Book Reviews

Untying the White Noose

Fair Housing: Discrimination in Real Estate, Community Development and Revitalization. By James A. Kushner.* *Colorado Springs: Shepard's/McGraw-Hill*, 1983. Pp. xv, 784. $70.00

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Why haven't the nation's neighborhoods become as racially integrated as its public schools and work places have over the past generation? Would our neighborhoods look different if laws forbidding discrimination in housing were as strict and as vigorously enforced as laws banning discrimination in education and employment? That they would indeed is the premise behind what have been optimistically called "fair" housing laws. That was also this writer's presupposition in his attempts as a member of Congress to enact the Fair Housing Amendments Act of 1980, the Edwards-Drinan Bill.[1]

In his encyclopedic book on fair housing, Professor Kushner unfortunately neither proves nor challenges the assumption that good, well-enforced laws could eradicate what the United States Commission on Civil

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1. The Fair Housing Amendments Act of 1980, H.R. 5200, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. REP. NO. 96-865, 96th Cong., 2d Sess. (1980), began as The Fair Housing Amendments Act of 1977 (Edwards-Drinan Bill), H.R. 3504, 95th Cong., 1st Sess. (1977), *reprinted in Fair Housing Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 422–41 (1978).

The Bill was an attempt to strengthen the enforcement mechanism of Title VIII of the Civil Rights Act of 1968, the Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (1982)). The Bill would have provided an administrative remedy for victims of housing discrimination by allowing them to bring their complaints to state and local human rights agencies or to the Department of Housing and Urban Development for informal resolution and, if necessary, formal disposition. In addition, the Bill encouraged informal resolution of complaints through conciliation and negotiation.

The House passed H.R. 5200 on June 12, 1980, by a vote of 310 to 95, *see* 126 CONG. REC. 14,477 (1980), but fell six votes short of the 60 needed to end a filibuster in the Senate on December 9, 1980, *see* 126 CONG. REC. 32,989 (1980).

Rights described in 1961 as the "white noose" that surrounds the increasingly minority population of our central cities.[2] Instead, his impressively comprehensive volume simply concludes that people are accepting the "concept of choice and equal opportunity and that fact is resulting in greater diversity and a slow process of the integration of previously all or predominantly white communities."[3]

Kushner's failure to confront the role enforcement might play in eradicating housing discrimination leaves the reader eager to know whether resistance to desegregation will remain unyielding in the area of housing while it weakens or even dies in education and employment. One wonders whether law alone can convince whites that it is simply "fair" to allow blacks to buy a house down the street.

"Fair" has been the accepted catchword in discussions about housing discrimination at least since the enactment of the Fair Housing Act of 1968.[4] But despite frequent use in statutes, court decisions, and sociological studies, the term conceals as much as it reveals. Alone, it says little about, for example, whether or what kind of affirmative action might be necessary to remedy the effects of some of the seemingly racist policies adhered to by the federal and state governments until the very recent past. Nor does the concept of "fair" housing say much about the techniques that we must employ in order to give millions of minority families the opportunity to leave substandard housing and share in the dream embraced by Congress in the preamble to the Housing Act of 1949—"a decent home and a suitable living environment for every American family . . . ."[5] Despite this ambiguity, it is clear that any version of "fair housing" must reject the legacy of federal government policies that created the white noose.

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2. U.S. COMMISSION ON CIVIL RIGHTS, 1961 REPORT: HOUSING 1 (1961).

3. J. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION 670 (1983) [hereinafter cited by page number only].

4. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1982)). The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, establishes that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Act, as amended, prohibits discrimination in the sale or rental of housing on the basis of race, color, religion, sex, or national origin. *Id.* § 3604. It exempts certain classes of sellers or landlords, however, *see id.* § 3603(b).

5. Housing Act of 1949, Pub. L. No. 81-171, § 2, 63 Stat. 413, 413 (1949). The Housing Act of 1949 was an attempt by the federal government to help the housing industry meet the demand for housing after World War II. *See* R. DAVIES, HOUSING REFORM DURING THE TRUMAN ADMINISTRATION xiii, 104 (1966). This was the first time the federal government set a national housing objective, but it was not aimed at assuring that minorities would have a share in the benefits of the post-war housing boom. *See* CITIZENS' COMMISSION ON CIVIL RIGHTS, A DECENT HOME 10-11 (1983) [hereinafter cited as A DECENT HOME]. In fact, the Senate rejected a proposed amendment that would have barred racial or ethnic discrimination in all public housing built under the bill. *See* R. DAVIES, *supra*, at 107-08.

I. The History of Unfair Housing

In the nineteenth century, America's cities were relatively integrated.[6] But after millions of whites fled to the suburbs, they used racial zoning to keep out blacks and Asians. When discriminatory zoning was struck down,[7] whites tried racially-restricted covenants under which housing owners and developers agreed not to sell or rent to non-whites. Before these, too, were declared illegal,[8] they had created dual housing markets, one white and one black. The Federal Housing Administration (FHA), the predecessor of the Department of Housing and Urban Development (HUD), added to the segregating impact of these measures by requiring racial restrictions in New Deal homeownership insurance programs.[9] Federal policies, as spelled out in a 1935 FHA manual, discouraged the movement of "inharmonious racial or nationality groups" into all-white communities.[10] And although recent studies show that the entry of blacks into housing markets often increases demand and therefore price,[11] the powerful presence of the federal government on the side of white property owners and developers helped engender myths that the presence of blacks lowered real estate values. In short, the federal government helped to segregate neighborhoods.[12]

President Kennedy took the first federal step toward racially-integrated housing when he signed Executive Order No. 11,063 on November 20, 1962.[13] Kennedy may have hoped to eliminate housing discrimination by a "stroke of the pen,"[14] but his executive order was pathetically weak. Applicable only to federally-assisted housing contracted for after the date of the order, it covered less than one percent of the then-existing inventory of housing and only fifteen percent of new construction.[15] In short, the order had little impact on the patterns of segregated housing built up over

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6. J. Kushner, Apartheid In America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States 6–15 (1980), first published as an article with the same title at 22 How. L.J. 547 (1979).

7. *See* Buchanan v. Warley, 245 U.S. 60 (1917).

8. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

9. *See* A Decent Home, *supra* note 5, at 6–10.

10. *See* The Richmond School Decision: Complete Text of *Bradley v. School Board of Richmond* 172 (1972) (quoting 1935 FHA underwriting manual).

11. *See, e.g.*, L. Laurenti, Property Values and Race: Studies in Seven Cities 52 (1960) ("the odds are about four to one that house prices in a neighborhood entered by nonwhites will keep up with or exceed prices in a comparable all-white area"); National Academy of Sciences, Freedom of Choice in Housing: Opportunities and Constraints 23 (1972) ("property values in neighborhoods entered by nonwhites do not generally fall and have sometimes risen").

12. J. Kushner, *supra* note 6, at 30–32.

13. 27 Fed. Reg. 11,527 (1962).

14. H. Wofford, Of Kennedys and Kings: Making Sense of the Sixties 140 (1980).

15. *See* A Decent Home, *supra* note 5, at 16–17.

previous decades with the consent, if not the active complicity, of the federal government.

In the mid-1960's Congress enacted the Civil Rights Act of 1964[16] and the Voting Rights Act,[17] which outlawed racial discrimination in education, employment, and voting. But Congress never gave much consideration to housing discrimination, in part because realtors and others urged that President Kennedy's executive order would accomplish all that was necessary.[18] This congressional omission was a serious one for those who believe that the ghetto is at the root of discrimination in education, employment, and voting.

In 1968 Congress partly rectified its earlier failure to curb housing discrimination when, shaken by the assassination of Martin Luther King, Jr., it enacted Title VIII.[19] Broader than Executive Order 11,063, Title VIII reached all forms of housing discrimination based on race, color, religion and national origin.

II. Developments After Title VIII

It is against this background that James Kushner, a professor at the Southwestern University School of Law, wrote his treatise on fair housing law. The book is an immensely impressive accomplishment. Kushner analyzes some 2500 judicial decisions, including 122 cases that resulted in the award of significant damages and 74 cases granting counsel fees of from $2.2 million down to $200. Ten chapters with 5,330 footnotes provide an exhaustive treatment of steering,[20] redlining,[21] land use controls, exclusionary zoning, affirmative action, attorneys' fees, the attitudes and activities of brokers and realtors, damages to victims of discrimination, and the pending and proposed changes in fair housing legislation.

