

## THE IMPORTANCE OF SCHOLARSHIP TO LAW SCHOOL EXCELLENCE

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As we have learned from Dan Coquillette,<sup>1</sup> Bob Kaczorowski,<sup>2</sup> and John Sexton,<sup>3</sup> access to substantial funding is undoubtedly a prerequisite for a law school to enjoy excellence. Funding, that is, is a necessary, but not sufficient condition for excellence. Something else—intellectual vision—is also required.

In the 1930s, Fordham University School of Law was, if not a peer, surely a rival of Columbia Law School. Fordham then had a special intellectual mission of national political importance.<sup>4</sup> By the 1950s, however, Fordham's mission, as articulated in the 1930s, had become politically and intellectually irrelevant. As a result, Fordham declined and became just an ordinary, good law school.

In the 1950s, Harvard Law School was the preeminent law school in the United States. Its faculty promoted an intellectual agenda that paralleled the judicial agenda of a majority of the justices of the Supreme Court of the United States.<sup>5</sup> By the 1980s, however, both the Supreme Court's and Harvard's agendas had changed, thereby ending Harvard's intellectual and institutional supremacy.

In this Article, I examine the relationship between ideas and institutional excellence in legal education. Although I differ with him in regard to some details, Bob Kaczorowski has discussed the importance of ideas in the history

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1. See Bruce A. Kimball & Daniel R. Coquillette, *History and Harvard Law School*, 87 FORDHAM L. REV. 883 (2018).

2. See Robert J. Kaczorowski, *Fordham University School of Law: A Case Study of Legal Education in Twentieth-Century America*, 87 FORDHAM L. REV. 861 (2018).

3. See John Sexton, *Subsidiarity and Federalism: The Relationship Between Law Schools and Their Universities*, 87 FORDHAM L. REV. 911 (2018).

4. See *infra* notes 20–22 and accompanying text.

5. See *infra* notes 77–86 and accompanying text.

of Fordham Law School, and so I will use his excellent book<sup>6</sup> to articulate a paradigm that explains how ideas relate to institutional development. I will then use the paradigm to examine developments at Harvard Law School parallel to those that occurred earlier at Fordham. I agree with John Sexton that a good law school must be concerned with the “ought” of the law as well as the “is.”<sup>7</sup> But my paradigm goes beyond that and shows that a leading or outstanding law school must view the “ought” in the context of political and societal debates ongoing in the nation at the time.

Fordham Law School may have been founded, at least in part, to enable Catholic students who could not attend the likes of Columbia, Harvard, and Yale to obtain a legal education.<sup>8</sup> But its principal purpose appears to have been the propagation of a Roman Catholic conception of law. For example, Father John Collins, who was Fordham University’s president at the time of the Law School’s founding, saw “professional schools” as “mediums . . . for the uplifting of mankind,” and he accordingly charged the new law school with preserving in students “a belief in higher things than those which can be seen with the eye and touched with the hand.”<sup>9</sup> To achieve this end, Fordham required all students to take a course in legal ethics and a course in jurisprudence that contained a significant ethical component.<sup>10</sup>

Joseph A. Warren, the Law School’s registrar, elaborated on this view of ethics. According to Warren’s Catholic perspective, the law “control[s] man’s outward relations with the state and with his fellow man.”<sup>11</sup> Ethics, in turn, control man’s “inner relations . . . with his Creator.”<sup>12</sup> In Warren’s view, the two could not “be divorced,” and hence he found it “essential that the student should bring to the study of law a mind well grounded and trained in the correct science of Ethics.”<sup>13</sup> Fordham Law School’s course in legal ethics was designed to achieve that end.

The course in jurisprudence was even more Catholic. In the Law School’s first sixteen years, Father Terence J. Shealy, a Jesuit, taught this course from the perspective of Thomistic Scholasticism’s natural law philosophy.<sup>14</sup> According to Kaczorowski, Shealy “assumed the existence of immutable metaphysical principles, and he attributed these principles of causation to God and the knowledge of these principles to ‘an infallible source,’ the Catholic Church.”<sup>15</sup>

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6. See generally ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* (2012).

7. See Sexton, *supra* note 3, at 921.

8. See KACZOROWSKI, *supra* note 6, at 5 (“Fordham Law School was intended to raise Catholic immigrants and their sons into positions of leadership in professional, economic, and political life.”).

9. *Id.* at 15 (quoting archival materials).

10. See *id.* at 15–16.

11. *Id.* at 15 (quoting archival materials).

12. *Id.* (quoting archival materials).

13. *Id.* at 15–16 (quoting archival materials).

14. *Id.* at 16–17.

15. *Id.* at 17.

Shealy's successor, Father Francis LeBuffe, another Jesuit, similarly rooted his jurisprudence course "in the doctrine of Natural Law and natural rights and consequently in an objective, real standard of justice."<sup>16</sup> LeBuffe argued that American political theory, as expressed in the Declaration of Independence and Constitution, had "evolved from Roman Catholic thought."<sup>17</sup> Thirty years after Fordham Law School's founding, yet another Jesuit, Father John Pyne, was still teaching that the rules of human law were "based on natural law—moral law."<sup>18</sup> This Roman Catholic perspective on law and legal education was generally well received by Fordham students.<sup>19</sup>

With the development of legal realism and the coming of the New Deal in the 1930s, Fordham's natural law Thomistic Scholasticism became politically important. Father LeBuffe, for one, published a book on jurisprudence in 1938, which he described as "stand[ing] in flat contradiction" to the totalitarian philosophy of Nazis and Communists, as well as to "the totalitarian philosophy of Justice Holmes and his followers"—that is, the legal realists.<sup>20</sup> In a series of articles published between 1925 and 1940, another Fordham professor, Walter B. Kennedy, who was "perhaps the most widely respected Catholic legal scholar" of his time, similarly defended Thomistic jurisprudence and attacked legal realism.<sup>21</sup> Meanwhile, the dean of the Law School, Ignatius Wilkinson, an opponent of President Franklin D. Roosevelt's New Deal and its reliance on legal realist jurisprudence, gave important testimony against the president's Court-packing scheme.<sup>22</sup>

As we know, the legal realist leanings of Oliver Wendell Holmes and of Franklin Roosevelt's appointees to the Supreme Court came to dominate the Court and the rest of the American judiciary in the aftermath of the late 1930s.<sup>23</sup> But, for my purposes, legal realism's victory is not what mattered when Fordham was at its pinnacle. What mattered was that Fordham Law School was a leader in the battle against legal realism and the New Deal; its leadership role made it not simply a good law school but an important one that stood out from the mass of other law schools.

