

Charity, Philanthropy and Law School Fundraising: the Emergence and the Failure, 1880-1930

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Since the founding of the first colonial college in 1636, leaders in American higher education have sought funds for their institutions by means such as soliciting wealthy individuals, conducting lotteries and enlisting subscribers. But full-fledged campaigns—nationally organized and conducted by paid staff over several years—first appeared in the late 1910s.¹ In legal education, the first effort to mount such a campaign developed in three stages over the half century between 1880 and 1930. Not previously studied, this evolution occurred at Harvard Law School (HLS), the wealthiest and preeminent school during this period.²

In 1882, recognizing that legal education was “*The Worst Endowed of All the Great Departments of Professional Education*,” HLS mounted an informal drive to raise money.³ Supported by the president and rationalized by the dean, the six-month effort was organized and led by one professor who recruited a small network of alumni and acquaintances to help. Then, in observance of its centennial in 1917, the school planned and conducted the first formal campaign in legal education from 1915 to 1920. Finally, between 1925 and 1927 it mounted a more elaborate campaign, headquartered in New York City and organized into 18 regions, which sought to employ all the strategies of successful university drives.

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1. Scott M. Cutlip, *Fund Raising in the United States 169-74* (Rutgers Univ. Press 1965).
2. The second stage is examined in detail in Bruce A. Kimball, *The Disastrous First Fundraising Campaign in Legal Education: The Harvard Law School Centennial, 1914-1920*, *J. of the Gilded Age and Progressive Era* (Nov. 2013).
3. John O. Sargent et al., *To the Friends of the Law Department of Harvard University* (April 1882) (Printed broadside, on file with the Harvard Law School Library Special Collections).

Each of these three initial attempts at fundraising in legal education failed to reach, or even approach, its goal. The hope in 1882 was to raise as much as \$80,000 and about \$47,000 was pledged. The goal in the centennial campaign was \$1 million, and less than \$250,000 was subscribed. In the mid-1920s the goal was \$5 million and about \$2,250,000 was pledged, including a foundation grant of \$750,000. Various circumstances and tactical problems contributed to failure in each case, but it also seemed true that “no amount of committees or effort is going to make contributing to a law school popular,” as the chairman of the centennial campaign opined.⁴ The fundamental and persistent problem was the lack of a persuasive rationale.

Why should anyone donate money to a law school? Persuasive appeals had to fit the meaning and justification of financial benefaction in American culture and higher education. During the 1800s and early 1900s two distinct and successive ideologies guided such benefaction. Scholars have termed these “charity” and “philanthropy.” The initial efforts to mount fundraising campaigns in legal education attempted to present convincing answers in terms of those two rationales, but failed. On the one hand, donors resisted charitable giving to law students and law schools. On the other hand, professors and deans could not justify legal scholarship in philanthropic terms. They could not explain how legal research served the public, especially in the terms of natural science that suited medical research and carried the greatest weight among philanthropists.

This history matters because failure in fundraising prevents building endowment and results in dependence on tuition, which forces schools to maintain high enrollments and charge high tuition. When the need for tuition leads to overcrowding, schools expand their facilities and incur debt, requiring more revenue and tuition. Hence, Harvard President Charles W. Eliot warned in the early 1870s about “this deplorable dependence [on tuition] which debases so many of the professional schools of this country.”⁵

Charity and Philanthropy

The history of financial benefaction in the United States, particularly concerning colleges and universities, has received significant scholarly attention over the past century.⁶ According to some authorities, the major shift in American benefaction occurred in the early 20th century when

4. Letter from James Byrne to Abbott L. Lowell (Mar. 3, 1917), in President Abbott Lawrence Lowell Records, at box 84 (1909-33) (on file with Harvard Univ. Archives).

5. Charles W. Eliot, Annual Report of the President of Harvard College 1871-72, at 21-22.

6. Jesse B. Sears, *Philanthropy in the History of American Higher Education* (Gov. Printing Office 1922); Eduard C. Lindeman, *Wealth and Culture* (Harcourt Brace 1936); Ernest Hollis, *Philanthropic Foundations and Higher Education* (Columbia Univ. Press 1938); Merle Curti & Roderick Nash, *Philanthropy in the Shaping of American Higher Education* (Rutgers Univ. Press 1965); Cutlip, *supra* note 1; Robert H. Bremner, *American Philanthropy* (Univ. of Chicago Press, 2d ed. 1988); Olivier Zunz, *Philanthropy in America: A History* (Princeton Univ. Press 2011).

charitable giving “transcend[ed] the relationship of neighbor to neighbor” and became “a nationally organized phenomenon” guided by “a new profession” of fundraising.⁷ This shift from an amateur and haphazard effort to a professionally run enterprise that systematically canvassed the public has been termed a transition from “charity” to “philanthropy.”⁸ But the more fundamental transition was identified by historians Barry Karl and Stanley Katz to mean that financial benefaction in the United States had been guided largely by two distinct and successive ideologies: charity and philanthropy.⁹ While this shift appeared in various domains of benefaction, it was given particular force by the policies of the enormous foundations that were created in the 1900s and 1910s.¹⁰ Scholars since the 1980s have increasingly invoked this “much-heralded shift.”¹¹

Rooted in the American Protestant missionary impulse that developed from the Puritanism of colonial New England,¹² the ideology of charity is founded in the sentiment of compassion or what some interpret as the wish “to impose a vision of the good upon others in need.”¹³ By either motive, charity is manifested in a personal response to problems of those in need and usually is expressed through giving to individuals. Thus, charity “engages individuals in concrete, direct acts of compassion and connections to other people”¹⁴ and attempts to alleviate “the immediate effects of . . . poverty, sickness and the various gross forms of social disorder.”¹⁵ As a result, charitable benefactions are generally personal, small scale and palliative, temporarily satisfying the needs of individuals known to the benefactor.¹⁶

7. John Price Jones, *The American Giver* i-ii, 13-14 (Inter-River Press 1954).
8. Cutlip, *supra* note 1, at 202; Bremner, *supra* note 6, at 3, 283; Zunz, *supra* note 6, at 2, 3, 45-75.
9. Barry D. Karl & Stanley N. Katz, *The American Private Philanthropic Foundation and the Public Sphere, 1890-1930*, 19 *Minerva* 236, 236-71 (1981) [hereinafter *American*].
10. *Id.* at 243-4; Barry D. Karl & Stanley N. Katz, *Foundations and the Ruling Class Elites*, 116 *Daedalus* 1, 5 (1987) [hereinafter *Foundations*].
11. Zunz, *supra* note 6, at 10. See Lawrence J. Friedman, *Philanthropy in America: Historicism and Its Discontents*, in *Charity, Philanthropy, and Civility in American History* 6-10 (Mark D. McGarvie & Lawrence J. Friedman, eds., Cambridge Univ. Press 2002) [hereinafter *Philanthropy in America: Historicism*]; Dwight F. Burlingame, 3 *Philanthropy in America: A Comprehensive Historical Encyclopedia* 774 (ABC-CLIO 2004); Lawrence M. Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* 149 (Stanford Univ. Press 2009).
12. Amanda Porterfield, *Protestant Missionaries: Pioneers of American Philanthropy*, in *Charity, Philanthropy, and Civility in American History*, *supra* note 11, at 51.
13. *Id.* at 50. See Burlingame, *supra* note 11, at v, 1, xxiv; Bremner, *supra* note 6, at 5-41.
14. Robert A. Gross, *Giving in America: From Charity to Philanthropy*, in *Charity, Philanthropy, and Civility in American History*, *supra* note 11, at 30.
15. *American*, *supra* note 9, at 243.
16. *Philanthropy in America: Historicism*, *supra* note 11, at 6-7. See Cutlip, *supra* note 1, at 3.

Furthermore, charity implies that the recipients relinquish their independence and humble themselves before the giver. As the Progressive reformer Josephine Shaw Lowell observed in 1879, we cannot “be charitable to our equals.”¹⁷ Hence, the discourse of charity, even for colleges and universities, commonly employed such terms as financial “embarrassment” or “begging” for money, whether metaphorical or not. In 1910, the treasurer of Yale reported with satisfaction that “the university . . . in recent years has not borrowed in the open market any money to tide it over a temporary embarrassment.”¹⁸ A few years later, the secretary of Yale warned: “Constant personal begging on the part of a university is apt to be undignified and to lead to the public’s losing confidence in that most vital of necessities—a reputation for fearless educational independence.”¹⁹ Consequently, discretion, privacy and anonymity usually characterized charitable gifts to higher education.²⁰

While the “stigma of charity”²¹ had long been recognized as problematic, dissatisfaction with the charitable understanding of benefaction grew rapidly in industrial America.²² Prompted by that dissatisfaction, as well as the rising authority of natural science and the drive for administrative organization in many aspects of American life, the philanthropic ideology emerged during the nineteenth century. According to Karl and Katz, philanthropy entails “a more scientific and business-like”²³ and “abstract and institutional” approach to benefaction.²⁴ Emphasizing verification through reason and evidence, philanthropy consults scientific research and professional expertise for an assessment of social ills and seeks an “*orderly* or *systematic*” strategy.²⁵ Aiming to cure, rather than merely alleviate, social ills, philanthropy intends to address “the root causes of social dysfunction,” rather than symptoms,²⁶ and seeks to establish not personal relationships between donors and recipients, but intermediary institutions, such as endowed foundations, that operate

17. Josephine Shaw Lowell, *Public Relief and Private Charity* 89 (G.P. Putnam’s Sons 1884).

18. Lee McClung, *Annual Report of the Treasurer of Yale University 1908-09* 11 (1909).

19. Anson Phelps Stokes Jr., *Annual Report of the Secretary of Yale University 1912-13* 45 (1913).

20. William Lawrence, *Memories of A Happy Life* 220 (Houghton Mifflin 1926); Horace Coon, *Columbia, Colossus on the Hudson* 93-115 (Dutton 1947); Robert A. McCaughey, *Stand, Columbia: A History of Columbia University in the City of New York, 1754-2004*, at 301-3 (Columbia Univ. Press 2003).

21. George Gordon, *A Free University*, *N.Y. Times* July 26, 1912, at 8. See Carl Smith Joslyn, *What Can a Man Afford?*, 11 *Amer. Econ. Rev.* 97, 4, 118 (Supp. 2, 1921).

22. Benjamin Soskis, *The Problem of Charity in Industrial America, 1873-1915* (Ph.D. diss., Columbia Univ., 2010); Zunz, *supra* note 6, at 17-18.

23. *American*, *supra* note 9, at 243-4.

24. Gross, *supra* note 14, at 31. See also *Philanthropy in America: Historicism*, *supra* note 11, at 7-8.

25. Judith Sealander, *Curing Evils at their Source: The Arrival of Scientific Giving*, in *Charity, Philanthropy, and Civility in American History*, *supra* note 11, at 218.

26. *American*, *supra* note 9, at 243-4. See Gross, *supra* note 14, at 39; Sealander, *supra* note 25, at 220-1.

according to policy guidelines.²⁷ The philanthropic detachment necessary for the assessment and correction of social problems contrasts with the direct and often close relationship between donors and recipients that charity entails.

Finally, “scientific and businesslike”²⁸ philanthropy prizes effectiveness, economy, and efficiency. Thus, the dean of Yale Medical School argued in 1904: “The general claim that medicine should receive the assistance needed . . . for instruction and researches [sic] [is] of the strongest character in view of the beneficent results . . . from the laboratory and hospital researches.”²⁹ In addition, philanthropy expects its dollars to be used well, as the Yale president said of his medical school: “I know of no place in which a man desiring to see visible returns from a gift could be assured of better economy in its use and more beneficent effect in practice.”³⁰ Consequently, “medicine is a good field in which to invest the large amounts necessary to thoroughly equip a school.”³¹ Furthermore, philanthropy requires “efficient organization” employing the “functional specialization and centralized coordination and administration that characterized the business world.”³² These philanthropic attributes were famously summed up by John D. Rockefeller as “the business of benevolence.”³³

Many historians today concur with Karl and Katz that the ideology of benefaction in the United States gradually shifted from charity to philanthropy, noting that “the word ‘charity’ was rapidly disappearing from the public’s lexicon” near the beginning of the 20th century³⁴ because of “repugnance toward ‘charity in its broad and popular sense.’”³⁵ While differing on the timing of the transition, these scholars agree that the eclipse was completed by the 1910s, when industrial capitalists endowed new foundations dedicated to funding philanthropic approaches to social betterment.³⁶ To be sure, the

27. Gross, *supra* note 14, at 44; Sealander, *supra* note 25, at 223; Foundations, *supra* note 10, at 1, 5.

28. Roy Lubove, *The Professional Altruist: The Emergence of Social Work As a Career, 1180-1930* 7 (Harvard Univ. Press 1965).

