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FOREWORD: LAWYERS AND SOCIAL CHANGE IN AMERICAN LEGAL HISTORY

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The articles in this Symposium address a progressive topic: the ways that lawyers and jurists promote legal and social change. They address this phenomenon from the perspectives of history—most frequently through studies of individual lawyers like Steven Lubet’s abolitionist lawyers, Thurgood Marshall as presented by Judge U.W. Clemon and Bryan Fair, and Jennifer Levison’s self-taught legal advocate, Elizabeth Parsons Ware Packard. Brian Landsberg’s case study of civil rights litigation in Sumter County, Alabama, examines the influence of multiple lawyers working at the Department of Justice with a common purpose—ensuring the rights of African-Americans to participate in the democratic process. Some of the articles also approach the topic of civil disobedience from the perspective of professional responsibility scholarship and from theoretical speculation, such as Tim Terrell’s examination of the duties owed by attorneys today, and to whom those duties are owed; and Christopher Bracey’s brilliant sociological study of the jazz-like behavior of jurists.

All of the articles share a reverence for the ways that lawyers and jurists might make (and remake) the law. Some of them are case studies in how that process happens; others look to the complex issues that limit or inhibit change. They are important reminders of the contributions that lawyers make to changing law and that there has been—throughout American history—a radical tradition in American jurisprudence.¹ From the first settlers in colonial America, some have used law to achieve radical results. One is

* Professor of Law, The University of Alabama School of Law. I would like to thank Adam P. Plant for the invitation to write this Foreword and for discussing the ideas contained in this Symposium with me. I have benefited from comments by John Dzienkowski, Mary Sarah Bilder, Carol Rice Andrews, Daniel M. Filler, Eric J. Miller, and Barbara Thompson, as well as an audience at the Ralph Ellison Library in Oklahoma City, Oklahoma, where I presented some of these ideas in February 2003.

1. See, e.g., DAVID RAY PAPKE, *HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION’S LEGAL FAITH* (1998) (discussing the radical legal tradition).

reminded of the Quakers in colonial Pennsylvania, for instance, who sought to limit civil suits and looked to government to provide security against religious intolerance, which had caused both destructive wars and harsh criminal punishment, including forfeiture of property for religious dissent.² An important theme in the Revolutionary era was the reform of English law through the elimination of vestiges of feudalism, such as fee tail and primogeniture.³ One may perceive the overarching agenda of the Enlightenment as the elimination of monarchy and aristocracy. America's endorsement of that agenda was expressed (even if only temporarily) through the Declaration of Independence, which was—as Peter Hoffer reminds us—written by a lawyer following the form of an appeal to a court of equity.⁴

Yet, “the lawyer as agent of social change,” to paraphrase Elizabeth Eisenstein,⁵ is not the dominant theme of American legal history. More common are the themes, explored frequently in nineteenth century literature, of the lawyer as impediment to social change and the law as impedi-

2. See, e.g., Alfred L. Brophy, “Ingenium est Fateri per quos profeceris:” *Francis Daniel Pastorius’* Young Country Clerk’s Collection and *Anglo-American Legal Literature, 1682-1716*, 3 U. CHI. L. SCH. ROUNDTABLE 637 (1996) (discussing Quaker legal thought). Quaker radicalism led in the direction of changes in legal and political thought more generally. See, e.g., DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823* (1975) (crediting Quakers with generating the American Anti-Slavery Movement).

3. See, e.g., GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1770*, at 26-42 (1997); Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 1-26 (1977).

One could repeat Katz’s study around the theme of inheritance in the antebellum era. The result would likely show key differences in attitudes toward inheritance. In cases of devises of slaves as property, for instance, one finds significant emphasis on the right to dispose of property as one pleases unless the owner wanted to end slavery, in which case there were significant restrictions on the right to dispose of property in some states. See, e.g., *Smithwick v. Evans*, 24 Ga. 461 (Ga. 1858) (construing a will as inconsistent with Georgia’s manumission legislation); *Spencer v. Dennis*, 8 Gill 314 (Md. 1849) (allowing the legislature to eliminate entirely the power of manumission and permitting the legislature to prescribe modes of emancipation). Mississippi, for instance, prohibited emancipations by will; after an attempted manumission, the slaves would descend according to interstate succession. See *Read v. Manning*, 30 Miss. 308 (Miss. 1855). South Carolina even applied an act prohibiting emancipation retroactively to a will of a person who died before the act was passed. *Gordon v. Blackman*, 1 Rich Eq. 61 (S.C. App. Eq. 1849). When the emancipation was set aside, it frequently benefited the testator’s relatives. See, e.g., *Pendleton v. Blount*, 21 N.C. 491 (N.C. 1837). Creative attempts to avoid sale of families for debt also failed. See *Lea v. Brown*, 56 N.C. 141 (N.C. 1857). Courts were more willing to uphold emancipation if the slaves were freed outside the state. See, e.g., *Cameron v. Comm’rs of Raleigh*, 36 N.C. 436 (N.C. 1857); *Roberson’s Heirs v. Roberson’s Ex’rs*, 21 Ala. 273 (Ala. 1852); *Pendleton v. Blount*, 21 N.C. 491 (N.C. 1837). Such cases illustrate the law’s careful guarding of the community’s interest in property. See generally WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996). In cases of slaves freed by will in the Deep South, as in so many other cases of wills law, when testators’ intents differed from the accepted notions of proper disposition, courts were willing to intervene and alter dispositions. Cf. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (discussing ways that findings of undue influence are affected by testors’ dispositions). What may be different about the antebellum wills cases is the way that judges forthrightly address the conflict between testators’ intents and state policy regarding manumission of slaves by will. And still, wills law made no effort to break up the larger slave estates. So the concern for equal distribution of property, which led to the demise of fee tail, vanished. In its place, we had a concern for preservation of property in the form of slavery, which Southerners viewed as a keystone of society. See ALEXANDER, *supra*, at 211-40.