Most law is dull, and it is boring both for professors to teach it and students to learn it. Discussing whether the rule against perpetuities invalidates a particular future interest simply is not exciting. Law becomes exciting,

16. *Id.* at 144 (quoting FRANCIS P. LEBUFFE, *OUTLINES OF PURE JURISPRUDENCE* i (1924)).

17. *Id.*

18. *Id.* at 19 (quoting the revised remarks of Governor Malcolm Wilson at the opening of Fordham's sesquicentennial celebration at the Rose Hill campus on September 30, 1990).

19. *See id.* at 16–17.

20. *Id.* at 145 (quoting FRANCIS P. LEBUFFE & JAMES V. HAYES, *THE AMERICAN PHILOSOPHY OF LAW WITH CASES TO ILLUSTRATE PRINCIPLES* vi (1947)).

21. *See id.* at 146 (quoting EDWARD A. PURCELL JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 163–64 (1973)). *See generally* Walter B. Kennedy, *A Review of Legal Realism*, 9 *FORDHAM L. REV.* 362 (1940); Walter B. Kennedy, *The Scientific Approach in the Law*, 70 *U.S. L. REV.* 75 (1936); Walter B. Kennedy, *Utility of Legal Philosophy*, 3 *N.Y. L. REV.* 353 (1925).

22. *See* KACZOROWSKI, *supra* note 6, at 147.

23. *See* William H. Rehnquist, *Presidential Appointments to the Supreme Court*, 2 *CONST. COMMENT.* 319, 326 (1985).

however, when the well-being of the nation or the future of liberty depends on what authorities determine the law to be. Law was exciting for members of the Fordham Law School community in the late 1930s because the scholarship that faculty members were writing, the testimony they were giving, the teaching they were doing, and the material students were learning mattered politically. Students and faculty alike were participants in a struggle over the American soul—they believed that the future of the nation, of liberty, and indeed of the world depended on their winning that struggle. Ultimately, of course, it mattered greatly that the members of the Fordham community lost the struggle, but in the midst of the struggle it did not matter at all. Fordham Law professors were players on a national stage, and their student audiences were intimately involved in the play. Students and faculty alike shared in the excitement surrounding them, and all were aroused by the struggle they were participating in.

This excitement attracted students to Fordham Law School: a student could go to Fordham and be part of a struggle over the future of the nation, or could attend New York University (NYU), St. John's, or Brooklyn Law School and learn about the rule against perpetuities. As one Fordham student had earlier written, "the palpable and almost universal defect in our law school system [wa]s the exaggerated technicalization of the law."<sup>24</sup> In most law schools, "the reasons of law and government . . . [we]re sacrificed for the practical and the technical"—for the rule against perpetuities—thereby reducing the profession of law "to a trade, and the presumably scientific lawyer a skilful [sic] clerk."<sup>25</sup> The "special feature of the Fordham system," in contrast, was its understanding that "legal training must ever be a question of vital public interest."<sup>26</sup>

The role of Fordham in the late-1930s battles over legal realism and the New Deal attracted not only students but also public attention. New Yorkers who paid attention to national events understood that the Fordham Law School community's efforts would help determine the course the nation would take; Columbia was the only other law school in New York whose faculty and alumni were players on the national stage. That put Fordham together with Columbia in the same league as Harvard and Yale, while law schools such as NYU, Brooklyn, and St. John's remained minor-league institutions distantly behind Fordham.

Fordham's reputation as a major institution lasted for about two decades.<sup>27</sup> The summer after my graduation from college in 1962, I worked as a delivery boy for my father's business. One day I delivered to a middle-aged Roman Catholic customer who had learned, probably from my parents, that I would be going to law school in the fall. Her question was fascinating—"where are you going," she asked, "Fordham or Harvard?" When I responded that I planned to attend NYU as a Root-Tilden Scholar, she did not understand.

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24. KACZOROWSKI, *supra* note 6, at 18 (quoting a third-year student).

25. *Id.*

26. *Id.*

27. *See id.* at 205.

This woman's knowledge was outdated, as was likely true of the knowledge of many people who were not experts. Nonetheless, her question makes the point that, for some time, Fordham was an outstanding law school—a law school in competition with Ivy League schools—both in the reality of what its faculty and students were striving to accomplish and in public perception. I agree with the student quoted above that Fordham's stature rested on its propagation of a legal ideology—natural law Thomistic Scholasticism, which was especially attractive to Roman Catholics like my father's customer—an ideology locked in struggle with the legal realism of Columbia Law School and the emerging jurisprudence of Harvard Law School.

In the aftermath of World War II, however, Fordham Law School's unique approach to jurisprudence came to an end. Professor Walter Kennedy died in 1945,<sup>28</sup> and Dean Ignatius Wilkinson passed on in 1953;<sup>29</sup> they were not replaced by like-minded faculty. The most important change, however, was in the required jurisprudence course. The change occurred in 1962 when Father Charles M. Whalen, yet another Jesuit, joined the law school faculty.<sup>30</sup>

Kaczorowski notes that it was important to Whalen “and his philosophy of legal education that students understand that he was not trying to sell any Catholic line in his teaching” but “simply trying to make students aware of the big questions in jurisprudence.”<sup>31</sup> Accordingly, he stopped wearing clerical garb and began to dress as a layman.<sup>32</sup> More importantly, he did not teach from Father LeBuffe's jurisprudence text but assigned readings by diverse authors such as Walter Lippman, Plato, and Professor Lon Fuller of Harvard Law School.<sup>33</sup> Whalen also “distributed notes on different versions of natural law, cautioning students not to think that natural law meant only one thing, the Scholastic version of natural law.”<sup>34</sup>

The change in Fordham's approach to jurisprudence was inevitable in light of the larger changes occurring in postwar American culture. In the 1930s Roman Catholics remained a separate and distinct minority in American culture with some churchmen striving to proselytize others to accept Catholicism's moral and religious views.<sup>35</sup> But World War II transformed the place of Catholics.<sup>36</sup> Largely as a result of the GI Bill, Catholics began to enter mainstream national life, which led to integration into mainstream American business, educational, and residential culture.<sup>37</sup> Mid-twentieth-

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28. *Walter Kennedy, A Dean at Fordham*, N.Y. TIMES, Dec. 31, 1945, at 14.