Professor Kushner provides a somber assessment of the events of the fifteen years since Title VIII was passed, along with similar laws in thirty-four states and many municipalities and counties. He concludes that "the absence of true *fair housing* in America is still the reality," observing that "[p]ublic enforcement has been rather meager and symbolic when one considers the pervasive scheme of discrimination in housing . . . ."[22] Between 1969 and 1978 only about 300 housing discrimination lawsuits

16. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000 (1982)).
17. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1973 (1982)).
18. *See* Drinan, *Is a Fair Housing Law a Forgotten Dream?*, AMERICA, April 7, 1984, at 258.
19. *See supra* note 4.
20. "Steering" refers to the withholding of information by sellers of residential property from homeseekers whose race the sellers consider to be "incompatible" with that of present residents.
21. "Redlining" refers to lenders' delineating areas of a city or town to which they will not extend credit because of the community's racial make-up.
22. P. 657 (emphasis in original).

were brought by the Justice Department.[23] None was filed in the first year of the Reagan administration.[24] HUD's record in conciliating cases is similarly disappointing. In 1977, for example, about 3,391 complaints were filed with HUD. Of these, only 277 were successfully conciliated, and the victim of discrimination actually obtained the contested housing in only about a fourth of these conciliated cases.[25]

The 1968 Act's basic failure would seem to be its omission of an automatic government enforcement mechanism. Congress apparently hoped that private citizens would generate enough litigation to achieve the objectives of the legislation, although the Act provided counsel fees only for plaintiffs who were too poor to retain their own counsel.[26] Not surprisingly, the private bar has not rushed to bring fair housing suits.[27] It has been left to a few public interest groups to litigate against blockbusting,[28] steering,[29] and other tactics of sellers and realtors to deny property to minority buyers or renters.

Kushner's scholarship is prodigious, his reasoning is careful, and his conclusions are guarded. But one, perhaps unfairly, yearns to know what might happen to America if fair housing laws were strengthened in both their scope and enforcement. Would they succeed at least as well as federal and state laws against discrimination in employment have? Or is the law too feeble an instrument to change racist patterns in the make-up of neighborhoods and communities? In *Fair Housing*, Kushner asserts that "the future of fair housing can only be characterized as bright,"[30] while cautioning that private enforcement of fair housing laws will be "the most critical aspect of a program to achieve fair housing."[31] In his earlier book, *Apartheid in America*, Kushner suggested that perfect laws, perfectly executed, could transform a segregated society into an integrated one.[32] He angrily rejected Justice Rehnquist's statement that "[e]ven if the Constitu-

23. *See* A DECENT HOME, *supra* note 5, at 43.

24. *See* AMERICANS FOR DEMOCRATIC ACTION, ONE THOUSAND DAYS: THE REAGAN RECORD 32 (1983).

25. *See* H.R. REP. NO. 96-865, *supra* note 1, at 4 n.13 (citing GENERAL ACCOUNTING OFFICE, STRONGER FEDERAL ENFORCEMENT NEEDED TO UPHOLD FAIR HOUSING LAWS 27 (1978) and UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 29, 32 (1979)).

26. H.R. REP. NO. 96-865, *supra* note 1, at 24–25.

27. P. 659. *See also* H.R. REP. NO. 96-865, *supra* note 1, at 5 n.19: "As the report indicates, most successful fair housing litigation is occurring in a limited geographical area. . . . Further, these cases are being handled by a handful of attorneys." In nearly 50 percent of the cases, "the plaintiff's attorney was associated with a fair housing group or a civil rights organization."

28. *See, e.g.*, Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977).

29. *See, e.g.*, Fair Housing Council v. Eastern Bergen County Multiple Listing Serv., 422 F. Supp. 1071 (D.N.J. 1976).

30. P. 670.

31. P. 671.

32. J. KUSHNER, *supra* note 6, at 119–39.

tion required it, and it were possible for federal courts to do it, no equitable decree can fashion an 'Emerald City' where all races, ethnic groups, and persons of various income levels live side by side in a large metropolitan area."[33]

Contrary to Justice Rehnquist, Kushner believes that the Constitution *does* require that members of various ethnic groups have the opportunity to "live side by side" and that federal courts alone *do* possess equitable powers to bring about integration in housing. In *Apartheid in America*, he stated his major premise firmly: "Government action is the proximate and essential cause of urban apartheid."[34] In his earlier book, Professor Kushner was equally vehement in rejecting Justice Stewart's claim in *Milliken v. Bradley* that central city black isolation is the result of "unknown and perhaps unknowable factors."[35] For Professor Kushner, the cause of racial segregation is clear: It is the erroneous reading of the Constitution by legislators and judges too timid to act upon constitutional requirements clearly designed to bring about a society free from segregation and discrimination on the basis of race.[36]

Professor Kushner's certainty that the Constitution mandates the elimination of segregation in housing prompted him to conclude in *Apartheid in America* that lawyers must bear their share of the blame for a segregated society. His accusation was quite sweeping: "Racial segregation is the legal system's Watergate. . . . Our law schools continue to initiate new members to a caste society . . . . The professors of constitutional law bear a sizeable portion of the responsibility, for they have not effectively conveyed the meaning of *Marbury v. Madison*."[37]

III. Unresolved Issues

Although Professor Kushner's stance is clear in *Apartheid in America*, *Fair Housing* leaves open three issues: (1) What should be the role of affirmative action in promoting "fair" housing?; (2) Can "fair" housing come about if the economic disparity between white and black citizens is not first lessened?; and (3) Could higher standards of professional ethics for attorneys break down interracial barriers?

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33. Cleveland Bd. of Educ. v. Reed, 445 U.S. 935, 938 (1980) (Rehnquist, J., joined by Burger, C.J. & Powell, J., dissenting from denial of cert.).

34. J. Kushner, *supra* note 6, at 130.

35. Milliken v. Bradley, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring).

36. J. Kushner, *supra* note 6, at 37–44, 64–119.

37. *Id.* at 138 (footnotes omitted).

A. *Affirmative Action*

The most difficult and largely unresolved problem in the area of fair housing is affirmative action. Should realtors, like employers, be required to follow goals and guidelines concerning the number of minorities to be sold property in communities hitherto virtually all white? Should federally-assisted housing units be required to accept non-whites in agreed-to numbers so that the housing units reflect, to some extent, the ethnic composition of the surrounding community?

Should there also be "benign quotas," limiting the influx of blacks or Hispanics so that it does not "tip" an integrated housing complex into a segregated one? In litigation over Starrett City in New York, one of the largest public housing complexes in the nation, with more than 5,800 units, the parties consented to such a quota.[38] On May 2, 1984, the State of New York, the management of Starrett City, and black families represented by the NAACP agreed to a policy which allows the present sixty-percent-white population to remain but requires Starrett City to rent an additional five percent of its apartments to minority families by 1989.[39] Although Starrett City must increase the number of apartments rented to minorities by 175 units over the next five years, minorities may still have to wait longer than whites for apartments.[40]

The question of the color of one's neighbors seems to arouse deeper emotions than the racial diversity of the local school or the ethnic makeup of one's place of employment. Then-President Richard Nixon observed in 1971:

> [W]hether rightly or wrongly, as they view the social conditions of urban slum life many residents of the outlying areas are fearful that moving large numbers of persons—of whatever race—from the slums to their communities would bring a contagion of crime, violence, drugs and the other conditions from which so many of those who are trapped in the slums themselves want to escape.[41]

While campaigning for the Presidency in 1976, Jimmy Carter expressed similar feelings: "I have nothing against a community . . . trying to maintain the ethnic purity of their [sic] neighborhoods."[42]

More recently, the actions (and inaction) of the Reagan Administration have evidenced deep feelings of resistance to affirmative action tools such

38. Washington Post, May 2, 1984, at A1, col. 1.
39. *Id.*
40. *Id.* at A5, col. 3.
41. Editorial, *Suburban Snobbery*, THE NEW REPUBLIC, June 26, 1971, at 7 (quoting R. Nixon).
42. N.Y. Times, April 7, 1976 at 23, col. 1.

as targets and timetables.[43] The claim has been that such affirmative action measures themselves discriminate in violation of Congress's intent in enacting the Fair Housing section of the 1968 Civil Rights Act.[44]

The affirmative action controversy is likely to continue in the courts for years to come. The three relevant Supreme Court decisions to date have in general permitted race-conscious policies if intended to help minorities.[45] But as Professor Kushner's discussion of the topic indicates, those decisions have left unresolved some of the essential issues surrounding affirmative action in the area of housing.[46]

B. *The Role of Economic Disparities*

Could a federal agency decree that no mortgage money be made available for the purchase of homes in a white suburban community until a certain percentage of the homes in that area are set aside for sale or rent to minorities? Questions such as this one have scarcely been asked, much less resolved, during the "fair housing" controversy. They tie in closely with the even more difficult question: Does the federal government, in the name of promoting integrated housing, have some obligation to extend further financial aid to minorities if without this aid they cannot be expected to purchase homes built for generally higher-income white families?

