similarly, in America, Oberlin was founded by students who broke away from Lane Seminary in Cincinnati over the issue of abolition. As already noted, Bologna was a *corporation* of students. In contrast, Oxford and Paris were *universitates* of teachers.

72. FRANCESCO CALASSO, *MEDIO EVO DEL DRITTO* chs. 11 & 12 (1954).

73. *Littera Bononesis* had the following organization: (1) *Old Digest* [Books 1-24, Title III]; (2) *Infortiatium* [24]; (3) *New Digest* (which covered the rest). Roman law was printed in this format well into the Middle Ages.

Dean Hoeflich suggests for the intrepid reader the following: MAX CONRAT (COHN), *GESCHICHTE DER QUELLEN UND LITERATUR DES RÖMISCHEN RECHTS* at 119 (1963) (information on the manuscript proper); ERNST PETER JOHANN SPANGERBERG, *EINLEITUNG IN DAS RÖMISCH-JUSTIANEISCHE RECHTSBUCH: ODER CORPUS IURIS CIVILIS ROMANI*, 1 *et seq.* (1970) (early medieval commentaries on the text); and CALASSO, *supra* note 72, at 599 (later medieval commentaries on the text).

English language sources of information include: KENNETH PENNINGTON, *MEDIEVAL STUDIES: AN INTRODUCTION* 339-40 (James M. Powell ed. 1992) and Wolfgang P. Müller, *The Recovery of Justinian Digests in the Middle Ages*, 20 *BULL. OF MEDIEVAL CANON L.* 1 (1990).

74. One common system of canonical procedures was the system of *ordeals*. Ordeals

and, by the year 1200, anyone trained in canon law had to know Roman law.

Ultimately, the revival of Roman law was largely academic, originating in the great universities and not directly concerned with the practical application of the law in the courts. Eventually, the academic theorists began to use the practical nature of Roman law to solve legal problems of their times. Systematic commentaries were developed and applied to medieval needs. Although this gloss was often far removed from the original texts, virtually third-hand, the aspect of Roman law that was applied was a practical and sensible one which could serve a society growing more sophisticated and commercial.<sup>75</sup>

In the West in the fifth and sixth centuries, Roman law's influence declined as societies became more primitive and agrarian. Roman law's sophistication was unnecessary and, often, could not be comprehended.<sup>76</sup> It survived in the codification of Germanic customs, however, and in the study at emerging universities. Theoretical study led to rediscovery at such institutions as Bologna, and a new appreciation and application of Roman law emerged. Although this version of Roman law was often far removed in understanding and concept from the imperial law of the Roman Empire, its practicality and level of sophistication adapted nicely to the needs of the Middle Ages as Western Europe revived commerce and began building nation states.

3. *The Emergence of the Common Law.*—Why is English law different? This is an important and interesting question to all students of American legal history and the common law. It is also the theme of some of the major works on law such as William Blackstone's *Commentaries on the Laws of England*<sup>77</sup> and Oliver Wendell Holmes,

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such as trial by combat and trial by water were used to determine proof of allegations. The concept of evidence as developed by the common law or employed today was unknown. The mode of proof via the enactment of ordeals was that the ultimate decision came from God.

The growth of the early English common law, covered in the next section, demonstrates how common law developments of the jury and writ system dramatically changed the method of trials and the nature of much of Western law.

75. See VINOGRADOFF, *supra* note 51, at 46-47.

76. The *Codex* (imperial laws) had no application to a subsistence society where law and order had broken down.

77. William Blackstone's *Commentaries on the Laws of England* (1765) is the subject covered in Section I.B.5. See *infra* notes 96-108 and accompanying text.

Jr.'s *The Common Law*.<sup>78</sup> These works were investigated as part of the curriculum for *Legal Classics*. Professor Pennington, having guided the class through the Middle Ages and the development of Roman law as nation states emerged on the Continent, redirected us to a backwater of medieval Europe, England, where a very different branch of Western legal thought was being nurtured.<sup>79</sup>

Twelfth and thirteenth century Europe had a fairly universal culture and civilization.<sup>80</sup> During this period, England was much more continental than we might casually think. It was ruled by a Norman French aristocracy. Henry II, the father of English law, was also the ruler of an Anglo-Norman empire stretching from England to Aquitaine to Sicily in the Mediterranean. The language of the courts was French. Yet, from this soil emerged a distinct indigenous legal system. By the end of the twelfth century, three great developments occurred: First, the English court system evolved. Centralized royal courts of law were created that were unique to England. Second, a jury system was developed. Juries had been known since Carolingian times.<sup>81</sup> Henry II borrowed from Norman practices and built a very different institution. Third, the writ procedure was created which provided entree to the judicial process.

Glanvill, who wrote a nuts and bolts treatise on English law at the end of the twelfth century, provides much information about the courts.<sup>82</sup> The Prologue of his treatise suggests the imagery of Justinian, and the first paragraph gives a flavor of the times:

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78. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881). See *infra* Section I.B.12, notes 205-13 and accompanying text.

79. The text for this segment was R.C. VAN CAENEGEM, *THE BIRTH OF ENGLISH COMMON LAW* (2d ed. 1988). Interesting comparisons can be made by studying van Caenegem and contrasting him with Holmes and Vinogradoff as they trace and develop the growth of the major streams of Western law.

80. Remember that students and clerics, regardless of nationality, were educated at universities throughout Europe ranging from Paris to Bologna, to Pisa, to Cambridge, and Oxford. Roman Christianity was the dominant religion and Latin the written language of the educated.

81. In the time of Charlemagne, juries informed on freemen. Land sometimes escheated to the state on the basis of jury testimony. Charlemagne used the system to enhance state power. Although the centralized royal courts in England enhanced and centralized royal power, eventually, their procedures developed checks on such power and prerogatives.

82. *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL* (Legal Classics Library ed. 1990) (1187-1189) [hereinafter *GLANVILL*].

Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples; so that in time of both peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects.<sup>83</sup>

Glanvill's legal system was based upon customary law, which required *powerful* arguments to admit change.<sup>84</sup> The king is "to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed."<sup>85</sup> But the seed was there: Reason, which was not part of customary law, gave rise to these customary laws. Once reason was admitted, the law was subject to discourse and subsequent change through argument.<sup>86</sup>

Yet, in the same section of the Prologue, Glanvill quotes *The Institutes*: "[W]hat pleases the prince has the force of law."<sup>87</sup> The will of the prince (like the will of the Roman emperors before him) had the force of law. At this time, England was not a land of laws. Legislation was not presumed. Written laws had no greater validity because they were written. *Reason* was the standard to which all legislation had to conform. Even if all law resided in the will of the prince, if it didn't conform to reason it could not be law. The thirteenth century Romanists in Bologna saw the same legal contradiction between will and reason. Ultimately, Continental Roman law opted for the will of the prince. In

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83. *Id.* at 1. Note how the language resonates the "arms and man" imagery of *The Aeneid*: "I sing of arms and the man . . ." VIRGIL, *THE AENEID*, Book I, 3 (L.R. Lind Trans., 1962). Roman power is linked to royal power. Arms and the law further the kingdom.

84. His customary law stretched back to the memory of man. Blackstone echoed Glanvill in WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, Book I, at 67 (Legal Classics Library ed. 1983) (1765).

85. GLANVILL, *supra* note 82, at 2.

86. Note how Holmes, Pound, and Llewellyn perceived the inherent flexibility of common law as being able to accommodate change and the times. See *infra* notes 205-18 and accompanying text.

87. GLANVILL, *supra* note 82, at 2.

England, the branching ultimately followed the reason of the legislation.

A great milestone of medieval English common law was the writ system. Writs were executive orders that may have had their origins in the Carolingian period. They were definitely used by the Anglo-Saxon monarchy before the Conquest. These executive writs were *ex parte*, and usually were orders for investigation (the conduct of which was an ordeal). The writs streamlined the administration of justice, provided excuse for royal intervention, and assisted the accretion of royal power.

Another factor in the growth of the common law was geography. After William the Conqueror, English kings imported the best of Norman administration and legal genius. Geography became a crucial factor in the centralization of authority. Medieval England was a small and isolated kingdom where aggressive exercise of royal power bore fruit. Glanvill and other theorists gave organization to the writ system and helped establish the common law by 1200. In contrast, Roman law theory and legislation proceeded slightly later.<sup>88</sup> France, a much larger entity, was not united until the end of the thirteenth century, and no common law was developed in France until late in the sixteenth century.<sup>89</sup>

The third distinguishing feature of the emerging common law was the substitution of the jury for the ordeal. Compurgation, a swearing to the truth, became employed in lieu of tempting God by demanding that He perform miracles to prove the truth at ordeals. Oath helpers, various people and neighbors, were called to testify of their knowledge of the litigation. Eventually, the jury employing the writ system became the judge of the facts, guided by the jurist who instructed on the law.

Hence, by 1200, the cornerstones of the common law had been set. The writ system was entrenched, royal courts administered justice, and

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88. Roman law was being rediscovered in Bologna, Pisa, and Florence in the universities in the 1100s. The theoretical framework was being created for re-implementation in the 13th and 14th centuries.

89. Although we Anglo-Americans tend to think of England as the defender of liberties and imagine an England whose royal power was held in check by the common law, much of this is myth. William the Conqueror did not want his English barons to enjoy the political power that barons on the continent then held. Henry II, the father of the common law, used it as a tool to build royal power. England had centralized royal authority at a much earlier stage than did France on the continent, where the distances were vaster and the baronial prerogatives of continental feudalism resisted the growth of royal power and the nation state. Ultimately, the tools developed in the common law and the very institutions created by the king (like the jury system) did lead to a legal system which protected liberties and thwarted absolutism. But history is rarely as neat as legend.

juries determined the truth of the issue. A distinct legal system was emerging; in part from the genius of the people, in part by chance, and in part because England was an island kingdom fortunately ruled by competent monarchs with a gift for law giving and central administration.

4. *Founders of Modern International Law: Grotius, Pufendorf, and Vattel.*—Toward the middle of the course, a serendipitous transition occurred when Professor Goldie taught two sessions on three of the giants of international law: Grotius, Pufendorf, and Vattel.<sup>90</sup> Grotius built on Roman law, and even law of the Biblical era, and yet his concepts are as vital today as they were in the early 1600s. His thoughts, and those of Pufendorf on natural law, influenced Blackstone, Locke, Kant, and other natural law thinkers. Emeric de Vattel (1714-1769) wrote after Grotius (1583-1645) and Pufendorf (1632-1694), and may have had the last, and ultimately, the most influential word on international law, as his writings preceded the state-practice analysis of the legal positivists. Thus, he would appear more modern in outlook to contemporary students and would be quite conversant with and sympathetic to the state of nature as envisioned by Thomas Hobbes.

Pufendorf thought justice was God-given to man, who through human nature had a sense of right conduct and sought a political society. In contrast, Hobbes maintained right conduct was imposed through the act of the state to protect men from total anarchy and unremitting war.