4. PETER HOFFER, *THE LAW’S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA* 71-76 (1990).

5. See ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979).

ment to justice. So we have James Fenimore Cooper's tales of the naïve woodsman who does justice, even as technology and "law" infringe on his domain.⁶ Perry Miller referred to this genre in *The Life of the Mind in America* as "nature versus law."⁷

More recently, Robert Ferguson has further explored the complexities in nineteenth century literature. Much of the early nineteenth century literature produced by lawyers explored the theme of how law brought discipline to American society—and tamed it.⁸ So even as some explored the injustice brought about by the rule of law, such as the ways in which it brought power to Federalists, powerful interests celebrated the role that law, and more specifically lawyers, played in regulating America. Ralph Ellison explored that theme—the connections between Federalism and hierarchy in the years after the Revolution and the decline of Enlightenment ideas—in his 1976 essay, *Perspective of Literature*.⁹ Then Ellison explored the conflict between our mythical conception of history—that the Declaration of Independence made us free and equal—and reality, which was much more complex. Ellison found that, "Social order is arduous, and power filters down to the lower levels of society only under constant pressure."¹⁰ Given the Federalists' control of the government after the Revolution, it was not surprising that, "As a new hierarchy began to function, those at its top were in a better position to take advantage of these newfound benefits, while those at the bottom were hardly better off than they had been under the Crown."¹¹

We know far too little about the legal profession in the early nineteenth century, but the available evidence points to a profession that conceived of

6. See JAMES FENIMORE COOPER, *HOME AS FOUND* (Capricorn Books 1961) (1860); see also G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835* (1988).

7. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 101-03* (1965). Perry Miller's book relies largely upon Whig-dominated sources: college orations, opinions from Whig justices, and Whig periodicals like the *North American Review* and the *American Jurist*. Miller paid less attention to those within the legal profession who held dissenting views. Some outside who critiqued legal thought—like John Brooke, whose lecture at Kenyon College distinguished legal and religious thought—illustrate the divergence of legal and religious thought. See JOHN T. BROOKE, *THE LEGAL PROFESSION: ITS MORAL NATURE, AND PRACTICAL CONNECTION WITH CIVIL SOCIETY* (Cincinnati, H.W. Derby 1849). They do not, however, show a tradition of radical legal thought. Thus, we do not see the rich history of opposition thought like Steven Lubet's abolitionist lawyers. Nor, even, Thoreau's disobedience. See HENRY DAVID THOREAU, [*Resistance to Civil Government*] *Civil Disobedience*, in *CIVIL DISOBEDIENCE AND OTHER ESSAYS 1* (Dover Publishing 1993) (1906). One of the many surprising elements of Miller's book, which is about romanticism in America, is his limited treatment of Transcendentalists' influence on law. See Alfred L. Brophy, Perry Miller's Sources for *Life of the Mind in America* and the Trajectory of American Legal History (Mar. 1, 2003) (unpublished manuscript, on file with author).

8. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); Daniel Webster, *Plymouth Oration*, available at <http://www.dartmouth.edu/~dwebster/speeches/plymouth-oration.html> (last visited Mar. 11, 2003).

9. RALPH ELLISON, *Perspective of Literature*, in *THE COLLECTED ESSAYS OF RALPH ELLISON 766* (John F. Callahan ed., 1995) [hereinafter *COLLECTED ESSAYS*].

10. *Id.* at 776.

