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## LEGAL HISTORY SYMPOSIUM HONORING PROFESSOR WYTHE HOLT

*The Editors of the Alabama Law Review respectfully dedicate this issue to  
Professor Wythe Holt.*

### WYTHE HOLT: TEACHER AND COLLEAGUE

*Alfred L. Brophy\**

Many years before I first met Wythe Holt, I was his student. I think it was in the fall of 1990 that I read his famous essay in the *William and Mary Law Review*.<sup>1</sup> It was a defense and extension of what was then and remains to this day one of my favorite books, Morton J. Horwitz's *Transformation of American Law, 1780-1860*.<sup>2</sup> Horwitz's book defined the issues in legal historical debate for several decades, for it presented what Wythe called a "field theory."<sup>3</sup> That is, it presented a way of conceptualizing an entire field. What impressed me about Wythe's article were two things: first, his extraordinary command of the meaning of those debates for understanding of history; and second, his boldness in defending *Transformation*, which, despite winning the prestigious Bancroft Prize, was subject to some harsh reviews. As Wythe wrote, the book was "fresh and progressive" and culmi-

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1. Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982).

2. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

3. Holt, *supra* note 1, at 663. One measure of *Transformation's* impact is revealed by the citations it has received. As of April 15, 2007, it had been cited more than 1,000 times in law reviews on Westlaw. Entire books have been written in response to *Transformation*. See, e.g., PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* (1997). For further discussion of Horwitz's influence, see Laura Kalman, *Transformations*, 37 TULSA L.J. 849 (2002).

nated “a burst of energy and enthusiasm in an area previously arid, antiquarian, [and] oriented toward the colonial era.”<sup>4</sup>

Much of *Transformation* seemed to me to be a synthesis of what was obvious: that antebellum judges self-consciously remade the law to promote economic growth. As one schooled in law and economics in the 1980s, I thought Horwitz’s (and Holt’s) proposition seemed entirely natural: we change the law to promote economic growth and have done so for time out of mind.<sup>5</sup> Add to that, Horwitz found in cases evidence of that self-conscious remaking of law to promote economic growth. Decades more of research in antebellum legal sources has revealed even further evidence of the ubiquity of the belief that law, like the society and economy more generally, was evolving. Judges and orators spoke about the evolution even in such unlikely places as college literary societies. The best-known literary address before the Civil War was Ralph Waldo Emerson’s 1837 “American Scholar” Address.<sup>6</sup> In it he urged a rejection of irrational precedent and a vigorous adaptation of literature and ideas for each new generation.<sup>7</sup> The scholar bore a striking resemblance to the jurist, who continually retested old assumptions:

Whatsoever oracles the human heart, in all emergencies, in all solemn hours, has uttered as its commentary on the world of actions,— these he shall receive and impart. And whatsoever new verdict Rea-

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4. Holt, *supra* note 1, at 663.

5. Even among the reviewers, like then Professor (now Judge) Stephen Williams, who urged a law and economics approach, there was skepticism of Horwitz’s overall project. *See, e.g.*, Stephen F. Williams, *Transforming American Law: Doubtful Economics Makes Doubtful History*, 25 UCLA L. REV. 1187 (1978) (reviewing *Transformation*). Judge Williams, for example, disagreed with what he identified as Horwitz’s depiction of the rise of utilitarianism. *Id.* at 1200-01. That particular criticism seems misplaced because considerations of utility were central to antebellum jurisprudence and because they are critical to the law and economics mission as well. Some opposed such considerations, but Henry David Thoreau was correct in noting the centrality of utility (which he labeled expediency). *See* HENRY DAVID THOREAU, *Civil Disobedience [Resistance to Civil Government]*, in 4 THE WRITINGS OF HENRY DAVID THOREAU 356, 361-62 (Houghton, Mifflin & Co., 1906) (“Paley, a common authority with many on moral questions, in his chapter on the ‘Duty of Submission to Civil Government,’ resolves all civil obligation into expediency . . . . But Paley appears never to have contemplated those cases to which the rule of expediency does not apply, in which a people, as well as an individual, must do justice, cost what it may. . . . This people must cease to hold slaves, and to make war on Mexico, though it cost them their existence as a people.”).