Grotius, unlike Pufendorf, invoked no authority to support his body of work. Neither emperor nor pope was needed. Legal order existed without political or philosophical sanctions. Grotius's authority in moral force was the law of nature. His insights relied on a long chain of philosophers stretching from Aristotle to the stoics to Marcus Aurelius and the scholastic, Thomas Aquinas. Unlike the churchman Aquinas,

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90. Professor Goldie assigned the following materials: L.F.E. Goldie, *A Brief Introduction to Grotius, Pufendorf & Vattel* (1988, rev'd 1990) (unpublished manuscript on file with the author at Syracuse University College of Law) [hereinafter Grotius, et al.]; L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors*, 32 *AUSTRAL. L.J.* 220 (1958); SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRO OCTO*, (On the Law of Nature and Nations) iii-x, 145-53, 179-309, 825-36, 1292-1341 (James Brown Scott ed., & C.H. Oldfather & W.A. Oldfather trans., 1934) (1688); MONSIEUR (EMERIC) DE VATTEL, *THE LAW OF NATIONS* vii-iv, 3a-9, 13-52, 199-221, 188-91, 235-58, 346-66 (Joseph Chitty, ed., Phil., T. & J.W. Johnson & Co., 1876) (1863); HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1-116, 290-371 (Legal Classics Library 1984) (1625).

who tried to reconcile reason and revelation, Grotius appealed simply to reason. Grotius studied Roman law and discerned that Rome (as a great mercantile state) used an "international law" in the administration of its empire. Aliens, who of course were not Roman citizens, did not follow Roman law. Special magistrates, the *Praeter Peregrinius* ("per-egrini" means aliens, usually foreign traders who resided in Rome), were elected to deal with disputes between citizens and aliens. The body of these decisions became known as the "*jus gentium*" or the law of nations.<sup>91</sup> Eventually, "*jus naturale*" (the law of nature) became linked with *jus gentium* in the mind of Roman lawyers. *Jus naturale* provided a vehicle for "the transformation of Roman Law from a primitive, unsystemized and unarticulated system of virtually no philosophical or judicial influence or importance into the present magnificent body of principles, of the greatest scientific importance and influence."<sup>92</sup> Natural law again attained importance in the thirteenth century when St. Thomas Aquinas (1225-1274) attempted to synthesize Christian and Greek morality through the use of natural law.

Grotius attempted to build a moral order for the conduct of states, rather than an order based upon the will of princes or emperors. He turned to the propounded principles of conduct reinforced by the practices of states. Grotius studied the practice of states wherever he could find the record. He found inspiration in the Bible, and writings from the classic era and Roman times. His studies also included "modern practices." Critics contended that Grotius founded his thesis either upon state practice (similar to Vattel and the modern positivists) or upon an *à priori* vision of what constituted a just society. Regardless, Grotius's grappling with the great issues of peace and war and the relations among nations still serves as a watershed over which all modern thought on international law has flowed.

Pufendorf wrote fifty years after Grotius (1632-1694). He was the first great natural law philosopher interested in international law. He attacked Hobbes for his irreligion and his concept of morality that human beings were guided only by fear. Even outside of political society, he saw a more humane state of nature than the one Hobbes described.<sup>93</sup>

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91. See Grotius et al., *supra* note 90, at 4-5.

92. *Id.* at 7.

93. "[T]he life of man [in nature is] solitary, poor, nasty, brutish, and short." See THOMAS HOBBS, *THE LEVIATHAN* 107 (The Liberal Arts Press, Inc. 1958) (1651).

Pufendorf posited a kinder, gentler state of nature built upon moral law. Hobbes, in contrast, saw a conduct which approached the state of constant war—war not only in the battle, but also the threat of war and the expectation of war.

Vattel modified the Hobbesian thesis: States by agreement mitigate the natural hostile state. Customs and treaties modify and mollify this state of nature. His writings preceded the nineteenth century legal positivists.

It was Vattel's position that the paramount natural right of states was self-preservation. It existed in a world without judges, where each claimant was its own judge. States possessed the right to wage war to vindicate their positions. The issue of just wars that so dominated the writings of Grotius and Pufendorf<sup>94</sup> mattered not to Vattel, because each state possessed the right to wage war for its own self-preservation. No person or body existed to determine the rectitude of the claims, and no states were obligated to intervene as self-interest and self-preservation justified neutrality.

Today, many modern international legal historians see Vattel as a transition between the naturalists and the positivists. Vattel's thoughts ultimately give rise to a conceptually workable international order. Despite the absence of an overarching moral regime or agreed-upon rules, international law is binding upon the states because they have agreed to be bound and treat the rules as binding—legal positivism provides the mechanism.

These sessions on international law enabled the students and teachers to bridge many schools of thought. Pufendorf, Vattel, and Grotius incorporated many concepts which already had been explored, and provided new insights into the foundations of law and the problems of order. Grotius provided further evidence of the impact of Roman law. He introduced natural law which was reflected in Pufendorf and later in Blackstone, Burke, Story, and others. Vattel was a profound and disturbing link to modernity, yet he created a system which provided order in an amoral world. Any of these writers can inspire great interest and keen insight for students as they begin to study thinkers of the modern era.

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94. Both maintained that nations should only engage in just wars. Theoretically, there could be no neutrality as morality bound nations to intervene on the side of the just.

5. *William Blackstone and Commentaries on the Laws of England*.—The natural law discussion of the founding giants of modern international law leads quite naturally (pun intended) to Sir William Blackstone (1723-1780), the great English legal writer who had such a profound influence on the American Colonies. From 1765-1769, Blackstone published his four-volume compilation of his Oxford lectures as the Vinerian Professor of Common Law,<sup>95</sup> *Commentaries on the Laws of England*.<sup>96</sup> Blackstone's compilation became the most important Western legal treatise ever published. It was the dominant law book in eighteenth century England and America.

Blackstone had two purposes for this treatise: to demonstrate that law was a proper subject for study by gentlemen in search of a liberal education, and to educate the landed gentry in the character of English law (as opposed to civil and canon law which had been traditionally studied by the elite at university). He succeeded on both accounts. His prose was elegant and direct. It was easily accessible to the beginning law student, and proved to be an excellent primer for novices on both sides of the Atlantic.<sup>97</sup>

His most significant achievement, however, was his popularization of English constitutional development. The observations of Montesquieu in *The Spirit of Laws*<sup>98</sup> inspired the American political theorists of the Revolution and the Constitutional Convention; but it was Blackstone who provided the lawyer's trained observations of a *constitutional* system in action.<sup>99</sup> Americans saw checks and balances,<sup>99</sup> due process,<sup>100</sup> legislative

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95. In 1752, Blackstone was bitterly disappointed after having been denied the Regius Chair in Civil Law. It is interesting to speculate what path he and the law might have taken had that honor not been denied him.

96. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Legal Classics Library ed. 1983) (1765) [hereinafter *COMMENTARIES*]. The treatise was the most ambitious undertaking since Bracton's great work in the 13th century. BRACTON, *DE LEGIBUS ET CONSUECUDINIBUS ANGLIAE* (d. 1268). *Commentaries on the Laws of England* proved to be a best-seller at home and in America.

97. Novices and lawyers alike used *Commentaries on the Laws of England* in its many editions. It was often the frontier lawyer's only law book and it had much to teach. For example, Blackstone's rules of legislative interpretation are still hornbook law.

98. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* (1748).

99. *COMMENTARIES*, *supra* note 96, at 150.

100. *Id.* at 134-35. The language in this section has been the rallying point for many a "takings clause" case.

power,<sup>101</sup> and freedom of the press<sup>102</sup> as fundamental components of a legitimate system of government. The Founding Fathers and subsequent generations of American lawyers viewed the constitutional world and the realm of practice through Blackstone's eyes.<sup>103</sup>

Blackstone based his system of laws upon the law of nature as constructed by Grotius and Pufendorf.<sup>104</sup> Men in society possess fundamental rights, and municipal law (state law) must protect and enhance those rights. These rights of persons which the government must protect will seem inalienable to the average American law student.<sup>105</sup> The government is to protect and defend personal security, liberty, and property.<sup>106</sup>

The system of laws that best protected these rights was the British form of mixed government. The King's power was checked by the Parliament, and he could act only with its consent. The King brought power and executive action to bear. The Lords brought honor and goodness. The Commons were endowed with wisdom to select the best means to accomplish the objects of state.<sup>107</sup> Students quickly grasp that this working model was the inspiration for the United States Constitution.

Blackstone shows that precise and elegant language can train students best and excite an interest in the law. His treatise is proof that one can

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101. The British Parliament, unlike the American Congress, possesses power that is only limited by natural law. *See, e.g., Id.* at 156-57. It is school child knowledge that ours is a government of limited powers with three separate and co-equal branches. Yet, in the abstract, an argument can be made for legislative supremacy in America, as even under the United States Constitution, the judiciary and executive are creatures of the legislature.

102. COMMENTARIES, *supra* note 96, at 159-60.

103. Americans dodged Blackstone's assertion that the common law was not received by the American colonies. *Id.* at 104-05. By ignoring his contention that English common law was not received and therefore did not apply, colonists claimed the unfettered rights and prerogatives of English citizens. We can be forgiven this selective reading because we won the Revolution.

104. COMMENTARIES, *supra* note 96, at 38-44.

105. But it was Blackstone who stated these ideas comprehensively. The four volumes were portable—not only for law students, but also for American lawyers on the frontier who often had few books (*the Commentaries* and *the Bible*) in their offices.

106. COMMENTARIES, *supra* note 96, at 125.

107. Here, Blackstone borrows from Aristotle when he analyzes forms of government. *See generally*, ARISTOTLE, POLITICS (Ernest Barker trans. & ed., 1962). He concludes that the British mixed form of government selected the best qualities from history to produce the most perfect form of government. COMMENTARIES, *supra* note 96, at 49-50.

be both profound and accessible. He argues eloquently that law is a cornerstone of liberal education. Indeed, if we are to be good citizens, the law must be a foundation for education.

It is easy to understand his natural law system which underpins the feudal liberties and prerogatives of the English system.<sup>108</sup> Blackstone gives American law students access to their English law heritage. They can then discern how America changed some of the forms to honor the spirit.

6. *Edmund Burke and Reflections on the Revolution in France.*—With the recent rise of neo-conservatism, Edmund Burke has become fashionable.<sup>109</sup> After digging deeply into Burke's most famous work, our students, regardless of political bent, found it hard to see how such an eloquent and brilliant commentator on the affairs of mankind ever could have been unworthy of acquaintance.<sup>110</sup>

Edmund Burke (1729-1797) was the son of an Irish attorney. He attended Trinity College, Dublin from 1743-1748. With his 1756 publication of *A Vindication of Natural Society*<sup>111</sup> and *Philosophical Inquiry into the Origin of Our Ideas on the Sublime and Beautiful*,<sup>112</sup> he was established as one of England's leading writers. Burke entered political life, representing in Parliament the great seaport of Bristol, from 1774-1780. During this period, he championed the American cause in the

108. One of the ideas that our students found most interesting was tracing the origin of many of our rights and ideas about government from the development of feudal common law. Once that is seen, students observe that the American Revolution was, in essence, a very conservative one, much like the Glorious Revolution (1688). Americans were not establishing a new world order, as the French attempted; they revolted to reclaim and retain their rights as Englishmen.

For an excellent, yet short analysis of the feudal origins of our ancient liberties, see Robert L. Stone, *We Inherit an Old Gothic Castle*, 8 HASTINGS CONST. L.Q. 923 (1981).

109. Burke's conservatism, although appealing to many neo-conservatives, does not fit neatly with the cabins of their minds. See, e.g., James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative Academic Judges*, 40 U. MIAMI L. REV. 913 (1986) (writing on five well-known conservative judges).

110. Burke was a man of letters who wrote extensively on legal, political, and aesthetic subjects. He made a very handsome living at it, and was well-respected in the intellectual community. Burke was a peer of Dr. Johnson and his crowd, all the while remaining one of England's greatest Parliamentary orators.

