2006

# Lessons on Lawyers, Democracy, and Professional Responsibility

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That American universities—and law schools as parts of such universities—should teach students to understand and support democratic institutions may seem self-evident and non-controversial. Yet in discussing the role of the academy, Stanley Fish, the departing Dean of the University of Illinois at Chicago's College of Liberal Arts and Sciences, recently stated a rather different position in the *New York Times*. Fish proclaimed that "[n]o doubt, the practices of responsible citizenship and moral behavior should be encouraged in our young adults—but it's not the business of the university to do so . . . ."[1] Fish is wrong. His views are particularly antithetical to the obligations of the legal academy. It is not merely enough for law professors to hope that our students become responsible citizens—we must make teaching them to do so central to our institutions' missions.

Law schools are *professional* schools. As such, we must prepare students to fulfill their *professional* obligations, and ranking among an American lawyer's greatest professional responsibilities is the duty to understand and to support democracy. In part, what characterizes the legal profession is its members' supposed expertise in the mechanics and principles of our polity. Such knowledge enables lawyers to make a difference in our polity and brings with it special responsibility to our democracy. Accordingly, emphasis on this "democracy duty" in our law schools is essential.

Yet Fish's comments illustrate that this is not an intuitive conclusion for all individuals. Why might some worry about academic emphasis on a democracy duty? Certainly there are those who doubt the prudence of democracy,[2] thus rendering the teaching of democratic norms suspect. Dictators throughout the centuries proffered, at least implicitly by their actions, that autocratic government was preferable to government based on the will of the people. And, questions

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* Assistant Professor, The University of Alabama School of Law. I thank my colleagues at The University of Alabama School of Law and the University of Alabama Law School Foundation for their generous support of my research. I am especially grateful for the assistance of Carol Rice Andrews, Bill Brewbaker, Al Brophy, Pam Bucy, Joseph Colquitt, Alan Durham, Dan Filler, Tony Freyer, George Geis, Bruce Green, Leslie Griffin, Susan Pace Hamill, Bill Henning, Constantine Katsoris, Bob Kuehn, Ken Randall, Norman Singer, and Norman Stein on earlier drafts of this paper. I also thank David Averyt for excellent research assistance.

1. Stanley Fish, *Why We Built the Ivory Tower*, N.Y. TIMES, May 21, 2004, at A1. Fish previously taught at the Duke University School of Law.

2. *See* GERRY MACKIE, DEMOCRACY DEFENDED 2 (2003).

about democracy are not limited to tyrannies. Even in the United States, some feel that a main theme of contemporary political science has become the flawed nature of democracy—a notion that also reaches law school classrooms.[3] In advocating the teaching of a democracy duty, my purpose is not to settle the debate of another academic discipline on democracy's benefits and shortcomings or to argue that U.S. democracy is perfect. Indeed, part of the democracy duty advocated herein is for lawyers to work towards an improved democracy.[4] Only by achieving a fuller understanding of democracy, *including its flaws*, can this be accomplished. But in addition to its weaknesses, democracy's strengths and underlying principles must be aired in law schools to provide students a more balanced view. Without full discussion, students may be left with the impression that democracy is not worth striving for and may find other alternatives, such as totalitarianism, more attractive.[5]

Others not explicitly opposed to the concept of democracy still might devalue the teaching of good citizenship. Fish's embrace of good citizenship without instruction about it might reflect a post-modernist view. One might question the validity of teaching what constitutes the truths of good citizenship, truths formulated in a society plagued by various biases, in favor of recognizing the primacy of each individual's own perceptions of what it means to be a good democratic citizen. But no matter how easy it is to brush away schools' role in teaching democracy with a post-modernist swipe, such action is imprudent. Critique of the biases that might inform our current educational system[6] and society more generally should not stultify discussion about good citizenship, but should become part of the classroom dialogue. Through such dialogue one can see how democracy adapts over time to address such biases and how one might accelerate such a process. Moreover, absent contextualization of these critiques as part of a process of strengthening our existing political system, one might imply wrongly, once again, that some other form of government is superior to democracy.

Perhaps more troubling is Fish's intimation that some groups might press for education about citizenship as a means to imply that certain political viewpoints are better than others.[7] It is not the place of this article to assess the motivations of each particular group that supports the teaching of democratic values. As previously acknowledged, the classroom discussion of our democracy supported herein should not be one-sided and should include analysis of democracy's

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3. *See, e.g., id.* at 2-3 ("[T]he main intellectual trend in American political science is the view that democracy is chaotic, arbitrary, meaningless, and impossible."). Professor Mackie traces the trend to the application of Kenneth Arrow's impossibility theorem to politics, and notes that irrationalist theory is taught, among other places, in law schools. *See id.* at 3-5.

4. *See infra* notes 40-46 and accompanying text.

5. *See* MACKIE, *supra* note 2, at 4.

6. *See infra* note 279.

7. *See* Fish, *supra* note 1.

current imperfections.[8] Teaching about citizenship and democracy need not, and should not, equate to intemperate advocacy of specific political positions or indoctrination.[9] Such a course could be counterproductive to students' full embrace of their democratic duty as lawyers. Reinforcing this point is the sage advice of Ohio State University Law Professor Robert Matthews, who decades ago advocated better teaching of leadership skills for lawyers in our democratic society. He wisely called for the teaching of values while also recognizing that care must be paid not to coerce students, for "[o]nly thus can the acquisition of an appreciation of values be enduring; only thus can we preserve the essentials of an educational process free of indoctrination."[10] Ultimately, if principles become the costume for fundamentalist positions, they threaten to undermine the liberal values at the heart of democracy.[11] However, we cannot allow timidity about broaching controversial subjects or political correctness stifle the democracy dialogue. Accordingly, Fish seems to overreach. While academicians always must be wary of others outside the classroom attempting to force the teaching of certain political viewpoints and heavy-handedness in the presentation of our own views, Fish's position that universities simply should not teach about good citizenship constitutes an overly broad reaction to such a danger.

His position's fallacy is belied not only by the needs, but the desires of today's law students. Notwithstanding Fish's advice, students from around the country appear very interested in their roles as citizens and the national polity. In particular, law students from Washington, D.C. to Stanford and from Cambridge to Tuscaloosa are actively learning about and buttressing the institutions of our democracy as part of their law school experiences. Georgetown University Law Center offers students the opportunity to participate in a federal legislation clinic offering a "bootcamp" that teaches "the basics of Congressional process . . . and examples of legislative lawyering."[12] Stanford Law School's Center for Internet and Society Cyberlaw Clinic joined with the Electronic Frontier Foundation to prevent the use of copyright law to encumber public debate on the quality of electronic voting systems.[13] Harvard law students formed a new group, Just

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8. *See* VINCENT OSTROM, THE MEANING OF DEMOCRACY AND THE VULNERABILITY OF DEMOCRACIES: A RESPONSE TO TOCQUEVILLE'S CHALLENGE, at ix (1997) ("[W]hat it means to live in a democratic society accrues as much from coping with threats to democratic ways of life as it does by being intentionally concerned about the constitution and viability of democratic societies.").

9. *Cf.* William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175 (2001) (illustrating that the legal academy struggles with the proper level of politics to bring to legal study).

10. Robert E. Mathews, *The Lawyer, the Law Schools and Responsible Leadership*, 25 ROCKY MTN. L. REV. 482, 488 (1953).

11. *See* Leslie C. Griffin, *Fundamentalism from the Perspective of Liberal Tolerance*, 24 CARDOZO L. REV. 1631 (2003).

12. *See* Georgetown Law: The Teaching of Legislative Lawyering, http://www.law.georgetown.edu/clinics/flc/teaching.html (last visited Nov. 13, 2005).

13. *See* Press Release, Elec. Frontier Found., Electronic Frontier Foundation and Stanford Law Clinic Sue Electronic Voting Company (Nov. 3, 2003), http://www.eff.org/legal/ISP_liability/OPG_v_Diebold/

Democracy, with the aim of getting law students from around the country to monitor polls to better ensure that voters are not improperly denied ballots.[14] And, University of Alabama law students joined an American Bar Association ("ABA") project aimed at registering new voters and providing cards with "information [Alabama voters] need to ensure that they can cast their votes, and that their votes will be counted."[15] These students' attitudes are particularly refreshing at a time when some question the dedication of the legal profession to the public good.[16] And, their efforts provide just a few examples of budding lawyers' commitment to democracy at law schools around the nation. We risk alienating such students by denying the role of democracy in legal education.

Civic spiritedness is not unique to today's law students. Take, for instance, Joseph Antoine Cantrell, a Georgetown student asked to speak on the occasion of the opening of his law school's new library in 1920. In reflecting back on the era of the school's founder,

> The American lawyer of today looks out upon a field crowded with problems which do not greatly differ from those of [the founder's] time. To meet such problems and to carry on our government as in the past we must grasp the three-fold principle of personal initiative, personal responsibility, and personal obligation, which it is the purpose of this School to instil.[17]

Cantrell's comments are revelatory beyond describing a law school's role in training young attorneys. His words reflect a belief amongst the bar and across society that lawyers are particularly important to the functioning of American democracy. Such a belief is not surprising given the role of attorneys, from the American Revolution forward, in the development of this nation. Indeed, given their critical role in U.S. democracy, lawyers can be said to have a *professional responsibility* to understand that democracy and to support it as citizen lawyers.

So how does a law school facilitate students' recognition and fulfillment of their role as citizens? On a practical level, representative democracy is the legal system of this nation, and law schools must train attorneys how to operate within

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20031103_eff_pr.php ("Diebold has delivered dozens of cease-and-desist notices to website publishers and ISPs [Internet Service Providers] demanding that they take down corporate documents revealing flaws in the company's electronic voting systems as well as difficulties with certifying the systems for actual elections.").

14. *Harvard Law Group To Send Students To Ensure Poll Access*, Mar. 16, 2004, http://www.lawschool.com/access.htm.

15. News Release, Am. Bar Ass'n, ABA President Joins Local Civil Rights Hero and University of Alabama Law School Dean, Student to Announce New Voting Rights Initiative (Feb. 27, 2004), http://www.abanet.org/media/releases/news022704.html; *see also* Dennis Archer, Remarks at the University of Alabama School of Law Farrah Law Society Banquet (Feb. 27, 2004), *in* 28 J. LEGAL PROF. 1 (2004).

16. *See infra* Part I. As discussed herein, the profession's recommitment to democracy and the public good importantly may combat such criticism.

17. Joseph Antoine Cantrell, Address at the Formal Opening of the New Law Library and Fiftieth Anniversary of the Foundation of the Georgetown Law School (Dec. 4, 1920), *in* GEO. L.J., 1920-1921, Issue 2, at 33, 35.

this system. Beyond that, however, students must recognize a professional role in our democracy that goes beyond merely representing individual clients to serving the greater society—a role they share with other lawyers that is critical to the vitality of the bar. Accordingly, support for the above-described student activities and instruction about democratic institutions is eminently sensible. Even those who agree with this position would do well to more closely consider the basis for the special role of law schools in familiarizing students with democratic institutions and the responsibilities of citizenship as well as the specific means for fulfilling these responsibilities as legal professionals. Proper instruction in the democracy duty entails more than training students to evaluate the benefits and drawbacks of particular legal approaches; it means encouraging their involvement in improving the law and the polity. It is easy for members of the legal academy to pay lip service to the role of law schools in teaching about the democratic duty while failing to actually assist with the instruction on a regular basis.

Discerning how to engage in such instruction requires a degree of introspection from the law school community. Some might question why this would be a subject of interest for a business law scholar, such as myself. Providing some insight is the work of another author, John Dos Passos, from almost a century ago. Among the subjects about which this member of the New York bar wrote was securities law, as evidenced by his work, *The Law of Stock Brokers & Stock Exchanges*. Yet Dos Passos also took time to study the legal profession and to write about the responsibilities of lawyers. He implicitly saw this study as one of necessary introspection, hearkening to the Delphian invocation of "[k]now thyself."[18] He acknowledged such introspection's intrinsic hazard of exposing the blemishes of one's own profession, but concluded,

> I know of no occupation more interesting, than to attempt to hold up to the lawyer, a faithful picture of his real mission. It then will be seen, that a large number of the lawyers are delinquents to society, not with malice prepense, but from a failure to appreciate the real and full nature of their professional duties.[19]

Every legal scholar, regardless of his or her academic interests, could benefit from closer consideration of the linkages between the subjects he or she studies and teaches and democratic principles and institutions. One who truly disputes Fish's proposition that universities should not be in the business of teaching about good citizenship is obligated to consider the method for such instruction. Through such consideration law professors should be better prepared to support their students in fulfilling their professional responsibility to understand and support democracy.

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18. JOHN R. DOS PASSOS, THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE 1-6 (1907).
19. *Id.* at 4-6.

In that spirit, Part I of this article argues why a lawyer's need to understand and support America's democracy should be characterized as a *professional responsibility*. If the democracy duty is more than an ideal, its instruction becomes a more imperative part of a professional education. Beyond describing why the democracy duty should be construed as a professional responsibility, it is important to illustrate lawyers' recognition of that duty throughout American history. Accordingly, Part II explores the bar's historical recognition of such a professional responsibility. I visit lawyers from various periods of American history. Their stories are useful not to prove that the profession has perfectly fulfilled its democracy duty, but rather to illustrate that notwithstanding the tremendous social changes that have occurred throughout American history and the continuous evolution of American democracy, lawyers continue to identify themselves as a profession by reference to their role in our democracy.

Part III turns to the historical efforts of legal educators to support fulfillment of the democracy duty. Just as the bar took notice of its duty to democracy as our polity evolved, the legal academy recognized the critical nature of the democracy duty and continually made that duty central to its mission. For some, as it should for all, the duty remains at the forefront of legal education. With this in mind, Part IV draws on lessons from today's law schools and suggests some approaches to reinvigorating law schools' special role in supporting students in this most significant professional obligation. By reevaluating the curriculum, institutionalizing support for student civic activities, and introducing students to professionally responsible lawyer role models, the legal academy can pervasively teach students to be better lawyer citizens.

## I. WHY A PROFESSIONAL RESPONSIBILITY?

To ground the notion of a professional responsibility to understand and support democracy, it is useful to explore why the existence of such a responsibility is important. Over a decade ago, in assessing the state of American lawyers, Anthony Kronman of the Yale Law School wrote of certain lawyer ideals, in particular, the ideal of a "lawyer-statesman" which he fretted was fading from the profession.[20] Professional ideals certainly inform professional responsibilities. Ideals can be viewed as a profession's greatest ambitions for itself. But, ideals are not in themselves responsibilities. The proclivity for ideals, aspirational in nature, to fade over time emphasizes why framing some issues as professional responsibilities might mark a difference with distinction. A professional responsibility can be something more definitive and obligatory in nature.

Perhaps this is why for centuries commentators have sought to identify

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20. *See* ANTHONY T. KRONMAN, THE LOST LAWYER 7 (1993); *see also* AM. BAR ASS'N, REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM, 2-5 (1996) [hereinafter 1996 ABA REPORT] (cataloguing descriptions of decline in lawyer professionalism).

professional responsibilities and ultimately to codify rules of professional conduct.[21] Such rules do not prevent all malfeasance. Some lawyers do behave badly. They did so before the delineation of professional responsibilities and always will. But by affirmatively identifying these responsibilities, the legal profession establishes grounds to sanction recalcitrant colleagues and more importantly provides a better roadmap for compliance by lawyers seeking to behave properly.

To see that a lawyer's fealty to democracy is obligated rather than aspirational, one need look no further than the oaths taken upon admission to the bar. Dos Passos noted that a bar oath "throws some light upon the lawyer's real functions and duties" and contrasts oaths from the United States and abroad.[22] He quite artfully notes how language in the specific oaths' texts might reveal different conceptions of the role of a lawyer in each jurisdiction but fail to define all of the specific duties of a lawyer.[23] However, there is a point of commonality for the oaths from all of the included American jurisdictions. For each of these jurisdictions, the lawyer needed to attest to a willingness to support the United States and/or relevant state constitution; in other words to support our democratic system.[24]

### A. THE DEMOCRACY DUTY

But what are the specific components of this professional responsibility? The lawyer's democracy duty posited and analyzed in this article has two components which are knowledge and support. A responsibility to understand democracy and its institutions may seem obvious. Responsibilities unstated, however, are easily forgotten. It is especially important that this responsibility not be neglected, for only informed citizens in the American democratic system are well positioned to help democracy progress.

Writing after the Civil War, Orestes Brownson, a student of the American Republic, correctly expressed concern about citizens' lack of attention to their political system. He emphasized how the nation "should take that new start with a clear and definite view of their national constitution, and with a distinct understanding of their political mission in the future of the world," and felt "[t]he citizen who can help his countrymen to do this will render them an important

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21. Although some might attribute this movement to the twentieth century and projects such as the American Bar Association's *Canons of Professional Ethics*, such work dates its origins to earlier efforts. *See* CAROL RICE ANDREWS ET AL., GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION (2003) (describing Thomas Goode Jones' ethics code in Alabama).

22. DOS PASSOS, *supra* note 18, at 63-67.

23. *Id.*

24. *See id.* at 64. Also, like earlier oaths, the American Bar Association's Constitution references a need "to uphold and defend the Constitution of the United States" as a purpose of the Association. *See* Loyd Wright, President, Am. Bar. Ass'n, Annual Address: Milestones and Concepts of the Lawyer-Citizen, *in* 80 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 366 (1955).

service and deserve well of his country . . . ."[25] American lawyers are especially qualified to serve this vital function. Their legal training offers a special opportunity to be able to understand our democracy[26]—a system of laws—and to work towards that democracy's improvement.

At an even more basic level, knowing the intricacies of democracy is part of a U.S. lawyer's fundamental responsibility to be competent. It is no surprise that one of the first substantive dictates in the American Bar Association's *Model Rules of Professional Conduct* requires: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[27] It would be hard to imagine a lawyer adequately fulfilling this responsibility without knowledge of the institutions of our legal system that constitute such a critical portion of our democracy. The required knowledge is not only that of the relevant written laws defining those institutions, but also includes an understanding of the principles and values underlying them. As Judge Sam Bratton of the United States Court of Appeals for the Tenth Circuit once observed, "constitutional and statutory provisions contribute to our form of democracy, yet democracy itself does not find its perpetuating source in them. It is enshrined in the hearts of men who cherish liberty and human dignity."[28]

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25. ORESTES BROWNSON, THE AMERICAN REPUBLIC: ITS CONSTITUTION, TENDENCIES, AND DESTINY 33-34 (Americao D. Lapati ed., 1972). Louis Dembitz Brandeis reinforces this notion in his emphasis on the need for education. *See* Frank L. Weil, *Louis D. Brandeis: Perfectionist*, *in* THE BRANDEIS READER 6 (Ervin H. Pollack ed., 1956) ("Democratic ideals cannot be attained by the mentally undeveloped . . . . In a government where every one is part sovereign, every one should be competent, if not to govern at least to understand the problems of government; and to this end education is essential."). Not surprisingly, Brandeis' vision placed significance on legal education in the expression of American democracy. For instance, he provided substantial support to the general library and law school at the University of Louisville in his birthplace city, believing "that to become great 'a university must express the people whom it serves, and must express the people and the community at its best.'" *See Resolutions*, *in* PROCEEDINGS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES AND MEETING OF THE COURT IN MEMORY OF ASSOCIATE JUSTICE LOUIS D. BRANDEIS 11 (1942) [hereinafter SUPREME COURT BAR PROCEEDINGS]. This commitment to education seems particularly appropriate for one with a unique ability to teach through his own works. *See* Charles E. Hughes, *Mr. Justice Brandeis*, *in* MR. JUSTICE BRANDEIS 4 (Felix Frankfurter ed., 1932) ("[I]t may be said that Mr. Justice Brandeis writes for students, both for those who are beginning and for those who are mature. He seeks to make his account of his researches a guide to every traveler over the same road.").

26. In addressing the training of lawyers for government service at a meeting of the Association of American Law Schools, Federal Security Agency General Counsel Jack B. Tate insightfully observed to applause:

> Law in the final analysis is government. In America, Government is the people. Alexander Pope once said, "The proper study of mankind is man." The proper study of law, too, is the study of man. A true government of law then is bound to be a government of men–men trained in the law as a living, moving science of public service.

HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING 63 (1941).

27. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) [hereinafter MODEL RULES]; *see* 1996 ABA REPORT, *supra* note 20, at 6 (describing "learned knowledge" along with "thoroughness of preparation" as "essential characteristics of the professional lawyer").

28. Sam G. Bratton, *Our Country Today*, *in* 4 ALA. LAW. 66, 68 (1943).

Separate from this responsibility to understand our democracy is the need to support it.[29] Mere knowledge is insufficient. The conception of a lawyer as a public servant—one with a responsibility to act for, and not only to recognize, the public good—necessarily follows from the fact that our democracy is a system of laws. After directing one of the great, comprehensive surveys of the legal profession, Reginald Heber Smith explained, "[u]nder a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and an independent bar. The legal profession is a public profession. Lawyers are public servants."[30]

Smith is not a solitary supporter of the conceptualization of the lawyer as public servant.[31] That role is augmented by duties to others besides the state, including a lawyer's clients. At times, duties to different parties may appear to conflict. But because ours is a democracy of laws placing the lawyer in a position of special importance, such conflicts should be resolved with the duty to the state remaining paramount.[32] Of course, the special public role and influence of

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29. Lawyers as citizens cannot divorce themselves easily from their polities. *See* DOS PASSOS, *supra* note 18, at 88-89 ("[W]hen a person is born into the world, he *eo instanti*, becomes a subject of some government, without any choice or consent of his own at all. He may afterwards expatriate himself, and transfer his allegiance to another State, but he can never enjoy natural or absolute liberty—he can never divest himself entirely of civic homage . . . .").

30. ALBERT P. BLAUSTEIN ET AL., THE AMERICAN LAWYER, at vi (1954).

31. Smith himself noted that Roscoe Pound, for instance, found such service essential to the nature of the legal profession:

> Let me repeat what we mean by the term 'profession.' When we speak about the oldest recognized profession, we mean an organized calling which men pursue. It is a public service, as I have said, no less a public service because they make a livelihood thereby. Here from the professional standpoint, there are three essential ideas: organization, learning, and the spirit of public service.

Reginald Heber Smith, *Lawyers as Public-Spirited Citizens*, *in* AM. LAW STUDENT ASS'N, LAWYERS' PROBLEMS OF CONSCIENCE 36 (1953) [hereinafter LAWYERS' PROBLEMS OF CONSCIENCE]; *see* William E. Borah, *The Lawyer and the Public*, *in* 41 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 405 (1916) (describing lawyers as public servants); Albert Lepawsky, *The University and the Public Service*, 2 J. LEGAL EDUC. 253, 264 (1950) (noting long-time linkage of legal profession and public service).

32. Dos Passos describes a "threefold duty" of lawyers "to the State, as an officer and citizen; to the court, as an officer and adviser; and to his client, as a fiduciary." DOS PASSOS, *supra* note 18, at 126-28. Although the lawyer may act freely when genuinely doubting the law or facts,

> If a conflict arise between his duty to the Government and his Client, in which the position of the State in its whole corporate capacity is clear (not a mere question of law, applicable to both, or a question of the rights of the citizens, which is in fact the interest of the State itself), he must decide in favor of the former, for the interest of that client is subordinate to the interests of all the other citizens—constituting the State—who are interested in maintaining the integrity of the judicial system.

*Id.* at 127-28; *see* Woodrow Wilson, Annual Address: The Lawyer and the Community, *in* 35 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION. 419, 421 (1910) ("[Lawyers'] duty is a much larger thing than the mere advice of private clients."). Clearly, vigorous advocacy of client interests is significant, and ultimately is a function of upholding the principles of our democratic system. What Dos Passos seems to identify is that there is, however, a limit to such advocacy—a prohibition of assisting the violation of law as part of such advocacy. This is a time-honored notion expressed in the ABA's *Model Rules of Professional Conduct* as well. *See* MODEL

attorneys on U.S. democracy is not without its own hazards or critics.[33] But concerns about attorneys unduly exercising their influence reinforce the need for them to feel obligated towards the protection of a greater public good.

