



TRANSFORMING LAW EDUCATION. RECLAIMING LEGAL THINKING

An Essay on the US Law School in the
Modern University

Abstract

The simplification and socialization of law is frustrated by the stand-alone JD which creates self-perpetuating complexity, facilitates institutional self-deception routines and accommodates systematic conflicts of interest among legal concept, method and application standards, in part from extended closed-system bias escalation. Such bias may be expressed under assertions of blanket academic freedom; however, they are more relevantly judged under standards of pedagogy and professional duties of care to students in captive university programs. If engineers can otherwise be educated as undergraduates, qualified to build nuclear power plants, orbital space stations, and global cyber networks, the lawyer with his contracts, rules and motions can be so trained, and thereby released faster from university behavioral and cognitive incentives, into vital independent applied work experience, benefiting himself, the public and the academy. The A.B.A. stands as the legal Berlin Wall between monopoly and reform, but I lay the blame, and opportunity, primarily with the modern law school.

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I find it remarkable that you understand what is going on in law schools so well, given that you have not been subjected to them. I suppose this is a situation where being an outsider is an advantage.

Robert F. Nagel, former Deputy Attorney General, Rothgerber Professor of Constitutional Law, University of Colorado Law School and author, *Unrestrained: Judicial Excess and the Mind of the American Lawyer*, to the author, January 2020

Let me give the name of "vicious abstractionism" to a way of using concepts which may be thus described: We conceive a concrete situation by singling out some salient or important feature in it, and classing it under that; then, instead of adding to its previous characters all the positive consequences which the new way of conceiving it may bring, we proceed to use our concept privatively; reducing the originally rich phenomenon to the naked suggestions of that name abstractly taken, treating it as a case of "nothing but" that concept, and acting as if all the other characters from out of which the concept is abstracted were expunged. Abstraction, functioning in this way, becomes a means of arrest far more than a means of advance in thought. [...] The viciously privative employment of abstract characters and class names is, I am persuaded, one of the great original sins of the rationalistic mind.

William James, *The Meaning of Truth*.

The CLS strategy of self-revolutionizing legal reform proceeds on undefended assumptions. The liberals and free-market right-wingers have no right to complain since they generally proceed on similar assumptions. I regret the clumsy reference to "free-market right-wingers," but whatever these Chicago school chaps may be, conservatives they are not. The most discouraging feature of the story of CLS so far emerges from its inadvertent revelation of the condition of the American Left as a whole. For it shows the extent to which the flower of the left-wing intelligentsia perceives the need for a political agenda attuned to the realities of a corporate state for which it has little stomach, and the extent to which it is unwilling to shed its utopian egalitarianism and destructive view of authority. The ability of a largely deranged Left to contribute to, much less lead, a political movement appropriate to the corporatism it woos and fears remains, to say the least, doubtful.

Eugene D. Genovese

Critical Legal Studies as Radical Politics and World View, 3Yale J.L. & Human. (1991).
<https://digitalcommons.law.yale.edu/yjllh/vol3/iss1/7>

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Transforming Law Education. Reclaiming Legal Thinking: An Essay on the US Law School in the Modern University

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Executive Summary

When law professors advance or serve special interests or act as activists through media, the classroom or direct external consulting, three things happen. First, facts, knowledge, rational interpretation, teaching standards and learning itself become corrupted or compromised. Two, the cognitive and emotional maturation of law students thereby becomes compromised, or even stunted. This has two dimensions. On the one hand, the student is left with the false and trivial impression that retail political events, for example, are either inherently socially causal, or meaningful subjects of justice deliberation, versus on the other hand, an opportunity cost incurred by thus masking more complex social, technical, institutional and cultural factors in the political economy. This opportunity cost can be further exacerbated by jurisprudence overwhelming applications in law, business and science, and law thereby losing its bearings in the “vital substrate” without which, like philosophy, it decays. Student socialization and judgmental maturity themselves are thus trivialized or even made defective.

