

# Book Reviews

## Two Judges, Two Cultures

*The Autobiographical Notes of Charles Evans Hughes. Edited by David J. Danelski and Joseph S. Tulchin. Cambridge, Mass.: Harvard University Press, 1973. Pp. xxix, 363. \$15.00.*

*Go East, Young Man: The Early Years. By William O. Douglas. New York: Random House, 1974. Pp. xv, 493. \$10.00.*

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### I

Of more than 6,000 titles listed in the standard guide to American autobiography, fewer than 300 are credited to lawyers.<sup>1</sup> Clergymen predominate; journalists and farmers outnumber representatives of what Tocqueville and others following him have identified as the aristocracy of the New World. This paucity of legal autobiography—even more noticeable when one tries to enumerate only works of intellectual merit—is all the more curious because autobiography appears to be a mode of expression especially congenial to Americans.<sup>2</sup> If “true autobiography” can only be generated by men and women “pledged to something within,”<sup>3</sup> it is not surprising that true autobiographers should abound in a society that has commonly been thought to offer a minimum of institutions and traditions to divert individuals from the path of self-discovery. Lawyers, however, have been disinclined to travel that path.

Exceptions might be noted—John Adams, for example, or Clarence Darrow,<sup>4</sup> not to mention miscellaneous self-promoting courtroom swashbucklers. But there is apparently an essential American conflict between the legal mind and the autobiographical impulse. Such a

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1. A BIBLIOGRAPHY OF AMERICAN AUTOBIOGRAPHIES (L. Kaplan ed. 1961).

2. See R. SAYRE, THE EXAMINED SELF: BENJAMIN FRANKLIN, HENRY ADAMS, HENRY JAMES 33-43 (1964) (general discussion of American autobiography).

3. R. PASCAL, DESIGN AND TRUTH IN AUTOBIOGRAPHY 195 (1960).

4. DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS (L. Butterfield ed. 1961); C. DARROW, THE STORY OF MY LIFE (1932).

conflict is indicated succinctly by a few remarks in one of the best of American legal autobiographies, Frederic C. Howe's *Confessions of a Reformer*. "For two years I worked listlessly at the law," Howe recalled in 1925, "and played cards in the evenings. . . . I disliked the law, had a fear of the judges, and most of all shrank from the experienced practitioners with whom I felt I could never cope."<sup>5</sup> Evidently, little more had to be said—which may be why some true autobiographers who have happened to be lawyers have had so little to say about law. Unfortunately, silence and reticence do not enhance understanding. For anyone interested in the relationship between professional legal culture and ecumenical American values, it is fortunate that two important and revealing legal autobiographies have recently been published—*The Autobiographical Notes of Charles Evans Hughes* and William O. Douglas's *Go East, Young Man: The Early Years*. Read in both biographical and historical context, these two books allow us to enter the mainstream of modern American legal culture—and to discern some countercurrents. Taken together, they point to a gap separating 20th century professional values from inward concerns traditional to American thought.

## II

Though the lives interpreted in these two books contrast sharply and significantly in some respects, it is striking to note the parallel circumstances that eventually brought these two men together in April 1939, when Douglas at the age of 40 joined a Supreme Court presided over by Hughes, more than 35 years his senior. Both men had been born into unprosperous but polite families; each was the son of a Protestant clergyman. Hughes as a small child suffered an "inflammation of the lungs" that for many years left him in delicate health, subject to fatigue and attacks of nervous depression. Always preoccupied with his health, he meticulously and proudly recorded in the *Notes* his increase in weight from a feeble 127 pounds circa 1891 ("with my clothes on, excepting coat and vest") to a mature 173 pounds ("stripped, before breakfast") in later life.<sup>6</sup> The key to this improvement in his physical condition was a program of strenuous walking that he initiated in the early 1890's while teaching at the hilly Cornell campus. Later, after a month in Switzerland, he made

5. F. HOWE, *THE CONFESSIONS OF A REFORMER* 75 (1925).

6. C. HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 12, 88 n.28, 114-15, 118 (D. Danelski & J. Tulchin eds. 1973) [hereinafter cited as HUGHES].

a regular hobby of hiking in the mountains—an activity which was also Douglas's way of overcoming both the physical and the emotional "scars" and "worries" that had resulted from a severe case of infantile paralysis.<sup>7</sup> (The recoveries of both children were due in large measure to attentive nursing by devoted mothers.<sup>8</sup>) Both attended Columbia Law School, and both were successful afterwards in part because they were endowed with "photographic minds" that enabled them to complete laborious tasks rapidly.<sup>9</sup> Hughes's public career was founded in the first decade of the century on his ability as a legislative counsel in New York State to probe the complexities and chicaneries of public utility and insurance companies. Douglas was first prominent when, as a Member and then Chairman of the Securities and Exchange Commission during the Depression, he established a reputation for wizardry at understanding essentials in the tangled world of high finance.<sup>10</sup> As Justices both men were particular admirers of Brandeis, whose seat on the Court Douglas had been selected to fill.<sup>11</sup> Little wonder, then, that Douglas—whose father had died at an early age—glimpsed something paternal in the dignified mien of his Chief Justice.<sup>12</sup>

But the parallels extend only so far, and are probably more misleading than instructive. Hughes's life was not of the sort to furnish material for an autobiography in the classic American mode. Douglas's life is, and he has written such an autobiography.

Hughes's *Notes* tell us much, sometimes inadvertently. They show the singlemindedness of the man to whom Learned Hand attributed "relentless self-discipline."<sup>13</sup> Thoroughness was the virtue his mother instilled in him, and these *Notes* were a final effort to tidy up, to set the record straight.<sup>14</sup> More or less they do that, with the help of a fine job of informative but unoppressive editing by Danelski and Tulchin, who draw on the relevant scholarly literature and on the biographical memoranda prepared at Hughes's request by Henry C. Beerits, a young graduate of Princeton. There are few unexpected specifics here, since the *Notes* in their original unpublished

7. *Id.* at 115; W. DOUGLAS, *GO EAST, YOUNG MAN* 32-34 (1974) [hereinafter cited as DOUGLAS].

8. DOUGLAS 32; HUGHES 12.

9. HUGHES 49-61, 337; DOUGLAS 127-56, xi.

10. HUGHES 119-27; DOUGLAS 257-96.

11. DOUGLAS 447-49. For Hughes's response to Brandeis, see Hughes, *They Don't Make Them Like That Any More*, N.Y. REV. OF BOOKS, May 30, 1974, at 32.

12. HUGHES xx.

13. *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 222 (I. Dilliard ed. 1953).

14. HUGHES 2, 13-14.

form were fully exploited by Merlo J. Pusey for his appreciative two-volume biography, published in 1951.<sup>15</sup> But overall, Hughes's self-portrait makes an impression. As his grandson suggests, there was "a certain conventionality" about Charles Evans Hughes's thought and way of expressing himself; his conquest of "the Wasp establishment" appears to have "taken a great deal out of him."<sup>16</sup> Despite the assurances of his editors that really he was a warm and humorous man, the public image of cold, cerebral austerity seems to reflect accurately the iron purposefulness and immunity to enthusiasm of the man. Though a hiker in the mountains, he was of course "never a mountaineer"; he just did "all that a sedentary man, with a young family dependent upon him, should attempt."<sup>17</sup> Though eventually he rebelled against the formal religion of his youth, he always remained "careful not to give offense" to those who preferred the old ways, his parents included. Never having experienced a call to the ministry, he brought to the law—which originally struck him as "repugnant"—an orderly sense of duty and a strong analytic mind.<sup>18</sup> "I have never known a man," Associate Justice Owen Roberts recalled after his death,

who patterned his life so meticulously and with such obvious intellectual balance. He calculated with nicety how much of his time he must devote to each of the departments of the Court's work. He laid out his day, his week, and his month accordingly, and he rigorously lived up to the schedule he had set himself.<sup>19</sup>

If it is useful to locate one autobiographical model for Hughes's *Notes*, Franklin's—*sui generis*, from the 18th century—is the obvious choice. More accurately, it is a particular interpretation of Franklin's recollections—like Hughes's, not avowedly intended for publication—that resonates in the *Notes*. Unkind as it may be to say so, one cannot help seeing in Hughes something of "the pattern American" that D. H. Lawrence saw in Franklin.<sup>20</sup> It appears fitting, then, that Hughes's Welsh father first determined to emigrate to America after reading the Franklin autobiography, and that young Charles at the

15. M. PUSEY, CHARLES EVANS HUGHES (1951).

16. Hughes, *supra* note 11, at 32-33.

17. HUGHES 115. In any case, as his ever-patient wife discovered during their European tour of 1905, even the most breathtaking mountains had to take second place to the problems of handling an insurance investigation. *Id.* at 121.

18. *Id.* at 25, 49; 1 M. PUSEY, *supra* note 15, at 60.

19. PROCEEDINGS OF THE BAR AND OFFICERS OF THE SUPREME COURT OF THE UNITED STATES, NOV. 4, 1949, IN MEMORY OF CHARLES EVANS HUGHES 120 (1950).

20. D.H. LAWRENCE, STUDIES IN CLASSIC AMERICAN LITERATURE 19-31 (1955).

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age of six was so Franklinesque as to draw up the "Charles E. Hughes Plan of Study," a self-imposed substitute for a regime of formal schooling. It is worth noting, too, that Hughes, like Franklin, found city life "very agreeable." In one brief paragraph of the *Notes* describing his first trip to the far West, Douglas's country, the only emotion Hughes recorded was pessimism over the bleak economic prospects of the region.<sup>21</sup>

Douglas, by contrast, celebrates an open, breezily energetic, individual style of life, in himself and in others. "I believe in cultivating one's own garden and not other people's," he once wrote to his friend Jerome Frank. "What is good for you may be spinach to me or vice versa. But what the hell? Because you like gin and bitters, is there any reason why I should not get tight on long drinks of Scotch and soda? Nuts!"<sup>22</sup> A communicant with nature, Douglas records his sensation of squalor upon reaching Chicago during the long trek from his home in Yakima, Washington, to law school in the nation's largest city. For New York he soon developed "a deep dislike," preferring "God's own land" on the other edge of the continent.<sup>23</sup> Invariably, Douglas rushes in where Hughes chose not to venture. Fears are not just subjected to control; in episode after episode (many of which appeared long ago in *Of Men and Mountains*<sup>24</sup>) they are conquered through open confrontation with danger.<sup>25</sup> Religion, it soon is evident, is "usually aligned with the Establishment." Divorce, which in the context of his Presbyterian heritage once seemed sinful, loses its terror.<sup>26</sup>

*Go East, Young Man* is suffused with youthful, humanistic spirit and with commitment to the general purposes Douglas proclaimed in his controversial *Points of Rebellion*, the book that in 1970 contributed to the determination of Gerald Ford and 110 of his colleagues in the House to impeach the Justice. The goal of the rebellious young, Douglas wrote then, "is to make the existing system more human, to make the machine subservient to man, to allow for the flowering of a society where all the idiosyncrasies of man can be honored and respected."<sup>27</sup> In *Go East* Douglas presents a life in-

21. HUGHES 4, 14, 37, 100.

22. DOUGLAS 425.

23. *Id.* at 132, 137.

24. W. DOUGLAS, *OF MEN AND MOUNTAINS* (1950).

25. DOUGLAS 183-202.

26. DOUGLAS 14, 144.

27. W. DOUGLAS, *POINTS OF REBELLION* 9 (1970). On the impeachment effort, see Viorst, *Bill Douglas Has Never Stopped Fighting the Bullies of Yakima*, N.Y. Times, June 14, 1970, § 6 (Magazine), at 8.

creasingly in harmony with this point of view. He has been making a journey toward self-discovery and self-fulfillment for many years. *Go East* chronicles that journey through 1939. As befits an author who once toyed with the possibility of making literature his career,<sup>28</sup> it is a book that brings to mind such earlier American autobiographical efforts as the maverick Theodore Parker's farewell letter to his maverick Boston congregation, written on the eve of the Civil War,<sup>29</sup> or Louis H. Sullivan's memoir of perpetual warfare with traditionalist architects at the end of the century,<sup>30</sup> or even—to stretch matters a bit—*Walden*. It is a book that has a voice of its own. It speaks with the inner conviction that marks a true autobiographer.

Because it is an autobiography in the classic American mode, *Go East* does not tell us as much as we might like about Douglas's public career, or about the institutions and events he has observed. Some readers will be disappointed, for example, that he proposes no serious structural explanations for what he concedes to have been the failure of the experiments in legal education undertaken while he was at Yale, early in the Depression. It all came to "zero," he merely says, "because we could not find enough people who were willing to devote effort to such matters."<sup>31</sup> A man capable of illuminating complex financial structures, Douglas could be far more insightful in his discussion of the American law school, if he wished. Such is plainly not his main concern.

Let it be clear too that *Go East* is firmly embedded in mainstream American ideology, despite a certain flirtatious use of radical vocabulary from the late 1960's. The Douglas family really was poor after his father died, but it is more fashionable than precise of him to say that his "little mother . . . knew poverty in the Middle Eastern, African, and Latin-American sense of the word." Elsewhere he notes that the Douglasses "never felt underprivileged"; they were entirely lacking, he says, in experience of class discrimination.<sup>32</sup> In general, *Go East* is marred by a few too many faint glimpses of injustices that would not become fully apparent for many decades. What these retrospective premonitions do is to obscure the fundamentally familiar and comforting message of Douglas's life. His own brand of

28. DOUGLAS 119.

29. 2 J. WEISS, *LIFE AND CORRESPONDENCE OF THEODORE PARKER* 447 (1864) (Appendix II: Parker's "Letter to the Members of the Twenty-Eighth Congregational Society of Boston").

30. L. SULLIVAN, *THE AUTOBIOGRAPHY OF AN IDEA* (1924).

31. DOUGLAS 170.

32. *Id.* at 8, 21.