111. EDMUND BURKE, *A VINDICATION OF NATURAL SOCIETY* (1756).

112. EDMUND BURKE, *PHILOSOPHICAL INQUIRY INTO THE ORIGIN OF OUR IDEAS ON THE SUBLIME AND BEAUTIFUL* (1756).

Revolution. Burke devoted his life to five "great, just, and honorable causes": the preservation of the English Constitution, the emancipation of Ireland, the emancipation of the American Colonies, the protection of the people of India from the misgovernment of the East India Company, and opposition to the ravages of the French Revolution."<sup>113</sup>

*Reflections on the Revolution in France*<sup>114</sup> was Burke's masterful condemnation of that world-shattering event. In graceful and thoughtful prose, he remonstrated against arbitrary power—whether it was the power of James II or Warren Hastings's East India Company. He would restrain passions. He held unlimited freedom in disfavor and was repelled by complex, abstract political theories which did not correspond to reality. He spoke with passion on the virtues of constitutional exercise of power. Like Montesquieu and Blackstone, he admired and defended the distribution of power in England.<sup>115</sup>

Burke was a realist. He abhorred political revolutions, like the one in France, because they sweep aside the barriers which curb power.<sup>116</sup> He knew that government is something more than the mere exercise of political power: "Government is a contrivance of human wisdom to provide for human *wants*."<sup>117</sup> Wisdom, he believed, is required to construct the device. Power, alone, is not sufficient.<sup>118</sup> "Good order is the foundation of all good things."<sup>119</sup> The exercise of power must be tempered

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113. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28.

114. *Id.*

115. George III's reign was seen as an aberrant flaw in the system. Burke viewed the King as having subverted Parliament to render it an instrument of the Crown. This corrupted the checks and balances found in the mixed form of government.

116. His position is similar to Thomas More's in *A Man for All Seasons*. More would give the devil the benefit of the law rather than root out the laws to get the devil. More and Burke knew that if there are no laws, then there is only power and passion. ROBERT BOLT, *A Man for All Seasons*, in LAUREL BRITISH DRAMA: THE TWENTIETH CENTURY (conversation between Will Roper and More) at 394-95 (Robert W. Corrigan ed., 1965) (1960). The thicket that offers protection to More and others is the thicket of prescriptive feudal rights and prerogatives which are the source of so many common law liberties.

117. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 72 (emphasis in original).

118. He would disagree most vehemently with Chairman Mao who contended that "Political power grows out of the barrel of a gun." MAO TSE-TUNG, *SELECTED WORKS*, Vol. II., *Problems of War and Strategy* (6 Nov. 1938).

119. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 262.

with intelligence and restrained by tradition.<sup>120</sup> His government requires virtue.<sup>121</sup>

*Reflections on the Revolution in France* is a conservative work founded upon intelligent observation of human nature and folly. The Regicide and Commonwealth were too close to Burke. Burke feared that the passions of the French Revolution would breach the English Channel, consume England, and destroy her liberties.<sup>122</sup> He also feared the zealous pursuit of perfection on earth which had captured France. Conservatism, caution, and respect for institutions and prescriptive rights were his hallmarks.<sup>123</sup>

To Burke, society was a contract. We hold only life estates and turn them over to our children and children's children. We should not commit waste or rend the fabric. Our heritage is not ours to abuse.<sup>124</sup> The Revolution, as Burke aptly demonstrated, had destroyed France's institutions. With the power of the nobles and Church destroyed, there was nothing to check the power of Paris and the army.<sup>125</sup> History proved him right. The French Revolution was the first totalitarian revolution.

120. This is quite Blackstonian. You will recall how Blackstone traced the long growth of English liberties and held for a "mixed" form of government where wisdom, goodness, and power would be united to cooperate for the good of the nation. *See supra* note 107.

121. *See supra* note 28.

122. *Reflections on the Revolution in France* was written to counter the revolutionary fervor flamed by such propagandists as Rev. Dr. Price. Burke was horrified by the demagoguery and believed the Jacobins would destroy England if not exposed and checked.

123. Blackstone, too, saw England's liberty founded upon ancient prescriptive rights. He rejected natural law concepts found in both Aristotle and the French Revolution, as natural rights failed to take into account fundamental differences in societies. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 109-11.

This deep respect for long-established traditions and society's values permitted him to defend with consistency the British Constitution, the American Revolution (based upon claims of rights as Englishmen), the freedom of the Irish people (as a privileged child he had observed the destruction the English had visited upon Irish society), and the emancipation of the Indian peoples from the oppression of the East India Company.

The French Revolution, of course, overturned its heritage in attempting to fashion a "new man." Burke viewed the destruction of the prescriptive rights by the Revolution as intrinsically linked with the Terror. History instructs that "New Men" are hard to create: witness the Bolshevik Revolution and the Chinese Communist Revolution. New Men arise unrestrained with their old passions and prejudices. Burke's fears were not unwarranted.

124. REFLECTIONS ON THE REVOLUTIONS IN FRANCE, *supra* note 28, at 108-109.

125. Burke correctly predicted "the man on horseback." *Id.* at 236.

It set the pattern for the Communist revolutions of the twentieth century.

The tides of history have changed. Burkean ideas may yet enjoy a renaissance. Communism and its revolutions are bankrupt of spirit and property. Burke's reasoned appeal to leadership, virtue, quality, intelligence, and ordered liberty may guide attempts to reestablish law and order in an era of rapid change. At a minimum, Burke's writings suggest history must not be disregarded,<sup>126</sup> and institutions and values must be understood before they are altered, abandoned, or replaced.

7. *The Federalist Papers*.—Professor Wiecek began his seminar by noting that *Legal Classics* was a continuation of a great dialogue extending over a millennium. Important legal thinkers, through their writings, were speaking to us about many of the issues with which we grapple. In *The Federalist*,<sup>127</sup> James Madison and Alexander Hamilton entered into a debate on the nature of republicanism. At the time of the Constitutional Convention, the debate was about a century old. James Harrington, in *Republic of Oceania* (1656), had outlined the essentials of a pure republican tradition. Adam Smith's assumptions about human behavior and individualism in the 1770s established a tradition of liberalism in the ongoing debate.<sup>128</sup>

Madison and Hamilton had certain assumptions about human nature and physical reality.<sup>129</sup> They were informed and inspired by the universe of Isaac Newton with its order, harmony, and balance. A good gov-

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126. "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 1 *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS* ch. 10, *Flux and Constancy in Human Nature*, at 82 (one-vol. ed. 1953). Karl Marx made a similar observation in *The Eighteenth Brumaire of Louis Bonaparte*: "Hegel says somewhere that all great historic facts and personages recur twice. He forgot to add: 'Once as tragedy, and again as farce.'" KARL MARX, *The Eighteenth Brumaire of Louis Bonaparte*, in MARX AND ENGELS: *THE COMMUNIST MANIFESTO* 47 (Samuel H. Beer ed., 1955).

127. *THE FEDERALIST*, *supra* note 22 and accompanying text.

128. After the Revolution and the establishment of the United States, the earlier traditional republicanism was exemplified by the anti-federalists. Liberal republican thought is seen best in *The Federalist* No. 10. Both were nationalists and republicans. Republicanism drew on Harrington's *Oceania*, Montesquieu, and Locke, as well as the Commonwealth Men (seventeenth century polemicists such as Trenchant and Gordon).

129. Hamilton had no illusions about human perfection. Once, he remarked to Jefferson after dinner, "Your people sir, is a great beast." *Quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 108 (15th ed., 1990). There is no hint of Thomas Jefferson in *The Federalist*. Although the Conservative Nationalists have won the debate (*see supra* notes 109-26 and accompanying text), the tension between Jeffersonian and Hamiltonian views of mankind is still present in today's political life.

ernment could be perfectly balanced—force by force, interest group by interest group.<sup>130</sup> Blackstone and Montesquieu knew that checks and balances could prevent baser political impulses from destroying the new republic.

To win over the anti-federalists<sup>131</sup> in crucial New York, a state dominated by anti-federalists such as Governor George Clinton,<sup>132</sup> *Federalist No. 1* argued that societies of men can establish good government by reason.<sup>133</sup> Reason and choice would permit the establishment of good government rather than the dead hand of tradition. Order was necessary, as well as an energetic and efficient government. Vigor<sup>134</sup> is essential to the establishment of liberty.<sup>135</sup>

*Federalist No. 10* was Madison's elegant exposition on the great republic.<sup>136</sup> Faction is the bane of political life. Citizens united by passion or interests could destroy the nation. Common impulse opposed to the

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130. See generally THE FEDERALIST, No. 10 (James Madison).

131. The anti-federalists generally are given short-shrift in most law school classes. It might be interesting to read anti-federalist works and compare them with the federalist position which triumphed, in the same manner as the comparison of American constitutional traditions in the next section. For the definitive collection of anti-federalist thought see H.J. STORING, THE COMPLETE ANTI-FEDERALIST PAPERS, 7 vols. (1981); for a student-sized edition see THE ANTI-FEDERALIST PAPERS AND CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986).

132. Clinton was "a doughty politician whose principles and prejudices and skills made him the most formidable of opponents to the proposed Constitution. Plainly New York was a state that could easily be lost yet had to be won." THE FEDERALIST PAPERS, Introduction at ix (Clinton Rossiter ed., 1961). Had New York not voted for the Constitution, it would have failed as New York was a leading commercial and financial state which lay at the crossroads of the new nation.

133. THE FEDERALIST No. 1, *supra* note 22, at 3 (Alexander Hamilton).

134. "[V]igour of government is essential to the security of liberty . . . ." *Id.* at 5.

135. This is, of course, what the anti-federalists were worrying about. An overly vigorous and efficient government could destroy personal freedom. A weak and enfeebled government would destroy the people's liberties. Cf. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 202, where Burke noted: "Nothing turns out to be so oppressive and unjust as a feeble government."

136. THE FEDERALIST No. 10, *supra* note 22, at 56 (James Madison). Prior to the United States, the republican experiment had been limited to ancient city-states, Venice, and the Dutch Republic. Republics were a rare form of government, and had thrived only in small territories with relatively homogeneous populations. It was an open debate whether a large republic would spin apart by centrifugal force, or crush liberties with centralism. In *Federalist No. 10*, Madison creates a vision of a free society which is free precisely because it masters the passions and factions of a continental state.

common good was a grave threat. How to control the factions was the essential question. Factions could pit class against class and region against region.<sup>137</sup> Yet, party and factions are necessary for the ordinary operation of government. Government must control the governed and oblige the governed to control themselves.<sup>138</sup>

Representative government could be structured to control the passions. The principle of representation elevates those elected from the common mass. Whereas historic democracies were moved by passion to immediate action and often demagoguery, representative government offered the chance for a more tempered form of government. Representatives are more capable of a broad view.<sup>139</sup> In a large republic, representatives are more isolated from the passion of the day. Factions can neutralize one another. It is less probable that the majority will invade the rights of the minority.<sup>140</sup> For government to control and yet not overwhelm the governed, checks and balances are provided through the separation of powers. "Ambition must be made to counteract ambition."<sup>141</sup> Federalism was combined with national power and that national power is limited by the compounded federal republics.<sup>142</sup> With so many different citizens and views, it is hard to combine to oppress the minority.<sup>143</sup> The fostering of a multiplicity of interests and sects provides for national security.

The concerns of the authors of *The Federalist* are still vital today. One need only look to the war powers issue to see that the debate on the limits of checks and balances is still very much alive. Likewise, factions are still with us. Perhaps too much so in the era of the savings and loan bailout and single issue politics, such as the Pro-Life movement! The insights of Madison and Hamilton are still instructive, even to

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137. Europe had seen what religious factions could do in the Thirty Years War. Factions endure today in Northern Ireland and Lebanon. Their fury, once uncabined, is hard to control or resist.

138. THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cook ed., 1961).

139. That's the argument. To look at today's solons in Congress, one never knows. But, American history provides examples of unselfish devotion to the common weal. See JOHN F. KENNEDY, PROFILES IN COURAGE (1956).