29. *400 Mourn at Mass for Dean Wilkinson*, N.Y. TIMES, June 26, 1953, at 19.

30. See KACZOROWSKI, *supra* note 6, at 150.

31. *Id.* at 151–52.

32. *Id.* at 151.

33. *Id.*

34. *Id.*

35. See JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 153–56, 162 (2003) (discussing Catholic leaders' promotion of barriers to divorce, film censorship, and birth control restrictions).

36. WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980*, at 168–69 (2001).

37. See *id.* at 168–69, 246.

century Catholics, unlike many early twentieth-century ones, began to think like other Americans and to accept mainstream ideas and values, and the church tamped down its belief system to accommodate them.<sup>38</sup> The change in Fordham Law School's jurisprudence course merely reflected this larger change in the place of Catholics in American society and in the faith of the American Catholic Church.

Meanwhile, the Thomistic Scholasticism of such scholars as Walter Kennedy and Ignatius Wilkinson had suffered total political defeat. Natural-law and natural-rights thinking no longer served as vehicles for arguing against the constitutionality of New Deal initiatives; in cases like *Wickard v. Filburn*,<sup>39</sup> the Supreme Court had left no doubt that Congress had unconstrained, plenary power to regulate the economy.<sup>40</sup> When Republicans regained control of Congress in 1946 and retained it in several subsequent elections, the Court stopped considering the constitutionality of regulatory legislation.<sup>41</sup> Opposition to the New Deal and its regulatory legacy instead resurfaced in Congress in the form of legislation such as the Taft-Hartley Act<sup>42</sup> and political movements such as McCarthyism. Although the Church often participated in anti-Communist efforts, its main motive for participating was not Thomistic Scholasticism but concern for the well-being of Catholics behind the Iron Curtain.<sup>43</sup>

At the same time, a new issue of social policy was emerging before the Supreme Court. During and after World War II, African Americans began demanding an end to segregation and other forms of racial discrimination.<sup>44</sup> The executive branch took some steps to meet their demands, most notably desegregation of the military,<sup>45</sup> but Congress, where action was blocked by Southern Democratic power on congressional committees and by threats of filibusters in the Senate, did nothing.<sup>46</sup> By the early 1950s, it was clear that the Supreme Court would be the principal institution to determine the legitimacy of segregation.<sup>47</sup>

The difficulty was that putting an end to segregation and racial discrimination was, in essence, a matter of politics and public policy. The

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38. See MCGREEVY, *supra* note 35, at 220–21 (discussing the effect of greater Catholic integration through an increase in college attendance, movement from urban areas to the suburbs, and higher intermarriage rates).

39. 317 U.S. 111 (1942).

40. *Id.* at 128.

41. See David P. Currie, *Constitution in the Supreme Court: The New Deal*, 54 U. CHI. L. REV. 504, 554–55 (1987).

42. See generally Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141–197 (2012)).

43. See WILLIAM E. NELSON, *FIGHTING FOR THE CITY: A HISTORY OF THE NEW YORK CITY CORPORATION COUNSEL 195–201* (2008).

44. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 216–18, 224–27, 238 (2004).

45. See *id.* at 254.

46. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 78–105, 212–22, 855–85 (2002).

47. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Sweatt v. Painter*, 339 U.S. 629 (1950).

New Deal Court in the late 1930s implicitly declined to decide issues of politics and policy, and key members of the Court, led by Justice Felix Frankfurter, maintained that the Court could decide only issues of law and should abstain from deciding matters of politics.<sup>48</sup> Thus the task for legal academics who sought to be in dialogue with the Court was to develop a set of principles elaborating how the Court could remedy segregation and racial discrimination as a matter of law rather than politics. Thomistic Scholasticism had nothing to contribute to this task, and thus Fordham Law professors had nothing distinctive to add to the discussion. Unlike what it had been in the 1930s, Fordham Law School simply became one of many good law schools training students to be legal technicians. It was no longer a distinctive player on the national jurisprudential stage and, consequently, did not radiate the excitement or enjoy the prestige of being on that stage.

As a 1986 report of an ABA inspection team noted, Fordham Law School no longer had a clear mission.<sup>49</sup> The report declared it “essential” that the Law School “define its mission, derive its objectives and goals from that mission, and then determine the policies and actions necessary to carry out the mission.”<sup>50</sup> The school’s lack of mission was reflected, in turn, in the faculty’s scholarship. Although the faculty wrote “a steady stream of books, articles . . . and other legal writing,” it produced essentially descriptive work that did “a fine job disseminating legal knowledge,” but did “*not advance legal knowledge* through scholarly inquiry.”<sup>51</sup> Even the best of the faculty’s scholarship, John D. Calamari’s and Joseph M. Perillo’s treatise, *The Law of Contracts*,<sup>52</sup> focused primarily on disseminating legal doctrine rather than evaluating it. Such scholarship, in the words of a subsequent ABA inspection report, tended to “detract from a school’s image both external and internal.”<sup>53</sup>

What the history of Fordham Law School thus suggests is that a school cannot be great unless it strives to advance some unique intellectual agenda. From the time of its founding until the 1940s, Fordham’s agenda was to proselytize the Roman Catholic Church’s vision of natural law.<sup>54</sup> This mission made the Law School a unique, exciting rival of Columbia Law School that presented a powerful message to both students and outside observers. And, when the Catholic understanding of natural law became a political weapon in the hands of opponents of legal realism and the New Deal,<sup>55</sup> Fordham Law School approached the pinnacle of legal education. With the triumph of realism and the New Deal, however, Fordham’s prominence faded. Key faculty died, unique Catholic ideas fell into desuetude, and the Jesuit jurist charged with proselytizing the Catholic

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48. See KLUGER, *supra* note 44, at 238–41, 279–81.