Notwithstanding this need, some might further attack a professional responsibility to support democracy as simply too vague. After all, democracy itself defies easy definition,[34] further complicating a requirement to understand and support its principles and institutions. In other words, one might question if there are even real democratic *truths* for lawyers to support.[35] But while they may not be clear[36] and we may not all agree to the details of their contents, to vary a phrase from popular culture, "the truths are out there." Julius Stone reinforces this point in his report on a 1950s conference on educating lawyers about their "public responsibilities." Stone identified different approaches by scholars from Ohio State University, Harvard, Columbia University, and St. John's University to articulating their views on American values. Despite differences, Stone indicated common acceptance of the existence of "basic values of American society," and further pointed to one attendee's observation that "the participants sensed

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RULES R. 1.16(a)(1) (requiring that a lawyer not represent a client if "the representation will result in a violation of the *Rules of Professional Conduct* or other law"). Even those associated with the most zealous advocacy of client interests seemingly concede this point, at least implicitly. Take for instance Monroe Freedman, who powerfully argues why such advocacy is critical to our particular legal system. To help illustrate his point, in *Lawyers' Ethics in an Adversary System*, he rebuffs criticism in the name of the public interest of former President Richard Nixon's counsel, James St. Clair. Freedman explains that "[t]he client's interests are not only paramount to those of the lawyer, but are superior to 'the law's' long-range interests," and labels as wrong one critic's assertion "that there is some 'concern for history and institutions' that a lawyer must take into account before advancing a claim on behalf of a client." MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 10-12 (1975). Yet in finding St. Clair had not gone too far in his advocacy under the Code of Professional Responsibility, Freedman constructs why by claiming that the lawyer, regardless of the likelihood of success, may make any "*lawful* argument." *See id.* (emphasis added).

33. *See, e.g.*, J. ALLEN SMITH, THE SPIRIT OF THE AMERICAN GOVERNMENT 301 (Cushing Strout ed., 1965) ("[T]he supremacy of lawyers as a class and through them of the various interests which they represent and from which they derive their support. This explains the fact so often commented on by foreign critics, that in this country lawyers exert a predominant influence in political matters."). *But cf.* STEPHEN BROOKS, AMERICA THROUGH FOREIGN EYES: CLASSICAL INTERPRETATIONS OF AMERICAN LIFE 51 (2002) (noting commentator James Bryce's view that ameliorating concerns about lawyer power is lawyers' tendency not to act in a coordinated fashion).

34. *See* Jean Baechler, *Individual, Group, and Democracy*, *in* DEMOCRATIC COMMUNITY 1, 22 (John W. Chapman & Ian Shapiro eds., 1993); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 1-3 (1956).

35. *See supra* text accompanying note 6 (discussing post-modernism).

36. Ambiguity in a statement of a professional responsibility can be beneficial. Others have advocated general ethics rules. *See, e.g.*, Russell G. Pearce, *Model Rule I.0: Lawyers Are Morally Accountable*, 70 FORDHAM L. REV. 1805 (2002) (suggesting creation of a professional rule of conduct generally requiring moral behavior). An overly detailed exposition of ethical responsibilities may provide a roadmap for the unethical to avoid fulfillment of such responsibilities. The recent push to require federal agencies to promulgate professional responsibility rules raises this possible danger. *See* Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003) (describing the Securities and Exchange Commission's promulgation of attorney conduct rules). Agencies used to providing guidance on activities permissible under regulations and prone to creating administrative safe harbors may effectively legitimize questionable activity that the unscrupulous otherwise might have avoided.

sufficient consensus on the minimal values to acknowledge their reality and meaning, even when they could not accept any particular formulation of them."[37] In our own time, by recognizing a responsibility to uphold America's democratic values and principles,[38] lawyers will be encouraged to discuss the exact nature of those truths and hopefully will work to further improve our democracy.

Such reform activities are critical given one principle of U.S. democracy that is clear: the need for government to be representative of and responsive to its citizenry. In this regard, U.S. democracy did not commence without flaws. Rights were denied to segments of the population, and their needs were not served.[39] U.S. democracy's ability to change became critical to the broader success over time of the nation. Although it may remain imperfect, our democracy can evolve to meet the needs of a changing citizenry. This is the hope behind Ralph Waldo Emerson's insight that "the State must follow, and not lead the character and progress of the citizen . . . ."[40]

Democracy's capacity to evolve famously drove the life work of Louis Dembitz Brandeis. This former Associate Justice of the U.S. Supreme Court, along with other progressives, felt it imperative that laws develop to reflect an ever changing society.[41] The requirement that democracy must adapt to the needs

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37. JULIUS STONE, LEGAL EDUCATION AND PUBLIC RESPONSIBILITY: REPORT AND ANALYSIS OF THE CONFERENCE ON THE EDUCATION OF LAWYERS FOR THEIR PUBLIC RESPONSIBILITIES 36-37 (1959).

38. *See* A. Lawrence Lowell, *The Responsibilities of American Lawyers*, 1 HARV. L. REV. 232, 235 (1887) ("The duty of watching over and guarding these fundamental principles—these legal morals, if I may be allowed the term—of developing, explaining, and defending them, rests with the legal profession; and if this is true, it is surely difficult to overestimate the responsibility of lawyers in America."). Lawyers' significance garners Lowell's attention, especially in a common law-based democracy where legislators are not alone responsible for the law. *See id.* at 232-35; *cf.* F.A. HAYEK, RULES AND ORDER 65-67 (1973) (indicating more generally the role of lawyers in political evolution in societies where law making extends beyond legislation).

39. *See infra* Part II.B.3.

40. RALPH WALDO EMERSON, *Politics*, *in* ESSAYS AND ENGLISH TRAITS (1844), *available at* http://www.bartleby.com/5/115.html. Of course, as the particular institutions of democracy evolve, it may be useful to maintain the principles from the past that remain worthy. *See* Arthur Larson, *The Lawyer as Conservative*, 40 CORNELL L.Q. 183, 193 (1955) ("[I]t is no time to cling blindly to past mechanisms. But it is more than ever a time to cling to past ideals.").

41. *See* Weil, *supra* note 25, at 5; *see also* Felix Frankfurter, *The Law and the Law Schools*, 1 A.B.A. J. 532, 533-34 (1915) (remarking that societal change fuels change in law); I. Maurice Wormser, *Sociology and the Law*, 1 N.Y.U. L. Rev. 8, 10 (1924) (Fordham law professor rejecting any "tyranny of precedent" and arguing "law is largely made by life, and must meet the fluctuating and varying conditions of life as born anew with each generation in the social consciousness of the people"); *id.* at 16-17 (citing speech by Woodrow Wilson to the American Political Science Association explaining "[t]he life of society is a struggle for law"). Similarly suggesting that a democracy's laws must change to incorporate new realities and the needs of the citizenry, Yale's Arthur Corbin explained,

> "The law as it is" is never the law that was or the law that will be. As the great army of life moves on, with its greater numbers and increasing complexity, it develops new mores, new opinions as to what makes for the survival of individuals and the general welfare, new forms of business activity, and new modes of thought.

*See* Arthur L. Corbin, Annual Address of the President: Democracy and Education for the Bar, *in* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING 149-50

and aspirations of a diverse citizenry provided only part of a two-way street. Interestingly, Brandeis, ever the champion of individual rights, also stressed the importance of individual responsibility to the polity;[42] he recognized "that Democracy 'demands continuous sacrifice by the individual and more exigent obedience to the moral law than any other form of government.'"[43] Brandeis' view of democracy is broader than that of many.[44] For instance, democracy includes not only the activities of national legislators and the like, but also that of individual citizens exercising civic responsibilities in their localities.[45] Such a broad conceptualization of an evolving U.S. democracy is particularly useful when exploring a lawyer's professional responsibility to that democracy. This notion of democracy drives home the magnitude and importance of the task for the legal profession: there is more for lawyers to understand, but also more opportunities for lawyers to support democracy in their professional and personal activities. By availing themselves of such opportunities, lawyers can hasten the betterment of our democracy. Work in the public interest becomes the lifeblood of a dynamic democracy.[46]

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(1921). In doing so, Corbin also indicates how one might understand such changes, finding "[a] knowledge of the law . . . requires more than a reading of any set of rules constructed by any law writer, however great. It requires some knowledge of the history of man, his economic needs and his biological evolution." *Id.* at 150.

42. *See* Max Lerner, *The Social Thought of Mr. Justice Brandeis*, *in* MR. JUSTICE BRANDEIS, *supra* note 25, at 11-12, 30-31.

43. Remarks of Attorney General Biddle, *in* SUPREME COURT BAR PROCEEDINGS, *supra* note 25, at 46. Brandeis articulated in *Whitney v. California*: "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.*

44. *See* Lerner, *supra* note 42, at 39 ("Neither is his conception of democracy the traditional one—a principle set apart in government; it is part of every activity in the state, just as freedom is part of every activity.").

45. In a representative democracy such as ours, citizens must not only identify areas for improvement, but act to effect change. Idaho Senator William Borah recognized this in addressing the American Bar Association:

> If evil exists within the community, if injustice or oppression somewhere prevails, the officers are only partially responsible. . . . We must, above all things, perform in full the duties of citizenship before we condemn for inefficiency the institutions under which we live. The call is less for a change in institutions than for a change as to the vigilance and civic activities of individual citizenship.

Borah, *supra* note 31, at 395-96. And, amongst their fellow citizens, lawyers have a special "obligation" to act, for "[a]lmost every conceivable question, almost every matter of moment to the citizen at this time involves in some way a knowledge of law and the training which enables us to adjust well-known legal principles to our new industrial and social conditions." *Id.* at 396-97; *see also* John G. Park, *The Public Service of the Future Lawyer*, 8 MICH. L. REV. 122, 130 (1909) ("The state educates the lawyer in order that the lawyer may serve the state. The lawyer who refuses to consider the condition of his country, the perils without and the dangers within, who is unwilling to serve with thought, speech and act, deserves neither citizenship nor professional rank.").

46. Some strong advocates of public interest work may contest the characterization of this work as in service of a democratic duty. Although they may describe such work to students and others as a "public calling," they may view their message as the need to do good for its own sake and out of a sense of personal morality. I do not seek to minimize the idea that public service work should be engaged in for moral reasons, but the additional characterization of this work as a political responsibility is useful in its own right. It potentially provides ground for a broader segment of the population, others not so driven by personal morality, to realize the importance of such work. Accordingly, this conceptualization of public interest work should complement, not diminish, the other.

## B. THE DEMOCRACY DUTY AND REPUTATION OF LAWYERS

Further evaluation of the nature of our American democracy and the need to reaffirm lawyer responsibilities to that democracy are particularly poignant today. Seemingly every generation of American lawyers has come under public scrutiny. That naturally results from the important role of lawyers in America's democracy. As Harvard Law School Professor Livingston Hall explained in introducing a series of lectures on lawyers' problems of conscience:

> Public interest in the role of lawyers has always been considerable, because of the controlling part law plays in a modern democratic society. The three-fold loyalty of the lawyer to his client, to the court or administrative agency before which he practices, and to society at large, presents important problems of intrinsic interest to everyone.[47]

Throughout American history, such attention has bred criticism.[48] Distrust of lawyers is hardly unique to one time, or even one nation.[49] One need only glance at the unflattering depictions of lawyers by the nineteenth century French artist Honore Daumier to recognize society's suspicion of attorneys.[50]

Such distrust lingers today. It fuels attempts to replace traditional self-regulation of the bar with additional government regulation of lawyers. A recent example of this is the call by corporate reform legislation, the Sarbanes-Oxley Act, for the United States Securities and Exchange Commission ("SEC") to promulgate rules of conduct for attorneys. Presumably underlying such legislation is a belief that attorneys contributed to the recent wave of corporate scandals, through apathy if not active participation. However, as I have previously explained with Fordham University Professor Jill Fisch, such government regulation may not be carefully conceived and possesses its own hazards.[51] Yet if lawyers are unwilling to recommit themselves to the regulation of their profession and their responsibilities to society, one might expect additional regulations of this sort.

What increases the probability of such a result is that criticism of the

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47. LAWYERS' PROBLEMS OF CONSCIENCE *supra* note 31, at v.

48. *See, e.g.*, MAX LERNER, AMERICA AS A CIVILIZATION 437-38 (1957); *see also* HAROLD J. LASKI, THE AMERICAN DEMOCRACY 575-82 (1948).

49. *See, e.g.*, Charles P. James, *Lawyers and Their Traits*, W. L.J. 49, 49-50 (1851) ("[T]he lawyer has been pre-eminently a subject of public criticism.").

50. *See* Brandeis University: Digital Collections, http://dembitz.mainlib.brandeis.edu:8882 (follow "Daumier" hyperlink; then select "search" tab and search for "lawyer") (last visited Nov. 16, 2005) (showing Daumier works on lawyers in addition to other subjects); *NewsHour with Jim Lehrer: Honore Daumier Exhibit* (PBS television broadcast Apr. 25, 2000), *transcript available at* http://www.pbs.org/newshour/bb/entertainment/jan-june00/daumier_4-25.html (last visited Nov. 13, 2005) (explaining Daumier "saved his bitterest barbs for lawyers").

51. *See* Fisch & Rosen, *supra* note 36.

profession only has grown in recent times.[52] A perception is emerging that law schools denude students of their public ideals and produce a cadre of self-interested attorneys, who sign a compact to forsake the public interest in return for private sector jobs upon graduation.[53] In many ways, this assessment is unfair. As already noted, today's law students retain a strong commitment to democracy even as they proceed through law school. And the reason that many go into private practice is that society requires and demands private practitioners' legal services. Because many will continue to go into private practice, rather than bemoaning this fact,[54] discussion should emphasize insuring that even in private practice a lawyer's democracy duty is satisfied.

Some lawyers' response to the naysayers might be to ignore them. But such a course would be unwise.[55] Lawyers' reputation matters.[56] Prior to becoming President, a young John Adams recognized this, writing that "[r]eputation . . . ought to be the perpetual subject of my thoughts, and aim of my behavior."[57] The reputation that Adams speaks of should not be construed as idle vainglory. Rather, it should reflect acts worthy of the esteem of others because those acts further the aims of society.

American lawyers' rededication to meeting their responsibility to democracy might help to alleviate fellow citizens' skepticism of the legal profession. All lawyers should safeguard the reputation of the profession by adhering to their democracy duty. To do so is an act of citizenship. Ultimately, American lawyers are American citizens. It is not easy to be a citizen in a democracy.[58] One of the paradoxes of democracy is that if the polity's actions are based in consent, all

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52. *See, e.g.*, SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994).

53. *See* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 5-11 (1992) ("While a surprising number of students enter law school with an interest in doing 'meaningful' and socially beneficial, humanistic work, few take public interest forms of legal practice upon graduation.").

54. Oliver Wendell Holmes offered a more attractive alternative to the rote belittlement of private practice:

> He refused to resign himself to the view that law is nothing more than a business, with the drudgery of practice alleviated only by the possibility of financial reward. But just as strenuously he rejected the notion that the practice of law is the detached pursuit of the good or of social justice; it did not lead to 'flowery paths and beds of roses . . . where brilliant results attend your work. Holmes avoided both of these common characterizations of the practice of law. "I confess," he said, "that altruistic and cynically selfish talk seem to me about equally unreal."

Thomas A. Balmer, *Holmes on Law as a Business and a Profession*, 42 J. LEGAL EDUC. 591, 592 (1992).

55. *See* Harry T. Edwards, *A Lawyer's Duty To Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1158-59 (1990) (explaining practical benefits of lawyers' recommitment to public spiritedness with reference to dangers of inaction).

56. ELTING E. MORISON, TURMOIL AND TRADITION 63 (1960) (noting James Bryce, observer of the American polity, "saw signs of decline in the standards of the lawyer and in his social position as well").

57. *See* DAVID MCCULLOUGH, JOHN ADAMS 46 (2001); *see also infra* notes 68-69 and accompanying text.

58. Elements of democracy, such as its participatory element, render it a difficult political system to install and to sustain. *See* CARL COHEN, DEMOCRACY 286-88 (1971) (having recognized democracy's difficult prospects in some corners of the globe, nonetheless advocating that we give our "best efforts to see things as they are and, so far as is within our power, make them better").

citizens might be held responsible for society's actions, including its miscues.[59] In addressing this problem, New York University's Edmund Cahn properly observed that the way to avoid such responsibility was by doing all in one's power as a citizen to make sure things went right—to act as "watchmen" of democracy.[60] Lawyers have a greater capability than many others in our democratic system of laws to be America's watchmen. The hours they invest in such a venture may be long, but are part of fulfilling their natural calling. With this knowledge of why there should be a professional responsibility to understand and support democracy, it is useful to explore how that responsibility developed over time in the United States. Such exploration will better prepare legal educators to support efforts to fulfill this responsibility.

## II. RECOGNITION BY LAWYERS OF THEIR DEMOCRACY DUTY

Discussion of the need for law schools to educate students about democratic institutions and to encourage good citizenship necessarily starts with a better understanding of the traditional link between the lawyer and democracy. Lawyers' self-recognized professional obligation to support democracy dates to the founding of our Republic. Attorneys played an especially significant role in the American Revolution and in formulating the contours of the government that followed. In addition to serving as midwife during the birth of the original democratic institutions of the United States, lawyers continued to serve a critical role as that democracy evolved over time. That role is inextricably intertwined with the development of the modern bar and its views on professional responsibility. Today's lawyers are duty bound to continue to foster the democracy that their predecessors helped to create and to develop over the life of our nation.

### A. THE HISTORIC ROLE OF ATTORNEYS IN THE NATION'S FOUNDING AND EARLY DEVELOPMENT

Lawyers largely became significant in the American colonies, especially in their relation to government, only shortly before the Revolution.[61] This may have resulted from the fact that English lawyers, their counterparts in the motherland, "had long been unpopular as a class, because they were looked upon as instruments for enforcing the subtleties and 'iniquities' of that body of law, known as common law, that had evolved from judicial decisions."[62] Earlier

59. *See* EDMOND CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 14-15 (1961).

60. *See id.* at 94-98, 110-11.

61. ESTHER LUCILE BROWN, LAWYERS AND THE PROMOTION OF JUSTICE 11 (1938). ("Lawyers were not numerous or important in the American colonies until after the beginning of the eighteenth century, and not until shortly before the Revolutionary War did they begin to play an important role in governmental affairs.").

62. *Id.*

animosity towards lawyers was illustrated by the comments of a promoter of William Penn's commonwealth, who in noting the lack of doctors and lawyers in the commonwealth, explained "there was no need either 'of the pestiferous drugs of the one or the tiresome loquacity of the other.'"[63]

Notwithstanding any prior public antagonism, lawyers would play a crucial role in the initial formation of our government, both in the Revolutionary years and in the formative years of the Republic.[64] Some of these lawyers are well known today. David McCullough's biography of the lawyer John Adams[65] transformed President Adams into a cultural icon for our own time.[66] But beyond augmenting the popularity of an underappreciated founding father, the book reveals how Adams' study and practice of the law molded the man who shaped our democracy. As a new lawyer, notwithstanding reading aloud from Cicero's *Orations* to fortify himself for his work, Adams lost his first case involving one man's horses breaking into a neighbor's enclosure and trampling crops.[67] The loss was juxtaposed with a family disagreement between his parents that left his mother in a rage.[68] Combined, the events convinced Adams that "[h]e must observe more closely the effects of reason and rage, just as he must never again undertake a case without command of the details. . . . Henceforth, he vowed, he would bend his whole soul to the law. He would let nothing distract him."[69]

Adams' dedication to the law was admirable,[70] and his tenacious devotion to

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63. *Id.* at 12; *see also* LASKI, *supra* note 48, at 571 (noting poor regard for early colonial lawyers); David J. Brewer, *A Better Education the Great Need of the Profession*, 5 Yale L.J. 1, 1-2 (1895) (indicating disregard of New England lawyers).

64. Judge Sam G. Bratton explained to the Texas Bar in 1942:

> The Constitutions of the thirteen colonies were largely the work of American lawyers. Thirty of the fifty-two members of the Philadelphia Conventions were members of the legal profession. . . . More than any other profession, lawyers have occupied the White House, held portfolios in the cabinet, filled key positions in the diplomatic service, served in international conferences of various kinds, sat in both branches of Congress and in state legislative chambers, written statutes, wisely construed and interpreted laws in their relation to personal liberty and property rights, and otherwise aided in the solution of complicated problems having profound effect upon the individual and society as a whole.

Bratton, *supra* note 28, at 4.

65. *See* MCCULLOUGH, *supra* note 57.

66. *See* Suzanne Mantell, *This Is Your Life: Would-be Boswells Succeed with New Heroes—and New Perpectives*, PUBLISHER'S WEEKLY, May 31, 2004, at 37 ("And speaking of surprises, who could have predicted that Simon & Schuster's John Adams would become a national bestseller, enjoying a 65-week run on [Publisher Weekly's] lists?").

67. MCCULLOUGH, *supra* note 57, at 45-46.

68. *Id.*

69. *Id.*

70. The study of law was not easy when Adams engaged in it, notwithstanding the relatively low social position of its practitioners. *See* CATHERINE DRINKER BOWEN, JOHN ADAMS AND THE AMERICAN REVOLUTION 145-46, 256 n* (1950). Yet in choosing law over the ministry and accepting a term of study with James Putnam, a Worcester attorney, Adams wrote to a friend: "It will be hard work, but the more difficult and dangerous the enterprise, a higher crown of laurel is bestowed on the conqueror. . . . But the point is now determined, and I shall have the liberty to think for myself." MCCULLOUGH, *supra* note 57, at 42.

his vocation would be echoed in his commitment to the formation of a new nation. His law practice was noteworthy, at one point leaving him one of the busiest lawyers in Boston.[71] Nonetheless, he devoted substantial time to contemplating government, which would serve him well in his role as a Founding Father. Among his views was the belief that,

> Government is nothing more than the combined force of society, or the united power of the multitude, for the peace, order, safety, good and happiness of the people. . . .There is no king or queen bee distinguished from all others, by size or figure or beauty and variety of colors, in the human hive. No man has yet produced any revelation from heaven in his favor, any divine communication to govern his fellow men. Nature throws us all into the world equal and alike. . . .
>
> The preservation of liberty depends upon the intellectual and moral character of the people. As long as knowledge and virtue are diffused generally among the body of a nation, it is impossible they should be enslaved. . . .
>
> Ambition is one of the more ungovernable passions of the human heart. The love of power is insatiable and uncontrollable. . . .
>
> There is danger from all men. The only maxim of a free government ought to be to trust no man living with power to endanger the public liberty.[72]

Thus, from the Massachusetts lawyer emerges a skepticism of concentration of power in government in the hands of the few that so characterizes American democracy. And, perhaps unlike other revolutionaries such as Thomas Paine who Adams felt was "better at tearing down than building," ever the lawyer, Adams focused on "the structure of government [as] a subject of passionate interest that raised fundamental questions about the realities of human nature, political power, and the good society."[73]

Adams's correspondence with contemporaries, who themselves would further define the governments of their own states in addition to that of the nation, would become classic essays such as *Thoughts on Government*.[74] Adams rejoiced in the opportunity of his generation to select and craft a form of government. As his biographer McCullough observed, Adams looked "beyond independence, beyond the outcome of the war, to what would be established once independence and victory were achieved."[75] Adams foresaw the "great difficulties and risks" of independence as well as the opportunities, and determined "that all good

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71. *See* MCCULLOUGH, *supra* note 57, at 63. Notably, Adams was willing to sacrifice personal popularity to vindicate his convictions in the practice of law. For instance, in 1770, he defended British soldiers "charged with murder for having fired upon a so-called 'Boston patriot mob,'" claiming, "Counsel ought to be the last thing for which an accused person should want in a free country." First Annual Address Before the Stanford Law Association, *in* CHARLES S. WHEELER, THE ORIGIN AND DEVELOPMENT OF THE LEGAL PROFESSION 31-32 (1903).

72. MCCULLOUGH, *supra* note 57, at 69-70.

73. *Id.* at 101.

74. *Id.*

75. *Id.* at 102.

government was republican, and the 'true idea' of a republic was 'an empire of laws and not of men . . . .'"[76] Lawyers, such as Adams, would be critical exemplars for the U.S. bar that emerged after the Revolution.[77]

Of course, others would be critical to the nation's development. Although Adams is readily identified as a lawyer, other well-known figures from the nation's early days were lawyers as well. Alexander Hamilton is an example. Hamilton, a native of Nevis in the Caribbean,[78] originally showed interest in becoming a doctor.[79] Fate propelled his life in a different direction. History may recall him best for military skills exhibited in the Revolution[80] or for his tenure as Secretary of the Treasury.[81] Yet Hamilton, like Adams, also was one of our nation's great lawyers.