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“radicalism,” a word which for him covers a range from Jefferson to Marx, is best not called “radicalism” at all. Despite occasional hints of more daring intentions, Douglas is usually accurate in saying that what he stood for during his days as a New Dealer was simply a program to make capitalism honest again. A Joseph Kennedy protégé, he was out to use the SEC to regulate the financial community in order to protect the rights and restore the confidence of small investors. In contrast to the more comprehensive visions of planners like Rexford Tugwell, his was a Brandeisian sense of America as “a complex and diverse pluralistic society” in which there was “room for everyone, even the brokers and dealers.” Truly free enterprise, he believed, “freed the spirits and loosed all men’s creative energies.”<sup>33</sup>

Douglas mentions in passing that he was opposed upon occasion, including that of his nomination to the Supreme Court, as being too conservative in his thinking. But he declines to elaborate.<sup>34</sup> Considering his recent willingness to associate himself with fulminations against all aspects of “the Establishment,” we should be unsurprised by his failure to report, for example, that news of his selection to succeed Brandeis was favorably received on Wall Street.<sup>35</sup> Nor does he report the tone of his public addresses while on the SEC. Though there were times when he antagonized the people he was regulating, as in the notorious Bond Club speech of 1937, mostly he was unthreatening. “We were and are in the same boat together,” he told a dinner crowd gathered to mark reorganization of the New York Stock Exchange. “I do not relish governmental intrusion into your business any more than you do.” Finance, he observed elsewhere, “occupies an important place in our society . . . . But finance moves into the zone of exploitation whenever it becomes the *master* rather than the faithful *servant* of investors and business.”<sup>36</sup>

Reasonable enough, perhaps—but not what some of Douglas’s youthful admirers of the last decade would like. Some of those admirers, indeed, have been reading revisionist New Left commentaries on the New Deal that pass severe judgment on its halfway measures.<sup>37</sup> Prob-

33. *Id.* at 307, 356, 365, 380. See generally *id.* at 257-316; R. DEBEDTS, *THE NEW DEAL’S SEC: THE FORMATIVE YEARS* (1964); M. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* (1970).

34. DOUGLAS 286-87, 463.

35. See, e.g., NEWSWEEK, Mar. 27, 1939, at 13-14.

36. DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS 10, 83 (J. Allen ed. 1940).

37. See, e.g., B. BERNSTEIN, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY* (1968); M. PARRISH, *supra* note 33.

bly least of all would some of his admirers like a commencement address he gave to his alma mater, Whitman College, in June 1938. "Our main efforts," he said then, "must lie along the lines of making as certain as possible that opportunity for work exists and that honest business has opportunity to make honest and substantial profits."<sup>38</sup> But that was all of a piece with Douglas's remarkable rise from impoverishment to national eminence. As a writer in *Collier's* noted when Douglas joined the SEC,<sup>39</sup> it was very much an old-fashioned American success story. It was, we may add, a particular kind of success story. Douglas's swift ascent is explained not by a rigid code of personal discipline but by his buoyancy and adventurousness of spirit. His youthful admirers should not find it odd, then, when Douglas voices shock that opponents of the war in Vietnam were very willing to burn an American flag.<sup>40</sup> Unlike Hughes, by whose cool skills much service was rendered, Douglas's faith in men, mountains, and national ideals has always been passionate. Whatever else one may think of what he has and has not achieved, that passion is his appeal.

### III

Considered from another perspective, the difference between Hughes's and Douglas's autobiographies may be said to reflect not so much a difference in personal temperament as a difference in their orientations toward the modern American legal culture. Hughes epitomized that culture; Douglas has persistently deviated from its norms.<sup>41</sup>

More than anything else, Justice Hughes was a professional man. His very austereness of manner conformed to standards of professional conduct that he knew from observing senior colleagues. The effective advocate had to be smooth and courteous, "always the gentleman." It was important to have a "poker face" and "never to appear nervous or to lose poise."<sup>42</sup> Much of Hughes's habitual self-

38. DEMOCRACY AND FINANCE, *supra* note 36, at 274.

39. Creel, *The Young Man Went East*, COLLIER'S, May 9, 1936, at 9.

40. DOUGLAS 94-95.

41. Even their styles of physical exercise illustrate the variance in their professional commitment. For Douglas, a good look at "the older men" in the profession—leaders of the Wall Street bar—was enough to drive him away. "If I walked their paths," he says he told himself, "I'd never be able to climb another mountain . . ." *Id.* at 156. Hughes, on the other hand, was entirely content to follow the advice of one of those older men, Joseph H. Choate, and thus allowed himself just "moderate" daily activity. Walking, Choate had suggested, was the "best and most convenient form of exercise for a professional man." HUGHES 85.

42. HUGHES 90-91.



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mastery, it seems, derived from his acceptance of professional norms espoused and exemplified by elite practitioners of the New York bar. The values of that legal community Hughes never seriously questioned. He had always known what he wanted, the highest professional success, and that was to be achieved by emulating men like Walter S. Carter, whose firm he joined and whose son-in-law he became. It was gratifying as a young man to be associated with older lawyers of such "high character and first-rate ability," from whom he might absorb "the best traditions of the bar."<sup>43</sup>

Hughes preferred legal practice to teaching, and seemingly to politics too. Writing to his parents in 1906, before embarking upon his first successful race for the New York governorship, he said he was in a "cold sweat" at the thought of what lay ahead. "I can be of more service and far happier," he concluded, "in my chosen profession."<sup>44</sup> No regrets are expressed in the *Notes* at his return to Wall Street in 1916,<sup>45</sup> after losing the Presidency to Wilson. Nor is there full comprehension in the *Notes* of the grounds on which a third of the Senate opposed his confirmation as Chief Justice in 1930. It was charged by many then, as almost alone William Jennings Bryan had charged in 1910 when Hughes began six years on the Court as an Associate Justice, that successful practice on Wall Street was evidence of loyalty to big business interests. Predictably, and in a sense correctly, Hughes's defenders responded that he had merely been engaged in advocacy on behalf of his clients, without regard to his own sentiments. What were ignored at the time were larger unsettling questions about the social utility of the advocacy system in general, the Wall Street bar in particular.<sup>46</sup>

Perhaps Hughes did understand some of those questions, having once been something of an outsider himself, but he had trained himself to ignore them. In one pregnant paragraph of the *Notes* there is an unexpected reference to the financial and social entrenchment of the legal profession in New York. "These highly privileged firms," Hughes observed, "seemed to hold in an enduring grasp the

43. *Id.* at 74.

44. R. WESSER, *CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905-1910*, at 63 (1967).

45. HUGHES 185-86.

46. *Id.* at 295-97. See also S. HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* 14-15, 78 (1951); 2 M. PUSEY, *supra* note 15, at 648-62. Hughes in defense praises the advocacy system and the right of the rich and powerful to hire lawyers and quotes a passage from a sympathetic commentator describing how Hughes moved easily from work for large corporations to representation of clients such as the United Mine Workers. HUGHES 295-97.

best professional opportunities and to leave little room for young aspirants outside the favored groups." Almost immediately the thought was suppressed, to be followed by complacent reflections on the "constant fructification" of the bar: "If the young lawyer sees to it that his work is of the best, and if by intelligence and industry he stands well in his own generation, he can afford to await his share of the privileges and responsibilities which to that generation are bound to come."<sup>47</sup>

Douglas's attitude toward the law is vividly different. The true autobiographer, it would seem, is not professionally sound. Hughes could recall his satisfaction in 1925, after four years as Secretary of State, at rejoining his son in the practice of law, the two thus again enjoying "an intimate professional relation,"<sup>48</sup> but Douglas says flatly that he is glad William, Jr., did not become a lawyer.<sup>49</sup> Does Douglas himself regret his choice of career? In the past he has spoken appreciatively of lawyers, but not often.<sup>50</sup> In the beginning it was a lawyer who persuaded his mother to invest the little money she had, from her husband's life insurance, in a highly speculative and totally unsuccessful irrigation project of which the lawyer was a promoter.<sup>51</sup> Though apparently this did not diminish the "strong pull" that law had for young Douglas, legal practice did. Working in the same New York professional community that had so fascinated Hughes, Douglas was at times exhilarated, at times depressed. Few of his friends were lawyers. Later, teaching at Yale, he would exchange "doubt and misgivings" with Robert Hutchins. Most of the giants of the Wall Street bar seemed to him to be "shriveled men" who brought few "spiritual or ethical values" to the system they served and exploited.<sup>52</sup>

47. HUGHES 76.

48. *Id.* at 285.

49. DOUGLAS 250.

50. *See, e.g.*, W. DOUGLAS, BEING AN AMERICAN 72-77 (1948) (his 1940 address to the Association of the Bar of the City of New York).

51. DOUGLAS 17. When Douglas left Cravath, deGersdorff, Swaine & Wood in New York for "country practice" in Yakima, he briefly became a partner of the same (but repentant) lawyer.

52. *Id.* at 119, 156, 165-66.

These men were spent before their time. When they reached the end of the corridor and were ready for retirement, they seemed to have no intellectual interests aside from the law.

I looked around at the older men in my profession and I knew I didn't want to be like any of them. They couldn't climb a mountain, couldn't tie a dry fly; they knew nothing about the world that was closest to me, the real world, the natural world.

*Id.* at 156. Worst of the breed, it appears was John Foster Dulles, whose manner was "so pontifical" during a job interview that at the end when he helped Douglas on with his coat, the young man from Yakima turned and gave him a quarter tip. *Id.* at 149-50. *See also id.* at 15, 60.

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These early impressions subsequently intensified during his term of service on the SEC. Over the years, he told the Eastern Law Students Conference in 1937, there had taken place a “degeneration of the bar” in America. Lawyers, the “professional tutors” of those who dominated the financial world, had irresponsibly ignored the public interest.<sup>53</sup> Furthermore, lawyers lived by “outworn symbols,” he told the Texas Bar Association in 1940, after ascending to the Supreme Court. “The bar’s rebellion to basic change,” he complained, “is apt to be more severe than that of any other group.”<sup>54</sup>

Out of such experience and observation has emerged Douglas’s very personal style as a lawyer—a style that may properly be called countercultural, set against prevailing professional norms. A man who has given his all to the law is a man to be pitied, in Douglas’s view. Instead of recommending the sort of thorough immersion in work that was characteristic of Hughes, Douglas warns against it. Law is a “narrowing experience,” and must be transcended lest the lawyer become “a dry husk.”<sup>55</sup> Long ago, it is plain, Douglas abandoned much of the self-congratulatory rhetoric that has accompanied and promoted the professionalization of the American legal community. In 1942, speaking at the Ohio State University College of Law, he sketched out a social vision almost Emersonian in spirit. The Republic might be in peril; lawyers might have “special responsibilities” at such a time. But it would be a mistake to rely too heavily on the bar, and unnecessary. For “the fundamental principles of our legal system are not technical concepts,” he said:

They are as universal as the Christian philosophy that conceived them. They are preserved not merely in codes but in the hearts of men. They are understood by school children who may not be able to explain them. They have been the basis of social and economic crusades by the rank and file, who, without comprehending their origins or their technical aspects, only know that they call for the fundamentals of fair play and decency. They have been rallying points for aroused communities who need no lawyer’s brief or citation of precedents to clinch their contention that the American way of life in some specific part has been violated.<sup>56</sup>

53. DEMOCRACY AND FINANCE, *supra* note 36, at 233, 238-39. Dulles, for one, is now said by Douglas to have been guilty of conduct within the purview of the SEC which might easily have justified an indictment for perjury. DOUGLAS 279.

54. BEING AN AMERICAN, *supra* note 50, at 52-53.

55. DOUGLAS 151, 155.

56. BEING AN AMERICAN, *supra* note 50, at 44.

These are sentiments at odds with the premises of legal professionalism, and rooted in that same romantic American mode of expression that has been at the heart of most of our national autobiography. The law, Douglas knows well, is not a romantic endeavor.<sup>57</sup>

Perhaps the ultimate heresy of Mr. Justice Douglas is that he has not shown full and appropriate respect for the majesty of the particular office he occupies. What makes this error so especially horrendous is that the image of judgeship, as David Riesman and others have suggested, has come to represent all that ideologues of professionalism have sought to certify as the noblest attributes of legal character.<sup>58</sup> Douglas, who was the youngest man after Story to be appointed to the Supreme Court, has worn his robes casually. Indeed, he tells us quite openly that he never dreamed of going on the Supreme Court,<sup>59</sup> and had no deep sense of fulfillment when he did. It was in a sense "an empty achievement" for him<sup>60</sup>—an honor, of course, but also a job that he did not find fully satisfying, nor fully time-consuming. Early in his judicial career, he determined to enjoy what he calls "first-class citizenship," by participating in a wide range of public projects,<sup>61</sup> some of which would later figure in the case for his impeachment. "A man or a woman who becomes a Justice," says Douglas, "should try to stay alive . . ."<sup>62</sup> Back in the thirties, while on the SEC, he had learned another thing about judges. They were "the most reactionary group" in the land, "even more reactionary than investment bankers."<sup>63</sup> Upon becoming a Justice, Douglas did not forget his fears of judicial tyranny.<sup>64</sup>

All of this has brought Mr. Justice Douglas sharply into conflict with a professional culture which, as it happens, Charles Evans Hughes promoted, helped to preserve, and himself came to symbolize. Fittingly, Hughes first joined the Court as the second of six appointees of "Judge" William Howard Taft (remembered by Douglas only as being "greatly overweight"<sup>65</sup>), having originally gotten his

57. DOUGLAS 155.

58. See, e.g., D. RIESMAN, *INDIVIDUALISM RECONSIDERED AND OTHER ESSAYS* 441-42 (1954).

59. DOUGLAS 455.

60. *Id.* at 465.

61. *Id.* at 466-69. Douglas even defied the then established tradition that Supreme Court Justices never voted. Douglas attributes his resolution to engage in civic activities to his deciding vote in a case holding that federal judges' salaries are fully taxable. *O'Malley v. Woodrough*, 307 U.S. 277 (1939).