49. See KACZOROWSKI, *supra* note 6, at 330–31.

50. *Id.* at 331 (quoting a 1986 site inspection report).

51. *Id.* (quoting a 1986 site inspection report).

52. See generally JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* (1977).

53. KACZOROWSKI, *supra* note 6, at 332 (quoting a 1986 report).

54. See *supra* notes 9–19 and accompanying text.

55. See *supra* notes 20–22 and accompanying text.

agenda abandoned the effort.<sup>56</sup> Father Whalen's jurisprudence course became merely a survey of jurisprudential options, and with it, Fordham became just one more good law school among many others.

I see a similar trajectory in the history of Harvard Law School. Of course, Harvard has always enjoyed a higher ranking than Fordham. For most of the century prior to about 1970, Harvard was not simply a rival to Columbia Law School. Harvard was the preeminent law school in the United States. The similarity that I see between Fordham and Harvard is that Harvard's preeminence, like the prominence of Fordham, rested significantly on its commitment to a unique intellectual mission of national importance. When that mission lost its vitality around 1970, Harvard's preeminence disappeared, and Harvard Law School became merely one of several outstanding American schools, although its financial resources and history continued to give it a better reputation and higher standing than that enjoyed by Fordham.

Harvard's rise to preeminence began with the appointment of Christopher Columbus Langdell as dean of the Law School in 1870.<sup>57</sup> Langdell had a mission—to introduce into legal education, first at Harvard and then elsewhere, the case method and the Socratic method in lieu of the lecture method.<sup>58</sup> This mission, on its face, might seem trivial, but it was related to a deeper understanding of what Langdell wanted American law to be. Langdell envisioned law as a science in which answers to legal questions could be discovered through internal analysis of the sources of law, especially past judicial precedents.<sup>59</sup> Law, according to Langdell, was not merely an adjunct of politics, and he did not want legal questions to be answered nor legal disputes resolved by determining the answer or resolution most consistent with the political values of the current holders of governmental power.<sup>60</sup> He wanted legal answers and the resolution of disputes to be neutral, objective, and independent of the political will of those holding power. “Law, considered as a science,” Langdell wrote, “consist[s] of certain principles or doctrines,” the mastery of which so “as to be able to apply them with constant . . . facility and . . . certainty . . . [is] what constitute[s] a true lawyer.”<sup>61</sup> According to Langdell, for a true lawyer, law should be distinct from and transcend politics.

Langdell quickly made his mission of developing an apolitical, scientific conception of law—what we today might call a professional conception—the mission of Harvard Law School.<sup>62</sup> That mission, in turn, gave Harvard

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56. See *supra* notes 28–30 and accompanying text.

57. See Martha Minow, *Marking 200 Years of Legal Education: Traditions of Change, Reasoned Debate, and Finding Differences and Commonalities*, 130 HARV. L. REV. 2279, 2282–83 (2017).

58. See *id.* at 2283.

59. *Id.*

60. *Id.* at 2284.

61. WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900*, at 84 (1982) (alterations in original) (quoting C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871)).

62. See Minow, *supra* note 57, at 2284.

national prominence.<sup>63</sup> Nearly forty years ago I wrote that American thinkers were growing disenchanted with the course of American politics and lawmaking in the aftermath of the Civil War.<sup>64</sup> American freedoms seemed threatened as political majorities in Congress rode roughshod over the presidency, the Supreme Court, southern state governments, and political opponents in general.<sup>65</sup> Reformers saw a need for “new standard[s]” that, in the words of E. L. Godkin, would “place men’s relations in society where they never yet ha[d] been placed, under the control of trained human reason.”<sup>66</sup> Langdell’s introduction of the Socratic case method into Harvard Law School provided reform thinkers with precisely what they were seeking in the vital field of law—an ideology that understood law as a product of trained human reason rather than the political will of those who happened to be in power. It tied law to its established past rather than to some new political future. To overstate, Langdell’s vision of law as a science reset the path of the law from one of radical, majoritarian, and egalitarian reform by Congress to the conservative path of the rule of law—from the radical Reconstruction dream of equality for all people, black as well as white, to law’s protection of the status quo and, with it, support for the wealth and power of established elites. It is no wonder that Langdell’s vision of law spread throughout American legal education between 1870 and the early twentieth century and made Harvard the preeminent law school in America.

Harvard Law School remained the model for professional, scientific analysis of the law well into the second half of the twentieth century. Although the model was intrinsically a conservative one, it often produced moderately progressive scholarship in the hands of faculty members who pursued it. James Bradley Thayer was one such faculty scholar; he, more than anyone else, developed the argument that the Supreme Court should normally defer to the political process and deploy its power of judicial review sparingly by striking down only legislation that unambiguously violates explicit constitutional norms.<sup>67</sup> Zechariah Chafee wrote powerfully in support of freedom of speech, especially the free speech rights of political dissidents caught up in the Red Scare of the early 1920s.<sup>68</sup> An important progressive member of the faculty, Felix Frankfurter, wrote and litigated on behalf of immigrants and labor unions and later became a key advisor to the New Deal, while always preserving his commitment to professionalism and the rule of law.<sup>69</sup> The most noted opponent of the Supreme Court’s conservative, laissez-faire jurisprudence in the 1910s and 1920s, however, was the dean of Harvard Law School, Roscoe Pound. I have always found Pound’s writings superficial because it has never been clear to me whether

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63. *Id.* at 2283.

64. *See generally* NELSON, *supra* note 61.

65. *See id.* at 72–81.

66. *Id.* at 82.

67. *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

68. *See generally* ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920).

69. *See* H. N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 67–78, 90–94, 99–124 (1981).

his criticism of the Court was that the Court was too conservative or that it was behaving too politically. But many took Pound seriously in the 1910s and 1920s, perhaps because his jurisprudence was viewed as both progressive and at the same time supportive of professionalism and the rule of law.<sup>70</sup>

Two noteworthy Harvard graduates on the Supreme Court, Justices Oliver Wendell Holmes and Louis D. Brandeis, further exemplified the Harvard position. Both were outstanding lawyers. Brandeis, in particular, paid detailed attention to legal doctrine and careful legal argument, while Holmes had written what remains one of America's great legal studies.<sup>71</sup> At the same time, both justices typically voted in support of progressive causes, ranging from freedom of speech<sup>72</sup> to upholding redistributive regulatory legislation.<sup>73</sup> As a result of the work and standing of the Harvard justices and the Harvard faculty, it was clear by the early 1930s that Harvard Law School was the preeminent professional law school in the United States, simultaneously supporting progressive causes within the constraints of the rule of law.