After the Revolution, Hamilton declined a nomination to the New York Assembly, and the concomitant opportunity to directly participate in government, in favor of private legal practice.[82] That practice in New York was distinguished.[83] Hamilton was concerned about the reputation of legal practice as a true profession.[84] And while he decided to forego legislative service, his practice reflected concern with the principles on which the new government would rest. For instance, he represented former loyalists to the British crown, thinking "America's character would be defined by how it treated its vanquished enemies . . . ."[85] When considered carefully, Hamilton's eloquently expressed vision for the new Republic, expressed in *The Federalist* and elsewhere, was a very lawyerly one—the proposal of a comprehensive system of rules for a new polity. Hamilton's biographer Ron Chernow clearly evoked the significance of this vision, by explaining, "[i]f [Thomas] Jefferson provided the essential poetry

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76. *Id.* Interestingly, an early use of the famed words by Adams, now so closely associated by some with the nature of U.S. democracy, was to contemplate the British constitution as more like that of a republic than an empire. *See* GERALD STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 57 (1970).

77. *See* Wheeler, *supra* note 71, at 48-49 ("[I]t requires something more than deep learning to make the ideal lawyer. He must have head and training and character and breadth, and he must have the American lawyer's heritage—the heart of John Adams. John Adams's conception of his profession and its duties is to-day the spirit of the American bar!").

78. RON CHERNOW, ALEXANDER HAMILTON 17 (2004).

79. *Id.* at 51-52. Interestingly, this also was a potential interest for John Adams. *See* MCCULLOUGH, *supra* note 57, at 38-39.

80. *See* CHERNOW, *supra* note 78, at 62-186.

81. *See id.* at 286-309.

82. *Id.* at 186.

83. *See id.* at 187-202; *see also* Cortlandt Parker, Annual Address, *in* 3 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION. 158 (1880) [hereinafter Parker Address] (characterizing Hamilton as "the acknowledged leader of the New York bar").

84. *See* CHERNOW, *supra* note 78, at 189 ("[Hamilton] flatly refused the business of a certain Mr. Gouverneur after learning he had made disparaging remarks about the 'attorneylike' way somebody had padded his bill. . . . Hamilton lectured Governeur that his behavior 'cannot be pleasing to any man in the profession and [that it] must oblige anyone that has proper delicacy to decline the business of a person who professedly entertains such an idea . . . .'").

85. *Id.* at 195.

of American political discourse, Hamilton established the prose of American statecraft. No other founder articulated such a clear and prescient vision of America's future political, military, and economic strength or crafted such ingenious mechanisms to bind the nation together."[86]

And then there were the lawyers who contributed greatly during our nation's formative years, but who are perhaps more foreign to today's students of American history. Take for instance, William Paterson of New Jersey, a participant at the Constitutional Convention, described by Cortlandt Parker in a nineteenth century speech to the American Bar Association.[87] Parker characterized Paterson as "a studious, plodding lawyer, and only incidentally a statesman," but one whose concerns about state sovereignty, in particular that of smaller states, nonetheless were reflected significantly in the final U.S. Constitution.[88] In his words to the ABA, Parker rued society's proclivity to forget "distinguished" lawyers such as Paterson—an individual who, in addition to working on the Constitution, served terms as a U.S. senator and governor, and ultimately sat on the U.S. Supreme Court, where he had the opportunity to breathe life into the document he helped to create.[89] Whether or not forgotten by many, Paterson and other lesser known lawyers' roles in our democracy's formation cannot be ignored.

Lawyers in the nation's early days not only provided a vision for our democracy's blueprint and institutions, but implemented this vision over time. Critical in this regard was U.S. Supreme Court Chief Justice John Marshall, another Revolutionary soldier and distinguished member of the bar.[90] It is no surprise that E. J. Phelps in one of the earliest Annual Addresses to the ABA chose to stress the special role of Marshall to the development of the United States beyond simple judicial acumen:

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86. *Id.* at 4.

87. *See* Parker Address, *supra* note 83, at 149-66. Parker himself represents a fascinating example of the "citizen lawyer." In beginning his speech, he noted his need to engage in the ensuing discussion of lawyer statesmen—lawyers whose role was critical to the development of our democracy—notwithstanding his work schedule. *See id.* at 149. Indeed, this prominent Newark attorney mixed a practice that included representation of clients before the U.S. Supreme Court with active involvement in Republican and Whig politics as well as bar activities that included assistance with the organization of the U.S. Supreme Court's Centennial Celebration, further preserving the history of a key democratic institution. *See* New Jersey Historical Society Archives, Manuscript Group 18, Parker Family, Summary, http://www.jerseyhistory.org/findingaid.php?aid=0018 (last visited Nov. 13, 2005); CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES (G. P. Putnam's Sons 1942) (describing Centennial Celebration planning).

88. *See* Parker Address, *supra* note 83, at 160-62.

89. *See id.* at 162-64. Interestingly, Parker's speech reflects that the current tendency to emphasize what may be characterized as the malaise of the profession is not new. His tonic against "this demoralizing tendency, [was] to elevate ourselves and elevate each other into the atmosphere, moral and intellectual, of the great exemplars of the profession; and for that purpose [sic], to contemplate and remember their virtues, and hold them up for admiration and emulation." *Id.* at 165.

90. E. J. Phelps, Annual Address, *in* 2 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 174 (1879).

> [W]e are indebted to Chief Justice Marshall for the American constitution. I do not mean the authorship of it, or the adoption of it—although in that he had a considerable share—but for that practical construction, that wise and far seeing administration, which raised it from a doubtful experiment, adopted with great hesitation, and likely to be readily abandoned if its practical working had not been successful, raised it I say, from a doubtful experiment, to a harmonious, a permanent, and a beneficial system of government, sustained by the judgment, and established in the affection of the people. He was not the commentator upon American constitutional law; he was not the expounder of it; he was the author, the creator of it.[91]

Phelps's message is that early American democracy, the Constitution, and lawyers faced a rough road as no precedents provided easy answers for interpreting this early Constitution.[92] Consensus on the Constitution when drafted was not absolute, and democratic principles stated would not automatically be observed.

The presence of Marshall and these other lawyers was important precisely because the form of democracy chosen by America was not preordained. Its most salient characteristic, as identified by Adams,[93] is the rule of law, making it unremarkable that lawyers—men dedicated to law—so significantly shaped its final form. This in no way is meant to diminish the contribution to the formation of our democracy of others, such as George Washington, who did not practice law.[94] But notably, notwithstanding occasional frustrations related to legal issues,[95] the fealty of such men to law is evidenced by the decision to surround

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91. *Id.* at 176.

92. *See id.* at 177. As G. Edward White has suggested, the Marshall Court, as reflective of American society in the early nineteenth century, also struggled with how to "preserve the institutions and principles of the Revolutionary experience in the face of an altered cultural landscape." *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE: 1815-1835, at 9-10 (Oxford Univ. Press, abr. ed. 1991).

93. *See supra* note 76 and accompanying text.

94. Lawyers have long acknowledged the contributions of such individuals as they educated themselves about American democracy. *See* ELIZABETH GASPAR BROWN, LEGAL EDUCATION AT MICHIGAN 1859-1959, at 865 (1959) (noting University of Michigan law students requested that an 1875 discourse be delivered to them on "Washington: His Character and the Lessons to Be Drawn From It"). It is interesting to note that although Washington himself was not a lawyer, he likely was named for one. His mother, who would focus considerable attention on the young George after his father Augustine's death, was an orphan taken in by a lawyer named George Eskridge. *See* JAMES THOMAS FLEXNER, WASHINGTON: THE INDISPENSABLE MAN 5 (1974); George Washington, http://www.geocities.com/presfacts/washington.html (last visited Nov. 13, 2005); J. PAUL HUDSON, NAT'L PARKS SERVS., HISTORICAL HANDBOOK SERIES NO. 26: GEORGE WASHINGTON BIRTHPLACE (1956), http://www.cr.nps.gov/history/online_books/hh/26/index.htm (follow "contents" hyperlink; then follow "e. Augustine Washington" hyperlink).

95. Frequently facing complex international and constitutional legal issues and with only a part-time counselor and attorney general on retainer, Washington, for instance, apparently grumbled that his personal dearth of legal expertise rendered "the presidency particularly irksome." *See* 2 HARRISON CLARK, ALL CLOUDLESS GLORY: THE LIFE OF GEORGE WASHINGTON 355 (1996). However, his skill at finding excellent lawyers for assistance was illustrated by a personal title dispute he became a party to for which he asked John Marshall and Bushrod Washington, both future Supreme Court Justices, to be on hand to provide any necessary assistance. *See id.*

themselves with lawyers to help run the new government.[96]

Moreover, those in the legal profession who would be critical to our nation's development count among their numbers far more than Adams, Hamilton, Paterson, and Marshall, and others have chronicled the importance of these lawyers in the early days of the Republic.[97] The purpose of noting such individuals here is not the pursuit of personal idolatry. Like all men, they too were imperfect. Their vision of America represented the beginning of a journey of our democracy, not a conclusion.[98] Rather, these stories are intended to illustrate first, that the profession's role in creating democracy resulted in a responsibility to preserve the product of its creation. As Dos Passos offered: "From the commencement of the government, the lawyers have absolutely dominated in the Federal and State Legislatures. . . . [T]hey were the chief authors of the Constitution of the United States, and of all the State Constitutions. They are the natural and necessary interpreters of it; the *guardians* of it."[99] Of further significance is that early lawyers exhibited their devotion to the American form of government while, at times, engaging actively in private practice. Thus, their experience proves noteworthy not only to today's attorneys who devote their full time to public practice of the law but to the vast majority of the bar engaged in private practice. For no matter what the nature of their practice, lawyers must recognize that they operate in and are beholden to a system of laws, not men.

The accomplishments and contributions of these lawyers place into context the famous observations of Frenchman Alexis De Tocqueville about early America:

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96. *See supra* note 64; Frank Gaylord Cook, *The Lawyer in National Politics*, 63 ATLANTIC MONTHLY 686, 689 (1889) (recalling presence of lawyers in Washington's cabinet). During the time of the Articles of Confederation, foreigners, such as Louis Guillaume Otto, noted how most congressmen were either farmers or lawyers. *See* Letter from Louis Guillaume Otto to Comte de Vergennes (Feb. 10, 1786), *in* 3 THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION, 1780-1789, at 90, 91 (Mary A. Giunta ed., Nat'l Historical Pub'n and Records Comm'n 1996). Indeed, over the more than two centuries of our nation, over half of our Presidents have been lawyers. *See* Infoplease.com, Presidents' Occupations, http://print.infoplease.com/ipa/A0768854.html (last visited Nov. 13, 2005).

As members of what was "the most prestigious profession in the new nation," by the early 1800s, lawyers dealing with the minutiae of a new nation's administration, from bankruptcies to estate auction to road laying had "a degree of influence previously enjoyed only by religious leaders." *See* JOYCE APPLEBY, THOMAS JEFFERSON 100 (Arthur M. Schlesinger, Jr., ed., Times Books 2003). Their role became so great that "Presybterian Lyman Beecher complained that lawyers had displaced clergymen as interpreters of public events." *Id.*

97. *See, e.g.*, William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986) (exploring role of Thomas Jefferson and James Madison, in addition to Hamilton and Marshall, in the formative years of the United States).

98. Their vision of America was notably imperfect in its failure to be more broadly inclusive. *See infra* note 139 and accompanying text. Moreover, in their consideration of various forms of government, they did not necessarily view the flawed republican form of government chosen as indispensable. *See* DAHL, *supra* note 34, at 11 (noting Hamilton entertained the idea of constitutional monarchy).

99. DOS PASSOS, *supra* note 18, at 85 (emphasis added).

> When one visits Americans and when one studies their laws, one sees that the authority they have given to lawyers and the influence that they have allowed them to have in the government form the most powerful barrier today against the lapses of democracy. This effect seems to me to have a general cause that is useful to inquire about, for it can be reproduced elsewhere.[100]

It seems equally useful to continue an inquiry into acceptance by lawyers of a democracy duty by examining development of a more formalized bar in this nation and that bar's continuous acknowledgment of such a responsibility.

### B. THE DEVELOPMENT OF THE AMERICAN BAR AND ITS COMMITMENT AND CONTRIBUTION TO DEMOCRACY

After these early days of American democracy, later generations of lawyers continued the tradition of the profession's support for democratic institutions. Although some decry the time of Jacksonian democracy in the first half of the nineteenth century as a difficult one for lawyers,[101] lawyers would soon have a colleague, Abraham Lincoln, elected to the Presidency and laboring to keep together America's democracy through the darkest hours of the Civil War. Even after the war concluded, however, our political institutions remained on shaky ground, making it more important than ever to achieve a firm understanding of the nature of democracy and to support that form of government.[102] Fortunately, a more organized and professional bar emerged that had at its foundation the link between lawyers and our democracy. That link would only grow stronger as the bar continued to serve American democracy in the ensuing decades—not only supporting democratic institutions, but working to help them better serve a broader range of the citizenry.

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100. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 251 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., 2000). In building upon de Tocqueville's observations, another great observer of America, James Bryce, noted the role of American lawyers in limiting potential abuses by the majority in a democracy. *See* 2 JAMES BRYCE, THE AMERICAN COMMONWEALTH 1557-58 (Liberty Classics ed. 1995).

101. This was a time of less respect for formal education. Albert James Harno, Address: Evolution in Perspective of the American Bar (Apr. 26, 1957), *in* THE DEDICATION OF THE NEW BUILDING OF THE SCHOOL OF LAW WAKE FOREST COLLEGE 27 (1957) (emphasis added). The profession, in general, faced the problem that elitism conflicted with the tenor of the Jacksonian times. FRANK L. ELLSWORTH, LAW ON THE MIDWAY: THE FOUNDING OF THE UNIVERSITY OF CHICAGO LAW SCHOOL 1 (Univ. of Chicago 1977). While objectively this may have been a time for practice requirements that might be characterized as less than rigorous, even under these circumstances, the ties between American lawyers and democracy continued. See discussion of education system *infra* Part III. Interestingly, in antebellum America, even extreme calls for diminished entry requirements into the legal profession in the name of democracy apparently tended not to constitute a demand for wholesale elimination of the bar and legal profession. *See* ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 40-41 (Arno Press 1976) (1921).

102. *See* BROWNSON, *supra* note 25, at 33-34. Brownson's shifting views as a commentator on America can be troubling at times, *see id.* at 7-19, but on this point he seems accurate.

### 1. THE RISE OF THE BAR ASSOCIATIONS AND UNIFORM LAWS

As the nineteenth century progressed, leading attorneys sought to create a bar not merely of technicians who could draft a document or a pleading, but rather one comprised of true professionals. Accomplished in part through requirements for professional practice and the development of codes of conduct, the roots of this professionalization of the bar reach back even further into history.[103]

But many believe that the "modern organized bar" commenced with the creation in 1870 of the Association of the Bar of the City of New York ("ABCNY"), with city bars ultimately stimulating the formation of state bar associations.[104] The ABCNY's history began with a threat to the bar's reputation. Various unscrupulous lawyers populated New York City, taking advantage of the turbulent times after the Civil War.[105] Not surprisingly, other lawyers responded to this threat to the profession's standing by rededicating themselves to public service. Over 200 lawyers signed a declaration that led to the ABCNY's formation after the circulation of a letter addressing these post-war improprieties and proposing the new bar association to "sustain the profession in its proper position in the community, and thereby enable it . . . to promote the interests of the public . . . ."[106] Henry Nicoll further captured the purpose of the ABCNY by stating at the group's first organizational meeting that "'all that is intelligent, all that is honest, all that is honorable in this Profession' had to be gathered together

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103. *See* Harno, *supra* note 101, at 27 ("By 1770, there were evidences of a growing sense of professional solidarity and responsibility which found expression in the setting up of regulations bearing on the preparation for the practice. At least seventeen jurisdictions adopted regulations between 1767 and 1829. These developments evidenced an awakening sense of the profession's responsibility to the public—the dawning of the perception that not all men are qualified to practice; that the lawyer has to be a person of good character, and has to meet minimum standards of professional competency.").

104. WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890-1930, at 214 (1986); *see also* ERWIN N. GRISWOLD, LAW AND LAWYERS IN THE UNITED STATES: THE COMMON LAW UNDER STRESS 20 (1964) (noting that "[u]ntil 1870, there were only the barest beginnings of any effective organizations for lawyers in the United States"). Although the early membership of such associations was limited, rendering them less than fully representative of the profession as a whole, the bar association movement beginning in 1870 benefited from the commitment from prominent lawyers. *See* HOBSON, *supra* note 104, at 211. Before focusing on self-regulation issues that ultimately would become one of their major concerns, bars were about "establish[ing] a sense of professional community within the vaguely defined group of leading lawyers whom they considered their constituency." *Id.* at 226.

The significance of a sense of belonging to a larger profession should not be discounted. As Judge Harry Edwards eloquently explained over a decade ago in his plea against "indifference" to a "decline of the profession's public spiritedness," there exists an important "connection between our profession's moral identity and our own individual moral identities" because "individuals do not constitute themselves in a vacuum; our lives gain meaning, in part, from our family, religious, business, and other communal associations." Edwards, *supra* note 55, at 1157 (citing Aristotle's view that "[h]e who is without a polis . . . is either a poor sort of being, or a being higher than man: he is like the man of whom Homer wrote in denunciation: 'Clanless and lawless and heartless is he'").

105. The Association of the Bar of the City of New York, About Us, http://www.abcny.org/aboutus (last visited Nov. 13, 2005).

106. *See id. See generally The Bar Association of the City of New York*, 5 AM. L. REV. 443 (1871) (describing creation of ABCNY).

in order that the influence of the best might be able 'to create a spirit of professional brotherhood, to create in the members of our profession a regard for the profession.'"[107] That regard by members of the profession could in turn spur higher regard from the rest of society.

The ABCNY would not stand alone in the bar association movement. The movement would become nationalized with the founding of the ABA in 1878 at a Saratoga Springs, New York meeting of 100 lawyers from twenty-one states.[108] In light of law's importance to our democracy, the ABA would link standards of professional competency to the *responsibility* of lawyers to serve the public good. University of Illinois Dean James Harno characterized an imperfect but still significant ABA:

> [G]radually there came an awakening on the part of the members of the Association to the responsibilities of the profession: first to the need of lawyers well trained in the skills of the craft; then a growing insight into the need of standards on admission to the bar and the need for an educated bar; then a perception of the intrinsic place of law in a free society; and, finally, *the dawning of a conception of the lawyer's responsibility to the public, and a growing appreciation of the dignity and mission of the profession.*[109]

One of the ways the profession would fulfill that mission was through attention to issues created by our form of government. Because legislation is so important in a representative democracy, as one might expect, the ABA's early projects placed importance on improving the quality of legislative processes and the statutes produced.[110] Furthermore, the ABA's first constitution wrestled with the federal-

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107. *See* HOBSON, *supra* note 104, at 219.

108. *See* American Bar Association, Profile of the American Bar Association (Jan. 2005), http://www.abanews.org/profile.pdf.

109. Harno, *supra* note 101, at 28 (emphasis added). Much as the founders were not the end of democracy's story nor indicative of democracy's perfection, neither are the early bar members. They sometimes exhibited disturbing traits, such as elitism and nativism that would continue for decades. *See, e.g.*, HOBSON, *supra* note 104, at 283, 310-11, 411. But their early citation of public responsibility is significant, as even the imperfect and evolving bar still realized its responsibilities to the nation.

110. *See, e.g., Report of the Committee on Jurisprudence and Law Reform on Improving Methods of Legislation, in* 9 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 282-86 (1886) (noting "growing evil of hasty and ill-considered legislation" and calling for institutionalization of a "permanent system" to review and revise legislation, particularly since the separation of legislative and judicial functions was significant to U.S. political institutions). Moreover, the early ABA took time to contemplate how political institutions should interact with the "national spirit," the freedom and consideration of the will of its people that is so important to U.S. democracy. In a paper read by George Mercer and included in the second volume of ABA Reports, Mercer observes that "[i]t is impossible to introduce and maintain good legal institutions among a people whose spirit is debased and unprepared to receive them." *See* George A. Mercer, *The Relationship of Law and National Spirit, in* 2 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 143-48 (1879). And, he reinforces the need for the continued evolution of democracy to serve its people championed by others, such as Brandeis, by explaining:

> The best legal institutions will decline and perish if subjected to the influence of a vitiated national spirit. The wisest laws, though grounded originally in the affections of the people, cannot resist the encroachments of an agency subtle but unceasing, which operating like the deep tides of the ocean

ist nature of our democracy, calling for "the uniformity of legislation throughout the Union."[111]

The ABA would be joined in this particular mission by the lawyers of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). NCCUSL places its origins with a gathering of representatives of seven states before an ABA meeting in 1892.[112] Even after NCCUSL took on a quasi-governmental character—a Uniform Law Commissioner's appointment is typically provided by state statute—ties between NCCUSL and the bar in general, and the ABA in particular, remained strong and continue today.[113] In addition to the fact that most Commissioners are practitioners, law professors, and judges,[114] part of the process of NCCUSL's drafting of uniform laws for adoption by individual states is a requirement of consultation with the ABA.[115]

The story of the ABA and NCCUSL's early history is especially instructive in recognizing the responsibility lawyers felt towards our political institutions. When faced with divergent laws in multiple jurisdictions, lawyers understood the cost to society of such differences and sought to improve our democracy. In doing so, they took notice of the important federalist character of our government, proffering a solution of greater coordination among the states that might be acceptable to a broader range of jurisdictions.[116] Moreover, the story illustrates why it is particularly important for attorneys to approach work on projects such as the drafting of uniform laws as part of a professional responsibility to our democracy. Although prior service to individual clients will help to inform

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> beyond the reach of ordinary vision, slowly but surely undermines the proudest structure. Governments and laws are not put together by mere measure and rule. They cannot be successfully constructed upon arbitrary principles, but grow up among the people who use them from simple and natural causes. They resemble the products of nature rather than the refinements of art. They mature like a plant, and derive their qualities from the soil which produces, and the elements which sustain them.

*Id.* at 148-50.

111. Am. Bar Ass'n, Constitution, *in* 1 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 30 (1878). The ABA was not first in this effort. Actors at the state level saw the need to address conflicts of law among the states as evidenced by the Alabama State Bar Association's formation of a committee in 1881 "to examine the law for the purpose of making recommendations about the uniformity of law between states, and to bring the subject to the attention of the bar associations of other states." WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 16 (1991).

112. Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, Introduction, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11 (last visited Nov. 13, 2005)[hereinafter NCCUSL Introduction]. All states had appointed commissioners in the ensuing two decades. *Id.*

113. *See id.* (noting that bar members provide valuable expertise to the NCCUSL).

114. *See id.*

115. *See* NCCUSL Constitution art. 30, § 30.1, *available at* http://www.nccusl.org/nccusl/DesktopDefault.aspx?tabindex=1&tabid=18 (last visited Nov. 13, 2005). The ABA also requires sections and committees "considering a matter of state legislation [to] consult with the Uniform Law Commissioners." ABA Constitution art. 24, § 24.6 (2003-2004), *available at* http://www.abanet.org/policy/cb0304.pdf.

116. *See* ARMSTRONG, *supra* note 111, at 3, 11-22.

participating lawyers about what legislative solutions might or might not be practical, when drafting uniform laws, these attorneys must subjugate those clients' interests to a broader public interest. Not only is this the upstanding thing to do,[117] but it is also practical in its own right. Ultimately, failure by uniform laws to reflect broader public concerns would hinder attempts to secure adoption of the laws by individual state legislatures.[118]

### 2. PROGRESS TOWARDS A CITIZEN LAWYER FOR THE TWENTIETH CENTURY

Following the Civil War, the United States eventually moved into the Progressive Era. As the era took hold, the fulfillment of a lawyer's professional responsibility to democracy increased in significance. Greater attention to society's ills necessarily placed greater scrutiny on society's architects, including lawyers. But the era also afforded lawyers a unique opportunity to burnish their image by using their legal expertise to facilitate social improvements—or, in Brandeis' conceptualization of our democracy, to help the Republic evolve to meet its people's needs.

The Russell Sage Foundation provides an example of the efforts to comprehend the nature of America's professionals, including lawyers, to evaluate the quality of their service to the polity. In the 1930s, the Foundation[119] sponsored a series of monographs examining certain professions in the United States.[120] In contrasting the legal profession with others, Esther Lucile Brown emphasized the varied roles of American lawyers, from counselor to advocate to participants in the legislative, executive, and judicial branches of government, and explained:

> So widespread is their influence and power that the future of the United States lies, in no inconsiderable degree, in the hands of lawyers. It has, therefore, seemed essential . . . to point, on the one hand, to the failure of bar and bench to accept certain social responsibilities, and to note, on the other, the emergence of several trends that appear to indicate a growing desire within the profession to promote justice more effectively than in the past.[121]

Thus, while the bar perhaps had fallen short in improving society—which

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117. This remains a process to undertake with great care. *See* MODEL RULES R. 6.4 ("A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.").