140. Madison despised Rhode Island, where he found an insecurity of rights and oppressive factions of majorities. THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cook ed., 1961).

141. *Id.* at 349.

142. THE FEDERALIST Nos. 45, 48 (James Madison).

143. THE FEDERALIST No. 51 (James Madison).

students who have been exposed to first year constitutional law and advanced courses on our federal system. *The Federalist* papers tell us what we have long known; but its fresh and vigorous prose, its vision of a strong and efficient government, and its telling arguments make us better lawyers and citizens. It deserves to be rediscovered and reread by every generation of lawyers.

8. *Survey of Nineteenth Century Conservative Legal Thought.*— Professor Wiecek's next class focused on writers who represented conservative legal thought in nineteenth century America. His readings demonstrated how long-settled political and philosophic beliefs were the result of historic clashes of deeply held beliefs and political positions. The debate over nationalism and state sovereignty has largely ended, but its study shows *the road not taken* and permits reflection on the development of constitutional thought.

Alexander Hamilton, John Marshall, Joseph Story, and Daniel Webster are well known to American lawyers. We assume that the Hamilton-Marshall-Story-Webster constitutional tradition was the correct one. James Madison, John C. Calhoun, and Thomas Jefferson were articulate proponents of the opposing southern state sovereignty tradition. Neither tradition was the obviously correct, orthodox, or dominant one prior to the Civil War. Because of the War, we incorrectly assume that a nationalist conservative view was always fundamental to our government. Yet, before 1830, the state sovereignty view was more orthodox and Justice Story was the revolutionary. However, it was his nationalist vision that triumphed with the Civil War. The Reconstruction Amendments<sup>144</sup> were quite *radical*: they embodied the final triumph of the nationalist vision,<sup>145</sup> and a revolutionary change in constitutional order in race relations and equality. These readings on American constitutional thought showed the logic and force of the debate that took a civil war to settle.

In Hamilton's view, the Supremacy Clause<sup>146</sup> was the focal point and ended the argument. State sovereignty advocates relied on the Tenth Amendment.<sup>147</sup> These proponents of state sovereignty argued that the balance of federalism was not struck in 1787.<sup>148</sup> They viewed the Con-

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144. U.S. CONST. amends. XIII (1865), XIV (1868), & XV (1870).

145. *Id.*, amend. XIV (1868).

146. *Id.*, art. VI, § 2.

147. *Id.*, amend. X (1791).

148. Nationalists thought all federalism questions were settled in 1787 by the Constitution. Compromises reached at the Convention, the Bill of Rights, and checks and balances were thought to have established the balance.

stitution as an effort to inhibit centripetal power. They feared the federalist/nationalist strain of republicanism would pervert the Constitution in the nationalist direction and destroy liberty.

The Virginia and Kentucky Resolutions<sup>149</sup> exemplify the orthodox Southern view.<sup>150</sup> Jefferson was the author of the First Kentucky Resolution, which declared that states were united by compact and states constituted the general government.<sup>151</sup> Only certain powers were delegated to the national government (war, interstate trade, and similar powers). The balance of powers were reserved to state sovereignty. The primary assumption was that powers not enumerated were *not* delegated by the states or people to the national government. Thus, the Alien and Sedition Acts were *void*. Each state is to be its own ultimate judge on the constitutionality of legislation to protect the people and their liberties.<sup>152</sup> Jefferson cited and relied on the Ninth and Tenth Amendments for his authority in finding no support for this federalist usurpation.

The Second Virginia Resolution was the product of James Madison. His ideas were similar to Jefferson's: states had the power to interpose themselves between the constitutionally abhorrent legislation and arrest the evil. In the 1830s, South Carolinians cited Madison as authority for *nullification*.<sup>153</sup> The Second Kentucky Resolution leap-frogged over the Virginia Resolution and concluded nullification was proper. Of course, the debate over nullification did not evaporate with the 1820s resistance to tariffs—nullification logically led to secession. The bloody Civil War ended the debate.

Justice Story constructed many of the nationalist arguments which were to prevail. Story, in *Commentaries on the Constitution of the United States*,<sup>154</sup> also concerned himself with the issue of whether the

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149. The Virginia and Kentucky Resolutions, 1798-1799, 5 THE FOUNDERS' CONSTITUTION VOL. V 131-36 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Resolutions].

150. *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Marbury v. Madison*, 5 U.S. 137 (1803), illustrate the Federalist approach.

151. Resolutions, *supra* note 149, at 131.

152. *Id.* at 135.

153. See remarks of South Carolina Senator Robert Hayne of the Hayne-Webster debates. *Register of Debates in Congress*, 21 Cong. 1st Sess., Vol. VI, 56-58 (5 Jan. 1830).

154. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed., Boston, 1858).

Constitution was a treaty or a compact.<sup>155</sup> Justice Story looked to the natural consequences which flowed from the Resolutions. If each state could nullify legislation, then the Constitution was a “rope of sand.”<sup>156</sup>

He declared society to be a compact which spread over time from past generations to generations unborn.<sup>157</sup> The legislature was not permitted to tamper with organic law. National laws are unalterable except in accordance with the manner prescribed in the Constitution—that is, amendment.<sup>158</sup> For Story, governmental legitimacy rests upon popular sovereignty. The majority rules, and it is limited only by the Constitution. To hold any other view would lead to *revolution or war*.

Story and the nationalists prevailed after a long and bloody civil war. The readings show that the constitutional debates on the nature of limited government were exciting and long-standing, and that the Southern tradition came very close to being the orthodox view. Each vision was based upon fundamentally different perspectives on the role of a national government. What emerged from the War was a second Constitution: the elimination of slavery altered the constitutional balance forever, reduced the power and role of the states, and created a new kind of national citizenship. The debate continues on just what kind of role the federal government should play in fashioning this national citizenship.<sup>159</sup>

9. *Legal Education*.—Dean Hoeflich turned to the subject of formal study of law and the question of how Americans arrived at their current model for legal education.<sup>160</sup> The Western European model had been

155. *Id.* at §§ 310-20.

156. “A rope of sand” was a favorite metaphor at the time of the creation of the Constitution and its use persisted well into the nineteenth century. The Oxford English Dictionary defines it as “something having no coherence or binding power.” OXFORD ENGLISH DICTIONARY 2575 (788 in the compact edition). Many famous statesmen used the phrase, including John Adams who wrote in 1800, “Our Union will become a mere rope of sand.” *Id.*

157. STORY, *supra* note 154, § 325 n.2. Story’s views are very close to Burke’s on this point. See REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 110-11.

158. STORY, *supra* note 154, § 337, at 225.

159. Consider, for example, today’s concerns about the appropriate limits of affirmative action, the right to privacy, the right to abortion, and other issues.

160. Dean Hoeflich assigned four essays on legal education: ROGER NORTH, *Discourse on the Study of the Laws* (ca. 1700-1730), in THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 41; THOMAS WOOD, *Some Thoughts Concerning the Study of the Laws of England in the Two Universities* (1708), in *id.* at 34; WILLIAM BLACKSTONE, *A Discourse on the Study of Law* (1765), in *id.* at 53; and DANIEL MAYES, *An Address to Students in the Law in Transylvania* (1834), in *id.* at 145.

based upon the sixth century law schools of Beirut and Constantinople, which taught the basic Roman law course over five years.<sup>161</sup> You will recall that formal study of Roman law ceased from the seventh through the eleventh centuries, when it was revived at the emerging universities. Students studied both canon and civil law on the Continent and in England.<sup>162</sup>

In the meantime, in London, attorneys, acting as agents for country landowners, were developing legal practices. These common law lawyers formed guilds which evolved into the Inns of Court. The Inn legal education was practice-oriented. Students were apprenticed to lawyers, and university degrees were not needed to enter the practice.<sup>163</sup> Readings were given and "moots" (similar to our moot courts) were employed to give students practice at reading cases and statutes. As part of their apprenticeships, students sat in court and took notes to learn the cases.<sup>164</sup> These notes were compiled in Yearbooks (the earliest court reports).

During the eighteenth century, reformers wanted to adopt the Continental system of structured civil law education. In the early 1750s, Blackstone stood for the Regius Roman Law Chair at Oxford, but was rejected because he lacked the requisite patronage. Fortunately for common law education, Blackstone was appointed in 1758 to the first Vinerian Chair of Common Law. Blackstone taught in university rather than the Inns because he wanted to train the gentry and inculcate university students with the discipline and character of the common law. He took a very liberal view of the role of legal education and believed it was the most appropriate course of study for students destined to serve their communities and England.

Blackstone was a popular teacher, and his university lectures were immortalized in his *Commentaries*. Prior to the *Commentaries*, there

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161. This was the very curriculum which Gaius had taught and for which he had written his *Institutes*.

162. From the 13th through the 17th centuries in England, civilians, as they were called, studied canon, admiralty, and military law in the universities. Currently, admiralty, military law, and some mercantile law still reveals civil or Roman law roots.

163. In Scotland, legal training continued to follow the civil law model. Lawyers comprised a faculty of advocates who taught at university. Students sat for exams in Latin, made digests and translations from Roman law texts, and presented a thesis.

164. Eventually, these notes developed into the practice of making court reports.

was no comprehensive source for the study of the common law. Blackstone's *Commentaries* and lectures made a university education in the common law possible, and set the agenda for future common law practitioners to the present day. After Blackstone, the university degree (undergraduate studies) in law, followed by a stint at the Inns of Court, was the path of legal education for English lawyers. A careful blending of liberal education in law with practical schooling at various Inns was the essence of effective legal education.

In the American Colonies, there were no universities or Inns, nor were there any attempts to establish them. The colonies, and then the United States, used an apprenticeship format which was often served under a judge. This system served to control the number of attorneys on the seaboard, and it offered frontier students a chance to study law without the expense of a formal education. However, the method did not assure competent practitioners.

In the antebellum North, colleges were becoming universities: curriculum was expanding from theology and classics to law, medicine, and pharmacology. Harvard endowed the Dane Law School and Joseph Story became the first Dane Professor. Story was charged with writing comparative law books and commentaries. Chancellor Kent of New York was becoming the American Blackstone while writing his commentaries on American law<sup>165</sup> and teaching law at Kings College (which became Columbia University). Nevertheless, apprenticeship was still the dominant format for legal education.

In the South, David Hoffman at the University of Maryland in Baltimore organized a course in legal education which covered seven years. He also created the first code of legal ethics. Daniel Mayes, at the Transylvania University was teaching fifty law students in 1833. Rules and principles were taught, and there was much less reliance on mere memorization. Law was becoming a *science* with its own overarching principles. Mayes created a national law school where students used the scientific method to understand the universal legal principles; but university education in the mid-nineteenth century still was not widely accepted. Society was suspicious of university-trained lawyers, and there was not yet proof that university-educated lawyers were better lawyers. The university education, however, could offer a broadly-based education.

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165. JAMES KENT, COMMENTARIES ON AMERICAN LAW (1826-1830).

This broad-based vision was not yet universal. Northern university education focused upon practicalities and produced very pragmatic lawyers. The Southern approach, fostered in Lexington (the home of Transylvania University), Charleston, and New Orleans took a more liberal and literary approach. Roman law was studied along with Gibbon's *Decline and Fall of the Roman Empire*.<sup>166</sup> Ultimately, the Northern model prevailed. The Civil War had destroyed the Southern legal culture. In 1870, Harvard Law School was formally established. Harvard's method of instruction became the dominant approach because the study of law as a science was promoted by Langdell. Langdell's touted "scientific" application was primitive. However, its scientific principles and theory fit nicely with the emerging American university<sup>167</sup> which patterned itself after German research universities. Classics and the liberal education program of Mayes and Blackstone gave way to the scientific logic of Langdell's case method.