Harvard Law School's last great intellectual effort was the propagation of legal process jurisprudence. Legal process should be understood as a successor to Harvard's longstanding support of progressive causes within the confines of the rule of law. The great scholar of legal process was, of course, Harvard professor Henry M. Hart, who initially worked alone and, later, worked with Albert M. Sacks.

Hart began his legal process work when he started teaching Harvard Law School's legislation course in the late 1930s.<sup>74</sup> By no later than 1940 he had entered into a joint enterprise with Abe Feller, an instructor at Yale, and Walter Gellhorn, at Columbia, and by the academic year 1941–42, they had produced a mimeographed edition of materials on legislation.<sup>75</sup> World War II interrupted Hart's work, but when he returned to Harvard for the academic year 1946–47, he continued to develop materials for his legislation course.<sup>76</sup> Sacks joined him in 1952–53, and by 1958 they had produced the tentative and final mimeographed edition of materials, entitled *The Legal Process: Basic Problems in the Making and Application of Law* ("The Legal Process").<sup>77</sup>

The dates are important because they reveal a great deal about legal process theory. Although the 1958 edition of *The Legal Process* focused

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70. DAVID WIGDOR, *ROSCOE POUND: PHILOSOPHER OF LAW* 181–254 (1974).

71. See generally O. W. HOLMES, JR., *THE COMMON LAW* (1881).

72. See, e.g., *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).

73. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 277, 281 (1918) (Holmes, J., dissenting).

74. William N. Eskridge, Jr. & Philip P. Frickey, *A Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* i, lxxiv (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

75. *Id.* at lxxiv–lxxv.

76. *Id.* at lxxvii–lxxviii.

77. *Id.* at lxxxv–lxxxvii, xci.

mainly on private law, its goal was to articulate a theory of public law.<sup>78</sup> There were two principal public law issues during the decade between 1946 and 1958, when *The Legal Process* was in gestation: (1) a series of Supreme Court cases beginning with *Dennis v. United States*<sup>79</sup> in 1951 and culminating in *Yates v. United States*<sup>80</sup> in 1957, in which the Court addressed the issue of freedom of speech for Communists and other radical dissidents; and (2) the issue of segregation and racial discrimination, exemplified by the 1954 case of *Brown v. Board of Education*.<sup>81</sup>

Another seed of legal process theory was a “Legal Philosophy Discussion Group” that met at Harvard Law School during the 1956–57 academic year.<sup>82</sup> In addition to Hart and Sacks, Lon Fuller, Paul Freund, and three important visiting professors—H. L. A. Hart, Julius Stone, and Herbert Wechsler—participated in the group.<sup>83</sup> The topic for the year was “Administrative and Judicial Discretion.”<sup>84</sup> All the participants agreed that discretion was an essential element of all legal decision-making, but they also agreed that discretion had to be controlled by institutional structures and practices, procedural safeguards, and what Hart called a requirement of “reasoned elaboration.”<sup>85</sup> Discretion was essential if society was to enjoy progress, but discretion had to be subjected to professional control in order to preserve the rule of law and individual freedom.<sup>86</sup>

Thus, legal process theory, like the jurisprudence of Harvard Law School since Louis D. Brandeis, Oliver Wendell Holmes, and James Bradley Thayer, sought to maintain a balance between progressive aspirations and the maintenance of professionalism and the rule of law. To quote Professors Eskridge and Frickey, the editors of the published version of the Hart and Sacks *The Legal Process* materials, it was an effort on the part of “comfortable law professors [who were] preparing their students to run the country” to bring about “incremental change through duly established procedures, with a libertarian rather than egalitarian view of *Brown*, and with principles that were neutral and reasoning that was universal.”<sup>87</sup> In this form, legal process theory was responsive to demands of dissidents for free speech; it readily explained and justified the transformation of constitutional doctrine that occurred between the *Dennis* and *Yates* cases. Individual rights and societal progress were not in tension in the free speech cases. In dealing with free speech, legal process jurisprudence was thereby able to reflect a culmination of Harvard Law School’s thinking since the turn of the twentieth

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78. *Id.* at c–cii.

79. 341 U.S. 494 (1951).

80. 354 U.S. 298 (1957).

81. 347 U.S. 483 (1954).

82. Eskridge & Frickey, *supra* note 74, at c.

83. *Id.*

84. *Id.* at c–ci.

85. *Id.* at cii.

86. *See id.* at c–cii.

87. *Id.* at cxii–cxiii.

century about progressive reform within the rule of law on behalf of white men.

Legal process theory was more problematic, however, in the context of race. Professors Eskridge and Frickey note that both Hart and Sacks were strong supporters of efforts to end segregation and racial discrimination.<sup>88</sup> Most other legal process theorists also defended the *Brown* decision. The most notable defense was that of Alexander M. Bickel, a student of Hart and a law clerk for Justice Frankfurter,<sup>89</sup> who published “The Original Understanding and the Segregation Decision,”<sup>90</sup> which was based on a bench memo he wrote for the Justice.<sup>91</sup> The article found the Fourteenth Amendment sufficiently capacious to allow for the Court’s decision in *Brown*,<sup>92</sup> but, as I read it, did not establish that the Amendment compelled *Brown*’s result. Although several noteworthy articles<sup>93</sup> did argue that *Brown* was not only permissible but also right, I have never understood that their defense rested on legal process grounds.

Legal process theory simply conflicted with the aspirations for racial equality as those aspirations developed during the 1960s. Legal process, as I understand it, contemplated the gradual assimilation of African Americans into an established, unchanging legal and social order, just as Catholic and Jewish immigrants were being assimilated. According to Professors Eskridge and Frickey, Hart and Sacks, by insisting that “change” could be “accomplished only through . . . ‘duly established’ institutions and mechanisms,” acquiesced “in the political status quo”;<sup>94</sup> they envisioned African Americans slowly assimilating into a culture that would remain unchanged. Their insistence, however, “was discordant with the experiences of many . . . people of color” for whom “‘duly established mechanisms of change’ were neither responsive nor even tolerant.”<sup>95</sup> Martin Luther King, Jr., for one, vociferously demanded immediate, not gradual, equality. To the suggestion that blacks wait, King responded:

“Wait” has almost always meant “Never.” . . .