118. *See* Hamilton, *supra* note 111, at 110-11 (noting challenges of improving the law while seeking uniformity).

119. The Foundation, created in 1907 "for the improvement of social and living conditions in the United States of America," employed a staff that studied such social conditions. *Statement Concerning Publications of Russell Sage Foundation*, *in* BROWN, *supra* note 61.

120. BROWN, *supra* note 61, at 5.

121. *Id.* at 6-7.

centered around our form of government—lawyers also had the potential and motivation to wield the tools of democracy to effectuate change. The Russell Sage Foundation provided only one of the studies of the legal profession of the time. Recall the efforts of Dos Passos along these lines and his intimations about the need for lawyers to be more self-reflective about the nature of their profession. Thoughtful members of the legal profession were natural successors to those described in early commentary on the legal profession by individuals such as de Toqueville. Simultaneously they reflected the needs of the citizenry that inspired the social movements of the time, and also reinforced the view of earlier commentators that lawyers held a key role in the development of the American polity.

Bar associations and other legal organizations would become a vehicle to improve the standing of the profession by addressing the shortcomings of our political system and by improving the self-regulation of lawyers. Lawyers needed to address directly the critiques of America's democratic institutions. Along these lines, Elihu Root cautioned 1904 Yale Law graduates that "to preserve and foster [the] living faith of the people in the supreme value of the great impersonal rules of right which underlie our system of law, is the highest and ever-present duty of the American lawyer."[122] Fortifying lawyers in this mission was a growing tradition of public service and knowledge of and focus upon the principles underlying our democracy. Henry Stimson, who served as both Secretary of State and Secretary of War, exemplifies this in recalling his early activities as a New York practitioner and the nobility of the bar to which he belonged. In learning that tradition,

> [He] came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. [He] felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed.[123]

As Stimson admired his predecessors, he too should be noted for his own public service. Importantly, Stimson's faith in democratic institutions motivated and informed such service, both while in government and during stints of private practice.[124]

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122. HOBSON, *supra* note 104, at 281 (footnote omitted). Addressing public needs became even more significant as some became increasingly frustrated by certain court opinions, threatening the judiciary as one of the pillars of America's democracy. *Id.* at 280. The bar argued that the public should seek to change the laws rather than attacking courts. *Id.* at 281. After all, by attacking the courts they attacked "some of the essential bulwarks of our system of government: separation of powers, protection of individuals, abstract and impersonal rules of conduct, and judicial review." *Id.* at 279-81.

123. HENRY L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR, at xxi-xxii (1948).

124. Stimson, for instance, did not serve in government between 1918 and 1927, but remained active in public life speaking on behalf of the executive budget and protesting the failure of the New York Assembly to

Armed with faith in American political institutions, lawyers such as Stimson could embark upon improving our legal system and democracy. The emergence of the American Law Institute ("ALI") exemplifies this. To this day, one of the ALI's core functions is to bring together leading lawyers to restate the law—to assist society by clarifying the workings of our legal system and democracy. Records of the ALI's origins reinforce the organization's ties to America's democracy.[125] In describing the intended "general character of the work" of the ALI, those seeking its formation contemplated that the ALI would "be created in response to the growing feeling that lawyers have a distinct public function to perform in relation to the improvement of the law and its administration."[126] In undertaking this function, the lawyers emphasized their roles as shepherds rather than masters of change, understanding that the nature of democracy required broad societal consent.[127] Ultimately, their work had to "be generally recognized as a work carried on by the profession in fulfillment of a public duty."[128]

The meeting forming the ALI featured a dazzling array of luminaries of the legal profession from U.S. and state Supreme Court justices, to distinguished members of the bar, and to members of the legal academy, whose sentiments further illustrate the commitment of these lawyers to improve democracy by clarifying the current law.[129] With his address presenting the Committee's Report, the ALI's Honorary President Elihu Root noted the problem to be addressed by the Institute—that "the law was becoming guesswork"[130]—which was obviously a threat to the functioning of our democratic institutions. Clearly a student of democracy, Root also made sure to note that lawyer participation in the project be viewed "as a great and imperative public service" and to reemphasize

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seat duly elected socialists. The later incident illustrated that the strength of his belief in the American form of government permitted him not only to contemplate improvements to that government but to tolerate other political views. *See id.* at 107-108. On a personal level, while contributing much to public life while in private practice, it appears that he felt some anxiety about the other demands of private practice and wished he could do even more for the public good. *See* MORISON, *supra* note 56, at 75.

125. *See, e.g.*, AM. LAW INST., *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, *in* 1 AMERICAN LAW INSTITUTE PROCEEDINGS 1 (1923).

126. *See id.* at 4.

127. *Id.* at 4-5 ("It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticize the instruments by which these policies are effectuated.").

128. *Id.* at 29 ("[T]he restatement must from its inception be generally recognized as a work carried on by the legal profession in fulfillment of an obligation to the American people, to promote the certainty and simplicity of the law, and its adaptation to the needs of life" and that it can "give to the bench and the bar a sense of professional responsibility for the character of the work which will go far to insure its excellence . . . .").

129. *See* AM. LAW INST., *An Account of the Proceedings at the Organization of the Institute in Washington, D.C., on February 23, 1923*, *in* 1 AMERICAN LAW INSTITUTE PROCEEDINGS 8-20 (1923).

130. *See id.* at 48-49.

the Report's suggestion that public support for the ALI project was critical.[131] To Root, success in the endeavor might determine the success or failure of American democracy:

> Gentlemen, many competent observers, many thoughtful students of history, are beginning to fear that the competency of mankind to govern is not keeping pace in its development with the ever-increasing complexity of life in this new era of universal interdependence.
>
> I have faith that our people will prove themselves equal to the ever-growing ever-increasing demands upon them, of life, of these strange new years. I have faith; but they cannot do it by lying down. No free people, no democracy—and I include in this the American democracy—can maintain its institutions, its freedom, its justice, its opportunity for the future, unless there be general, practically universal effort, willingness to serve, desire for knowledge, determination to grapple with and deal with the difficult problems that confront humanity.
>
> We may not succeed; but we can try. Here is one thing we can try. It is something the need of which is universally recognized.[132]

Amplifying Root's remarks during the ensuing debate on whether to form the ALI was Herbert Hadley, a former governor and law professor from Colorado. Hadley framed "the clarification and simplification of [U.S.] law" as an issue of professional responsibility, and indicated that the public has a right to make demands of its legal professionals to which they must respond.[133]

With bluntness perhaps bred during his former days as a politician, Chief Justice and former President Taft when introducing the ABA President at another point in the meeting even more markedly observed the need for legal professionals to actively engage society's concerns:

> We are living in an age and under conditions where it seems to me that the profession should rouse itself to be heard not only in the organization of reform of the law, but in the maintenance and preservation and protection of the institutions of civil liberty, which the members of the profession of the law so clearly understand. Time was when the bar of the country exercised a much greater influence in society than they now do, and in this present juncture of instability it is necessary that the bar should reassert itself, and these organizations of lawyers and this stirring up of the profession to united

131. *See id.* at 52 ("It can be done only if the public opinion of the American democracy recognizes the need of the service, and that public opinion you here today represent and can awaken and direct. That is why the Committee solicited your attendance here, to ask you whether you will put all that you represent behind the undertaking, so that the American democracy may be behind it.").

132. *Id.* at 54-55. Attorney General H. M. Daugherty, who was unable to attend the meeting, wrote a letter to add his view that the ALI's "teachings and reforms as will result from the success of your endeavors are as essential now as when this Government was founded." *Id.* at 44.

133. *See id.* at 64 (noting that ALI work goes beyond duty of lawyers to courts or of citizens to country to a special professional obligation).

> expression are most important in retaining for use those institutions that have been handed down to us by our fathers, and that have made this country a place that we are proud to live in.[134]

In this briefly expressed sentiment, Chief Justice Taft captures the danger of continued diminishing influence for lawyers in our society if they do not rededicate themselves to the support of democratic institutions.

Accordingly, the ALI's origins reconfirm lawyers' democracy duty.[135] One additional item, however, should be noted before leaving the Progressive Era—the significance of canons of ethics for legal professionals. These codes were not entirely new,[136] but their importance was especially timely during an era in which lawyers increasingly faced intense scrutiny by social critics. Under these circumstances, commitment to self-regulation took on greater importance, especially as it reinforced lawyers' duties to the polity.

The further emergence of national organizations such as the ABA facilitated the spread of more standardized ethics responsibilities throughout the nation.[137] This is worth mentioning, because those responsibilities also found their foundation, in part, in the role of the lawyer as public servant to the polity. As Canon 32 of the *Canons of Professional Ethics*, "The Lawyer's Duty in its Last Analysis," explains,

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his

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134. *Id.* at 109.

135. Not all would be satisfied by the efforts of the ALI or other organizations, such as NCCUSL. *See, e.g.*, LASKI, *supra* note 48, at 580 (regarding efforts of ALI and NCCUSL as limited in scope). But regardless of whether their efforts were appropriately vigorous or always successful, such organizations illustrate recognition of a professional obligation.

136. *See generally* ANDREWS, *supra* note 21. Those who developed the canons likely drew inspiration from others, such as the Honorable George Sharswood, who also taught at the University of Pennsylvania and whose view of ethics envisioned an important role of the attorney in the polity. Sharswood wrote a classic essay on professional ethics, of which one of its "two general heads" was a section on "[t]hose duties which the lawyer owes to the public or commonwealth." *See* George Sharswood, *Professional Ethics, in* 32 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 9 (1907).

137. Notwithstanding the development of the ABA *Model Rules*, one can argue that there still exists a significant degree of "ethical pluralism" within the legal profession. *See, e.g.*, Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 679-80 (1989) (noting various viewpoints on ethics by different subgroups within the bar). However, ethics codes still represent important expositions of general norms for the profession.

> undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. *But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.*[138]

By concluding with an emphasis on the lawyer as citizen, the bar seems to say that whether lawyering in private or public service, the attorney must remember his democracy duty.

### 3. A MORE DEMOCRATIC VISION OF "WE THE PEOPLE"

As previously noted, the democracy supported by lawyers at the nation's inception was imperfect. In particular, it was flawed by its failure to be more broadly inclusive. As African-American Congresswoman Barbara Jordan stated eloquently at a 1974 House Impeachment Hearing for President Richard Nixon:

> Earlier today, we heard the beginning of the preamble to the Constitution of the United States. "We the people," it's a very eloquent beginning. But when that document was completed on the 17th of September in 1787, I was not included in that "we the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decisions, I have finally been included in "we the people."[139]

As Jordan implied, inclusion required changes to the law and its interpretation, and thus changes to the manner in which democratic institutions operated. If law mattered, then lawyers mattered. Although some would use the law as a barrier to inclusion, lawyers' understanding their true responsibility to democracy worked to remedy its imperfections. Such lawyers' efforts were critical to the civil rights movement which thankfully accelerated as the twentieth century progressed.

Well known among these lawyers was former Supreme Court Justice Thurgood Marshall. As a young graduate of Howard University's Law School, he quickly recognized and began to fulfill his professional responsibility to democracy in the tradition of other great citizen lawyers. He entered private practice in the 1930s and soon became involved with work for the Baltimore

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138. AM. BAR ASS'N, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND THE CANONS OF JUDICIAL ETHICS ANNOTATED 27 (1946) (emphasis added). Although other portions of the canons added and amended since ABA adoption at 31st Annual Meeting in 1908, Cannon 32 appears to have remained throughout. *See id.* at ix.

139. *See NewsHour with Jim Lehrer: The First and Only* (PBS television broadcast Jan. 17, 1996), *transcript available at* http://www.pbs.org/newshour/bb/remember/jordan_1-17.html.

branch of the National Association for the Advancement of Colored People ("NAACP").[140] He would later work at the NAACP's national office, eventually providing twenty-five years of service to the organization.[141] Professor Mark Tushnet has pointed out the difficult "duality" faced by civil rights lawyers, such as Marshall, whereby "[t]hey were committed to enforcing a Constitution whose promises had been repeatedly betrayed."[142] Perhaps this is why at a public celebration of the Constitution's bicentennial, "Marshall was troubled by 'the tendency for the celebration to oversimplify,' and he refused to 'find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound,' because 'the government they devised was defective from the start.'"[143] Yet, notwithstanding his observations of the defects of democracy, Marshall worked to change that democracy by understanding and utilizing its institutions, most importantly the federal courts.

The impact on society of his work on *Brown v. Board of Education* is well documented.[144] Perhaps less known is the approach Marshall took to preparing for the *Brown* litigation. During his preparations, "lawyers, law professors, sociologists, anthropologists, and even psychologists . . . all came to Marshall's office to discuss how to convince the Court that separate but equal was a devastating burden to black people, nothing more than racism."[145] Marshall's approach was to wield all the tools available to better understand and explain the nature of our society—a society necessarily shaped by the legal realities of U.S. democracy at the time—to secure change.[146]

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140. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 10-19 (1994).

141. *See id.* at 18-19.

142. *See id.* at 3.

143. *See id.* at 5.

144. *See* U.W. Clemon, Birmingham Civil Rights Institute Online: *Brown v. Board* at 50, http://www.bcri.org/resource_gallery/other_videos/judgeclemon.htm (last visited Nov. 16, 2005); The Legacy of *Brown v. Board of Education*: Reflections on the Last Fifty Years, A Joint Conference in Two Parts, http://islandia.law.yale.edu/brownconference (last visited Nov. 13, 2005).

145. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 209 (1998). Further support for Marshall's efforts would come from lawyers from a wide array of organizations in the form of *amici curiae* briefs sent to the court. *See* CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 191 (1993).

146. It is interesting to note the striking similarity of Marshall's style of constructing legal arguments to other progressives such as Brandeis, a great proponent of the role of the contribution of diversity to America's successes. *See* Remarks of Attorney General Biddle, *in* SUPREME COURT BAR PROCEEDINGS, *supra* note 25, at 47; *see also* Charles A. Beard, THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS, at xiii (Alfred Lief ed., 1930); Louis Brandeis, Address at the Annual Fourth of July Oration at Boston's Faneuil Hall: True Americanism (1915), *in* BRANDEIS ON DEMOCRACY 27, 29 (Philippa Strum ed., 1995). Perhaps Brandeis' most famous brief was one in support of a ten-hour work day law for women in Oregon. In reminiscing about Brandeis after his death, Attorney General Biddle explained of the brief:

> Three pages argue the law; the other ninety-seven diagnose factory conditions and their effect on individual workers and the public health. This approach has had a profound influence on the method of presenting arguments in cases involving social legislation, and, I suggest, on the outlook of courts to social problems.

Years later Marshall, who once dreamed of becoming a local judge, would become the first African-American member of the United States Court of Appeals for the Second Circuit.[147] When President Lyndon Johnson asked him to leave the bench to become his Solicitor General, Marshall accepted the challenge. Given his commitment to a more inclusive version of democracy, Marshall undoubtedly was moved by Johnson's stated vision of both black and white youngsters coming to the Supreme Court to see an African-American as the government's lawyer.[148] Marshall's decision to forsake the financial security and prestige of his circuit court judgeship likely paved his path to the Supreme Court bench.[149]

Singling out Marshall is not to discount other lawyers' contributions to civil rights causes. Just as individuals such as William Paterson were critical to the formation of democracy in its formative years,[150] notwithstanding history's failure sometimes to herald their presence more loudly, lesser known patriots have been critical to the improvement of this nation's character. Judge Constance Baker Motley, for example, provided critical service to our democracy. She argued ten cases related to attaining equal rights for African-Americans before the U.S. Supreme Court, winning nine of them.[151] Judge Motley worked alongside Marshall at the NAACP, and ultimately would win the NAACP's highest honor, the Spingarn Medal.[152] After her work for the NAACP and as a New York State legislator, the Senate confirmed her as the first African-American woman on the federal bench,[153] allowing her to serve as an exemplar for the advantages of a more inclusive judiciary.

Supplementing efforts in the courtroom by lawyers such as Motley and Marshall to expand democracy's reach were the lawyers who worked on

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Remarks of Attorney General Biddle, *in* SUPREME COURT BAR PROCEEDINGS, *supra* note 25, at 43. Such techniques served Brandeis and others well not only as courtroom advocate, but in other settings. *See* Lerner, *supra* note 42, at 44 ("In [Brandeis'] emphasis on democracy and freedom he has insisted that as a nation we bid fair to alienate ourselves from the psychological drives that have conditioned our history. The pragmatic cast of his thought, its ethical strain, have set up responses in the American mind. His method—factual, experimental, inductive—strives only to assimilate law to those other procedures that already have those characteristics. He has advocated not the creation of new institutions but the instrumentalism that will use law to bring out the best implications of existing institutions.").

147. *See* WILLIAMS, *supra* note 145, at 296.

148. *See* HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 189 (1998).

149. *See* WILLIAMS, *supra* note 145, at 314-18.

150. *See supra* notes 87-89 and accompanying text.

151. *See* Press Release, Nat'l Ass'n for the Advancement of Colored People, NAACP Awards Judge Constance Baker Motley Its 2003 Spingarn Medal (May 14, 2003), http://www.naacp.org/news/2003/2003-05-14.html.

152. *See id.*

153. *See* ABA Division for Public Education: Black History Month 2000, Profile 3: Constance Baker Motley, http://www.abanet.org/publiced/cbm.html (last visited Nov. 13, 2005); Federal Judicial Center, Judges of the United States Courts, http://www.fjc.gov/servlet/tGetInfo?jid=1704 (last visited Nov. 16, 2005).

legislation. Although *Brown* and other litigation spurred progress, more needed to be made. As the U.S. Commission on Civil Rights concluded in its 1963 report, *Freedom to the Free, Century of Emancipation*,

> As a Nation, we have solved Tocqueville's paradox of a free society's dependence upon a system of slavery. . . . We have come a far journey from a distant era in the 100 years since the Emancipation Proclamation. At the beginning of it, there was slavery. At the end, there is citizenship. Citizenship, however, is a fragile word with an ambivalent meaning. The condition of citizenship is not yet full-blown or fully realized for the American Negro. There is still more ground to cover. The final chapter in the struggle for equality has yet to be written.[154]

Changes to the law codified progress made and provided a further vehicle for moving forward. Almost immediately upon taking office, President Johnson explained to a joint session of another democratic institution, the United States Congress, why legislation was necessary: "We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter, and to write it in the books of law."[155] Behind the scenes, Johnson would tell attorney-general Nicholas de B. Katzenbach after winning the Presidency in his own right in 1964 to "write the god-damnedest, toughest voting rights act that you can devise."[156] Major civil rights legislation soon followed.

Kindred in spirit to the principles underlying the civil rights movement was the recognition of the need to make legal services more broadly available.[157] It became increasingly difficult to claim that U.S. democracy represented all citizens, when some lacked the means to access its institutions. The bar struggled to come to terms with issues raised by legal aid, including independence of the bar from the government which funded some of these services. Yet the demand for such services outweighed the objections, ultimately leading to the bar's support.[158]

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154. U.S. COMM'N ON CIVIL RIGHTS, FREEDOM TO THE FREE: CENTURY OF EMANCIPATION 1863-1963, at 207 (1963).

155. President Lyndon B. Johnson, Address Before a Joint Session of the Congress, (Nov. 27, 1963), http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/631127.asp. Although not a lawyer by profession, Johnson recognized the power of law. Indeed, even before he became a lawmaker himself through his election to Congress, as a young Congressional aide to Congressman Richard Kleberg, Johnson briefly attended Georgetown's law school. *See* Lyndon Baines Johnson Library and Museum, President Lyndon B. Johnson's Biography, http://www.lbjlib.utexas.edu/johnson/archives.hom/biographys.hom/lbj_bio.asp (last visited Nov. 13, 2005).

156. BALL, *supra* note 148, at 187.

157. Greater institutionalization of legal aid to the poor seems to parallel the post-Civil War development of a more professionalized bar. *See* JOHN MACARTHUR MAGUIRE, THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926, at 238-52 (1928) (describing the growth of legal aid).

158. *See* AM. BAR ASS'N, LAWYERS AND THE POOR: A REPORT ON THE LEGAL SERVICES PROGRAM OF THE OFFICE OF ECONOMIC OPPORTUNITY (1966) (reporting on inaugural year of the Legal Services Program created

Lawyers lifted the spirits of many whose voices had been neglected in our democracy. Their services would be further required as our democratic institutions would soon face another severe test—the Watergate scandal. As a lawyer, President Nixon's involvement in the Watergate scandal and subsequent resignation posed a direct challenge to the legitimacy of democratic institutions. Manipulation of those institutions bred deep mistrust from segments of the public. With lawyers implicated in the scandal,[159] lawyers were especially important in dealing with the crisis. Voices of lawyers such as Barbara Jordan gave credence to some in the profession's desire to reveal past wrongs and to correct them. The modern executive branch of U.S. democracy would be reworked to provide greater transparency and accountability to the public.[160]

Not surprisingly, when attempting to comfort those who felt betrayed, emphasis again was placed on efforts to better meet the legal needs of a wider segment of the population.[161] Judge Frank Johnson described such a mission as one of engendering trust. In discussing "the crisis in delivery of legal services to poor Americans," Judge Johnson noted,

> The importance of the legal system in this regard lies not only in the resolution of actual conflict, but in the establishment of a faith and belief by our citizens that there exists an orderly process through which they can present their grievances if it becomes necessary to do so. Yet trust in the legal system has been badly shaken by the growing public knowledge that the civil side of our courts is beyond the financial reach of a majority of our citizens.[162]

Johnson's comments suggest something else. Democracy depends on the trust of individual citizens—trust engendered by addressing their concerns. Sometimes the needs of individuals are met by the national government, but at other times they may rely on the delivery of services at the local level.

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with federal assistance as part of the war on poverty). On February 8, 1965, the ABA's House of Delegates adopted a resolution to "cooperate with the Office of Economic Opportunity and other appropriate groups in the development and implementation of programs for expanding availability of legal services to indigents and persons of low income . . . ." *Id.* at 4; *see also* Orison S. Marden, President, Am. Bar Ass'n, Address: The Organized Bar—Today and Tomorrow, *in* 92 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 404 (1967) ("In return for [the Bar's] monopoly [on the practice of law] and the trust reposed in us by the public, all segments of the community are entitled to be well and competently served by our profession in legal matters affecting their lives, their liberty, and their property.").

Over time, legal advice also would be provided to the poor as part of lawyers' *pro bono* activities, as the ABA's *Model Code of Professional Responsibility* evolved to endorse such *pro bono* work. *See* Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 424-28 (2003).

159. *See* Robert B. McKay, *Nowhere To Go but up*, 1 J. LEGAL PROF. 41, 41 (1976) (noting "oprobium" against lawyers after Watergate).

160. For example, the Watergate episode facilitated passage of amendments to the Freedom of Information Act. *See* SENATE COMM. ON THE JUDICIARY, ELECTRONIC FREEDOM OF INFORMATION IMPROVEMENT ACT OF 1995, S. REP. NO. 104-272, at 6-8, 23-26 (1996); *see also* HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW 44-49 (1999).

161. *See* McKay, *supra* note 159, at 45-46.

162. Frank M. Johnson, *The Legal Profession and Social Change*, 28 ALA. L. REV. 1, 1 (1976).

### 4. LOCAL POLITICS

Much has been written until this point about the national democracy. But the federalist aspect of our democracy should render government activities at the local level equally important to the responsible attorney. And the local level includes not only state governmental affairs, but also more local, municipal ones. Accordingly, in concluding a discussion of the bar's realization of its responsibility to understand and support democracy, it is useful to briefly discuss the bar's role in localities.

Recall Professor Cahn's suggestion of how the responsibility of a citizen for its democracy's actions may be discharged by full participation in that democracy to the extent her abilities allow.[163] For lawyers the responsibility often is greater, because their opportunity for active participation in the governance of their communities' affairs may be greater than for the average citizen.[164] Perhaps this also is why in a well known exposition categorizing the public's expectations of the legal profession, New Jersey Chief Justice Arthur Vanderbilt emphasized the role of lawyers in shaping public opinion, improving law, and providing "leadership and integrity in public office."[165] Certainly, the public's expectations

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163. *See supra* notes 59-60 and accompanying text.

164. *See* Senator Paul Douglas, Address: The Lawyer in Government and Politics (Jan. 10, 1952), *in* LAWYERS' PROBLEMS OF CONSCIENCE, *supra* note 31, at 25 (In lecturing on "the lawyer in government and politics," Illinois Senator Paul Douglas, explained to an audience of students that they "have a greater chance tha[n] the members of other professions to participate in civic life without endangering your jobs. We have reached the point in this country where it is very difficult for most people to take part in political life without endangering their own living."); *see also* Mathews, *supra* note 10, at 482, 485-86 (remarking on leadership capability of attorneys and their ability to serve at various levels, including the local one); *cf.* Wilson, *supra* note 32, at 435-36 (expressing concern about lawyers losing the role of community adviser in addition to individual client counsel).

