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HUGO LAFAYETTE BLACK AND JOHN MARSHALL HARLAN: TWO FACES OF CONSTITUTIONAL LAW—WITH SOME NOTES ON THE TEACHING OF THAYER'S SUBJECT

BY O. W. WOLLENSAK*

I.

It was a great surprise last semester when Supreme Court Justices Hugo Black and John Marshall Harlan visited the LSU Law Center for what turned out to be a heated dialogue on color video tape. The program was hosted by LSU's media mastermind, Professor Paul Baier,** who apparently has given up suing hospitals, see *Baier v. Woman's Hospital*,¹ and turned to producing television shows, his latest entitled "Hugo Lafayette Black and John Marshall Harlan: Two Faces of Constitutional Law."²

Professor Baier believes that constitutional law includes

* *Editor's note:* Professor Baier is following Karl Llewellyn in using a pseudonym. Llewellyn's was "Teufelsdröckh," which means "devil's print" in German. See *THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION 93* (R. M. Ellinwood & W. L. Twining eds. 1970). Llewellyn wrote as Teufelsdröckh whenever he wanted to toss out a quasi-heretical piece. Professor Baier's *nom de plume* derives from O. W. Holmes, Jr., one of Baier's intellectual heroes, and from "Wollensak," the machine on which he plays the recordings of the oral argument in Supreme Court cases in his constitutional law classes. At the 1980 meeting of the Association of American Law Schools in Phoenix, Professor Baier presented a demonstration of the use of these recordings in teaching, and in speaking of the equipment necessary to play the tapes in class, Mr. Baier picked up his trusty Wollensak 2520 and introduced it to the crowd, saying: "This is my associate, Professor Wollensak, whose circle of constitutional acquaintances is wide indeed."

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1. A case that, unfortunately for Mrs. Baier, neatly coupled the miracle of childbirth with the knotty medico-legal question of husband access to the delivery room. For further details, see Appendix A, *infra*, note 1.

Because the annotations to this article constitute an extensive commentary on the materials and methods of teaching constitutional law, they are set forth separately as Appendix A, *infra*.

men:

I suppose this is obvious, but our methods have not recognized the fact. Ours is a government of laws, we say proudly, not of men. And so our students study hundreds of cases, case after case, the very embodiment of constitutional law. Never mind the men who make it. I believe our ideals have gotten in the way of teaching truth: Ours is a government of laws *and* of men.³

The Black-Harlan dialogue was Professor Baier's way of focusing student attention on the persons who make the law. "I have always believed that if you can get a judge's philosophy out in the open, you can better understand his cases," he says.

II.

Baier got the idea for his Black-Harlan dialogue while watching Steve Allen's "Meeting of Minds," A PBS television program that allows the viewer to see and hear noted historical figures talking about their lives and sharing ideas. Anyone who has seen this program knows it teaches history in a very lively fashion; it also tends to improve the minds of the listeners-in. Doubtless, Henry Adams, whose job it was to teach history at Harvard College back in 1870, would have welcomed these illuminating conversations to his classroom.⁴ But TV was a technology unknown to man, and Steve Allen was not yet sucking his thumb.

A few years ago Norman Redlich's ingenious "Black-Harlan Dialogue" appeared in print.⁵ The article, which Professor Redlich openly acknowledged as an unconventional form of legal scholarship,⁶ is really the script for a short play featuring Justices Black and Harlan, who are engrossed in a meeting of minds of their own. Scene I depicts a country lane in Heaven in late Spring 1975. The Justices are out for their daily "constitutional," as it were. Each has a marked-up copy of the Constitution which he managed to take with him on the long journey in 1971. As they stroll along, Black and Harlan talk about life and law—argue would be a better word—through three engaging scenes, with Professor Redlich adding a few citations in the notes for the reader's guidance.

One excerpt from Professor Redlich's article⁷ is enough to demonstrate not only is it refreshing reading, but, more important here, it is also powerful teaching.

BLACK: You may think I twisted history to try to get the Bill of Rights into the fourteenth amendment, but at least my view roots the Court's authority over the states in specific constitutional provisions. Under your theory each case would be decided according to the concept of fundamental fairness shared by a majority of Justices. It would all depend on what would shock a particular judge's conscience.

HARLAN: I don't think that's fair, Hugo. Ever since *Adams*, you have constantly poked fun at those of us who believed that due process involves a careful process of inclusion and exclusion. We were no less dedicated to basic human rights than you were. We simply did not believe that the Bill of Rights, word for word, is what the due process clause is all about. Where the Constitution says that life, liberty and property cannot be taken without due process of law, it calls upon us to interpret that language in terms of evolving principles of American justice.

BLACK: I never doubted your sincerity, John. It's just that those words don't mean anything to me—even when I hear them up here. And that's why your system, which I'm afraid is prevailing, gives so much power to the courts. Depending on their own whims or shifting political pressures, judges will now be able to expand or contract individual rights.

HARLAN: Hugo, I rather doubt that my views have prevailed. However, even under your approach, judges have to make the individual value judgments you attribute to my system. I'm sure you thought that if the first section of the fourteenth amendment could be read as incorporating the entire Bill of Rights, judges would have to decide cases involving individual rights and liberties within the context of specific constitutional provisions and not on the basis of personal judgments. However, as I said in *Griswold*, personal judgments are involved in all important constitutional questions, whether they concern a specific provision of the Bill of Rights or the due process clause of the fourteenth amendment. As long as America is a changing society, there is simply no way our constitutional system can be frozen into the kind of rigid pattern you were trying to develop in the '50's and '60's. Consequently, your system wouldn't protect individual liberty any more than mine.

BLACK: I can't guarantee that it would. But my system gives to the American people the rights that are set forth in the Constitution rather than the rights that a majority of judges think they should have at any particular moment of history. And I

have more faith in the text of the Constitution than in the changing values of a majority of judges.

III.

Reading Norman Redlich's Black-Harlan Dialogue convinced Mr. Baier to make a production of his own, only this time he proposed lifting the Justices off the printed page and having them come to class "live and in person," so to speak, for his students to see and hear. "A casebook," says Baier, "can be a dull thing and the case method of instruction lifeless."⁸

Only the other day law teachers were challenged anew to do something, and not just to complain, about student boredom in the second and third years of law school.⁹ The words are those of Derek Bok, seventh Dean of the Harvard Law School, now President of Harvard University:

The great weakness of legal education is that Langdell's vision is the only substantial insight we have ever had. As a result, the law school experience tends to grow repetitive, and interest declines steadily throughout the last two years If we try seriously to do something about student apathy in the second and third years [we should] offer a wider variety of teaching methods.¹⁰

Why not try the magic of television production?¹¹ "[N]o teaching is good," said James Bradley Thayer, "which does not rouse and 'dephlegmatize' the students—to borrow an expression attributable to Novalis—which does not engage as its allies, their awakened, sympathetic, and cooperating faculties."¹² Thayer's *Cases on Constitutional Law*, which was published in 1895, is the grandfather of today's teaching materials in constitutional law. Looking at the surviving grandchildren you can see Thayer's influence. Without question, James Bradley Thayer was a giant scholar. But scholarship is not teaching and, like the rest of us, even Thayer had his ups and downs in class.¹³ One wonders what Thayer would think of this thoroughly modern notion of video-taping two students portraying Justices Black and Harlan after a period of intense instruction on their philosophies and opinions? To Baier, the idea seemed to have pedagogical promise.¹⁴ After all, in the words of one of Thayer's teaching colleagues at Harvard: "No man ever learned to dance or to swim by read-

ing treatises upon saltation or natation."¹⁵ Why not try putting our students in the justices' place?¹⁶ And so for three weeks Baier worked with two students in his Constitutional Law II course, a second-year, individual rights offering. Raymond Maher, who has an Alabama accent of sorts, volunteered to play the role of Hugo Black. Miles Tilly, who, believe it or not, actually looks like John Marshall Harlan II (especially after an hour's make-up session at the Drama School on campus) was chosen to portray Justice Harlan. The group met frequently at "The Library,"¹⁷ where Baier loosened up his two stars with a soothing libation. Miles had never before done anything like this. Ray, on the other hand, was a regular ham and he had no trouble with the assignment. The three of them read all the biography on Black and Harlan they could find,¹⁸ and they read many of their opinions.¹⁹

Finally the big day came, and 60 minutes of color video tape was filmed at LSU's Instructional Resource Center. The group worked without a script, and so the event was a kind of oral examination for the students. By the time the tape was made, Ray and Miles saw things pretty much the way their judicial counterparts did, which is quite evident from the video tape itself. After the filming, the tape was edited to 35 minutes, thus allowing 25 minutes for questions and discussion between the students and the two justices after the tape was shown in class.²⁰

It was interesting to observe the reaction of the students to the tape. After a minute or two of expected snickering ("Hey, look at the make-up job they did on Ray"), the class settled down and began listening attentively to what was being said. In a very real sense, Justices Black and Harlan had come alive in the classroom.