There were, as Horwitz pointed out, some ideological differences on the meaning of the law and economics interpretation. *See* Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980). Horwitz saw the process of common law evolution to promote economic growth as a conspiracy of the wealthy; others saw much the same process of common law evolution but did not see that as a conspiracy. *See, e.g.*, Holt, *supra* note 1, at 695 (employing the characteristically Wythian phrase, “Conspiracy is not conspiracy when it is consensus, apparently”). On the ideological aspects of the conflict, see Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042, 1044 n.6 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992) and characterizing the shift in interpretative styles from Willard Hurst to Morton Horwitz as the pronominal shift as from “us” to “them”).

6. RALPH WALDO EMERSON, *The American Scholar*, in RALPH WALDO EMERSON: ESSAYS & LECTURES 53, 53-71 (Joel Porte ed., 1983).

7. *Id.* at 56-57.

son from her inviolable seat pronounces on the passing men and events of to-day,—this he shall hear and promulgate.<sup>8</sup>

And so, American judges came to believe with Emerson, that “[t]here are new lands, new men, new thoughts.”<sup>9</sup> It was natural, then, for them to “demand our own works and laws and worship.”<sup>10</sup>

At Dartmouth College, Supreme Court Justice Levi Woodbury spoke about the burst of technological, moral, and economic knowledge. Newspapers, for instance, he observed, travel “by the fleet wings of steam, cross mountains, oceans and continents, almost as quickly as they once crossed counties. . . . It would be no very forced view of the subject to consider printing as a galvanic chain between nations, no less than different portions of one people,—the conductor or medium for a like literature, politics, philosophy and religion, as if, in many respects, a single pulse beat through the whole.”<sup>11</sup> Woodbury saw progress in individuals, as well as society. He thought that it was the present where “liberty and law, the arts and the securities of organized government . . . reign.”<sup>12</sup> Woodbury cataloged some of the changes—the spread of literacy, more humane behavior in war, and the end of serfdom. Changes in law were an important part of the move toward humanity.<sup>13</sup> The progress had been rapid, for until “the seventeenth century, scarcely any books existed on the morals and rules that should govern the intercourse among nations; and perhaps no stronger evidence could be cited of the progress made in this matter than the fact, rather harshly expressed by a recent writer, that ‘the international law of Greece and Rome was the international law of New Zealand, with the exception of cannibalism.’”<sup>14</sup> Here in Tuscaloosa, United States Supreme Court Justice John A. Campbell spoke to the University of Alabama in 1859. His concern was about the connections between a people’s religion, commerce, and sentiments.<sup>15</sup>

Similarly, Benjamin F. Porter’s address to the University of Alabama, given in 1845, illustrates the evolution of morals and law. Porter saw hope in the evolution, for “as a mass, men of this day as much exceed in mind and morals, those living two hundred years ago, as those living two hundred years hence, will exceed the present generation.”<sup>16</sup> He wanted to understand how the world fit together—the “various characteristics of the religion, phi-

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8. *Id.* at 64.

9. RALPH WALDO EMERSON, *Nature*, in 1 THE COMPLETE WORKS OF RALPH WALDO EMERSON 3 (1903).

10. *Id.*

11. LEVI WOODBURY, *On Progress*, in 3 WRITINGS OF LEVI WOODBURY, LL.D: POLITICAL, JUDICIAL AND LITERARY 75, 79 (Little Brown & Co., 1852).

12. *Id.* at 78.

13. *Id.* at 80.

14. *Id.* at 81 (emphasis omitted).

15. John A. Campbell, *The Institutions, Duties and Relations of Alabama: An Oration Before the Erosophic and Philomathic Societies of the University of Alabama* (July 12, 1859) (Tuscaloosa, Jno. F. Warren, 1859).

16. Benjamin Faneuil Porter, *The Past and The Present: A Discourse Delivered Before the Erosophic Society of the University of Alabama* 19 (Dec. 11, 1845) (Tuscaloosa, M.D.J. Slade, 1845).

losophy, laws, scientific improvements, and social manners of the human race.”<sup>17</sup> Porter surveyed the multiple ways in which the present excelled over the past: in religion, in philosophy, in law. In each of those areas, great progress had been made. He told a lengthy story about the advancement of modern law over the arcane and arbitrary systems of ancient Greece and Rome and about the extraordinary technological advancements of the nineteenth century. Porter depicted the legal history of Greece, France, and even of Great Britain filled with arbitrary pronouncements of judges, lack of respect for judges, and irrational rules of evidence:

The state of the laws of ancient times . . . like all human institutions, have varied; at one time challenging the admiration, at . . . another, the abhorrence of men, frequently surrounded with a venerable mystery, into which the unprofessional eye has not dared to obtrude; often displaying unmeaning and useless forms eliciting only the contempt of men.<sup>18</sup>

His was an optimistic message. But this is a story about Wythe, not the University of Alabama in the antebellum years, and so I shall reserve for another time the rest of the story of literary culture at the University of Alabama and its promise for helping us understand jurisprudence.