29. Herbert E. Smith, *Annual Report of the Dean of Yale Medical School 1903-04* 147 (Yale Univ. 1904).

30. Arthur T. Hadley, *Annual Report of the President of Yale University 1902-03* 16 (Yale Univ. 1903).

31. Herbert E. Smith, *Annual Report of the Dean of Yale Medical School 1908-09* 198-9 (Yale Univ. 1909).

32. Lubove, *supra* note 28, at 6.

33. John D. Rockefeller, *Random Reminiscences of Men and Events 184* (Doubleday, Page & Co. 1909).

34. Cutlip, *supra* note 1, at 203-4. Compare Joslyn, *supra* note 21, at 118; Donileen R. Loseke, ‘The Whole Spirit of Modern Philanthropy’: The Construction of the Idea of Charity, 1912-1992, 44 *Social Problems* 425, 425-444 (1997).

35. Joslyn, *supra* note 21, at 118.

36. American, *supra* note 9, at 243-4; Foundations, *supra* note 10, at 5; Sealander, *supra* note 25, at 218; Cutlip, *supra* note 1, at 203-4; Zunz, *supra* note 6, at 2.

traditional charitable rationale persevered in many sectors in American culture and the two ideologies were often entwined.³⁷ But philanthropy triumphed broadly in American benefaction and the ideological shift also spread into American higher education during the late 19th century and early 20th century when universities began to compete for funding and to focus upon amassing endowment.³⁸ The preeminent and wealthiest law school in the nation seemed perfectly positioned to enter that competition and succeed.

1882 Campaign: The Limits of Charity

In 1881, significant gifts came to Harvard Law School. President Charles W. Eliot announced the need for a new building and within a few weeks “a friend of the university” privately “informed the president that he desired to . . . devote \$100,000 to the purpose,” while remaining anonymous.³⁹ Then in the fall of 1881, the opportunity to appoint Oliver Wendell Holmes, Jr., to the faculty prompted alumnus Louis D. Brandeis and Professor James B. Thayer to quietly approach another wealthy Bostonian, who agreed to contribute \$90,000 anonymously to endow a professorship for Holmes.⁴⁰ Conforming to the charitable tradition that gifts should arise from personal relations and avoid attracting attention, such discreet negotiations were customary among wealthy benefactors in Boston and the result inspired Thayer to expand the range and the rationale of the solicitation.

Thayer began writing personal requests to alumni around the country⁴¹ and, with Eliot’s help, arranged for Boston newspapers to print stories about the school’s need for endowment for scholarships, professorships and the library.⁴² Dean C. C. Langdell also issued an extensive analysis and rationale for giving to law schools in his annual report in early January 1882. Although the library was mentioned most often by Thayer, the ensuing informal drive announced several purposes and Langdell’s nine-page statement aimed primarily at justifying gifts for scholarships.⁴³ Eliot summarized Langdell’s reasoning in his accompanying annual report and referred the reader to the dean’s statement

37. See *Charity Old and New*, N.Y. Times, Dec. 11, 1917.
38. Bruce A. Kimball & Benjamin A. Johnson, *The Discovery of Endowment in American Higher Education, 1900-1930*, 114 *Teachers College Record* 1, 1-32 (2012); Roger L. Geiger, *To Advance Knowledge: The Growth of American Research Universities, 1900-1940* 58-93 (Oxford Univ. Press 1986).
39. Charles W. Eliot, *Annual Report of the President of Harvard College 1880-81* 26 (1881).
40. James B. Thayer, *Memoranda Books*, v. 3, at 103-07, [Jan. 1882] (on file with Harvard Law School Library Special Collections).
41. *Id.* at 108. See James B. Thayer Papers at boxes 19, 20 (1881-82) (on file with Harvard Law School Library, Special Collections).
42. *The Law School at Cambridge*, *Boston Advertiser*, Jan. 18, 1882; *The Law School at Cambridge*, *Boston Evening Post*, Jan. 24, 1882; letter from C. W. Ernst to Charles W. Eliot (Jan. 14, 1882) (on file with Harvard Univ. Archives); letter from Charles W. Eliot to James B. Thayer (Jan. 14, 1882) (on file with Harvard Univ. Archives).
43. C. C. Langdell, *Annual Report of the Dean of Harvard Law School 1880-81* 78-86 (1881).

for “full discussion of this subject and of the true conception of professional education in a university.”⁴⁴

Langdell began by observing that in the United States “money has seldom been given . . . for the promotion of legal or medical education” and he located the root cause in the preference of Oxford and Cambridge Universities for “academic,” or liberal arts, education and their depreciation of professional education. American colleges had blindly followed this tradition, according to Langdell, without recognizing that England provided financial support for legal education in various indirect ways. Having identified and rebutted this historical cause, the dean then turned to “the most plausible arguments against the claims of professional, and especially legal, education to pecuniary encouragement and support.”⁴⁵ He partly adopted and partly conceded certain charitable points, while broaching philanthropic arguments in his rebuttal. Langdell’s statement thus reflects an early phase of the ideological shift discussed above.

First, although Langdell argued generally for gifts for legal education, he did not treat law schools as the recipients. Instead, he analyzed support for legal education in terms of students who benefit in the form of scholarships. Thus, he adopted the terms of charity as his unit of analysis. Next, Langdell identified two central charitable objections to providing scholarships. On the one hand, law students do not deserve gifts because they pay tuition “for their own advancement in life.” On the other hand, law students who are college graduates are not really in need because “a young man who has received a good college education ought to be able to make his own way.” In either case, such students do not deserve charity because they do not incur a debt from which they need to be rescued, according to this rationale. Any debt incurred for tuition is an investment or a debt they can afford. To the former objection, Langdell never replied; to the latter, he argued that Harvard’s new higher standard of legal education was more expensive and required more work and so a college graduate could not reasonably be expected to find a job to pay for it.⁴⁶ In this fashion, he partly adopted, partly conceded and partly rebutted points framed in the traditional ideology of charity.

In addition, Langdell attempted to invoke the inchoate philanthropic ideology by defending legal scholarships for their broad, long-term benefit to the public. First, providing scholarships would allow law schools to raise academic standards, alleviating the problem “that there are too many lawyers already and that the interest of the public lies in reducing their number.” Second, providing scholarships would allow students to study longer and more intensively and develop a more sophisticated understanding of law “with which the most vital interests of the public and the state are closely bound

44. Charles W. Eliot, Annual Report of the President of Harvard College 1881-82 17 (1882).

45. Langdell, Annual Report of the Dean of Harvard Law School 1880-81, *supra* note 43, at 79, 82.

46. *Id.* at 82-83.

up.” Here Langdell took for granted that stronger legal training and expertise provide greater social benefit. Third, beyond reducing the number of lawyers and increasing their expertise, scholarships would improve the quality of those entering the bar “by raising the standard of legal attainments, education and character in the men [from] whom the profession is recruited.”⁴⁷ Thus, the public would be served if law students and lawyers were drawn from a better class of people.

Nevertheless, Langdell did not expect these arguments about public benefit to convince lay benefactors, commensurate with the undeveloped nature of philanthropic ideology. “Perhaps no one but a member of the legal profession can be expected to take sufficient interest in the subject.” Hence, he concluded that lawyers can aid the public by improving their own profession through endowing legal scholarships. “By devoting money to such an object, one can serve the public in the most attractive of all ways, namely, by conferring signal benefits upon a perpetual succession of worthy individuals.”⁴⁸ Thus, lawyers who endow legal scholarships will enjoy both a better profession and a better society.

In the weeks following Langdell’s public statement, Thayer’s drive began auspiciously. He recruited recent graduates to solicit in New York, Philadelphia, Chicago and San Francisco⁴⁹ and a total of about \$40,000 was promised by early March.⁵⁰ At that point the pace of giving slowed to a crawl. “In fact, the whole outlook seems to me rather hopeless at present,” wrote one young alumnus.⁵¹ Undeterred, Thayer composed an appeal that was signed by seven prominent alumni, printed as a two-page circular and sent to Harvard Law alumni in Boston and New York City, the two major financial centers that were expected to provide most of the contributions. The circular proclaimed that the goal “should be not less than sixty thousand dollars and might . . . be increased to eighty thousand.”⁵² Yet, over the next few months gifts only trickled in and none exceeded a few hundred dollars. When Thayer relinquished the effort during the summer, the total had reached \$47,000, and nearly 75 percent of that came from two gifts. So, the vast majority of the law

47. *Id.* at 81-83. *See id.* at 84-85.

48. *Id.* at 85.

49. Letter from John O. Sargent to James B. Thayer (Apr. 30, 1882); letter from George F. Canfield to James B. Thayer (Apr. 19, 1882); letter from J. S. Rosengarten to James B. Thayer (Apr. 24 & 27, 1882), in James B. Thayer Papers, *supra* note 41, at box 20; letter from William Thomas to James B. Thayer (Jan. 30, 1882), in James B. Thayer Papers, *supra* note 41, at box 19.

50. Thayer, Memoranda Books, *supra* note 40, at 108; letter from George Shattuck to James B. Thayer (Feb. 16, 1882); letter from Henry Villard to James B. Thayer (Mar. 11, 1882), in James B. Thayer Papers, *supra* note 41, at box 19.

51. Letter from Victor Morawetz to James B. Thayer (Mar. 27, 1882), in James B. Thayer Papers, Special Collections, Harvard Law School Library, box 20. *See* correspondence in folder.

52. Sargent, *supra* note 3. *See* letter from Victor Morawetz to James B. Thayer (Mar. 31, 1882), in James B. Thayer Papers, *supra* note 41, at box 20.

school's alumni had not contributed significantly. Several earning \$10,000 to \$20,000 annually in legal practice in New York City contributed only token amounts.⁵³

Extant testimony about the refusal to give is rare. But it appears, on the one hand, that alumni were not attuned to the philanthropic terms of Langdell's appeal, whether or not they read it. "The benefits received [by the public] are not sufficiently apparent to the unprofessional mind to interest them in the school," wrote one from Salem, Massachusetts.⁵⁴ On the other hand, the alumni most often framed their objections in terms of charity. They maintained that law students did not deserve help. "I am unable to see why . . . the means of breadwinning . . . should not be paid for by the recipient," wrote another from Boston.⁵⁵ Or the needs of law students did not move them. One recent graduate reported to Thayer that "he approached several of his friends who were men of means, but that the reception he received was positively chilling."⁵⁶ Another, visiting Chicago, "found, on coming into close contact with the old gentlemen . . . the hard stuff they are made of."⁵⁷

Most revealing was a meeting of wealthy alumni convened in New York City in April 1882 by John O. Sargent, one of Thayer's allies. Sargent invited to the gathering several men who had signed Thayer's circular. He planned for the signees to testify enthusiastically to the cause and persuade the prospects to contribute. Instead, "to my astonishment," Sargent found that some of the signees, particularly James C. Carter, a leading member of the bar in New York City, "vehemently—not to say venomously—opposed . . . the whole plan."⁵⁸

Their reasons, according to a witness, "are that it is against the interests of the university to go beg for money and that it has never been done before." Here the request was framed in the ideology of charity: the law school was a beggar in need, humbling itself before benefactors and "creat[ing] an unpleasant feeling in the community, which will be harmful" to the school in the long run.⁵⁹ Instead, the law school "should wait till the spirit moved

53. Eliot, Annual Report of the President of Harvard College 1881-82, *supra* note 44, at 30; letter from Victor Morawetz to James B. Thayer (Apr. 5, 1882), in James B. Thayer Papers, *supra* note 41, at box 20; Thayer, Memoranda Books, *supra* note 40 at 108; Shattuck to Thayer, *supra* note 50; Letter from Villard to Thayer, *supra* note 50.