As with the study of American conservative thought, the study of British and American legal education in the eighteenth and nineteenth centuries exposes students to their legal heritage. It also gives them the chance to question the doctrinaire assumptions of mainstream legal education and to consider the several roads not taken.

10. *Austin and Maine*.—John Austin (1790-1859) and Henry Sumner Maine (1822-1888) were presented next by Professor Richard I. Schwartz. Although both were nineteenth century legal thinkers, each had a strong influence on contemporary legal thought. The "Law & Society" movement will recognize much in Maine's *Ancient Law* (1861),<sup>168</sup> and legal positivists will feel at home with Austin's *The Province of Jurisprudence Determined* (1832).<sup>169</sup> Maine and Austin were Englishmen who wrote within thirty years of one another, but they had very different views on the role of law in society. Their thoughts persisted into the twentieth century: Weber and Unger have been occupied with understanding the

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166. EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (1765). It was coincidentally published the same year as Blackstone's *Commentaries on the Laws of England*. The year, 1765, was a banner year for legal education in the West.

167. American technical education was proceeding apace. Land grant colleges were established to teach engineering and agriculture. The classics were no longer the center of the academic universe in the United States.

168. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* (1861).

169. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

role of authority in complex societies; Durkheim has built on Maine in his study of the organization of society.<sup>170</sup>

Austin saw the law as the force of the state. Law has a central, normative theme.<sup>171</sup> Government is the primary and exclusive locus of legal rules. For Austin, legal rules formed a natural system of normative learning, rules, principles, policies, and procedures for announcing the law.<sup>172</sup> Austin was philosophically aligned with the utilitarians and Benthamites<sup>173</sup> and their vision of a progressive society.

Utilitarian thought maintained that legislation (or sanctions of the sovereign) would improve the human condition if the pains of violating society's norms were sufficiently strong. How was Austin to assert this utilitarian outlook in the face of the Rotten Boroughs and the inept leadership of the Hanoverian kings? He took an expansive view of the sovereign, somewhat akin to Hobbes. The law, commands, or sanctions of the state did not require wisdom. Thus, an unwise sovereign, be it king or parliament, still would be empowered to utter commands which became law (albeit unfortunate laws).<sup>174</sup>

Austin described existing law as a self-contained system. His command theory required that commands of the sovereign be comprehensible.<sup>175</sup> In his system, officials were guided by rules which controlled the behavior of the population. Conformity to these rules was achieved through both consent and the threat of force. Legal authority was derived from both force and legitimacy.<sup>176</sup> Although Austin's thesis did not solve

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170. See *infra* notes 186-94 and accompanying text.

171. Holmes believed society took from the past the central normative schemes as its source of law.

172. This is particularly evident when courts announce rules in accord with legal learning.

173. His friend, Jeremy Bentham, was the founder of the University of London and was responsible for Austin lecturing in law in 1828, the university's first year of instruction.

174. Aquinas would not declare bad law to be law. See *infra* note 228 and accompanying text.

175. Austin's command theory, and his principles of government and bureaucracy, provided the legal themes for the administration of the British Empire.

176. The 20th century legal philosopher H.L.A. Hart was greatly influenced by Austin. Hart was a positivist in law, and a utilitarian in morals. Hart built on the foundations of Austin, and wrestled with the unanswered questions of the authority of law in a modern society. Hart puzzled over such fundamental issues as the location of the sovereign in a sophisticated society, the description of the power that confers rules

all the puzzles of law and sovereign authority in an advanced nation state or empire, it did provide the modern intellectual framework for the analysis of bureaucratic rules and legislation which underpins much contemporary legal thought.<sup>177</sup>

Maine saw law as an expression of culture, and believed that legal analysis required close attention to the origins of the law. Unlike Austin, he sought to understand the law not by studying progressive, sophisticated societies but from assaying primitive ones.<sup>178</sup> He discerned weaknesses in Austin's theory that law was the austere command of the sovereign. Commands, alone, must ultimately fail: a system based upon the imposition of commands falters because sanctions, if not followed, must be succeeded by more severe sanctions. As the escalation continued, even the severity of sanctions could not buttress the failure of authority. Thus, something more than the mere sanction of the sovereign was required for law. Maine saw the vital link between what people think is right in society and what the law is.

In primitive, patriarchal societies, the family was the central institution and the source of legitimate authority.<sup>179</sup> As society developed, territorial contiguity replaced kinship.<sup>180</sup> As society evolved, rights underwent a change from status to contract. Custom became less important,

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(something more complex than Austin's command of a sovereign backed by sanctions), and a system of rules accepted by the population. For Hart, these legal rules had to be recognized by the people as being valid and there had to be a mechanism for rule change and adjudication. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

177. See, e.g., *id.*

178. He dismissed earlier theorists as having been unduly influenced by Roman law (which, as we have shown, was an advanced legal system flexible enough to have been re-adopted in the late Middle Ages and then to have served as an inspiration for the civil law codifications in the nineteenth century). Maine believed that underlying forces could not be discerned when viewing a complex legal state and, hence, turned to more primitive cultures for his research and thesis.

179. If Austin supplied the thesis for the bureaucratic organization of the British Empire, Maine provided the sympathy for native institutions which allowed the empire builders to respect native traditions while ruling vast territories.

180. For example, as Rome became more advanced, the rules of adoption expanded to allow nonrelatives to adopt. Under Roman law, very elaborate schemes were created for regulating relations between Roman citizens and noncitizens, and for acquiring Roman citizenship. This kind of sophistication is not possible in a society based upon kinship. But as the bonds of kinship slip, the power of the state rises. This is quite evident in contemporary America where the welfare state and entitlements have supplanted the extended family and neighborhood charity.

and relations were governed by more technical rules embodied in the legal system. Kinship and familial relations were no longer paramount. Slaves and aliens (traders and others) were still not accorded all the rights of Roman citizens. But the law of Rome grew to accommodate the commercial and social needs of both Romans and aliens. As Roman law became more complex, it also recognized valuable commercial and social relations with noncitizens. Ultimately, more choices and options abounded for both citizens and aliens as contract liberated the ancient Romans from status.<sup>181</sup> Risks were present, however, as the kinship network lost its vitality and people structured their lives around objective rules and not safe, familial and time-honored relationships. Custom had become less binding and rules became more objective and abstract.

Austin and Maine both contributed to how we govern and formulate legislation in our modern world.<sup>182</sup> Austin imagined the moral foundations for the modern bureaucratic state, and contributed to our understanding of the locus of authority in a progressive society (which was abandoning its traditions and heritage as it sought to fashion a better world).<sup>183</sup> Maine's work showed how custom created a moral acceptance of law. This custom, with its ancient roots, still provides the glue of manners, expectations, and moral and legal assumptions that hold our increasingly complex society together as it continues to evolve.<sup>184</sup>

11. *Durkheim, Weber, and Unger.*—The problems of authority and the moral source of law that were studied by Maine and Austin continued to be considered by twentieth century legal thinkers as society grew increasingly complex. Professor Schwartz picked up the story and described how the branches of thought that sprang from Maine and Austin

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181. With the collapse of the Empire, society became more primitive and status became increasingly important. Feudal relations and law were heavily imbued with status.

182. We often unconsciously view the legal world and society through assumptions constructed by them.

183. For those who try the alternative syllabus, *Legal Classics: Problems in Law and Literature* (Table 2, *infra*), you might wish to explore the ramifications of utilitarianism when carried to the nth degree in John Calvin Batchelor's *The Birth of the People's Republic of Antarctica*.

184. When Maine was writing, society had moved from status to contract. In the late twentieth century, the pendulum appears to be swinging back in the West. Employment status is replacing freedom to contract, citizens are concerned with entitlements, and legal decisions often rest upon the appeal to status concerns rather than concern for the common weal. Cf. FREDERICK A. VON HAYEK, *THE ROAD TO SERFDOM* (1944). So, too, in the capitalist realm of real estate development. See MALLOY, *supra* note 18.

grew and, occasionally, entwined. In this century, Austin's model of the sovereign was established in its own right, and Western utilitarian and bureaucratic legislation can trace its philosophical origin in his theories. The autonomy of Austin's system replaced and subordinated customary law.<sup>185</sup>

Nevertheless, there remained much to be gleaned from studying law and society. Durkheim (1858-1917), like Maine before him, searched out organizations in society.<sup>186</sup> He observed that simple societies require minimal divisions of labor,<sup>187</sup> but complex societies have great divisions.<sup>188</sup> In a complex, modern society, the principle of solidarity was difficult to observe. Durkheim studied morality to determine the adhesive which holds society intact.<sup>189</sup>

He observed mechanical solidarity in primitive societies because every member knew the behavioral constraints and norms. Punitive sanctions were invoked to express disapproval and to drive deviants from disobedience<sup>190</sup> toward compliance.<sup>191</sup> These sanctions corrected illegiti-

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185. Maine, if taken far enough, reaches the same result, as when society evolves, freedom of contract supplants status and men become more free and autonomous.

186. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls ed., 1984) (1933).

187. In primitive tribal societies, everyone does approximately the same tasks and has a consciousness formed by their role. Contrast this with modern society where the lawyer or aerospace technician has little in common with the philosopher or the aborigine bushman.

188. He also observed that complex societies have less cohesion or solidarity.

189. He used modern scientific research based upon anthropologic evidence. The Greeks used the same method to study primitive and ancient societies to learn about their world. "*Plus ça change, plus c'est la même chose.*" ("The more things change, the more they remain the same.") Alphonse Karr (1808-1890) *Les Guêpes* (Jan. 1849), quoted in JOHN BARTLETT, *FAMOUS QUOTATIONS* 627 (Emily Morison Beck ed., 14th ed. 1968).

190. Although the Talmud prescribes the death penalty for certain offenses, the stringent requirement of proof and the people's compliance were such that this extreme sanction was rarely applied. Had the Jewish community been less well-ordered and civilized, the Talmudic Code undoubtedly would have crumbled because the Jews lacked the legal sanctions of the Christian and Moslem states in which they resided. Had the Code crumbled, it is doubtful that Judaism would have survived as we know it today.

191. Modern law, to the contrary, often liberates. For example, look at all the choices that are present in modern corporate and financial law. Property law has evolved from feudal status to copyright law grappling with the classification of computer chip technology. Very little modern law is penal in nature, and much of it is deliberately enacted to expand possibilities of association and enterprise.

mate behavior and reaffirmed the norm.<sup>192</sup>

Organic solidarity was found in modern society where breaches of society's norms harmed isolated individuals and restitution was employed to return the injured party to the status quo ante. The law of contract illustrates this when contract damages attempt to mitigate the harm, rather than punish the wrongdoer for the breach.<sup>193</sup> In spite of complex modern society, the potential remained for organic solidarity to hold the system together. The crucial issue was how to organize the economic activity to optimize development, without undermining the social order.<sup>194</sup>

Weber (1864-1920) analyzed bureaucratic legal principles and questions of authority.<sup>195</sup> In primitive societies, custom was the basis for authority.<sup>196</sup> It evolved from a stable and predictable society. However, although custom may have been a source of law in rapidly changing and evolving societies, it was an inadequate source in advanced systems. According to Weber, customs alone were insufficient to hold societies together in advanced states.<sup>197</sup>

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192. Complex ancient societies existed, but with different norms from modern complex societies. Despite their complexity, punishment often occupied a prominent place in the matter of things. For an excellent description of this phenomenon, see JEAN LEVI, *THE CHINESE EMPEROR* (Barbara Bray Trans., Vintage Books 1989) (1985). This historic novel is the story of Ch'in Shih Huang Ti, the Great Emperor who built the Great Wall and for whom China is still named. Despite the sophistication of the culture and the bureaucracy, crime and punishment occupied a very high profile in the minds of the people and the machinery of the state.