11. *Id.* at 774. Legal historians have explored the mechanism by which Federalist political ideology effected federal courts. See Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81 (2000).

itself as a protector of American society against the incursion of radicalism. The Whig-dominated legal profession established legal periodicals, case reporters, and treatises as vehicles for raising the intellectual caliber of the profession.¹² It aimed to make law into an elegant, understandable science. That professionalization also included talk about the functions that law and lawyers served.¹³

In a series of speeches to college literary societies, antebellum jurists and lawyers celebrated the role of lawyers in stopping radical reform, and they told themselves they had a great duty to the public to establish and maintain order.¹⁴ Daniel Lord's 1851 lecture at Yale University, for instance, explored how the training of lawyers and ministers shaped what they taught. The education of lawyers and ministers taught them the dangers of radicalism and they, in turn, educated their audiences:

On the general influence, however, of both the pulpit and the bar on the political interests of society;—their training in learning, the character of their knowledge as derived, historic, traditionary knowledge, and their intellectual habits of life, lifting them above common and vulgar passions, render them as classes eminently conservative. And although both at times have headed revolutions, it has been in favor of some time-honored principle of Religion, Liberty or public Justice. Generally, with the modesty of knowledge, they distrust things untried, they truly but lightly esteem the arrogance of reforming ignorance and stand fast by plain truths and practicable principles. They are bulwarks to the sacredness of social ties, to the weighty sanctions of the civil law, to the inviolability of contracts and to the protection of every civil and social right.¹⁵

Other lecturers also told of the ways that institutions, such as the legal profession, were inherently conservative. Professor Henry St. George Tucker of the University of Virginia told law students that lawyers are “bred to a love of order; a devotion to settled forms and the supremacy of the law is one of their distinguishing characteristics. The ascertainment of fixed and definite

12. See MILLER, *supra* note 7, at 117-55 (discussing the legal profession's intellectual elegance).

13. Some of the best work exploring the nature of the antebellum legal profession comes from scholars of legal ethics, who seek to understand the nature of law as a profession, with duties to both the public, and to private clients. See, e.g., Paul D. Carrington, *The Romance of American Law* (July 1, 2002) (unpublished manuscript, on file with author); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethic Codes*, 6 GEO. J. LEGAL ETHICS 241 (1996); see also Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999).

14. See Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151 (1998) (mining public lectures for evidence of jurisprudence); cf. David Hoffman, *Hoffman's Course of Legal Study*, 6 N. AM. REV. 45 (Boston, Cummings & Billiard 1817), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); David Hoffman, *Hoffman's Legal Outlines*, 30 N. AM. REV. 135 (Boston, Gray & Bowen 1830), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003).

15. DANIEL LORD, ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR 12-13 (New York, S.S. Chatterton 1851).

rules of property and principles of Jurisprudence is their hourly occupation.”¹⁶ Lawyers learned to oppose radicalism through their training. Those learning the profession “grope among the rubbish of the year books of four centuries ago, for the precious treasure of the law.”¹⁷ From that experience, “we cannot fail to trace the antagonizing principle, to the eternal love of change.”¹⁸

And in much popular literature, the Whig theme of order predominated over the democratic theme of “justice.” During the Anti-Rent Movement in upstate New York, poor tenant farmers on ninety-nine-year leases staged an uprising, refusing to pay rent unless they had the right to purchase the property they lived on. The *New Englander* characterized this movement as a “civil war” that is “wildly stalking through her borders, burning the property, and sacrificing the lives of her citizens, while the majesty of the civil law was trampled in the dust.”¹⁹

Even when journals acknowledged the need for change, they urged gradual reform. An essay on *The Common Law* in the *North American Review* reminded readers that change had to be gradual for, it is not too much to say, the moral impossibility of changing by an act of national volition, or legislation, the established jurisprudence of a people, is as certain as the physical impossibility of changing the great geographical features of the country they inhabit.²⁰

So a dominant theme of the early American legal profession was the use of law as a stabilizing, rather than a radicalizing, force.²¹ There were, of course, dissenting voices. We see them frequently in the *United States Democratic Magazine*. So, while many thought the common law was the “perfection of reason,” radical opponents saw it as a burdensome, unfair, uninterpretable labyrinth.²² In an 1841 article on codification, one critic of the common law said:

In other words, while the Common Law is acknowledged as an authority in our courts, law must fail of attaining the rank and consis-

16. HENRY ST. GEORGE TUCKER, INTRODUCTORY LECTURE DELIVERED BY THE PROFESSOR OF LAW IN THE UNIVERSITY OF VIRGINIA, AT THE OPENING OF THE LAW SCHOOL 7-8 (Charlottesville, Magruder & Noel 1841).

17. *Id.*

18. *Id.* at 8.