54. Letter from Arthur S. Huntington to James B. Thayer (Jan. 24, 1882), in James B. Thayer Papers, *supra* note 41, at box 19.

55. Letter from Francis W. Palfrey to James B. Thayer (Jan. 31, 1882), in James B. Thayer Papers, *supra* note 41, at box 19.

56. Letter from Morawetz to Thayer, *supra* note 41.

57. Letter from Canfield to Thayer, *supra* note 49.

58. Letter from John O. Sargent to James B. Thayer (Apr. 15, 1882), in James B. Thayer Papers, *supra* note 41, at box 20.

59. Letter from Victor Morawetz to James B. Thayer (Apr. 15, 1882), in James B. Thayer Papers, *supra* note 41, at box 20.

someone to give a large sum—fifty years hence or more.”⁶⁰ Carter, in fact, bequeathed \$100,000 to endow a professorship at the school two decades later, so he was not a cheapskate. Nor was he a “mugwump” who could not make up his mind on this issue.⁶¹ Rather, he and his fellow wealthy alumni interpreted benefaction in terms of charity, which was beneath their dignity. Sargent “replied that there is no intention to beg.”⁶² However, “Carter’s opposition was persistent and uncompromising and exceedingly damaging to the cause,” lamented Sargent.⁶³ In 1882, it seemed evident that most HLS alumni were repulsed by charitable appeals and deaf to philanthropic appeals and that law schools would remain “*The Worst Endowed of All the Great Departments of Professional Education*,” as Thayer’s circular had warned.⁶⁴

The significance of the problem grew during subsequent decades as the standards of legal education gradually rose, exemplified by the founding of the Association of American Law Schools in 1900. Raising academic standards costs money and the paucity of financial resources in legal education increasingly influenced the standing and strength of the profession. In 1882, Thayer’s pamphlet had observed that the Harvard Law endowment fund was “a little over \$48,000 . . . the Divinity School fund at over \$300,000 . . . and the Medical School fund . . . at nearly \$119,000.”⁶⁵ As of 1900 it was reported that the aggregate endowment of theological schools in the nation was about nine times larger than that of medical schools and 18 times larger than that of law schools.⁶⁶ By 1914 the aggregate endowment of theological schools was nearly \$40,700,000 compared to \$20,050,000 for medical schools, and merely \$2,276,000 for law schools. Medical schools had closed the gap considerably while law schools still straggled far behind, as the law deans of Yale and Harvard lamented in the mid-1910s.⁶⁷

Indeed, by that point even the best endowed universities were adopting tuition dependence as policy for their law schools but not for other professional schools. At Yale, President Arthur T. Hadley declared in 1914, “the

60. Letter from Sargent to Thayer, *supra* note 58.

61. Charles W. Eliot, Annual Report of the President of Harvard College 1905-06 52-53 (1906). See Lewis A. Grossman, James Coolidge Carter and Mugwump Jurisprudence, 20 Law and History Rev. 577, 577-629 (2002).

62. Letter from Morawetz to Thayer, *supra* note 59.

63. Letter from Sargent to Thayer, *supra* note 58.

64. Sargent, *supra* note 3.

65. *Id.*

66. James R. Parsons, Jr., Professional Education, Monographs on Education in the United States 17 (1900).

67. Henry W. Rogers, Annual Report of the Dean of the Yale Law School 1914-15 320-1 (1915); Thomas W. Swan, Annual Report of the Dean of Yale Law School 1916-17 309 (1917); letter from Roscoe Pound to A. L. Lowell (Dec. 11, 1916), in President Abbot Lawrence Lowell Records, *supra* note 4, at box 90.

best institutions of the United States are abandoning the practice of having professional schools supported by tuition fees alone.” However, he continued,

the need for this change is felt with different intensity in different lines. It is frequently possible to support a first-rate law school, taught by men of real eminence, from the fees of the students. This is partly because law students see a lucrative profession not far ahead and can therefore afford to pay high fees for good instruction and partly because law is a subject in which large classes can be taught almost as well as small ones, so that a single efficient teacher can command the fees of a large number of interested pupils.⁶⁸

A decade earlier, Eliot had reached the same conclusion: that law schools are the only professional schools that do not need endowment.⁶⁹

1917 Campaign: Toward a Philanthropic Rationale

As educational standards in the legal profession rose between 1882 and the Harvard Law centennial in 1917, a number of factors contributed to shifting the meaning and justification of benefaction in American higher education away from charity and toward philanthropy. Prior to 1865 the U.S. economy did not produce enough surplus wealth to support significant benefactions and most gifts were made for current use.⁷⁰ Between 1870 and 1920, the U.S. gross national product grew more than six-fold, as a revolution in the areas of transportation, communication and manufacturing sparked a great economic expansion.⁷¹ Commensurately, large industrial corporations emerged, producing an unprecedented number of millionaires and multi-millionaires, who contributed to an enormous increase in benefaction, most of which flowed into higher education. Particularly prominent was Andrew Carnegie, who founded the Carnegie Institution of Washington in 1902, the Carnegie Foundation for the Advancement of Teaching in 1905, and the Carnegie Corporation of New York in 1911. Even more influential was oil magnate John D. Rockefeller, who endowed the Rockefeller Institute of Medical Research in 1901, the General Education Board in 1903, and the Rockefeller Foundation in 1913.⁷² In addition to expanding the resources for benefaction, these new entities cultivated the ideology of philanthropy.

68. Arthur T. Hadley, Annual Report of the President of Yale University 1913-14 13-14 (1914).

69. Bruce A. Kimball, Impoverishing “the greatest law school in the world”: the Financial Collapse of Harvard Law School under Dean James Barr Ames, 1895-1909, 61 *J. Legal Educ.* 4, 17-22 (2011).

70. Isaac L. Kandel, Endowments, Educational . . . United States, in 2 *A Cyclopedia of Education* 458-9 (Paul Monroe, ed., The MacMillan Co. 1911); Sears, *supra* note 6, at 38; Curti & Nash, *supra* note 6, at 41, 56.

71. See Standard Series, in *The Historical Statistics of the United States* (Susan B. Carter et al., eds. Cambridge Univ. Press 2006); Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 52 (Harvard Univ. Press 1977).

72. Michael E. McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* 147-81 (Oxford Univ. Press 2003); Bremner, *supra* note 6, at 85, 106; Curti

James Thayer demonstrated the shift toward philanthropy in an often-cited address to the meeting of the American Bar Association in 1895. Doubtlessly reflecting on his experience in 1882, Thayer attempted to reframe what he called “charity” for law schools in the emerging ideology of philanthropy. Thayer began with the analogical argument that all “the great parts of human knowledge” are “alike beneficial” and “these subjects should be investigated with the deepest research and the most searching critical study.” Furthermore, in these fields of knowledge, “the highest education always means endowment; the schools which give it are all charity schools. . . . If they are not [endowed], then the managers [of the schools] must . . . consult the market and consider what [students] will pay; they will bid for numbers of students instead of excellence of work.” Now, law is one of those “great parts of human knowledge;” therefore, “our law must be studied and taught as other great sciences are studied and taught at the universities, as deeply, by like methods, and . . . [by] a learned and studious faculty.” It also follows that “our law schools must be endowed as our colleges are endowed.”⁷³

Having made this analogical argument for endowment, Thayer then elaborated on the broad, long-term “beneficial” character of legal study, which makes it deserving of philanthropy. Amplifying Langdell’s argument on behalf of student aid, Thayer proposed that legal education benefits the public by way of its three kinds of students: “First of all, those who, for any reason, propose to master these subjects. . . . Second, . . . the leaders in the practical application of these branches of knowledge to human affairs. Third, . . . all practitioners of these subjects . . . who wish to understand their business and to do it thoroughly well.” But Thayer did not explain or provide evidence of the beneficial influence of these three kinds of students or how better legal education would improve that influence. Instead, he invoked an English authority who maintained that “there is no other class or order in the community . . . on whom so much of human happiness depends, or whose pursuits and studies are so intimately connected with the progress and well-being of mankind” than lawyers.⁷⁴

Adding a philanthropic dimension to Langdell’s argument, Thayer then addressed legal scholarship in terms of “the use of it and its necessity,” particularly given the “widespread skepticism among a certain class of practical men, in and out of our profession.” Consider other fields, he said. Such skepticism formerly prevailed about “what seemed to a majority of mankind useless and unpractical study and experiment” in electricity, chemistry, physics, physiology, geology and other natural and technical subjects. Yet, these studies yielded practical and technological benefits such as “the steam-engine, the telegraph, the telephone, the electric railway and the electric light, the telescope, the improved lighthouse, the lucifer match, antiseptic surgery,

& Nash, *supra* note 6, at 91, 110, 164, 211.

73. James B. Thayer, *The Teaching of English Law at Universities*, 9 *Harv. Law Rev.* 173, 174, 184 (1895).

74. *Id.* at 174, 172.

the prophylactics against small-pox and diphtheria, aluminum the new metal, and the triumphs of modern engineering.”⁷⁵ Consequently, the complexity and obscurity of research does not obviate its public benefit.

Now, jurisprudence is also obscure and complex because common law lies “in an immense mass of judicial decisions.” These cases have yielded “certain inherited principles, formulas and customs and certain rules and maxims of good sense and of an ever-developing sense of justice.” Therefore, advanced legal study or research is necessary and useful and it entails investigation of “600 years” of English legal history and beyond to the Middle Ages and Roman law.⁷⁶ In this way, Thayer seemed to commit the fallacy that obscurity and complexity of scholarship is not only compatible with public benefit, but indicative of it.

Attentive to the philanthropic demand for efficiency and economy, Thayer then addressed the objection: “‘What is the use of carrying on our backs this enormous load of the Common Law?’ Let us codify and be rid of all this by enacting what we need and repealing the rest.” But, Thayer rejoined, “I have never seen any attempt at codification . . . which was not plainly marked by grave and disqualifying defects.” According to his personal experience, the common law could not be made more efficient without sacrificing its effectiveness. In any case, he added, legal reform and codification would require the expertise of legal scholars. Beyond that personal testimony, Thayer never presented an example of how research in common law did or could contribute to better decisions on practical legal questions. Nor did he specify or explain the benefit to the public from legal scholarship. In conclusion, he lamented that “the scientific systematic study of law” is still “scorned or depreciated by many,” quoting Frederick Pollock.⁷⁷

Though lacking validation and specificity, Thayer’s argument advanced in philanthropic terms beyond Langdell’s in at least two ways. Thayer advocated benefaction less because of its direct assistance for individual students and professionals and more because it strengthened law schools as institutions by decreasing dependence on tuition through increasing endowment. Thayer’s emphasis here was precisely that adopted in the early 1910s by the Rockefeller-endowed General Education Board through its cardinal policy of aiming for the “concentration of gifts in the form of endowment.”⁷⁸

Furthermore, while Langdell had viewed law as a “noble science” of equal rank with any other, Thayer went further and explicitly addressed the potential of legal scholarship to benefit the public, analogous to other academic fields. By this approach, benefactions to endow law schools were conceived as investments yielding widespread social improvement, consistent with the

75. *Id.* at 174.

76. *Id.* at 175, 178.

77. *Id.* at 181, 182.