62. DOUGLAS 469. His Court work never demands more than four days of his week.

63. "The bankers were usually open to new ideas; the judges were anchored fast to the past. Precedents were their hallmark. What had once been done was hallowed; what had never been done was suspect." *Id.* at 412.

64. *BEING AN AMERICAN*, *supra* note 50, at 9-10, 98.

65. DOUGLAS 123.

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start in New York politics as a mugwump protégé of Taft's brother Henry.<sup>66</sup> The Taft Presidency, which filled more Court vacancies than any other but Washington's and FDR's, occurred at a time when the modern professional ideal of judgeship seems to have crystallized in the national forum. In part because he attributed his popularity with the legal profession to expectations that he would be "conscientious in the selection of judges," whose social-economic orthodoxy was urgently needed to guard against "the present agitation," Taft worked hard at building a Court free of apparent partisanship and thus able to command public esteem. Hughes he considered "a great appointment," one that made "politics look petty." *The Wall Street Journal* agreed, praising "the perfect impartiality and the absolutely judicial quality of his mind."<sup>67</sup> (Teddy Roosevelt also approved, but worried whether Hughes was sufficiently alert to the need for "a very radical change in the attitude of our judges to public questions."<sup>68</sup>) As for the nominee himself, he told Taft that his "personal inclinations" definitely lay "in the direction of judicial work." He seemed perfectly suitable as the choice of a President who prided himself on being a connoisseur of the judiciary. "I love judges and I love courts," Taft is reported once to have said. "They are my ideals on earth of what we shall meet afterwards in Heaven under a just God."<sup>69</sup> Cloaked in a mantle of nonpartisanship and professionalism, they were also guarantees that the Republic would be safe from "socialistic" experimentation. Standing at the head of the bar, they attested to the disinterested, public-spirited functions of lawyers.

From the start, Hughes—"who looks like God and talks like God," Robert H. Jackson would later say<sup>70</sup>—proved that he had the requisite judicial manner and cast of mind. He spent long hours at his work, in contrast to Douglas's later example, and showed an almost obsessive sense of the behavioral niceties expected of a Justice. There was to be one small lapse—when in 1916, despite his eagerness "to keep the judicial ermine unsullied," he answered the call of duty by accepting the Republican presidential nomination. "I have wished to remain on the bench," he told the Convention. That statement

66. McHargue, *President Taft's Appointments to the Supreme Court*, 12 J. POL. 478 (1950).

67. S. HENDEL, *supra* note 46, at 14; I. H. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 531 (1939); McHargue, *supra* note 66, at 489.

68. S. HENDEL, *supra* note 46, at 13.

69. I. M. PUSEY, *supra* note 15, at 272; McHargue, *supra* note 66.

70. HUGHES xxviii.

was not enough for some of his critics, who professed shock and outrage. "The nation has grown to think of its highest judicial tribunal as something stable and permanent," editorialized the New York *Evening World*, "wherein men sat as with a final dignity befitting ultimate honor."<sup>71</sup> Whatever the harm that had been done, Hughes fully atoned for his indiscretion during his second term of service on the Court. As Chief Justice in 1937, he moved determinedly to strengthen opposition to Roosevelt's court-packing proposals, the most serious assault upon judgeship in America since the judicial recall movement of the Progressive period—which Taft had fought with uncharacteristic vigor.<sup>72</sup>

In his *Notes* Hughes took pains to reaffirm the principle at stake in 1937, the independence of the Court. Indeed, if there is a dominant theme running through his recollections, it is his insistence on the correctness and importance of this principle—against which, to his apparently never-ending embarrassment, some ill-chosen words of his while Governor were continually being cited.<sup>73</sup> Those words he was eager to explain in the *Notes*, where he also denied emphatically that the Court had in any way buckled to political pressure in its decisions of 1937.<sup>74</sup> To Hughes it was an article of faith that judicial independence was actual. Nowhere did he state his views more forthrightly than in a lecture series he gave at Columbia in 1927. It was by no means impossible, he was sure, for judges to work "in an objective spirit," however much skeptical academic lawyers might wish to maintain the contrary. Most Supreme Court Justices had done so. "One cannot study their lives and decisions," he argued,

without confidence in their sincerity and independence. The Supreme Court has the inevitable failings of any human institution, but it has vindicated the confidence, which underlies the success of democratic effort, that you can find in imperfect human beings, for the essential administration of justice, a rectitude of purpose, a clarity of vision and a capacity for independence, impartiality and balanced judgment which will render impotent the solicitation of friends, the appeals of erstwhile political associates, and the threats of enemies.<sup>75</sup>

71. *Id.* at 164-65, 180, 181 n.6; S. HENDEL, *supra* note 46, at 69.

72. 2 M. PUSEY, *supra* note 15, at 749-65. On Taft and recall, see D. ANDERSON, WILLIAM HOWARD TAFT: A CONSERVATIVE'S CONCEPTION OF THE PRESIDENCY 229-33 (1973).

73. HUGHES 143-44 ("We are under a Constitution, but the Constitution is what the judges say it is . . .").

74. *Id.* at 311-13. Hughes finds the votes of himself, Roberts, and the other crucial Justices upholding New Deal legislation in 1937 foreshadowed by their earlier votes.

75. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS 38, 45-46 (1928).

At the height of the controversy over court-packing, Thurman Arnold, Douglas's close friend from Yale, complained wryly in the *American Bar Association Journal* that practicing lawyers were shying from realism so far as the Court was concerned, and had allowed the issue to become "smothered in symbolism."<sup>76</sup> His complaint had no effect; even Douglas was unmoved by the case for court-packing.<sup>77</sup> One reason Arnold failed to clear the air was the symbolic potency of Hughes himself, that "judge *par excellence*," according to the New York *Herald Tribune*.<sup>78</sup> Hughes was understandably pleased to be able to claim, as he did in the *Notes*, that the crisis of 1937 "had the good effect of revealing the strength of public sentiment in support of the independence of the Court."<sup>79</sup> A crucial prop of 20th century American legal culture remained in place.

### IV

Probably it is well that it did, however gravely one may view the general condition of the profession today. Probably, too, the counter-cultural possibilities suggested by Douglas's life have more appeal as literature than as policy. Has Douglas's way been effective? Was Hughes's? Douglas does not directly confront the first question, but he expresses clearly his admiration of Hughes's record in support of the freedoms that he, Douglas, so cherishes.<sup>80</sup> Hughes guided his Court toward conclusions that significantly expanded constitutional protections of political and civil liberties; Roosevelt's appointees, who formed a majority until 1954, did not as a group show solicitude for the same values.<sup>81</sup> Presumably things would have been different, had Douglas been able to assert leadership within that Court. But if the familiar criticisms are justified, that he did not and possibly did not seriously try to do so, then it must be asked whether his autobiography can serve as a useful example for law as well as life. Perhaps any future volume of the autobiography will help enlighten us.

Douglas has had little use for American Bar Association presidents ("reactionary"),<sup>82</sup> and Harvard law professors, in particular Felix

76. Arnold, *A Reply*, 23 A.B.A.J. 364 (1937).

77. DOUGLAS 320-21.

78. S. HENDEL, *supra* note 46, at 277.

79. HUGHES 307.

80. DOUGLAS 108.

81. See DOUGLAS OF THE SUPREME COURT: A SELECTION OF HIS OPINIONS 24-26 (V. Countryman ed. 1959).

82. DOUGLAS 60.

Frankfurter ("chaameleonlike").<sup>83</sup> These may not be unreasonable aversions. It is also possible to sympathize with his distaste for historians who—like doctors, as Mr. Dooley put it—"are always lookin' f'r symptoms."<sup>84</sup> Still, it is not at all evident that Douglas's kind of legal counterculture has a future. And it is not entirely unrealistic to think that lawyers may yet find ways to make better service of their professional culture, to draw on what Douglas once called "the elements of public trust inherent in their profession."<sup>85</sup> Perhaps the recent performances in Washington, as special prosecutors, of a Harvard law professor and a former American Bar Association president confer plausibility on that thought.

83. *Id.* at 327.

84. DEMOCRACY AND FINANCE, *supra* note 36, at 290.

85. *Id.* at 240.



## The Civil Law in England

*The Civil Lawyers in England 1603-1641: A Political Study.* By Brian P. Levack. Oxford: The Clarendon Press, 1973. Pp. x, 311. £5.00

Reviewed by Charles Donahue, Jr.†

As is the case with so many controversies, the controversy over the influence of the civil law on the development of English law is one in which the polemical has often preceded the descriptive, in which questions are answered before they have been precisely stated. Anglo-American legal writers have long emphasized the uniqueness of the English legal experience. Pride in the common law, coupled with a contempt for the continental legal tradition (bred, at least in some cases, by ignorance), has made these writers want to find that the contributions of the civil law to our own legal system were small.

The historical reasons for this attitude may be inferred from Professor Levack's book.<sup>1</sup> In the 17th century the civil law became associated in England with royal absolutism, with the Court of Star Chamber and High Commission, with the enforcement of religious orthodoxy and the denial of civil liberty. The effects of this association can be seen today in those opinions of our Supreme Court which define the meaning of the Bill of Rights by contrast to the practices of the "civilian" Stuart monarchy.<sup>2</sup>

Beyond the specific objections to the civil law there lies a characteristic strain of anti-intellectualism in common law thinking:

The great American jurist, Holmes, has said that the life of the law is not logic but experience. This is bred in the bone in English law. A bench of medieval judges once sneered at a barrister for using the "sophisticated reasons" of the philosophers at the ancient English universities. Law was taught, till the eighteenth

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1. B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641: A POLITICAL STUDY* (1973) [hereinafter cited to page numbers only].

2. See, e.g., *In re Oliver*, 333 U.S. 257, 266-71 & nn.21-31 (1948) (Black, J.); *Brown v. Walker*, 161 U.S. 591, 596-97 (1896); cf. *Ullman v. United States*, 350 U.S. 422, 445-47 (1956) (Douglas, J., dissenting). See also R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 27-54 (1957); Moreland, *Historical Background and Implications of the Privilege Against Self-Incrimination*, 44 Ky. L.J. 267 (1956).

century, only in legal practice at the Inns of Court, a workaday "tough" law in Maitland's view. Inherent in this law is the distrust of philosophical analysis which still survives.<sup>3</sup>

The view that English law is exclusively a home-grown product of the British Isles has produced a reaction, perhaps equally silly, that purports to see Roman law in every Anglo-American legal doctrine and institution for which a Roman law analogy can be found.<sup>4</sup> Although there have been occasional attempts at a balanced appraisal,<sup>5</sup> scholarship has suffered from not having many of the basic documents available in an accessible form and has lacked the necessary monographic foundations on which a definitive appraisal could be erected.

On the basis of the work that has been done, we may now safely begin with the proposition that in England the Roman law did not survive the Germanic invasions, as it did in some places on the Continent.<sup>6</sup> When the Normans arrived in England, therefore, they found a legal system almost totally devoid of Roman influence. From this starting point the traditional view then focuses on three periods of contact between the English legal system and the civil law.

First, and perhaps most controversial, is the period of the precocious development of centralized royal justice in the 12th century. Roman law, some of which was probably derived at second hand through the academic canon law, may have played some part in that development.<sup>7</sup> The earliest English treatise on the common law, known as Glanvill,<sup>8</sup> shows considerable acquaintance with the Roman law, and Bracton, writing in the middle of the 13th century, displays so much knowledge of the Roman law that the accuracy of his description of English law may at times be called into question.<sup>9</sup>

After Bracton the traditional focus of attention shifts to Maitland's

3. Kiralfy, *English Law*, in AN INTRODUCTION TO LEGAL SYSTEMS 157, 159 (J. Derrett ed. 1968).

4. See, e.g., Sherman, *The Romanization of English Law*, 23 YALE L.J. 318 (1914).

5. See, e.g., J. BARTON, ROMAN LAW IN ENGLAND (Ius Romanum Medii Aevi pars V, 13a, 1971) (leans toward emphasis of civil law); Plucknett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 U. TORONTO L.J. 24 (1939) (leans toward de-emphasis).

6. The analogies to Roman law which may be found in the scanty surviving legal material from the Anglo-Saxon period can confidently be attributed to the influence of the Church and not to any native survival of Roman law. See J. BARTON, *supra* note 5, at 4-6.

7. For a relatively strong but defensible statement of the influence, see R. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 360-90 (Selden Soc'y Pub. No. 77, 1959).

8. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (G. Hall ed. & transl. 1965). Glanvill's "Romanism" is discussed in *id.* at xxxvi-xl.

9. See J. BARTON, *supra* note 5, at 13-24 & n.62.

thesis that a reception of Roman law was threatened in the 16th century.<sup>10</sup> Research since Maitland's time would indicate that Maitland may have overstated the seriousness of this threat, and one respected legal historian has recently suggested that there was no threat at all, at least not in the terms in which Maitland conceived of it.<sup>11</sup> But precisely what did happen during this period and what role civilian learning played in it are questions that have, as yet, no definitive answers.

A final period of civilian influence comes in the late 17th and early 18th centuries. At this time, particularly under the leadership of Lord Mansfield, the common law courts absorbed much of the law merchant, and with that law some civilian ideas.<sup>12</sup>

For all this, the traditional view would emphasize the uniqueness of the English legal experience. England, alone among the Northern European countries where the Roman law had not survived the Germanic invasions, did not "receive" Roman law in the 16th century. It did not, so this view would have it, because its centralized courts had developed early, because it had learned the Roman analytic methods through Bracton without accepting the Roman law itself, and because it had developed a system for recording precedents, the year books, and centralized institutions for training lawyers, the Inns of Court, which enabled it to resist the onslaughts of Romanism in the 16th century.<sup>13</sup>

More careful proponents of the traditional view do not suggest that all the law in England from the 12th to the 19th centuries is to be found in that applied in the King's superior common law courts. They have a tendency, however, to look at the non-common-law courts as oddities—"eccentric tribunals," Blackstone called them<sup>14</sup>—forerunners of what they became in the 19th century, the Probate, Divorce, and Admiralty Divisions of the High Court.