19. *Anti-Rent Disturbance*, 4 NEW ENGLANDER 92, 92-93 (New Haven, William J. Kingsley Jan. 1846), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); see also George Grote, *Constitutional History of Athenian Democracy*, 18 NEW ENGLANDER 651 (New Haven, William J. Kingsley Aug. 1860), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003).

20. William Sampson, *The Common Law*, 19 N. AM. REV. 411, 428 (Boston, O. Everett Oct. 1824), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003).

21. Historians share this assessment. See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

22. See, e.g., *What is the Reason?*, 16 U.S. MAG. & DEMOCRATIC REV. 17, 23 (New York, Henry G. Langley Jan. 1845), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 25, 2003); William Whewell, *The Elements of Morality; Including Polity*, 19 U.S. MAG. & DEMOCRATIC REV. 385, 386 (New York, Thomas Prentice Kettell Nov. 1846), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 25, 2003).

tency of a science. “Science,” says Sir John Herschel, “is the knowledge of a few, methodically adjusted and arranged so as to become attainable by all.” Law is the knowledge of a few—of a very few—so irreconcilable in its principles and so immethodically dispersed, that it can never come into the possession of one-thousandth part of those for whose civil conduct it is intended to be the guide.²³

Even antebellum orators sometimes saw the virtues of change; sometimes they even seemed to acknowledge the potential of reform, but even then reform was kept within the tradition of American law.²⁴

23. *Edward Livingston and His Code, Second Article*, 9 U.S. MAG. & DEMOCRATIC REV. 211, 213 (New York, J. & H.G. Langley Sept. 1841), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003). One might also look to the following: *Flogging in the Navy*, 25 U.S. MAG. & DEMOCRATIC REV. 97 (New York, Thomas Prentice Kettell Aug. 1849), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *History of Constitutional Reform in the United States*, 18 U.S. MAG. & DEMOCRATIC REV. 403 (New York, Thomas Prentice Kettell June 1846), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *Judicial Encroachment*, 26 U.S. MAG. & DEMOCRATIC REV. (New York, Kettell & Moore Mar. 1850), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *Law and Reason*, 40 U.S. DEMOCRATIC REV. 211 (New York, Conrad Swackhamer Sept. 1857), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *Law Reform in England*, 28 U.S. MAG. & DEMOCRATIC REV. 33 (New York, Kettell & Moore Jan. 1851), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); Philip H. Nicklin, *Literary Property*, 2 U.S. MAG. & DEMOCRATIC REV. 289 (New York, J. & H.G. Langley June 1838), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *Rationale of Land Reform*, 26 U.S. MAG. & DEMOCRATIC REV. 124 (New York, Kettell & Moore Feb. 1850), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *The Constitution—The Framers and the Framing*, 11 U.S. DEM. REV. 337-51 (New York, J. & H.G. Langley Oct. 1842), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *The Sources and Perfection of the American Law*, 29 U.S. MAG. & DEMOCRATIC REV. 161 (New York, Kettell & Moore Aug. 1851), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); *The Supreme Court of the United States*, 7 U.S. MAG. & DEMOCRATIC REV. 497 (Washington, S.D. Langtree June 1840), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003); R.W. Wells, *Law Reform*, 21 U.S. MAG. & DEMOCRATIC REV. 477 (New York, J. & H.G. Langley Dec. 1847), available at <http://cdl.library.cornell.edu/moa> (last visited Mar. 11, 2003).

24. JOSEPH R. INGERSOLL, AN ADDRESS DELIVERED BEFORE THE PHI BETA KAPPA SOCIETY, ALPHA OF MAINE, IN BOWDOIN COLLEGE (Brunswick, 1837). Ingersoll’s lecture, which celebrated the democratizing influence of education, was significantly different from most other antebellum college lectures. Where some urged obedience to law, Ingersoll celebrated the cultivation of a love for country and an attachment to the idea of intellectual progress. Ingersoll, a Democratic politician, thought that:

Every one is competent to provide a contribution towards it. In the prodigious improvements of the day, it is matter less of surprise than sorrow, that misdirected exertions should occasionally break forth in lawlessness and mischief. It should be no less the pride than it is the peculiar office of science to counteract these tendencies; and while philosophy presides in the recesses of the schools, she will send forth her winged ministers, with wisdom for their guide, to stay the unruly passions, and substitute for their indulgence an honest pride in the glory of the republic, a warm attachment to its institutions and an ardent zeal in the support, defense and perpetuation of them.