78. The General Education Board: An Account of its Activities, 1902-1914, 143 (General Edu. Board 1915). *See id.* at 3-17.

emergent philanthropic reasoning. Because of this incipient philanthropic approach, Thayer's statement continued to be quoted two decades later during the planning of the first formal fundraising campaign in legal education, organized around the HLS centennial.⁷⁹

In the mid-1910s the deans and alumni leaders began organizing a campaign that would address "the hazardous dependence on necessarily fluctuating tuition fees"⁸⁰ and the need to secure gifts for "an adequate endowment."⁸¹ The first to fully appreciate and publicly announce this financial dependence was Ezra R. Thayer, the son of James B. Thayer, who left private practice in Boston to become Harvard Law dean in 1910.⁸² After realizing the importance of endowment and failing in several attempts to raise money, Dean Thayer welcomed a proposal in 1914 from the New York alumni association to organize a campaign in recognition of the school's centennial in 1917.⁸³

Though novel in legal education, this campaign was preceded by the increasing number and size of fundraising efforts in higher education during the early 1900s. These culminated in the university's Harvard Endowment Fund (HEF) campaign that ran from 1915 to 1925. This was the first full-fledged, multi-year drive in higher education, hiring full-time staff and enlisting 3,000 volunteers to raise some \$14 million from 36,000 alumni around the world.⁸⁴

The contemporaneous Harvard Law centennial campaign failed miserably, however, for several reasons. Harvard President A. L. Lowell was never enthusiastic and late in 1915 Dean Thayer committed suicide. His successor, Roscoe Pound, did not actively engage alumni volunteers, who dithered and delayed and refrained from direct personal solicitation. When hostilities broke out in Europe, broad solicitations for disaster relief began to compete with other fundraising. In April 1917, the United States entered World War I, halting the centennial campaign. Meanwhile, throughout the period from 1915 to 1920, the law school encountered stiff competition from the university's

79. See News and Views, 16 Harvard Alumni Bulletin 445 (Apr. 8, 1914); letter from Ezra R. Thayer to Mark A. D. Howe (Mar. 28, 1914), in Dean Thayer Correspondence Subject Files, at box 1 (on file with Harvard Univ. Archives, Harvard Law School Dean's Office Records).
80. Austin W. Scott, Annual Report of the Dean of Harvard Law School 1914-15 149 (1915).
81. William C. Loring, James Byrne & William Church Osborn, To the Graduates of the Harvard Law School (Mar. 31, 1917) (on file with Harvard Law School Library, Special Collections). See Report of the Dean of the Law School, 16 Harvard Alumni Bulletin 448 (Apr. 8, 1914); Roscoe Pound, Annual Report of the Dean of Harvard Law School 1915-16 145 (1916).
82. Ezra R. Thayer, Annual Report of the Dean of Harvard Law School 1912-13 126-7 (1913). See Kimball, *supra* note 69, at 4-29.
83. Kimball, Disastrous First Fundraising Campaign, *supra* note 2.
84. Bruce A. Kimball, The First Campaign and the Paradoxical Transformation of Fundraising in American Higher Education, 1915-1925, 114 Teachers College Record (forthcoming 2014); Cutlip, *supra* note 1, at 169-74; Seymour E. Harris, Economics of Harvard 298-99 (McGraw Hill 1970).

HEF drive because many law graduates had a stronger attachment to their college than to the law school.

While contributing to the campaign's failure, these factors stemmed from the lethargy, apathy and pessimism that suffused alumni from the start. Those attitudes were rooted in the fundamental problem that graduates, former students and lay citizens were never convinced of a reason to give to the law school. Their extant testimony, though scarce, echoes the objections identified by Langdell in 1882: law students neither need help nor deserve help and gifts merely worsen the overcrowding of the bar.⁸⁵ These views reflect the ideology of charity, in which Dean Thayer and the campaign executive committee largely framed the justification of their requests, despite the philanthropic arguments of the dean's father.

Thayer observed that "one feels some embarrassment about a public wail concerning the poverty of his institution." Financial need was not characteristic of a respectable institution, the dean implied, and soliciting funds was "begging" to be done quietly and privately.⁸⁶ The executive committee adopted similar terms in its primary published statement mailed to all alumni. The school needed help to get back on its feet. Costs had risen and "the gifts it has received . . . have not been many." Like the deserving poor, the school merited assistance, because the problem "is not from any weakness in the school or its faculty. The difficulty is due to lack of money." And "this school, without a peer in the past and with the certainty of realizing a future equal to its past, should have an adequate endowment for carrying on its work." Furthermore, "[t]he teaching force is seriously overworked. . . . That the officers of the school should carry burdens sufficient, as in Dean Thayer's case, to cause a complete breakdown, should not be expected by the profession and by the alumni." Moreover, the school had a close personal relationship with its alumni "for whose benefit the school exists." Alumni should affectionately bestow "an adequate endowment . . . as a birthday present at its centennial celebration."⁸⁷

In closing, this statement mentioned that the school also served "the use of the profession and the world," and referred the reader to Dean Roscoe Pound's annual report for 1915-16, which was reprinted and appended.⁸⁸ Successor to Dean Thayer, Pound provided the primary published rationale for the centennial campaign through this report, whose language and arguments were largely repeated in the concluding chapter of *The Centennial History of the Harvard*

85. See letter from Edmund K. Arnold to Ezra R. Thayer (June 20, 1914), in Ezra Ripley Thayer Papers, box 8, f. 13 (on file with Harvard Law School Library, Special Collections); Letter from Archibald King to Joseph Sargent (Mar. 6, 1914); letter from Horace F. Baker to Joseph Sargent (Mar. 4, 1914); letter from Alvin A. Morris to Horace F. Baker (Mar. 5, 1914); letter from Justin Bowersock to Joseph Sargent (June 17, 1914), in Ezra Ripley Thayer Papers, *supra*, at box 8, f. 11.

86. Letter from Thayer to Howe, *supra* note 79.

87. Loring, Byrne & Osborn, *supra* note 81.

88. Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 140-50.

Law School.⁸⁹ Pound then incorporated much of the arguments and the language of his 1915-16 report in “The Harvard Law School,” a pamphlet disseminated to all alumni in a failed attempt to revive the campaign after World War I.⁹⁰ Commensurate with the ideological shift in American benefaction and with Pound’s “sociological jurisprudence,”⁹¹ these three documents launched a philanthropic rationale for giving to a university law school.

Pound’s central thesis was that giving to the law school provides support for work that is “useful socially” and results in “solving social problems” and “securing . . . social interests.”⁹² In this regard, Pound went beyond Thayer’s analogies to medicine and technology and attempted to explain the return on giving to legal education. In addition, Pound appealed in terms of the business of benevolence, arguing that donating to legal education “gives greater promise of results . . . than any other form of investment in educational enterprises which is at present open.”⁹³

The social benefit of legal research and graduate instruction, according to Pound, lay primarily in reconciling new legal developments in the 20th century with received legal doctrine. Legal scholarship turns “the [common] law of the [19th] century . . . to intelligent account as an agency of justice in the [20th] century.”⁹⁴ For example, Pound cited Harvard Law professors advising on new legislation: “the work of Professor Williston, as one of the Commissioners on Uniform State Laws, on the Sales Act, the Warehouse Receipts Act, the Bill of Lading Act and the Certificates of Stock Act [is] especially noteworthy.”⁹⁵ An even larger need arises in “the body of law which is growing up outside of courts” in “administrative boards and commissions” in the early 20th century, such as the “Interstate Commerce Commission . . . public service commissions of one sort or another . . . [the] Federal Trade Commission . . . [and] boards of probation or parole.”⁹⁶

89. Harvard Law School Assoc., *The Centennial History of the Harvard Law School, 1817-1917* vi, 162-174 (Harvard Law School Assoc. 1918) [hereinafter *Centennial History*].

90. Roscoe Pound, *The Harvard Law School* 3 (1919) [hereinafter *The Harvard Law School*]; Roscoe Pound to Abbott L. Lowell (July 22, 1919), in *President Abbott Lawrence Lowell Records*, *supra* note 4, at box 122; letter from Edgar H. Wells to John B. Atkins (Nov. 28, 1919), in *Correspondence, Harvard Endowment Fund Records*, at box A-Byrne 1917-1921 (on file with Harvard University Archives).

91. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* [parts 1-3], 25 *Harv. L. Rev.* 591-619, 140-168, 489-516 (1911); David Wigdor, *Roscoe Pound: Philosopher of Law 161-205* (Greenwood 1974); N. E. H. Hull, *Roscoe Pound and Karl Llewellyn* 76-96 (Univ. of Chicago Press 1997).

92. Quotations are, respectively, from Pound, *Annual Report of the Dean of Harvard Law School 1915-16*, *supra* note 81; *id.* at 140; *Centennial History*, *supra* note 89, at 167; *The Harvard Law School*, *supra* note 90, at 18.

93. Letter from Pound to Lowell, *supra* note 67.

94. *Centennial History*, *supra* note 89, at 168.

95. *The Harvard Law School*, *supra* note 90, at 9.

96. Pound, *Annual Report of the Dean of Harvard Law School 1915-16*, *supra* note 81, at 140. *See*

Assimilating these entities and developments in new legal fields requires more than either the layman's "unfettered common sense" or training "merely in the political and social sciences." Legal research and graduate instruction are needed because "in the end, the lawyer will be called upon to formulate in legal principles the results of administrative experience."⁹⁷ For example, "reconciliation of the new principles behind our workmen's compensation acts with the general law of torts is a pressing problem."⁹⁸ Conversely, the new administrative boards and commissions and their associated legislation create problems "in the older fields" of law. Legal scholarship needed to address these problems as well.⁹⁹

The absence of jurisprudential foundation for new doctrine and the discontinuity between new and old doctrine were the fundamental problems, in Pound's view. Reconciliation of 20th century developments with 19th century jurisprudence was the solution. The social benefit lay in meeting "the exigencies of general peace and good order" and "the paramount social interest in the general security," Pound said.¹⁰⁰ These benefits demonstrate that "the study of the common law, as carried on at Harvard, is conservative in the best sense of that word. . . . To teach the experience of English-speaking peoples in the administration of justice . . . is one of the surest ways of perpetuating American institutions, dispelling plausible political crudities and insuring a sane and orderly legal and political development."¹⁰¹ Pound thus advanced the incipient philanthropic rationale advanced by James Thayer. But his approach also raised questions.

Notwithstanding the progressive jurisprudence attributed to Zechariah Chafee, Felix Frankfurter, Brandeis, Pound and other Harvard Law faculty and alumni,¹⁰² the dean's appeals to "the exigencies of general peace and good order" and "the paramount social interest in the general security" seemed to side with the interests of industrial capitalism and the wealthy. His argument thus reinforced the popular complaint voiced by Theodore Roosevelt at an earlier Harvard fundraising dinner: "many of the most influential and most highly remunerated members of the bar . . . work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which . . . regulate, in the interest of the public, the use of great

Centennial History, *supra* note 89, at 166; The Harvard Law School, *supra* note 90, at 13-15.

97. Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 141. See Centennial History, *supra* note 89, at 166-7; The Harvard Law School, *supra* note 90, at 14-15.

98. Centennial History, *supra* note 89, at 167-8. See The Harvard Law School, *supra* note 90, at 9.

99. Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 141. See Centennial History, *supra* note 89, at 167.

100. The Harvard Law School, *supra* note 90, at 14-15. Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 141; Centennial History, *supra* note 89, at 166-7.