Despite the importance of the common law courts, it is easy to

10. F. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE* (Rede Lecture 1901), reprinted in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 168-207 (Ass'n of Am. Law Schools ed. 1907).

11. Thotne, *English Law and the Renaissance*, in *ATTI DEL PRIMO CONGRESSO INTERNAZIONALE DELLA SOCIETÀ ITALIANA DI STORIA DEL DIRITTO, LA STORIA DEL DIRITTO NEL QUADRO DELLE SCIENZE STORICHE* 437 (1966).

12. See generally C. FIFOOT, *LORD MANSFIELD* 82-117 (1936); 5 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 102-54 (3d ed. 1945); 6 *id.* 519-22 (2d ed. 1937); 12 *id.* 524-42 (1938); Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, 17 *TRANS. ROYAL HIST. SOC'Y* 149 (4th ser. 1934).

13. See, e.g., F. MAITLAND, *Outlines of English Legal History*, in 2 *COLLECTED PAPERS* 417, 438-45 (H. Fisher ed. 1911); see also F. MAITLAND, *supra* note 10.

14. 3 W. BLACKSTONE, *COMMENTARIES* \*86.

overemphasize their importance if we look at English legal history from the vantage point of the common law courts' ultimate triumph. If we instead take the point of view, say, of a sophisticated 14th century litigant, the picture is considerably different. True, if the litigant is not a serf, he will be advised that the common law courts have taken over much of what had formerly been feudal jurisdiction.<sup>15</sup> But he still has a bewildering variety of courts in addition to the superior common law courts open to him, depending on who he is and what kind of claim he has. His claim, for example, may be heard in a county court, in a church court, in a borough court, or in a merchant court. He may try the as yet ill-defined jurisdiction of Chancery. Indeed, certain cases may be heard before the High Court of Parliament itself. From what is now known of the county courts, we would expect to find little penetration of the learned law in them.<sup>16</sup> On the other hand, in the church courts our litigant will find the academic Romano-canon law being applied. The importance of this law for the development of English law can only be determined when more of the records of the medieval ecclesiastical courts are published, when we have a clearer idea of the extent of these courts' jurisdiction. The work that has been done would indicate that if our litigant's case concerns a promise, a marriage, a will, a piece of ecclesiastical property, defamation, or a group of offenses which might roughly be described as morals offenses, he may well find himself in an ecclesiastical court.<sup>17</sup> In the merchant courts, where our litigant may go if he is a merchant, the law applied will be the custom of merchants, a diverse body of rules that will become a transnational body of law with substantial civil law underpinnings.<sup>18</sup> Some influence of the law merchant can be seen as well in the borough courts.<sup>19</sup> The civil law element in the law applied in Chancery and in the High Court of Parliament is more problematic. There can be little doubt, however, that the shape of the procedure before these bodies displays the influence of the learned law.<sup>20</sup>

15. See S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 8-12, 376 (1969).

16. See W. MORRIS, *THE EARLY ENGLISH COUNTY COURTS* (14 U. CALIF. PUB. IN HIST. No. 2, at 89-230, 1926); S. MILSOM, *supra* note 15, at 6-8, 376.

17. See Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 658-70 (1974).

18. See W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (Yorke Prize Essay 1904). But see Sutherland, *supra* note 12, at 151-54 for the suggestion that the law merchant does not acquire a cohesive character until the Renaissance.

19. See, e.g., 2 *BOROUGH CUSTOMS* lxvii-lxxxv (M. Bateson ed., Selden Soc'y Pub. No. 21, 1906).

20. See J. BARTON, *supra* note 5, at 28-71.

If we move to Professor Levack's period, the reigns of James I and Charles I, shortly after the period in which Maitland perceived a threat of reception, the situation is even more confused. At the local level, our hypothetical litigant will still find county and borough courts and local ecclesiastical courts, with ultimate appeal from these latter now to the High Court of Delegates, instead of to the Court of Rome. In addition, if he lives in the right part of the country, his case may be heard before the Council of the North or the Council of Wales and the Marches. At Westminster he will find that the superior common law courts have lost some business to the newer conciliar courts, the Court of Star Chamber and of Requests, and to the Privy Council itself, as well as to the increasingly active jurisdiction of the Chancery.<sup>21</sup> In addition, the High Court of Admiralty and local admiralty courts are seeking to expand their jurisdiction over mercantile matters, while an offshoot of the Council, the High Commission (Commissions for Ecclesiastical Causes), is tending to draw business away from the regular ecclesiastical courts.<sup>22</sup>

Of this multiplicity of courts only the ecclesiastical and admiralty courts are distinctly civil law courts, applying civil law and dominated by civil lawyers. In the conciliar courts and the Chancery, the civilians filled some but by no means all of the positions.<sup>23</sup> As in the medieval Chancery, civil law influence can be seen in the shape of the procedure of these courts; how much its influence goes beyond that is a difficult question.

In summary, current research forces us to discard any notions we may have had of the total isolation of English legal development from the academic law. It also indicates that if we want to have a full understanding of how the English legal system operated in the Middle Ages and Renaissance, the non-common law is worth further examination. That examination has already begun. Marsden and Senior have studied the admiralty jurisdiction.<sup>24</sup> More recently, Woodcock has given us a view of the medieval diocesan court of Canterbury;<sup>25</sup> Mar-

21. For a readable account of these developments with a strong point of view, see C. OGLVIE, *THE KING'S GOVERNMENT AND THE COMMON LAW 1471-1641* (1958). On the chancery, see W.J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* (1967).

22. On the High Court of Admiralty, see 2 *SELECT PLEAS IN THE COURT OF ADMIRALTY* xii-xv, xli-lvii (R. Marsden ed., Selden Soc'y Pub. No. 11, 1897); on the High Commission, see R. USHER, *THE RISE AND FALL OF THE HIGH COMMISSION 91-105* (1913).

23. Pp. 21-30.

24. 1 *SELECT PLEAS OF THE COURT OF ADMIRALTY* (R. Marsden ed., Selden Soc'y Pub. No. 6, 1892); 2 *id.* (No. 11, 1897); W. SENIOR, *DOCTORS' COMMONS AND THE OLD COURT OF ADMIRALTY* (1922).

25. B. WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* (1952).

chant has studied the ecclesiastical courts, particularly the York courts under Elizabeth I, James I and Charles I,<sup>26</sup> and more on the ecclesiastical courts is promised.<sup>27</sup> Squibb has studied the High Court of Chivalry,<sup>28</sup> Duncan the High Court of Delegates.<sup>29</sup> Usher's pioneering study of the High Commission will be considerably enhanced when Tyler's study of the Ecclesiastical Commission of York is published.<sup>30</sup> Jones has given us an excellent study of the Elizabethan court of Chancery,<sup>31</sup> and there exist Selden Society volumes on the Council, the Court of Requests, the Star Chamber and the law merchant.<sup>32</sup>

So far the studies have tended to focus on an individual court. Such a focus permits the scholar to work with relatively well-catalogued and well-defined archival material, to construct an institutional history and to keep his analysis of cases within jurisdictional bounds. Such studies are necessary, but they are confining. They lead, without their authors' intending that they do so, to associating a body of legal ideas, in this case the civil law, with a given set of legal institutions, the civil law courts. Further, they tend to make us look lineally at a given segment of the legal system rather than at how all the pieces of the system fit together at any given time.

Professor Levack boldly takes another approach. Rather than looking at any one court, he has chosen to look at the body of men who practiced before a number of courts—the doctors of civil law from Oxford and Cambridge who were active in England in a variety of roles during the reigns of James I and Charles I.

Levack's thesis unfolds carefully from chapter to chapter of the book. He begins by outlining the social and economic characteristics of the 200 men with whom he is dealing. By and large his civil lawyers rank lower on the socioeconomic scale than do the common lawyers of

26. R. MARCHANT, *THE CHURCH UNDER LAW: JUSTICE, ADMINISTRATION AND DISCIPLINE IN THE DIOCESE OF YORK 1560-1640* (1969).

27. The Selden Society has announced volumes on the ecclesiastical courts of Canterbury in the 13th century and those of York in the 14th and 15th.

28. G. SQUIBB, *THE HIGH COURT OF CHIVALRY* (1959). This court, which dealt with military and heraldic matters, was also a civil law court.

29. G. DUNCAN, *THE HIGH COURT OF DELEGATES* (Cambridge Stud. in Legal Hist. 1971).

30. R. USHER, *supra* note 22; P. Tyler, *The Ecclesiastical Commission for the Province of York 1561-1641*, 1967 (unpublished D. Phil. thesis on file in the Bodleian Library, Oxford).

31. W.J. JONES, *supra* note 21.

32. *SELECT CASES BEFORE THE KING'S COUNCIL* (I. Leadham & J. Baldwin eds., Selden Soc'y Pub. No. 35, 1918); *SELECT CASES IN THE COUNCIL OF HENRY VII* (C. Bayne & W. Dunham eds., Selden Soc'y Pub. No. 75, 1956); *SELECT CASES IN THE COURT OF REQUESTS, A.D. 1497-1569* (I. Leadham ed., Selden Soc'y Pub. No. 12, 1898); *SELECT CASES BEFORE THE KING'S COUNCIL IN THE STAR CHAMBER, 1477-1544* (I. Leadham ed., Selden Soc'y Pub. No. 16, 1903); 2 *id.* (No. 25, 1911); 1 *SELECT CASES CONCERNING THE LAW MERCHANT* (C. Gross ed., Selden Soc'y Pub. No. 23, 1908); 2 *id.* (H. Hall ed., No. 46, 1930); 3 *id.* (H. Hall ed., No. 49, 1932).

the same period. They are the sons of merchants and the second sons of gentry, not the heirs of landed estates.<sup>33</sup> They lived by their wits, and they needed professional positions in order to advance economically. At the beginning of the 17th century, when Levack's story begins, the profession is in trouble. From a high point in the decade of the 1580's, the number of doctors of civil law graduating from Oxford and Cambridge is on the decline. Perhaps as a result of the common lawyers' reaction to the loss of business to the civilian-oriented courts, James was not preferring civil lawyers in the way that Elizabeth had.<sup>34</sup>

The crisis, according to Levack, led the civil lawyers to seek help from their usual sources of preferment, the King and the Church. In the succeeding chapters he tries to show how the civil lawyers used their learning to defend the royal prerogative in the political arena,<sup>35</sup> to make use of their jurisdiction to further the purposes of the King and the Church,<sup>36</sup> and thus to become intimately associated with the prevailing ecclesiastical polity that was to collapse thunderously in the Long Parliament.<sup>37</sup>

As a profession the civilians never regained the position that they had prior to the Long Parliament. Some of the positions which they had held, such as those in the Court of Requests and the High Commission, were abolished; the positions in Chancery became exclusively the province of the common lawyers; the positions in the Church courts never achieved the importance after the Restoration that they had had before. Doctors' Commons, the High Court of Admiralty and the Church courts continued, but the beginnings of their decline as

33. Pp. 9-16.

34. Pp. 60-66. There may not be any necessary connection between the civilians' perceived economic difficulties at the beginning of the 17th century and the common lawyers' assault on their jurisdiction. For example, the analysis that has been done of the case loads of the local ecclesiastical courts shows no significant decline in the cases being heard. See R. MARCHANT, *supra* note 26, at 16 (Table 2, Norwich Consistory Litigation, 1509-10), at 20 (Table 3, Norwich Consistory Litigation, 1623-24, 1626-37), at 62 (Table 8, Cases Entering the York Consistory Court, 1561-1639), at 68 (Table 9, Cases Entering the York Chancery Court, 1571-1635), at 110 (Table 10, York Exchequer Litigation, 1592-93, 1637-38). (Dr. Ralph Houlbrooke's forthcoming study of the Norwich court during this period should be a considerable help in this regard.) Quite independent reasons may be found for the civil lawyers' economic difficulties. For one thing this is a period of increasing laicization of the civil law profession, and laymen, unlike clergymen, cannot rely on a benefice to provide them their basic income. Secondly, with an economic naïveté that is typical of the period, the Church, under parliamentary pressure, displayed great reluctance to raise the statutorily-fixed fees charged to litigants, while at the same time England experienced a 650 percent inflation between the years 1500 and 1640. On both points, see *id.* at 243-45; on the fees point, see *id.* at 21-31, 51-54, 111-12, 134-36, 140-45, 189-92. Levack also discusses fees. See pp. 66-72.

35. Pp. 86-121 (ch. 3).

36. Pp. 122-95 (chs. 4-5).

37. Pp. 196-202 (ch. 6).

independent and effective institutions can be seen as early as the Restoration.<sup>38</sup>

Levack's thesis is an attractive one. It explains why the common law, which at one time might almost be described as a partner in England of a number of other civil-law based systems of law, ultimately came to triumph. In the struggle between King and Parliament, court and country, the civilians of necessity backed the wrong horse, and the civil law was severed from English legal development when Charles I's head was severed from his body. The thesis also goes much of the way to explaining why the civil law is held in such bad odor in American legal circles, and why it comes out so badly in the peculiarly whiggish view of English history that is favored by our Supreme Court. If we can associate the civil law with absolutism, whether there is any necessary connection between the two or not, then we are against it because that is what the Founding Fathers were trying to get away from.

Levack's work in its broad outlines is a careful and helpful book. He has worked long and hard in the basic source materials and has assembled an impressive amount of information. The biographical dictionary of his 200 civilians appended at the end of the book is a labor of love which will serve scholars for many years to come.<sup>39</sup> He has shown us the political ideas and alliances of an interesting group of men in a critical period of English constitutional and political history. The book is not, however, and does not purport to be, a complete assessment of the role that the civil law played in the development of English law during this period.