Id. at 23. Ingersoll credited the scientific ideal with intellectual and moral progress:

Why is each onward step but an initiate or progressive movement in a swift career, in which positions reached are only fresh starting points for farther and loftier attempts? It is because *science* is emphatically the parent of the improvements of the day. Whatever other errors may be incident, and perhaps peculiar, to the period in which we live, false philosophy and empiricism, to any considerable extent, are not among them. The crucible of the chemist is no longer filled with strange combinations of matter, with a view to detect the philosopher’s stone among the lurking secrets of nature. The observatory of the astronomer is not vexed

What is important, then, about these articles is the way that they recover an important alternative tradition of radicalism—or at least reform—among American lawyers. Steven Lubet’s article is located in one of the times of greatest social change in American history: when the movement to abolish slavery was gathering momentum. He deals with the question: How can abolitionist lawyers make use of pro-slavery law? In fact, we learn through the prism of the Oberlin rescuers that pro-slavery law provided little opportunity for abolitionists accused of aiding fugitives to escape in violation of the criminal provision of the Fugitive Slave Act. As a consequence, abolitionist lawyers developed a strategy of civil disobedience. In addition to making as strong a case as possible using traditional criminal defenses, the attorneys for Rufus Spalding and Horace Bushnell appealed to jurors’ sentiments about the immorality of the Fugitive Slave Act. Sometimes that argument was restrained—it provided merely a means of narrowly interpreting the “odious act.”²⁵ At other times, the defense impugned the morality of the Act, or asked the jurors to consider how their children might be enslaved,²⁶ and that the Act itself was not moral and, hence, the actions were not those of a criminal.²⁷

Yet those arguments, though morally moving, could not carry the jurors. Lubet aims at uncovering the history of radical lawyers. However, one important lesson is that the law of slavery constrained even abolitionist judges, for on appeal to the Ohio Supreme Court an abolitionist judge upheld the convictions. Chief Justice Joseph Swan wrote that he was “under [his] solemn oath as a judge, bound to sustain the supremacy of the Constitution and the law.”²⁸ Lubet’s moving story reminds us of the power that law has to bind a person’s conscience. That is a powerful theme and it attracted the attention of Harriet Beecher Stowe in her 1856 novel *Dred: A Tale of the Great Dismal Swamp*,²⁹ Herman Melville in *Billy Budd*,³⁰ and Robert Cover in his 1975 study *Justice Accused*.³¹ In each of those cases,

with horoscopes to mark the fancied destiny of men or nations. Alchymy [*sic*] and astrology, not less than witchcraft and necromancy, are explored arts. Even “the eye of childhood” does not fear “a painted devil.” The classic age of polished Athens abounded with spells, and incantations, and magic in its various delusive forms. But the delusion has every where worn away, and the decree of the lawgiver has ceased, practically at least, to aim its vengeful shafts against these mysterious and not always harmless practices of the cunning upon the unwise.

Id. at 27-28.

25. Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescuers*, 54 ALA. L. REV. 785, 809 (2003) (quoting JACOB R. SHIPHERD, HISTORY OF THE OBERLIN-WELLINGTON RESCUE 81 (1859)).

26. *Id.* at 806.

27. *Id.* at 817-19.

28. *Id.* at 827 (quoting NAT BRANDT, THE TOWN THAT STARTED THE CIVIL WAR 212 (1990)).

29. HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (Penguin Books, Robert S. Levine, ed. 2000) (1856); see also Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriett Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998).

30. HERMAN MELVILLE, *BILLY BUDD* (Raymond Weaver, ed. 1924).

31. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

the conservative force of law showed its power to bind the consciences of humane actors.

Lubet also reminds us that there is a tradition in American literature of celebrating those who break the law. This is explored by John Steinbeck in *The Grapes of Wrath*.³² When Grandpa Joad died on the way to California, the Joads worried that the law would not permit them to bury him. Steinbeck writes:

“Sometimes the law can’t be foller’d no way,” said Pa. “Not in decency, anyways. They’s a lots a times you can’t. When Floyd was loose an’ goin’ wild, law said we got to give him up—an’ nobody give him up. Sometimes a fella got to sift the law. I’m sayin’ now I got the right to bury my own pa. Anybody got somepin to say?”

The preacher rose high on his elbow. “Law changes,” he said, “but ‘got to’s’ go on. You got the right to do what you got to do.”³³

Christopher Bracey’s brilliant, suggestive article analogizes judges who remake law to jazz musicians. They are “training”—riffing the law to make it new. It is a wonderfully suggestive essay, which picks up on important scholarship by John Calmore³⁴ and the tragically unfinished work by Kellis Parker.³⁵ But here I wonder whether the analogy should be drawn in the way that Bracey does. Bracey provides an eloquent defense of the expansion of antistatutory principles in judging. He uses jazz as a metaphor for what Americans do—as a supremely American form of thought. For Bracey, free

32. JOHN STEINBECK, *THE GRAPES OF WRATH*, in *THE GRAPES OF WRATH AND OTHER WRITINGS*, 1936-1941, at 207 (Library of America 1996) (1939).