Third involves the effects of special interest activism on the professor himself, who undermines his own professional standards, and duties of care, while blocking the cognitive and sensing feedback loop necessary to learning and understanding. The law school risks incubating a self-deceptive and institutionally entrenched “critical legal studies” or “neo-CLS” culture, overwhelming its professional objectivity, especially when it is masquerading as law and economics. This has nothing to do with academic freedom, with free speech or with free thought, but rather with standards of teaching; standards of scholarship, research and writing; with compliance concerning professional legal guidelines; and with quality of university administrative leadership.

This is why, on the supply side, the university is, under ideal conditions, utterly independent, or more realistically, actively managing conflicts of interest, rather than facilitating such deficiencies under a blanket assumption of academic freedom. On the demand side, such effects are reduced or avoided by reducing student exposure to the academy through more tailored and accelerated degree programs, releasing students into applied work domains that create a more natural, independent and productive relationship among the university and its members.

Such acceleration can be organized by pushing the J.D. degree back down into the college as a true first LL.B or B.C.L. qualifying law degree, including de-isolating and merging JD content effectively into the M.B.A. where it is also a more logical and effective fit; repositioning the LL.M as a true independent university graduate degree in applied subjects of law, outside law proper; and merging the J.D. into what it purports to be, but isn't: a doctorate, through the repositioning and acceleration of the J.S.D., LL.D. or Ph.D. This obviously requires a re-balancing of the academy labor portfolio. The necessary simplification of law and legal decision making, is frustrated by the JD program which creates a self-perpetuating complexity, exacerbated when tied to extensive case law (versus case method) doctrine. Law education has become so structurally and institutionally consolidated and politically infiltrated and networked, that this may appear effectively a proposal of civil disobedience.

If engineers can otherwise be trained within 4 years in an undergraduate program, licensed as a PE, designing and building nuclear power plants, orbital space stations, hypersonic jet aircraft; molecularly engineering an entire desert aquification program, or constructing a global 100 Gbps communications network, surely the lawyer with his contracts, decrees, rules and motions can be so trained, as they are, outside the U.S.

The A.B.A. stands as the legal Berlin Wall between monopoly and reform, but I lay the blame, and opportunity, primarily with the modern law school.

Universities should have as their objective the production of knowledge, not activism...Activism interferes with the university's production of knowledge, because it leads directly to ideological discrimination and the erection of roadblocks of orthodoxy that impede truth seeking. John O. McGinnis

Colleges and universities are disciplinary, not political, institutions. They exist to serve the common good in the production and distribution of expert knowledge, as well as in the pedagogical inculcation of a mature independence of mind. Research and teaching are sites of critical thinking. AAUP 2019 statement, 'In Defense of Knowledge and Higher Education'

Conservative and libertarian law professors are underrepresented in the legal academia, whether compared to the American population overall, those who graduate from law school, or elite lawyers who look most like law professors. And it appears at least part of the answer as to that underrepresentation is discrimination, though not discrimination against conservatives and libertarians so much as discrimination against anyone who is not liberal. To the extent the legal academy is concerned about diversity, given the significant role politics plays in the law, few types of diversity could be more beneficial to legal education than increased political diversity among law school faculties. Ironically, liberal students and law professors will arguably benefit the most if the percentage of conservative and libertarian faculty members increases. James C. Phillips, 'Political Discrimination and Law Professor Hiring'

A theory like yours founded on the Nature of man, which is always the same, will last, when those that are founded on his opinions, which are always changing, will and must be forgotten. I own I am particularly pleased with those easy and happy illustrations from common Life and manners in which your work abounds more than any other that I know by far. They are indeed the fittest to explain those natural movements of the mind with which every Science relating to our Nature ought to begin. But one sees, that nothing is less used, than what lies directly in our way. Philosophers therefore very frequently miss a thousand things that might be of infinite advantage, though the rude Swain treads daily on them with his clouted Shoon. Edmund Burke in a letter to Adam Smith, 10 September 1759

Political neutrality does not require the tower or the veil, but a commitment to honest discussion on the basis of reason and evidence. This commitment implies a commitment to truth beyond position or interest. An account of academic freedom for law schools that ignores our professional obligations must become either a platitude or a denial of responsibility. 'Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education,' J. Peter Byrne, 1993

No genuine rule of law can exist without independent lawyers, who are no less essential than independent courts. Bruce Pardy, Queen's University Law

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It takes a special energy, over and above one's creative potential, a special audacity or subversiveness, to strike out in a new direction once one is settled. It is a gamble as all creative projects must be. Oliver Sacks

The *public* use of one's reason must always be free. By the *public* use of one's own reason I understand that use which someone makes of it *as a scholar* before the entire public of the *world of readers*. Kant, "What is Enlightenment?"