Viewed as a study of the profession of civil law in England in the first half of the 17th century, the book is confined to the 200 lawyers who were at the very top of their profession from an academic point of view, and it is limited to the institution, Doctors' Commons, which many of them used as a base for their activities. But the bread-and-butter courts of the civil lawyers, the ecclesiastical courts, were not staffed exclusively by the doctors of the civil law. For example, relatively few of Levack's lawyers appear in the ecclesiastical courts of York during this period.<sup>40</sup> I do not know what an intensive study of all

38. For the depressing story of the state of the ecclesiastical courts just prior to reform, see Manchester, *The Reform of the Ecclesiastical Courts*, 10 AM. J. LEGAL HIST. 51 (1966).

39. Pp. 203-82. The book also contains a useful bibliography of both printed and unprinted sources, although the usefulness of the latter would have been enhanced if the publishers had allowed Levack the space to give at least short-titles and authors of the manuscript tracts and treatises.

40. See R. MARCHANT, *supra* note 26, at 247.



the personnel of the York Court would reveal. Certainly one would not be surprised to find that these men, too, espoused orthodox religious positions. On the other hand, since the York lawyers had their roots deep in the countryside, we might find that the York lawyers were not as closely associated with the political positions of the court as their London contemporaries with greater academic qualifications.

Levack's omission of the civilians in the provinces has some substantive ramifications. First, it makes it easier for him to say that the civilians' political positions were influenced by their self-interest. If we could determine what the political views of the provincial civilians were, we would have a valuable check on Levack's thesis, since the provincial lawyers' self-interest was not nearly so closely associated with the King and the court. Second, Levack's book can give one the impression that the civilians were a considerably narrower group than they actually were. The doctors did not have a monopoly on civilian writing; indeed Henry Swinburne's treatises on wills and spousals<sup>41</sup> were certainly among the most important pieces of civilian writing in this period. Thus, if we are trying to fashion an accurate picture of the 17th century legal system, we cannot ignore the men in the provinces, because a large number of cases were tried in their courts.<sup>42</sup> Nor should we ignore them if we are trying to assess the impact of the civil law on the common law, since the practitioners of the common law may well have come to know the civil law through the local church courts or the writings of such men as Swinburne.

Although considerable work still needs to be done, the main outlines of the English civil law courts, as institutions, are now reasonably clear, and thanks to Levack's book we now have some idea of the civilians as men. We have gone beyond the narrow confines of specific courts, again thanks to Levack's book, but we are still in the realm of the institutional—the civil law courts as institutions, the body of lawyers who practiced before them as an institution. Further, because of the excellent work which has been done with civil law institutions, we are in danger of equating the history of civil law institutions in England with the history of the civil law itself, of seeing in the failure of the former to establish and maintain a significant position the ultimate insignificance of the latter.

As to the impact of the civil law on English political and consti-

41. H. SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* (1590); H. SWINBURNE, *A TREATISE OF SPOUSALS* (1686). The former went through at least seven editions and was still being published as a practice book in 1803.

42. See generally R. MARCHANT, *supra* note 26.

tutional ideas, Levack's answer—that it was a body of doctrine from which a group of men, driven by the pressure of circumstances, derived justifications for a position that ultimately lost in the political battle—must be accepted only as a partial one. Levack has discovered, as many law students have before him, that law is malleable stuff.<sup>43</sup> Two civilians, relying on the same texts of the civil law, could reach diametrically opposite political conclusions. John Cowell was proceeded against in Parliament for his extreme views of absolute monarchy, whereas Isaac Dorislaus became a regicide.<sup>44</sup>

It is not Levack's view, then, that civil law necessarily leads to absolutism. Rather it was the civil lawyers' need for preferment that determined their association with royal absolutism, the Church, and the court, against the parliamentary party, the Puritans, and the country. Thus Levack's thesis is deterministic, and this political determinism is not really undercut by his one attempt at qualification in the concluding chapter.<sup>45</sup>

By detailing the divergent stories of men such as Dorislaus and Cowell and by showing how others, such as Marten, could, despite views generally in accord with the prevailing ideas of the civil law tradition, support the Petition of Right,<sup>46</sup> Levack has demonstrated that all the conclusions of the writers in the mainstream do not follow ineluctably from the basic civil law texts. We should not conclude from his book, however, that the civilians' general position can only be explained by self-interest. Perhaps more importantly, Levack has not shown what there was about these texts of the civil law that gave them such power that men felt they had to come to grips with them in propounding their political ideas. Perhaps Levack's perception of the civilians' self-interest has led him to underestimate the role their ideas played in determining the course of English political and legal development. For example, the civilians have much to say about sovereignty, an idea which they borrow from Jean Bodin, himself a civilian, and a quality which they attribute to the King.<sup>47</sup> Ultimately English political thought is to keep the idea but reject the attribution, transferring the locus of sovereignty to Parliament.<sup>48</sup> There was obviously something about the idea of sovereignty that men, including the civilians who introduced it, found powerfully attrac-

43. See pp. 86-95, 109-21, 152-54.

44. Pp. 4, 224.

45. P. 200.

46. Pp. 117-21.

47. Pp. 97-98, 101-02.

48. See C. OGILVIE, *supra* note 21, at 152-55.

tive, but Levack contents himself with a thorough description of what the civilians said and disappoints, at least this reader, by not applying his substantial body of knowledge to the question of what it was that gave the civilians' ideas such power.

The relationship between what goes on on the high level of theory and what actually goes on in the courtroom may be tenuous in the extreme, and it is at the level of the courtroom that Levack's book is most incomplete. The book is rightly subtitled a "political study." It is the work of a careful historian who is interested in lawyers, their political ideas and alliances, but it is not really a work of legal history, if we define "legal history" as the history of legal doctrine, of courts, and of cases.<sup>49</sup>

The civil lawyers with whom Levack is dealing had received extensive university training in their discipline. He regards this training as highly impractical,<sup>50</sup> but did it have no effect on the judgments

49. Indeed, it is in the minutiae of legal history that Levack makes the only errors or questionable statements which I found. For example: (1) The fact that Robert Newcomb was his great uncle's legatee did not give him "in effect" "control of the entire family estate" (p. 14), since the family was a landed one. The history of the family that Levack suggests, however, indicates that Newcomb may well have been his great uncle's heir, or he may have been his great uncle's devisee, both of which might have given him the family lands. (2) It is unlikely that "the emperors of Ulpian's time [early 3d c., A.D.] ruled by the classical *lex de imperio Vespasiani* . . .," and Schulz does not say that they did (p. 94 & n.1). What Schulz says on the cited page is that "we know by the *lex de imperio Vespasiani* that only a strictly limited power was given to [the emperor]." The *lex* may have been a purely political document used on a one-time basis to still people's fears after the traumatic events of 69 A.D. (3) The Henrican Commission to revise the canon law did complete its assignment (p. 183). Professor Donald Logan of Emmanuel College announced the discovery of a manuscript of the commission's work at the International Congress of Medieval Canon Law in Toronto in August 1972 (perhaps too late for inclusion in Levack's work). (4) On pp. 33-34 we learn that Dr. John Burman, sitting as Judge of the Vice-Admiralty Court in Norfolk, when confronted with a Mayor who had ordered jurors that Burman had summoned not to perform their office, "*acquainted the said Mayor that he was about Her Majesty's service and told him that he greatly wondered how he durst offer such a disturbance in the execution thereof.*" While Levack suggests that this incident illustrates the peculiar attachment of the civilians to the central authority they served, I cannot imagine that a common law assize judge, confronted with the same act of contempt, would not have replied in language at least as strong. (5) On p. 156 Levack states that the "civilians' initial presumption that the accused was guilty serves as only one indication of their partiality." This just will not do. That the civil law has a presumption of guilt in criminal cases is a shibboleth that Merryman on the cited page (*id.* at n.1) is trying to dispel. Usher at the page cited in the same note makes quite clear how strict the civil law of proof applied by the High Commission was, and shows that the source of the problem is the civilians' statement that accusation creates a sufficient *praesumptio* that the accused must come forward and deny the charge, a shift of the burden of coming forward which was shifted back upon the denial of the charge. It is well to point out that at common law at this time a person who refused to plead to a felony charge was crushed with weights until he did plead or died. Compared to this, a shifting of the burden of coming forward seems quite civilized. It was not until 1827 in England that refusal to plead at common law was treated as a plea of not guilty rather than an admission of guilt.

But these are counsels of perfection. As a whole the work is careful and well-written.

50. Pp. 16-18.

the civilians reached when they were daily confronted by social reality in their courts? Levack suggests, and he may be on the track of something quite significant here, that the civilians had a different style of judgment from the style professed by the common lawyers. Despite their more rule-oriented system, the civilians handled their cases in a less rigid way than did the common lawyers.<sup>51</sup> Unfortunately, Levack pulls back from this suggestion after he makes it, without a systematic analysis of the types of cases and the law applied in the civil law courts.

As to the possible influence of the civil law on the practice of the common law courts, Levack tells us little; he is studying civil lawyers, not common lawyers. He does suggest, however, that the relationship between the two groups was not always as strained as when they opposed each other in Parliament. They served together, apparently amicably, on the High Court of Delegates, the High Commission, the Court of Requests, and in Chancery, and a number of civilians were admitted to membership in the Inns of Court, although none seems to have been called to the bar.<sup>52</sup> All of this suggests a working relationship and at least the opportunity for exchange of ideas.

What evidence can we find for influence of the civil law on the development of the common law? As I suggested before, the problem suffers from a lack of definition. While the citation of cases as authorities is at least as old as Bracton, the doctrine of precedent does not achieve its modern form until the 18th century.<sup>53</sup> When English courts in the 19th century cite Roman law (which they do more frequently than one might think),<sup>54</sup> it is clear that the citation is to an "academic" authority, an authority which will be followed only in the absence of domestic authority and only because it is persuasive, not because it is binding. Until the doctrine of binding authorities was developed, however, the distinction between "academic" and "binding" authorities was considerably fuzzier. Further, the absence of citation of civil law authorities in the year books is not conclusive, since those books are, by and large, concerned with the pleading stage of a case. Nonetheless, the general absence of citations to civil law in both the later year books and the earlier common law reports would seem to indicate that civil law was not "authoritative" in the common

51. Pp. 152-57.

52. Pp. 126-30.

53. 12 W. HOLDSWORTH, *supra* note 12, at 146.

54. See Oliver, *Roman Law in Modern Cases in English Courts*, in *CAMBRIDGE LEGAL ESSAYS WRITTEN IN HONOUR OF AND PRESENTED TO DOCTOR BOND, PROFESSOR BUCKLAND AND PROFESSOR KENNY* 243 (P. Winfield & A. McNair eds. 1926).

law courts in this period, at least in the sense that it was not a body of doctrine to which counsel regularly asked the judges to turn for the resolution of specific questions of law.<sup>55</sup>

Failing discovery there, we must look for the influence of the civil law in the way in which English law in its broad outlines changed over the course of the 16th and 17th centuries. The common law at the end of the 15th century was in a sorry state. Narrowly confined to property and crime with a few rudimentary ideas of tort and contract, the system had declined to one that was procedurally unworkable for all but the richest and the most patient, and substantively incapable of handling the great commercial expansion that was to come. Somehow two centuries later, the system had withstood the challenge of the conciliar courts and had managed to incorporate enough new ideas that the cry for more radical reform died down.<sup>56</sup> Did at least some of the new ideas come from the civil law?

If we look for civil law influence in the specific rules that the common law or equity courts adopted, we quickly find ourselves in a hopeless morass. For every principle of common law alleged to have civil law ancestry, there is a case to be cited which explains it totally in common law terms, or a text from the Digest which suggests that the civil law rule was really quite different.<sup>57</sup>

The problem with this kind of analysis is that it glorifies the specific rule by which the case is decided and underplays the basic principles underlying the rule and the methodology used to arrive at that

55. The situation in Chancery is considerably more difficult to assess, since the court throughout the 17th century was only gradually developing a system of precedents. See 1 LORD NOTTINGHAM'S CHANCERY CASES xxxvii-cxxiv (D. Yale ed., Selden Soc'y Pub. No. 73, 1957). The question, then, is what was it that informed the Chancellor's conscience when the decision turned on it, and what role did the learned law play in the hardening of the principles that were to become the rules of equity? Jones suggests that the connection between equity and the civil law is tenuous at best. W.J. JONES, *supra* note 21, at 266, 301. Others have suggested civil law influences on specific bodies of doctrine. See, e.g., T. SCRUTTON, THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND 152-62 (Yorke Prize Essay 1885). The opportunity for civilian influence was there, both from the civilian-trained masters of the court and from the fact that the three great 17th century chancellors—Ellesmere, Bacon and Nottingham—were all men who had considerable acquaintance with continental learning. See 2 J. CAMPBELL, LIVES OF THE LORD CHANCELLORS 309-10 (4th ed. 1856) (Ellesmere); 3 *id.* 5-6 (4th ed. 1857) (Bacon); 1 LORD NOTTINGHAM'S CHANCERY CASES, *supra*, at xxxiv n.3 (Nottingham). But this leads us to the consideration of influence on principles and methodology rather than on specific rules, and to the point next developed in the text.

56. On the situation of the common law in the 15th century, see C. OGILVIE, *supra* note 21, at 13-14, 19-24, 43-54; A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 119-39 (1966). For the suggestion that there were few changes in the 17th century and that the Interregnum was a great opportunity lost, see *id.* at 265-67; D. VEALL, THE POPULAR MOVEMENT FOR LAW REFORM 1640-1660, at 225-40 (1970).

57. This is particularly characteristic of the debates concerning the influence of the civil law on the early development of the common law. See sources cited in notes 7-9 *supra*.

rule. If it is true that the life of the law has not been logic but experience, it is equally true that that experience has been shaped by the power of certain fundamental ideas and methods of proceeding. And in the development of these ideas and methods in England, civilian influence may have played some part.