Especially in a democracy, however, it should be emphasized that a lawyer's ability to lead does not equate to an unfettered right to do so. As Minnesota law Dean Everett Fraser once observed,

> In a democracy no class is specially designated for leadership, but the lawyer, because of his knowledge of existing institutions, is naturally expected to lead. . . . It is the function of the statesmen to appraise the findings of the specialists, and to apply them in the world of practical affairs. . . . Living among the people and advising them as to their affairs, [the lawyer] develops an understanding of what is practicable, and is in a position to supply the needed leadership. For progress in a democracy requires three steps, the discovery of ideas, acceptance of them by the people, and their enactment as law.

HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 61 (1936); *see* John D. Randall, Annual Address of the President: Look Beyond Tomorrow, *in* 85 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 367 (1960) (identifying lawyers as community housekeepers and leaders who serve as "artisans of [a community's] ideals," and who, in a democracy, must encourage debate and refrain from "espous[ing] ideas merely because they happen to be popular"). For an arguably more pugnacious view of the attorney's position as a societal leader compare Brewer, *supra* note 63, at 1-4 (juxtaposing "proper and accustomed place" of attorney as leader with threats to that leadership in the late 1800s).

165. *See* John G. Hervey, *The Decline of Professionalism in the Law: An Exploration into Some Causes*, 10 ALA. L. REV. 1, 2-3 (1957). Vanderbilt took the role of the lawyer in public administration so seriously that he successfully urged New York University Law School, where he had served as Dean, to establish "a Citizenship

of the bar's leadership and integrity should be no less at the local level as compared to the national level.

At the municipal level, the bar certainly does not always fulfill its responsibilities. Albert Blaustein's study of the legal profession, for example, cites an Ohio lawyer's report noting that "[w]ith few exceptions, lawyers have not busied themselves with the functioning of local government" and claiming that "[t]he great mass of lawyers supinely accept evil political conditions in their locality or, worse, abet them . . . ."[166] But this critique only reemphasizes the view that the lawyer must behave better in this regard in the future.

Local activism clearly was at the heart of Brandeis' view of U.S. democracy. His former law clerk, Paul Freund, noted Brandeis' commitment to Federalist principles in the larger context of his suspicion of *bigness*[167] and his concern that all Americans' energies be fully utilized. Accordingly, Brandeis "lost no opportunity to advise young lawyers that the United States was not Wall Street or even Washington; that if one went there on a tour of duty one should not overstay his time; that talents and training should be taken back to the home community."[168] Although he spent much of his own life in Washington, Brandeis immersed himself in the micro-level democratic life that he recommended to others by taking part in all manner of civic organizations notwithstanding other demands on his time.[169] Indeed, he reveled in his civic participation and public service, explaining in a 1911 interview with *American Cloak and Suit Review* that his "luxury is to invest my surplus effort, beyond that required for the proper support of my family, to the pleasure of taking up a problem and solving, or

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Clearing House in order to prepare its law students for more active participation in public affairs." Lepawsky, *supra* note 31, at 270.

166. BLAUSTEIN, *supra* note 30, at 103-04.

167. The problem of "bigness" was a frequent theme for Brandeis that probably stemmed from societal problems that he associated with large businesses from his era, but that carried over to potential pitfalls for governments that grew too big to allow citizens opportunities to effectively participate. *See* BRANDEIS ON DEMOCRACY, *supra* note 146, at 118-53. Civic involvement is also consistent with another related theme in Brandeis' views identified by Professor Cahn. According to Cahn, Brandeis envisioned a creative society, where numerous experiments, private as well as public, would occur to improve human relations. *See* Edmond Cahn, *Louis Dembitz Brandeis*, *in* THE BRANDEIS READER, *supra* note 25, at 28 ("Naturally, in this society of his, the citizens would never let themselves sink into a mire of complacency. Brandeis recognized that the one most important cosmic fact of the twentieth century is the acceleration in the rate of social change. In a world where change is so drastic and rapid, only the land of the vigilant, the daring, and the experimental would be found fit to survive."); *see also id.* at 32-33 (noting that were he alive, Brandeis would call on attorneys to better know their communities and for citizens to "never surrender a policy wholly to the hands of government").

168. Paul A. Freund, Remarks, *in* SUPREME COURT BAR PROCEEDINGS, *supra* note 25, at 28; *see Resolutions*, *in* SUPREME COURT BAR PROCEEDINGS, *supra* note 25, at 11 (noting Brandeis' desire to preserve local traditions because diversity provided America's strength); Paul A. Freund, Tyrell Williams Memorial Lecture at Washington University (St. Louis) School of Law: Mr. Justice Brandeis Evaluated (Apr. 30, 1953), *in* THE BRANDEIS READER, *supra* note 25, at 231-32 (discussing Brandeis' view of community building).

169. *See* Louis Brandeis, Speech to the Good Government Association (1903), *in* BRANDEIS ON DEMOCRACY, *supra* note 146, at 30-31.

helping to solve it, for the people without receiving any compensation."[170] Lawyers today would do well to similarly partake in these pleasures by fulfilling part of their responsibility to democracy through active involvement in their communities' civic affairs.

Although these stories of early legal practitioners and the development of the bar proffer some successful attempts by lawyers to fulfill their obligation to democracy, room for improvement always has and likely always will remain. Democracy's lawyers must always vigilantly discern the needs of a changing society and be responsive to the full diversity of the nation's citizenry.[171] The ability to improve U.S. democracy constantly reestablishes a lawyer's professional obligations. If the obligations are ever present, it is logical that lawyers need to be trained to meet those obligations. Accordingly, the role of law schools is critical.

## III. LEGAL EDUCATION AND DEMOCRACY

Throughout the nation's history, buttressing lawyers' fulfillment of their professional responsibility to understand and support democracy have been the efforts of America's legal educators. Strong parallels can be drawn between the development of legal education in this nation and the evolution of the bar. As University of Illinois College of Law Dean Albert James Harno explained at the dedication of a new building at Wake Forest University's law school:

> The history of the legal profession, of legal education, and of bar admissions are, indeed, parts of the same story. The Colonial lawyer had little of professional consciousness and was apathetic to the question of admission to practice. Correspondingly, the cause of legal education lagged. With the deepening insight in the era of the American Revolution as to the place and function of the lawyer in the social context, the conception of how the lawyer should be educated likewise showed a transformation. Gradually, the feeling developed that the profession was, and by the nature of the calling had to be, a learned one.[172]

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170. *See* Interview with *American Cloak and Suit Review*, 1911, *in* BRANDEIS ON DEMOCRACY, *supra* note 146, at 35. *See generally* Edwards, *supra* note 55, at 1155-57 (praising Brandeis' general conceptualization of the role of U.S. lawyers and utilizing Brandeis' view to argue against indifference "to a decline of the profession's public spiritedness").

171. This justifies the ABA's efforts in more recent times, for example, at improving voter registration since citizen participation is so critical to the democratic process. *See, e.g.*, Robert McCrale, Report of the President, *in* 113 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 724 (No. 2) (1988); *see also supra* note 15.

172. Harno, *supra* note 101, at 26-27. It is no surprise that Wake Forest chose this Illinois Dean to speak at a ceremony associated with the law school. Dean Harno was known in the legal academy for "emphasiz[ing] the responsibilities of lawyers to support and maintain the basic precepts of democracy." *See* ASSOCIATION OF AMERICAN LAW SCHOOLS 1952 PROCEEDINGS 6 (1952). Indeed, he often emphasized this theme in correspondence with the Illinois College of Law community which was admired enough to be formally collected for publication. *See generally* ALBERT J. HARNO, LETTERS TO THE LAW ALUMNI OF THE UNIVERSITY OF ILLINOIS

If lawyers were to fulfill their responsibility to American democracy, they needed tools. Legal educators provided those tools.

From the earliest law professors to those at more modern law schools, educators sought to provide students with insight into the working of our legal system, which was part and parcel of our democratic system. As democracy and the bar evolved over time, legal educators responded by broadening their curricula, improving teaching methods, and addressing a more diverse audience of students. But even as legal education changed, a unifying principle emerged: educators needed to convey to students their professional role as public servants. To the extent legal education changed, it did so in large part to help students fulfill their democracy duty.

### A. THE GREAT EARLY PROFESSORS

The academic study of law was not new at the time of the American Revolution, yet it took some time for legal education to become widespread in the United States.[173] Notwithstanding the slow growth of the legal academy in America's early days, emphasis on the proliferation of university legal departments and law schools in the late nineteenth century may obscure the significance of the earliest days of American legal education. Recall the importance of lawyers at the dawn of our democracy, and one can understand Dean Harno's observation that:

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1930-1957 (1958). Education often demarcates the difference between professionals and those engaged in other occupations. During this time period, the legal academy was particularly interested in the study of "The Role of the Law Schools in Education for Professional Responsibility and Leadership," which led to a prospectus for such a study sent by the AALS to various entities. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS 1952 PROCEEDINGS, *supra*, at 5-6; Robert E. Mathews, *Activities of the Association: The Association's Project on Education for Professional Responsibility and Leadership*, 5 J. LEGAL EDUC. 217, 217-219 (1952).

173. Perhaps the type of study in vogue in Europe during colonial times did not lend itself to the new nation as it was "highly academic law which had spawned Bologna: Roman law, in its two facets, the Civil Law and Canon Law." THOMAS GARDEN BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 5 (1978). This is not to say that early American legal educators did not rely on European models. The work of Blackstone was particularly influential. *See, e.g.*, John H. Langbein, *Blackstone, Litchfield and Yale: The Founding of the Yale Law School*, *in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 20-23 (Anthony T. Kronman ed., 2004) (noting Blackstone's work provided a template for materials utilized by one of America's earliest proprietary law schools, Litchfield, which was a precursor of the Yale Law School). Moreover, as American legal educators discovered the importance of teaching about our political system, apparently so too did the British. Samuel Warren of the Inner Temple published a popular manual for legal studies in 1835—a work "of inestimable value to every law student who felt the need of an experienced instructor and a judicious guide." SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES, at v (Isaac Grant Thompson ed., 1870). A later edited version revealed the value placed on the study of politics, especially political economy, in a legal education. *See id.* at 137-41.

Interestingly, as legal education expanded in the United States in the late nineteenth century, it was no surprise that European universities—particularly those in Germany—were "cast[ing] professionalism and therefore professional education in a new light." *Id.* at 7; *see* Manfred C. Vernon, *Legal Education in Germany*, 12 ALA. L. REV. 140 (1959) (describing German legal education in the 1950s that provided various possibilities for civil service).

> What challenges our attention is that in the latter part of the 1700's and early 1800's the profession was in a ferment which was to result in a truly remarkable change in the attitude and outlook of lawyers toward the mission of the law, and *a fortiori toward legal education.* Lawyers in number seemed to cast off the mental confinement associated with the routines of the practice and to become enlightened leaders in public affairs. It is as if they had suddenly had a vision of the place and function of law and of the destiny of their profession. The work of lawyers in the dramatic days of the Revolution, and in the years immediately following, in the contributions they made in ideas and services to the welfare of the Republic, constitutes one of the most glorious chapters in the history of the nation.[174]

The story of legal education in the United States importantly begins with the early law professors at American universities, who captured the spirit of democracy close to the time of the nation's founding and sustained it in the hearts of students even during difficult times for the profession during the era of Jacksonian democracy.[175] Unsurprisingly, those professors' stories are inextricably linked with the Founding Fathers.

It was Thomas Jefferson who advocated the establishment of one of America's first chairs of law at the College of William and Mary.[176] That chair, created in 1779 and first held by George Wythe,[177] was soon accompanied by those at other American universities.[178] And it was James Madison who contemplated that the documents of our democracy might provide materials for use by the universities' early law students.[179]

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174. Harno, *supra* note 101, at 21.

175. *See supra* note 101; *cf.* ALFRED ZANTZINGER REED, PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 5-9 (Arno Press, Inc. 1976) (1927) (discussing relation of legal training to democratic priorities in the Jacksonian era).

176. In contemplating the need for more professionals with public administration skills in his own time, Political Scientist Albert Lepawsky characterized Jefferson's vision for a Professorship of Law and Police as reflecting a desire to train public servants. *See* Lepawsky, *supra* note 31, at 265 (citing Herbert Adams' 1887 history of William and Mary); *see also* Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185, 192-95 (2001) (discussing education's role in the new nation and Jefferson's desire "to educate a group of 'public citizens'").

177. Wythe's credentials in government included his service as a 28-year old Attorney General of Virginia and his signing of the Declaration of Independence. *See* GRISWOLD, *supra* note 104, at 38. He had been Thomas Jefferson's tutor in law, and also taught other prominent men, including John Marshall, James Monroe, and Henry Clay. *See id.* Wythe was an innovative teacher of government, for instance, instructing students about the mechanics of the legislative process on Saturdays in the old colonial capital's legislative chamber. *See* Douglas, *supra* note 176, at 200-02.

178. Harno, *supra* note 101, at 23. For example, in 1799, Kentucky's Transylvania University appointed a William and Mary alumnus as a professor of law *and politics*, leaving it as the only organized center of legal education west of the Alleghenies for a generation. BROWN, *supra* note 61, at 25.

179. THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, at xxi (Marvin Meyers ed., Univ. Press of New England 1973) (noting use of his work in *The Federalist* as possible material for University of Virginia students studying law). While implicitly revealing his desire that lawyers study his conception of America's political system, Madison was not, on occasion, above prodding lawyers. On January 24, 1774, he wrote to William Bradford:

Even non-lawyers, such as President George Washington, took interest in the work of early law professors. In addition to President Washington, U.S. Supreme Court Justice James Wilson's first lecture at the College of Philadelphia drew an audience that included the President's cabinet, Pennsylvania's Governor, Congressional members, and other legislators. Unfortunately, the lecture also showed the hazards faced by a law professor, drawing poor reviews from the public and lawyers for his critique of Blackstone and strong federalist views on the national government's power.[180]

Moreover, interest in legal education was not limited to those who would take the lead in the development of the *federal* government. Leaders also saw the importance of education, and legal education in particular, to the development of local political systems after the Revolution. The state of North Carolina, lacking public schools, chartered the University of North Carolina in 1789. William R. Davie, writing of the enterprise in 1796,

> began by quoting from the French Convention, "That as in every free Government, the *Law* emanates from the *People*, it is necessary that the People should receive an education to enable them to direct the Law, and the political part of this education should be consonant to the principles of the Constitution under which they live." He [then] proceed[ed]: "The plan of education established by the Board of Trustees appears to be predicated upon this principle, and designed to form useful and respectable members of society—citizens capable of comprehending, improving and defending the principles of our Government; citizens, who from the highest impulse, a just sense of their own and the general happiness, would be induced to practice the duties of social morality."[181]

Not surprisingly the plan incorporated a "Professor of Moral and Political Philosophy and History" and contemplated a curriculum that would study various political philosophers and the U.S. Constitution.[182] Armed with such an education, University of North Carolina students could go to private law offices for further professional studies.[183]

Universities sometimes hired active practitioners as their earliest professors,

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> A Delicate Taste and warm imagination like yours must find it hard to give up such refined and exquisite enjoyments for the coarse and dry study of the Law: It is like leaving a pleasant flourishing field for a barren desert; perhaps I should not say barren either because the Law does bear fruit but it is sour fruit that must be gathered and pressed and distilled before it can bring pleasure or profit.

JAMES MADISON'S "ADVICE TO MY COUNTRY" 61 (David B. Mattern ed., Univ. Press of Va. 1997).

180. BROWN, *supra* note 61, at 24; *see also* REED, *supra* note 101, at 122 (recognizing ambition of Wilson's project, but also his problems). The College eventually was consolidated into the University of Pennsylvania which did not appoint another law professor for a quarter century. BROWN, *supra* note 61, at 24-25.

181. ALBERT COATES, A CENTURY OF LEGAL EDUCATION 13-14 (Robert H. Wettach ed., 1947).

182. *Id.* at 14.

183. *Id.*

with the benefit of these individuals' professional insights, but the drawback of their limited time to devote to their academic pursuits. Take for instance the professors at Harvard. In 1778, Isaac Royall provided in his will for the establishment, at the discretion of the Overseers and Corporation, of either a Professor of Laws or one of "Physick and Anatomy," and in 1815, Massachusetts Chief Justice Isaac Parker received the Chair.[184] In 1817, Justice Parker submitted a plan for a law school, which contemplated a University Professor of Law, ultimately Asahel Stearns, who would establish a course of studies.[185] Justice Parker and Professor Stearns, however, were distracted by other professional responsibilities, and the school had limited success in its early years.[186] Accordingly, in the 1820s, the school sought an additional instructor of national reputation and hired U.S. Supreme Court Justice Joseph Story.[187] Notwithstanding his judicial duties, Justice Story's enthusiasm for the enterprise was evident and attracted the devotion of his students.[188] This devotion was not insignificant, because even the "law schools" of this time had few professors, making it critical for them to attract personally students who otherwise might just take the apprenticeship positions more commonly relied on for the study of law.[189] Undoubtedly, what attracted early American law students of the time was professors' enthusiasm for the law, an enthusiasm which probably was made all the more natural given the law's ties to a still young democracy.[190]

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184. THE HARVARD LAW SCH. ASS'N, THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 1817-1917, at 2 (1918) [hereinafter HLS CENTENNIAL HISTORY].

185. *Id.* at 3-4.

186. *Id.* at 6-7.

187. *See id.* at 7; *Biographical Notice of Mr. Justice Story*, III AM. REV. 68, 77 (Jan. 1846) ("As he loved the law himself, so he inspired in others that love of law which is as much more to be desired than any amount of legal learning, as a fountain is more inexhaustible than a cistern. It was a hopeless case for the student who did not catch from his instructions the enthusiasm with which they were so pervaded."). Story took advantage of his students' attention and enthusiasm to emphasize the need to adhere to higher principles as they embarked on a legal career. *See id.* ("By his eloquent precepts and his spotless example, he impressed upon his pupils a deep sense of the beauty of a virtuous life; that all professional triumphs were worthless that were not honorably won; and that to be a great lawyer, it was requisite first to be a good man."). As with James Kent, who is discussed below, Story provides an example of how early legal scholarship contributed to democracy. In addition to publishing treatises on business law subjects, such as agency and partnership, his *Commentaries on the Constitution of the United States* furthered the understanding of the key document upon which U.S. democracy was based. *See id.* at 77-78.

188. *See* HLS CENTENNIAL HISTORY, *supra* note 184, at 14-15; *see also* BENJAMIN F. BUTLER, PLAN FOR THE ORGANIZATION OF A LAW FACULTY, at ix (Law Ctr. Found. 1956) (1835) (noting Justice Story used an associate to help with the teaching load).

189. *See* HLS CENTENNIAL HISTORY, *supra* note 184, at 14-15.

190. This is evidenced by the acts of University of Maryland Professor David Hoffman, whose professorship was created in 1816:

> [He] organized a course of study under thirteen separate titles, including *Moral and Political Philosophy, The Law of Nations, Political Economy*, and the more orthodox legal subjects. . . . It is not what Hoffman accomplished as a teacher that draws our attention to this program; it is the insight it gives us into the aspirations of some of the leaders of the bar of that period. *It is as if they were moved by a feeling of mission—'a sense of embarking on an adventure in democratic government,'* which

An even fuller illustration of the impact of law professors' infusion of students with the spirit of American government comes from the story of Columbia College's James Kent. After an influx of funds in 1792, Columbia College sought to fill a professorial chair in law.[191] The politically connected[192] Kent would fill that law chair, which was clearly advertised as providing for instruction in the American form of government:

> [T]his professorship is intended to comprise a brief review of the history, the nature, the several forms, and the just ends of civil government—a sketch of the origin, progress, and final settlement of the United States—a particular detail of the organization and duties of the several departments of the general government, together with an examination of such parts of the civil and criminal codes of federal jurisprudence . . . the courts of the several states . . . and the more particular examination of the Constitution of this State. The whole detail of our municipal law, with relation to the rights of property and of persons, and the forms of administering justice, both civil and criminal, will then be treated fully and at large.[193]

Upon acquiring the Chair, Kent set the tone for legal education at Columbia—and indeed for the nation—in his inaugural address that "pointed out the necessity of a knowledge of law to the citizens of a republic," and that revealed the ideal lawyer "should be fit for the administration of public affairs, and to govern the commonwealth by his councils [*sic*], establish it by his laws, and correct it by his example."[194] As one would expect of an early lawyer citizen of the republic, he laid out a course of study that would challenge the students to understand the principles behind that republic:

> This is not the proper place to prescribe a system of rules for the mere mechanical professor of our laws. The design of this institution, is undoubtedly of a more liberal kind. It is intended to explain the principles of our constitutions, the reason and history of our laws, to illustrate them by a comparison with those of other nations, and to point out the relation they bear to the spirit of representative republics.[195]

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> was to be erected on the firm foundations of law and which was to be administered by lawyers who were skilled not only in the crafts of the law, but who also had a vision as to the broad implications and purposes of law.

Harno, *supra* note 101, at 23 (emphasis added); *see also* REED, *supra* note 101, at 124-26 (describing Hoffman's experience and pitfalls).

191. STAFF OF THE FOUNDATION FOR RESEARCH IN LEGAL HISTORY, A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 11 (1955) [hereinafter COLUMBIA HISTORY].

192. Kent was associated with Alexander Hamilton and the Federalists, who had come to his town of Poughkeepsie for the constitutional convention. *Id.* at 11-12, 14.

193. *Id.* at 14 (footnote omitted).

194. *Id.* at 14-15 (footnote omitted).

195. *Id.* at 15 (footnote omitted).

Although not originally contemplated, Kent's teachings at Columbia later would be published, thus constituting some of the earliest legal scholarship in America—writings that, among other things, documented and provided greater understanding of the nature of the U.S. government.[196] Such scholarship reminds us that "schools have the further responsibility of providing scholarship for the profession, and through scholarship and research constantly preparing the path for law improvement."[197]

Kent's writings remain useful in our own time and certainly were critical to nineteenth century legal education. A student's observations about North Carolina Governor David Lowry Swain's use of Kent at the University of North Carolina reflects the impact that such scholarship could have in the classroom:

> The very first recitation in which I ever appeared before him was one . . . I shall never, never forget. . . . In 1851, I entered the University, and joined the senior class as an irregular. This first lesson was in Constitutional Law. A single general question was asked and answered as to the subject in hand, and then he began to discourse of Chancellor Kent, whose treatise we were studying; from Kent he went to Story, from Story to Marshall, repeating anecdotes of the great Americans who had framed and interpreted our organic law; and touching upon the debate between Hayne and Webster. . . . Warming as he went with the glowing theme, walking up and down the recitation room, which was then the Library of the "old South," with long and awkward strides, heaving those heavy passionate sighs, which were always with him the witnesses of deep emotion, he would now and then stop, reach down from its shelf a volume of some old Poet, and read with trembling voice some grand and glowing words addressed to man's truest ambition, that thrilled our souls like a song of the chief musician. A profound silence was evidence of the deep attention of the class, and the hour passed almost before we knew it had begun.[198]

By building upon Kent and teaching about the fundamentals of America's government and democracy, Swain earned a teaching evaluation that would make any law professor proud.

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196. *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547 (1993); COLUMBIA HISTORY, *supra* note 191, at 22-24. The publication decision likely reflected the utility of publishing Blackstone's commentaries. *See* COLUMBIA HISTORY, *supra* note 191, at 22-23. Treatises aimed at providing lawyers' insight into various aspects of American government would continue to appear during the nineteenth century. *See, e.g.*, 1 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, at v (6th ed., rev. 2002) (noting 1896 origin of Sutherland Statutory Construction treatise exploring legislation). Kent's service also extended beyond his writings, for example, through his work on organizing the New York Law Institute. *See* REED, *supra* note 101, at 205.

197. Harno, *supra* note 101, at 33.

198. COATES, *supra* note 181, at 21-22 (footnote omitted). In addition to Kent, Swain also used other major government documents and treatises to teach his students. *See id.* at 21.