By understanding the world I mean being equal to the world. It is the hard reality of living that is the essential, not the concept of life, that the philosophy of idealism propounds. Those who refuse to be bluffed by enunciations will not regard this as pessimism. Oswald Spengler, 'The Decline of the West,'

*Our whole purpose is to make the mistakes as fast as possible.*²

The US House of Representatives impeachment process, trial and on-going election contention against President Trump had, and will have this new year, and likely several more, many lessons for the public. One of the most important may be the display of behavior from individuals trained in law.

On the one hand, a few fine men and women expressed a mature, thoughtful approach to legal reasoning. On the other hand, many more others seemed schooled in blind ideology. This made me wonder why a group of adults, most with extensive higher education legal credentials, could have such a hard time thinking clearly: if they're supposedly so smart, why were they so challenged? But worse, why would they interpret legal principles, legal procedure and legal rights in a partisan way, and thereby effectively engage in cognitive predation on a captive law student cohort? If I testified as an engineer, knowingly against a competitive entity, and corrupted theories of engineering physics, fluid dynamics, stability and control, how should I be sanctioned? Who enforces standards of rational, empirical fidelity? Where is the self-enforcing mechanism—or even Kant's internal court of conscience? (I'm not suggesting law is strictly science, but like science it rests on clear if intuitive thinking, and like morality, draws on judgment).³

² Nobel physicist John Archibald Wheeler, who I had the pleasure of knowing at the University of Texas at Austin. My point is that learning comes from discovery of mistakes, but the mistakes must be made. Law training has had few "mistakes" since consolidating the JD program. "Time is nature's way to keep everything from happening all at once" may have otherwise been over-interpreted by the modern legal academy. Wheeler quoted this in *Complexity, Entropy, and the Physics of Information* (1990) with an interesting footnote.

³ I do not assert an application of *logic to law*, (nonsyllogistic logical reasoning drawing on propositional calculus, for example) per Jensen and others, and make here no necessary distinction between realism and formalism, *but rather suggest a total coherency of thought* that is fundamentally, but not exclusively, resting on a logical *thought process, which may include* intuition and instinct, including referents in experience. This includes the difficult emotional recognition of conflict; the presence of numerous "decision traps" or heuristic bias stemming from cognitive mistakes, and an alertness to broader human routines of deception that are often easily crafted, transmitted

Why in turn, would many licensed attorneys so casually but systematically de-emphasize the rules of professional conduct that guide their work, and just as problematic, why would university law professors training our young adults in law school, so eagerly act as expert witnesses or lobbyists, or sign partisan mass protest letters with their university affiliation, all in order to advance their own political bias and agenda, and put at risk principles of teaching: why would their judgment, go suddenly blank—why were they so “dumb”?⁴

I lay much of the blame with the modern law school.

The public may not generally appreciate that law schools are a fairly modern invention: in England, someone pursuing a law profession would work as an apprentice to a practicing Solicitor or Barrister, read law on their own, and eventually become licensed. In the US, many practicing attorneys took the same path. Abraham Lincoln is probably the most famous example: he was a lawyer without a law degree. But he had one thing too many lawyers today don't have: experience in the hard lessons of living a hard life; the demands of building an enterprise (a country); and the working knowledge of dealing with the complexities of highly diverse, if violent, human nature, rather than the intricacies of quoting--and abusing--legal theories.