IV.

The transcript of "Hugo Lafayette Black and John Marshall Harlan: Two Faces of Constitutional Law," as well as the video tape itself, is available from Professor Baier, and so the full interview need not be set out here. A brief sampling will suffice to allow the reader to evaluate the learning²¹ captured on the tape.

BAIER: Justice Black, you are the Senior Associate Justice. I suppose I should ask you the first question.

BLACK: Yes sir.

BAIER: Can you tell us what is your judicial philosophy? If I ask you that question, what would you say about your judicial philosophy?

BLACK: My judicial philosophy is basically constitutionalism. I interpret the Constitution as it is written, and I believe that this is the way the Founding Fathers intended the institution of the Supreme Court to be.

BAIER: How do you interpret the Constitution, Mr. Justice Black?

BLACK: By what is written, a literal interpretation,²² and I believe that this is the way the Founding Fathers intended the institution of the Supreme Court to be.

BAIER: Mr. Justice Harlan, how would you describe your judicial philosophy?

HARLAN: Well, my philosophy is one essentially of self-restraint on the part of the judge. I don't believe that judges should make law, simply that they should interpret what the law says, and in interpreting the Constitution I don't believe it was made to be interpreted literally. As Mr. Chief Justice Marshall once said, "We must always remember that it is a *Constitution* we are expounding."²³

BAIER: Mr. Justice Black, your Brother Harlan said that you are not supposed to interpret the Constitution literally.

BLACK: He's wrong.

BAIER: (laughing) He's wrong—well have you ever, on particular cases, reached opposite results because you are of the view that the Constitution ought to be interpreted literally and he apparently is not?

BLACK: Yes, many times. *Griswold v. Connecticut*²⁴ is a classic example of what you just said. I do not believe that the Constitution had anything in it that covered that particular case, but my Brother John believed the opposite and made law, which a judge—I feel a judge should not do.

BAIER: Justice Harlan, what was your position in *Griswold v. Connecticut*?

HARLAN: Well, first of all, I don't think we made law in that case. My position in *Griswold v. Connecticut* was that the Due Process Clause of the fourteenth amendment stands on its own bottom. I don't believe we are limited by the words of the Con-

stitution. When the Due Process Clause of the fourteenth amendment says "nor shall any State deprive any person of life, liberty, or property, without due process of law," I interpret "liberty" as meaning those fundamental values without which our basic social and political institutions cannot survive.

BAIER: And one of those fundamental values was what in *Griswold v. Connecticut*?

HARLAN: The privacy of the marital relationship. I do not believe that the state has the right to use the full sanction of the criminal law to invade the privacy of married couples.

BAIER: Mr. Justice Black, as you mentioned, you dissented in *Griswold v. Connecticut*.

BLACK: Yes sir.

BAIER: What is your own view about a state that would prohibit a married couple from using a contraceptive?

BLACK: Well, as I said in my opinion, I personally thought the law was ridiculous, but a judge does not make law. A legislature makes law, and I feel that a judge's function is to interpret legislative law and not to make it. The people elect a sovereign body of legislators to make law, not judges.³⁵

BAIER: So you have a fundamental difference of opinion with respect to the judge's function that caused a difference of vote in *Griswold v. Connecticut*. Mr. Justice Black, can you give us a second illustration of how judicial philosophy led to different results, in the case of Justice Harlan and yourself?

BLACK: Well, going back to what my Brother Harlan said about the fourteenth amendment, I feel he is wrong. It was a particular point of dispute between me and his predecessor, Felix Frankfurter. My opinion in *Adamson v. California*³⁶ in 1947 basically gives what I feel the Fourteenth Amendment means; and I don't believe that a so-called judge's idea of liberty should be read into it.

BAIER: As I understand the *Adamson* case, an important question was the nature of due process of law and how one determines what is and what is not according to due process of law. And your view, Mr. Justice Black, is that you look to the Bill of Rights?

BLACK: Yes sir.

BAIER: Now, as you probably know, at the time of your *Adamson* opinion, a scholar was quite critical and wrote a law

review article, I believe it was Professor Charles Fairman.²⁷

BLACK: Yes.

BAIER: I'm curious, did you read Fairman's critique of your work?

BLACK: I read it,²⁸ but I thought it was pure hogwash—to use an Alabama term.

BAIER: And you didn't agree with it?

BLACK: No, I think that my Appendix that I put to the opinion clearly gives the reason why I said what I did, and it's historically sound and cannot be disputed.

BAIER: Justice Harlan, has your colleague Justice Black persuaded you that the Bill of Rights ought to be totally incorporated and given meaning through the Due Process Clause?

HARLAN: I think that that notion does a grave injustice, or will do great damage, to our basic governmental structure of federalism, which is the basis of our structure. By incorporating the Bill of Rights into the fourteenth amendment, you are putting a straight jacket on the states. I believe that the states should be able to act however they want as long as they do not violate fundamental fairness. My Brother Hugo's position is to take the Bill of Rights and all of the federal jurisprudence that has grown up around the Bill of Rights and to apply this to the states. And I think this does violence to our basic notions of federalism.

BAIER: Justice Black, you were a staunch supporter of President Roosevelt's Courtpacking plan.

BLACK: Yes sir, I was.

BAIER: Why? And can you describe the climate of the times when you were nominated for the Supreme Court?

BLACK: I basically felt that the Supreme Court justices on the Court at that time were reading their own *laissez-faire* economic philosophies into the Constitution and basically submerging social and economic legislation that the people mandated in the electoral process. I felt this wrong, and I felt that it was leading the country on the road to disaster.²⁹ I basically agreed with Franklin—President Roosevelt's Courtpacking plan—on this basis.

BAIER: When you took your seat as a Supreme Court justice, did you bring those views to bear on your work and can you say that you were responsible for change? Is that what you

would say about your 34 years on the Court?

BLACK: I would say, possibly; but then, again, I wouldn't read my economic philosophies into my opinions either. I feel that this is what should be done and I feel that if there's one legacy I left on the Court, it's been this basic tenet that the economic philosophy of a local, state, or national government should be given much deference in the Court.

BAIER: Justice Harlan, may I ask you, in your service on the Court, which justice had the greatest influence on you; which justice did you feel closest to and why?³⁰

HARLAN: Felix, Felix Frankfurter, would definitely be the one. Felix, like the other great justices such as Brandeis and Holmes, had this philosophy of judicial self-restraint. Their philosophy was developed from the teachings of a man by the name of James Bradley Thayer,³¹ whose teachings I also am fully in accord with. Felix and I disagreed on the merits of some cases, but essentially we both had the same idea of judicial self-restraint. I would definitely say Felix was the greatest influence on me and the one I admired the most.

BAIER: What were his personal traits that you admired?

HARLAN: Well, Felix would not approach a case in a hurry. "Hard cases made bad law" was his view.³² And that's the thing that I think I learned the most from him that was helpful to me—was to approach a judicial problem and to sit down and reflect on it and not to hurry through a decision.³³ And that is the quality I admired most in him.

BAIER: I seem to remember that in your dissenting opinion in *The Pentagon Papers Case*,³⁴ you did emphasize the fact that the Court was terribly rushed and you thought it highly inappropriate to reach a judgment that quickly. Justice Black, may I ask you the same question. Which Supreme Court justice do you feel closest to and admire most and why?