As an example of the type of elements in the English law which suggest the influence of civil law ideas, consider the limitation act<sup>58</sup> passed by Parliament in 1623, right in the middle of Levack's period. This act is the ancestor of our own statutes of limitations for actions to recover real property, and its history is known to every first-year property student: What is worded as a simple statute of limitations became the statutory basis of the doctrine of adverse possession with the familiar judicially engrafted requirements that the possession be actual, continuous, open and notorious, and hostile, with the frequent addition that it be under "(good faith) claim of right" and "color of title."<sup>59</sup> A great deal has been written emphasizing how the common law system of limitation differs from the civil law system of acquisitive prescription.<sup>60</sup> The point is not often made, however, that adverse possession, in the hands of at least some judges, looks remarkably like acquisitive prescription, without quite the civilian emphasis on bona fides.<sup>61</sup> Whether this result was foreseen by the framers of the 1623 statute is hard to know. The notion of prescription was, however, not unknown to them; it had been brought into English law by Bracton to compensate for the fact that the common law of his day had no system of limitation that applied to someone claiming a nonpossessory right to the land of another.<sup>62</sup> The preamble to the 1623 statute states twin purposes: "avoiding of suits" and "quieting of men's estates."<sup>63</sup> The former idea is clearly derived from the notion of limitation, but the latter certainly smacks of prescription.

The question which I am suggesting needs further exploration is not whether a "reception" of Roman law was threatened in the 16th or 17th centuries, nor whether the institutions of the civil law, their courts, and the body of civil lawyers themselves were stronger than recent research would suggest they were.<sup>64</sup> Nor am I suggesting that

58. 21 Jac. 1, c.16.

59. See generally 3 AMERICAN LAW OF PROPERTY §§ 15.1-15.14, at 755-831 (A.J. Casner ed. 1952).

60. See, e.g., B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 120-30 (1962).

61. See, e.g., Taylor v. Horde, 1 Burr. 60, 97 Eng. Rep. 190 (K.B. 1757) (Mansfield, L.C.J.); cf. City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908 (1929).

62. See W. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 279-86 (1927).

63. 21 Jac. 1, c.16, preamble.

64. See, e.g., Ives, *The Common Lawyers in Pre-Reformation England*, 18 TRANS. ROYAL HIST. Soc'y 145 (5th ser. 1968).

at least the main elements in the movement for law reform were motivated by a desire to abandon the "barbaric" common law for the more "elegant" civil law.<sup>65</sup> The evidence seems quite convincing that there was no real danger of reception, that the civil law institutions never posed a serious threat to the common law, and that the motivation for the most thoughtful of the reform writing was not an intellectual but a practical one. What I am suggesting needs more study is what role the learned law played in shaping the reactions of the English legal system, a system concededly dominated by common lawyers, to the felt need for reform.

In the latter part of the 17th century and in the 18th, the academic civilians on the Continent abandoned the idea of getting the Digest as such accepted as an authoritative body of law in the courts and began instead to use the civil law as a means for determining certain first principles of law—what we might today call fundamental Western legal ideas and what they called natural law.<sup>66</sup> The abrasive contact between the civil law taught in the academies, the non-civil law espoused in the courts, and the diverse human conflicts which call for resolution led thoughtful men to search for first principles. That contact occurred in England at many times, most notably in the 16th and early 17th centuries, and it is the effect of this contact that ought to be more fully explored.

65. See pp. 131-33, on the attitude of the humanists. See generally D. VEALL, *supra* note 56, for what the reformers were after.

66. See A. PASSERIN D'ENTREVES, *NATURAL LAW* 51-64 (2d ed. 1970); B. NICHOLAS, *supra* note 60, at 50-51.

## In Pursuit of the Public Interest

*The Genteel Populists.* By Simon Lazarus. New York: Holt, Rinehart and Winston, 1974. Pp. xvii, 303. \$8.95.

Reviewed by Benjamin W. Heineman, Jr.†

### I

The “public interest” law movement has been at least partly defined by its economic problems, since the movement—and even its name—has been a response to the failures of the private market for legal resources.<sup>1</sup> The public interest lawyers’ broad goal—representing the “unrepresented”—obviously has an important economic dimension, for the distinction between the “private” lawyer and the public interest lawyer rests fundamentally on the fact that they have different sources of income.<sup>2</sup> The private lawyer earns his daily wage by competing in the market for legal resources, giving his talents to the highest (or, at the least, to very substantial) bidders. By contrast, the public interest lawyer seeks to provide legal counsel for individuals or groups who have not been able to compete in the market for legal talent and obtain quality legal representation. Such public interest advocacy often involves significant subsidies from a variety of public and private sources. And the existence of the subsidy means that public interest lawyers are continually forced to offer justifications for their work to either their public or private benefactors.<sup>3</sup>

*The Genteel Populists*<sup>4</sup> is an extended essay summarizing the efforts of 20th century American reformers to make corporate and other vested interests “accountable” to the public, one that in the end endorses and justifies public interest law. In concluding that public

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1. See generally Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970); M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION (1974). For a bibliography relating to public interest law, see *Selected Materials on Public Interest Law Firms*, 28 RECORD OF N.Y.C.B.A. 328 (1973).

2. Public interest and private lawyers are, of course, to be distinguished from “public” lawyers, those who are employed by agencies of government.

3. Private lawyers do not have to give justifications to third parties for their efforts to take paying clients and achieve economic rewards within a conventional market structure.

4. S. LAZARUS, *THE GENTEEL POPULISTS* (1974) [hereinafter cited by page number only].



## In Pursuit of the Public Interest

interest lawyers are important defenders of the populist ideal, Lazarus observes that the future of public interest law practice turns on the issue of finding stable and significant sources of financial support for this type of legal practice. In this review, I will discuss Lazarus's book in the context of the relationship between public interest law's ideology and its future sources of funding. And before doing so, I offer a few framing thoughts.

### A.

General justifications of public interest law have recognized two types of citizen interests which need either provision of basic individual legal services or the advancement of more collective concerns through law reform efforts at the judicial, administrative or legislative levels. In this century, the goal of representing the unrepresented originated with a concern over the plight of "weak minorities" in a democracy—the poor, political dissidents or victims of racial discrimination. And the earliest organized manifestations of public interest law—the legal aid societies, the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc.—were a response to the classic problem of protecting relatively powerless minority interests from an overbearing majority through provision of legal counsel.<sup>5</sup> Subsequently, with the growth of government intervention in social and economic life, the need arose to protect the interests of a "diffuse majority" from the untoward influence on government agencies of corporate and other highly organized groups. Such influence frustrated implementation of legislation aimed at promoting a general public good.<sup>6</sup> Weak minority interests tend to arise from lower economic strata; diffuse majority interests tend to be more

5. For an account of the origins of the NAACP Legal Defense and Educational Fund, Inc., see M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 5-10 (1973).

6. The phrase "public interest law" is sometimes used to refer only to "diffuse majority" efforts thus excluding "weak minority" (poverty and civil rights) law. This more limited usage of the term has its origins in the 1970 Internal Revenue Service (IRS) guidelines for tax exemptions, which are "applicable to organizations formed to provide legal representation in the public interest. . . . These proposed programs are frequently in support of the interests of a majority of the public, as distinguished from legal representation for a disadvantaged minority, such as the poor, the victims of racial discrimination, or those denied human and civil rights either in criminal or civil matters." See *Hearings on Tax Exemptions for Charitable Organizations Affecting Poverty Programs Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 11 (1970) [hereinafter cited as *Hearings*]. See also FORD FOUNDATION, *THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES* 9-10 (1973).

This review will not use the narrower definition of public interest law adopted by the IRS.

middle class in character. Both types, however, lack the resources and organizational muscle to counter expressions of power either by majoritarian instruments (in the case of weak minorities) or concentrated centers of private power (in the case of diffuse majorities). The result is a need for public interest law—at least as expressed in the promotional stages of public interest law's development.<sup>7</sup>

To some proponents of public interest law, the rubric "representing the unrepresented" reflects, in essence, a *procedural* set of values. Regardless of whether the public interest lawyer represents weak minority or diffuse majority citizen interests, providing legal counsel to those unable to afford it serves to increase access to rule-making and justice-dispensing bodies. Public interest law is thus justified from the procedural perspective as enhancing either the adversary process (when courts or administrative units are involved) or the pressure-group dominated political process (when the legislatures, the executive or political parties are the targets of "legal" efforts). When supporters of public interest law justify their efforts in these terms, they need not identify with the substance of the claims made by the formerly unrepresented; instead, they can argue that some concept of procedural justice requires that the unrepresented have an opportunity to present their position forcefully to decisionmakers. When so defended, public interest law is a misleading phrase: Advancement of the public interest does not necessarily depend upon substantive victories of the unrepresented but instead from participation of weak minorities or diffuse majorities in the competition of the adversary or political processes. The public interest presumably emerges from the conflicting pressures of these processes.

To other supporters of public interest law, the broad goal of "representing the unrepresented" is merely an uncontroversial gloss for more *substantive* values. The purpose of providing legal resources for formerly unrepresented consumers or environmentalists is to secure decent products or to promote clean air. Blacks or Puerto Ricans need lawyers because racial equality is an unalloyed good. Assertion of such substantive values presupposes a balancing of complex inter-

7. While the concepts of the "public interest," "diffuse majority" and "weak minority" raise obvious conceptual difficulties, *see* note 18 *infra*, public interest lawyers have often failed to carry their justification for public interest law much beyond the generalizations outlined above. During the last ten years, when public interest law in the diffuse majority sense has grown markedly, little attention has been paid to the refinement of these concepts; instead, efforts have been devoted to garnering money from sources generally sympathetic to the broad concept of public interest law and to showing that public interest law works in practice.

ests; public interest lawyers who advance substantive rationales are presumably prepared to argue that the particular value they espouse should prevail under some conception of justice or equality, regardless of the impact on other values.<sup>8</sup> But appropriating the phrase public interest for such activities, while a candid declaration of value, is nonetheless controversial. Obviously, other individuals or groups who are adversely affected by the goals the public interest lawyers are promoting (*e.g.*, “clean air,” “racial equality”) will challenge the claim that the environmentalists or integrationists have exclusive power to decry the public welfare. Given the political controversy that is certain to arise when substantive values are aggressively asserted as being in the public interest, the procedural justification for public interest law has always been the more conservative one: It fits more easily into the norms of our political and legal culture.

### B.

Since the existence of a subsidy to represent the unrepresented means that public interest lawyers must defend their efforts to the subsidizer, articulating justifications for public interest law bears an obvious relation to securing funding for such legal activities. At present, there are three main sources of income for public interest lawyers.

1. *The public interest law market.* In order to avoid justifying their legal efforts to third party subsidizers, a small number of public interest lawyers have attempted to explore the possibilities of surviving in an ill-defined market for public interest law.<sup>9</sup> Such lawyers either engage in a “pure” public interest practice—taking reduced fees from previously unrepresented clients—or in a mixed public interest/private practice—by using regular fees from private clients to finance public interest cases brought on behalf of individuals or groups otherwise unable to obtain legal counsel.<sup>10</sup> In a sense, these market public

8. Of course, when arguing from an express legislative command, public interest lawyers can maintain that they are merely seeking to implement the will of Congress, which has already balanced competing concerns. However, since Congress often delegates enormous power to administrative agencies with vague legislative history as a backdrop, the development of substantive statutory standards may be left to the agencies and to the courts. *See pp.* 229-31.

9. *See, e.g.,* Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970).

10. Large commercial firms also engage in what might be termed a “mixed public interest/private” practice, since many of the more prestigious ones devote a certain amount of their time to public interest cases on a pro bono basis. As a definitional matter, a firm might be considered a public interest law firm when it spends more than 25 percent of its time on public interest practice. Even the most public-spirited

interest lawyers are subsidizing their own legal efforts, since they are often foregoing much greater economic gain to represent formerly unrepresented clients. A second type of market public interest lawyer is beginning to pioneer in group legal services; he or she provides services to individuals or groups on a high volume, reduced fee basis. The emphasis of the "group legal public interest" lawyers is often on service efforts, not on law reform litigation or policy formulation.<sup>11</sup>

2. *Public subsidies.* A number of lawyers have, of course, been working as public interest attorneys pursuant to government-funded Neighborhood Legal Services. This program in the civil area, like funding for the Criminal Justice Act or public defender services on the criminal side, constitutes a direct public subsidy for lawyers representing the previously unrepresented. Such a subsidy is justified on procedural due process grounds.<sup>12</sup> The award of attorney's fees, under either a common fund or private attorney general theory, represents another form of public support for public interest law, but one that is, of course, available only after a substantive victory.<sup>13</sup>

3. *Private subsidies.* Direct private subsidies have doubtless provided most of the funds for those public interest firms engaged in major law reform efforts. The dominant form of direct private subsidy is foundation funding.<sup>14</sup> Other types of private subsidies include: membership/subscription support;<sup>15</sup> large individual donors; public in-

private firm rarely claims that it spends more than 15 percent of its time on pro bono matters.

Another definitional problem arises over the concept of "reduced fees from previously unrepresented" clients. If the standard fee for a private, corporate lawyer is \$100 per hour, is the lawyer who represents the Sierra Club at \$30 an hour a "public interest" lawyer, but the attorney for a national union who works at \$70 an hour a "private" one? How does one know that a lawyer who takes a "reduced fee" could, in other circumstances, command a higher (*i.e.*, more normal) one?

11. See generally B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 225-91 (1970).

12. For example, the recently passed Legal Services Corporation Act, Pub. L. No. 93-355, § 1001(1) (July 25, 1974), includes in its declaration of purpose the finding that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances."

13. See, *e.g.*, Comment, *Court Awarded Attorneys' Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974). With respect to attorney fee awards, the phrase "public subsidy" is used loosely; recovery of fees pursuant to court order may lie against both governmental units and private parties.

14. The list of foundations which have contributed to public interest law efforts includes: Carnegie, Clark, Field, Ford, New World, Rockefeller Brothers, Rockefeller Family and Stern Family. The largest contributor to public interest law has been the Ford Foundation. See FORD FOUNDATION, *supra* note 6; Foster, *Playing it Safe on \$11 Million a Year*, JURIS DOCTOR, June 1973, at 9.