Eventually the apprentice model in England and the US gave way to a formal legal training program in a four-year college or university. The first law “degrees” were actually undergraduate ones, called the “LLB” or more plainly, the bachelor of laws (still the basic 3-year undergraduate law credential in the UK). Over time, the encroaching regulatory systems in American public life resulted in yet another professional industry regulatory association. The one for law training is the ABA or American Bar Association. It maintains an effective monopoly on law school curriculum and organization, and despite the hundreds of law schools in the country, from big public universities like Michigan, Texas, California or Illinois, to so-called Ivy law schools like Yale, Harvard or Cornell, they all teach exactly the same courses mandated by the ABA, except now it's done in a graduate program: even more college, more time, more student debt, and more make-work for law professors.⁵

Tocqueville's observation after visiting the US in the 1830s that the bar and judicial bench represented the “American aristocracy,” still apparently defines the self-image of the law trade,

and accepted. Lawyers and law students are both easily susceptible to heuristic bias. See <https://www.chicagomaroon.com/article/2018/10/9/booth-alum-says-law-school-signatories-mistakenly/>

⁴ I appreciate that this is perhaps more a question in cognitive psychology, than law, as it is centrally observed in logical fallacy. The House impeachment trial opening statements by House legislators and lawyers, *were defined by the logical fallacy of assertion. This often happens in law when fact standards and evidence are deficient, but a case is still pressed not in law but in marketing.* However another dislocation in behavioral standards stems from the status of law professors as most often university employees, rather than licensed practicing attorneys at law with an ARDC number subject to their MRPC (the current construct such that it is, but it is their own standard), which may raise an interesting question as to why law professors are even qualified to testify under oath as expert witnesses (ABA notwithstanding). See also, Del Pinal G, Spaulding S. *Conceptual centrality and implicit bias*. Mind Lang. 2018;33:95–111. <https://doi.org/10.1111/mila.12166>

⁵ https://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/. It may be interesting to note that law schools also tend to “cluster” commercially and ideologically. The Stanford-Chicago-Yale-Harvard axis acts in some regards as a “league” concerning intra-labor markets which can result in cultural and bias reinforcement; the Wyoming-Texas-Mississippi-Alabama axis is generally conservative and rarely do the two interact in university labor markets or in external institutional ones. A similar phenomenon can exist in the “Loxbridge” law market.

the law school, and the conceit of many of today's congressional leaders,⁶ many who take a fast and casual approach to law through an unbridled realism and legalism.

Indeed, a recent op-ed, Chicago law professors Aziz Huq and Tom Ginsburg try to convince the public, for example, that impeachment is good for a democracy; that it helps "reset" order by washing out corruption, *and should be effectively normalized*, while ignoring the profound wisdom of the Federalist, among other documents, concerning the severity and logical bipartisan test of impeachment cause of action. Their argument cites data and statistics, *but it is little more than critical legal studies, masquerading as law and economics.*⁷ (Worse, they seek to re-define impeachment as an effective congressional political party "golden share" in public elections, and bypass the relevant constitutional clause entirely. It is legalistic deception, which "invites a willing suspension of disbelief so that, if we but accede to a creative reformulation of language, reality can be altered and improved. In order to mandate progress in the name of law, especially constitutional law, it is necessary to deceive"⁸). As a "law and economics" argument, it fails, or

⁶ The modern equivalent observation is made by economist and Chicago Ph.D Thomas Sowell in "Intellectuals and Society," Basic Books, 2010 and to some extent by Roger Scruton in *Conservatism*. "An intellectual conservative is someone who articulates the real reasons for not having reasons." See also Samuel Moyn, "Law Schools Are Bad for Democracy," CHE, 16 December 2018, and same titled in the WSJ, much earlier, and more original, by Colorado Law's Robert Nagel.