We have waited for more than 340 years for our constitutional and God-given rights. . . . [W]hen you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can’t go to the public amusement park that has just been advertised on television, . . . and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort

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88. *Id.* at cvii–cix.

89. *Id.* at cxvi.

90. 69 HARV. L. REV. 1 (1955).

91. *See id.* at 1.

92. *See id.* at 64.

93. *See generally, e.g.,* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

94. Eskridge & Frickey, *supra* note 74, at cxi.

95. *Id.*

her personality by developing an unconscious bitterness toward white people; . . . when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; . . . then you will understand why we find it difficult to wait.<sup>96</sup>

Legal process theory failed to adequately respond not only to the demands of African Americans but also to the next group of political dissidents— young opponents of the Vietnam War.<sup>97</sup> Duly established institutions were neither responsive nor tolerant when students in the late 1960s made clear that they were unwilling to die in Vietnam for what they saw as a lie. One of my first-year law students at Harvard Law School in those years was a young second lieutenant who had just returned from Vietnam. I eagerly asked him to tell me what he knew about the war so that I could better counsel other young men who sought my advice on whether to accept the draft, to refuse to report for induction, or to flee to Canada. But he would not tell me what he knew.

His refusal to impart his knowledge made it impossible for me, in many respects a legal process acolyte who hoped that reasoned analysis could help solve the crisis that other young men faced, to speak effectively to those young men. I have always assumed that his knowledge also made it impossible for him to accept the reasoned elaboration of Professors Hart and Sacks in his second and third years at Harvard Law School. “Sometimes, sometimes,” as even Hart knew, “you just have to do the right thing”<sup>98</sup> and not engage in wrong things, and reasoned elaboration did not help decide what was right.

Yet another failure of legal process theory, this time in the early 1970s, occurred in response to feminism. Women demanded equality, one element of which was the power to control their own bodies and choose whether and when to bear a child. *Roe v. Wade*<sup>99</sup> gave women that power, but not in accordance with legal process precepts. *Roe* was not a legal process opinion; it reflected activist, political decision-making even on the part of three of the four justices that President Richard Nixon had appointed to the Court to limit the Court’s activist tendencies. Legal process theory and full gender equality were simply at odds; courts adhering to legal process concepts could not give women the full equality they sought when the political process was not prepared to confer it.

Meanwhile, the judicial inspiration of legal process, Justice Frankfurter, suffered a stroke and was forced to retire in 1962; he died in 1965.<sup>100</sup> In 1971, the last true legal process acolyte on the Supreme Court, the younger

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96. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN’T WAIT* 64, 69–70 (Signet Classic 2000) (1963).

97. See Eskridge & Frickey, *supra* note 74, at cxix n.306.

98. *Id.* at cxiii (quoting Hart’s comments, as recalled by David Chambers).

99. 410 U.S. 113 (1973).

100. See *Felix Frankfurter Is Dead; Influenced the Law Widely*, N.Y. TIMES, Feb. 23, 1965, at 1, 26.

John Marshall Harlan, left the Court and died shortly thereafter.<sup>101</sup> The two academic leaders of legal process, Hart and Sacks, passed off the scholarly scene about the same time: Hart died in 1969,<sup>102</sup> and Sacks moved into administration as dean of Harvard Law School in 1971.<sup>103</sup> Alexander M. Bickel,<sup>104</sup> another leading legal process thinker, died in 1974.<sup>105</sup>

Moreover, for activists and student sympathizers in the late 1960s and early 1970s—young people committed to “doing the right thing” without delay—legal process theory offered no help.<sup>106</sup> They needed something different. In response to that need, African American and feminist scholars developed over the course of the next decades two new categories of scholarship—what we now know as critical race theory<sup>107</sup> and feminist jurisprudence.<sup>108</sup> At the same time, the critical legal studies (CLS) movement, led by young Harvard Law School faculty members together with faculty from other law schools, sought to articulate a more comprehensive jurisprudential alternative to legal process by understanding law as simply a form of politics. In the words of Joseph Singer, a CLS scholar and now a faculty member at Harvard Law School, legal principles are “fundamentally contradictory.”<sup>109</sup> It follows that:

Since every legal decision reverts to the fundamental contradiction, we have no alternative but to decide each case in the light of competing goals and interests. To make these decisions, nothing can aid us except the same moral and political arguments we use in other areas of ethical discourse. It is an illusion to think that legal reasoning is any less political and subjective than the reasoning used by legislators, voters and other political actors.<sup>110</sup>

It is difficult to imagine a more clear-cut abandonment of Harvard Law School’s century-long commitment to professionalism, which began with Langdell, continued through Frankfurter, and ended with legal process theory that developed in detail the need to focus on institutional structures, procedural safeguards, and reasoned elaboration as the foundations of professionalism.

I was one of many outsiders who worried in a 1988 article that CLS’s turn to politics and abandonment of professional traditions and standards would

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101. Lesley Oelsner, *Harlan Dies at 72; on Court 16 Years*, N.Y. TIMES, Dec. 30, 1971, at 1, 29.

102. *Henry M. Hart Jr., Harvard Teacher*, N.Y. TIMES, Mar. 25, 1969, at 56.

103. See Alfonso A. Narvaez, *Albert M. Sacks, 70, Harvard Law Dean and Noted Teacher*, N.Y. TIMES, Mar. 23, 1991, at 28.

104. See *supra* notes 89–90 and accompanying text.

105. *Alexander M. Bickel Dies; Constitutional Law Expert*, N.Y. TIMES, Nov. 8, 1974, at 42.

106. See Eskridge & Frickey, *supra* note 74, at cxix n.306.

107. See *generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

108. See *generally* FEMINIST JURISPRUDENCE: CASES AND MATERIALS (Cynthia Grant Bowman et al. eds., 4th ed. 2011).

109. Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058–59.

110. *Id.* at 1059.