Over the years, I read more of Wythe’s work—his article on the breach of labor contracts in the *Wisconsin Law Review*<sup>19</sup> and his article on the federal courts in the 1790s in the *Duke Law Journal*<sup>20</sup>—among others.<sup>21</sup> I benefited often from his edited volume of essays on nineteenth-century legal history<sup>22</sup> and his other one on early American legal history.<sup>23</sup> Then there is Wythe’s charming essay “Tilt,” written when critical legal studies was at its height.<sup>24</sup> It was while reading Wythe’s scholarship that I realized that we can find so much in our history to admire if we are willing to patiently seek it out. I was led again to that insight upon reading his yet-unpublished book manuscript on the Whiskey Rebellion. Scholarship is, I suppose, in many instances autobiographical.

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17. *Id.* at 18.

18. *Id.* at 24-25.

19. Wythe Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677.

20. Wythe Holt, “To Establish Justice”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

21. Wythe Holt, *We Some of the People: Akhil Reed Amar and the Original Intent of the Bill of Rights*, 33 U. RICH. L. REV. 377 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547 (1989).

22. *ESSAYS IN NINETEENTH-CENTURY AMERICAN LEGAL HISTORY* (Wythe Holt ed., 1976). Included in that volume is Wythe Holt, *Now and Then: The Uncertain State of Nineteenth-Century American Legal History*, 7 IND. L. REV. 615 (1974).

23. *THE LAW IN AMERICA, 1607-1861* (William Pencak & Wythe W. Holt, Jr. eds., 1989).

24. Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).

What I remember most about Wythe is my first encounter with him face-to-face. It was during my job talk at the University of Alabama in November 2000. I presented on the Tulsa riot of 1921. My theme was the riot as the breakdown of the rule of law. I saw the rule of law (that important but frequently maligned concept) as a key organizing concept for three reasons. First, because the African-Americans who took action to prevent a threatened lynching did so to uphold the rule of law; second, because the destruction of the black section of Tulsa was so absurdly unlawful; and, third, because even in the aftermath of the riot, when cooler heads should have prevailed, the city failed to make good its promise to restore to the victims of violence what they had lost. From beginning to end, virtually nothing that we might recognize as the rule of law prevailed in Tulsa. And after I completed my talk, Wythe asked the first question (as he almost always does in colloquia): why was I not a proponent of reparations to the descendants of the riot victims? I recall thinking, "ah, this must be Wythe Holt!" I could not imagine anyone else would have asked, let alone even thought of, such a provocative question.

Then after I arrived here in the summer of 2001, I realized what a legendary figure Wythe is in the community. When I signed a lease in town, the rental agent said, "Oh, you must know Wythe. We all call him 'Uncle Wythe.'" In 2002, in a courtroom in Birmingham during the trial of one of the bombers of the 16th Street Baptist Church, I happened to sit next to one of his former students. She recalled the fun days of Alabama's law school in the early 1970s, when Wythe was the most dynamic of many engaged and dynamic faculty at the law school. She spoke of trusts and estates and frisbees. Now those are two topics you don't immediately think of as going together!<sup>25</sup> Seemingly everywhere one goes in Alabama, one hears about Wythe. Legendary he ought to be because he taught here for nearly forty years. Often when I am at a conference and the discussion turns to people we might know in common, I am asked about Wythe.

Partly his legendary status is due, one supposes, to his name. Yes. He is related to Chancellor George Wythe, Jefferson's teacher at William and Mary. There is, no doubt, a great book waiting to be written about the life of

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25. And now, in looking over his list of publications, I see that he was writing about such issues (or at least ways to make law school different) in the 1970s. See, e.g., Wythe Holt, *A Radical Law School*, 2 ALSA F. 25 (1977). Though I might observe that nowhere in that article is there any mention of frisbees, the semi-annual bowling party, Jackie's Lounge (the students' favorite bar), Horne's Barbeque (a faculty favorite for decades), or of the law school float, which occupies a central place in the homecoming parade. But we do get a revealing history of the law school in Wythe W. Holt, Jr., *A Short History of Our Deanship*, 25 ALA. L. REV. 165 (1972).