Some argue that if more blacks and Hispanics had adequate incomes they could buy the homes they desire in the suburbs.[47] This raises the question whether affirmative action, to be effective, requires subsidies that will make the purchase or rental of desirable housing a genuine possibility for the poor. Professor Kushner suggests this: "Rebates or tax incentives to persons who move to neighborhoods where they are in the minority or incentives such as lower interest loans and *perhaps* grants to real estate brokers who facilitate choice and integration are initiatives that *might* prove effective."[48] Professor Kushner's use of "perhaps" and "might," however, reveals his doubt as to the efficacy of this proposal. The awful truth is that there is little certainty as to what techniques could or would successfully integrate the largely non-white inner cities and the over-

43. Reagan Administration Assistant Attorney General William Bradford Reynolds has stated that "race-conscious remedies" are unacceptable. He added: "I don't think any government ought to be about the business to reorder society, or neighborhoods to achieve some degree of proportionality [in the racial composition in housing]." Wash. Post, July 11, 1984, at A4, col. 2.

44. *Id.*

45. Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

46. Pp. 395–402.

47. *See* A DECENT HOME, *supra* note 5, at 56 (citing THE REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING 3 (1982)).

48. Pp. 670–71 (emphasis supplied; footnote omitted).

whelmingly white suburbs. This uncertainty leads to the crucial question of whether the courts, the law, and a new sense of professional responsibility on the part of attorneys can eliminate discrimination in housing.

C. *The Legal Profession*

Perhaps the most important issue Professor Kushner raises is the role of attorneys in creating the housing segregation that characterizes the nation. *Fair Housing* is rife with examples of lawyers' arguments and judges' decisions that have perpetuated segregation and discrimination in housing. Indeed, Professor Kushner documents a persistent defiance and evasion of the Constitution and the laws, forcing one to wonder if the bar of the present or of the future will correct the mistakes and tragedies of the past. What would prompt them to do so? A sense of shame at how the legal institutions of America, altered after the Civil War to bring racial equality, have nonetheless enslaved blacks for a second time? A deep desire to rectify a series of wrongs inflicted on ten percent of the nation just because they are black? Or a pragmatic fear that the black people of America will return to demonstrations and marches if equality of opportunity continues to be denied them?

The writings on ethical norms and standards of professional conduct for lawyers seldom, if ever, talk about the responsibility of lawyers to promote integrated housing.[49] Perhaps the ultimate recommendation one concerned with this issue could make is that the legal profession should forbid its members to engage in any transaction for the sale or rental of homes directly or indirectly involving racial discrimination. If lawyers were to follow such a directive, the shocking pattern of racism in housing could perhaps be corrected. Should lawyers fail to heed such a mandate, they would certainly continue to contribute to the perpetuation of two Americas—one white and one black.

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49. One exception is Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A. J. 121 (1968), *reprinted in* S. THURMAN, E. PHILLIPS & E. CHEATHAM, THE LEGAL PROFESSION 393 (Successor vol. 1970) (exhorting lawyers to combat all forms of inequality).

The Devil and Daniel Webster

The Papers of Daniel Webster: Legal Papers. Vol. I: *The New Hampshire Practice.* Vol. II: *The Boston Practice. Edited by* Alfred S. Konefsky* *and* Andrew J. King.** *Hanover: University Press of New England,* 1982–83. Vol. I, Pp. xxxix, 571. $45.00; Vol. II, Pp. xx, 694. $55.00.

Robert W. Gordon†

This is the third major historical collection of the documentary records of an American lawyer's practice, following *The Legal Papers of John Adams*[1] and *The Law Practice of Alexander Hamilton.*[2] Together, the three collections provide an exhaustive guide, overwhelming in its detail, to the routine business of successful lawyers from the mid-eighteenth to the mid-nineteenth centuries. (There is nothing as thickly detailed for any later period except Swaine's monumental history of the Cravath firm.[3]) Their publication is exciting because it breaks a great silence: Previous work on or by lawyers has talked about almost any aspect of their careers other than how they made a living. If the lawyer becomes a judge or politician, his (it's nearly always "his") biography usually devotes only a perfunctory early chapter to his law practice, mentioning only his involvement in famous cases or notorious trials.[4] Practitioners' reminiscences tend also to dwell on big cases and fond sketches of characters at the bar. Histories of "law" are of course largely histories of courts, doctrines, and procedures; histories of "the legal profession" usually attend to the social composition, education and training, professional organization, and public relations of the bar, rather than to the bread-and-butter of its members'

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1. THE ADAMS PAPERS: THE LEGAL PAPERS OF JOHN ADAMS (L. Wroth & H. Zobel eds. 1965) [hereinafter cited as ADAMS LEGAL PAPERS].

2. THE LAW PRACTICE OF ALEXANDER HAMILTON (J. Goebel & J. Smith eds. 1964–81) [hereinafter cited as HAMILTON LAW PRACTICE]. A fourth collection, THE LEGAL PAPERS OF JOHN MARSHALL (H. Johnson, C. Cullen & W. Stinchcombe eds. 1974–1984), is in preparation. Four volumes are already in print.

3. R. SWAINE, THE CRAVATH FIRM AND ITS PREDECESSORS, 1819–1948 (1946–48).

4. Significant exceptions, containing unusually informative chapters on their subject's practice, are: G. EGGERT, RICHARD OLNEY 10–32 (1974); W. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973); E. MORISON, TURMOIL AND TRADITION: A STUDY OF THE LIFE AND TIMES OF HENRY L. STIMSON 62–112 (1960).

working lives.[5] The reasons for the silence are obvious. The details of day-to-day practice often seem trivial, repetitious, and boring even to those whose living depends upon them; to outsiders, the details are potentially interesting only when aggregated and used as guides to underlying structures or tendencies, a task demanding the patience and skill to pick jewels out of mountains of junk.

Professors Konefsky and King have done heroic and intelligent labor in striving to make the records of Daniel Webster's practice accessible and interesting. Since Webster's own law office files have been lost,[6] the editors have had to reconstruct his practice from other sources, in particular the records of the forty-one New Hampshire, Massachusetts, and federal courts in which he appeared. They have also published a good deal of Webster's correspondence on legal matters.[7] For each of Webster's fields or subfields of practice, the editors have selected a representative case or two,[8] presented all the documents they could find relating to the cases (from requests for legal advice through summonses, pleadings, depositions, notes for arguments before judge or jury, to post-trial motions and proceedings), and—most usefully—supplied an introduction providing the social and legal background to each field. In what are probably the most revealing chapters, the *Legal Papers* pull away from this fairly standard format to offer perspectives on nineteenth-century practice that cut across substantive legal categories. There are sections on legal education;[9] on the general scope of practice in a rural community (Boscawen, N.H.),[10] provincial town (Portsmouth, N.H.),[11] and major city (Boston);[12] on ethics;[13]

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5. For a useful elaboration of this point, see Botein, *Review Essay: Professional History Reconsidered*, 21 AM. J. LEGAL HIST. 60 (1977). Again, there are distinguished exceptions, D. CALHOUN, PROFESSIONAL LIVES IN AMERICA 59-87 (1965) (19th-century frontier practice); J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 295-375 (1950) (historical survey of lawyers' professional tasks); E. IVES, THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND (1983); A. OFFER, PROPERTY AND POLITICS, 1870-1914: LANDOWNERSHIP, LAW, IDEOLOGY AND URBAN DEVELOPMENT IN ENGLAND 11-87 (1981) (practice of conveyancing solicitors). Future historians of the current profession will have the considerable advantage of superior journalistic accounts, *e.g.*, J. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS (1983), and superior how-to manuals, *e.g.*, J. FREUND, ANATOMY OF A MERGER (1975), containing a wealth of inside information.

6. THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS. Vol. I: THE NEW HAMPSHIRE PRACTICE; Vol. II: THE BOSTON PRACTICE (A. Konefsky & A. King eds. 1982-83), Vol. I: xvii [hereinafter cited by volume and page number only].

7. Some of this correspondence has already been published in the general *Webster Papers* series, THE PAPERS OF DANIEL WEBSTER: CORRESPONDENCE (C. Wiltse ed. 1974-82). Most of the rest was taken from manuscript collections either of Webster's letters or of those of his correspondents.

8. Where possible, they are careful to show *how* representative the case is, by counting all the cases of that type. *See, e.g.*, I: 72, 194 (statistical summaries of Webster's cases).

9. I: 3.

10. I: 61.

11. I: 185.

12. II: 6.

13. I: 101; II: 306.

on attorney's fees;[14] and on the connections between practice and politics.[15] These general sections lie at the heart of the editors' enterprise. Conscientious though they are in the reporting of legal minutiae, Konefsky and King are really most concerned to furnish materials toward a *social* history of the legal profession. In this ambition they have succeeded splendidly.

These two volumes cover the records of Webster's commercial and trial practice from his years as a country and provincial seaport lawyer in Boscawen (1805–07) and Portsmouth, N.H. (1807–16) to the metropolitan career he pursued in Boston between (and to some extent during) terms in Congress and service in various cabinets from 1816 to his death in 1852.[16] The legal work that made him famous, the 168 cases he argued in the U.S. Supreme Court, will be the subject of a third volume to appear later this year. The great virtue of these first two volumes is that they catch an extraordinary lawyer in his commonplace preoccupations. To all who knew him, Webster always came across as larger than life. His capacity for work, amazing memory, oratorical power, intense ambition, and sense of his own importance tended dramatically to heighten almost any piece of business he touched. Yet the main features of his legal career—his education, early ideals, ambitions, caseloads, client relations, ethical dilemmas, finances, and the rest—significantly resemble those of his ordinary brethren at the bar. Through the exaggerating medium of this exceptional personality, then, we gain access to understanding the early nineteenth-century profession as a whole.

Webster's climb upward through the hierarchies of practice, for example, illuminates how law business came to be divided by the early nineteenth-century bar. When he started out in Boscawen, nearly all of his business came from routine debt-collection cases, mostly settled or sent to reference (arbitration) after filing, hardly ever (less than two percent) going to a jury trial.[17] Even then, however, Webster was well off the bottom rung of the bar, since most of his clients were plaintiffs, and, most important, connections from his legal apprenticeship in Boston had given him a steady client in the Boston mercantile house of Gore, Miller & Parker.[18] The lawyer for such a house served as its general business agent

14. I: 246; II: 119, 265.
15. I: 530; II: 276.
16. Webster's public career, in outline, was as follows: Elected to U.S. House of Representatives (from N.H.), 1812; re-elected in 1814. Elected to Massachusetts General Court, 1822. Elected to U.S. House of Representatives (from Mass.), 1822; served until elected to U.S. Senate (from Mass.), 1827; re-elected in 1833, 1839; resigned to serve as Secretary of State, 1840–43. Elected to U.S. Senate (from Mass.), 1845; resigned to serve as Secretary of State, 1850–52. Cole, *Daniel Webster* in 19 DICTIONARY OF AMERICAN BIOGRAPHY 585–92 (D. Malone ed. 1936).
17. I: 72–75.
18. John Gore of this firm was the nephew of Christopher Gore, the Boston lawyer in whose

in dealing with its rural customers, reporting (in the days before Dun & Bradstreet) on their credit-worthiness and judging their motives if they were late in paying their bills. Indeed, Konefsky and King argue that the lawyer played a vital stabilizing role in the fragile web of credit connecting entrepôt creditors and inland merchants.[19] At the downturn of the business cycle, overeager debt collection could bring about a chain-reaction of defaults and unravel the entire web.[20] The lawyer could keep everyone afloat by manipulating legal forms (delaying court proceedings or obtaining extra security through collusive agreements to waive statutes of limitations or usury bans),[21] administering in effect an informal local bankruptcy. Contemporaries thought it neither uncommon nor (given this mediating function) unethical for Webster to appear in court for and against the same person, first to help him collect his own debts, and then to collect the proceeds for the benefit of Webster's primary creditor client.[22]

Not surprisingly, Webster found his Boscawen practice—keeping "shop," as he called it, "for the manufacture of Justice writs"[23]—fairly tedious:

> It is now eight months since I opened an office in this town, during which time I have led a life which I know not how to describe better than by calling it a life of writs and summonses. . . . My business has been just about so, so; its quantity less objectionable than its quality.[24]

He moved to Portsmouth as soon as he conveniently could—unfortunately, just in time to experience the beginning of its decline brought on by the Embargo Act of 1807. While dramatic improvement in his practice did not come immediately, Portsmouth provided a base from which Webster could diversify his practice. From 1807 to 1813, while he was still traveling on circuit through small New Hampshire towns, his cases consisted mostly (70 percent), though less than formerly, of collections on promis-

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office Webster served as apprentice. Unlike most law "students," Webster obtained this apprenticeship without connections or introductions. In 1804 he went from one Boston office to another, meeting with rejection every time, until he walked into Gore's office, introduced himself directly, and asked for a job. I: 32.

19. I: 89-91.

20. One historian estimates that in late 18th-century America, one out of every three householders appeared in court as a defaulting debtor, and that in early 19th-century America, one out of every five householders experienced actual business failure. P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900, at 287 (1974).

21. I: 112-13.

22. I: 101.

23. I: 71 (letter from D. Webster to J.H. Bingham (May 4, 1805)).

24. I: 67 (letter from D. Webster to J.H. Bingham (Jan. 19, 1806)).

sory notes. From 1813 to 1816, however, that figure was down to 34 percent. He was elected to his first term in Congress in 1812. In reflection of his growing reputation and ability to pick his own clients, his practice was increasingly concentrated in his home county of Rockingham.[25] His other cases were chiefly contract cases, with a smattering of property, family law, and maritime law business. Yet even these offered him little scope to exercise his talents before a jury. As before, all but a few[26] of his cases ended in defaults or dismissals.[27] Nevertheless, he kept on the more prestigious side of these routines, maintaining his connections to Boston creditors and appearing mostly for merchant plaintiffs.[28]

The character of his practice altered dramatically upon his move to Boston in 1816. The expansion of international trade after the Revolution created an entirely novel set of practice opportunities, founded upon long-term relationships with large mercantile concerns, particularly insurance companies. This new business involved litigation much more complex than the typical writ-issued/case-settled transaction of the provinces; it called for a good deal of office work (drafting, counseling, writing opinion letters), and brought in much higher fees. Though practice was still conducted solo or in two-man or temporary partnerships, it was in many other respects the recognizable ancestor of today's metropolitan corporate practice.

To appreciate the scope of these changes, consider that John Adams, while practicing in Braintree and Boston in the 1760's and 1770's, made do with a miscellany of bread-and-butter cases; these were predominantly debt-collection cases, but they also included land, defamation, enforcement of town regulations, and many criminal cases.[29] He had to follow the Superior Court on its arduous circuits around New England.[30] As the editors of his papers point out, his fees were modest: "Even at the peak of his career, Adams owed any financial success more to quantity of business than to high fees. His charges seem to have been standard for nearly all clients and in many cases were governed by statute."[31] His income was thus built up of a pile of twelve-shilling writs together with cases tried worth a couple of pounds apiece; in gross, this income never seems to have

25. I: 194–95.

26. I: 195 ("The number of jury trials went from 4 percent (1807–1813) to 6 percent (1813–1816), a wholly unimpressive figure for an institution given a predominant role in traditional historiography.").

27. Some cases were sent to arbitration or, by court order after commencement of suit, to a referee. I: 322.

28. I: 196–97.

29. 1 ADAMS LEGAL PAPERS, *supra* note 1, at lx.

30. *Id.* at lxvi.