33. *Id.* at 357.

34. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992). The next generation of jazz and law scholarship seems to be going in two directions. First, towards an understanding of jazz as a metaphor for community and law. See, e.g., Jonathan A. Beyer, Note, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L.J. 537 (2000). Second, towards understanding of how jazz effects law. See, e.g., Amy L. Wilson, A Unifying Anthem or The Path to Degradation?: A Survey of the Jazz Influence on American Property Law (Mar. 17, 2003) (unpublished manuscript) (on file with the *Alabama Law Review*). Can the effect of jazz on contract and entertainment law be far behind?

35. Parker left uncompleted a book, *Jazz: The Law the Slaves Made*. His basic thesis was that jazz was an antidote to law, sort of an “anti-law.” That is remarkably similar to Ralph Ellison’s vision in *Juneteenth*, where jazz society was an alternative to the corrupt “law” of Senator Sunraider’s white society. RALPH ELLISON, *JUNETEENTH* (John F. Callahan ed., 1999) [hereinafter *JUNETEENTH*]; see also Arthur G. LeFrancis, *Our Chosen Frequency: Norms, Race, and Transcendence in Ralph Ellison’s Cadillac Flambé*, 26 OKLA. CITY U. L. REV. 1021, 1021 n.2, 1022 (2001). Ellison set up the jazz-musician-turned-minister, Alonzo Hickman, who raises the child of a white woman who became pregnant and then accused Hickman’s brother of rape. His brother was lynched for the crime—and yet . . . Hickman takes in the boy and raises him in hopes that the boy will “share the forgiveness” that African-Americans’ lives “taught [them] to squeeze from it.” *JUNETEENTH*, *supra*, at 308. Jazz society is an alternative to the segregation imposed by Jim Crow law and the norms of segregation enforced by lynching.

jazz is analogous to civil rights judging: both are concerned with freedom and realization of human potential. Along those lines, one could also refer to Ralph Waldo Emerson's *American Scholar* address, which urged Americans to break free from the past.³⁶ Emerson's *American Scholar* bears a pretty close resemblance to the antebellum judges who tested precedent against reason.³⁷ In a later period, perhaps *Brown* and jazz (and modern social science and religion) derive from a common reservoir of thought.

But which way are the arrows of influence pointing? Did jazz musicians author *Brown*?³⁸ Bracey explores the connections between jazz and progressive judging through the agency of Ornette Coleman. He locates three key principles in Coleman's work: freedom, improvisation and reimagination, and courage. Then Bracey finds these elements in critical civil rights decisions, like *Brown*.³⁹ Bracey's principles call into question critical aspects of how we have viewed the Warren Court's approach to civil liberties.

Jazz is celebrated precisely because it is innovative; what makes common law changes acceptable is that they are gradual, almost imperceptible. As the *North American Review* recognized in 1827, excessive weight to precedent is harmful; yet, change must often be gradual in order to be accepted:

This excessive veneration for authority binds one age in the chains of another; it tends to preclude improvement. The very idea of improvement is to discover and put in use something better than what has hitherto been known, whereas, the principle upon which the law is administered is to repress all innovation, and to ascertain and declare precisely, what our ancestors would have declared in a similar case. This is reversing the proper and natural order of things. The world, as it grows older, in the ordinary course grows wiser, and ought to put away as childish, some things which are fast passing from the ancient and venerable, to the absurd and ridiculous.

36. RALPH WALDO EMERSON, *The American Scholar: An Oration before the Phi Beta Kappa Society, at Cambridge, July 15, 1838*, in *ESSAYS AND LECTURES* 51 (Library of America 1983) (1838); see also KENNETH S. SACKS, *UNDERSTANDING EMERSON: "THE AMERICAN SCHOLAR" AND HIS STRUGGLES FOR SELF-RELIANCE* (2003) (exploring the meanings of Emerson's address).

37. *Id.* at 53.

38. One can construct, I think, a credible (if somewhat fanciful) argument that the *Invisible Man* authored *Brown*. See Alfred L. Brophy, *Invisible Man as Literary Analog to Brown v. Board of Education*, in *THE INVISIBLE MAN TURNS FIFTY* (Lucas Morell ed., forthcoming 2004). One wonders whether African-American ideas about equality became part of the larger American cultural and legal scene in the same way that jazz and the blues did. Cf. ELLISON, *Blues People*, in *COLLECTED ESSAYS*, *supra* note 10, at 278, 282-83; see also David Luban, *Difference Made Legal: The Court and Dr. King*, 87 *MICH. L. REV.* 2152, 2220 (1989). One might contrast Bracey's approach to jazz with some postwar thinkers who linked jazz and totalitarianism. See Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 *YALE J. L. & HUMAN.* 171, 188 (2000) ("For them, modern jazz is a way station to fascism, and the modern bourgeois individual in mass society is 'already virtually a Nazi.'"). Even so, the Nazis saw jazz differently—as a threat. See Matthew Lippman, *The White Rose: Judges and Justice in the Third Reich*, 15 *CONN. J. INT'L L.* 95, 160 (2000).

39. Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 *ALA. L. REV.* 853, 868 (2003).

Society has grown and spread in every direction, and the garments of her youth would but serve as ligatures to repress and distort the growth of her riper years.⁴⁰

Were the Warren Court's decisions acceptable because they were innovative and kept up with the times—or because they molded contemporary attitudes *with precedent*?⁴¹ At a high level of generality, the connectedness of jazz to democracy and law to democracy suggest that successful judges are good analogs. Moreover, as Ralph Ellison stated in his tribute to Charlie Christian, *Remembering Jimmy*, jazz suggests the possibilities of rising above discrimination:

For Jimmy Rushing was not simply a local entertainer; he expressed a value, an attitude about the world for which our lives afforded no other definition. We had a Negro church and a segregated school, a few lodges and fraternal organizations, and beyond these there was all the great white world. . . . [O]ur system of justice was based upon Texas law; yet there was an optimism within the Negro community and a sense of possibility which, despite our awareness of limitation (dramatized so brutally in the Tulsa riot of 1921), transcended all of this⁴²

When Ellison wrote about jazz, he saw it as an alternative world from white law. "Jazz and the blues did not fit into the scheme of things as spelled out by our two main institutions, the church and the school"⁴³ Jazz may be the analogy that helps us break free from outmoded ways of thinking.⁴⁴

Timothy Terrell looks at the problem of lawyers' defense of civil disobedience through the lens of professional responsibility. Terrell analyzes recent examples of lawyers' duties to people other than their clients—a theme we hear about periodically. The nature of those duties shapes lawyers' behavior: Do we allow zealous representation of business, or impose restrictions on representation in favor of the community of consumers?⁴⁵ Terrell advances strong arguments to business clients and community against allowing lawyers to breach ethical duties in favor of more transcendent courses.

Judge U.W. Clemon and Professor Bryan Fair address the lessons we can learn from two civil rights leaders working a century apart: John Brown

40. Sampson, *supra* note 20, at 420; *see also* John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003) (discussing some ways that common law doctrine evolves).

41. *See* MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 15-31 (1998).

42. ELLISON, *Remembering Jimmy*, in *COLLECTED ESSAYS*, *supra* note 10, 273, 273-74.

43. *Id.* at 275.

44. *Cf.* Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475 (2003) (discussing ways that courts might have a more liberating jurisprudence).

45. *See* JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1975) (discussing the 1908 Canons of Ethics and the conflicting ideas about lawyers' duties).

and Thurgood Marshall. Brown, best known for his martyrdom to the cause of abolition, illustrates the way that law failed in the antebellum era. Abolitionists were left, or so they thought, with no alternative to violence. As such, John Brown presents a critical problem for those of us concerned with the rule of law: How should one behave when law and the democratic process abandon the idea of justice? Legal scholars frequently address that problem through case studies of the Fugitive Slave Act of 1850.⁴⁶ But Clemon and Fair remind us that there were greater conflicts, those skirmishes between the law of slavery and violence that might end it. It is tempting to bring Brown into apotheosis; however, it is also dangerous for lawyers to revere too much those who retreat to the violence that is at war with the idea of the rule of law.

John Brown's retreat to violence stands in contrast with Thurgood Marshall. The contrast between the two illustrates the differences in the Civil Rights Movements of the 1850s and the 1950s. Marshall's intellect accomplished much that Brown's guns could not. Marshall appears as someone who should receive apotheosis, as well—indeed, much more than John Brown—because he placed faith in the law. That faith was rewarded and, as Clemon and Fair point out, holds out the promise of more rewards in the future. It is reminiscent of many other figures in American history who placed faith in law. One thinks of Roscoe Dunjee, editor of the *Oklahoma City Black Dispatch*, whose editorials urged sit-ins in the 1930s.⁴⁷ Dunjee placed his faith in the Constitution and Declaration of Independence. He saw something in them that might bind together the United States, even as their promises of equality were—through the corrosion of racism—being contorted beyond recognition.⁴⁸ In the 1910s and 1920s, when Dunjee was first urging faith in law, others in the African-American community impugned his masculinity.⁴⁹ Yet he persisted; in the 1930s he recruited Thurgood Marshall to defend a young man charged with capital murder in Oklahoma⁵⁰ and in the 1940s he helped force the integration of The University of Oklahoma College of Law.⁵¹ Within his lifetime what had once been inconceivable even as a practical joke came to pass. There were, of course, in-