“undermine law rather than use it to better society.”<sup>111</sup> I expressed my “fear” of “government in accordance with the naked political preferences of . . . [a Middle America] majority” and could “think of no way to restrain this majority other than by appeals to law.”<sup>112</sup> I therefore urged “legal scholars . . . to strengthen the capacity of law to restrain tyranny by building as much objective and determinate content into it as possible”<sup>113</sup> rather than focus on law’s fundamental contradictions. Now, during the presidency of Donald Trump, I value professionalism and objectivity in law even more as, possibly, the last defense against arbitrary tyranny.

What is clear to me in retrospect is that an old guard of the Harvard faculty in the 1970s and 1980s had concerns similar to those I have just expressed. They fought the young CLS faculty to preserve professional norms and standards.<sup>114</sup> The result was two decades of civil war at Harvard Law School as CLS faculty argued for a purely political vision of law and the legal system, in the process undermining faith in professional norms, while the old guard strove to uphold those professional traditions. In the end, the old guard failed, with the result that today’s Harvard Law School no longer adheres to a special, unwavering mission of professionalism. The effort of the CLS movement to give Harvard a new politically progressive mission also failed, although the movement generally helped politicize law. Thus, Harvard Law School has been left with no clear mission, which has pushed it, like Fordham before, into a period of decline. Harvard’s resources and traditions continue to make it a great law school, but it is no longer the preeminent law school in the United States.

What I have said points me toward some vague speculations with which I would like to end. Fordham Law School and Harvard Law School both attained their greatest eminence when they propagated a set of norms, religious in the one case and professional in the other, which were capable of constraining untrammelled power on the part of political actors. But neither religion nor professionalism today possess the power of constraint they once enjoyed. Other sources of constraint are needed.

I want to speculate that Yale Law School in the 1980s succeeded Harvard in preeminence by looking to other disciplines, especially economics, history, political science, and philosophy, for sources of constraint. In the late 1990s, NYU Law School turned to globalism—to an understanding that, as America loses its hegemony and becomes merely one part of the larger world, deep forces of that larger world will provide lawyers with a foundation to preserve law as a constraint on the exercise of power by political leaders. These are optimistic aspirations. Much more pessimistic are the ambitions

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111. Robert W. Gordon & William Nelson, *An Exchange on Critical Legal Studies Between Robert W. Gordon and William Nelson*, 6 *LAW & HIST. REV.* 139, 167 (1998).

112. *Id.*

113. *Id.* at 185.

114. Conversation with Arthur R. Miller, Univ. Professor, N.Y.U. Sch. of Law (July 12, 2018). Professor Miller was a professor at Harvard Law School from 1972 to 2007.

of Presidents Putin, Trump, and Xi, that rulers will deploy power with no constraints whatsoever.

APPENDIX: TRANSCRIPT\*

PROFESSOR ROBIN WEST: So two thoughts. First, I think that the view of politics you're describing is very, very dark. Politics itself is a constraint on power in a well-functioning polity as well as the most important vehicle for exercising power in good ways. So the vilification in ordinary legal discourse of politics and the exercise of power and also in critical legal discourse is, I think, alarming and unfortunate.

PROFESSOR WILLIAM NELSON: Can I respond to that before you get to your second? I'm actually an optimist about politics. My concern is that sometimes it goes bad, and, when it does, a lot of bad things can happen. James Bradley Thayer seems to me to have the answer in saying courts should not interfere in politics except in very clear cases.<sup>115</sup> Frankfurter agreed and kept saying courts shouldn't do things; the political process should do them.<sup>116</sup> The political process needs to be encouraged and made capable, and when courts interfere, they diminish its capability.

PROFESSOR WEST: I'm with you entirely on that. My limited point is that there was an awful lot of shared ground between the old-guard liberals and the CLS people about the alignment of politics with power and law with reason. The Crits never really problematized the basic moral distinction between power, bad politics, bad law, and good reason. If you can show that law is really more like politics, then you've shown something important and sort of malignant about law itself. But the Crits never did it, and I fault them for that.

Now my second thought. In the first part of your paper you described a distinction between the ordinary mission of ordinary law schools and an exalted mission of a law school that identifies a higher purpose for law and for itself.<sup>117</sup> The rule against perpetuities, the holder in due course doctrine, all of that I think has a lot of nobility to it and it is part of the mission of the ordinary law school to convey that nobility. So I resist the idea that what legal scholarship should be doing is exploring an exalted mission that will identify its law school with something higher than ordinary law. You don't want to be just producing technicians but, on the other hand, let's not denigrate technicians.

PROFESSOR NELSON: Much of my take comes from teaching property for thirty years or so. There is a nobility to a lot of property law. But that

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\* This discussion followed the author's presentation of this Article at the Symposium. The transcript has been lightly edited. For a list of the Symposium participants, see Matthew Diller, *Foreword: Legal Education in Twentieth-Century America*, 87 *FORDHAM L. REV.* 859 (2018).

115. See Thayer, *supra* note 67, at 155–56.

116. See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

117. See *supra* notes 9–26 and accompanying text.

nobility is overwhelmingly about preserving the status quo, and preserving the status quo is overwhelmingly about making sure that the rich stay rich. We can talk about efforts by judges to do some redistribution, such as the *Mount Laurel*<sup>118</sup> case in New Jersey, but the judiciary's success has been very limited because of institutional and procedural limitations on what judges are able to do.

JUDGE GUIDO CALABRESI: I have quite a few different things to say. First, on four different possible roles of scholarship. One is to present a particular point of view, moral, ethical, for what society should be. And that is what scholarship should be about. Which is how you described Fordham. The second is for scholars to look in particular areas and create new paradigms, new ways of looking at it all together. The third is simply to take an area and move it forward, adjusted to the needs of the day. And the fourth is simply synthesis, putting it all together clearly.