31. *Id.* at lxix. Statutes fixed the rates for writs, trial days, court fees, and other costs. *Id.* at lxx.

been very high.[32] To move up as a lawyer in Adams' world meant to attract a greater volume of business, from richer and more socially prominent clients, but not to change one's way of life.[33]

When Alexander Hamilton, by contrast, left the Secretaryship of the Treasury to return to private practice in New York City in 1795, he found the nature of that practice profoundly altered. One of his commercial contracts cases (an unusual one, to be sure)[34] took eight lawsuits in three courts over a five-year period to resolve, and resulted in a judgment of almost $120,000.[35] The great bulk of his counseling and litigation work came from marine insurance companies, especially the United Insurance Company, which held his services on annual retainer.[36] In 1802 he recorded almost $13,000 in fees.[37]

Webster's move from Portsmouth to Boston allowed him to trade, in effect, Adams' world for Hamilton's. By the mid-1830's his book of receipts records annual fees totalling as high as $21,793.[38] A sizable part of this income consisted of retainers and fees from Webster's new urban clientele: mercantile and banking houses (including Baring Brothers of London, and the Bank of the United States, as well as Boston-based merchants), mill owners, canal and railroad companies, and, of course, insurance companies. By 1835 eight Boston insurance offices were each paying him annual retainers of $100.[39] During much of this time (1821–24), he was also representing a consortium of Boston and Philadelphia merchants before a special Commission set up to adjudicate claims for losses to American ships at the hands of Spain: From this business, he eventually realized $70,000 in contingent fees.[40] Such fees, though prohibited in Massachusetts,[41] were becoming common elsewhere as rates for lawyers' services underwent general deregulation under the pressure of the bar's increasingly entrepreneurial attitudes towards practice.[42]

Yet to achieve professional prestige, an early nineteenth-century lawyer required more than an office practice nourished by the retainers of large

32. *Id.* at lxix–lxx.

33. This statement requires some qualification. Adams had one steady corporate client (the Kennebec company) that paid him a retainer in a relationship that prefigured the later modes of practice. *Id.* at lxxi. Success at the private bar also brought the chance to appear in important public trials, such as the Boston Massacre trial in which Adams appeared for the British soldiers. For an account of the trial, see 3 ADAMS LEGAL PAPERS, *supra* note 1, at 1–34.

34. Le Guen v. Gouverneur & Kemble, 1 Johns. Cas. 436 (N.Y. 1800).

35. 2 HAMILTON LAW PRACTICE, *supra* note 2, at 48–164.

36. 2 *Id.* at 418–24.

37. 5 *Id.* at 366.

38. II: 123 (for 1835–36).

39. II: 157.

40. II: 175–275.

41. II: 120–21.

42. II: 119–21.

urban capitalists: He had to be a litigator as well.[43] The leaders of the bar at that time were without exception the great courtroom performers, and success brought frequent opportunities to try jury cases[44] and argue appeals—relatively rare events in a law industry, then as now, mainly occupied with "keeping shop for the manufacture of Justice writs." By the 1830's, having passed on the routine of his Boston practice to an associate,[45] Webster occupied himself with appellate practice, much of it before the United States Supreme Court in Washington. Most of his appearances before that Court were on behalf of his regular commercial clients—the New England merchants and the Bank of the United States, and a number of inventors for whom he acted in patent disputes.[46] Only a few (24 out of 168) of his Supreme Court arguments raised any Constitutional issues, much less the grand issues of his famous public causes.[47]

Still, the famous and the ordinary cases were connected; success in one arena could lead to employment in another. This is one of the many complex relations, hostile as well as symbiotic, between a lawyer's private and public careers, upon which the *Webster Legal Papers* volumes throw considerable light.

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43. Was such an office practice necessary to financial success, or could one prosper on litigation alone? The evidence is not available to answer this question reliably. Webster's contemporary (and chief ally among Massachusetts Whigs) Rufus Choate, who was almost exclusively a trial lawyer and a criminal defense lawyer at that, earned $1500–$2000 per case and an annual income of $22,000 at the peak of his fame in 1856, even though he was charmingly neglectful about collecting his fees. 1 S. BROWN, THE WORKS OF RUFUS CHOATE WITH A MEMOIR OF HIS LIFE 285 (Boston 1862). But Choate is atypical, since his reputation as a trial wizard surpassed even Webster's, and he was therefore in exceptional demand.

44. *The Elements and Style of Practice*, one of the best chapters in the second volume, selects records illustrating different aspects of Webster's trial tactics—notes for his own arguments, notes on opponents' arguments, transcripts of examinations of witnesses—to show why he was able to be so effective in court. One reason was his ability to switch at will from the florid Ciceronian style of his political speeches and appellate perorations into the blunt, matter-of-fact idiom he mostly relied on in the courtroom; another was his gift for rapidly boiling down a complex fact situation (even one he had had little time to study, since his many engagements left him chronically underprepared) into a few central issues; another was his narrative gift for setting a scene so that a jury could be made to feel it was actually *there*. II: 55–118.

45. II: 4–5.

46. He developed patent law into one of his specialties, and a remarkably lucrative one at that: Charles Goodyear offered Webster $10,000 to defend his rubber patent with a bonus of $5,000 should Webster succeed, which he did. II: 173.

47. Among the most famous cases he argued were: The Passenger Cases [Smith v. Turner; Norris v. Boston], 48 U.S. (7 How.) 283 (1849) (declaring unconstitutional state statutes imposing taxes upon alien passengers arriving in ports of N.Y. and Mass.); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (holding that bankruptcy clause does not preclude state legislation on the subject except where the state laws conflict with those of Congress); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (reaffirming *McCulloch* and validating Bank's statutory authority to sue in federal court); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (clarifying scope of commerce clause); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (New Hampshire legislature's attempt to modify college charter violated contract clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (Congress had power under necessary and proper clause to charter national bank; state taxation of the bank unconstitutional). For the count of cases raising constitutional issues, see M. BAXTER, DANIEL WEBSTER AND THE SUPREME COURT 247–51 (1966).

One of the keys to the interaction between public and private careers is that, although public practice remained miserably underpaid, after the Revolution it suddenly became possible (provided one could reach the top rungs of the profession) to get rich from the private practice of law. In the eighteenth century, by contrast, John Adams accumulated little more than a middling competence from his practice.[48] For his generation, to succeed in law was to escape from its practice, to retire as a country squire on one's land and business speculations, or to rise on royal favor in the patronage bureaucracies of the imperial service.[49] (The Revolution not only cut off these bureaucratic career ladders, but helped to instill the distrust for public authority and low regard for civil service careers that continues even today to distinguish the United States from other Western democracies).

In early nineteenth-century New Hampshire, as Konefsky and King point out, the statutory limits on lawyers' fees continued to reflect a general social consensus that lawyers were not to get rich from their practices, but only (if at all) from the opportunities practice opened up for investments and land speculation.[50] The opportunity costs, so to speak, of leaving law practice entirely for other activities, including involvement in public affairs, were therefore still quite low. Not so with the new urban practice. Hamilton made $10,300 in 1797 and $13,000 in 1803 while in practice full-time; in between, while he was engaged in politics and public service, his annual income fell to between $970 and $5950.[51] Twenty years later, Lemuel Shaw had to give up $15,000–$20,000 in annual income from law practice to take the $3500-a-year job of Chief Justice of Massachusetts.[52]

Webster's congressional salary was only $2000 a year. This pay difference kept him slogging away to the end of his life at practice tasks that increasingly bored him, kept him from the public spotlight that he loved,

48. 1 ADAMS LEGAL PAPERS, *supra* note 1, at lxix.

49. *See* Murrin, *The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 415, 426 (S. Katz ed. 1971).

50. I: 246-47.

51. 5 HAMILTON LAW PRACTICE, *supra* note 2, at 366. *See also* Letter from A. Hamilton to J. McHenry (Dec. 16, 1798), *reprinted in* 22 THE PAPERS OF ALEXANDER HAMILTON 368-69 (H. Syrett ed. 1975) (estimating his annual financial loss from public service at 4000 pounds and expressing concern about "ruining [himself] once more in performing services for which there is no adequate compensation"); Letter from A. Hamilton to J. McHenry (Jan. 7, 1799), *reprinted in* 22 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 407 ("The result [of my accepting public service] has been that the emoluments of my profession have been diminished more than one half and are still diminishing—and I remain in perfect uncertainty whether or when I am to derive from the scanty compensations of the office even a partial retribution for so serious a loss.").

52. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 17 (1957). Shaw was, however, able to live comfortably on the income from his savings and investments.

and worked him mercilessly in his old age.[53] Although it would not be accurate to call Webster a mercenary man—he was much more addicted to power and glory than to money—his early success at the bar had accustomed him to extravagance, large parties and country-houses; he speculated foolishly, borrowed recklessly, and always had to take on new cases to pay his debts.[54]

But if public life was no longer an attractive financial alternative to private practice, it remained an almost indispensable supplement. Despite the stingy salaries of public officers, even lawyers with no taste for politics were driven to seek office in order to advance their careers. To rise in practice, a lawyer needed clients and patrons. Unless he had family connections, engaging in politics was one of the few ways for a lawyer to get public exposure. It produced occasions for oratory—campaign speeches, Fourth of July orations, legislative debates—that might capture the attention of potential clients, those merchants, bankers, and corporate directors who sought to cultivate young politicians for their own purposes. Between 1760 and 1810, 44.2 percent of all the lawyers in Massachusetts were elected to some office; between 1810 and 1840, 32.9 percent.[55]

Webster was not unmindful of the advantages of family connections. He calculatingly married into an influential mercantile family after his first wife's death, and his daughter married into the leading mercantile family of Boston, the Appletons. Nevertheless, for Webster, involvement in Federalist political circles was critical to his early success at the bar. In his first years of apprenticeship and practice he contributed articles to the Federalist literary organ, the *Boston Anthology*,[56] and thus displayed before Boston's elite the Federalist virtues of classical cultivation, legal erudition, and savage invective against political radicals.

As a New Hampshireman in Congress (1812–14), Webster attracted national attention by opposing the War of 1812, accusing President Madison of keeping secret information that might have prevented the war, and commending the secession-minded Hartford Convention.[57] When he moved his practice to Boston, the Federalist-Unitarian elite immediately adopted him as one of their chief political talents, accepted him in the

53. Letter from D. Webster to J. Mason (Feb. 6, 1835), *reprinted in* II: 30; Letters from D. Webster to D. Sears, J. Mason (Feb. 5 & 6, 1844), *reprinted in* II: 48–51.

54. I. BARTLETT, DANIEL WEBSTER 190–209 (1978).

55. G. GAWALT, THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840, at 68 (1979). Mr. Gawalt's universe consists of all the lawyers in Massachusetts on whom he could find some data (and he is a very thorough scholar), so he thinks a few lawyers may be missing from his total sample. *Id.* at 79 n.83. On the other hand, his figures report only lawyers actually elected. The proportion of lawyers among all *candidates* for office therefore is probably much larger.

56. I: 165–78.

57. I. BARTLETT, *supra* note 54, at 56–64.

highest ranks of society,[58] and retained him as their lawyer. And it was his political prominence, as well as his rising fame as a trial lawyer, that encouraged the Federalist board of trustees of Dartmouth College to seek (in 1815) the help of their loyal alumnus in the litigation that established him as a national figure.[59]

This symbiosis of legal and political careers, convenient though it undoubtedly was for young men without capital as a way of getting ahead in life and for the polity as a way of attracting ambitious talent to office, often created severe tensions between lawyers' public and private roles. The source of most of these tensions was what we now tend to call "conflicts of interest," but what Webster's generation, employing "classical republican" terms of analysis, labeled "corruption."[60] Corruption in individuals resulted from the surrender of the independent, public-regarding judgment that supported "virtue"; corruption leading to the decline of republics could follow from the loss of virtue among their chief citizens. Federalist-Whig lawyers like Webster subscribed to an ideal of representation supposedly controlling lawyers and politicians alike: that in neither role should one act simply as an extension of constituency or client, but in both preserve an independent judgment. To become overdependent upon or over-attached to a particular interest would subvert that independence. One would become prisoner of a faction, no longer able to perceive, much less pursue, the interests of the whole community. Among the forces creating the temptations to corruption were "ambition" and "commerce." Ambition could corrupt not only because it could raise the interests of the self over those of the public, but because the loyalties, debts, and compromises incurred to serve ambition could enslave one's judgment to one's factional patrons. Commerce could corrupt because the love of profit and luxury could distract one from the public business and deliver one's independence into the power of creditors. In the Federalist-Whig ideology, neither ambition nor commerce was despised as such; indeed, both were highly prized, but only if subordinated to virtue.[61]

Webster was thoroughly saturated in this ideology, as his following observations indicate. He wrote the first while still at Dartmouth:

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58. *Id.* at 70–74.

59. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

60. The seminal accounts of the classical republican framework of thought are in J. POCOCK, THE MACHIAVELLIAN MOMENT 506–52 (1975); Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119 (1972). For a review of the immense literature on the subject, see Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 334 (3d series 1982).

61. For the relation of prominent Whig lawyers, including Webster, to the "republican" ideology, see D. HOWE, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 210–37 (1979); J. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 81–82, 227–28 (1980); Botein, *Cicero as Role Model for Early American Lawyers: A Case Study in Classical "Influence"*, 73 CLASSICAL J. 313 (1978).

> Ambition is what? The grand nerve of human exertion; the producer of everything excellent in virtue and . . . in vice . . . . Ambition in Caesar and in Washington is radically the same; in each it is the wish of excelling. But there is an essential difference in its direction. Caesar's ambition was not subordinate to his virtue. . . . In Washington ambition was a secondary principle. It was subordinate to his integrity . . . .
>
> Thus various are the effects of ambition. It can enslave a nation, or it can burst the manacles of despotism, and make the oppressed rejoice . . . .[62]

And this—somewhat less a rhetorical set-piece and more a bitter and deeply felt *cri de coeur*—while a struggling young lawyer in Boscawen:

> The evil is, that an accursed thirst for money violates everything. We cannot study, because we must pettifog. We learn the low recourses of attorneyism, when we should learn the conceptions, the reasonings, and the opinions of Cicero and Murray. . . . The liberal professions are resorted to, not to acquire reputation and consequence, but to get rich. . . . Our profession is good if practised in the spirit of it; it is damnable fraud and iniquity, when its true spirit is supplied by a spirit of mischief-making and money-catching.[63]

The fascination of Webster for his contemporaries was that he seemed to lead a life of allegory in which the forces of virtue and corruption battled for his mighty soul. We, who are insulated by Webster's death from the magnetic force of his personality, and by the culture of modernism from the power of his rhetoric, have difficulty appreciating that most antebellum Americans considered him the greatest man of his age, indeed one of the greatest men of all time, the very model of ambition subdued to virtue. His more enduring reputation is probably the one originated by the antislavery "Conscience Whigs" of Webster's party. They pictured him as a fallen Lucifer, who, in his support of the Fugitive Slave Law in the compromise package of 1850, had sold out all his principles to his own ambitions for the Presidency and to his commercial clients.

The *Webster Legal Papers* make possible more concrete if less melodramatic insights into the temptations and tensions of a statesman who was simultaneously trying to practice law. Webster was under constant pressure (although much of it was self-generated) to use his office to pursue favors for clients. After winning big judgments for his mercantile clients

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62. Unpublished manuscript, *quoted in* I. BARTLETT, *supra* note 54, at 26.