Parts of *A Radical Law School* resemble Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 38 (David Kairys ed., rev. ed. 1990), which is further evidence of the breadth of ideas in circulation in Tuscaloosa in the 1950s, 1960s, and 1970s. See, e.g., N.E.H. HULL, WILLIAM JAMES HOFFER & PETER CHARLES HOFFER, *THE ABORTION RIGHTS CONTROVERSY IN AMERICA* 94 (2004) (maintaining that University of Alabama Law Professor Roy Lucas developed a "vital source of ideas for the frontal attack on criminal abortion statutes"); Jay Murphy, *Can Public Schools Be "Private"?*, 7 ALA. L. REV. 48 (1954); Jay Murphy, *Free Speech and Atom Bombs*, 2 ALA. L. REV. 24 (1949).

this Virginia patrician who came to Tuscaloosa in 1966. (Of course, a very famous novel has already been written by a University of Alabama faculty member about life in Tuscaloosa: Carl Carmer's *Stars Fell on Alabama*. And then there are the stories written about Tuscaloosa, from Caroline Hentz's obscure antebellum short story "Wild Jack" (which I like to believe is set in Tuscaloosa) to Cully Clark's *Segregation's Last Stand*, to Warren St. John's *Rammer Jammer Yellow Hammer*, which most assuredly is set in Tuscaloosa.) It is my hope that Wythe might one day write a similar account. Oh, the stories he could tell.

Since I arrived in 2001, Wythe has taught me a few more lessons. He's taught me something about the intricacies of the Alabama wills code—a statute that bears fewer resemblances to the Uniform Probate Code than you might expect. I'm still not sure I will ever understand the future interest that he identified and named.<sup>26</sup> He encouraged me to accompany one of Martha Morgan's constitutional law classes on a field trip to visit Brownville, the company town where *Thornhill v. Alabama* arose.<sup>27</sup> What a great adventure, to a remote part of the county, to visit the remnants of the town. Our trip was guided in part by a student from the area, in part by Justice Murphy's description in the *United States Reports*, and in part by Wythe's description of a similar visit some years before.

What did we find when we arrived? The same plant making telephone poles, though it is now largely mechanized, a few houses that dated to the era of *Thornhill*, and an abandoned meeting hall with two ancient movie projectors. It's one of those times that one realizes the pleasure and virtues of teaching in Tuscaloosa. Such a wonderful trip would not have been possible were I teaching at any other school. The photo that one of us took of the class on the steps of the meeting hall hangs in my office. There is a romance associated with college towns, particularly with southern college towns; Wythe has lived that romantic life and helped the rest of us to appreciate it.

He also taught me about the positive impact one can make locally. We worked together to have the University of Alabama acknowledge more publicly the university's connections to the era of slavery (including marking the graves of several slaves buried on the campus) and to have the trustees award an honorary degree to a man who was denied admission to the law school in the 1940s for no better reason than his race.

In fact, as I write this tribute, I realize that the entire community of students and faculty here have taught me many lessons: of friendship, of community, and of legal analysis and legal practice, too. There is a magic in Tuscaloosa and at the University of Alabama. I have learned from the law school an appreciation for the ways to combine rigorous study with friend-

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26. See Wythe Holt, *The Testator Who Gave Away Less than All He or She Had: Perversions in the Law of Future Interests*, 32 ALA. L. REV. 69 (1980).

27. 310 U.S. 88 (1940).

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ship, with the opportunities for research in legal history around the state, and with the fun to be had here, as well.

It was a great pleasure to host Wythe's friends and colleagues from the legal history world in Tuscaloosa on a Saturday in November 2005, when papers and reminiscences about Wythe were delivered by Morton Horwitz, John Schlegel, Christopher Tomlins, Sandra Van Burkleo, Rhoda Johnson, and State Senator Hank Sanders. It is testimony both to their kindness and to their friendship with Wythe that they all made the trip. No one we invited turned us down, though Staughton Lynd and his wife were unable to attend. One of the many highlights was Sandra Van Burkleo's reading of poetry she wrote about Wythe. Now, how many law faculty have poetry written for them? It is also testimony to Dean Kenneth C. Randall's generosity that he agreed to fund the conference on short notice. We're all looking forward to enjoying Wythe's friendship and learning from his scholarship for years. And I hope, among other projects, that he will write an article on the local context of *Thornhill*. We certainly need it. If I might make one other, bold request: give us a field theory for the legal history of the early national period, for I think we are in need of that.