101. The Harvard Law School, *supra* note 90, at 24.

102. Hull, *supra* note 91, at 119-22; Donald L. Smith, Zechariah Chafee, Jr., Defender of Liberty and Law 36-57 (Harvard Univ. Press 1986).

wealth. Now, the great lawyer who employs his talent and his learning [in this way] . . . encourage[s] the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy.”¹⁰³

But if Pound’s appeal favored the wealthy, they did not see the law as their ally. Even if law’s efforts at “solving social problems” were tailored for “conservative” interests, those interests doubted law’s effectiveness. Businessmen did not see law or lawyers as constructive allies. Hence, Pound’s philanthropic rationale could scarcely persuade wealthy business interests. He faced the profound difficulty that, for either progressive or conservative donors, “dissatisfaction with law and distrust of lawyers are no less marked than a century ago. Social conditions and industrial conflicts have made more than one tenet of our legal system unpopular and have roused strong opposition to the fundamental dogma of the supremacy of law,” as the *Centennial History* acknowledged in 1917.¹⁰⁴

Yet, Pound’s three documents assumed that readers credited the social benefit of law in the past and, therefore, the value of reconciling new law with the old. Contrary to public perception, Pound took it for granted that the law school’s “very effectiveness in handling the law of the [19th] century is a guarantee of ability to turn this law to intelligent account as an agency of justice in the [20th] century.”¹⁰⁵

Finally, even if public “dissatisfaction with the law and distrust of lawyers” could somehow be assuaged, was legal research deserving of more, or as much, support as medical research? The new philanthropic foundations were potential sources of bountiful aid. Alumni leaders of the centennial campaign wistfully observed that “the Rockefeller and Carnegie Foundations would be institutions to be appealed to in the best way possible.”¹⁰⁶ Pound initiated requests in this regard.¹⁰⁷ But the bulk of foundation support within higher education went to medical research and education¹⁰⁸ and Pound discovered that the foundation staff expected funded projects to produce direct tangible benefits like medical improvements in “individual hygiene.”¹⁰⁹

103. High Ideals Urged On All, *Boston Globe*, June 29, 1905, at 5.

104. *Centennial History*, *supra* note 89, at 163.

105. *Id.* at 167-68. See *The Harvard Law School*, *supra* note 90, at 9.

106. Letter from Joseph P. Cotton to Frank W. Grinnell (June 21, 1916); letter from Frank W. Grinnell to Joseph P. Cotton (June 23, 1916), in *President Abbott Lawrence Lowell Records*, *supra* note 4, at box 84.

107. Letter from Abbott L. Lowell to Roscoe Pound (May 9, 1916), in *President Abbott Lawrence Lowell Records* *supra* note 4, at box 61; Walter E. Meyer to Roscoe Pound (June 2, 1911), in *Roscoe Pound Papers*, Microfilm version, Part I, reel 10, #561 (on file with Harvard Law School Library, Special Collections); letter from A. L. Lowell to H. P. Walcott (Dec. 26, 1916), in *President Abbott Lawrence Lowell Records*, *supra* note 4, at box 76.

108. Hollis, *supra* note 6, at 274-76.

109. Roscoe Pound to Abbott L. Lowell (Dec. 22, 1916), in *President Abbott Lawrence Lowell Records*, *supra* note 4, at box 61.

The fundamental difficulty here was that legal scholarship did not fit the “scientific naturalism” that suited medical science and became the dominant paradigm of knowledge in American culture and academe by the 1910s, suffusing the social sciences as well.¹¹⁰ Into legal thought, it has been argued, “scientific naturalism entered, first as sociological jurisprudence, then as legal realism.”¹¹¹ But Pound, perhaps because of his scientific training in botany, took for granted the autonomy and distinctiveness of jurisprudence apart from expertise either in the natural sciences or “merely in the political and social sciences.”¹¹² His 1919 pamphlet maintained the distinction while arguing that “criminal law is our main reliance for the securing of social interests.”¹¹³

Pound had long devoted attention to problems in criminal law. In the academic year 1915-16 he cited criminal law and procedure prominently among the objects of legal research and graduate instruction.¹¹⁴ During 1916-17, he solicited an endowed chair in criminal law, even to the point of interfering with the plans of the centennial campaign’s executive committee.¹¹⁵ In 1919, he said that “no subject calls more urgently for . . . study,” by which he meant “study which the Harvard Law School has been able to devote to legal problems in the past.”¹¹⁶ He offered no rapprochement with scientific naturalism.

As a result—whether in regard to legislation, administrative law, or criminal law—Pound’s three documents did little to validate lawyers’ “securing of social interests.” He cited a few examples of issues on which legal scholarship might yield tangible benefits to society. But he did not explain how this would happen and did not identify benefits beyond social stability. In support of the point, he cited grandly and vaguely the law’s past accomplishments, which few of the laity credited.

The non-lawyer could immediately understand the improvement wrought by “the steam-engine, the telegraph, the telephone, . . . the prophylactics against small pox and diphtheria.” But how did the legal research of Professor Williston, if he employed any, improve the Warehouse Receipts Act beyond

110. John C. Burnham, *How Superstition Won and Science Lost: Popularizing Science and Health in the United States* 7 (Books on Demand 1987).
111. Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* 159 (Univ. Press of Kentucky Press 1973). Compare John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Univ. of North Carolina Press 1995).
112. Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 141. See Centennial History, *supra* note 89, at 166-7; The Harvard Law School, *supra* note 90, at 14-15.
113. The Harvard Law School, *supra* note 90, at 18.
114. Pound, Annual Report of the Dean of Harvard law School 1915-16, *supra* note 81, at 141. See Wigdor, *supra* note 91, at 241; Hull, *supra* note 91, at 151.
115. Byrne to Lowell (Mar. 3, 1917); Pound to Lowell (Dec. 11, 1916); Roscoe Pound to James M. Byrne (Dec. 22, 1916), box 6, Subject File 1916-1932, Harvard Law School Dean’s Office Records; Lowell to Pound (May 9, 1916); Pound to Lowell (Dec. 22, 1916); Abbott L. Lowell to James Byrne (Jan. 16, 1917), box 84, Records of A. L. Lowell.
116. Pound, Annual Report of the Dean of Harvard law School 1915-16, *supra* note 81, at 141.

what “unfettered common sense” could have done? How would reconciling the “workmen’s compensation acts with the general law of torts” solve social problems? How did the “rational development” provided by lawyers improve upon those trained “merely in the political and social sciences?” Pound did not explain, demonstrate or provide evidence of the benefits of legal research.

By its conclusion in June, 1920, the centennial campaign raised less than a quarter of its goal of \$1 million, and only about 2 percent of the 8,700 living former students contributed.¹¹⁷ This dismal outcome and failed drive were evidently considered best forgotten, since no reference to them appears in the subsequent records of Harvard Law School fundraising.

1925-27 Campaign: Tactical Problems

In January 1920, the Eighteenth Amendment prohibiting the sale of “intoxicating liquors” took effect, and ensuing attempts to evade Prohibition contributed to a national “crime wave” that attracted increasing publicity and concern.¹¹⁸ In response, the Cleveland Foundation invited Pound to conduct a survey of urban crime and criminal justice to provide understanding of the growing problem. He and Felix Frankfurter assembled a team of legally trained social scientists who produced the path-breaking Cleveland Crime Survey in 1922. Pound’s summary of this study emphasized that sociological and psychological factors contribute to criminal activity¹¹⁹ and reinforced his interest in studying criminal law.

Meanwhile, fundraising campaigns proliferated throughout higher education, prompted by the national publicity given to the Harvard Endowment Fund drive. As that campaign was winding down early in 1920, the *New York Times* reported that “nearly seventy-five colleges throughout the country are conducting campaigns” seeking more than \$200 million.¹²⁰ Concurrently, various Harvard departments began clamoring to raise money and the governing board agreed in 1921 to run a quiet campaign to raise \$10 million for the business school, the chemistry department and the fine arts department.¹²¹ As during the HEF drive, the university seemed oblivious to the financial needs of its law school and Pound grew extremely frustrated that the new appeal did not include HLS.¹²²

117. Kimball, *supra* note 2.

118. Henry S. Ruth & Kevin R. Reitz, *The Challenge of Crime: Rethinking Our Response* 15 (Harvard Univ. Press 2003).

119. Wigdor, *supra* note 91, at 241-5; Hull, *supra* note 91, at 154.

120. *Universities Ask Over \$200,000,000*, N.Y. Times, Feb. 8, 1920, at E1.

121. A. L. Lowell, *Annual Report of the President of Harvard University 1922-23*, at 26-29 (1923); A. L. Lowell, *Annual Report of the President of Harvard University 1923-1924*, at 27-29 (1924). See *Commencement Gifts*, N.Y. Times, June 20, 1924, at 18; Lawrence, *supra* note 20, at 417-20.

122. Letter from A. L. Lowell to Roscoe Pound (July 20, 1925); letter from Roscoe Pound to A. L. Lowell (July 22, 1925); letter from Roscoe Pound to W. M. Powell (Nov. 24, 1926 and Jan.

Nevertheless, he began to identify and announce the school's problematic syndrome of insufficient endowment to support expenses beyond teaching LL.B. students, of dependence on tuition, and of resultant overcrowding, though he did not appreciate the danger of diverting resources into building or incurring debt.¹²³ Lowell also began to cite the needs of Harvard Law School in his annual reports, and late in 1924 the governing board agreed to support a fundraising drive for the law school as soon as the business-chemistry-fine arts appeal was completed.¹²⁴ "The embargo has now been lifted," Pound exulted, and rapidly pushed to organize a campaign.¹²⁵ As events would show, Pound underestimated the effort required and overestimated the amount that could be raised. Both of these miscalculations resulted from his excessive confidence in the persuasive power of his philanthropic rationales.

Pound proposed raising \$5 million, including \$3 million in endowment and \$2 million for buildings.¹²⁶ The governing board and various university officials advised that no more than \$3 million was achievable but Pound ignored the advice.¹²⁷ In fact, he added another \$400,000 for immediate purposes. And, six months later, enthused when new buildings were erected for the University of Michigan Law School, Pound suggested that an additional million dollars could be raised for another building.¹²⁸ In the summer of 1925, he envisioned raising nearly \$6.4 million, although at least one prominent law school alumnus and member of the governing board warned that the

11, 1927), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, at box 2 (on file with Harvard Univ. Archives).

123. Roscoe Pound, Annual Report of the Dean of Harvard Law School 1923-24 181-85 (1924); Roscoe Pound to Charles H. Strong (Dec. 13, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
124. Lowell, Annual Report of the President of Harvard University 1923-24, *supra* note 121, at 15-16; A. L. Lowell, Annual Report of the President of Harvard University 1924-25 21-22 (1925); A. L. Lowell, Annual Report of the President of Harvard University 1925-26 23-24 (1926); letter from Roscoe Pound to A. L. Lowell (Jan. 14, 1925); letter from Roscoe Pound to Julian W. Mack (Nov. 26, 1924); letter from Roscoe Pound to John P. Nields (Nov. 28, 1924), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
125. Letter from Roscoe Pound to Charles M. Hough (Nov. 28, 1924), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
126. Roscoe Pound, The Harvard Law School: Its History, Its Development, Its Needs: a Project 29 (Harvard Law School Endowment Fund 1926) [hereinafter The Harvard Law School: a Project].
127. Letter from Roscoe Pound to Julian Mack (Jan. 13, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
128. The Harvard Law School: a Project, *supra* note 126, at 29; letter from Roscoe Pound to Wilson M. Powell (June 19, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.

university's series of solicitations between 1904 and 1924 had exhausted the capacity or inclination of many alumni to give.¹²⁹

Meanwhile, the governing board approved the plan to seek \$5 million and stood "heartily behind the drive for the law school, and ready to urge it with all its might," said Lowell.¹³⁰ Pound then began to draft a 30-page, pretentiously titled *Projet* to serve as "the manifesto" of the campaign.¹³¹ In March 1925, Wilson Powell, vice president of the New York City Bar Association, agreed to chair the campaign. In the ensuing months he formed an executive committee of 28 members and hired an executive secretary and a publicity consultant. Relying on this group, Powell hoped to collect almost all the money from a small number of wealthy donors and foundations through a quiet appeal in August and September of 1925, thereby avoiding a public drive.¹³² "If that does not succeed," he wrote, "then [we will] start a drive, making all preparations for it now, so that we will waste no time in the fall."¹³³

Tactical problems beset the campaign, however. Pound quickly lost patience with the process of achieving consensus on plans among prominent alumni, the faculty, the governing board and the Overseers Visiting Committee to the Law School.¹³⁴ By May 1925, he grew impatient with the critical feedback from Powell and other prominent alumni on successive drafts of his *Projet*.¹³⁵ Furthermore, as in the centennial campaign, Pound devoted most of his effort to writing visionary statements for distribution in print or in speeches. He