63. Letter from D. Webster to J.H. Bingham, Jan. 19, 1806, *quoted at* I: 69. As an apprentice lawyer, Webster admired the Boston lawyers Theophilus Parsons and Samuel Dexter for their concentration on professional virtuosity rather than political or financial success. I: 41–43.

before the Spanish Claims Commission, for example, Webster turned his attention to what he called "[*m*]*y* great business of the [House] Session,"[64] appropriation of the money to pay the claims, thus protecting both his constituents and his contingent fee.[65] As chairman of a Senate committee considering whether to set up a similar commission to pay losses suffered by American merchants through French attacks on their ships, Webster actually solicited Boston merchants to appoint him as their claims agent, assuring them that "[b]y proper pains, this Bill *will assuredly pass the Senate*".[66] He subsequently issued a statement denying he had ever been interested in or connected with the French-Spoliation claimants.[67] In 1831 Senator Webster sponsored legislation on behalf of one of his biggest clients, the Bank of the United States, enabling the Bank to obtain federal court jurisdiction when it brought suit in states that had no federal circuit courts. "Webster drafted the bill in general terms," the editors explain, for "if President Jackson knew it aided the Bank he would surely veto it."[68] The bill passed, and Webster charged $500 for his services.[69]

Such favors as these seem not to have troubled Webster or the mores of his time. What ultimately undermined Webster was not the money he earned, however tainted, but the money he borrowed. His financial base, a law-office clientele developed through advantageous political connections, solidified into a discrete *constituency* to which Webster was always in debt. Not just morally in debt, for having advanced his career and given him business, but literally: He was kept afloat by their extensive loans and other contributions. In one of many such transactions, forty Boston businessmen subscribed to a $100,000 fund in 1845 to enable Webster to return to the Senate. "This is at least the third time that the wind has been raised for him," a somewhat disillusioned patron wrote at the time, "and the most curious fact is that thousands are subscribed by many who hold his old notes for other thousands, and who have not been backward in their censures of his profusion."[70] He was constantly in debt to the Bank of the United States ($100,000 worth in 1841), which was a major political embarassment while he was maneuvering to maintain his inde-

64. Letter from D. Webster to J. Mason, April 19, 1824, *quoted at* II: 251 (emphasis in original).

65. II: 251–52.

66. Letter from D. Webster to H. W. Kinsman, Jan. 11, 1834, *reprinted in* II: 335 (emphasis in original). An agent had already been appointed, so he did not get the business.

67. II: 342–43.

68. II: 316–17.

69. II: 317.

70. Harrison Gray Otis, the doyen of Federalist-Whig Boston, *quoted in* R. CURRENT, DANIEL WEBSTER AND THE RISE OF NATIONAL CONSERVATISM 137 (1955). The very next year, probably calculating that with Webster a gift was as good as a loan, a consortium of Boston subscribers established a $37,000 annuity for his benefit, "in evidence of their grateful sense of the valuable services you have rendered to your whole country." I. BARTLETT, *supra* note 54, at 193.

pendence and play the mediator in Jackson's war with the Bank in the 1830's, and when he was appointed Secretary of State in the 1840's.[71] These dealings made life easy for his political enemies, and eventually helped to cost him the Presidency.

They cost him some loss of vision as well. The "Conscience Whigs" were probably being unjust when they accused Webster of selling out in 1850 to his clients, the pro-slavery mercantile interests of State Street. His support of the Compromise was of course completely consistent with the overarching theme of all his political life, the cause of national Union. (His opponents were on much surer ground when they brought up his fight against the War of 1812 and his switch from opposing to favoring the tariff, both highly sectional positions.) But it is not far-fetched to suppose that by rooting his professional and social lives so solidly within a single class, Webster had become unable to conceive of a view of the national interest separate from his own interests and those of his crowd. He was unable to ally with the antislavery cause, or even to sympathize with it enough to understand what it was all about, and in consequence drastically underestimated its importance. This loss of perspective, rather than the cruder examples of bribe-taking, perhaps best illustrates the subtler meaning of "corruption."

What of the tensions between virtue and corruption in the lawyer's private role? On this issue we have the benefit of the fascinating introduction to these volumes, in which Professor Konefsky for once abandons the textual scholar's careful neutrality for a speculative and frankly judgmental interpretive essay. Using a conceptual framework very like that of the "classical republican" theory itself, Konefsky describes the progress of lawyers such as Webster through the hierarchies of antebellum law practice as a story of decline from virtue to corruption, or to use Konefsky's own terms, from "autonomy" to "dependence." This declension is causally linked in Konefsky's analysis to a general development in the social context of legal practice, across both time (1800–1850) and space (Boscawen-Boston), from a pre-capitalist "community" with a fairly unitary moral consensus to that of a society increasingly fragmented into the conflicting "interests"—segregated class, occupational, and economic roles (mill owner-worker; creditor-debtor, etc.)—of capitalist economic relations.[72]

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71. On these episodes see II: 319–25, and I. BARTLETT, *supra* note 54, at 142–44, 205. As both these sources point out, Webster's dealings with the Bank have been unfairly misconstrued in one respect. His letter to Nicholas Biddle, in which he seems to threaten to act for a client against the Bank unless his retainer is "renewed, or *refreshed*, as usual," has often been quoted. Letter from D. Webster to N. Biddle, Dec. 21, 1833, *reprinted in* II: 320 (emphasis in original). A cover letter to Biddle makes plain that Webster had no intentions of acting against the Bank, but was giving Biddle a bargaining tool to use with the rest of the Bank's directors to secure payment of his fees. II: 319–20.

72. I: xxxi–xxxix.

What is interesting here is how this *Gemeinschaft-Gesellschaft* story, much indebted to the seminal accounts of Karl Polanyi, Edward Thompson, and Konefsky's own mentor (and mine) Morton Horwitz,[73] is made to connect with changes that these volumes document in the lawyer's role. The polar contrast is between Webster as a debt-collection attorney in Boscawen and as a corporate lawyer in Boston. In Boscawen, Konefsky argues, Webster could think of himself as serving the whole community, representing both debtors and creditors, helping to maintain the integrity of a network of economic relations founded upon a sense of personal moral obligation.[74] He could think of himself as an "autonomous" agent because he was not bound to any particular interest, but was free to try to fashion accommodations among all interests. He could also try to do justice according to an informal sense of the equity of the situation, rather than being tied down to formally rational rules.[75] In Boston, on the other hand, Webster was tied to a particular faction of civil society by myriad bonds of loyalty, political and career advantage, and even kinship:[76]

> His notion of service altered from a publicly balancing function toward a concept of a private facilitator and manipulator of services to further private interests. A shift had occurred from relative independence and autonomy as a lawyer to deep dependence on his clients. . . . [T]he rise in status of Webster and other lawyers was built upon the foundation of their increased dependency.[77]

Now it's never very hard to fuzz up a bold historical thesis that a society has evolved from one polar type into its opposite by dwelling on all the actual points of continuity—a competent historical critic can usually demonstrate that nothing has ever really changed—and this thesis is as

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73. *See generally* K. POLANYI, THE GREAT TRANSFORMATION (1944) (transformation of economic relations "embedded" in social and personal relations to relations defined by autonomous abstract markets); Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1971) (solidarity of pre-capitalist communities); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 140-59 (1977) (elite of legal profession captured by commercial clienteles).

74. I: xxxii-xxxiii

75. Here Professor Konefsky sounds the Weberian theme that capitalist development entails (or at any rate accompanies) a "rationalizing" shift from equitable-informal to formal-rational legality. This theme has become a recurrent one in the recent historiography of American law. *See, e.g.*, M. HORWITZ, *supra* note 73, at 160-73 (informal dispute-settlement processes such as arbitration and reference ousted in favor of formal law; restitution of reasonable or customary costs ousted as a remedy for breach of contract by expectation damages); P. MILLER, THE LIFE OF THE MIND IN AMERICA, Book 2 (1965) (law increasingly the emotionless rationalism of corps of experts); W. NELSON, AMERICANIZATION OF THE COMMON LAW 3 (1975) (procedures granting decisionmaking discretion to juries displaced by devices that allow judges to control juries). For a thorough exploration of the "rationalization" process in the context of debt-collection, see Mann, *Rationality, Legal Change, and Community in Connecticut, 1690-1760*, 14 LAW & SOC'Y REV. 187 (1980).