## B. THE END OF APPRENTICESHIP AND RISE OF PROFESSIONALS

Legal education's progress beyond what was mostly a group of individual professors teaching at various universities on to more organized legal departments and law schools represented a broader reevaluation of the best way to educate lawyers. More specifically, the change reflected a move away from the traditional method of teaching lawyers—an apprenticeship in an experienced lawyer's chambers—that dated back to the study of law for many in England.[199] The emphasis on apprenticeship was not necessarily entirely antagonistic to a budding lawyer's understanding of government and responsibility to democracy, as some of the leading statesman of the day such as Alexander Hamilton provided apprenticeships.[200]

But in addition to denying a wider audience the inspiring focus on democratic principles and government provided by some of the great law professors, the legacy of apprenticeship from colonial times had more practical limitations. University of North Carolina Professor Albert Coates revealed these difficulties of legal education in colonial North Carolina in celebrating a century of legal education at his university, noting how some individuals "acquired their knowledge of the law by the unaided private study at home of such books as they could buy or borrow."[201] Fortunately, wider scale legal education would soon be available to satisfy the needs of developing lawyers. At first, more formal courses of legal studies supplemented apprenticeship. One of the more intriguing efforts to create an extended legal course of studies was undertaken by Benjamin F. Butler of the University of the City of New York, a predecessor of New York University's law school. Butler first published his plan for a law faculty at the University in 1835 during the age of apprenticeship.[202] Importantly, Butler approached the instruction of law by emphasizing the policy behind the law.[203] He saw Europe, with multiple faculty members for different legal disciplines, as a model, and he envisioned three departments with a "General or Parallel Course"

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199. *See* COLUMBIA HISTORY, *supra* note 191, at 4 ("In 1754, when King's College was established in New York, it could have occurred to no one concerned that a proper function of the new foundation was the professional training of lawyers. . . . In America, as in England, wherever the common law was law it was accepted by both educators and practitioners that one learned the law by "reading law" in an office."); *see also* Langbein, *supra* note 173, at 19-20; THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 4 (Michael H. Hoeflich ed., Greenwood Press 1988) (identifying apprenticeship as training model for Colonial America in the seventeenth and eighteenth centuries).

200. *See* CHERNOW, *supra* note 78, at 188.

201. COATES, *supra* note 181, at 9. Faced with these practical difficulties of economies of scale, some early institutions characterized as "law schools" largely constituted more populous apprenticeship programs with particularly popular practitioners. *See* Langbein, *supra* note 173, at 23.

202. BUTLER, *supra* note 188, at iii, viii. The plan recognized the shortcomings of relying solely on apprenticeship and provided a complimentary course of study. *Id.* at 6, 14.

203. In his Inaugural Address at the school's opening in 1838—one praised by "Justice Story for its 'high professional spirit & tone of thought,'"—Butler noted that "[t]he law is unknown to him . . . who knoweth not the *reason* thereof." *Id.* at v.

to bring students in the different departments together.[204] That general course was noteworthy for its inclusion of government-related subjects such as Principles of Legislation and Interpretation of Statutes as well as its emphasis on professional responsibility with a case entitled Forensic Duties and Professional Ethics.[205]

Students eventually viewed academic courses in law as a critical component of their education. One of the great observers of American democracy, James Bryce, observed that although university education was not a prerequisite in America for bar admission in the second half of the nineteenth century, some found it valuable enough to dedicate two or three years scientifically studying law with the "indirect results of this theoretic study in maintaining a philosophical interest in the law among the higher class of practitioners, and a higher sense of the dignity of their profession, are doubly valuable . . . ."[206] Acceptance of the significance of legal education in a lawyer's training is further confirmed by George A. Macdonald of the New York Bar in his 1896 book *How Successful Lawyers Were Educated*, which was "addressed to students, to those who expect to become students, and to their parents and teachers," and which posited, "[i]t is now universally conceded that the law schools afford the student the best opportunities of acquiring a groundwork for his professional career, the advantages of such a course of training being the necessary concentration upon and application of the mind to the study in hand . . . ."[207] In advocating formal legal education, he highlighted the increasing variety of schools and methods available to the law student.[208]

Notwithstanding the emergence of legal education at universities, the transition to such education as the preferred method to prepare for the practice of law took several years. This is illustrated by university catalogues. The first six catalogues of the University of Minnesota law program, which began with a law department in 1888, commenced with language from an ABA legal education report:

> There is little, if any, dispute now as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as

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204. *Id.* at 7, 15.

205. *Id.* at 21-22. Butler's efforts are also noteworthy, having begun during the time of Jacksonian democracy, a time of distrust of elites such as lawyers and concomitant decline of requirements for admission to the bar. *See* THE LAW SCHOOL PAPERS OF BENJAMIN F. BUTLER: NEW YORK UNIVERSITY SCHOOL OF LAW IN THE 1930S, at 26 (Ronald L. Brown ed., 1987); *see also supra* note 101.

206. *See* BRYCE, *supra* note 100, at 1288-89.

207. GEORGE A. MACDONALD, HOW SUCCESSFUL LAWYERS WERE EDUCATED 43 (1896). Interestingly, in describing materials to study in preparation for law, he emphasized works of government and political economy. *See id.* at 29-31.

208. *Id.* at 43-65.

> an attorney's clerk. Without disparagement of mere practical advantage, the verdict of the best informed is in favor of the schools.[209]

Clearly, some still needed to be sold on the idea of a university education. But the advantages of university education were transparent as advocated by an early Minnesota Dean in *Green Bag*, where he stated that "[t]he one thing needful the student does not possess, and can never thoroughly acquire in the average office–discipline of mind."[210]

However, skepticism remained about the relative benefits of university legal education, and some particularly questioned whether public universities, in general, should be in the business of what ultimately was professional education. The University of Michigan faced such skepticism when its law department was organized, and "[t]he Regents were criticized for providing preparation for a particular profession at public expense."[211] Fortunately, reference to lawyers' public role provided justification for such expense.[212] With public service at its foundation, arguably more than ever, legal education needed to emphasize students' need to learn more about their democracy in preparation for service of it.

By 1900, the founding of the Association of American Law Schools by thirty-two member schools evidenced how far legal education had come from the age of apprenticeship.[213] As legal education moved to the university environ-

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209. ROBERT A. STEIN, IN PURSUIT OF EXCELLENCE: A HISTORY OF THE UNIVERSITY OF MINNESOTA LAW SCHOOL 8 (1980). The 1860 University of Michigan's catalogue, in describing the law department, similarly reflected competition with the apprentice system. *See* BROWN, *supra* note 94, at 19-20.

210. STEIN, *supra* note 209, at 8.

211. BROWN, *supra* note 94, at 17.

212. An Address by James Campbell at the Law Department's opening may have considered this, stating:

> While the object of founding this Department is chiefly to provide some assistance in the training of good lawyers—an object the importance of which will be referred to presently; yet such is not its only object. When the law student leaves the University, he leaves it to pursue for a lifetime the course which is here commenced. But every year, hundreds of young men leave this place, some to preach the Gospel, some to heal the sick—all to become citizens, and to take their place as active members of an active community. In whatever sphere they move, and whatever course they pursue, they live under the protection of the Law, and they are governed by the restraints of the Law. It measures their rights, and it redresses their wrongs.

*Id.* (footnote omitted). In the ensuing years, Campbell would not stand alone in his positive view of the need for legal education at state universities. *See* Andrew Alexander Bruce, *The Function of the State University Law School*, 5 MICH. L. REV. 1, 3 (1906) (arguing for support of law departments). Harkening to the role of the lawyer as citizen, as Campbell did, not only has the potential to deflect public criticism of law schools, but to promote a more positive image of the profession in general. *See supra* Part I.

213. *See* Ass'n of Am. Law Schools, What is the AALS?, http://www.aals.org/about.html (last visited Nov. 13, 2005); *see also* H.L. Wilgus, *Legal Education in the United States*, 6 MICH. L. REV. 647 (1908) (providing a broad survey of legal education's development by the early twentieth century). Longstanding ties between AALS and the ABA, as well as the continued role of the ABA in accrediting law schools, reflect acknowledgment by the bar of the critical role of university education for young lawyers to act in an upstanding, professional manner. *See* Lawrence Maxwell, Jr., *Preparation for the Bar*, 39 AM. L. REV. 822 (1905) (describing as Chair of ABA Section of Legal Education the importance of ABA role in focusing on and

ment, an effort was made to increase the rigors of legal education. For instance, Dean Langdell's tenure at the Harvard Law School, which began in 1870, is noteworthy not only for widespread adoption of the case method of study,[214] but also for more rigid entry requirements and a requirement to pass three annual examinations to qualify for a law degree.[215] The introduction of law school publications, such as the *Harvard Law Review* in 1887, further illustrated the desire to emphasize the scholarly study of law.[216] These changes provided students suited for membership in a more professional bar—a bar already noted for its emphasis on service to democracy.[217] Schools' emphasis on the needs of democracy only would accelerate during the Progressive Era.[218]

### C. CURRICULUM CHANGES AND THE RISE OF THE GREAT LEGAL MOVEMENTS IN THE PROGRESSIVE ERA

During the Progressive Era, law schools continued to mirror increasing recognition by the bar of its professional responsibility to democracy. New schools, in part, owed their existence to a desire to produce lawyers who could

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improving legal education); *see also* F. M. Finch, *Legal Education*, 1 COLUM. L. REV. 94, 97 (1901) (noting state bar association also must focus on law schools). The participation of legal scholars in the activities of organizations such as the ALI and NCCUSL further reinforces the linkage between the bar and legal education.

214. The method would be modified as it was adopted by other law professors. *See, e.g.*, William A. Keener, *Methods of Legal Education*, 1 YALE L.J. 143, 148-49 (1892). A brief further note about the case method is merited. Some might view Langdell's emphasis on the study of law as a science as antithetical to a focus on public citizenship by law students. Study of civic responsibilities might be foresworn in favor of hours spent in libraries dissecting those cases. However, the principles that he sought to have students discern by studying cases to predict future legal results certainly needed to reflect the current state of the democracy in which the legal system operated. Concern of case method professors for students' understanding their public role is shown by one of the method's great masters, Professor Dwight at Columbia, imploring his students to have civic interests. *See infra* note 273 and accompanying text.

Of course, different professors of the time developed other methods that emphasized the lawyer's public role as well. Educators at Hastings College employed the "Pomeroy System." *See* BARNES, *supra* note 173, at 88-90, 111-17 ("[This] was an understanding that the LAW was a development of history and ethics, and that in our legal system a fully-formed lawyer was produced by the study of cases, codes, legislation, and especially the 'municipal law' of the United States and its principal state jurisdictions, against the background of historical and jurisprudential knowledge.").

215. *See* GRISWOLD, *supra* note 104, at 51; *see also* Wilgus, *supra* note 213, at 651-53 (cataloguing schools' movement towards stricter entry requirements in Wilgus' survey of American legal education, perhaps in response to criticism by progressive bar members seeking to make and keep the law a "learned profession"). Ultimately, admission requirements were linked in turn with the betterment of law schools, an improved bar, and "the preservation and improvement of American institutions." *See* William W. Cook, *A Letter to the Lawyers' Club*, 24 MICH. L. REV. 34, 34 (1925).

216. *See* GRISWOLD, *supra* note 104, at 53; *see also Editorial*, 1 YALE L.J. 30, 30-31 (1891) (describing aspirations for the new *Yale Law Journal*); *Editorial*, 1 YALE L.J. 269, 269 (1891) (expressing satisfaction with the new *Yale Law Journal*). Over time, such law reviews would become a powerful vehicle for descriptions of democracy and its improvement, a fact apparently recognized by Brandeis, who "inundated" Felix Frankfurter at Harvard with suggestions for the *Harvard Law Review*. *See* BRANDEIS ON DEMOCRACY, *supra* note 146, at 198.

217. *See supra* Part II.

218. If democracy was going to reform and change, and lawyers were the leaders of democracy, arguably "a better education [was] the great need and the most important reform." *See* Brewer, *supra* note 63, at 8.

facilitate the changes to the polity demanded by society. In describing the origins of the University of Chicago, for instance, a chronicler of the school's history, Frank Ellsworth, noted that this venture on the Midway

> was founded in response to rapid and significant changes within American society in the 1890s. As that society became increasingly complex, the legislative and regulatory role of government extended into new areas of social and economic concern. Reform movements proliferated, together with confidence in the role of law as a lever to social justice.[219]

Existing institutions joined these newer ones in changes that included the evolution of the law school curriculum, the emergence of important legal schools of thought appropriate for the times, and institutionalization of the ties between law schools and the fulfillment of lawyers' mission to support democracy.

Curricular changes followed from the increasing recognition that law schools educated society's leaders. This realization was not limited to the United States. Charles Noble Gregory, who served on the faculty of the University of Wisconsin[220] and at the time was Chair of the ABA's Section of Legal Education, reflected this in a report on the state of legal education around the world.[221] He noted the phenomenon of increased attendance at law schools and contemplated its cause. Gregory concluded:

> The lesson of the great attendance upon law schools in most of the more active and civilized nations, so far beyond that required to maintain the requisite contribution to the bar, is simply that more and more young men are turning to the study of the law of the land as the best preparation for many activities other than those of the lawyer, and especially for those of public and official employment.[222]

To educate leaders, both inside and outside of government, some schools increased the number of years of legal education and added studies beyond the old undergraduate degrees. Put simply, there was more about an increasingly complex American polity to learn. Illustrating this well is the experience of the University of Minnesota. Around 1930, while serving on a state crime commission, Minnesota Dean Everett Fraser perceived the legal profession's conservative proclivities and its attachment to the status quo, leading him to consider the effect on reform programs.[223] This further led him to reflect on the fact that,

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219. ELLSWORTH, *supra* note 101, at 1.

220. REUBEN GOLD THWAITES, HISTORY OF THE UNIVERSITY OF WISCONSIN (1900), *available at* http://www.library.wisc.edu/etext/WIReader/Thwaites/Contents.html (follow "CHAPTER XI" hyperlink).

221. Charles Noble Gregory, *The State of Legal Education in the World*, *in* 23 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 459-74 (1900).

222. *Id.* at 469.

223. STEIN, *supra* note 209, at 102-03. Years earlier, as noted in its Executive Committee Report, the AALS had contemplated a four year law course of study, in part, because of the need for instruction in areas such as

representative of legal education in general,

> The entire three-year curriculum at Minnesota and elsewhere was directed to providing the student with "the information and skill necessary to enable the lawyer to serve his client." It had not, wrote Fraser, "given the information, skill or interest necessary to enable the lawyer to serve the state through improvement in the administration of justice." Law schools produced lawyers who acted not only as client caretakers but also as legislators, judges, and other civic leaders—yet law schools actually prepared their students for only the first of these functions.[224]

The school responded by providing a two-year/four-year arrangement of the course of study, the so-called Minnesota Plan, along with the traditional three-year/three-year plan, with the shorter two-year period for pre-law studies allowing greater subsequent exploration of new issues without cutting instruction related to serving clients.[225]

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legislation and administrative law. HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE SEVENTEENTH ANNUAL MEETING 24 (1919). Schools such as Northwestern University and the University of California School of Jurisprudence at Berkeley were experimenting with an extended law curriculum, and vigorous discussion ensued based, in part, on papers on the matter provided by Northwestern Professor Robert W. Millar and California Professor Orrin K. McMurray. *See id.* at 43-60, 112-20. The discussion, at times, included how political science and government course work might be incorporated into an extended course. *See, e.g., id.* at 44, 50. Although the discussion did not result in the AALS calling for all schools to adopt a four year curriculum, it was proposed that the organization be resolved that the experimentation in this area by some members be viewed "with interest and sympathy." *See id.* at 59-60; *see also* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE SUMMER MEETING AND OF THE EIGHTEENTH ANNUAL MEETING 89-101 (1920) (illustrating that the curriculum issue extended without resolution and full consensus of the members to the AALS's eighteenth annual meeting).

224. STEIN, *supra* note 209, at 103 (footnote omitted). Esther Lucile Brown, the surveyor of the legal profession, in writing on the "attitudes of law teachers toward training for public service," appears to echo this observation, explaining:

> [T]he ascendancy of lawyers in the nation's government . . . indicates the necessity for a type of preparation different from that for the private practice of law, *as traditionally conceived*, appears to be an inescapable conclusion. . . . Yet it is a relatively new concept to the bar as a whole, and it is disturbing to many teachers of law.

ESTHER LUCILE BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE 22-23 (1948). Brown even questioned the actual content of courses in legislation and constitutional and administrative law that were being offered, claiming it would be naïve to assume "that these courses are designed primarily to give the student an understanding of broad constitutional issues . . . of the purpose, function, and techniques of the administrative process, and of the place of statutory law . . . in modern society." *Id.* at 23.

225. *See* STEIN, *supra* note 209, at 103-04. A large percentage of students opted for the plan of extended law study over time. *Id.* at 106-07. The post-war period and general increased enrollment at the University encumbered law student efforts to take courses as part of their studies from other departments. *Id.* at 129-30. The curriculum was subsequently reevaluated in a report of the curriculum committee approved by the faculty in 1950 with a call for eliminating nonlegal courses offered through the law school in favor of integrating nonlegal material into law courses. *Id.* at 132. Among courses that ultimately were required was Modern Social Legislation. *Id.* at 137.

Over the years, Dean Fraser sought not only to implement his vision of a legal curriculum that educated American leaders, but to share that vision with the rest of the legal academy. *See, e.g.*, HANDBOOK OF THE

And, the requirements for two-year undergraduate bachelor of laws degrees at other universities also explicitly reflected the need to understand political institutions. Among required subjects for the first of the two years at Notre Dame, for instance, were "Political Economy," "Principles of Legislation," and "Public and Private Law."[226] At the heart of the evolving curriculum was the recognition of public law's increasing role in the lives of the American citizens. While the rise of the administrative state and the bar's recognition of its importance were not preordained,[227] their reality led to the teaching of public law courses at a variety of institutions.[228] This made particular sense as the United States moved into an age of New Deal legislation and additional administrative agencies.[229]

Augmenting the importance of these curricular changes was the emergence and further development of important legal movements. These movements were significant because many scholars at law schools, teaching America's future

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ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 60-65 (1936).

226. PHILIP S. MOORE, A CENTURY OF LAW AT NOTRE DAME 4 (1969).

227. Some conservative members of the bar likely were suspicious of the shift of law from courts to legislatures and administrative agencies in the wave of social legislation that arose in the early part of the twentieth century. *See* HOBSON, *supra* note 104, at 262-63.

228. *See, e.g.*, JAMES A. RAHL & KURT SCHWERIN, NORTHWESTERN UNIVERSITY SCHOOL OF LAW—A SHORT HISTORY 34 (1960) (noting "appearance [at Northwestern] in the curriculum of a number of new public law courses, in addition to the old common law and private statutory staples" including administrative law, labor law, federal taxation, trade regulation, and interstate commerce); MOORE, *supra* note 226, at 58 (indicating course in administrative law and public officers at Notre Dame); BROWN, *supra* note 61, at 89-90 (noting trend to provide courses in statutory interpretation and to prepare students for practice before administrative agencies); LASKI, *supra* note 48, at 584 (recognizing increased interest in public law courses in 1930s); *see also* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING 49-52 (1941) (addressing the AALS, Dr. Rollin B. Posey notes curricular options for law school training in public administration); *cf.* Wayne L. Morse, Address: Training for Public Administration, *in* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 73-86 (1937) (discussing university wide approach to training for public service and suggesting law training may be better for some tasks than others). Public law would remain in curricula as law schools continued their development. *See* Lepawsky, *supra* note 31, at 267 (describing 1950 public law curriculum). Michigan's curriculum committee in a 1950 Report calling for legal education that promotes "knowledge and understanding" of the legal system in its entirety, noted:

> [The] prodigious increase in statutory law, particularly in the areas of public law impinging upon private right and interest, requires attention to and emphasis upon the fundamental concepts and processes observable in this area also. A system of legal education that shunts public law to the periphery gives our students only an imperfect view of the legal system.

BROWN, *supra* note 94, at 604-05. Along these lines the 1957 Michigan *Law Students' Handbook* reveals a requirement to take at least three courses from a selection of those in the Public Law area. *See id.* at 745.

229. It also made sense from the perspective of increasing students' awareness of their professional responsibility. In worrying that too little attention had been paid in legal education to "provid[e] the lawyer with some understanding of his public responsibility" and "to guide his judgments . . . as a citizen whose work is peculiarly centered on the problems of government," Columbia Professor Karl Llewellyn saw expanding the public law curriculum as a partial salvo. Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 219 (1948) (noting also that he would like "overt recognition that even 'private' law is shot through with problems of general welfare").

lawyers, subscribed to them. Moreover, such movements were informed by the current nature of American democracy and sought to alter that democracy's future course. The "law and" movement, focusing on the intersection of law with other academic disciplines, for example, naturally complemented an increasing emphasis on public law. The movement was not only reflected in legal scholarship, but in efforts to introduce students to other fields of study as part of their development as lawyers.[230] Eventually tools would be developed to support this end. For instance, Professors Sidney Post Simpson, Julius Stone, and M. Magdalena Schoch produced a remarkable three volume work, *Cases and Readings on Law and Society*, for the American Casebook Series.[231] In their own words, the books provided "materials for the study of the major institutions of the legal order in their relation to the social and economic conditions of the time and place, over an extensive time-scale and on a broad geographical basis."[232] No doubt is left about the association of their endeavor to a better understanding of democracy, with the second book entitled *Law in Modern Democratic Society* and book three named *Law, Totalitarianism and Democracy.*[233] The books place American democracy in an international context, and provocatively explore that democracy in the changing times of the nuclear age.[234]

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230. Legal educators debated the efficacy of bringing other disciplines into the classroom, and social science courses eventually emerged in the curriculum. *See* Lepawsky, *supra* note 31, at 267-68 (describing introduction of social sciences courses into law school curriculum and varying views on their benefit); James Rowland Angell, Address: The University and the School of Law, *in* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL MEETING 40, 48-50 (1927) (addressing AALS, Yale University President explains how "more intimate correlations of the work of the law school with the social sciences can be brought about"); *see also* Wormser, *supra* note 41, at 11 (claiming law is a "progressive and developing social science" that should be studied with subjects such as "sociology, philosophy, ethics and political economy"). Young law reviews provided an important forum for dialogue on how other disciplines might inform legal pedagogy. *See* Samuel Nirenstein, *The Law Review and the Law School*, 1 N.Y.U. L. REV. 31, 31 (1924).

Notwithstanding that he was actually a replacement speaker due to another's illness, Columbia University's Richard Powell artfully described a "movement" afoot in legal education, one which by its nature addressed dissatisfaction with the current state of affairs. *See* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL MEETING 34-40 (1928). Such dissatisfaction resulted from an inaccurate assumption "that the nonlegal social structure either was known to the students or was immaterial," an assumption that meant law students departed school "with only a slight awareness of the store of knowledge gathered by social scientists, with only a dim picture of society as it actually exists." *Id.* at 34. To correct the failings of law faculties to become acquainted with and to share with their students the work of psychologists, sociologists, and others working in the social sciences, he called for not only addressing these issues but also for experiments in instructional methods. *See id.* at 37-40.

231. *See* SIDNEY POST SIMPSON, JULIUS STONE, & M. MAGDALENA SCHOCH, CASES AND READINGS ON LAW AND SOCIETY (Warren A. Seavy ed., 1949).

232. *Id.* at vii.

233. *Id.* at xxi-xxii.

234. *See id.* at 2177-2343 (exploring a variety of subjects from socialism, corporations, urbanization, and employment to agriculture, civil rights, international relations, and nuclear energy). Simpson, Stone, and Schoch's work was important because beyond paying lip service to integrating other disciplines into the classroom, it provided actual means to do so. *See* Albert A. Ehrenzweig, *Teaching "Integration"—A Comment on Law And Society*, 2 J. LEGAL EDUC. 359, 359 (1950). The books' vast scope left law schools likely unable to

Interdisciplinary studies facilitated lawyers' abilities to understand the flaws of the current American polity and to be engineers of social change as a new public law emerged.[235] While discussing the objectives of legal education in the 1930s, University of Michigan Dean Henry Bates explicitly made this point when he announced,

> The School is placing increased emphasis upon instruction in the application of law to contemporary life, and upon a consideration of the standards, principles, and rules of law, as constituting the general scheme of social control. This involves consideration of the light thrown upon our legal system by economics, political theory, sociology, and other social sciences, and by psychology, psychiatry, and biology . . . .[236]

Those who advocated legal realism especially saw the importance of law as a means for social engineering,[237] and thus provide critical support for the notion of a democracy duty during their time. This may not be an intuitive conclusion. After all, realists often contrasted their views with staid principles of law and jurisprudence,[238] principles which might include those related to traditional notions of democracy. But central to the realists' mission—a more scientific study of the law—was recognition that the current understanding of the American legal system and polity was insufficient. And their study was a practical one aimed at improving and modernizing our democracy.