46. See, e.g., COVER, *supra* note 31; Brophy, *supra* note 29 (discussing conflicting views of duty to law and humanity surrounding enforcement of Fugitive Slave Act). Most lawyers at the time urged support for the law over individuals' conscience. Judging by the Phi Beta Kappa orations delivered at Brown, Yale, and Harvard in the wake of the Act, considerations of humanity held little weight against claims of legal duty. See WILLIAM GREENE, SOME DIFFICULTIES IN THE ADMINISTRATION OF A FREE GOVERNMENT (Providence, John F. Moore 1851), reprinted in Alfred L. Brophy, *The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene*, 31 CUMB. L. REV. 231, 261 (2001); LORD, *supra* note 15; TIMOTHY J. WALKER, THE REFORM SPIRIT OF THE DAY (Cambridge, James Munroe & Co. 1850).

47. See ELLISON, *Roscoe Dunjee and the American Language*, in COLLECTED ESSAYS, *supra* note 9, 449, 454.

48. *Id.*

49. *Id.*; *Misguided Oklahoma Patriots*, TULSA STAR, Sept. 4, 1920, at 4.

50. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 61-63 (1994).

51. *Id.* at 129.

stances in which the constitutional dream did not meet reality.⁵² There is, as Dunjee's protégé Ralph Ellison told us in *Invisible Man*, "The Great Constitutional Dream Book."⁵³ And Dunjee's editorials helped us read that book.⁵⁴

Brian Landsberg provides a micro-history of voting rights litigation in Sumter County, Alabama, in the early 1960s. He focuses on the litigation strategy of the Civil Rights Division of the Justice Department and provides an optimistic story of how lawyers compelled state officials to register African-American voters. Landsberg focuses on the voting rights litigation in the years leading up to Voting Rights Act of 1965 and he demonstrates how that litigation fed into the Act. In essence, Landsberg recovers the context that led to the Act but he also shows how lawyers struggled to protect voting rights while simultaneously laying the foundation for later Congressional action. Landsberg contributes to our understanding of the processes of legal change. Through meticulous work, Civil Rights Division lawyers created a detailed picture of the illegal behavior of Alabama state officials. That picture led to both injunctive and legislative relief. One might compare Lubet's abolitionist lawyers and Landberg's civil rights lawyers in the amount of change that lawyers can bring about.

Jennifer Levison provides yet another case study—this time of an individual legal advocate: Elizabeth Parsons Ware Packard. Packard's advocacy stemmed from her incarceration in a mental institution. Her biography illustrates the connections between religious and legal thought—and the ways that her involuntary confinement in an institution led first to a lawsuit and then, later, to her advocacy for reform of confinement procedures. She extended that advocacy to protect women's property and child custody rights. Levison's careful reading of the evidence reveals that confinement for mental illness frequently was really due to the ill will of domineering husbands. For, as Packard understood, "the *subjection* of the wife was the cure the husband was seeking to effect under the specious place of insanity."⁵⁵ Levison is able to show us how Packard employed the pen as a ploughshare to cultivate legal change. Packard's able written advocacy brought the law more into keeping with justice.

52. U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 961, 984 n.141 (2003) (quoting Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 53 (1991)).

53. RALPH ELLISON, *INVISIBLE MAN* 280 (Vintage Int'l 1995) (1952). As the *Invisible Man* said, Yes, these old folks had a dream book, but the pages went blank and it failed to give them the number. It was called the Seeing Eye, The Great Constitutional Dream Book, The Secrets of Africa, The Wisdom of Egypt—but the eye was blind, it lost its luster. . . . All we have is the Bible and this Law here rules that out. So where do we go?
Id. at 279-80.

54. See, e.g., *The Law of the White Man*, BLACK DISPATCH (Okla. City), Jan. 15, 1925, at 4.

55. Jennifer Rebecca Levison, *Elizabeth Parsons Ware Packard: An Advocate for Cultural, Religious, and Legal Change*, 54 ALA. L. REV. 987, 1009 (2003) (quoting 1 ELIZABETH PARSONS WARE PACKARD, *MODERN PERSECUTION, OR INSANE ASYLUMS UNVEILED: AS DEMONSTRATED BY THE REPORT OF THE INVESTIGATING COMMITTEE OF THE LEGISLATURE OF ILLINOIS 99-100* (Hartford, published by author, 12th ed. 1891)).

Even as twenty-first century scholars challenge the boundaries of legal thought,⁵⁶ there are certainly important limitations on judges' innovation, and consequently even on what we can expect in terms of change from the legal system. Together this Symposium suggests the boundaries of those changes and the outer limits of lawyers' roles in civil disobedience.

56. See, e.g., Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483 (2003); Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1 (1998).