76. I: xxxvi-vii.

77. I: xxxviii-ix.

vulnerable as any. By the time Webster got to Boscawen, the "community" of New England traders was *already* sharply fractionated; a great gulf had opened in economic, political, religious, and even legal outlooks between the cosmopolitan merchants of the seaboard and the provincials of the interior, a gulf increasingly spanned only by the prospect of mutual commercial advantage.[78] Webster did not derive his ability to mediate among debtor and creditor so much from a local consensus about justice or from his standing as a local notable (he was rather young for that), as from his position as the agent for Gore, Miller & Parker, a powerful Boston creditor who could choose at will between doing equity and pursuing debtors with formal "rigor." Paradoxically, just as the Konefsky thesis overemphasizes the persistence of communitarian norms, it overemphasizes their breakup under the pressures of capitalist development. Political life remained oriented to local issues through most of the century. If anything, the vitality of community cultural life and appeals to community spirit increased; even the organization of local economic life would prove surprisingly resistant to the fractionating pressures of growing national markets.[79]

Konefsky could also qualify his argument with Durkheim's insight that economic development can generate novel reintegrating forces as well as disintegrating ones.[80] The community of interest in avoiding chain-reaction defaults, for example, that Konefsky and King found in rural New Hampshire was created by a network of continuing relationships that were products, not obsolescing victims, of an extended market. As Konefsky himself points out,[81] and as Robert Wiebe has argued at length,[82] nineteenth-century middle class elites promoted professionalism, in law as in other fields, as a means of replacing the departing order of the old communities by providing practitioners with a new basis both for fraternal solidarity and for staking claims to autonomous judgment. Konefsky is of course right to suggest that such benefits of professional unification may have been bought at a high price: the hardening of class

78. *See generally* R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 256–62 (1971) (discussing division between "commercial elitists and agrarian democrats"); Lockridge, *Social Change and the Meaning of the American Revolution*, in COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT 490 (S. Katz 2d ed. 1976) (finding eighteenth-century origins for polarization of society "along lines of wealth, interest, and opportunity").

79. *See* T. BENDER, COMMUNITY AND SOCIAL CHANGE IN AMERICA 61–108 (1978).

80. *See* E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 50–54 (1933) (increasing division of labor in industrial societies and resulting interdependence produce need for new cooperative forms of social relations ("organic solidarity")). I would guess that Konefsky might accept this point while quite properly wanting to caution that (*pace* some of Durkheim's more apologetic American interpreters) there is nothing necessarily wonderful about these new normative integrations: They may just reflect new forms of domination.

81. I: xxxv.

82. R. WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 113–23 (1967).

boundaries by the further segregation of the professions (and the hierarchical prestige orders within them) in the class structure.[83]

Moreover, Webster was himself a prodigious Durkheimian glue factory, a key figure in the production of socially reintegrating institutions. With Marshall and Story, he was one of the lawyers chiefly responsible for converting what started out as a parochially factional position—the Federalist view of the Constitution not as a compact between the states but as law, intended to promote national power and to protect vested property rights, and subject to final interpretation by the federal judiciary—into a worldview approaching hegemonic orthodoxy.[84] His speeches, whose famous peroration—"Liberty *and* Union, now and for ever, one and inseparable!"[85]—every Northern schoolboy was required to memorize, may well have been the most influential nineteenth century contribution to establishing the Constitution as a basic symbol of national unity, and thus the Nation as a cultural surrogate for traditional communities.

Nonetheless, after all these reservations are expressed, there remains a powerful plausibility to the interpretation of Webster's career as an allegory of the profession's decline from independent public service into dependence upon factional patronage. Lawyers not only of Webster's own generation, but ever since, have with astonishing frequency described their own experience of their history and situation as such a declension. The persistent hymn of self-congratulation that dominates the rhetoric of the American bar has always included a strong countertheme of jeremiads, lamenting the profession's Fall from the civic virtue of the makers of the Revolution and the Constitution into the pursuit of private, factional, and mercenary advantage. This history is too complex to be explored here.[86] But the thoroughness and ingenuity of Professors Konefsky and King have advanced us a long way down the road to understanding the pressures and incentives, and sometimes bitter contradictions, underlying the career and practice of a great nineteenth-century lawyer.

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83. On the modern professions' self-carved niche in the class structure, see M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 104–35, 166–77 (1977); on the prestige hierarchies within the modern legal profession, see J. HEINZ & H. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1983).

84. Webster, oddly enough, was not a significant contributor to another major project of the legal elite, that of constructing an American legal "science" of private rights and imparting it to the profession through treatise-writing. Aside from an essay on debtor-creditor law (II: 283) and some reviews (I: 165), he seems not to have written on legal subjects.

85. D. WEBSTER, *The [Second] Reply to Hayne*, in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 227, 269 (E. Whipple ed. 1894).

86. I am working on an essay that will document and try to explain this countertheme of declension rhetoric.

A Bibliography of Critical Legal Studies

Duncan Kennedy†
Karl E. Klare††

Until now, those interested in the vast Critical Legal Studies literature have not had easy access to it. Because Critical Legal Studies embraces disciplines other than law, and because many Critical Legal Studies articles cut across traditional legal categories, use of standard legal reference tools does not enable one easily to isolate that literature. In order to help those interested in this body of work, the YALE LAW JOURNAL *is publishing the following Critical Legal Studies bibliography prepared by Professors Duncan Kennedy and Karl Klare.*

Legal bibliographies are a rarity. While the nature of Critical Legal Studies makes a bibliography of works relevant to the movement particularly helpful, bibliographies in other areas of the law would undoubtedly aid students, practitioners, and scholars. The editors of the YALE LAW JOURNAL *hope that our publication of this bibliography will encourage others to undertake similar endeavors.*

Since 1981, we have been circulating an informal bibliography of Critical Legal Studies (CLS).[1] The numerous requests that we have received for the nineteen successive versions of this document suggest that many people, including lawyers, teachers, students, and reseachers in a variety of fields, have found it useful. We are grateful to the *Yale Law Journal* for publishing this revised and updated version.

We have made no attempt to define what CLS is. The CLS movement has been generally concerned with the relationship of legal scholarship and practice to the struggle to create a more humane, egalitarian, and democratic society. CLS scholarship has been influenced by a variety of currents in contemporary radical social theory, but does not reflect any agreed upon set of political tenets or methodological approaches. Quite the

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1. Critical Legal Studies is a movement of lawyers, law teachers, social theorists, and students who are directly or indirectly linked to the Conference on Critical Legal Studies (CCLS). The CCLS was founded at a meeting in Madison, Wisconsin in 1977; of the approximately 50 participants, a majority were academics in either law or the social sciences. Since then, CCLS has become a membership organization and has sponsored eight national conventions and five "summer camps" to discuss a variety of topics in the theory, teaching, and practice of law. One of CCLS's important activities is to encourage research and writing by creating a collaborative atmosphere and support networks of interested co-workers. We trust the results of such efforts are reflected in these pages.

contrary, there is sharp division within the CLS movement on such matters. CLS has sought to encourage the widest possible range of approaches and debate within a broad framework of a commitment to democratic and egalitarian values and a belief that scholars, students, and lawyers alike have some contribution to make in the creation of a more just society.[2]

Since we did not establish fixed criteria for determining what a "CLS-type" work is, we should explain how we constructed this bibliography. Initially, we assembled a tentative and incomplete list of articles that came to our minds as examples of CLS work. Over the years, we added books and articles that seemed to us to reflect, even obliquely, a CLS influence, however defined. We included the works of people who were active participants in the Conference on Critical Legal Studies (CCLS) or who had presented papers at annual meetings that were subsequently published. Many people wrote us requesting that we include their works, and we took such requests to be sufficent evidence of identification with CLS to merit inclusion. In addition, in preparing this published version, we wrote to all members of the CCLS (based on our most recent information, which was current as of early winter, 1984) and invited them to list published works of theirs that they felt should be included in this bibliography.

This is a bibliography of the Critical Legal Studies movement, not of critical works on law. Thus, we have not included the writings of Marx or Weber, or other classics of the social theory of law. Nor have we attempted to include the many exciting and valuable contributions to legal theory outside the CLS movement being written in the United States and abroad. In addition, we have included only published works. The idea was to provide in a readily accessible form a document that tells people where they can go to read CLS-type works, not to establish a research clearinghouse.

We have not tried to search out all writings that might conceivably belong in a CLS bibliography nor have we included complete lists of each individual's work. We have done our best to be as inclusive as possible and have strictly refrained from making political judgments on any person's work. Unavoidably, some people will be offended because we inadvertently failed to list some or all of their work, and they have our apologies in advance. By the same token, readers are advised that some people

2. The following collections contain good selections of CLS work (although they also contain a variety of non-CLS works as well): MARXISM AND LAW (P. Beirne & R. Quinney eds. 1982) (New York: John Wiley & Sons); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982) (New York: Pantheon Books); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). The Kairys volume was co-sponsored by the Theoretical Studies Committee of the National Lawyers Guild and the Conference on Critical Legal Studies.

are included here who might not or do not consider themselves to be identified with the CLS movement. Responsibility for the construction of the bibliography rests with us alone, not the listed authors.

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