BLACK: Well, I'd say on the present Court I feel closest to Bill Douglas. He basically shares my ideas of judicial independence and courage and I would say that, going back to my favorite Supreme Court justice, I would think it would have to be John's Grand-daddy Harlan because of his independence. I really admired that.

BAIER: Mr. Justice Harlan, what would you consider to be your most important case in your years on the Supreme Court?

HARLAN: I think my most important case was *Poe v. Ull-*

man.³⁶ And there, in my dissent, I fully explained my view of due process of law, and it seems that recently some of the justices have adopted this view—for instance, Justice Powell in the case of *Moore v. East Cleveland*³⁶ extensively cited my opinion in *Poe v. Ullman*.

BAIER: Did that make you feel good?

HARLAN: Yes sir, it did.

BAIER: Do both of you read the advance sheets? I mean, you have been off the Court and retired for a number of years now. Mr. Justice Harlan, you must look at them because you knew about Justice Powell's work.

HARLAN: Yes sir.

BAIER: Justice Black, how about you?

BLACK: Yes, I do.

BAIER: Do you still play tennis?

BLACK: I do.

BAIER: And read?

BLACK: I do, definitely.

BAIER: Do you see each other often and reminisce?

BLACK: We usually do, but a lot of times it ends in an argument. (Laughter)

V.

Obviously, this Black-Harlan dialogue focuses student attention on the persons who make the law.³⁷ This approach by no means ignores the cases. Certainly not. Baier and his students study the usual cases, but they are ordered differently. Particular judges are the focus of attention, not doctrinal topics. Teaching constitutional law in this fashion in the second year shifts the gears and changes the epistemological pace, so to speak. Varying the pace, Baier believes, helps learning.

What did the students think of using television to teach law?³⁸ According to Ray Maher:

The end result is that we learned more law³⁹ than I feel we would learn in the normal classroom situation. Also, we learned this law in a relaxed atmosphere that, I feel, is more conducive to learning than a rigid classroom atmosphere.⁴⁰ I also read a lot of outside, non-casebook reading (biographies, *etc.*), more

than one gets to read normally.

This gives one the ability to grasp the subject matter better. Also, working with people in other areas of campus life was a refreshing experience. A law student sometimes does not realize just how isolated from the main campus he is. Finally, the experience was a pleasant diversion from the monotony of law school.⁴¹

Miles Tilly said:

I feel that the preparation for the dialogue was a valuable learning experience. It gave me an insight into the workings of the United States Supreme Court that I did not have before.

First, I had not realized the influence which individual members of the Court could have on their fellow justices. However, after studying the lives and influences of Mr. Justice Harlan and Mr. Justice Black, I now realize that this can be an important factor. Second, I had not realized the great degree to which most justices believe in the constitutional limitations to their power.⁴² However, I now see that this realization is present in the beliefs of the truly great justices. Finally, I do not think that I had a proper understanding of the role of the Supreme Court in the American system of government under the Constitution. However, I think that my study of the system of the philosophies of Mr. Justice Harlan and Mr. Justice Black has helped me to obtain a proper perspective on the role of the Supreme Court in our government.⁴³

In closing, let me say again that I did find the making of this video-tape to be a valuable learning experience. From the questions that were asked of me after the film was shown in class, I think my classmates found it to be such too.

VI.

Almost a century ago, at the time when "Mr. Langdell's method"⁴⁴ was king, a consummate law teacher, Harvard's John Chipman Gray,⁴⁵ took it upon himself to assay the then current state of the law teaching art in an article whose title mirrored the prevalent technology of his time, "*Cases and Treatises*."⁴⁶ How ironic, in light of what Gray said so long ago, that legal education has seen nothing really new in over 100 years:

I am far from thinking that the method of case study as practiced at Cambridge is the final word on legal education. The improvement in the art of education during the last quarter of a century has been great. I do not believe that improve-

ment has come to an end.⁴⁷

Perhaps it is time for a bit of the necromancer's art⁴⁸ and a Pedagogy of Persons⁴⁹ in our law schools.

APPENDIX A

SOME NOTES ON THE TEACHING OF THAYER'S SUBJECT

1. *Baier v. Woman's Hospital*, 340 So.2d 360 (La. App. 1st Cir. 1976), *writ refused* 342 So.2d 224 (La. 1977), is one of three reported opinions on the matter of husbands in the delivery room, an issue that first took Professor Baier to Helena, Montana, of all places, as Amicus Curiae for the International Childbirth Education Association [Cf. Griswold, *Teaching Alone Is Not Enough*, 25 J. LEGAL EDUC. 251 (1973)] to argue the constitutional cause for Robert Hulit, M.D., an otherwise gentle obstetrician who sued his colleagues—imagine that—over the claimed right of married couples to share the coming of their children together in the delivery room. Dr. Hulit's patients were trained in the LaMaze method of obstetrics, which requires the husband's presence and assistance at both labor and during delivery. Dr. Hulit won at trial, but lost on appeal, with the Montana Supreme Court saying nothing at all about the constitutional issues that Professor Baier had briefed and argued as a "friend" of the court. See *Hulit v. St. Vincent's Hospital*, 164 Mont. 168, 520 P.2d 99 (1973). So it goes sometimes.

Well, it was back to Baton Rouge for the Baiers and into court. This time, as parties plaintiff, Mr. and Mrs. Baier lost both at trial and on appeal, with one child coming into the world and another being conceived—so as to avoid mootness, some would say—during the long course of the legal proceedings. The fact that at least 11 husbands had already been brought into the delivery room at Woman's Hospital without incident, and by the very same doctors who insisted at trial that Paul Baier be kept out, meant nothing to the judges. *But see* Brandeis, J., dissenting in *Adams v. Tanner*, 244 U.S. 590, 600 (1917): "Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumption or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law."

It should be noted, by way of bringing this story full circle, that Woman's Hospital reversed itself a year and a half later and started allowing trained and willing husbands into

the inner sanctum. See Baton Rouge State Times, Aug. 11, 1978, at 1-B, col. 1. "Vindicated in the Court of Experience," says Professor Baier.

For commentary from the academic chair on the matter of a man and woman sharing childbirth, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1510 [*Governmental Control over the Body: Decisions About Birth*] at 934 (1978), where Professor Tribe expounds upon *Fitzgerald v. Porter Memorial Hospital*, 523 F.2d 716 (7th Cir. 1975), a case that split the Seventh Circuit of Appeals (Stevens/Sprecher, JJ.) over this unsettling riddle of law and life.

What did all of this teach Professor Baier? Many things, to be sure. For one thing, he now appreciates more than ever what Learned Hand had to say about litigation [quoted in J. FRANK, COURTS ON TRIAL 40 (1949)]: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." Also, he learned firsthand that: "It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend." O.W. HOLMES, *George Otis Shattuck* (1897), in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 92, 95 (M.D. Howe ed. 1962) [hereinafter OCCASIONAL SPEECHES].

2. Earlier productions include "‘Double Revolving Peripatetic Nitpicker’: A Report on the Reporter," WLSU TV, 1978, an interview with Mr. Henry Putzel, jr., Thirteenth Reporter of Decisions of the Supreme Court of the United States. The transcript of this interview, with notes and an Appendix on *The True Story of the Ohio Syllabus Rule*, has been published in Y.B. 1980 SUP. CT. HIST. Soc’y 10. Another in this illuminating series of video tapes is an interview with Frederick Bernays Wiener, LL.B Harvard, 1930, entitled "Experiences in Advocacy," WLSU TV, 1979. Colonel Wiener is the author of BRIEFING AND ARGUING FEDERAL APPEALS (1967) and a former Assistant to the Solicitor General and later Assistant to the Attorney General of the United States. Mr. Wiener argued a total of 38 cases at the Bar of the Supreme Court of the United States, including his ultimate triumph in *Reid v. Covert*, 354 U.S. 1 (1957) (on rehearing), the only instance on record of the Supreme Court of the United States reversing itself, without a controlling change in membership, following a published opinion. Professor Baier shows "Exper-

iences in Advocacy” in his appellate practice seminar at LSU; the tape allows students to see and hear real cases being argued by a lawyer of extraordinary capacity—“one whose arguments are much esteemed by every member of this Court.” Felix Frankfurter to his “Dear Brethen,” May 27, 1953, Frankfurter Papers, Library of Congress, Box 219, File 004032. Another historic figure in this series is Erwin N. Griswold, who was sixth in Langdell’s line as Dean of the Harvard Law School and later Solicitor General of the United States from 1967 to 1973. Dean Griswold’s career as Solicitor General spans 25 volumes of the United States Reports, 389 U.S. to 413 U.S., and his recorded television recollections are entitled “A Life Lived Greatly in the Law,” WLSU TV, 1980. Dean Griswold’s tape is a lively addition to the ink of the casebook when Baier’s constitutional law students reach *The Pentagon Papers Case*, [New York Times Co. v. United States, 403 U.S. 713 (1971)], which General Griswold argued for the United States. Copies of these video tape cassettes are available from Professor Baier, C/O LSU Law Center, Baton Rouge, Louisiana 70803. If your interest centers on O. W. Holmes rather than on Colonel Wiener, Professor Baier also has Justice Holmes, *bona-fide*, preserved on standard audio-cassette tape and on 16 mm film.