129. Letter from Jeremiah Smith Jr. to Roscoe Pound (Aug. 15, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
130. Letter from A. L. Lowell to Roscoe Pound (July 24, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
131. Quotation is from James F. Clark, The Harvard Law School Deanship of Roscoe Pound, 1916-1926, sect. IV C 2 (unpublished third-year paper, Harvard Law School, 1999). See The Harvard Law School: a *Projet*, *supra* note 126, at 29. Another pamphlet gained some notoriety, but Pound's carried more weight. See Memorandum Concerning Plan for the Development of Harvard Law School (Mar. 30, 1926), in John Price Jones Co. Records 1919-1954, at box CH, v. 57 (on file with Harvard Bus. School Library, Special Collections); Socializing Legal Education, 46 *The New Republic* 211, 211-213 (1926).
132. Letter from Wilson M. Powell to Roscoe Pound (Mar. 7, 1925); letter from Joseph P. Cotton to Roscoe Pound (Mar. 2, 1925); letter from Wilson M. Powell to Roscoe Pound (Mar. 18, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2; Ravi P. Ramchandani, The Stalling Effort: The Harvard Law School Endowment Campaign of 1925-1927 19-22 (May 2012) (unpublished Legal History Seminar Paper, Harvard Law School) (on file with Professor Daniel R. Coquillette).
133. Powell to Pound (June 1, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.
134. See Ramchandani, *supra* note 132, at 13-16.
135. Roscoe Pound to James F. Byrne (May 5, 1925); Roscoe Pound to Wilson M. Powell (May 5, 1925), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 2.

spent little time visiting prospective donors, except for a few major prospects in the summer of 1925. In contrast, the Harvard Endowment Fund organizers and staff believed that “personal solicitation is the only satisfactory method” of fundraising. Writing statements, they believed, “results in very few subscriptions.”¹³⁶

In addition, Pound made himself unavailable at critical points. He took a leave from the deanship to serve on the American-British Claims Arbitration Tribunal in Washington, D.C., for most of the fall of 1925,¹³⁷ the period when Powell intended to raise the money. Upon returning from his leave, Pound faced a backlog of administrative work and teaching that limited his efforts to help the campaign.¹³⁸ Nevertheless, dozens of HLS alumni wrote to Pound in April volunteering to help after a blizzard of announcements appeared in newspapers¹³⁹ and he worked with the executive committee to form 18 regional committees. But Pound then told Powell that he would be occupied giving lectures at nine universities between May and July.¹⁴⁰

Yet, the dean did successfully solicit a major contribution that suited his philanthropic approach. Beginning in November 1924, he made a concerted effort to interest the Rockefeller-endowed General Education Board and succeeded in obtaining a commitment for a conditional grant of \$750,000, contingent upon securing a two-to-one match to build an endowment of \$2,250,000 for “research and graduate instruction in law.” Officially announced in March 1926,¹⁴¹ this grant was, in fact, the only yield from the quiet appeal to major donors during all of 1925. Consequently, in the early months of 1926 Powell and the executive committee began to plan for a second phase, the public drive that they had wanted to avoid.¹⁴²

136. Letter from Wells to Atkins, *supra* note 90.

137. Letter from Joseph Warren to H. J. Thorkelson (Nov. 14, 1925), *in* Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean’s Office Records, *supra* note 122, at box 2.

138. Letter from Roscoe Pound to Edgar V. Frothingham (Apr. 5, 1926), *in* Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean’s Office Records, *supra* note 122, at box 2.

139. Harvard Asks \$5,000,000 for Law Research, N.Y. Herald Tribune, Apr. 1, 1926; Law Reform Fund Urged by Harvard, N.Y. World, April 1, 1926; \$5,000,000 Law Fund Asked, N.Y.C. Post, Apr. 1, 1926; Dean Pound Outlines Law’s Weaknesses and Its Needs, Christian Science Monitor, Apr. 3, 1926; As a Science, Boston Daily Globe, Apr. 2, 1926; Harvard Fund Committee: Leaders Are Named for Law School Endowment Campaign, N.Y. Times, Apr. 3, 1926.

140. Letter from Roscoe Pound to Wilson M. Powell (Apr. 15, 1926), *in* Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean’s Office Records, *supra* note 122, at box 2.

141. Letter from H. J. Thorkelson to Roscoe Pound (Mar. 5, 1926), *in* Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean’s Office Records, *supra* note 122, at box 2. *See* Ramchandani, *supra* note 132, at 23-27.

142. Ramchandani, *supra* note 132, at 27-31.

Little money had been contributed to that point because tactical problems, similar to Pound's, also beset the members of the executive committee. They therefore retained John Price Jones, Inc. (JPJ), the leading consulting firm at that time for fundraising in higher education. Beginning work in late June 1926, the firm guided the HLS campaign over the next year.¹⁴³ There was a great deal to do. With the guidance of JPJ, the executive committee developed a "Survey and Plan" projecting that \$2 million could be raised from the 9,400 alumni and former law students, perhaps \$1,750,000 from foundations, including the General Education grant, and another \$2 million from the lay public and wealthy lawyers.¹⁴⁴

Tactical problems persisted, however. In September 1926, the John Price Jones supervisor reported that the law school campaign had fallen at least a month behind because the executive secretary made decisions too slowly and the executive committee members were frequently unavailable. In addition, the supervisor suspected "that the field organization is largely a paper one and cannot be expected to function rapidly and efficiently when the bell rings."¹⁴⁵ At the end of October, he observed that the HLS drive demonstrates "how badly a campaign can be organized . . . [T]he patient is doing as well as can be expected under the circumstances, bearing in mind that . . . an enterprise with less prestige than Harvard Law School would have [been] killed . . . off long ago."¹⁴⁶

In late October and early November a series of dinners in Boston, New York, Philadelphia and St. Louis kicked off the campaign.¹⁴⁷ In the next few months, subscriptions came in steadily and reached \$1,114,067 in January 1927.¹⁴⁸ The campaign then stalled until it seemed "to be standing almost still."¹⁴⁹ Powell

143. See Daily Reports and Weekly Reports, in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 47.

144. Survey and Plan of Fund-Raising for Harvard, University Law School Endowment Fund (June 24, 1926), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 57, 207; Harvard Law School, Quinquennial Catalogue of the Law School of Harvard University, 1817-1924, at v (Harvard Law School 1925).

145. Robert F. Duncan, Situation Report (Sept. 17, 1926), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 47.

146. Duncan, Situation Report (Oct. 30, 1926), *supra* note 145, at 3, 5.

147. Harvard Law School Fund Drive Opened, Boston Globe, Nov. 2, 1926, at 5. See Opening of the Campaign to Raise Five Million Dollars for the Harvard Law School, Harvard Alumni Bulletin 29 (Supp. Nov. 25, 1926). The New York dinner on Nov. 9 generated a public controversy about the state of criminal law in the United States. See Arthur E. Sutherland, The Law at Harvard, A History of Men and Ideas, 1817-1967 266-9 (Harvard Univ. Press 1967).

148. Subscription Register, Records of the Harvard Law Endowment Fund 1926-1938, Harvard University Archives; Many Graduates Give \$1000 or More, Boston Globe, Dec. 18, 1926, at 5.

149. Letter from Wilson M. Powell to Roscoe Pound (Jan. 31, 1927), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 1.

boldly asked the Harvard Corporation, the university's governing board, for an advance of \$200,000 to pay expenses for a third phase, an appeal to the public to reach \$5 million. But the Corporation doubted a third phase could succeed and refused. Pound was willing to sink \$100,000 from the law school's surplus into the venture, but he and Powell finally decided against going forward alone with the third phase.¹⁵⁰

A critical problem remained because the drive needed \$323,000 more dollars in contributions to reach the \$1.5 million necessary to secure the General Education Board matching grant of \$750,000.¹⁵¹ While Pound was off lecturing, Powell worked through April, May and June writing to individuals to secure the balance by commencement.¹⁵² Even this amount proved difficult to raise, and the school faced the embarrassment of falling short until Rockefeller personally offered \$100,000 contingent on obtaining the \$223,000 needed to satisfy the terms of the General Education grant.¹⁵³ With Rockefeller's face-saving gift, the campaign achieved the match just before the commencement deadline.

This outcome led Lowell to view the campaign with "satisfaction" and Pound to consider it "fully subscribed."¹⁵⁴ Various Harvard historians have declared it "a great success."¹⁵⁵ In fact, the amount was well short of even the scaled-back goal of \$5 million approved by the Corporation. Total contributions amounted to about \$2,250,000, including the Rockefeller funded foundation grant of \$750,000 and Rockefeller's personal contribution of \$100,000.¹⁵⁶ Non-contingent gifts from individuals therefore amounted to only about \$1.4 million, including \$200,000 from 125 non-alumni and about \$1.2 million from 3,492 alumni.¹⁵⁷

In its final report in July 1927, John Price Jones announced a summative tally of \$3,508,180 raised. But this inflated figure counted a loan of \$1,250,000 from the university for the building fund, a loan that eventually swelled to

150. Ramchandani, *supra* note 132, at 40-41

151. Letter from Wilson M. Powell to A. L. Lowell (Mar. 2, 1927), in President Abbott Lawrence Lowell Records, *supra* note 4, at box 221.

152. Ramchandani, *supra* note 132, at 43.

153. Letter from Wilson M. Powell to A. L. Lowell (Apr. 25, 1927), in President Abbott Lawrence Lowell Records, *supra* note 4, at box 221.

154. A. L. Lowell, Annual Report of the President of Harvard University 1926-27 5-6, 22-3 (1927); Roscoe Pound, Annual Report of the Dean of Harvard Law School 1926-27 185 (1927).

155. Sutherland, *supra* note 147, at 270. See Henry A. Yeomans, Abbott Lawrence Lowell 238 (Harvard Univ. Press 1948); Clark, *supra* note 131, at sect. IV C 2.

156. Form letter by Wilson M. Powell (n.d.), in John Price Jones Co. Records 1919-1954, *supra* note 135, at box CH, v. 50; Harvard University Law School Endowment Fund Final Report, as of July 10, 1927, in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 47, 1-4. See Yeomans, *supra* note 155, at 252-53.

157. Harvard University Law School Endowment Fund Final Report, *supra* note 156 1-4.

\$1,463,447.¹⁵⁸ Pound likewise avoided mentioning both the loan and the 100 percent tuition hike that the university required as a condition of the loan.¹⁵⁹ In fact, Pound complained that the entire amount for the building fund could have been raised if the Corporation had supported the third phase in 1927, and he speculated that it refused in deference to other departments that wanted to raise money.¹⁶⁰ In Pound's exculpatory view, the Corporation's lack of support halted the campaign, resulting in the need for the loan.

Nevertheless, the final tally was not inconsequential. Arriving between 1924 and 1930, the funds contributed to enlarging the HLS endowment by 259 percent, an increase comparing well to other leading law schools. Those at Columbia and Yale were only beginning to organize campaigns, and their endowments, though increasing, were still dwarfed by that of HLS, as seen in Table I.¹⁶¹

158. *Id.*; Erwin N. Griswold, Annual Report of the Dean of Harvard Law School 1947-48 390 (1948).
159. Roscoe Pound to Wilson M. Powell (Apr. 27, 1927), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 1; Roscoe Pound, The Law School, 1817-1929, in Development of Harvard University 506 (Samuel Eliot Morison ed., Harvard Univ. Press 1930).
160. Roscoe Pound to Edgar H. Wells (Aug. 13, 1927), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 1.
161. In the early 1920s Yale University conducted a \$20 million endowment fund drive and incorporated its law school, which was celebrating its centennial. As a result, several significant gifts came to the law school and increased its endowment. Thomas W. Swan, Annual Report of the Dean of Yale Law School 1923-24 105 (1924); Thomas W. Swan, Annual Report of the Dean of Yale Law School 1925-26 113 (1926); George P. Day, Annual Report of the Treasurer of Yale University 1925-26 21 (1926); George P. Day, Annual Report of the Treasurer of Yale University 1926-27 24 (1927); George P. Day, Annual Report of the Treasurer of Yale University 1927-28 31 (1928); Laura Kalman, Legal Realism at Yale, 1927-1960 105 (Univ. of North Carolina Press 1986).