⁷ But it is worse than that: it is irresponsible legal fabrication, and inexplicable detachment from the core principles of US government construction, that clearly set out the standards for impeachment. They include Madison's clear thinking concerning separation of powers such that the chief executive was not answerable strictly to the House (as an effective parliament) but part of three co-equal branches (moreover, Federalist 65 clearly outlines the danger of such proceedings on partisan lines). He devoted much thought to impeachment standards, and the convention debated whether it was even a sound idea. George Mason proposed a standard of "mal-administration" but the framers, Madison in particular, fought to establish a much higher cause based in English common law (treason and high crimes standard). "Obstruction of congress and abuse of power," are if of any category, perhaps merely mal-administration but that would make every president in modern history so accused. Huq and Ginsburg never find their bearings in the most fundamental, relevant guideline, the impeachment clause of the constitution, indeed ignore it entirely, but more inexplicable, seek to re-define impeachment as an effective congressional party "golden share" in public elections. Their argument is inherently flawed, but in the most basic basis of legal reasoning, evidence and standards. <https://www.latimes.com/opinion/story/2019-12-15/impeachment-democracy-presidents-donald-trump>. See Adam Bonica, Adam S. Chilton & Maya Sen, "The Political Ideologies of American Lawyers" (Coase-Sandor Working Paper Series in Law and Economics No. 732, 2015) and James C. Phillips, POLITICAL DISCRIMINATION AND LAW PROFESSOR HIRING, *New York University Journal of Law & Liberty* [Vol. 11:915]. University of Chicago and Harvard visiting professor Daniel Hemel wrote a similarly discrediting special interest interpretation concerning a recent presidential EO. In it he takes a linguistically incongruous if not intellectually tortured position, disregarding numerous bases in law, reason and policy that falsify his opinion (versus a normative judgment of his view). <https://www.nytimes.com/2019/12/12/opinion/trumps-executive-order-has-firm-legal-grounding.html>. Harvard's Laurence Tribe succumbed to similar partisan interference in clear thinking in his various public advocacy articles concerning the impeachment trial where he cites Federalist 65 for example, but leaves out its most important concept for impeachment procedure concerning party-line voting, as he otherwise deceptively conflates anecdotal historical opinion with legal definition, while completely ignoring the fundamental underpinning of evidence standards. (Even) University of Alabama Law's Ronald J. Krotoszynski Jr. jumped on a partisan bandwagon in his difficult essay in the *New York Times*, where he confuses (or conveniently reinterprets) the separation of powers, privilege and judiciary adjudication, with executive intervention, all in the context of a fatally flawed impeachment theory which is conveniently assumed in conformity with actual legal standards, let alone the Federalist, among other vital interpretative guidelines. <https://www.nytimes.com/2020/01/15/opinion/impeachment-trump-executive-privilege.html?action=click&module=Opinion&pgtype=Homepage>

⁸ Robert F. Nagel, *Lies and Nationhood*, 174, 177, in "The Implosion of American Federalism," (2002). Further, "Where the law is backward, it must be made to seem progressive. Where the law is uncertain or permissive, it must be made to seem definite and mandatory. Where arguments are limited and honestly debatable, they must be made to seem comprehensive and inescapable. Where opponents refuse to yield, their positions must be distorted or they themselves must be belittled and insulted."

is undermined. through its questionable statistical treatment.⁹ This is also an ever-present trap for law students not thoroughly trained in statistics and other finite mathematics (which most, including their professors, are not).¹⁰ Professors Huq and Ginsburg are by no means alone in selective or deceptive interpretation standards. Harvard Law’s unfortunate professor Laurence Tribe, provides a nearly textbook-perfect case of interpretive deception and cognitive confusion, in his recent *Washington Post* opinion. As a legal scholar citing Federalist, his entire argument rests on selectively ignoring its most relevant sections on party-line action, while building his case on a patchwork of historical anecdote and casual personal opinions. Moreover, he carefully confuses the reader (and students) by misinterpreting constitutional and other language: an impeachment crime may not necessarily be *per se* statutorily criminal or indictable, but rather “high,” borrowed from English common law. That is, he confuses *crime* with *criminal*. As does University of Missouri Law’s Frank Bowman, who appeals to “The almost universal consensus — in Great Britain, in the colonies, in the American states between 1776 and 1787, at the Constitutional Convention and since” in his argument against a *per se* criminal threshold, *yet doesn’t seem to realize that he thereby precisely ratifies the Federalist concept of bi-partisan consensus in making impeachment determination*.¹¹ Such a crime, or act, or transgression, is