15. Such diverse public interest law efforts as the American Civil Liberties Union, Ralph Nader's Public Citizen, Inc., and the Natural Resources Defense Council (NRDC) receive substantial proportions of their annual income from funds donated by individual members or subscribers. The NRDC, for example, has hired a full-time fundraiser to deal with membership and other financial problems.

terest research groups;<sup>16</sup> and the pro bono efforts of the bar, either through individual activities of firm members, branch offices or public interest firms sponsored by local bar associations.<sup>17</sup> The justifications for such efforts are as diverse as the subsidizers. But it is probably fair to generalize that most public interest lawyers formally defend their work to their donors on procedural grounds, although strong substantive preferences (if not full-blown theoretical defenses) for the values being defended lurk in the background of the lawyers' minds (and often in the minds of the donors as well).

C.

If the defining goal of the public interest law movement is to represent the unrepresented, then the goal of public interest law finance might be expressed as follows: provision of an adequate number of politically independent public interest lawyers who are economically self-sufficient. But if stating these basic goals is easy, defining their operative terms is extraordinarily difficult. The concept of public interest law raises a host of theoretical questions. What does "unrepresented" mean? When is a minority "weak" or a majority interest "diffuse"? What is "procedural equality"? How does one demonstrate the substantive validity of a value advanced by public interest lawyers?<sup>18</sup> Similarly, what does the concept of an "adequate number of public interest lawyers" entail?<sup>19</sup> And, if economic self-sufficiency involves having money for starting up, for sustained operations, for complex as well as simple litigation and for attracting quality lawyers,

16. The public interest research group (PIRG) is Ralph Nader's idea. In essence, the PIRG's are financed by a checkoff system, in which many students in various colleges or university systems contribute a small amount of their tuition to public interest law firms that are overseen by students and faculty. See generally R. NADER & D. ROSS, ACTION FOR CHANGE: A STUDENT'S MANUAL FOR PUBLIC INTEREST ORGANIZING (1971).

17. For an excellent, if somewhat dated, summary of public interest efforts of private law firms and the organized bar, see R. MARKS, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY (1972). A newsletter, *Pro Bono Report*, is published by the American Bar Association's Special Committee on Public Interest Practice; it contains current information on public interest activities by both public interest and private firms.

18. Many of the normative debates about public interest law are, of course, merely the reflections of the controversy between "pluralist" economists and political scientists and their critics over whether the competition between organized interests yields the public good, how unorganized interests may be brought into competitive parity, and whether certain critical societal needs will be ignored in any conflict, however equal. See Note, *supra* note 1, at 1070 n.3. With a little imagination, one can quickly push beyond the confines of the pluralist debate into the whole realm of normative and descriptive history and argumentation in trying to analyze the public interest concept.

19. For an attempt to analyze the demand for and cost of legal services, see B. CHRISTENSEN, *supra* note 11, at 1-81.

how much money is needed to achieve such self-sufficiency? Or, if "independence" means the ability to represent controversial clients—to be "free" from "political" constraints—how can public interest lawyers who receive public monies be both accountable and independent?

These questions and the many others that lie behind them are not just of academic interest. To be sure, private donors can give individual answers to them and dole out all the money, consistent with the tax laws, that they wish. But, as will be noted below, if the resources devoted to public interest law are to expand and the sources of income are to be more broadly based, then the justification must be more carefully detailed in order to persuade new money (that may be neither intuitively sympathetic with public interest law nor unalterably opposed to achievement of its goals) to participate in its development.

Such broadening of financial support for public interest law is almost surely necessary if the movement is even to begin to achieve its objectives. For although it is difficult (and beyond the scope of this review) to establish a precise conceptual framework for assessing whether the goals of public interest law and public interest law finance are being achieved, it is certainly possible to make the common sense observation, as the President of the American Bar Association has recently done,<sup>20</sup> that there is still an enormous unmet need for providing quality legal representation to citizens and groups who do not have it.

It is also possible to give an impressionistic overview of the limits of current sources of income for public interest lawyers. The conclusion of such an overview is that none of the current sources of financial support are secure, and an expanded practice of law in the public interest is not certain, or even likely, to occur.

Lawyers trying to exist independently in a public interest law market still face numerous problems. These include: lack of startup

20. In calling for support by the organized bar of public interest law firms, Chesterfield Smith noted:

While activity on behalf of the indigent is laudable and must continue, it is now apparent that this concern is only one part of the total obligation of the legal profession to ensure that each and every segment of society is adequately represented.

If this is so, it is vital to the continued viability of the adversary system that remedial action be instituted in behalf of the unrepresented. There are both individuals and groups who, for practical purposes, are barred from the courts and from legal processes generally because they lack sufficient commitment and resources to support litigation on the same scale as their adversaries. Environmental and consumer concerns are two immediate and obvious examples.  
Smith, *President's Page*, 60 A.B.A.J. 641 (1974).

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funds; limited number of public interest clients who can afford to pay even at reduced fee rates; very ill-defined and risky markets; inability to undertake long and complicated litigation because of extreme cash flow problems; the need to take paying cases, causing cases that are more important from a policy perspective to be ignored; and economic pressures that prevent systematic development of new areas of law. In fact, due, among other things, to cash flow problems and the difficulties in finding clients who can pay on a reduced fee basis, it is hard to imagine this form of public interest law growing significantly without other forms of subsidy, such as attorney's fee awards. Similarly, many of the new group legal services efforts are in a very uncertain period because basic statistical information on the needs of different kinds of groups does not yet exist; this information is necessary not only for the survival of this type of practice, but also for development of significant law reform components within them.

The problem with using public subsidies, through government programs, to support independent public interest law is, of course, expressed in a single word: politics. The problems involved in the recent passage of the Legal Services Corporation Act need not be recounted here,<sup>21</sup> but they certainly dampen any optimism about immediately establishing any new legal assistance programs that directly tap the national treasury for public interest law support. Moreover, awards of attorney's fees under private attorney general theory, while a promising development, are unlikely to be a total solution to the problem of financing public interest law activity. For example, under current Internal Revenue Service guidelines, certain types of public interest firms cannot accept attorney's fees.<sup>22</sup> In addition, fees cannot generally be obtained from the federal government under present law.<sup>23</sup> The question of what is a reasonable fee, an issue that is critical

21. See, e.g., Comment, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971).

22. IRS Guideline No. 2 does not allow public interest firms to accept fees except with the approval of the IRS. *Hearings, supra* note 6, at 12. Negotiations are currently underway between Public Advocates, a Ford-funded public interest firm, and the IRS over the circumstances in which Public Advocates may accept fees either paid by clients or won in the firm's role as private attorney general.

23. It has generally been thought that 28 U.S.C. § 2412 (1970) acts as a bar to recovery of attorney's fees in actions against the federal government, *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), although there are many express statutory exceptions to this command. An attempt by public interest lawyers to have the statute construed differently was recently rebuffed at the appellate level, though certiorari is now being sought. See *Pyramid Lake Paiute Tribe v. Morton*, 499 F.2d 1095 (D.C. Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3173 (U.S. Sept. 26, 1974) (No. 342). Moreover the Supreme Court's recent decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), raises the question of whether the Eleventh Amendment bars recovery of attorney's fees against the states.

to any calculus of public interest law's economic survival, is unsettled, to say the least.<sup>24</sup> And fees are usually not awarded to lawyers making a substantial contribution in proceedings before administrative agencies or for expert testimony produced by public interest lawyers, even though both areas are vital to the sophisticated practice of public interest law.<sup>25</sup> Furthermore, the growth of federal class actions, upon which the common fund theory may depend, has been restricted by recent Supreme Court decisions.<sup>26</sup>

Finally, each type of direct private subsidy presents problems if one seeks to rely on any of them for the provision of an adequate number of self-sufficient public interest lawyers. Foundation funding has been an important source, especially in the last five years, but the perennial question remains<sup>27</sup>—how long will the major foundations contribute substantially to the public interest law field?<sup>28</sup> Subscription income is also problematical for a variety of reasons: It is difficult for organizations to establish stable membership bases, direct mail costs are rising rapidly, and net revenues for some groups em-

24. See Comment, *supra* note 13, at 702-05. The reasonableness of the fee is a key variable, of course, in any plans for a public interest firm to support itself without other forms of subsidy. Other variables in the calculus which determines how effective attorney fee awards will be in financing a public interest law firm are: total salaries of lawyers, relation of total salaries to overhead, the number of billable hours per attorney, the number of cases the firm wins, the total amount recovered through court awarded fees, and the average recovery per lawyer-hour worked in a winning cause.

A hypothetical example will illustrate the relationship of the variables. Assume an eight-person firm, with each lawyer earning \$25,000. Assume also that each lawyer accounts for \$25,000 of overhead. The firm's annual budget is thus \$400,000. Assume further that each lawyer works 1600 billable hours per year (approximately 30 per week), that each lawyer wins half his or her cases, that half the cases account for half the hours, and that the average recovery for those hours worked is \$50. Given this set of facts, the firm's annual income would be \$320,000, or \$80,000 less than expenses (800 hours  $\times$  \$50  $\times$  eight lawyers = \$320,000). Moreover, such an analysis does not take into account two other critical economic problems: startup costs and cash flow. The latter factor is important because the receipt of fees often takes place long after the court victory.

25. In a case currently pending before the D.C. Circuit Court of Appeals, plaintiffs are seeking attorney's fees for their contribution to an administrative proceeding. *Turner v. Federal Communications Comm'n*, Civil No. 74-1298 (D.C. Cir., filed Feb. 28, 1974). This case is one of the first to raise this issue.

26. For example, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court held that in Rule 23(b)(3) class actions founded on diversity jurisdiction every member of the plaintiff class must meet the jurisdictional amount in controversy requirement of \$10,000. And in *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974), the court ruled that individual notice must be given to all identifiable class members in a class action brought pursuant to FED. R. CIV. P. 23(b)(3). See also Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds*, 87 HARV. L. REV. 1597 (1974).

27. Note, *supra* note 1, at 1111-15.

28. "Among the unresolved questions is whether . . . [public interest firms] will remain heavily dependent on financial support from private foundations, or whether they can broaden their financial support and thus guarantee their independence." FORD FOUNDATION, *supra* note 6, at 39. Budget reductions are currently under consideration at the Ford Foundation, which could affect funding in this area. See N.Y. Times, Sept. 22, 1974, at 1, col. 1.



ploying this method have been rising more slowly than anticipated.<sup>29</sup> Large individual donors, it need hardly be said, are difficult to find. The public interest research groups (PIRG's) are a hopeful development, but they have not as yet demonstrated continuity and staying power. And, while individual law firms are hampered from undertaking public interest efforts due to conflicts of interest, the organized bar has not yet provided enough leadership in developing public interest law.<sup>30</sup>

## II

After reviewing American reform from the 1890's to the present, Lazarus concludes that "public-interest law is now the last best hope to vindicate the populist ideal."<sup>31</sup> Unfortunately, *The Genteel Populists* is a *tour de force* that fails. It does not take the general, diffuse majority justification for public interest law much beyond the commonplace (though accurate) observation that implementation of regulatory legislation is sometimes frustrated by concentrated corporate (and other) interests. Accordingly, it is best read as a partial summary of the broad, promotional thinking which has accompanied the recent emergence of public interest law as a "most interesting example of social experimentation,"<sup>32</sup> rather than as a presentation of the new ideas regarding both the rationale and financing of public interest law which must emerge if it is to become an enduring and significant feature of the legal landscape.

To telescope Lazarus's argument, the populist ideal derives its animus from a "suspicion of corporate power, or more precisely, suspicion of corporate subversion of government power."<sup>33</sup> As economic forces became increasingly concentrated, populists historically sought to cabin the unbridled power of "special interests" and to "redress the balance of social power" in favor of the public.<sup>34</sup> To accomplish this, populist reformers have advanced two broad strategies: direct democratic control over institutions with power (the Progressives) or use of government and its bureaucracies to regulate the excesses of vested interests (the New Deal).

29. This has been the experience of the Natural Resources Defense Council. Interview with Thomas Stoel, NRDC staff attorney, Sept. 30, 1974, in Washington, D.C.

30. As a recent American Bar Foundation study concluded: "The organized bar . . . has not played a central part in either the overall response or in the overall address of the profession to questions of professional responsibility to the public." R. MARKS, *supra* note 17.