3. P. Baier, *Address before the National Archives Conference on Law in American History: New Historical Perspectives and Resources 2-3*, Washington, D. C. (Sept. 21, 1978) (copy on file at National Archives). Compare what Professor Felix Frankfurter used to tell his students at the Harvard Law School:

We speak of the Court as though it were an abstraction. To be sure, the Court is an institution, but individuals, with all their diversities of endowment, experience, and outlook, determine its actions In law, also, men make a difference.

F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 8, 9 (1938).

Mr. Justice William Rehnquist also emphasized the important place of the person in understanding the work of the Supreme Court in his 1983 Edward Douglass White Lectures at LSU, *Lions Under The Throne*. In introducing his lectures, Justice Rehnquist quoted Ralph Waldo Emerson’s comment: “There is properly no history, only biography.” Emerson’s ap-

proach, said Justice Rehnquist, "would indicate that some attention be paid to the individuals who have been judges of the Supreme Court." Justice Rehnquist went on to sketch the lives and times of ten Chief Justices, including Edward Douglass White, "to try to get some understanding of what Chief Justices are like . . . [and] better our understanding of the institution to some degree." W. REHNQUIST, *LIONS UNDER THE THRONE* — (The Edward Douglass Lectures on Citizenship, Forty-first Series, 1983, publication pending).

And listen, in this connection, to the arresting voice of Justice Hugo Black, happily captured on the sound track of "Justice Black and the Bill of Rights" (CBS News 1968), the first television interview ever with a sitting member of the Court:

Our system of government puts different people on the Court, people with different views. I think it's their business to try to read these words—silly as it may sound to some people. Some people have said that I'm either a knave or a fool because, if I was not dishonest, I couldn't say there are absolutes. Well, I just don't agree with them. I think I can and do.

Instead of listening to the professor talk, today's law student can see and hear Justice Black himself conducting a class in constitutional law via the CBS film, which was shot on location in Justice Black's Alexandria, Virginia, home. No one sleeps. No mind wanders. Hugo Black's visit to class is a powerful stimulus to thought and to discussion of fundamental questions in constitutional law. "Speaking as a teacher," says Professor Baier, "I am glad to have Hugo Black come to class." Baier, *Introduction to Hugo Black: A Memorial Portrait*, Y.B. 1982 SUP. CT. HIST. SOC'Y 72, 73. This *Memorial Portrait* is an account of the making of the 1968 CBS interview with Justice Black, written by his wife of fourteen years, Mrs. Elizabeth S. Black. Professor Baier is the editor of *HUGO LAFAYETTE BLACK: THE MAGNIFICENT REBEL: A Personal Memoir*, by Hugo Lafayette Black & Elizabeth Seay Black, forthcoming. A color film of the CBS interview, 32 minutes in length, can be rented from University of Illinois Film Center, 1325 South Oak St., Champaign, Illinois 61820. Fortunately, for those who consider it beneath their dignity to watch television [*cf.* Charles W. Elliot, *Langdell and the Law School*, 33 HARV. L. REV. 518, 522 (1920) ("To Professor Langdell books

had a kind of sacrosanct character.”)], a transcript of the Agronsky-Sevareid interview, as it was shown on television, has been published in a symposium issue of the Southwestern University Law Journal honoring Justice Black, 9 S.W.U.L.J. 845 (1977). An unabridged transcription of the interview, which actually ran well over two hours, will be published in the forthcoming *Black Memoir*.

4. We know from Adams's own account that he considered the seven years he spent in teaching a failure. Why is that? Because, as Adams tells of himself, “He could not get it done to please him, rightly or wrongly, for he never could satisfy himself what to do Try as hard as he might, the professor could not make it actual.” H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 300, 303 (1931).

5. Redlich, *A Black Harlan Dialogue on Due Process and Equal Protection: Overheard in Heaven and Dedicated to Robert B. McKay*, 50 N.Y.U.L. REV. 20 (1975) [hereinafter Redlich].

6. “What follows, therefore, in an unconventional form of legal scholarship dedicated to a person whose instinct is to eschew the commonplace, and whose vigor and openness encouraged us to develop our talents to the fullest:” *Id.* This genre of writing seems to be catching on. For the latest contribution to the field see Strickgold, *Nineteen Eighty: Being an Interview with William O. Douglas Shortly after his Death Together with a Brief Remembrance of his Life*, 10 GOLDEN GATE U.L. REV. 535 (1980).

7. Redlich, *supra* note 5, at 23-24 (citations omitted).

8. ASSOCIATION OF AMERICAN LAW SCHOOLS 1980 ANNUAL MEETING PROGRAM, *Sections on Constitutional Law and Teaching Methods*, 19. Trying to teach law students, as opposed merely to professing at them, is no light assignment, as anyone who has ventured into the crucible of the classroom surely knows. And, for reasons best explained by Harvard's John Chipman Gray, one gets nowhere trying to teach by means of a text book:

I think a professor sometimes fails to realize how very dull a text book is to students. He himself knows a good deal about the subject, the leading authorities are familiar to him, he is aware of the difficult and doubtful points, he probably has had a case involving them in practice, very likely he has lost his case [how true, see *Baier v. Women's Hospital*, 340 So.2d 360

(La. App. 1st Cir. 1976), discussed *supra* note 1], and perhaps his temper too [not in public: "It is a fine legal tradition to go to the tavern to cuss the judge when he decides against you, though assuredly it is unprofessional to stay mad at him more than 3 or 4 months." Frederick Bernays Wiener to Felix Frankfurter, May 8, 1964, Frankfurter Papers, Library of Congress, Box 112, Folder 002338 (quoted by permission)]. It is all very real to him, and so he takes up the text book, eager to see what the author has to say; whether he agrees with it or not, it is interesting. But to the students this background is wanting. The professor thinks "what an admirable, exact and lucid statement of these difficult and complicated topics, it is just the book for students; they cannot help finding it delightful." But the students, not having had any experience of the difficulties and complications, cannot appreciate the merits of the book; they are not delighted with it at all. They find it hard to keep awake over it.

Gray, *Methods of Legal Education, Part IV*, 1 YALE L.J. 159, 160 (1892).

It might be thought that, with the invention of the case method of instruction and by virtue of the modern casebook, things have changed, and for the better. Not so at all. As early as 1932, Professor Frankfurter wrote to his colleagues on the Curriculum Committee at Harvard, saying: "At the end of the second year men 'are sick' of reading cases merely as a method of training or as a means of finding out what cases hold, what the doctrines are." Felix Frankfurter to the Committee on Curriculum, Harvard Law School, May 12, 1932 (*Some Observations of Third Year Work*), in II SURVEY OF THE HARVARD LAW CURRICULUM 1934-34, at 254 (copy in Frankfurter Papers, Library of Congress, Box 143). Fortunately, through Gerald Dunne's painstaking scholarship, Frankfurter's memorandum was brought to the attention of the editors of the Harvard Law Review, who had the good sense to recognize its relevance after fifty years. See Dunne, *The Third Year Blahs: Professor Frankfurter after Fifty Years*, 94 HARV. L. REV. 1237 (1981).