Table 1 Endowments of Law Schools at Harvard, Yale and Columbia Universities, 1910-30 (in reported dollars)

Year (as of June)	Harvard ¹⁶²	Yale ¹⁶³	Columbia ¹⁶⁴
1910	510,518	358,260	316,250
1920	969,111	500,083	488,184
1930	4,229,606	2,086,657	538,323

Notwithstanding this progress, it is important to look on the other side of the ledger. Between 1924 and 1930 the law school incurred nearly \$1.5 million in debt—as much as all the non-contingent gifts received from individuals during the campaign. Hence, the failure of the 1925-27 campaign to reach its goal by more than half had enormous consequences, and the final John Price Jones report was markedly ambivalent for publicists prone to inflate their accomplishments.¹⁶⁵

1925-27: Failure of the Philanthropic Rationale

Harvard Law School lore subsequently attributed the deterioration of the campaign to the contemporaneous controversy over the Sacco-Vanzetti case, involving Pound, Frankfurter and Lowell. Supposedly, the controversy alienated alumni on both sides of the issue and detracted from giving to the campaign.¹⁶⁶ But little evidence supports this.¹⁶⁷ According to the consulting firm, the fundamental problem was that, among HLS alumni and faculty, “every one indulges in a lot of discussion about the campaign but scarcely

162. Charles F. Adams, Annual Statement of the Treasurer of Harvard University 1909-1910 11, 63 (1910); Charles F. Adams, Annual Statement of the Treasurer of Harvard University 1919-20 11, 130 (1920); Charles F. Adams, Annual Statement of the Treasurer of Harvard University 1929-1930 8, 267 (1930).

163. George P. Day, Annual Report of the Treasurer of Yale University 1909-1910 88, 132 (1910); George P. Day, Annual Report of the Treasurer of Yale University 1919-1920 16, 96 (1920); George P. Day, Annual Report of the Treasurer of Yale University 1930-31 109-110, 190-1 (1931).

164. Frederick A. Goetze, Annual Report of the Treasurer of Columbia University 1919-1920 323-53, 408-431 (1920); Frederick A. Goetze, Annual Report of the Treasurer of Columbia University 1929-30 106-146 (1930).

165. Harvard University Law School Endowment Fund Final Report, *supra* note 156, at 1-4.

166. Sutherland, *supra* note 151, at 261; Yeomans, *supra* note 155, at 252-3; Hull, *supra* note 91, at 149-150, 156, 161; Erwin N. Griswold, *Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer* 158 (West Group 1992).

167. Ramchandani, *supra* note 132, at 47. About \$2,000 of pledges were cancelled because of the controversy. Letter from Julian W. Mack to Roscoe Pound (Sep. 28, 1927), *in* Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122, at box 1.

anyone does any work.”¹⁶⁸ Regarding the leaders, the JPJ firm’s supervisor observed that, “unless this leadership is much more positive or vigorous than it has been in the last six months, there is no chance of completing the fund.”¹⁶⁹ Regarding the followers, the consulting firm’s staff found that “we have been unable to get any effective personal solicitation . . . in the various cities around the country.”¹⁷⁰ In the end “a chronic state of inertia . . . settled over everyone in our campaign organization,” reported the JPJ staff.¹⁷¹

Thus, the tactical problems of the campaign stemmed largely from volunteers’ lethargy and apathy. The lack of energy and interest was rooted in the inability to explain to alumni or others why they should donate to the law school. The waning ideology of charity certainly could not provide the justification any better than it had in 1882, and neither Pound nor the executive committee invoked it. In fact, the General Education Board prohibited it. When awarding its grant of \$750,000, the foundation stipulated that no funds should support professional training for lawyers.¹⁷² The potential for raising money for legal education depended on how well the appeal could be justified in terms of the philanthropic ideology that increasingly predominated in benefaction for higher education. Pound had to explain the “signal public service” that, he claimed, would issue from donations to support legal scholarship at Harvard.¹⁷³

Medical education was the exemplar. In 1900, massive contributions began flowing into Harvard Medical School, and by 1902 it possessed “a larger endowment than any other professional department of the university.”¹⁷⁴ By 1914, Yale Medical School did the same.¹⁷⁵ The reason was undisputed: “the hope of beneficent results from medical and surgical research . . . has made it easy to procure large gifts to the medical school. Rich men who have intelligent imaginations see that there is a fair prospect of obtaining in medical laboratories great benef[it]s for the human race.”¹⁷⁶ In 1929, Lowell

168. Letter from W. R. Hauslaib to Robert F. Duncan (Mar. 15, 1927), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 57.

169. Duncan, Situation Report (Feb. 1, 1927), *supra* note 145, at 4, 5.

170. Letter from Hauslaib to Duncan, *supra* note 168. See letter from Wilson M. Powell to Roscoe Pound (Jan. 31), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean’s Office Records, *supra* note 122, at box 1; Harvard University Law School Endowment Fund Committee, Bulletin No. VII, at 3 (Dec. 11, 1926) (on file with Records of the Harvard Law Endowment Fund 1926-1938, container of money raising promotional literature 1926-1927).

171. Duncan, *supra* note 145 (Apr. 1, 1927).

172. Yeomans, *supra* note 155, at 252-3.

173. Pound, Annual Report of the Dean of Harvard Law School 1923-24, *supra* note 123 186.

174. Charles W. Eliot, Annual Report of the President of Harvard College 1900-1901 49-50 (1901).

175. George P. Day, Annual Report of the Treasurer of Yale University 1913-14 72 (1914).

176. Charles W. Eliot, Annual Report of the President of Harvard College 1902-1903 22 (1903). See Kenneth M. Ludmerer, *Time To Heal: American Medical Education from the Turn of the Century to the Era of Managed Care* 57-58 (Oxford Univ. Press 1999).

reported that the joint income of the Schools of Medicine and Public Health had increased 400 percent since 1920¹⁷⁷ The comparative increase for the law school was 36 percent.¹⁷⁸

For more than a decade, Pound had recognized the allure of medical research. “The social hygiene involved in proper investigation in a law school is quite as important as the individual hygiene investigated in the medical school,” he wrote.¹⁷⁹ Regarding his favorite field of criminal law, Pound suggested, “we may expect endowment of such a chair to be no less fruitful of results than the endowments of medical research which have been so conspicuously fruitful in recent years.”¹⁸⁰ Lowell likewise invoked the point,¹⁸¹ as did the dean of Yale Law School: “Just as the public has been ready to give necessary financial support to the improvement of medical education, the combating of disease and the creating of better health conditions, so, we believe, will it be ready to aid efforts to improve legal education and to promote the research essential to bettering the administration of justice.”¹⁸²

But Pound appeared wary of analogies to medicine, which he made only in letters and annual reports and avoided in his public manifesto for the 1925-27 campaign. Instead, his *Projet* advanced the philanthropic rationale in two limited respects. First, he focused on the benefits of legal research and graduate education, largely neglecting needs associated with LL.B. instruction.

But those needs created the fundamental financial problems of the school. Since the arrival of Dean Thayer in 1914, the law school had for two decades lamented the problem of tuition dependence. Pound had led the chorus, repeatedly complaining about the “box office plan” whereby “the school must live from hand to mouth.”¹⁸³ However, perhaps because arguments to support law students had always been interpreted as appeals for undeserved charity, he dedicated 97 percent of the requested \$3 million of endowment to support

177. A. L. Lowell, Annual Report of the President of Harvard University 1927-28 24 (1928).

178. Adams, Annual Statement of the Treasurer of Harvard University 1919-20, *supra* note 162, at 11, 130; Adams, Annual Statement of the Treasurer of Harvard University 1929-1930, *supra* note 162, at 8, 267.

179. Letter from Pound to Lowell, *supra* note 67.

180. Pound, Annual Report of the Dean of Harvard Law School 1926-27, *supra* note 154, at 185-186.

181. Lowell, Annual Report of the President of Harvard University 1925-26, *supra* note 154, at 23-24.

182. Swan, Annual Report of the Dean of Yale Law School 1923-24, *supra* note 161, at 124.

183. Quotations are from Roscoe Pound to Frank W. Grinnell (Apr. 13, 1916), in President Abbott Lowell Records, *supra* note 4, at box 84; The Harvard Law School, *supra* note 90, at 16. See Pound, Annual Report of the Dean of Harvard Law School 1915-16, *supra* note 81, at 145; Pound, Annual Report of the Dean of Harvard Law School 1923-24, *supra* note 123, at 185; Roscoe Pound, Annual Report of the Dean of Harvard Law School 1924-25 80 (1925); letter from Pound to Lowell, *supra* note 67; The Harvard Law School: a *Projet*, *supra* note 126, at 23; Centennial History, *supra* note 89, at 173; Lowell, Annual Report of the President of Harvard University 1923-24, *supra* note 121, at 15-16.

professorships, fellowships, publications and library services associated with research.¹⁸⁴ Meanwhile, the \$2 million requested for land and buildings would raise maintenance costs and require a tuition increase, as Pound conceded.¹⁸⁵ Consequently, the goal for the 1925-27 campaign implied expanding the school's dependence on LL.B. tuition and worsening the problematic syndrome of the law school's finances.

Pound's inattention to LL.B. students seemed totally wrongheaded to some faculty, even apart from neglecting to appeal for endowment to support it. Professor Edward H. Warren regretted that the dean and many of the faculty "take a greater interest, enthusiasm and pride in graduate courses than in undergraduate [LL.B.] courses." In fact, "the greatest asset of this school will prove to be the good will of those students who have obtained here the foundation of their success. . . . [T]heir response to an appeal for funds . . . would yield substantial results."¹⁸⁶ The failure of the campaign focused on graduate studies and research seemed to confirm Warren's judgment..

Second, Pound's *Projet* attempted to explain the social benefit of legal research and graduate education but in a very limited way. He asserted that legal scholars and lawyers must assist legislatures in writing better laws and "make law-making take account of the social facts to which it must be applied and at the same time fit harmoniously into the legal system of which it must be a part."¹⁸⁷ He also affirmed that "administration of criminal justice is admittedly the weakest point in the American polity. No subject of research affords greater possibilities."¹⁸⁸ However, Pound did not provide details, evidence, or examples of social benefit beyond his previous statements. The 1925 *Projet* repeated the approach, arguments, and language of Pound's 1919 pamphlet and earlier annual reports. He kept invoking the experience of the 19th century as evidence, and elliptically restating that benefits would flow from legal research.

Above all, he neglected to address, or even acknowledge, the "widespread skepticism among a certain class of practical men, in and out of our profession," that legal research and graduate study is socially useful, as James Thayer had written.¹⁸⁹ Indeed, Pound recognized this skepticism, for he raged privately that the dean of Harvard Business School, an HLS graduate, was giving

184. The Harvard Law School: a *Projet*, *supra* note 126, at 23.

185. *Id.* at 20, 29.

186. Edward H. Warren, Harvard Law School Outlook in November, 1941—Statement made at a meeting, Nov. 23, 1941, of the Visiting Committee of the Harvard Law School, in *Spartan Education* 58-59 (Houghton Mifflin Co. 1942).

187. The Harvard Law School: a *Projet*, *supra* note 126, at 22.

188. *Id.* at 21.

189. Thayer, *supra* note 73, at 174.

lectures around the country that criticized law's capacity to improve industry and business.¹⁹⁰ But Pound did not address the skepticism.