The realists of the Yale Law School illustrate this important end. Edward Stevens Robinson, a Yale Professor of Psychology and early realist associated with the law school, cleverly anticipated that some might dismiss realists' study of the judicial process and exposition on how lawyers think as merely an amusing

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cover all of these volumes in a single existing course, but they provided materials for schools to innovate. The University of Alabama, for instance, used Book 1 as part of an introductory course, which Alabama Professor Jay Murphy opined would help make students "more constructive lawyers and citizens." *See id.* at 360-61.

235. The great lawyers of the early twentieth century embodied lawyers' aspirations to be social engineers. *See* Paul A. Freund, Tyrell Williams Memorial Lecture at Washington University (St. Louis) School of Law: Mr. Justice Brandeis Evaluated (Apr. 30, 1953), *in* THE BRANDEIS READER, *supra* note 25, at 227 (discussing Brandeis' view of utilizing "the talents of ordinary people" and lawyers' role in helping to do so; also noting "[p]reachers, publicists and politicians were spreading the gospel, but it was the lawyer's function to translate these aspirations into the structure of our institutions").

236. BROWN, *supra* note 94, at 24-28 (discussing objectives of legal education at Michigan in the 30s, 40s, and 50s, which included Dean Bates' rejection of "merely teaching the law as it is, uncritically and dogmatically, for such teaching would amount to little more than mere training, as for a trade").

237. *See* RALPH HENRY GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 413 (3d ed. 1986) (noting how realists viewed "written constitutions and positive laws that issued from the legislatures as instruments of social engineering"); EDWARD STEVENS ROBINSON, LAW AND THE LAWYERS 3-7 (reprint 1937) (recognizing lawyers as a class of social engineers).

238. *See, e.g.*, RAHL & SCHWERIN, *supra* note 228, at 42-44 (describing Northwestern's realist Dean Leon Green and contrasting legal realism with "the older formal jurisprudence of abstract and natural legal principles"); GABRIEL, *supra* note 237, at 412-15 (contrasting realists' views with earlier jurisprudence that saw positive law as creating norms for specific situations but that were "always conditioned by the fundamental law beneath them" based on life values and ultimate norms).

professorial exercise.[239] But clearly his hope was that by stating the facts inherent in his favored naturalistic approach to law, future lawyers would be encouraged to accept use of increasingly available sociological and psychological knowledge rather than trying to accord "ancient legal theories" with "changing social circumstances."[240] Building on his colleague Robinson's skepticism of how some matters continued to be addressed with an unscientific approach, Yale law professor Thurman W. Arnold questioned whether "the problems of government" must "continue to be studied in the light of faiths and symbols rather than by scientific observation?"[241] In pursuing this question, Arnold observed a "troubling paradox":

> Social institutions require faiths and dreams to give them morale. They need to escape from these faiths and dreams in order to progress. The hierarchy of governing institutions must pretend to symmetry, moral beauty, and logic in order to maintain their prestige and power. To actually govern, they must constantly violate those principles in hidden and covert ways.[242]

Yet rather than stopping with this observation from his study of our polity as a realist, he struggled to craft a "constructive philosophy of government" and concluded in a hopeful fashion by expressing the belief that the citizenry might accept a more realistic approach by their government.[243]

Thus, for Robinson and Arnold, law arguably not only provided the means for social engineering, an activity better engaged in by a focus on objective facts rather than past mythologies; the end sought was a better democracy for modern times.[244] This rendered critical the link between the legal movement they espoused and law schools. Lawyers needed to be trained to change the system to better serve the citizenry.[245] Certainly, this was the aim, for instance, of realists at the Yale Law School in ensuing decades such as Jerome Frank, who emphasized clinical education, and Myres McDougal and Harold Laswell, who sought to

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239. *See* ROBINSON, *supra* note 237, at 317-23. For some the exercise might not have been amusing nor advisable. For instance, Harvard Law School Dean Roscoe Pound represented a more traditional jurisprudence in arguing emphasis should go beyond "merely how judges decide" to "how they ought to decide" in light of values; and, legal philosopher Morris Cohen noted that if law is social engineering, study of social ideals behind law is critical. *See* GABRIEL, *supra* note 237, at 414-15.

240. *See* ROBINSON, *supra* note 237, at 317-23.

241. *See* THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT, at v (3d prtg. 1938).

242. *Id.* at 229.

243. *See id.* at 229-30, 268-71.

244. *See* GABRIEL, *supra* note 237, at 412-15.

245. The observations of Robert M. Hutchins, a Yale Law School Dean from the 1920s, seem to reinforce the point. Hutchins saw a United States where people focused on making sure only more able individuals could study and practice the law but gave less attention to how to train those individuals. *See* Robert M. Hutchins, *The Law School Tomorrow*, 225 N. AM. REV. 1, 3 (1928). He further offered that while students and professors critique court opinions as "'socially undesirable'" and "[c]ertainly a law teacher can guess as to what is socially undesirable . . . unless he is in touch with modern developments in the social sciences he can hardly make an intelligent guess." *Id.* at 10.

train a new generation of policy-makers.[246]

Remember that these movements developed during a time of great social change and innovation for our democracy, and offered ideas and tools to assist with these developments. Accordingly, law schools naturally looked to institutionalize links with the bar and policy-makers. As lawyers and policy-makers reevaluated the current system, law schools became a research agency supporting these endeavors. The law school's mission grew beyond merely training future bar members to help determine what the law should be. This took advantage of the perception of some that the legal academy potentially provided a less partisan source of expertise for dealing with society's problems.[247]

Universities created public law institutes to facilitate the study of legal problems and the invention of solutions. One such institute was at the University of Minnesota. By 1922, Dean Everett Fraser, known for his political activities in support of President Franklin Delano Roosevelt, conceptualized "the law school as a research agency."[248] He reported on "[t]he law and its administration" failing to meet "the necessities of changing conditions.'"[249] Accordingly, he saw the faculty as a vehicle to foster improvement of the law when busy courts and legislatures could not, and several faculty members would go on to draft major legislation in the ensuing two decades.[250] The University of Michigan similarly developed the Legislative Research Center, where research assistants studied current legislation for a publication, *Current Trends in State Legislation*; and those associated with the Center also could develop legislation or provide research assistance for other statutory drafters.[251] The work of these types of institutes continues through today.[252] By exposing students to materials that

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246. *See* Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504, 507 (1999). Laswell and McDougal were known for "advocat[ing] that the law school curriculum be redirected to 'systematic training for policy-making . . . for the more complete achievement of the *democratic values* that constitute the professed ends of American policy . . . .'" Lepawsky, *supra* note 31, at 269 (emphasis added).

247. *See* James Parker Hall, *The Next Task of the Law School*, 24 MICH. L. REV. 42, 46-48 (1925) (claiming benefits of non-partisan research role for law schools and potential especially for state universities to work to improve both local laws and to impact the law at the national level by working with the ALI); *see also* Cook, *supra* note 215, at 38 (suggesting that the University of Michigan could compete with the ALI); Bruce, *supra* note 212, at 3-5 (justifying support for state university law departments with their research value); Frankfurter, *supra* note 41, at 538-39 (commenting on how the legal academy is well positioned to devote more time to task of analyzing and improving law).

248. STEIN, *supra* note 209, at 77-78, 101.

249. *Id.* at 101.

250. *Id.* at 102.

251. BROWN, *supra* note 94, at 164.

252. An example is the Alabama Law Institute. This legislative agency was created by statute in 1967 "to clarify and simplify the laws of Alabama, to revise laws that are out-of-date and to fill in gaps where there exists legal confusion." The Institute resides at the University of Alabama, and draws largely on the expertise of volunteers, including law school faculty from the state, lawyer legislators, judges, and members of the state bar. It conducts studies for state legislators and other government officials. *See* Alabama Law Institute, Purpose, http://ali.state.al.us/about.html (last visited Nov. 13, 2005).

would help them fulfill their responsibility to democracy and by showing democracy's importance through action—action including the work of scholars engaged in the movements of the time and the research institutes—law schools further wed themselves to efforts of the bar to meet the profession's public obligations.

### D. SERVING A LARGER PUBLIC AND RESTORING FAITH IN THE LEGAL PROFESSION

As previously noted, also critical to democracy's improvement over time was consideration of the interests of a broader range of citizens. As democracy improved in this regard, although slowly, so did law schools. One aspect was educating a more diverse student body, who could advocate the interests of a broader swath of society.

For example, the creation of new law schools raised the issue of admission policies. Hastings College confronted this issue in its dealings with Clara Shortridge Folz, an attorney, whose attendance of class at Hastings College of Law in 1879 apparently triggered a move by the College's Board at one of its early meetings to unanimously bar women from admission to the school.[253] However, litigation ensued based on the College of Law's association with the statutorily created University of California, whose other departments generally admitted women.[254] The California Supreme Court unanimously upheld a lower court judgment in Folz's favor.[255] The relevant statute did provide for full affiliation of the College of Law with the University and discretion provided to its Board by the statute to control the school's property did not cover this policy on women.[256] This was a College founded to instruct those seeking admission to practice, and as women by law could practice law in California, they had to be permitted to attend this College.[257] Folz went on to other great "works and fame," such as efforts leading to the adoption of the public defender system, but "having broken open Hastings [for women] remained in her own eyes her greatest achievement."[258] Not all female and minority candidates for admission would be as lucky,[259] but there were other

253. *See* BARNES, *supra* note 173, at 47-57.

254. *Id.* at 51.

255. *Id.* at 53.

256. *Id.* at 54-55.

257. *Id.* at 55.

258. *Id.* at 56-57 (noting her criminal law crusade led to the Foltz Defender Bill and the public defender system). Unfortunately, in an apparent final jab at Folz, the Board quickly passed a resolution prohibiting admission to the College, absent special order, of anyone already admitted to practice by California's Supreme Court as Folz was; however, although the exact history is unclear, she may have ultimately attended some classes notwithstanding the Board's efforts. *Id.* at 55-56.

259. As a general matter, for instance, existing patterns of class structure continued to limit access to legal education for many in the nineteenth century. *See* Mark W. Granfors & Terence C. Halliday, *Professional*

early successes.[260]

Charles Hamilton Houston studied at Harvard and became the first African-American elected as an editor of the *Harvard Law Review*.[261] Subsequently in the 1920s, Houston helped transform Howard University "into a place where the African-American community could find leaders to fight the racial discrimination embedded in the law."[262] Houston possessed an unfailing understanding of lawyers' responsibility to support America's democracy through its improvement. After studying African-American lawyers, he concluded that younger African-American lawyers had "'a higher conception of the privileges and responsibilities of the lawyer'" while older ones "'tend[ed] to regard the profession as a trade for exploitation' and did not respond to 'civic or racial matters which do not touch directly upon their own personal interests.' Community activists complained that 'the lawyers have isolated themselves from other forces and agencies working for racial advancement.'"[263] He saw legal education as a way to inspire more publicly-spirited legal work. One of his best students, Justice Marshall, explained that "Houston 'insisted that we get out into the field and become "social engineers" and not just lawyers.'"[264]

In addition to preparing engineers for social change, professors themselves became involved in civil rights causes. Law professors buttressed some of the important efforts of lawyers to support the civil rights movement that were previously discussed. Columbia Professor Charles Black's work with the NAACP on the *Brown* litigation comes to mind.[265] Moreover, the U.S. Commission on Civil Rights that authored the *Freedom to the Free, Century of Emancipation Report* included individuals with strong ties to the legal academy such as Erwin Griswold and Spottswood Robinson.[266] These individuals not only fulfilled their own responsibility to democracy through such service,[267] but also became role models for their students.

One also should not discount the efforts of students themselves to help broaden

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*Passages: Caste, Class and Education in the 19th Century Legal Profession* 17 (Am. Bar Found., Working Paper No. 8714, 1987) ("[T]he shift toward a predominantly law school trained bar could not have democratized the bar by effecting changes in social backgrounds. The antecedents of such changes must be sought elsewhere.").

260. *See, e.g.*, Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, 2004 Albritton Lecture: Women's Progress at the Bar and on the Bench: Pathmarks in Alabama and Elsewhere in the Nation, *in* 56 ALA. L. REV. 1 (2004).

261. BALL, *supra* note 148, at 29-31.

262. TUSHNET, *supra* note 140, at 6.

263. *Id.* at 6-7.

264. *See* BALL, *supra* note 148, at 29-31.

265. *See* WILLIAMS, *supra* note 145, at 210-11.

266. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 154, at 207.

267. As most law professors are lawyers, they must not neglect their own public professional responsibilities. *See* Robert R. Kuehn, *A Normative Analysis of the Rights and Duties for Law Professors To Speak Out*, 55 S.C. L. REV. 253 (2003); Susan Pace Hamill, *The Book that Could Change Alabama*, 56 ALA. L. REV. 219 (2004).

the reach of U.S. democracy. The students mentioned at the beginning of this article had predecessors who were actively involved, for example, in the movement to deliver legal services to the poor.[268] This generation of lawyers would help restore trust in the profession in the wake of cynicism engendered by Watergate. Their ability to do so was not an accident. Law schools supported their efforts, fueling the momentum of their desires to engage in public service. Eventually law schools tried to institutionalize support of such efforts in the same way that they provided research agencies for progressive legislators earlier in the century. An example is Fordham University School of Law's Louis Stein Center for Law and Ethics. Created in the wake of Watergate,[269] the Center "sponsors programs, develops publications, and supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work."[270] Such programs offer opportunities to improve the reputation of lawyers by educating attorneys with a keen sense of their public responsibilities, who can then proceed to serve the polity.

### E. RETURNING TO THE HOMESTEAD AND LEARNING TO AVOID BEING AN IDIOT

Before completing consideration of law schools' traditional role in facilitating observance of the democracy duty, the role of schools in exposing students to local law must be considered. Most institutions today view themselves as *national* law schools and avoid focusing solely on the law of one jurisdiction. And, this national focus is longstanding.[271] For example, this was a critical aspect of the more "cosmopolitan" curriculum established at the Litchfield Law School which served as a model for other educational institutions.[272] But, law schools still considered the impact of lawyers on local communities.

Individual professors long have advocated the need for students to be interested in local issues. Exemplifying this is Columbia Professor Theodore Dwight's instruction to his students that "every lawyer should have some other,

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268. *See* AM. LAW STUDENT ASS'N, LEGAL AID HANDBOOOK (American Bar Center 1955) (explaining student organization's interest in legal aid almost from its inception and providing guidance for students "establishing legal aid clinics"). Also see AM. LAW STUDENT ASS'N, EXTENDING LEGAL SERVICES TO THE POOR: ANNUAL MEETING SEMINAR (1966) (discussing legal aid issues at the time of the war on poverty in a seminar moderated by U.S. Supreme Court Justice Tom Clark). Junius Allison, Executive Director of the National Legal Aid and Defender Association, emphasized the role of students in the provision of legal services as part of the 1960s war against poverty. *See id.* at 6-8.

269. *See* William Michael Treanor, *Integrity in the Law: In Honor of John D. Feerick, Introduction*, 72 FORDHAM L. REV. 251, 253 (2003) (noting Stein Center grew "out of [former Dean] John [Feerick's] and Lou Stein's conviction in the aftermath of Watergate that Fordham Law School could play a critical role in restoring faith in the legal profession . . .").

270. Fordham University School of Law, Louis Stein Center for Law and Ethics, http://law.fordham.edu/htm/st-home.htm (last visited Nov. 13, 2005).

271. *See* LASKI, *supra* note 48, at 584.

272. *See* Langbein, *supra* note 173, at 26-29.

outside, useful, or public-spirited interest," and his example of service to the community.[273] In the twentieth century, public figures continued to call on students to continue this tradition. For instance, Illinois Senator Paul H. Douglas urged law students to "get interested in local affairs and in community improvements."[274] Douglas added,

> Why am I saying all this? I am saying it simply to show you that you will have tremendous latitude in your functions as a citizen; that you can take part in the discussion of public affairs without endangering your present livelihood. Now this is extremely important—more important now than ever before. All too often the tendency is for lawyers, when they become successful, to retire to the suburbs amongst comfortable people and to cease to exist as citizens.
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> The other day, I looked up the origin of the word "idiot." I found to my interest and pleasure and surprise that the term "idiot" comes from the Greek root "idiotes" which meant "a man uninterested in public affairs." Idiots, according to the Greeks were people who did not take any interest in public affairs, and I think that is a very real lesson for us at the present time. A person is not fully rounded out unless he takes part in the stream of activity and in the great decisions which have to be made. You cease to be a moral being unless you take some share in the issues to be decided. So what I am urging you prospective lawyers to do, is to be active in public affairs, and I think you will find it will do a lot for you as people.[275]

Even more recently, some of the most important efforts in this regard are those of the law school clinic movement. While largely recognized as a way to provide students with practical legal experience, the law school clinic movement serves an additional end. Students get to practice their professional responsibility to democracy by engaging their local communities and working to improve the conditions therein.[276] Under law school auspices, by undertaking to improve the lives of community members, as suggested by Brandeis, these clinics can

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273. *See* COLUMBIA HISTORY, *supra* note 191, at 39-43. An important addition to Dwight was Francis Lieber as Professor of Political Science. *Id.* at 47-48, 60. Recall also that the advertisement for Dwight's predecessor at Columbia, Kent, sought someone versed not only in the laws of other jurisdictions, but also in the home jurisdiction of New York.

274. *See* Senator Paul Douglas, Address: The Lawyer in Government and Politics (Jan. 10, 1952), *in* LAWYERS' PROBLEMS OF CONSCIENCE, *supra* note 31, at 27.

275. *Id.* at 26-27. Senator Douglas might have been pleased to know that his words appear to have lingered around Harvard years later. During his campaign for a seat in the United States Senate, a graduate of the school who spent much of his time after leaving Cambridge engaged in law teaching and community service, spoke with Bob Hebert of the *New York Times*. In summing up his campaign, Hebert explained of this Harvard alumnus, Barack Obama, "He told me he believes strongly that while there are powerful and persistent differences at work in society, there is also 'a set of core values that bind us together as Americans.' He said the basic idea of his campaign, which he described as 'an experiment,' was to see whether 'we could recast politics' in a way that responded to his assumption 'that people want to hear an expression of those common values.'" Bob Hebert, *A Leap of Faith*, N.Y. TIMES, June 4, 2004, at A6.

276. *See, e.g.*, Holland, *supra* note 246 (describing history of clinical education at the Yale Law School).

revitalize democracy in a way that is as important as the work undertaken by the Founding Fathers in creating America's political institutions. And, hopefully for students, this work provides a foundation for a life characterized by civic responsibility.

## IV. LEGAL EDUCATION'S ROLE IN HELPING TODAY'S LAWYERS FULFILL THEIR DEMOCRACY DUTY

The above-described tradition in legal education illustrates that when considering how to teach students about the democracy duty, one must move beyond simplistic binary debates about whether to teach principles or practicum, ideas or skills. Discussion of the practical workings of democratic institutions should enhance students' ability to work with those institutions, and understanding the principles behind these institutions and a lawyer's need to support democracy should inspire students to live up to their forthcoming professional obligations. Indeed, if all professors think about how American democracy is reflected in, affects, and is affected by the subjects they teach, they should be better positioned to encourage students already engrossed by the public interest to harness such enthusiasm in support of the good of the polity after graduation.[277] Felix Frankfurter, a great proponent of the legal academy's ability to facilitate law reform and improvement of society through research, appropriately cautioned scholars not to forget the additional impact that they can have through the inspiration of their students' service of the polity; for, as he explained, "We make of [students] clever pleaders but not lawyers if they fail to catch the glorious vision of the law, not as a harsh Procrustean bed into which all persons and all societies must inexorably be fitted, but as a vital agency for human betterment."[278]

Many universities and legal scholars today already engage in this enterprise with their students. They regularly bring democracy into their classrooms.[279] And, they do so in a variety of courses and utilize an increasingly wide array of

277. Indeed, one can argue that lawyers in the legal academy have an obligation to do so. *Cf.* Edwards, *supra* note 55, at 1161 ("[L]egal education inevitably shapes the profession, and if academicians abdicate their duty to communicate the profession's traditional commitment to the public good, they deliver students by default to the forces supporting unbridled corporatizing of the profession.").

278. Frankfurter, *supra* note 41, at 539-40.

279. That is not to say that legal education is perfect in its service of democratic ends. Just as attention has been drawn to the fact that access to legal education in the nineteenth century remained limited by the class structure in the United States, some believe that legal education today may continue to reinforce traditional hierarchies. *See* Granfors & Halliday, *supra* note 259; DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY (2004) (critical edition with commentaries). However, this only seems to reemphasize the importance of members of the legal academy—whatever their view on what democracy and the proper order should be—bringing their vision to the classroom for discussion.

vehicles to accomplish their goals.[280] Although a proper component of a professional responsibility course, democracy should not be relegated to a single course offering. It should be taught *pervasively* throughout the curriculum, including in legal ethics courses. This is consistent with a realization by many that the teaching of the broad array of issues associated with professional responsibility should not be limited to a single course.[281]

Each law professor and school ultimately must select the teaching methods best designed to accomplish their goals given their familiarity with their students and the circumstances at their own institutions.[282] However, discussion of a few current examples of how schools are bringing democracy to their students is useful. Perhaps it is time for a little Locke or a modicum of Montesquieu to return to law school classrooms.[283] That is one way to introduce democracy to students, but many others exist. Whatever specific method selected, we must bring

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280. Scholarship in other fields of study continues to be produced that can provide students with further insights into our political system and democracy. *See, e.g.*, Casey B. Mulligan et al., *Do Democracies Have Different Public Policies than Nondemocracies?*, 18 J. ECON. PERSP. 51 (2004); Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075 (1998) (reflecting use of public choice theory to understand law in the "modern administrative state"). More generally, the social sciences introduced to legal education decades ago and other interdisciplinary insights possess continued vitality in helping students to understand not only the society in which they practice, but also more about themselves as professionals better prepared to serve that society with integrity. *See* Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261, 276-77 (2003).

281. *See* 1996 ABA REPORT, *supra* note 20, at 15-23 (recommending that legal ethics be taught pervasively during a law student's multi-year education in light of the benefits of such efforts to do so by law schools such as Notre Dame); Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139, 148-51 (1995) (providing "rationale for pervasive ethics"); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992) (describing strategy for integrating ethics into coursework); *see also* Mary C. Daly et. al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (1995) (describing Fordham's offering of courses that look at legal ethics in particular contexts and benefits of this approach); Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998) (noting limits on effective coverage in an introductory legal ethics class and the benefit of additional contextual courses). That stated, it is easy to pay lip service to this notion, but the benefits of a pervasive approach only may be realized by more members of the legal academy personally dedicating themselves to such ends. *Cf.* Susan P. Koniak & Geoffrey C. Hazard, Jr., *Paying Attention to the Signs*, 58 LAW & CONTEMP. PROBS. 117, 117-18 (1995) (positing that "at most schools, the 'pervasive method' . . . is still little more than tokenism designed to satisfy the American Bar Association").

282. *See* John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 DUKE L.J. 317 (1987) (recognizing curriculum reform faces "restraints and costs").

283. In linking the quality of lawyers to their course of study, Dos Passos bemoaned in his own time:

> To judge of the quality of our lawyers . . . it is necessary . . . to know the course of studies they pursue before they are admitted to practice. As the lawyer is trained, so he grows. To produce lawyers who can perform their duties, they should be taught to cultivate a moral sense; the nature and object of law; the nature and duties of citizenship; the nature and duties of a legislator; but above and beyond everything else, they should be taught the real mission of the lawyer—which includes professional ethics. These fundamental requisites to the making of a full lawyer are almost entirely overlooked in all of the courses of education followed in law offices, law schools, and academies or colleges. Lawyers are made up to be mere instruments for their clients, without any attention being paid to their duties to the State. The fact is extraordinary, nay, incredible. But it is true.

democracy to students in a vibrant fashion.[284] The examples discussed below by no means comprise a comprehensive list of efforts to bolster students' compliance with professional obligations. Many others encourage this in their classrooms on a regular basis. Hopefully, the examples provided will spark further discussion of their potential for broader application as well as a dialogue on additional techniques currently being used by others in the legal academy.

### A. THE MODERN DEMOCRACY CURRICULUM

As Esther Lucile Brown recognized in her study of the U.S. legal profession, "adequate preparation constitutes the most important single element of successful practice" of a profession.[285] The significance of preparing students for their professional responsibilities renders critical the nature of the law school curriculum. As law schools adopted their curricula in the last century to address the emergence of public law, today's law schools also must reevaluate and modify their curricula.