9. There is a rich literature of boredom in the law schools. All of it is summarized in Professor Bergin's trenchant comment: "To be mercifully brief, law school is unmercifully dull." Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 648 (1968).

Of course, Mr. Bergin's arrow is wide of the mark, but the

problem of monotony in the law school is quite real. Most of the relevant commentary is noted in David Robertson's *Some Suggestions on Student Boredom in English and American Law Schools*, 20 J. LEGAL EDUC. 278 (1968), and the commentary continues to the present hour. See, e.g., Carrington & Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977). For an early analysis of the monotony problem, quite bold for its time, see Karl Llewellyn's incisive essay *On the Problem of Teaching "Private Law,"* 54 HARV. L. REV. 775, 793 (1941) ("And muddling through gets boring for them, and we wonder why the edge is off the boys in the second year. It is off because we--as we made our instruction--books have taken it off We make slight effort to get hold of counsel's argument, and so to present the case as an exercise in how a lawyer goes about his job, an exercise in dealing with cases from *in front*. How should the edge not be off the boys?").

The problem of teaching "public law," including constitutional law, might seem less pressing to some. It did to Frankfurter, who believed that "public law courses gave one a sense of reality, dealt with things that were alive here and now, that really will matter tomorrow, and involved complicated facts that were themselves intrinsically interesting." Felix Frankfurter to Committee on the Curriculum, Harvard Law School, May 12, 1932, quoted in Dunne, *The Third Year Blahs: Professor Frankfurter after Fifty years*, 94 HARV. L. REV. 1237, 1239 (1981). To Frankfurter's astonishment "[T]his opinion was severely challenged" [id.] by a group of third-year students and the preceding year's editor-in-chief of the Harvard Law Review. "Frankfurter realized then that the third year was 'largely a bore' for the 'great muck of the class' who failed to make the Law Review hierarchy, since no attempt was made to give them any 'stimulus or exhilaration or a feeling of excitement about the law and their future share in it.'" J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* 65 (1978).

10. Bok, *A Challenge to Legal Education*, 31 HARV. L. SCH. BULL. 12, 13-14 (1979). Compare Calvin Woodard's comments in *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 727-28 (1968):

Langdell's first year is our first year; his method—briefing cases, analyzing holdings, socratic probing—is our method. In

other words, legal education remains in form a kind of Procrustean bed in which all learning for lawyers is forced to lie. I think I know why Langdell and his colleagues made it so. Frankly, I do not know why we do, unless it is pure inertia [L]ike Maitland's forms of action, it still rules us from the grave.

11. "Who could resist the inspiration of the magic by which light and sound were converted into some other essence, instantaneously transported, and made permanent upon a tiny celluloid strip?" L. HAND, *To the Harvard Alumni Association* (1936), in *THE SPIRIT OF LIBERTY* 111, 113 (I. Dillard ed. 3d 1960). Judge Hand was speaking of the great moving picture factories at Hollywood. Today television is the medium of the masses, and its potential for use in law teaching was suggested over a decade ago by Professor Charles Kelso, now of the McGeorge School of Law:

The law schools simply must begin experimenting with the use of television as a catalytic agent for discussion. In the past, and perhaps up to the present time, law students were for the most part print-oriented. Increasingly, however, the law schools will have a generation of students who have worked with programmed instruction and who will have learned from educational television, as well as having spent countless hours in front of television sets.

Law schools have to take their students as they come and cannot totally remold their methods of learning. And, according to Professor McLuhan, television is a medium which induces a high degree of total involvement, much as if the viewer were experiencing an extension of his tactile sense and not merely his eyes and ears. Students who have grown up on such fare will expect higher education much more to resemble a "happening" than a lecture.

Kelso, *Behavioral Psychology: Springboard for Imaginative Legal Educators*, 45 DEN. L. REV. 313, 334-35 (1968).

Of course, there are some acute problems to overcome in using television production to teach law. First, there is nothing in Edward L. ("Bull") Warren's *SPARTAN EDUCATION* (1942), a book that aims, in Professor Warren's words (p. ix) "to give helpful suggestions to younger men who seek to justify their existence by becoming effective teachers of the law" about using television to teach law. Hence one can expect a few raised eyebrows en route to the television studio. More

serious is the problem that James Elkins stresses in his radiant essay *The Paradox of a Life in Law*, 40 U. PITT. L. REV. 129, 150-51 (1979):

There is little encouragement from administrators or colleagues to pursue innovative and creative teaching methods. Even with encouragement, the lack of staff and financial support make innovation difficult. The effect is to discourage innovation and change in law teaching Given such an environment, it should come as little surprise that only the exceptional law professor confronts the apathy of "status quom" to attempt innovative teaching ideas.

12. J. B. THAYER, *Preface* to I CASES ON CONSTITUTIONAL LAW, WITH NOTES at vii (1895).

13. "He found teaching very difficult at first, and there were certain streets in Cambridge through which he afterwards hated to go because he had been used to walking there disheartened in this early time." J. P. Hall, *James Bradley Thayer* (1909), in THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL 276, 280 (1918). Dean Hall, author of Mr. Thayer's life in Lewis's GREAT AMERICAN LAWYERS series, described him this way:

It goes without saying that a man of Professor Thayer's exact scholarship and breadth of view left his mark upon legal education in America. In the professor's chair he was painstaking, candid, never dogmatic, yet firm in his own carefully-formed opinions. His success with his students was not that of the magnetic teacher whose very personality inspires enthusiasm in the work. It lay in the admiration and respect of many successive classes for his mastery of what he taught, for the power and accuracy of his thinking, and for the modesty and fineness of the man.

Hall, *James Bradley Thayer*, in VIII GREAT AMERICAN LAWYERS 345 (W. D. Lewis ed. 1909).

14. [I]f we value creativity, . . . then we may wish to give a trial of ways of facilitating learning which give more promise of freeing the mind. If we value independence, if we are distributed by the growing conformity of knowledge, of values, of attitudes, which our present system induces, then we may wish to set up conditions of learning which make for uniqueness, for self-direction, and for self-initiated learning.

C. ROGERS, ON BECOMING A PERSON 292 (1961), quoted in Mc-

Dowell, *The Dilemma of a (Law) Teacher*, 52 B.U.L. REV. 247 (1972).

15. John Chipman Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888).

16. While still a professor at Harvard Law School in 1930, Felix Frankfurter said that "I have long felt that there is only one truly good course on constitutional law—the discussions at the Saturday (now Wednesday and Friday) conferences of the Supreme Court. But, alas, that course in constitutional law is a strictly confined seminar, open only to the nine members of the Court." Frankfurter, *Book Review*, 16 A.B.A.J. 251 (1930) (reviewing C. E. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* (1928)). Not any more. In a third-year seminar on the Supreme Court, nine of Professor Baier's students reach the ultimate plateau of their legal education: they become justices of the United States Supreme Court and hear a case currently pending argued by two other members of the seminar, who use the actual briefs submitted by the lawyers in the case. The student justices meet in conference, vote, and prepare written opinions. The idea is an old one [see Braden, *The Current Business of the Supreme Court*, 3 J. LEGAL EDUC. 333 (1952)], although Professor Baier adds a pedagogical twist of his own: he video tapes the conferences, thus assuring thorough preparation and participation and allowing a later critique of the justices' performance. So far, the record of the LSU Supreme Court is perfect: *Moore v. East Cleveland*, 431 U.S. 494 (1977) (5-4 for Mrs. Moore; 6-3 the same way in the seminar); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (7-1 for Maryland; 5-3 the same way in the seminar); *Davis v. Passman*, 442 U.S. 228 (1979) (5-4 for Shirley Davis; 7-2 in the seminar); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 531 (1980) (7-2 for Con. Ed; 7-2 in the seminar).

There is one ticklish administrative problem with such a seminar, *viz.*, who gets to be Chief Justice? Sometimes a student's physiognomy entitles him to be Chief, as in the case of Chief Justice Danny Knowles, who, looking like Taft, "marshalled" his Court to hold against Exxon and six other big oil companies in their dispute with the Maryland Legislature.