Immediately upon coming aboard in June, 1926, the John Price Jones staff expressed doubts about Pound's *Projet*. They endorsed his philanthropic theme "that there is a vital public service to be done by our law schools in re-making the law into an effective instrument for the orderly development of our present complex society." However, while "the theme is admirably set forth in a manner that will strikingly appeal to lawyers and alumni, there is a question as to whether [Pound's] presentation will catch the attention of the laymen. For them the appeal should be developed in a less technical, and more popular style." In addition, "for businessmen, the central theme should be presented . . . on the ground that the proposed research work would make it possible for the growth of the law to keep pace with the growth of big business."¹⁹¹ In sum, "the appeal must be reduced to terms of every-day life. The man of affairs must be shown that scientific study of the law will bring results comparable with those already obtained by research workers in business and industry."¹⁹²

The consulting firm's doubts evidently did not convince Pound or Powell, because the campaign published 15,000 copies of the *Projet* and distributed it to more than 10,000 alumni and prominent judges in the fall of 1926.¹⁹³ Then in October the criticism was repeated. In remarks at the kick-off dinner in Boston, the university's leading volunteer fundraiser, Anglican Bishop William Lawrence, maintained that the campaign must "show all walks of life why Harvard Law School was needed for their welfare, safety, and happiness."¹⁹⁴ The JPJ staff also sharpened its critique:

It serves no purpose to keep telling the average citizen what a very fine thing law research is. He wants to know what law research will do He is not interested in generalities, law books and law libraries. He is interested in crime and crime prevention . . . [and] in the conflict and disorder whenever legislation is given an oppressive twist. . . . When we turn to the businessman, the appeal must be placed on a business basis. It is not enough to say that the science of law must keep pace with the science of business The businessman is engaged in buying and selling The purpose of this publicity is . . . to state . . . : *What Legal Research Could Accomplish?*¹⁹⁵

190. See Pound to Powell, *supra* note 122; Clark, *supra* note 131, at sect. IV C 2. See Roscoe Pound to Julian Mack (Jan. 11, 1927), in Correspondence regarding endowment funds 1919-1927, Harvard Law School Dean's Office Records, *supra* note 122.

191. Quotations are from Survey and Plan, *supra* note 144, at 21.

192. *Id.* at 7.

193. Harvard University Law School Endowment Fund News Releases (October 18, 1926), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, vols. 48, 49; Specifications for *Projet* Pamphlet, in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 54.

194. Harvard Law School Fund Drive Opened, Boston Globe, Nov. 2, 1926, at 5.

195. Memorandum from Mr. Lohrke, Memorandum Report on Developing the Human Angle of the Harvard Law School Endowment Fund (Oct.-Nov. 1926), in John Price Jones Co.

Since Pound could not effectively answer this critical question, the consulting company's staff prepared a new manifesto, while focusing all campaign publicity on "the need for scientific research in the field of law."¹⁹⁶ It took until April 1927 to hash out a new statement explaining unmistakably to the laity the social benefit of legal research: *For the Safety of the Citizen and the Protection of Business, A plan to eliminate from the administration of justice in this country many elements of delay, waste, friction and uncertainty which are threatening the general security and hampering commerce and industry.*¹⁹⁷ By the time 5,600 copies of this 80-page pamphlet were mailed to prominent periodicals and individuals across the country,¹⁹⁸ "the chronic state of inertia" had seized the campaign. Yet, it is doubtful that the second manifesto would have mattered because it further demonstrated the difficulty in explaining the social benefit of legal research. Whereas Pound appeared unwilling or unable to do so, the JPJ staff fitted this appeal into the Procrustean bed of scientific naturalism and a direct causal model of social benefit.

Addressing the question "What is meant by legal research?" *For the Safety of the Citizen and the Protection of Business* pointed to "the proved methods of Pasteur and Reed and Banting and Faraday" through which "many terrible scourges—hydrophobia, typhoid, diphtheria, malaria, yellow fever, diabetes—have been brought under control."¹⁹⁹ The pamphlet also emphasized the "public demand . . . that national law schools shall function as great law laboratories, directly serving the public interest in much the same way as chemical and engineering laboratories, university hospitals and clinics or our great scientific foundations."²⁰⁰

A primary benefit of such experimental research would be simpler, more efficient law, it said, particularly in matters of crime and business. Regarding crime, the pamphlet's opening anecdote described the lamentable delay in extraditing and trying a heinous criminal, whose case exemplified how "the modern professional criminal frequently finds a way to elude justice through the archaic technicalities of our inherited procedure."²⁰¹ Legal research was evidently going to determine how to try, convict and jail criminals expeditiously.

Records 1919-1954, *supra* note 131, at box CH, v. 57.

196. See Harvard University Law School Endowment Fund News Releases (Nov. 1926–April 1927), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 51.

197. *For the Safety of the Citizen and the Protection of Business, a plan to eliminate from the administration of justice in this country many elements of delay, waste, friction, and uncertainty which are threatening the general security and hampering commerce and industry* (Harvard Law School Endowment Fund 1927), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 50 [hereinafter *For the Safety*].

198. See form letter by Wilson M. Powell (Apr. 27, 1927), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 50.

199. *For the Safety*, *supra* note 197, at 11.

200. *Id.* at 15.

201. *Id.* at 9, 21.

No mention was made about rights of the accused or the possibility that suspected criminals might be innocent or the paradox that lawyers had created the archaic technicalities that they now were volunteering to fix for a donation.

In the domain of business, the new manifesto assailed “legal uncertainties” and “legal perplexities” that undermine “those conditions of certainty and uniformity which are so important to the safe, orderly and expeditious development of business and industry.”²⁰² The pamphlet did not say how professional expertise would cure the ills of arcane technicality to which professional expertise had often contributed. Nor did the pamphlet consider whether technicality and complexity might be necessary.²⁰³

In addition, *For the Safety of the Citizen and the Protection of Business* discarded Pound’s argument for continuity and reconciliation between old and new law, arguing that “modern conditions call for modern law” adjusted to “the wholly different and much more complicated conditions of a present-day America, which is predominantly urban and industrial.”²⁰⁴ No consideration was given to the question of whether such adjustment might entail new social arrangements that might be controversial. Furthermore, commensurate with its enthusiasm for scientific naturalism, the pamphlet neglected politics. It suggested that legal research would yield practical improvements. But, even when considering how legal research could improve the “ill-considered, badly drawn, experimental, first-impression legislation with which the country is flooded from year to year,” no mention was made of the politics involved in enacting legislation.²⁰⁵

Fundamentally, the published manifesto of the consulting firm did not appreciate the complex relationship between legal research and public benefit. HLS faculty had pointed to this complexity when instructing JPJ staff on “Things to Remember” in preparing publicity for the campaign, including: “Make no rash promises that legal research is a cure-all. . . . Legal research is . . . not the same as medical research. . . . When possible, base arguments on business law and administration of justice, rather than on sensational aspects of criminal law.”²⁰⁶ Nevertheless, the consulting firm attempted to explain the social benefit of legal research through a causal model drawing on scientific naturalism.

In the end, neither HLS leaders nor the John Price Jones consultants adequately responded to the problem that “to the layman the campaign’s dominant theme—the value of legal research to American society—would probably seem questionable. The law was highly technical; its reform appeared unrelated to the ordinary man’s daily welfare. It sometimes seemed a mass

202. *Id.* at 9-10.

203. *Id.* at 13-15, 24.

204. *Id.* at 11.

205. *Id.* at 24.

206. “Standard Practice for Harvard Law Account” (Dec. 29, 1926), in John Price Jones Co. Records 1919-1954, *supra* note 131, at box CH, v. 57.

of exasperating rules, tending to retard rather than to forward the ends of true justice.”²⁰⁷ The consulting firm knew what lay philanthropists wanted to hear; the legal academics knew what they did and could do. Across the gap between them, the 1925-27 campaign failed to build a conceptual bridge that philanthropy could cross to endow legal education.

Conclusion

The three early stages in developing a full-fledged fundraising campaign for legal education at Harvard were hampered by circumstantial, tactical, institutional, and human factors that contributed to their failure to reach, or even approach, their goals. But the fundamental problem was the inability to construct a persuasive rationale. Donors resisted giving charity to law students and law schools, and law professors and deans could not explain and justify their scholarship in philanthropic terms, particularly in light of public skepticism about the social benefit of the legal profession. Leaders of the successful HEF campaign maintained “that the two great lines of publicity are the appeal to the intellect and the appeal to the heart. If you can get both of these, you can hardly fail.”²⁰⁸ Though preeminent in the field, Harvard Law School could get neither between 1880 and 1930. The failure to justify fundraising had important consequences. Without gifts for the needed new building, HLS sought help from the university, which drove a relatively hard bargain. Yale and Columbia universities had assisted their law schools when facing similar circumstances in previous decades,²⁰⁹ while Harvard had enthusiastically supported the fundraising of its medical and business schools. But the Harvard Corporation nurtured the law school through deprivation, even though, or perhaps because, four of the seven members of the Corporation had graduated from the school. The university thus lent the law school more than \$1,400,000 at market rates for the building and required it to raise tuition by 100 percent to service the debt.²¹⁰ At the end of its campaign, HLS was a larger school with more students, buildings, expenses, and debt.²¹¹ It was even

207. Sutherland, *supra* note 147, at 264. See similar language in Survey and Plan, *supra* note 144, at 7.

208. Guy Emerson to Thomas W. Lamont (Jan. 9, 1919), box 2 1918-1921, Thomas W. Lamont Correspondence, Records of Harvard Endowment Fund 1916-39, Harvard University Archives.

209. Timothy Dwight, Report of the President of Yale College 1897 61 (Yale College 1898); Julius Goebel Jr., *A History of the School of Law, Columbia University 100-03, 185-56* (Columbia Univ. Press 1955).

210. Lowell, Annual Report of the President of Harvard University, 1923-24, *supra* note 121, at 15-16; Lowell, Annual Report of the President of Harvard University 1926-27, *supra* note 154, at 5-6; Griswold, Annual Report of the Dean of Harvard Law School, 1947-48, *supra* note 158, at 390.

211. Roscoe Pound, Annual Report of the Dean of Harvard Law School, 1932-33, at 215.

more dependent on tuition. The loan on the building was not paid off until 1948 and cost the school over \$430,000 in interest.²¹²

The long-term financial implications have been serious. Among law schools, Harvard is extremely wealthy. Its endowment is now about three times larger than the next largest endowments of any law school in the country, which belong to Yale, Stanford and Columbia.²¹³ But, outside the field of law, the best endowed law school in the nation has remained more dependent on tuition than its peers in the strongest domains of professional education. Today the endowment of Harvard Law School is less than half that of the much smaller Harvard Medical School, whose endowment was half that of the law school in 1895. The law school endowment is about two-thirds that of Harvard Business School, founded a century after the law school in an academic field with a lesser pedigree.²¹⁴

Even more significant, during the 2000s the fraction of revenue that the school draws from tuition is greater than for any other school at Harvard, including the education school, the divinity school, and the school of design.²¹⁵ In this sense, the law school has remained “the worst endowed of all the great departments of professional education.” Like other law schools, the wealthiest law school in the country is still caught in the syndrome of relatively low endowment, high tuition, high enrollment, and a tendency toward overcrowding, which leads to expanding physical plant, debt, and tuition dependence.²¹⁶ The seeds were planted between 1880 and 1930.

212. Griswold, Annual Report of the Dean of Harvard Law School, 1947-48, *supra* note 158, at 390.

213. Brian Leiter, Top 20 Law Schools by Size of Endowment (Based on Data from 2000), Brian Leiter’s Law School Reports (Sept. 1, 2006), *available at* http://leiterlawschool.typepad.com/leiter/2006/09/top_20_law_scho.html.

214. Charles F. Adams, Annual Statement of the Treasurer of Harvard University 1894-1895, at 30 (1895); Harvard University, Harvard University Fact Book 2010-11 42 (The Office of Institutional Research 2011).

215. Harvard University, Harvard University Fact Book 2000-2001 36-7 (Office of Budget and Financial Planning 2001); Harvard University Fact Book 2010-2011, *supra* note 214, at 40-41.

216. *See* Harvard Law School Fund Volunteer Manual 2 (2009).