⁹ *This is a major, though very old problem in social science research especially.* This problem has been termed the “Irreproducibility Crisis.” It stems from unbounded use of statistics, arbitrary research methods, along with an absence of accountability, special-interest bias escalation, and an institutional culture that ultimately generates as a matter of cognitive confusion, positive and politically favored results that confirm such assumptions. “By some estimates, half of all recent scientific research could well be irreproducible. A huge amount of ordinary scientific findings published in peer-reviewed journals can’t be replicated. As a result, something has gone terribly wrong in the name of science,” Independent Institute, 2020

¹⁰ See the very interesting presentation and paper by University of Pittsburgh Center for Philosophy of Science visiting scholar Paola Hernández-Chávez, *Cheating, Deceiving, and Corruption. Reshaping the Empirical Data, which describes precisely the effects of legal special interest bias in the academy*. I quote part of her abstract (italics mine): “More recent literature on cheating detection describes it as the occurrence of a subject breaking a social rule and or receiving a benefit without paying the cost of it (Spence 2004, Ermer et al. 2006, Grèzes et al. 2004, Ganis et al. 2009, Litoiu 2015). *From now on, it is essential to clarify that the benefit should be understood in a broader sense, i.e., as receiving any compensation, or atonement, in terms of resources, dividends, social recognition, advantages, etc.* In cognitive sciences, a classic definition of deception was offered by Zuckerman et al. (1981, p. 3). According to them, deceiving is “*a deliberate act that is intended to foster in another person a belief or understanding which the deceiver considers false.*” Henceforth, *deception is generally defined as a generalized social behavior that takes place when someone attempts to persuade others to accept as truthful, information that the deceiver knows is false* with the purpose of obtaining a benefit or avoiding a punishment (Ganis et al., 2009, Grèzes et al., 2004). More often than not, persuading others implies breaking a rule or a social contract (Grèzes et al., 2004, Ermer et al., 2006). *Corruption lies in the inability to detect that there is a cheating/deceiving situation, as well as it rests on an explicit violation of a social norm* (author note: the difficulty in detection is masked by the law professor expert/authoritarian identity, combined with negative reinforcement consisting of grades, degrees, recommendations, scholarship and employment prospects, along with sanction and discipline asserted rights. The “Chicago Principles” in ‘Statute 21 of the UChicago Trustees Restated Articles of Incorporation.’ This document is legally deficient on a number of grounds but remains largely unchallenged). A very minimal definition of corruption can be portrayed as a situation where an agent or a group of agents obtain a personal benefit (in terms of attaining an asset, remuneration, expiation, or overcompensation), in addition to a conspicuous recognition that a cheating, a deception, or a transgression of a social rule taking place. This work starts explaining why there is not yet an encompassing account of the phenomenon of corruption. The purpose is to redress that trend elaborating on the subtle emotional components involved in detecting cheating and deceiving behaviors. I will stress how the level of emotional commitment boosts or detaches the corruption detection since it also boosts or detaches cheating detection. Section 2 spells out the central hypothesis, i.e., that identifying deception changes dramatically depending on the level of emotional proximity to the case. For example, when there is a detriment to the first person, the cheating/deception situation will be easier to identify. This contrasts with cases where there is a detriment to an impersonal subject, as an institution, or to a third person. A significant difference will be noticed when the situation entails a benefit to the first person. The central thesis is that the level of emotional proximity bolsters or suppresses the capability for detecting cheating/deception situations, and thus the capacity for detecting corruption.”

¹¹ <https://www.nytimes.com/2020/01/20/us/politics/trump-impeachment-legal-defense.html>