31. P. 274.

32. Levi, *Foreword* to FORD FOUNDATION, *supra* note 6, at 8.

33. P. 2.

34. P. 20.

But, according to Lazarus, these strategies have not worked: Life is too complicated for direct democratic control, and efforts at government regulation are inevitably captured by the very interests that government seeks to regulate. Pluralist political theorists, the arch-enemies of the populists, have hoped that the public interest will emerge from the competition between organized interest groups under the government's moderating hand. But the populist critics of pluralism, and Lazarus apparently counts himself as one,<sup>35</sup> note that some interests worthy of protection are not organized and that organized interests do not always compete with each other but instead stake out their own areas of concern and manipulate government efforts to intrude in those special precincts. Moreover, some programs of neo-populists like Ralph Nader will only perpetuate the mistakes of the past: By using public relations techniques, which Lazarus terms the "pageant of reform,"<sup>36</sup> Nader urges adoption of "grand designs"<sup>37</sup> like the Consumer Protection Agency or federal incorporation, programs that promise much more than they can deliver. Thus there is the danger of "fake reform"<sup>38</sup> which will only result in further entrenchment of "special interests" as they dominate new government agencies. Lazarus maintains that the new populists must "adopt a vision that is at once strategically more modest and philosophically more conservative."<sup>39</sup> Central to such a vision is the public interest law firm, advocating the general welfare in courts of law administered by judges who will be more immune from improper political pressures than agency administrators and who will, with the help of counsel, vindicate the public interest in at least some instances.<sup>40</sup> Public interest law holds out the promise of "making corporate and bureaucratic power accountable."<sup>41</sup>

The basic failing of *The Genteel Populists* is that it never comes to grips with the fundamental problem it is analyzing: the role of government intervention in the economy to secure the public interest. Granted, this is as complex a problem as there is; but given the scope and ambition of Lazarus's effort one could expect that he would

35. Lazarus briefly summarizes and agrees with the writings of the antipluralist critics (pp. 167-89), including the following: H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961); T. LOWI, *THE END OF LIBERALISM* (1969); G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

36. Pp. 78-80.

37. Pp. 196-202.

38. P. 16.

39. P. 26.

40. Pp. 226-66.

41. P. 228.

have a coherent position—or at least a perspective—on the issue. This, however, is not the case. Lazarus is neither a violent de-regulator nor a closet socialist. He has no strong views on the role of the antitrust laws or antitrust enforcement.<sup>42</sup> At times, he does doubt, along with many others, whether agencies established to structure whole industries and thereafter direct their course in the public interest will succeed in their task of “offensive regulation.”<sup>43</sup> Yet at other times he suggests that the enterprise is a worthwhile one if carried out by the courts.<sup>44</sup> He does think that agencies with “defensive,” policing functions—*e.g.*, banning or labeling of unsafe products—can be effective. But the distinction between the types of reform is presented as a brief afterthought. In short, Lazarus favors a mixed economy with some form of regulation, but because he leaves the nature of regulation so vaguely adumbrated, his position is hardly an illuminating or novel one.

The spareness of theory is unfortunately matched by an absence of facts. Although this is a book about reform, social and economic ills are rarely described in any detail. We are not given many facts about how particular industries are structured, what their failings are, how citizens are harmed, how such failings and harms are measured. Although the book has its share of anecdotes, too much of *The Genteel Populists* takes place in a social and economic vacuum, a factor which only compounds the fuzziness resulting from the lack of theoretical focus. Lazarus does emphasize again and again the political fact that industry lobbyists hover about legislators and agency personnel, trying to stage-manage decisions.<sup>45</sup> But this observation, too, is hardly a novel one.<sup>46</sup>

Given these general problems, it is not surprising that Lazarus's account of public interest law lacks sharpness. For example, there is confusion about what it means to say that public interest lawyers may be able to make corporate power, or other organized interests, “accountable.” “Accountable,” it must obviously be asked, in what sense? Lazarus himself acknowledges that public interest law is a

42. See pp. 215-18.

43. Pp. 222-25. Lazarus opposes broad cartelization of certain industries through regulation, pp. 54-55, though he does not offer much by way of analysis and explanation: What, for example, would be the effects of greater competition on the airline industry? See note 50 *infra*.

44. Pp. 230-34.

45. See, *e.g.*, pp. 104-05.

46. It has, of course, been a salient theme of nearly all the studies of federal agencies by Ralph Nader and his associates. See, *e.g.*, J. TURNER, *THE CHEMICAL FEAST: RALPH NADER'S STUDY GROUP REPORT ON THE FOOD AND DRUG ADMINISTRATION* (1970).

fairly conservative reform technique, proceeding mainly through the courts. Does Lazarus then propose that a hardy band of public interest lawyers and a handful of innovative judges are going to deal by themselves with the dominant economic issues of the day implicating business, labor, and government: inflation, manpower policies, control of technology, resource allocation, environmental controls, economic concentration, quality of consumer goods, and worker safety? Of course not, since litigation is a time-consuming, costly technique that often has a limited impact on major policy decisions. But what then is the public interest lawyer's role with respect to those questions? We are not told, since basic economic issues are not analyzed in any depth.

A related problem is Lazarus's failure to analyze the concept of the public interest. At times he uses the phrase in the procedural sense to mean increased access to decisionmakers of heretofore unrepresented interests. In so doing, he is merely adopting a form of pluralist proceduralism which he criticizes elsewhere.<sup>47</sup> At other times, he suggests that judges, following the urgings of public interest lawyers, should give more substantive content to "populist platitudes written into laws . . ."<sup>48</sup> With respect to the Federal Aviation Act, for example, Lazarus contends that the courts "must insist that 'the public interest' should be construed as 'the consumer interest,' or that terms like 'economical' or 'efficient' be given meaningful content and be applied vigorously by the agency to evaluate the operations of regulated interests."<sup>49</sup> That sounds like a nice idea, but it clearly is not as easy to do as it sounds. Again, Lazarus does not give us enough substance to demonstrate (or even suggest) how it can and should be done if neither the statutory language nor the legislative history offer much guidance.<sup>50</sup> Moreover, in light of Lazarus's hope that public interest lawyers will induce judges to pour content into vague substantive standards embodied in acts of Congress, it seems illogical for him to criticize Nader's efforts to use the pageant of reform as a catalyst for new national legislative efforts. The tools which he urges

47. Compare pp. 154-57 (environmental advocates only represent "a public interest") [emphasis in original], with pp. 167-89.

48. P. 231.

49. *Id.*

50. What is *the* consumer interest? Would airlines still be required to maintain unprofitable routes? Would more competition result in the danger of cost-cutting on safety measures with the increased need for more federal regulation to prevent violations of safety rules? There is so little analysis of the airline industry and the role of the Civil Aeronautics Board that Lazarus fails to make out a convincing case to the intelligent, but uninformed layman for public interest law intervention (although there is doubtless one to be made).

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public interest lawyers to use come from “grand design” legislation currently on the books; and the arts of publicity practiced by people like Nader and John Gardner may shape the political climate, making it easier for judges to decide cases under such laws against “special interests.”<sup>51</sup>

Finally, while recognizing that methods of financing public interest law must be found,<sup>52</sup> Lazarus offers little analysis of this problem except to endorse, quite properly, an expansion of attorney’s fee awards under either a common fund or private attorney general theory. Oddly enough, given his experience as law clerk to Nicholas Johnson at the Federal Communications Commission, he does not discuss the various lacunae in attorney’s fee law which have a substantial limiting effect on public interest practice before federal courts and administrative agencies. Furthermore, despite his endorsement of public interest law, his recognition of the central importance of funding for such practice, and his concern with the ideology of reformist movements, Lazarus neither explores other sources of income for public interest lawyers nor asks how public interest justifications might affect the availability of money.

*The Genteel Populists* is best when Lazarus, who is obviously a creative activist and writes with a lively style, sketches scenes from his own experience as clerk to Nicholas Johnson and as general counsel of New York City’s consumer protection agency. When painting with a broad theoretical and historical brush, he is weakest, and given the large themes Lazarus has set for himself, such strokes fill up much of his book. In order to make the points which he cares about—the influence of corporations on government regulation, the problems with neopopulist proposals, the role of the public interest lawyers—Lazarus would have produced a more compelling book if he had treated in greater detail the role of a public interest firm concerned with a particular industry<sup>53</sup> or had developed more fully a much needed account and critique of Ralph Nader’s conception of public

51. Lazarus broadly criticizes Nader’s plan for federal incorporation on the usual ground that any agency which administers the law will become captive of corporate interests. Pp. 207-15. But he does not examine the question with any care; neither does he clearly explain the various purposes federal incorporation might serve nor discuss whether some of those purposes might be achieved by other means; cf. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

52. P. 230.

53. For example, Lazarus, drawing on his own experience at the FCC, might have more carefully evaluated the efforts of an energetic public interest law firm, the Citizens’ Communication Center, to intervene in the regulatory processes affecting the broadcasting industry.

interest reform.<sup>54</sup> In order to avoid repeating the truisms of public interest thought, he would have done well to heed his own advice and been more conservative in his aims and less concerned about trying to describe the whole pageant of reform in 20th century America.

### III

If Lazarus's account provides little guidance for the future of public interest law, what, then, are the potential mechanisms for securing the financing of the public interest practice? In the public interest law market, the group legal services concept, as noted, is the most promising, although the problems involved in establishing group legal services for certain kinds of interests<sup>55</sup> or in creating law reform components in existing organizations have barely been explored.

With respect to public subsidies, there are several possibilities. Agencies could establish their own public interest counsel, who would represent the interests of citizens rather than those of the agencies.<sup>56</sup> National legislation on attorney's fees could be developed, based on either the common fund theory or the private attorney general theory.<sup>57</sup> Alternatively, national legislation involving more direct subsidies to public interest lawyers, administered either by a quasi-independent board of governors of a public trust fund or through a *judicare* mechanism, could be urged.<sup>58</sup>

So too, there are a variety of possibilities for increasing funds from private donors. A Fund for Public Interest Law could be established through large grants from a number of foundations. Ideally, foundations already active in the field, in combination with other charitable organizations, could establish a corpus which would yield income

54. While both critical and admiring of Nader, Lazarus never draws together the various threads of his analysis to give a comprehensive view of the work of the most well-known public interest lawyer. Nader has used a wide variety of reforming techniques: from publicity and lobbying to litigation and local organizing. While favoring some "grand designs," as Lazarus notes, Nader is also concerned with questions of de-regulation. A more complete assessment of his ideas, methods and successes would have offered some concrete lessons for the future of public interest law.

55. How, for example, would environmental interests get represented through a group legal services mechanism?

56. See, e.g., Stein, *Public Counsel and the Federal Railroad Reorganization*, ALTERNATIVES, Aug. 1974, at 6 (attempt to create an office of public counsel in the Interstate Commerce Commission to facilitate representation of citizen interests in agency proceedings under the Regional Rail Reorganization Act of 1973).

57. Hearings were held last year to consider such legislation, *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizen Interests of the Senate Judiciary Comm.*, 93d Cong., 1st Sess. (1973).

58. See, e.g., S. BRAKEL, *JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS AND POOR PEOPLE* (1974).

either for annual funding of public interest law firms or for firm startup costs. A separate board of trustees and staff would be formed to manage and allocate the Fund. Alternatively, a similar fund, fueled by donations from bar associations or individual firms or firm members, could be set up at a local, state or national level. Bar association experiments with the establishment of local public interest firms could also be expanded.<sup>59</sup> Compulsory tithing could be the fundraising mechanism for such bar initiatives.<sup>60</sup>

In addition to the foundations, the two largest future sources of income, at least for major public interest litigation and policy formation, are the private bar and the public treasury. But the need for sophisticated justifications for public interest law arises forcefully when either the bar or Congress (or state legislatures) are the targets of financial solicitation for public interest law. Obviously, as subsidizers become more political—composed of persons with a range of ideological views and subject to a broader range of interest group pressures—the need for making a persuasive justification that will reconcile diverse objections to public interest practice becomes correspondingly greater. The procedural justification has clear appeal in this respect. But whether the prospective public interest institution is to protect a weak minority or a diffuse majority interest, vital substantive questions of who represents the interest, who decides who is representative, and what principles determine the allocation of money both between and within unrepresented interests will pose great difficulties for any subsidy planner. Beyond the conceptual problem of identifying legitimate representatives for the unrepresented, the politics of the subsidy may well be difficult since the abstract cry of procedural fairness cannot hide the reality that assertions of right—albeit in the name of the adversary process—have a significant impact, in terms of time, money and possible result, on other established groups or interests.<sup>61</sup> Moreover, basic economic facts should be developed about the need for public interest lawyers in various fields

59. Bar associations in Boston and Beverly Hills have allocated a portion of dues to creation of public interest law firms. Smith, *supra* note 20.

60. See, e.g., Tucker, *Pro Bono Publico or Pro Bono Organized Bar?*, 60 A.B.A.J. 916 (1974) (suggesting that the bar tithes itself or provide equivalent service, enforced by sanctions and disciplinary procedures, to meet its public interest obligation).

61. Specific justifications, e.g., protection of consumer or environmental or health care interests, are doubtless easier to develop than more general justifications. But if a larger number of specific justifications are offered to more political subsidizers, then other specific interests may be ignored in any resulting subsidized public interest institution.

and about how individual public interest firms subsist. These facts are necessary to buttress any justification of public interest practice.

It is an open question, just as it was four years ago,<sup>62</sup> whether procedural or substantive justifications can be devised that will satisfy political, conceptual and factual needs and yield greater income for public interest law. But there can be little doubt that if public interest law is to move beyond the promotional stage and achieve a measure of institutional and financial permanence through new, expanded economic support, more sophisticated justifications for public interest law practice and more precise factual material on its economics must be developed. And since public interest lawyers are so preoccupied with litigation and other day-to-day tasks, such thinking should probably come from an institution created for the specific purpose of devising new methods of public interest law finance. *The Genteel Populists* clearly demonstrates the need for such analysis.

62. "[T]he practice of public interest law, if it is to survive at all, will have to seek new forms and sources of financing." Note, *supra* note 1, at 1148.



In Memory of  
Alexander M. Bickel  
(1924 - 1974)

*Alexander Bickel was the first law professor many of us ever encountered, that distant first morning of law school in Constitutional Law I. We had heard of him, of course: the man who defended the Times in the Pentagon Papers case, who wrote so trenchantly for The New Republic, who stumped for Bobby Kennedy. These were exciting "liberal" credentials; perhaps we expected to have our fondest predispositions reinforced—many of us being convinced, in those innocent days, that if an action were wrong, it must somehow be unconstitutional.*

*We were in for a surprise, a brisk cold shower in that early morning of our law careers—stimulating, good for our intellectual health. He asked probing questions about the role of courts in a democratic society. He reminded us that federal judges were not inevitably "little Earl Warrens in black robes" (as he put it once, making gentle fun of our eagerness). He inspired us with a vision of the law as the highest and most careful application of our powers of reason. If we did not all emerge in complete agreement with him—little Alexander Bickels in blue jeans—we did come away with a deeper and more subtle sense of what is at stake when a court exercises its ultimate powers of constitutional interpretation—a most important lesson. We are richer for that experience; students who follow are now so much deprived.*

*The Editors dedicate this issue to the memory of Professor Bickel.*



PROFESSOR ALEXANDER M. BICKEL