Later, when the seminar visited the Supreme Court in Washington, the group met with Mr. Justice Powell for an hour's conversation. At this stage of the proceedings, accord-

ing to Chief Justice Knowles's written account of the trip, the educational cup was overflowing: "In my opinion, the tour of the Supreme Court which you gave us on Thursday added more to my legal education than anything else I have experienced in my life. Mr. Justice Powell would, by his position, have been a thrill to meet had he not said a word. I can honestly say that his comment to me, 'You sure look like a Chief Justice,' will never be forgotten. Letter from Daniel E. Knowles, III to Paul Baier, June 6, 1978, on file in Chancellor's office, Paul M. Hebert Law Center, Louisiana State University (quoted by permission).

Professor Baier is quite convinced that this particular seminar model produces a high level of educational output in the third year of law school, when most students are otherwise quite asleep mentally.

17. A local pub whose name is not, *nota bene*, a tribute to C. C. Langdell, who, back in the 1880's, laid it down that "the library is the proper workshop for professors and students alike" RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 98 (1887), quoted in A. SUTHERLAND, THE LAW AT HARVARD 175 (1967). Nevertheless, Professor Baier and his two co-stars assembled at this location thinking of themselves as sort of twentieth century Langellians:

There were about a dozen of us who took our hash together at a boarding house on Brighton Street, and of these Langdell was the presiding genius. At table, nothing was talked but shop. Cases were put and discussed, and I have sometimes thought that from these table discussions Langdell got the germ of the idea that he later developed into the case system of instruction which has made his name famous both here and abroad.

Charles Phelps to Charles Warren, 1908, quoted in C. WARREN, II HISTORY OF THE HARVARD LAW SCHOOL 181-82 (1908).

18. *E.g.*, J. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949); W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961); H. BLACK, JR., MY FATHER: A REMEMBRANCE (1975); (G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977).

Of course, Justice Black's own extra-judicial utterances were very useful, especially, in light of the task at hand, Ed-

mond Cahn's *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962). See also H. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960) (James Madison Lecture, New York University School of Law); "Hugo Black and the Bill of Rights" (CBS News 1968); H. BLACK, A CONSTITUTIONAL FAITH (1969) (Carpentier Lecture, Columbia University School of Law).

On Justice Harlan, the group consulted THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN MARSHALL HARLAN (D. Shapiro ed. 1969); N. Dorsen, *John Marshall Harlan*, in IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2803 (L. Friedman & F. Israel eds. 1969); N. Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U.L. REV. 249 (1969); Wilkinson, *Justice John Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

Two law review articles treated Justices Black and Harlan in combination, and, as a result, were most enlightening. Professor Redlich's *Black-Harlan Dialogue* has already been mentioned. The other is Norman Dorsen's *Mr. Justice Black and Mr. Justice Harlan*, 46 N.Y.U.L. REV. 649 (1971).

19. Instead of marching through the cases in the usual manner, *viz.* to the drum of doctrine, Professor Baier's students come at a portion of the cases through the eyes of particular justices. In other words, Hugo Black and John Marshall Harlan have a place on the syllabus; they are a formal part of the course.

20. Before the tape is shown in class, students are assigned a collection of excerpts from the opinions of Justices Black and Harlan, including: *Griffin v. Illinois*, 351 U.S. 12 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *In re Winship*, 397 U.S. 351 (1970); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Katz v. United States*, 389 U.S. 347 (1967); *Boddie v. Connecticut*, 401 U.S. 371 (1977); *Scales v. United States*, 367 U.S. 203 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *Baird v. State Bar of Arizona*, 401 U.S. 23 (1971); *New York Times Co. v. United States*, 403 U.S. 713 (1971). After the tape is shown, students are given a transcript of the interview for further study and for review purposes.

21. By significant learning, I mean learning which is more

than an accumulation of facts. It is learning which makes a difference in the individual's behavior, in the course of action he chooses in the future, in his attitudes and in his personality. It is a pervasive learning which is not just an accretion of knowledge, but which interpenetrates with every portion of his existence.

C. ROGERS, ON BECOMING A PERSON 280 (1961), quoted in McDowell, *The Dilemma of a (Law) Teacher*, 5 B.U.L. REV. 247, 253 (1972).

22. Compare Hugo Black's own words, in his public interview with Professor Edmond Cahn:

So we have a written Constitution. What good is it? What good is it if as some judges say, all it means is: "Government, you can still do this unless it is so bad that it shocks the conscience of the judges." It does not say that to me. We have certain provisions in the Constitution which say "Thou shalt not." They do not say, "You can do this unless it offends the sense of decency of the English-speaking world." They do not say that. They do not say, "you can go ahead and do thus unless it is offensive to the universal sense of decency." If they did, they would say virtually nothing. There would be no definite, binding place, no specific prohibition, if that were all it said.

Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U.L. REV. 549, 561 (1962).

23. The exact quotation, as John Marshall laid down in *M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819), is a trifle different: "[W]e must never forget," said the Great Chief Justice (not "we must always remember"), "that it is a *constitution* we are expounding," an admonition that Professor Frankfurter considered "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." F. FRANKFURTER, *John Marshall and the Judicial Function* (1955), in *FELIX FRANKFURTER ON THE SUPREME COURT* 534 (P. Kurland ed. 1970).

24. 381 U.S. 479 (1965).

25. A basic principle of separation of powers that young Hugo Black heard espoused by his teachers at the University of Alabama School of Law back in 1906: "Working with Walker's AMERICAN LAW and other textbooks, Judge Thorton and Judge Sommerville helped my classmates and me to

learn the principles of the law as it then existed. They taught us, as I recall, that legislators not judges should make the law." H. Black, *Reminiscences*, 18 Ala. L. REV. 3, 10 (1965). And some sixty years later, when it was Justice Black's turn to teach law students a thing or two, he repeated the same fundamental point, putting it this way in his 1968 Carpentier Lectures at Columbia University School of Law:

[T]here is a tendency now among some to look to the judiciary to make all the major policy decisions of our society under the guise of determining constitutionality. The belief is that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches of the government. To the people who have such faith in our nine justices, I say that I have known a different court from the one today. What has occurred may occur again. I would much prefer to put my faith in the people and their elected representatives to choose the proper policies for our government to follow, leaving to the courts questions of constitutional interpretation and enforcement.

H. BLACK, A CONSTITUTIONAL FAITH 11 (1969).

26. 332 U.S. 46 (1947)

27. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights": *The Original Understanding*, 2 STAN L. REV. 5, 139 (1949): "In his contention that Section I [of the Fourteenth Amendment] was intended and understood to impose Amendments I to VIII upon the states, the record of history is overwhelmingly against [Justice Black]."

28. "I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my Adamson dissent." *Duncan v. Louisiana*, 391 U.S. 145, 165 (1965) (Black J., concurring).

In his dissenting opinion in *In re Winship*, 397 U.S. 358, 383 (1970), Justice Black again dismissed Fairman's article out of hand, saying:

Mr. Justice Harlan continues to insist that uncontroverted scholarly research shows that the Fourteenth Amendment did *not* incorporate the Bill of Rights as limitations on the States I cannot understand that conclusion. Mr. Fairman, in the article repeatedly cited by Mr. Justice Harlan, surveys the legislative history and concludes that it is his opinion that the

amendment did not incorporate the Bill of Rights. Mr. Flack, in at least an equally "scholarly" writing, surveys substantially the same documents relied upon by Mr. Fairman and concludes that a prime objective of Congress in proposing the adoption of the Fourteenth Amendment was "[t]o make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States." . . . It is, of course, significant that since the adoption of the Fourteenth Amendment this Court has held almost all the provisions of the Bill of Rights applicable to the States . . . To me this history indicates that in the end Mr. Flack's thesis has fared much better than Mr. Fairman's "uncontroverted" scholarship.

397 U.S. at 383 n. 11 (citations omitted).

29. In a radio address delivered in 1937, Senator Black attacked the Court's "judicial tinkering with the Constitution" and he expressed his dismay "at the Supreme Court's use of reasonableness through the Due Process Clause to paralyze legislative action to cure pressing social and economic problems." See H. BLACK, *A CONSTITUTIONAL FAITH* 26 (1969). Hearing this radio address would doubtless vivify Mr. Justice Black's opinion for the Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963), which all too often remains buried in the ink casket of the casebook. Cf. O. W. HOLMES, *The Use of Law Schools* (1886), in *OCCASIONAL SPEECHES* 34, 43 ("Does not a man remember a concrete instance more vividly than . . . when you merely see it lying dead before you on the printed page?").