193. To be sure, punitive damages are sometimes allowed in contract actions, and in cases of strict liability, damages are assessed once liability is found, regardless of negligence or moral blameworthiness on the part of the defendant. But these are still the exceptions.

194. Medieval cities, when feudalism was losing its grip, established charters and created new structures to cope with the breakdown of social order. Eventually, some of these havens and their prerogatives were squelched by the nationalism and centralizing forces of the developing nation-states. For example, the walled town of Loudun, which had resisted the centralization of the French monarchy until the walls were torn down under Cardinal Richelieu, was destroyed and the citizens lost their ancient liberties. ALDOUS HUXLEY, *THE DEVILS OF LOUDUN* (1953).

195. MAX WEBER, *LAW IN ECONOMY AND SOCIETY* (1961).

196. As it was for Maine. See generally MAINE, *supra* note 168.

197. As societies advance and become more complex, charismatic leadership and authority create customs which bind society. Great religious leaders such as Christ, Mohammed, and Buddha derived authority from God, or because they were perceived to be God. Even in some advanced societies, such as Imperial Rome, religion played a vital force. Emperors were often worshipped as gods as part of the state religion. Early Christians

Eventually, a bureaucratic system of great rationality and stability is created to maintain the norms and order society. Weber made students think about how the passion, fertility of mind, and charisma of the founding leaders can be managed by bureaucratic organizations for the good of society. For if bureaucracy fails to accommodate aspirations, order for order's sake will give way to revolution and change.<sup>198</sup>

Unger<sup>199</sup> observed that in great societies, bureaucratic law could be read as governmental statements.<sup>200</sup> Legal order and law were autonomous. For him, sets of people, who depended upon their relationship to each other and their places in society, had their own ways of implementing laws.<sup>201</sup> For example, in the late Middle Ages, commercial classes formed alliances with the Crown against the Church and the aristocracy. Sovereigns granted concessions and charters in exchange for political support. Eventually, the feudal power of prelates and barons was dislodged by the centralized monarchy and the emerging merchant classes. What emerged is the modern bureaucratic state, and that may not be enough to manage our political lives.<sup>202</sup>

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were not persecuted out of religious hatred or intolerance; they were persecuted because their refusal to worship the state gods was viewed as subversion.

At the founding, the charisma and leadership alone binds the people to the leader but, as the society matures, charismatic customs will not suffice. Eventually, charisma becomes routinized: Consider, for example, how the Catholic Church organized a large and bureaucratic order to manage its mission. The charisma of Christ was melded into the organizational structure of Imperial Rome and it lasted more than a millennium until the Reformation.

198. Witness the collapse of the Soviet system when it became apparent to the most die-hard Communist that the commissar had no clothes and that some animals were more equal than others.

199. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* (1976).

200. Note the derivation from Austin's thesis on the commands of the sovereign.

201. One of the cardinal principles of common law heritage and tradition is that like cases be treated alike. America has incorporated this principle into its Constitution. U.S. CONST. amend. XIV (1868). Yet, Unger believes that modern society has become an end game for its sophisticated players. Special pleadings abound. There is a failure to treat like cases alike. Unger contends our focus on corporate interests, special interests, and rights will rend apart society.

Burke, too, was concerned with the subversion of the whole for the short-term benefits of the individual, and was willing to place his trust in prescriptive rights, tradition, custom, and ordered liberty. *See generally, supra* notes 109-26 and accompanying text. Unger, however, places little credence in the role of culture and custom in complex modernity.

202. The state has deteriorated into interest groups waging internecine war.

If bureaucratic law fails to provide the structure that both society and personality demand and that the breakdown of custom shatters, what can be put in its place? Can the need for organized power be satisfied without a hierarchy of ranks? Can the awareness of the capacity to create social arrangements, an awareness associated with the decline of custom, be somehow reconciled with the experiences . . . that life receives weight and direction from an order that precedes the human will?<sup>203</sup>

Austin's bureaucratic theories have triumphed. Customs have become increasingly rationalized in modern society. The tyranny of the group and family has given way to the anomie of daily life where many citizens feel powerless. The readings from Weber, Unger, and Durkheim show that dangerous tensions exist in the modern bureaucratic state. Society has created complex organs to replace the norms of primitive culture; yet, the solution is incomplete, and gives rise to new problems, legal and moral.

Although our complex society has liberated us, it has also unleashed factions. These divisive factions and special interests, in pursuit of narrow goals, often undermine society's accepted norms and render the state unable to provide a nurturing environment.<sup>204</sup> Students recognize that we have come a long way from Austin's command of the sovereign as we strive to rein in the leviathan, and make it responsive to our needs.

12. *Holmes, Llewellyn, and Pound.*—Professor Sam Donnelly observed to me, while I was preparing this manuscript, that one of the things *Legal Classics* was about was the teaching of argument and rhetoric. He seconded comments that had been made by a number of the faculty and students who felt the exposure to various forms of legal rhetoric and argument was one of the most important benefits of the course.

Perhaps the most significant form of common law argument and rhetoric of our century is legal realism and pragmatism. Professor Donnelly selected Holmes, Llewellyn, and Pound because they made fundamental contributions in the twentieth century to the continuing legal dialogue. They also are useful for understanding where contemporary legal thought is heading. Oliver Wendell Holmes, Jr.'s (1841-1935) giant

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203. UNGER, *supra* note 199, at 133.

204. This is not the future James Madison penned in *Federalist No. 10*. See THE FEDERALIST No. 10. (James Madison).

presence forms a backdrop for our legal realism and the pragmatic ability of the law to solve contemporary human problems.

Because Holmes occupies such a place of honor in the American pantheon, it was useful to spend some time discussing Holmes, the man.<sup>205</sup> Students were presented with two visions of Holmes. Some critics perceived him as less than a paragon of virtue. He had a reputation as a womanizer, a militarist, an extreme skeptic of moralistic opinions, and what today would be termed a racist.<sup>206</sup> He also is remembered as one of the first major legal historians and legal philosophers in the United States. He inspired legal thought movements and defended freedom of speech, his opinions promoted court deference to legislative enactments, and he was a Civil War hero.<sup>207</sup>

Holmes was a man in pursuit of truth. He aspired for law to transcend the dry record of the reporters and to incorporate ideas developing in other intellectual disciplines, including science, economics, and philosophy.<sup>208</sup> Holmes's decisions depict the characteristics of American Pragmatism. He rebelled against the traditional logical approach

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205. Our experience was that students were fascinated by the man and were able to see how his times influenced his thought and works. To that end, Professor Donnelly assigned some biographic material in addition to selected readings in *The Common Law*. HOLMES, JR., *supra* note 78, Introduction & Lecture III; O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

You might wish to follow his suggestions: MARC DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS (1870-1882)* Vol. 2, ch. 7, "A Theory of Torts" (1963); CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY* (1944); and SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* (1989).

206. Although he supported abolition, he did not believe initially that the freed slaves were ready to deal with freedom in society. He later regretted his opinion when history proved him wrong.

207. The impact of the Civil War loomed large for Holmes as it did for most Americans of the period. It made him a "militarist" and colored his outlook. He was proud of his patriotism and military service. His tombstone at Arlington National Cemetery reads: "Oliver Wendell Holmes . . . Capt. in Mass. Voluntary Infantry, Served in Army, U.S. Supreme Court Justice." No mention is made of his many other accomplishments including his service on the Massachusetts Supreme Judiciary Court.

208. Justice Holmes, because of his wide-ranging interests in many areas, including the dismal science, would welcome Brandeis briefs. The Brandeis brief was created by Louis Brandeis while a practicing lawyer. It made its appearance in *Muller v. Oregon*, 208 U.S. 412, 416 419-20 n.1 (1908).

to law and legal philosophy as presented by Hegel and Kant.<sup>209</sup> He sought to rationalize the nineteenth century American common law, and make it more manageable for practitioners.<sup>210</sup> He also sought to make the law more intellectual.

The rationalization of legal systems was a major task of those engaged in the law in the nineteenth century.<sup>211</sup> Holmes initially was attracted to the logical approach to the law as seen in such jurisprudents as John Austin. He changed his position, however, and ultimately concluded that history and experience (not logic) determine the development of law.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>212</sup>

This well-known quote is quintessential Holmes. He recognized the importance of political theories, public policy, and even prejudices as influencing legal rules.<sup>213</sup> Throughout his long and distinguished career as a jurist, philosopher, and writer, he worked to create a pragmatic

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209. Holmes promoted the objective reality of the law, as he believed that the subjectivity found in Kant and other contemporary philosophers would undermine many legal sanctions. Kant, for instance, could not tolerate the notion of using a human being as a means to an end. Holmes believed that even a good man should be punished if he broke the law. In this instance, a man is being used as a means of forcing compliance for the good of order. Kant believed such punishment immoral.

210. Where was Gaius when we needed him? It was the Roman law problem all over again. The *Digests* were not indexed and were indecipherable. The sprawling, burgeoning growth of the common law presented nineteenth century practitioners with the same dilemma.

211. In New York State, the Field Code was the result of this movement. Note that in Europe, codification, based on the Code Napoleon and Roman law influences, was in full swing. Holmes's *The Common Law* was written in opposition to the intellectual attraction to Roman-based civil law, and to establish a systematic framework for understanding the superiority of the common law.

212. HOLMES, JR., *supra* note 78, at 1.

213. His understanding of the role of judges' predispositions, intuition, and public policy would make him at home with modern legal realists and Critical Legal Studies. His creation of a legal structure based upon the reasonable man, his assignment of fault and responsibility, and his use of objective standards would make him less welcome with Critical Legal Studies, which would assign bias and subjectivity to Holmes's objective reality.

legal system that would respond to the needs of society in the manner of the common law.

In the twentieth century, Karl Llewellyn (1893-1962) brought his great breadth of mind to the legal pragmatism of Holmes and humanized it.<sup>214</sup> Roscoe Pound (1870-1964) continued to study how judges made law.<sup>215</sup> Pound focused on social engineering, interest analysis, and impact analysis. Pound was unwilling to retreat to a narrow jurisprudence. In his American Pragmatist view, he saw the law as wrapped up in ethics, economics, and social engineering.

Modern legal theory has evolved from the logical analysis of Austin and Christopher Columbus Langdell, who attempted to order the law according to strictly perceived "scientific" principles.<sup>216</sup> As seen earlier, Holmes saw the common law as essentially pragmatic and dynamic in approach.

Pound and Llewellyn made legal realism creative.<sup>217</sup> They saw an open policy decision-making where knowledge of the legal rules was insufficient. The *judges'* considerations assumed greater importance as they "found" and declared the law. However, the judges were not unfettered. Their decisions must be grounded in, and comport to, reality.

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214. Professor Donnelly assigned KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962), and WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT, Situations, Sources and the Uniform Commercial Code* (1973).

215. For a brief overview of Pound see Samuel J.M. Donnelly, *Roscoe Pound: Philosopher of Law*, 3 *HOFSTRA L. REV.* 899 (1975) (book review).

216. Law continued to use the "scientific" metaphor well into the twentieth century. The library is still a "laboratory" at law schools (although clinical programs and simulations have expanded the architecture of the lab). American legal education in the first year still employs the Langdellian case method, where students are taught to "read the cases" to discern the legal principles found therein. A certain amount of confusion reigns when novices discover that the rules are not hard and fast, and that the law is much more open-textured than they had initially been led to believe.