Some of what is old is new. While classes in legislation and administrative law have existed for years, some schools are reintroducing courses in these areas as part of the core, rather than elective curriculum.[286] Part of Washington and Lee's self-proclaimed first year "mental boot camp," for instance, is a course called American Public Law Process.[287] The course introduces first-year students "to the legal framework of American constitutional and administrative government."[288] Wake Forest requires second-year students to take a course, Legislation

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Dos Passos, *supra* note 18, at 50-51; *see also* Larson, *supra* note 40, at 193-94 (noting how subjects of past study and existing teaching techniques may complement new aspects of legal education).

284. In thinking about how to bring democracy and its principles to students, one might recall former NYU Dean Robert McKay's observation about teaching professional responsibility principles. He proclaimed:

> It is unquestionably difficult to teach effectively the moral standards of the profession, involving, as appears on the surface, too-obvious homilies on the one hand and quirkily detailed rules on the other. But to view the professional responsibilities in that light is tunnel vision of the most restricted nature. Contemporary problems of professional responsibility are as interesting, as intricate, and as many-faceted as those of criminal justice, consumer law, or conflict of laws.

McKay, *supra* note 159, at 47-48. As one professional responsibility, a lawyer's obligations to democracy, when placed in context, also should be fascinating for students.

285. *See* Brown, *supra* note 61, at 5; *see also supra* note 283.

286. Endorsement by schools of such subjects is significant. Mere offering of important courses without such endorsement limits their impact. *See* Laski, *supra* note 48, at 587 (noting limited student vision of democracy, focused on judge-made law, notwithstanding the introduction of courses emphasizing statutory interpretation and the role of federal and state legislatures which garnered low enrollments).

287. Washington and Lee University School of Law, About the Curriculum, http://law.wlu.edu/academics (last visited Nov. 13, 2005).

288. Washington and Lee University School of Law, Admissions Book, Curriculum, https://law.wlu.edu/admissions/AdmissionsBook.pdf (last visited Nov. 13, 2005).

and Administrative Law.[289] Wake Forest's "course surveys the legislative process, fundamentals of statutory interpretation, and the work of administrative agencies, with special emphasis on the administrative rule-making process."[290] Professor Ron Wright's section of the class not only studies these areas of the law, but garners practical experience through statutory drafting exercises.[291] And as previously noted, Georgetown offers clinical experience to its students in the field of legislation. Such courses provide fundamental insight into our democracy by providing a deeper understanding of its institutions and of the process of how law—both statutes and regulations—is promulgated in that democracy.

Such insight need not be limited, however, to specialized courses. Law teachers can pervasively emphasize aspects of the government's structure and the administrative state that reflect the nature of U.S. democracy across their various courses. For example, many business organizations classes undoubtedly discuss the director nomination and proxy-voting process. Policymakers have spent much time recently scrutinizing that process and considering changes to shareholder participation in corporate governance. Classroom discussion of this issue provides a unique opportunity to introduce students, for example, to the administrative rulemaking process of the SEC, an important institution of our democracy at a time of numerous corporate scandals—one that reflects a desire to make the product of the instruments of our government representative of the needs and will of its people. In my own business organizations course, we review proposed rule language, but also discuss how an agency such as the SEC consults with the public during rulemaking and how lawyers need to engage the Commission in an effort to improve the final regulations.[292] Discussion topics range from the SEC's use of techniques beyond the standard written comment process, such as public roundtables,[293] that attempt to forge consensus on controversial issues to the special role of specific members of the bar, such as those on the ABA Section of Business Law's committee on the federal regulation

289. Wake Forest University School of Law, First-Year Course Requirements, http://www.law.wfu.edu/x282.xml (last visited Nov. 13, 2005); *see* Memorandum from Miles Foy, Associate Dean, Wake Forest University School of Law, to 2Ls and 3Ls Regarding Several Matters of Importance (June 27, 2003) ("[T]he subjects of legislation and administrative law are so central to the modern practice of law that they must be a part of the core curriculum of any good law school.") (on file with author).

290. Wake Forest University School of Law, Legislation and Administrative Law 220, www.law.wfu.edu/x312.xml (last visited Nov. 13, 2005).

291. *See* Ron Wright, Legislation and Administrative Law Course Home Page: Fall 2003 (on file with author).

292. Participation is a privilege that must not be squandered. *Cf.* Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (Brandeis, J., dissenting) ("The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it.").

293. *See, e.g.*, Press Release, U.S. Securities and Exchange Commission, Notice of Roundtable Discussion Regarding Proposed Rules Relating to Security Holder Director Nominations (Feb. 9, 2004), http://www.sec.gov/news/press/2004-15.htm.

of securities, during the rulemaking process.[294] New teleconferencing technologies provide further capability to bring into the classroom lawyers from around the nation engaged in the democratic process and at work on issues of the day. Courses in various subjects could similarly bring government processes, both at the national and local levels, into the classroom.[295]

Of course, just like our colleagues from decades ago, legal scholars must constantly consider new aspects of our democracy that need further exploration in the curriculum.[296] In the spring of 2005, University of Alabama students for the first time could elect to study integrated financial regulation. The new seminar studies an increasingly significant aspect of the American administrative state—how federal regulators encroach upon each other's traditional jurisdictions, particularly in the areas of banking, commodities, securities, and insurance law. The interaction of regulators is particularly complex in a democracy where interest groups from relevant regulated industries have the opportunity to actively engage both the regulators and federal legislators. The seminar exposes students to how our polity functions today, increases their understanding of that polity, and prepares and encourages them to participate in the future policy-making dialogue. If they do so effectively, in addition to impressing their clients, they will further fulfill their professional obligations.

### B. INSTITUTIONALIZING SUPPORT FOR STUDENT CIVIC ACTIVITIES

In addition to academic course work, today's schools further enable students to fulfill their responsibility to democracy by institutionalizing opportunities for students to become actively involved in public interest work that addresses evolving social needs.[297] Student field work can commence prior to graduation. This is consistent with the common law notion that students already are part of

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294. *See* Letter from Dixie Johnson et al., to Securities and Exchange Commission (Mar. 30, 2004), *available at* http://www.sec.gov/rules/proposed/s71903/aba033004.pdf. SEC efforts to reach out and to consult lawyers outside of the Commission are longstanding. *See, e.g., infra* note 314.

295. There are also opportunities to bring local civic interests into such discussions. For example, an international business transactions class in Alabama provides an excellent venue for discussing the state government processes used to attract Mercedes-Benz's automobile manufacturing facility to the state and the impact on the lives of the state's citizens.

296. Yale Professor Abraham Goldstein supports this point through observations he made for an AALS roundtable on curricular reform in the late 1960s. He spoke of Yale's efforts to reevaluate its curriculum at the time and its finding that the advanced classes of the past had become the introductory courses of the present. Ultimately, Yale learned it "would have to develop a much more graduate-oriented curricular profile than anything we had ever contemplated in the past. The pressure came from a pervasive sense of promises unfulfilled—on the part of students asking how to examine the institutions we were urging them to examine; on the part of students and faculty as we wondered how one comes to know institutions well enough to examine them." Abraham S. Goldstein, *Educational Planning at Yale*, 20 J. LEGAL EDUC. 402, 405 (1968). We need to take similar notice of our students' desires to understand various institutions of our legal system better—especially our democratic institutions—and offer new course work to help them meet their aspirations.

297. Offering opportunities for students to form early habits of public service is eminently sensible. As Professor Deborah Rhode has observed in discussing *pro bono* work:

the legal profession.[298] The previously mentioned Louis Stein Center for Law and Ethics ("Stein Center") at Fordham University exemplifies a comprehensive approach to encouraging students interested in public interest work. Students especially interested in such work can be named Stein Scholars, and participate in a three year program to prepare themselves to enter the field.[299] However, in pursuing its mission to increase consideration of ethical issues in the practice of law, the Center reaches out to a far broader segment of law students, legal scholars, and bar. For instance it recently sponsored a symposium in honor of former Dean John Feerick[300] on "integrity and the law."[301] The program brought together a wide array of legal scholars, government officials, and members of the bar to share thoughts on this important issue that underlies every effort an attorney makes to fulfill her professional obligations.

Or consider Cornell's recently created assistant deanship for public service law to provide "substantially increased support for students seeking careers as attorneys for government or nonprofit agencies."[302] This reflects a trend among law schools to actively support students who wish to enter public service as a career. Loan forgiveness and assistance programs for those taking public interest positions can provide enormous support. A Report by Equal Justice Works indicates that compared to 2000, when there were loan repayment assistance

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> By the time an individual launches a legal career, it is too late to alter certain personal traits and experiences that influence public service motivations. Such factors include a willingness to empathize, a sense of civic or group responsibility, and earlier positive exposure to volunteers and volunteer work. If these formative influences are lacking, pro bono may hold little appeal. Yet the preceding research also suggests that well-designed strategies by law schools, bar associations, and legal employers can increase the quality and attractiveness of pro bono service.

Rhode, *supra* note 158, at 423.

298. *See* Smith, *supra* note 31, at 36.

299. *See* Fordham University School of Law, Louis Stein Center for Law and Ethics: Stein Scholars Program, http://law.fordham.edu/homejump.ihtml?pageid=160 (last visited Nov. 13, 2005); Bruce A. Green, *Dedication: John D. Feerick: The Dean of Ethics and Public Service*, 70 FORDHAM L. REV. 2165, 2166 (2002) (describing origins of Stein Public Service Scholars).

300. Feerick was an appropriate honoree. His career embodied the pursuit of integrity and public service. In addition to his service as Fordham Dean and work leading to the creation of the Stein Center, early in his career he became a labor law expert and partner at Skadden Arps law firm; helped draft the Twenty-fifth Amendment to the United States Constitution; shared the law of government with the greater public in *The Twenty-fifth Amendment: Its Complete History and Earliest Applications* (1976), his Pulitzer Prize-nominated book on presidential succession; chaired the New York Commission on Government Integrity in 1980s that worked to restore public trust after corruption scandals; acted as President of the Association of the Bar of the City of New York; chaired the ABA Section on Legal Education and Admission to the Bar's Professionalism Committee; and more recently was selected to head a commission studying the judicial selection process and to chair a separate three member panel working on homelessness in New York City. *See* Treanor, *supra* note 269, at 251-55.

301. The Symposium's proceedings also were published to reach an even broader audience than those in attendance. *See* Symposium, *Integrity in the Law: In Honor of John D. Feerick*, 72 FORDHAM L. REV. 251 (2003).

302. *See* Thomas Adcock, *Cornell Law Launches Program To Support Careers in Public Interest*, N.Y. L.J., July 30, 2004, at 16.

programs at forty-seven law schools, there are now programs at eighty schools with twenty more working to create such programs.[303]

Even if they do not go into full-time public interest positions, law students can prepare to make civic service a significant component of their professional lives. An especially effective way for law schools to encourage students' public interest work is through formal partnerships with the bar. The University of Alabama School of Law's Public Interest Institute was created in 2000, and has several components:

> [A] speakers [sic] series; service programs for students, faculty and staff; summer fellowships for students engaged in public interest legal work; clinical and externship experiences in public interest law offices; summer and post-graduate public interest career planning; resources for on-going Law School student organizations; and a Public Interest Student Board on which membership is earned through community service.[304]

By volunteering for certain public legal causes for a designated number of hours, students can earn the Volunteer Lawyers Program Student Award created by the Alabama State Bar Commissioners; the Award complements the existing Volunteer Lawyers Program for state bar members.[305] By doing so, the program lets students begin service to their community that can continue long after graduation.

If one speaks with students and alumni, anecdotal evidence reveals that many law firms encourage participation in civic activities by young associates.[306] Cynics may view this as an act of self-interest. But ultimately all public service can be characterized as self-interested, because citizens working to improve society ultimately leave a better polity for themselves as well as others. If we emphasize and support community service activities by students while at law school, perhaps students' clear interest in civic responsibilities will continue throughout their careers. Then democracy will be served.

### C. RETURN OF THE (REPRESENTATIVE) HEROES

Much of this article has focused on individual lawyers who prominently served

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303. *See* Tresa Baldas, *Paying the Way: Loan Programs Booming for Grads in Public Service Jobs*, NAT'L L.J., July 5, 2004; *see also* Equal Justice Works, http://www.equaljusticeworks.org (last visited Nov. 13, 2005).

304. Pamphlet, The Public Interest Institute University of Alabama School of Law (on file with author).

305. *See id.*

306. This seems consistent with an observation made years ago by an ABA President: "I have no doubt the public service of individual lawyers everywhere is far greater than generally assumed." *See* William J. Jameson, President, Am. Bar Ass'n, Annual Address: Service to the Public and Legal Profession—A Reappraisal, *in* 79 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 424 (1954) (reporting as well an Oklahoma survey showing, among other things, over 85% of Oklahoma lawyers participated in political activities other than personally running for office, 72% worked with chambers of commerce and similar entities, 64% were associated with charitable organizations, and 46% with "patriotic organizations").

America's democracy. Often instruction on the legal profession entails the selection of role models to provide students with examples of proper conduct. Perhaps this is why much of George A. Macdonald's previously referenced guide to the study of law was devoted to biographies of prominent lawyers. In presenting these sketches, in addition to recognizing Thomas Carlyle's advice in *Sartur Resartus* that "[b]iography is by nature the most universally profitable, universally pleasant, of all things, especially biography of distinguished individuals," Macdonald noted the observation of Judge Sharswood's 1870 *Law Lectures*:

> There can be no pleasure in this study, no success in its practice unless excited and sustained by an ardent desire to excel. The highest eminences of the profession should be constantly kept in view. Every student may not, indeed it is certain that it will be the lot of few to reach them. Let him keep his eye on the examples of the men, living and dead, who have climbed the steep and rugged path before him. He will not fail to mark, almost without exception, the arduous self-training and single devotion to the business of their lives. His shaft will not fly the worse for being aimed at the highest point. A lofty—and is it not an honorable?—ambition can alone sustain that close, unwearied and patient mental toil, year after year, which is necessary to qualify him to take his place in the rank of the foremost, to serve his country and his fellow-citizens with ability and to be an honorable and useful man.[307]

Some would argue that the American Bar in more recent years has failed to produce the *eminences* who might inspire today's students in fulfilling their democratic responsibilities. Chief Justice Rehnquist's tribute to past great lawyer statesmen, for instance, observes that there appear to be fewer such statesmen in recent times.[308] But perhaps the lawyer heroes have not disappeared. Maybe we have failed to search carefully enough for them and to introduce them to our students.

That is not to say that legal education should become an exercise in deification of prominent lawyers. Ralph Waldo Emerson provides a more advised approach on this matter. Apparently Carlyle once urged that Emerson "take an American hero, one whom you really love, and give us a history of him."[309] In writing *Representative Men*, however, Emerson avoided Americans and provided a twist on traditional biography in an attempt to reconcile what is perceived to be one of democratic belief's major quandaries—reconciling the fact that not all may be equally talented, yet all are fundamentally equal: "Emerson believed in equality

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307. MACDONALD, *supra* note 207, at 79. In offering these wonderful short sketches, that a student might be able to carry around for inspiration, Macdonald did not choose only to include the most famous of lawyers. For instance, he wrote of patent attorney Charles L. Buckingham of New York who chose to serve as an Examiner in the United States patent office during law school and before serving as counsel on private matters. *See id.* at 107-09.

308. *See* Rehnquist, *supra* note 97.

309. *See* ROBERT D. RICHARDSON JR., EMERSON: THE MIND ON FIRE 413 (1995).

because he believed in the adequacy of the individual, of each individual. Each great person represents, for Emerson, the full flowering of some one aspect of our common nature. Great persons are not superior to us; they are exemplary, symbolic, or representative of us."[310] In other words, rather than placing our historical predecessors beyond reach on a pedestal, we should seek to understand them—both their positive qualities, and perhaps too their flaws—to better understand ourselves and thus to provide means for self-improvement.[311] We should keep this in mind when exposing our students to more contemporary lawyer heroes and their efforts to meet their democracy duty.

Such heroes do exist. Consider two examples from the world of securities regulation—Manuel Cohen and Linda Quinn. Former SEC Chairman Arthur Levitt, not himself a lawyer, emphasized the importance of lawyers to government regulation of securities markets in a 1998 speech. One of the "great lawyers" he specifically named was Manuel Cohen.[312] Cohen rose from the ranks of the SEC staff to become a Commissioner and ultimately Chairman of the Commission.[313] He served the Commission for so long in so many capacities, his varied accomplishments and contributions to securities law might be the subject of a separate article.[314] Capturing the essence of his spirit of public service, however, is that it was during his tenure that the SEC's Conduct Regulation was amended to permit the staff to volunteer to provide free legal services to the poor.[315] Cohen continued his service even after departing the SEC.[316] Beyond the legal programs that are his legacy, Cohen's influence today includes his use as a role model by the securities bar; for instance, the Federal Bar Association's

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310. *Id.* at 413-14; *see also* RALPH WALDO EMERSON, REPRESENTATIVE MEN (1850), *available at* http://xroads.virginia.edu/~HYPER/EMERSON/repmen.html (last visited Nov. 13, 2005).

311. Ordinary lawyer role models may be closer than one thinks. *See* Walter H. Bennett, Jr., *The University of North Carolina Intergenerational Legal Ethics Project: Expanding the Contexts for Teaching Professional Ethics and Values*, 58 LAW & CONTEMP. PROBS. 173, 177-91 (1995) (describing project at University of North Carolina utilizing oral history techniques, where students interview lawyers to learn generally about professional ethics).

312. *See* Arthur Levitt, Remarks at the "S.E.C. Speaks" Conference: A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading (Feb. 27, 1998), *transcript available at* http://www.sec.gov/news/speech/speecharchive/1998/spch202.txt.

313. *See* U.S. Securities & Exchange Commission, Concise Directory, http://www.sec.gov/about/concise.shtml (last visited Nov. 13, 2005). Cohen began his SEC service in 1942 and was nominated to be a Commissioner in 1961. *See Nominations of Manuel F. Cohen and Jack M. Whitney II: Hearing Before the S. Comm. on Banking and Currency*, 87th Cong. 1 (1961).

314. He apparently early recognized the need of the government to interact with the governed. *See, e.g.*, *Leaders of Bar Attend SEC Briefing Conference*, 1 FED. B. NEWS 228, 228 (1953) (indicating Cohen's participation in conference bringing together government officials, securities business representatives, and lawyers while he was a staff person in the SEC's Division of Corporation Finance).

315. *See* Memorandum from M. F. Cohen, Commissioner, Securities Exchange Commission, to All Staff Attorneys, Re: Voluntary Legal Services to the Poor (July 15, 1968), *available at* http://www.sechistorical.org/collection/papers/1960/1968_0715_Cohen_Memo.pdf.

316. *See, e.g.*, Manuel F. Cohen, Address: The Work of the Commission on Auditors' Responsibilities (Mar. 8, 1977), *available at* http://newman.baruch.cuny.edu/digital/saxe/saxe_1976/cohen_77.htm.

Securities Law Committee annually designates the top junior SEC attorney who best epitomizes Cohen's qualities as the winner of its Manuel F. Cohen Award,[317] and George Washington University's School of Law honors his memory by annually inviting a prominent speaker to deliver its Manuel F. Cohen Memorial Lecture.[318]

More recently, Linda Quinn served for sixteen years on the staff of the Securities and Exchange Commission before becoming a partner at Shearman and Sterling.[319] She spent ten of those years at the SEC as Director of the Division of Corporation Finance, an office that is critical to the regulation of corporate entities in the United States, and was the first woman named a director of a division at the SEC.[320] Those familiar with securities law will recognize the importance of her tenure at the SEC where she worked on the integration of the reporting provisions of the decades old Securities Act of 1933 and Securities Exchange Act of 1934, as well as important issues related to foreign access to America's domestic capital markets.[321] Like Cohen, her public service and efforts to improve government administration, and accordingly our democracy, continued after her departure from the SEC. She remained vocal in the world of securities policymaking and worked to keep a dialogue open between the government and private bar.[322] Perhaps best speaking to her impact on the world of securities law was the recognition that her life's work garnered after her untimely death in 2003.[323]

Were policies crafted during Cohen and Quinn's professional lives perfect? Securities scandals that continue to provide material for newspaper front pages negate that supposition. Yet notwithstanding an inability to predict and prevent every problem of the securities laws—laws that constitute an aspect of American democracy and its legal system with direct financial impact on much of the

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317. *See* SEC Historical Society's Fourth Annual Meeting, Proceedings, http://www.connectlive.com/events/sechistorical/sechistorical-060403.html (last visited Nov. 13, 2005).

318. *See* GW News Center, Law School Welcomes Treasury Secretary John Snow as 24th Annual Manuel F. Cohen Memorial Lecturer, Feb. 12, 2004, http://www.gwu.edu/~media/pressview.cfm?ann_id=10643.

319. *See 2004 Jean Allard Glasscutter Award Presented Posthumously to Linda Quinn*, A.B.A. SEC. BUS. L. ESOURCE, Vol. 2, No. 11 (Apr. 2004), http://www.abanet.org/buslaw/newsletter/0023.

320. *See id.*

321. *See* A.A. Sommer, Jr., Former SEC Commissioner, Remarks at Association of SEC Alumni Annual Meeting (Mar. 8, 1996), *available at* http://www.theintrovertzcoach.com/sommers_aseca_annual_meeting.html; *Linda Quinn Obituary*, FIN. TIMES (London), Nov. 14, 2003, at 22 (noting her contribution to opening American capital markets).

322. *See, e.g.*, William H. Donaldson, Chairman, Securities Exchange Commission, Remarks to the Practising Law Institute (Nov. 6, 2003), *available at* http://www.sec.gov/news/speech/spch110603whd.htm (thanking Quinn for efforts in organizing annual institute where SEC officials speak to the bar); Directors' Education Institute at Duke University: October 2002 Conference Agenda (listing Quinn as a panelist) (on file with author).

323. *See, e.g.*, Dixie L. Johnson, *From the Chair*, SEC. REP., Fall 2003, at 1 (noting how lawyers "learned a tremendous amount from her, and . . . will miss her greatly"); *Linda Quinn Obituary*, *supra* note 321 (noting her contribution to opening American capital markets).

citizenry—these lawyers showed a constant dedication to improving the polity. We are fortunate in the legal academy to have the resources to preserve and share the stories of important lawyers,[324] including those from more recent times. If our students could find some of Cohen and Quinn's qualities in themselves, they would be well on their way to fulfilling their democracy duty.

### D. RECOMMITMENT TO DEMOCRACY

Just as lawyers must rededicate themselves to fulfilling their professional responsibility to democracy, law schools must constantly renew their commitment to preparing future members of the bar to meet their democracy duty. These two processes are inextricably linked, because as our democracy evolves, lawyers must constantly strive to understand it, to serve it, and to insure that it continues to change for the better. In describing that evolution, long before the dawn of the twenty-first century, Brandeis explained the scope and power of America's progress:

> At first our ideal of government was expressed as, "A government of laws and not of men." Then it became, "A government of the people, by the people, and for the people." Now it is, "Democracy and social justice." In the last half century our democracy has deepened.[325]

Further changes in the ensuing decades since he wrote these words only reconfirm the need for lawyers to continue to support a democracy that strives to meet the needs of its citizenry. Accordingly, we all must work to make democracy a common part of the classroom dialogue. Fear that particular policies might inappropriately be advocated must not lead law schools to abdicate their vital role in educating good lawyer citizens. Encouraging students to understand democracy and to commit themselves to active civic service better prepares them to continue improvements to American democracy earnestly fostered by their professional predecessors for over two centuries.

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324. *See, e.g.*, Kenneth M. Rosen et al., *The Third Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law, Panel Discussion: Celebrating Thirty Years of Market Regulation*, 9 FORDHAM J. CORP. & FIN. L. 295 (2004) (bringing together past and current officials of the SEC's Division of Market Regulation to discuss significant matters faced by the Division in the last thirty years).

325. THE CURSE OF BIGNESS, MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 316 (Osmond K. Fraenkel ed., 1965). Interestingly, Brandeis observed that accompanying the rise of a new, better democracy was, at times, lower esteem in the legal profession. *See id.* In discussing a topic of great interest, the relation of businesses and working people, notwithstanding his affinity for greater industrial democracy and broader social justice, Brandeis seemed to discount the displacement of court and lawyers—targets of distrust—with other commissions:

> The remedy so sought is not adequate, and may prove a mischievous one. What we need is not to displace the courts, but to make them efficient instruments of justice; not to displace the lawyer, but to fit him for his official or judicial task. And, indeed, the task of fitting the lawyer and the judge to perform adequately the functions of harmonizing law with life is a task far easier of accomplishment than that of endowing men, who lack legal training, with the necessary qualifications.

*Id.* at 323. Put another way, lawyers must be educated to fulfill their role in U.S. democracy and society.