30. This question, if not the whole approach of Professor Baier's "Pedagogy of Persons," see Part VI *infra*, is a response to Roger Cramton's call for a few professional paradigms in the classroom: "[T]he young professional hungers for mature professionals on which he can model his conduct." Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J. LEGAL EDUC.* 247, 259 (1978). The idea, of course, is hardly new to legal education. As far back as 1817, David Hoffman, in his *A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSIONAL GENERALLY*, advised the law student "to seek his lights chiefly in his own heart and understanding, and from the numerous examples, for weal and for wo, afforded him in the lives of others." *Id.* at 635 (2d ed. Baltimore 1836).

31. I am of the view that if I were to name one piece of

writing on American Constitutional Law—a silly test maybe—I would pick an essay by James Bradley Thayer in the Harvard Law Review, consisting of 26 pages, published in October, 1893 [7 HARV. L. REV. 17], called ‘The origin and Scope of the American Doctrine of Constitutional Law’ which he read at the Congress on Jurisprudence and Law Reform in Chicago on August 9, 1893. I would pick that essay written 62 years ago. Why would I do that? Because from my point of view it’s the greatest guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions.

F. FRANKFURTER, FELIX FRANKFURTER REMINISCES 299-300 (H. Phillips ed. 1960).

For a nifty piece of detective work tracking the power of Thayer’s pen, see Wallace Mendelson’s *The Influence of James Bradley Thayer Upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978).

32. Following the wise admonition of Holmes, J., dissenting the Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904):

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

33. Rooting through the Frankfurter Papers at the Library of Congress (with great care, of course) is an adventure that Mr. Baier likes to share with his Supreme Court seminar students, who accompany him to Washington, D.C., at the conclusion of classes for a week of on-location learning. [Cf. C. C. Langdell: “I wish to emphasize the fact that a teacher of law should be a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before.” *Speech at the Quarter-Millennial Celebration of Harvard University*, at Cambridge, Nov. 5, 1886, in *Harvard Celebration Speeches*, 3 L.Q. REV. 123, 124 (1887).] And on one of these annual forays into the Frankfurter Papers the group turned up a 30-page, type-written nugget captioned *Conversations Between L.D.B. and F.F.*,

which records what Justice Louis Dembitz Brandeis and Professor Felix Frankfurter had to say to one another about Court business from 1921 to 1935. This illuminating document is a diary of sorts, and, surprisingly, Joseph Lash makes no mention of it in his eye-opening book *FROM THE DIARIES OF FELIX FRANKFURTER* (1975). Doubtless Professor Frankfurter made good use of the information he got from Justice Brandeis in his teaching at Harvard, and the *Conversations* memo is assigned reading in the second year of instruction in constitutional law in Mr. Baier's course at LSU. The memorandum is new intellectual capital, unmasking decisionmaking in the Supreme Court [*Cf. J. NOONAN, JR., PERSONS AND MASKS OF THE LAW* (1976)], and exposing the roots of judgment in constitutional cases. And these *Conversations* conclude with a grave admonition that bears repeating every so often: "The work of a judge should never be done in a hurry." *Conversations Between L.D.B. and F.F.* at 30, Frankfurter Papers, Library of Congress, Box 224, Folder 00401.

Compare *Kinsella v. Krueger*, 351 U.S. 470, 485 (1956) (Reservation of Frankfurter, J.):

Time is required not only for the primary task of analyzing in detail the materials on which the Court relies. It is equally required for adequate reflection upon the meaning of these materials and their bearing on the issues now before the Court. Reflection is a slow process. Wisdom, like good wine, requires maturing.

Moreover, the judgments of this Court are collective judgments. They are neither solo performances nor debates between two sides, each of which has its mind quickly made up and then closed. The judgments of this Court presuppose full consideration and reconsideration by all of the reasoned views of each. Without adequate study there cannot be adequate deliberation and discussion. And without these, there cannot be that full interchange of minds which is indispensable to wise decision and its persuasive formulation.

34. *New York Times Co. v. United States*, 403 U.S. 713, 752 (Harlan, J. dissenting).

35. 367 U.S. 497, 523 (Harlan, J. dissenting).

36. 431 U.S. 494, 501-02 (1977).

37. Mrs. Elizabeth S. Black, the Justice's wife for fourteen years and a woman who, in Holmes's expression "added gold to the sunset," visited the LSU Law Center and saw the

Black-Harlan television production for the first time in the company of Ray Maher, who portrayed her husband in the show, and other students and faculty. Mrs. Black told the group of the close personal relationship that existed between Justices Black and Harlan despite their strong intellectual differences on such matters as the meaning of due process and the scope of the First Amendment. During her stay at LSU, Mrs. Black added sparkle to Professor Baier's class by guest-lecturing on the *Barnwell Brothers* and *Arizona Train Length* cases [South C. Hwy. Dept. v. Barnwell Bros., 303 U.S. 177 (1938); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)], telling the students how "Hugo really hated that word 'reasonableness.'" Compare G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 188 (1977) ("[I]n South Carolina Highway Department v. Barnwell Brothers, Stone upheld a South Carolina statute limiting the size of trucks—even those in interstate travel—in an opinion from which he removed one small but critically significant adverb at Black's behest. For after the excision the challenged law was validated as 'adapted to the exercise of an acknowledged legislative power,' and not as one 'reasonably' adapted."). Needless to say, when asked, "What one class made the greatest impression on you and why?"—Question 17 on the Baier Course Evaluation Form—most students cited Mrs. Black's visit. "Her appearance impressed upon me the fact that Supreme Court justices are human," said one of the students. Another said "[t]he atmosphere was so intense one got caught up in learning." *Course Evaluations, Constitutional Law I*, LSU Law Center, Mr. Baier, Spring 1980, on file in Chancellor's Office, Paul M. Hebert Law Center, Louisiana State University.

38. Ray Maher and Miles Tilly were asked to critique their experiences in writing, and the quotations that follow are taken *verbatim ac literatim* from their reports, on file in Chancellor's Office, Paul M. Hebert Law Center, Louisiana State University.

39. Of course, "learning the law" includes more than a mere accumulation of facts. Real learning affects one's attitudes, one's thought patterns, the course of action one chooses in the future. Not surprisingly, after stepping up to the Supreme Court of the United States in his third year of law school (see note 16 *supra*), Mr. Justice Maher dissented when the LSU Supreme Court decided *Davis v. Passman* in Ms. Da-

vis's favor. Doubtless, Hugo Black would have done the same thing, following his dissenting opinion in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 427, 430 (1971) ("the business of the judiciary is to interpret the laws and not to make them").

40. On this atmospheric point, compare what Mr. Baier had to say in his *Address before the National Archives Conference on Law in American Society: New Historical Perspectives and Resources*, Wash., D.C., Sept. 21, 1978, *supra* note 3, at 33 ("Learning that is fun is easy. Learning that is tedious is empty.") with Dean Francis Allen's views in his *Mr. Justice Holmes and "The Life of the Mind,"* 52 B.U.L. REV. 229, 234 (1972) [reprinted in F. ALLEN, *INTELLECT AND EDUCATION* 1, 7 (1979)] ("One of the modern ideas most subversive to 'the life of the mind' is the notion the 'learning is fun.' It would be closer to the mark to say that 'learning is pain.'").

41. In 1959, James Casner and Benjamin Kaplan of Harvard characterized "sameness of method through the three years" as "a besetting sin of legal education" and deplored the fact that "the image of the first year repeats itself later with only a certain blurring of outline," without "enough step-up or progression." A. J. CASNER & B. KAPLAN, *LAW SCHOOLS LOOK AHEAD* 103 (1959), quoted in W. Gellhorn, *The Second and Third Years of Law Study*, 17 J. LEGAL EDUC. 1, 5 (1964). In 1974 Professor Boyer and Dean Cramton repeated the charge:

The sameness in course content and teaching methods throughout the law school experience, together with the absence of an orderly progression in the development of skills and substantive knowledge, have probably contributed to the frequently-noted boredom and withdrawal of some second—and third—year law students.

Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 230 (1974). And Harvard's President Bok, a former law dean himself, has said the same thing. See text accompanying note 10 *supra*.

Obviously, Ray Maher is in good company in mentioning the monotony of law school. More important, he was a participant in a concrete effort to do something, and not just to complain, about the monotony problem in legal education. Cf. John Chipman Gray, *Methods of Legal Education, Part IV*, 1

YALE L. J. 159, 161 (1892): "A Man who has much to say about 'systems' is sailing perilously near the shoals of cant. Not by their systems but by their fruits shall ye know them."

42. An important lesson, to be sure, for students of constitutional law to learn and for teachers of the subject to teach. Compare P. FREUND, A. SUTHERLAND, M.D. HOWE, & E. BROWN, *Preface to First Edition* (1954), CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS at xxvi (4th ed. 1977): "Above all, the topical arrangement reflects a conviction that present-day students (doubtless differing from their predecessors of a generation ago) have greater need to be reminded that constitutional issues may yield to objective analysis and resolution than to be reinforced in the impression that the subject is an undisciplined expression of personalities."

43. Compare Felix Frankfurter's comment, in his letter to Fairman, that "The work of the Supreme Court is the history of relatively few personalities To understand what manner of men they were is crucial to an understanding of the Court." Felix Frankfurter to Charles Fairman, Dec. 27, 1948, quoted in *The Writing of Judicial Biography: A Symposium*, 24 IND. L. J. 363, 367 (1949).

44. The expression "Mr. Langdell's method" is Holmes's, in his *Oration on the Use of Law Schools and Their Methods of Instruction*, before the Harvard Law School Association, at Cambridge, Nov. 5, 1886, in OCCASIONAL SPEECHES 34, 43.

One wonders what O. W. HOLMES would think of Mr. Baier's method. Perhaps there is a clue in what Holmes had to say at the unveiling of memorial tablets at Ipswich, in 1902:

I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.

O. W. HOLMES, *Ipswich*, in OCCASIONAL SPEECHES 16.

45. Lecturer in Law, 1869, 1871-73; Story Professor of Law 1875-83; Royall Professor of Law 1883-1913. Thus Gray was both the first and last of the great teachers who surrounded Langdell. After some forty years of teaching and shortly before the end, Gray told Williston: "I cannot imagine any more delightful work than teaching intelligent young men things which you know and which they do not know but desire

to know." Quoted in Williston, *John Chipman Gray*, 28 HARV. L. REV. 544, 547 (1915). "His resplendent ties were the glory of the School." *John Chipman Gray*, in THE CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917, at 209 (1918). Much more important, in terms of identifying Gray as a great teacher, is his farewell letter to the Class of 1913 in Property III [reproduced in facsimile in THE CENTENNIAL HISTORY, opposite 213], which includes this telling line: "I have always felt that on both sides it was not an attempt to show how much we know, or how smart we were, but that we were fellow-students trying to get to the bottom of a difficult subject."

46. 22 AM. L. REV. 756 (1888). From the article it appears that Gray was decidedly on the side of cases, not treatises, in the Great War for Pedagogical Supremacy that raged after Langdell published his CASES ON THE LAW OF CONTRACTS in 1871. For details of the fight, see J. REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914). Gray, following Holmes ["Why, look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle?" *The Use of Law Schools* (1886), in OCCASIONAL SPEECHES 34, 43], favored the case method because: "The case gives form and substance to legal doctrine, it arrests the attention, it calls forth the reasoning powers, it implants in the memory the principles involved." Gray, *Cases and Treatises*, 22 AM. L. REV. at 764. To his everlasting credit, Gray was not closed-minded on the matter of teaching methods in the law schools. Nor did he foreclose the possibility of improvements in the future. "All I contend is that the method of study by cases is the best form of the legal education that has yet been discovered." *Id.* at 763.

47. 22 AM. L. REV. at 762-63.

48. The expression "necromancer's art" is Learned Hand's, in his *Address to the Harvard Alumni Association* (1936), in THE SPIRIT OF LIBERTY 111, 113 (I. Dillard ed. 3d. 1960).

Quite recently, in his 1979 Isaac Ray Awards Lectures, *Some Psychological Forces in the Ebb and Flow of Professional Status: Implications for Training and Regulation*, delivered at Boalt Hall, Berkeley, Professor Andrew Watson of the University of Michigan called for the archiving, on video tape, of the great lawyers and judges of our time. "Would it

not be wonderful if we had some well conducted interviews with Justices Holmes, Cardozo, Brandeis, and Frankfurter? Would it not be exciting for law students to listen and watch the judicial thought processes of the brothers Hand, or better still, to see them work?" Watson, *The Current Status of Lawyer Professionals: Some Implications for Legal Education*, Isaac Ray Awards Lectures, Part III, in 24 LAW QUAD. NOTES 17, 24 (1980). No doubt, most students would welcome these video tapes to class, and for reasons graphically recorded in Scott Turow's diary of the first year at Harvard Law:

But students still see the operation of the law only in a second-hand and thirdhand way, as it is revealed in carefully prepared case reports. Learning to think like a lawyer should involve more than the mastery of an important but abstract mental skill. Were I king of the universe—or dean of the Harvard Law School—I would supplement case reading with use of other devices—film, drama, informal narrative, actual client contact like that provided in the upper-year clinical courses—seeking to cultivate a sensitivity to the immediate human context in which the law so forcefully intervenes.

S. TUROW, ONE-L 297-98 (1977). Precisely.

49. Compare Frankfurter's teaching, as described by Erwin Griswold, who took F.F.'s Federal Jurisdiction seminar at Harvard:

It was an opportunity for Professor Frankfurter to roam; and this he did, leading his students through many episodes of the Supreme Court in history, and into problems in its structure and place in our governmental system But beyond this was a broad introduction not only to the Supreme Court as an institution but also to many of its Justices as persons. Marshall, Story, Taney, Field, Bradley, Waite, Miller, Moody—all of these and others of the past came alive and took their places in the stream of thought which is the business of the Supreme Court. And the contemporary Justices—Taft, Holmes, Brandeis, Butler, Stone and the rest, became real personalities—intellectual personalities—with whom one might agree or differ, but for whom one acquired some measure of understanding and respect.

Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 8-9 (1962).

And consider, in this connection, what Archibald Cox had to say when he wrapped up his review (92 HARV. L. REV. 1170,

1182-83) of Joel Seligman's *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* (1978):

In the end, young men and women do not set their compasses solely—or even chiefly—by courses of formal instruction Much used to be done by portraying great figures in Anglo-American Law: Coke, Erskine, Marshall, Story, Evarts, Rufus Choate, Clarence Darrow, Holmes and Brandeis. The list goes on and on. Today one would add Robert H. Jackson, Hugo Black, Earl Warren, Felix Frankfurter, Thurgood Marshall, and many others. I cannot speak for my colleagues, but I have failed to present the examples that my classmates and I admired as Austin Scott, Felix Frankfurter, and Edmund Morgan presented them to us. The mood has seemed against it. History and heroes seem to command little attention from the “now” generation. I would like to have the opportunity back.

Those who follow the dry stuff of jurisprudence will recognize the link between Baier's call for a Pedagogy of Persons and John Noonan's 1972 Holmes Lecture at Harvard, which focused on “the central place of the human person in any account of the law.” Yet, as Noonan observed:

Little or no attention is given to the persons in whose minds and in whose interaction the rules have lived—to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it. No key reporting system is keyed to counsel. No encyclopedia is arranged in terms of judges. The prime teaching tools, the casebooks, have been composed to shed light on the life of a rule, not upon the parts of the participants in the process. Those in the classic mold, with snippets of appellate opinions arranged to display variations and contradictions of a principle, carry the indifference to the participants to the maximum.

J. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* viii, 6-7 (1976).

Professor Noonan was not speaking specifically about constitutional law or its instruction in the law schools. But it should be obvious that Baier's work involves an attempt to apply a similar jurisprudence of persons to the challenge of teaching Thayer's subject.