217. Remember that Llewellyn was the principal draftsman of the 1929 Uniform Trust Receipts Act, and labored on the Uniform Commercial Code in the 1930s.

Llewellyn's work is analogous to Holmes's, who believed that general principles do not decide concrete cases. In the Uniform Commercial Code (U.C.C.), particular rules govern particular commercial situations. There is no attempt to fashion general, overarching principles. Llewellyn's drafting is very different from the old Uniform Sales Act, which had relatively simple concepts that were very difficult to apply to cases. For example, his approach to the risk of loss in the U.C.C. exemplifies his pragmatism and its link to Holmesian thought. U.C.C. Section 2-205 has very specific and complex rules for the allocation of risk of loss. Although the beauty of grand general principles is not easily discerned, courts and merchants can discover quickly the rules applicable to their cases.

Did the rule apply to the situation? Knowledge of the reality yields the key to the purpose of the rule, which leads to the proper result. This is the practice of the common law of Holmes in the grand tradition.

We began with the Talmud and saw it as living text that spoke through many generations. Talmud's argument and rhetoric permitted Jews to create legal solutions for their times and to preserve Jewish law and culture. The works of Holmes, Llewellyn, and Pound showed how in the twentieth century we have come to use the open-textured common law to fashion flexible rules for our dynamic society and its human needs and problems.<sup>218</sup>

## II. UNDERGRADUATE LEGAL CLASSICS

### A. *Suggestions for Teaching Undergraduate Legal Classics*

The objectives of the undergraduate version of *Legal Classics* remain largely the same as the law school or graduate school course.<sup>219</sup> Exposure to eloquent and thoughtful writers helps to develop better and more critical writers. The authors selected help place great legal and moral thought in its own times.<sup>220</sup> Unlike many survey courses where exposure is limited and materials are often presented by secondary sources, *Legal Classics* requires students to immerse themselves in the original text (or

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218. Llewellyn and his disciples are less text-oriented and place greater emphasis upon human beings and the patterns of their relationships. The concern is not for the rule qua rule, but for the people invoking the law. The rule is the tool for relating the judge, as the decision-maker, to the people and problems before the court.

219. Blackstone perhaps best summarized the reasons for studying the law: And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under.

COMMENTARIES, Book I, *supra* note 96, at 6 (citations omitted).

220. See *infra* Tables 3, 4 for the proposed undergraduate syllabus and schedule.

a good translation).<sup>221</sup> Thus, students have to grapple with the writers themselves and draw their own conclusions, rather than rely upon what the professor or scholar critiquing the work thinks.<sup>222</sup> Contact with great legal minds and writers hones reasoning skills. The research paper component, if a small class is offered, develops abilities in writing, research, and analysis.

*Legal Classics* could be offered as a team-taught class or seminar as we offered our law students at Syracuse.<sup>223</sup> It could be structured as a large class or lecture where the professor meets twice a week and is assisted by teaching assistants (law or government graduate students) who cover the third study section.<sup>224</sup> As a large class, two short papers and a final exam, or a mid-term and a final, might prove most manageable. If the class were a small one taught solely by the faculty member, two short papers (five to ten pages in length) and a final research paper might be required.<sup>225</sup>

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221. Some secondary sources, such as Professor Goldie's fine expositions on international law (*see supra* note 90) and Nicholas's introduction to Roman law (*see supra* note 61) are used. They were selected over primary sources because they were well-written and, with a minimum of text, introduced students to basic themes. You will note that the graduate offerings in Roman law (*see infra* Table 1) and international law (*see infra* Table 1) had substantial excerpts from original sources; you may wish to select materials from these offerings or others. Because of space limitations and time constraints, I chose to edit here.

222. Some of the finest courses I experienced at Cornell University were political theory courses taught by Professor Alan Bloom. His teaching remains the inspiration for bringing such a course to undergraduates at Syracuse. I also was fortunate to take additional courses in the philosophy of law and the philosophy of literature. These were some of the most exciting and memorable of my undergraduate years. Most of our students in *Legal Classics* reported that this offering rekindled similar feelings.

223. If team-taught, eventually one of the more foolhardy souls may be emboldened to go it alone as a small class or larger lecture. Even if the solo effort is the first undertaking, the reading lists and anecdotal thoughts about coverage and themes contained in this Article will help in formulating an effective syllabus of your own.

224. At Syracuse, we are fortunate to have a number of law students who have history, English, or political science degrees. They would make ideal candidates for the teaching assistantships. Graduate students in these related disciplines would also be appropriate.

225. For the shorter papers, students might compare selected writings of Daniel Webster and the opinions of Justice Marshall and Justice Story to the writings of Senator John C. Calhoun and Senator Hayne. Another short paper topic would be to compare the views of Blackstone and Burke on prescriptive rights. Such topics could also be turned into examination questions.

*B. Comments on the Undergraduate Syllabus*

The undergraduate readings are a fairly rigorous introduction to legal thought and are designed for a fourteen week course which meets three hours per week.<sup>226</sup> The readings are approximately 1,300 pages, or about 100 pages per week. The reading assignments may be reduced somewhat without substantial harm to the coverage and themes, should reduction prove to be necessary. Nevertheless, as offered, students in a small class or seminar should be able to do them justice.<sup>227</sup>

The readings begin with Blackstone's assertion that the study of law is appropriate for a liberal education and essential for good citizenship. Study of Talmud provides a good introduction to reading law as text, and provokes consideration of the eternal nature of legal issues. Next, Aristotle presents some keen insights into good government and good citizenship. (Aristotle's ideas reappear in such authors as Aquinas, the great international lawyers, and Blackstone.)

Roman law makes several appearances, as it is the basis for that other great form of Western and world law, *civil law*. The common law is studied through the eyes of a number of thinkers. These writings lead to understanding our modern legal system and our Constitution and its ordered liberties.

International law and Aquinas address natural law themes and the issue of "What is law?" Burke is a great conservative mind, especially worthy of study in this time of revolution and change. The nationalistic conservatism of *The Federalist* sets the American agenda. The Virginia and Kentucky Resolutions and Justice Story illuminate the great American constitutional debate of the nineteenth century. Maine, Unger, and Holmes lead students into modern jurisprudence. The readings conclude with further thoughts about the study of law as a liberal experience.<sup>228</sup>

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226. See *infra* Table 4.

227. When I set about the task of editing materials for undergraduates, I used my undergraduate experiences at Cornell, my seven years of teaching undergraduates at The Wharton School, the University of Pennsylvania, and conversations with several graduate assistants in the history program at the Maxwell School of Citizenship to guide me.

228. The schedule is somewhat different from the previous law offerings at Syracuse. In reality, strict chronological presentations in the classroom were tempered occasionally by faculty scheduling conflicts.

Blackstone's essay on teaching law to undergraduates seems a fitting place to start. He was a wonderful writer, one of whom many undergraduates will have heard, and of

### III. CONCLUSION

It is hoped that your appetite for the teaching of great Western legal works to law students and undergraduates has been whetted.<sup>229</sup> *Legal Classics* offers great and lucid writing. The course has developed and enhanced legal writing, legal research, and legal thought at Syracuse University College of Law.

The suggested texts expose faculty and students to important ideas, and allow them to trace the development of Western legal thought.<sup>230</sup> They reacquaint participants with moral issues and great choices. *Legal Classics* invites professors and students to study the moral and theoretical underpinnings of our system of laws, to contemplate the choices not made, and to revel in the beauty of the language and thought.

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major importance to American common law and constitutional thought.

Aristotle's *Politics* is included because Aristotle was a superb writer and a well-organized one. Students can see readily how the scholastic thinkers of the Middle Ages adopted Aristotle for their philosophic model. Further, he expressed important ideas on the nature of political life and citizenship. His categories of government influenced Montesquieu and Blackstone, to name two. His observations about republics and democracies were on the minds of the American founders.

Aquinas will give students a feeling for medieval political and moral philosophy. Through him, students see Aristotelian thought at work, transmuted by a brilliant medieval mind. Aquinas permits students to think about the connection between morality and the law. (For Aquinas, law had to be moral and good or else it was not law.) Students can draw comparisons to legal positivist thought and modern debates about the morality of law.

Holmes's *The Common Law* could be substituted for R.C. van Caenegem's *The Birth of English Common Law*. If that substitution were to be employed, the order would be changed to reflect it. I chose to put Holmes in the modern era and to use him for his modern, objective observations, rather than follow a purely chronological approach for topics covered.

229. Ironically, this Article presents exactly what we deliberately sought to avoid: second-hand discussion of several pillars of Western legal thought without the benefit of in-depth exposure to the texts. The author and his collaborators encourage readers to keep foremost in mind that excitement and learning in class sessions (and the inspiration for this Article) were generated by the actual living texts that still influence the law today.

230. In completing this Article, certain themes leaped to life as I reviewed the texts and my class notes. It may seem that we embarked with an agenda and set about to structure a curriculum that traced ideas of complexity, legitimacy of power, growth of bureaucracy, sanctions, and prescriptive rights and their relationship to common law liberties. We did not do this expressly—my memory and the discipline of writing undoubtedly helped order the themes. The selected readings we used ultimately revealed patterns in the evolution of Western law.

The study of *Legal Classics* offers the possibility of improving the quality of political, moral, and legal rhetoric. Compare *The Federalist*,<sup>231</sup> *Common Sense*,<sup>232</sup> *Rights of Man*,<sup>233</sup> and *Lincoln's First Inaugural Address*<sup>234</sup> to "Family Values" and the talk of God being bandied about by every hack politician.<sup>235</sup> Thirty-second sound bites and cheap slogans have become what passes for political dialogue in our tarnished age. If students appreciated the power and glory of our political and legal language, they might hold themselves and others accountable to a higher standard and enoble rather than diminish the quality of political life and legal culture. The legal classics offered here will provide a heady and uplifting tonic and a relief from the contemporary bromides of popular culture.

Words are important—too important to be left to the teachers, politicians, and lawyers. Pat Buchanan at the GOP convention frightened many by speaking about a "Cultural War."<sup>236</sup> His conservative attack sent a shudder through me as the phrase "cultural war" reminded me of Hitler's Kulturkampf which ultimately burned books,<sup>237</sup> dissenters, and the Jews. Knowledge of our history will forewarn us. We cannot continue to make heinous mistakes and survive as a people or species.

Karl Marx said history repeats as farce.<sup>238</sup> The great thinker erred. In our century, we have had awful repetitions—the Turkish genocide of Armenians,<sup>239</sup> the Holocaust, the Gulag, the millions who died in the

231. See *supra* note 22.

232. THOMAS PAINE, *COMMON SENSE* (1776), reprinted in 1 *THE COMPLETE WRITINGS OF THOMAS PAINE* (Philip S. Foner ed., The Citadel Press 1969) (1945).

233. THOMAS PAINE, *RIGHTS OF MAN* (1791), reprinted in 1 *THE COMPLETE WRITINGS OF THOMAS PAINE* 243 (Philip S. Foner ed., The Citadel Press 1969) (1945).

234. Abraham Lincoln, *First Inaugural Address* (March 4, 1861), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES*, S. DOC. NO. 101-10, 101st Cong., 1st Sess. 133 (1989).

235. See, e.g., William Safire, *God Bless Us*, N.Y. TIMES, Aug. 27, 1992, at A23; Barbara Ehrenreich, *Why the Religious Right is Wrong*, TIME, Sept. 7, 1992, at 72.

236. See generally Pat(rick) Buchanan, *Remarks at the Republican National Convention* (Aug. 17, 1992), Federal News Service, available in LEXIS, NEXIS Library, Current File.