To go back to Fordham. I don't think you can understand Fordham's position in the 1930s and its later decline apart from the position of Catholicism—seen as an immigrant religion of foreigners who were considered inferior to the rest. I know that because as an Italian Catholic arriving here I had very little contact with American Catholicism because I came from a place where Catholicism was dominant, where intellectual Catholics were constantly disagreeing. It was not until I went to Oxford that I found as snobbish a view of Catholicism as had been mine. Now this is important because without it, one cannot understand some of the things going on in the abortion debate. I'm talking about the unfortunate opinion by Blackmun which says a fetus is not a person for purposes of our Constitution<sup>119</sup>—the white Anglo-Saxon Protestant Constitution, not your Constitution, not southern rebel, not Catholic immigrant. Once I was in a taxi with Bill Buckley and the leading pro-life bishop of southern Illinois. I asked them to suppose the result had been the same but that the opinion had been: "There are life values here, and they're there, and there are equality values, and they're there. In the technology of today we cannot do both, and we decide for equality over life." What would your reaction have been? Both of them in one voice said we would not have liked the result but we could have lived with it. But it's too late to put the genie back in the bottle and stop the return to an attitude toward Catholicism as separate, different, foreign, and ultimately excluded from the American mainstream.

Now to Harvard. I think what you say is right, but I think you mark the end too late. Now, I say that because the last great flowers of legal process moved from Harvard to Yale with Bickel and Wellington and there they ran into the "law and . . ." movement and the last great flowers of legal realism. The combination forced them to look more broadly, the way Bickel and Wellington did, and various new paradigms came out of Yale, starting with

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118. See generally *S. Burlington Cty. N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

119. *Roe v. Wade*, 410 U.S. 113, 158 (1973) ("All this . . . persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

the great appointments by Rostow in the fifties. Yeah, it wasn't until the seventies that people kind of looked back and saw how Harvard had lost its preeminence. But I think you have to date it earlier because legal process did not come to terms at Harvard until much later with legal realism, call it CLS, and "law and . . ." When I visited Harvard in 1970, what I was saying in law and economics was absolutely new, but nobody there was even aware of it except Frank Michelman.

PROFESSOR KENNETH MACK: I'd like to offer a different definition of what makes a law school prominent and what we might define as decline. You say the last great intellectual effort of Harvard Law School was legal process; no, it was critical legal studies. The four big ideas about law since 1970 are law and economics, originalism, feminist legal theory, and critical theory. And the reason we put critical theory in it would be in part because of critical legal studies but also in part because of critical race theory. Critical race theory is gargantuan at the moment; it is taught everywhere—often outside law schools.

So where did critical race theory come from? It was invented in part by three people at Harvard—Derrick Bell on the faculty and two students, Kimberlé Crenshaw and Patricia Williams.<sup>120</sup> Crenshaw and Williams were part of a critical mass of fifty to seventy-five black students in each class. Many of them reacted negatively to the old guard and tried to figure out: What did law mean for them? Critical race theory was inspired in part by impatience, criticism, and difficulty. They eventually wrote about it and invented something called critical race theory. I was at Harvard with a second group of future critical race theorists. It was great. We argued about what law was. We argued about what race was. We argued about what the relationship between race and power was.

Now, when I reconstruct the history of Harvard Law School, all these people were produced by an atmosphere in which people were fighting. They joined the fight, and they invented something new. Critical legal studies is dead but critical race theory is everywhere, and it's because of the process I just described.

JUDGE CALABRESI: One thing about that. In the 1970s and 1980s, the same thing was not going on in New Haven. The difference is that what has been described as a disadvantage of Harvard because of size becomes an enormous advantage. Yale had fifteen to twenty African Americans in a class, and that's a large number in that class but it's still minuscule. At Harvard, because of its size, you have a group which is enormous, and the fact of size makes all the difference. The place has to be open to it, as it was, but it gives a tremendous advantage to Harvard and there is no doubt that Harvard and Harvard graduates have taken advantage of it to the good of the nation.

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120. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 107 (containing essays by Derrick Bell, Kimberlé Crenshaw, and Patricia Williams, among others).

PROFESSOR MACK: One other addendum. I'm sort of the inventor of the story, but it's true. Barack Obama was there in the late 1980s. We were classmates, and he's in the middle of all this and basically he's figuring out who he is as a public person in the midst of all the contestation. It's the first place that he really gets validated that he's going to be somebody important in American life. And it's because he is in the middle of this contestation that he's got to figure out where he fits in—or doesn't fit.

JUDGE CALABRESI: When you're talking white, Anglo-Saxon Protestants, even Irish today, if there's a few more from Harvard, there's some from Yale, it really doesn't matter. But when you're talking about the degree of diversity that is accomplished in society, then the size of the place is what makes it from my point of view still dominant.

PRESIDENT EMERITUS JOHN SEXTON: I'm very nervous when we begin to make a uniqueness or deep mission an important element in a law school's success.

PROFESSOR NELSON: I agree with much of what Guido, Ken, and John have said. As to my dating, it is clear from the perspective of today that Yale's faculty was doing more interesting scholarship than Harvard's in the 1960s. But from the perspective of 1965, the Harvard faculty of James Casner, Archibald Cox, Mark De Wolfe Howe, Paul Freund, Lon Fuller, Henry Hart, Louis Jaffe, Ben Kaplan, Louis Loss, Al Sacks, and others looked mighty preeminent in comparison with the handful of young people at Yale who had not yet done most of their major work.

As to critical race theory, I'm a fan. Feminist theory as well. But they're different from critical legal studies. CLS is based on a concept of a fundamental contradiction that renders all law political and, as I said in my 1988 debate with Bob Gordon,<sup>121</sup> thereby undermines the capacity of good law to trump bad politics. I've always understood that, since the colonial period, American law has not been contradictory but has been driven by commitments to individual liberty and community self-rule and that those commitments will trump bad politics. Thus, I disagree with the Crits. Equality for women and minorities, in contrast, entered the picture in the mid-nineteenth century and has been in conflict with liberty and local self-rule ever since. There is a fundamental contradiction here, and feminist theory and critical race theory are both striving to resolve the contradiction in favor of equality. They have gone beyond CLS in addressing a real contradiction, and I'm with them.

I need to note, however, that both were minority positions at Harvard after 1970, and thus neither became the mission of the Law School in the fashion that professionalism had been the sole mission from 1870 to 1970. Like John, I become nervous when a school adopts a single, unique, unitary mission, but I believe I am correct historically in recognizing that both Fordham and Harvard did so and gained special prominence as a result.

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121. See generally Gordon & Nelson, *supra* note 111.