237. "In the words of a student proclamation, any book was condemned to the flames 'which acts subversively on our future or strikes at the root of German thought, the German home and the driving forces of our people.'" WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 241 (1960).

238. See *supra* note 126.

239. See FRANZ WERFEL, *THE FORTY DAYS OF MUSA DAGH (DIE VIERZIG TAGE DES MUSA DAGH)* (1933).

Peoples Republic of China, the Pol Pot experiment in Cambodia, and now "ethnic cleansing" in the former Yugoslavian territory.<sup>240</sup> Knowing history and our culture does not ensure that there will be no more tragedies—but ignorance of history and thought ensures disaster.

Finally, Americans, especially those of us who are lawyers, comprise an elite group<sup>241</sup> and have a moral duty to understand our common culture, lest we become a people of whom they say: They learned nothing. They knew nothing. They did nothing.<sup>242</sup>

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240. Cf. Leslie Gelb, *The Awful Choice on Bosnia*, N.Y. TIMES, Aug. 27, 1992, at A23.

241. American lawyers are our Nation's elite, and have been since before Alexis de Tocqueville made his famous observations in the nineteenth century. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Alfred A. Knopf, Inc. 1960) (1945).

De Tocqueville's observations, despite being well over a century old, are still the best ever written about American culture and politics. *Democracy in America* and *The Federalist* should be studied by all who contemplate holding power or privilege in our society.

242. Talleyrand's famous aphorism about the Bourbons has haunted me, and was responsible for this final concern. The great statesman and observer of human follies noted: *Ils n'ont rien appris, ni rien oublie*. ([Of the Bourbons] They have learned, and forgotten nothing.) Charles Maurice de Talleyrand—Perigord from Chevalier de Panat, letter Mallet du Pan (January 1796), quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 483-84 (Emily Morison Beck ed., 14th ed., 1968).

## TABLE 1

GRADUATE LEVEL *Legal Classics* (AS OFFERED)*Talmud:*

BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS 128-75 (Barry W. Holtz ed., 1984).

JACOB NEUSNER, INVITATION TO THE TALMUD 87-169 (1984).

ABRAHAM COHEN, EVERYMAN'S TALMUD 298-345 (1932).

*Roman Law:*

THE INSTITUTES OF GAIUS: TEXT AND TRANSLATION 20-123 (W.M. Gordon & O.F. Robinson trans., 1988).

*Gaius Noster: Substructures of Western Social Thought, in HISTORY, LAW AND THE HUMAN SCIENCES* 619-48 (Donald R. Kelly ed., 1984).

PAUL VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (3d ed., 1961).

*Early Common Law:*

R.C. VAN CAENEGEM, THE BIRTH OF ENGLISH COMMON LAW (2d ed., 1988).

*International Law:*

L.F.E. Goldie, *A Brief Introduction to Grotius, Pufendorf & Vattel* (unpublished manuscript on file with the author) (1988, rev'd 1990).

L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors* 32 AUSTRL. L.J. 220 (1958).

SAMUEL PUFENDORF, DEJURE NATURAE ET GENTIUM LIBRO OCTO, On the Law of Nature and Nations, iii-x, 145-53, 179-309, 825-36, 1292-1341 (James Brown Scott ed., & C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

MONSIEUR (EMERIC) DE VATTEL, THE LAW OF NATIONS vii-iv, 3a-9, 13-52, 199-221, 188-91, 235-58, 346-66 (Joseph Chitty, ed., Phil., T. & J.W. Johnson & Co., 1876).

HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 1-116, 290-371 (Legal Classics Library 1984) (1625).

*Blackstone:*

WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* Book I, a-161 (Legal Classics ed., 1983) (1765).

*Burke:*

EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Dolphin Books, 1961) (1790).

*Federalist Papers:*

THE FEDERALIST Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 49, and 51 (James Madison).

*The Virginia and Kentucky Resolutions (1798-99):*

5 THE FOUNDERS' CONSTITUTION Vol. V. 131-36 (Philip B. Kurland & Ralph Lerner eds., 1987).

*Story:*

THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614-38 (William W. Story ed., 1952).

JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 206-65, 282-97, 381-93, Ch. XLII, Sec. 1836-1842 (3d ed., Boston, 1858).

*Legal Education:*

Roger North, *Discourse on the Study of the Laws*, (ca. 1700-1730), in *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* 15-33 (Michael H. Hoeflich ed., 1988).

Thomas Wood, *Some Thoughts Concerning the Study of the Law of England in the Two Universities* (1708), in *id.* at 34-52.

Daniel Mayes, *An Address to the Students of Law in Transylvania University* (1834), in *id.* at 145-64.

*Maine:*

HENRY SUMNER MAINE, *ANCIENT LAW*, Introduction & 1-237 (London, 1861).

*Austin:*

JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE* (London, 1832).

*Durkheim:*

EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* xxv-lix, 1-87 (W.D. Halls Trans., 1984).

*Weber:*

MAX WEBER, *LAW IN ECONOMY AND SOCIETY* 65-97 (1954).

*Unger:*

ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 47-133 (1976).

*Holmes:*

O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* Introduction, Lecture III (Howe ed., 1963) (1881).

*Llewellyn:*

KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 42-76 (1962).

WILLIAM L. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT*, *Situations, Sources and the Uniform Commercial Code* (1973).

*Pound:*

Samuel J.M. Donnelly, *Roscoe Pound: Philosopher of Law*, 3 HOFSTRA L. REV. 899 (1975) (book review).

## TABLE 2

## LEGAL CLASSICS: PROBLEMS IN LAW AND LITERATURE

Background and Reference: JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984).

## I. GREEK POLITICAL AND LEGAL THOUGHT:

Plato and Aristotle considered the ideal political state and the ethics needed to achieve excellence. *Antigone* wrestles with tradition and authority with horrifying consequences. *Agathon* is the tale of a philosopher, Agathon, who is imprisoned for rudely and wisely protesting Kykourgous's fanatical policy of law and order in sixth century B.C. Sparta.

PLATO, *THE REPUBLIC* (c. 427-347 B.C.)

ARISTOTLE, *POLITICS* and *NICHOMACHAN ETHICS* (c. 384-322 B.C.)

SOPHOCLES, *ANTIGONE* (c. 496-406 B.C.)

JOHN GARDNER, *THE WRECKAGE OF AGATHON* (1970)

## II. THE RISE OF THE STATE IN THE MIDDLE AGES:

These readings would encourage students to think about the clash between secular forces of nationalism and religious institutions. Although we take secular society for granted in the West, the achievement of secularism was not without its cost.

R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973)

OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881)

RICHARD WINSTON, *THOMAS BECKET* (1974)

JEAN ANOUILH, *BECKET* (1960)

GEORGE BERNARD SHAW, *SAINT JOAN* (1924)

RICHARD MARIUS, *THOMAS MORE* (1984)

ROBERT BOLT, *A MAN FOR ALL SEASONS* (1962)

### III. THE GLORIOUS AND FRENCH REVOLUTIONS

The right to revolution. The practical conduct of a revolution and the establishment of a government. Contrast the “conservative” Glorious Revolution with the “radical” and modern French Revolution. Did the English get it right? Or did the French get it wrong?

THOMAS HOBBS, *THE LEVIATHAN* (1651)

JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* (1689)

WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*  
Book I (1765)

EDMUND BURKE, *REFLECTIONS ON THE REVOLUTIONS IN FRANCE*  
(1790)

PETER WEISS, *MARAT/SADE* (1965)

### IV. UTOPIAN SOCIETIES

Various ideas about utopia will conclude the study. “Utopia” is blessedly nowhere. The problems of establishing and maintaining a just and productive society are daunting. These readings are especially well-written and thought-provoking.

KARL MARX, *THE COMMUNIST MANIFESTO* (1848)

W. BRUCE LINCOLN, *PASSAGE THROUGH ARMAGEDDON: THE  
RUSSIANS IN WAR & REVOLUTION 1914-1918* (1986)

THOMAS MORE, *UTOPIA* (1516)

JOHN CALVIN BATCHELOR, *THE BIRTH OF THE PEOPLE'S REPUBLIC  
OF ANTARCTICA* (1983)

## TABLE 3

## PROPOSED UNDERGRADUATE-LEVEL LEGAL CLASSICS

*Blackstone:*

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Book I, a-37 (Introduction on Why Law Is Worthy of Study) (Legal Classics ed., 1983) (1765).

*Talmud:*

BACK TO THE SOURCES: READING OF THE CLASSIC JEWISH TEXTS 128-75 (Barry W. Holtz ed., 1984).

*Aristotle:*

ARISTOTLE, POLITICS Book I., ch. 1-2, Book II, ch. 7-8, Book III (Ernest Barker trans. & ed., 1962).

*Roman Law:*

BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 1-53 (1962).

PAUL VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (3d ed., 1961).

*Early Common Law:*

R.C. VAN CAENEGEM, THE BIRTH OF ENGLISH COMMON LAW (2d ed., 1988).

*Aquinas:*

THOMAS AQUINAS, TREATISE ON LAW, (Summa Theologica, Questions 90-97) (Henry Regnery Company, A Gateway Edition 1965).

*International Law:*

L.F.E. Goldie, *A Brief Introduction to Grotius, Pufendorf & Vattel* (unpublished manuscript on file with author) (1988, rev'd 1990).

L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors* 32 AUSTRL. L.J. 220 (1958).

*Blackstone:*

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Book I, 38-161 (Legal Classics ed., 1983) (1765).

*Burke:*

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 13-71, 106-11, 155-58, 166-72, 260-66 (Dolphin Books, 1961) (1790).

*Federalist Papers:*

THE FEDERALIST Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 49, and 51 (James Madison).

*The Virginia and Kentucky Resolutions (1798-99): 5 THE FOUNDERS' CONSTITUTION* Vol. V:133-36 (Philip B. Kurland & Ralph Lerner, eds., 1987).

*Story:*

THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614-38 (William W. Story ed., 1952).

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206-265, 282-297, 381-393, Ch. XLII, Sec. 1836-1842 (3d ed., Boston, 1858).

*Maine:*

HENRY SUMNER MAINE, ANCIENT LAW, Introduction, Ch. I, II, & V (London, 1861).

ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 47-133 (1976).

*Holmes:*

OLIVER WENDELL HOLMES, JR., THE COMMON LAW LECTURES I & III (Legal Classic ed., 1982) (1881).

*Legal Education:*

Roger North, *Discourse on the Study of the Laws*, (ca. 1700-1730), in *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* 15-33 (Michael H. Hoeflich ed., 1988).

Thomas Wood, *Some Thoughts Concerning the Study of the Law of England in the Two Universities* (1708), in *Id.* at 34-52.

Daniel Mayes, *An Address to the Students of Law in Transylvania University* (1834), in *Id.* at 145-164.

TABLE 4

WEEKLY ASSIGNMENTS FOR UNDERGRADUATE LEVEL *Legal Classics*

WEEK 1:	Blackstone Talmud	36 pages 47 pages
WEEK 2:	Talmud Aristotle	80 pages
WEEK 3:	Aristotle Introduction to Roman Law	53 pages
WEEK 4:	Introduction to Roman Law Medieval Roman Law	145 pages
WEEK 5:	Early Common Law	110 pages
WEEK 6:	Aquinas Founders of Modern International Law	116 pages 35 pages
WEEK 7:	Mid Term Blackstone	123 pages
WEEK 8:	Burke	80 pages
WEEK 9:	Federalist Papers	75 pages
WEEK 10:	State Sovereignty v. Nationalism	126 pages
WEEK 11:	Maine	100 pages
WEEK 12:	Unger	85 pages
WEEK 13:	Holmes	90 pages
WEEK 14:	Common Law Legal Education	60 pages