defined, and contrasted with, mere mal-administration, *through Federalist 65's most sound test: bi-partisan consensus in the presence of relevant evidence and evidence standards. Bi-partisanship—and consensus—is the fail-safe impeachment standard* (and that transgresses mere historical interpretive and linguistic debate). *It is the surest, perhaps only, way to determine "how high high is" in judging regardless of the semantics deployed, either a crime, a breach, misconduct, abuse or violation.* That is precisely why, among other reasons, there is separation: the executive office does not fall under general House authority, let alone on a fractional party basis, as it otherwise generally would in a "parliamentarian" structure (and why the Founders altered the US model). Mr. Tribe apparently either doesn't understand that, or deliberately ignores the fundamental independent variables in the entire impeachment equation. *To make his argument, he must dismantle the entire intellectual foundation of American constitutional law.*¹² To paraphrase a White House counsel public response made to the Senate¹³, Mr. Tribe carves out constitutional accommodation, contempt and litigation as too intellectually and factually inconvenient for his politically driven motivations (yet implicitly embraces subjective intent, which surely he knows is a deficient basis). Further troubling his argument, Mr. Tribe avoids a discussion of evidence standards, which omission undermines his entire position—and in my view his general credibility.¹⁴ Like too many legal arguments, it is in a cognitive fog regarding the necessary distinctions among, and active management of, dependent, independent and control variables.¹⁵ *Ultimately, ones has to ask why Mr. Tribe is teaching in a law school and not rather working as a commercial lobbyist and consultant.* Like other academics, he wants to give advice (and takes payment) but not be held accountable or liable—effective professorial immunity. I discuss these particular cases of law school professor political lobbying because they are good examples not only of legal infirmity, but pedagogic dishonesty by advancing arguments in the public domain that are specifically arranged to advance an activist agenda that is undisclosed and even camouflaged behind professor university credentials, and the imprimatur of research. In the Ginsburg and Tribe cases, they are aligned with a larger radical ideology concerning constitutional reform (in the Ginsburg argument he is actually making a case for not just a "normalization" of casual at-will impeachment action, as I stated, but thereby the implicit dismantling of the constitution itself.)¹⁶

I am not suggesting that "political challenges to legally prescribed meanings" are somehow *per se* inappropriate or inherently mendacious.¹⁷ *My argument has nothing to do with academic freedom, with free speech or with free thought, but more rather with standards of teaching; standards of scholarship, research and writing; with compliance concerning professional legal guidelines; and with quality of university administrative leadership.*¹⁸ (The problem however, has two dimensions. At one level, the political interests pursued by law professors have a

¹² See the excellent "Novus Ordo Seclorum: The Intellectual Origins of the Constitution," by the late University of Alabama historian Forrest McDonald, University of Kansas Press, 1985

¹³ <https://www.whitehouse.gov/wp-content/uploads/2020/01/Trial-Memorandum-of-President-Donald-J.-Trump.pdf>

¹⁴ <https://www.washingtonpost.com/opinions/2020/01/19/trumps-lawyers-shouldnt-be-allowed-use-bogus-legal-arguments-impeachment/>

¹⁵ I am not suggesting, nor strictly following, the logic argument made by Jensen in "The Nature of Legal Argument." That is, poor or deceptive legal reasoning in my view is not necessarily a product of a violation of rules of logic, *but rather the embrace or deployment of logical fallacy, and especially, the difficulty in discerning its presence.* Cf, "The Nature Of Legal Argument," by O. C. Jensen. Oxford: Basil Blackwell, 1957

¹⁶ Cf, Harvard's Lawrence Lessig and his constitutional convention agenda:

¹⁷ To paraphrase Nagel.

¹⁸ Nor is it a recommendation for a "moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democracy tending toward mere credulity and idolatry." (Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29J. Legal Educ. 247, 262 (197)

simple-order corrupting affect on the internal integrity of university teaching, knowledge and research. At another level, less obvious but more troubling, however, it plays into the hands of external special interests which draw the university deeper into conflicts of interest, but more than that, into an effective co-option (not always casual or merely random) of multi-institutional strategy involving larger federal, commercial and occasionally foreign organizational networks where the university can be instrumentalized as a credentialing, discrediting, or propagandizing entity. These two levels affect students in turn, both with poor reasoning examples in the former case, and with what are ultimately trivial distractions from high levels of intelligence, data and knowledge in the later; that is, the student is left with the false and trivial impression that retail political events are either socially causal, or meaningful subjects of justice deliberation. *Student socialization and cognitive maturity are thus trivialized or stunted.* This is why among other reasons, the university is, under ideal conditions, utterly independent)¹⁹.

The nuts and bolts law classes—commonly called the “1L” or the first year law sequence—which make up the law students’ core practical studies (contracts, property, torts, remedies, constitutional and criminal law) then give way to two more years of graduate school (already on top of a costly 4-year undergrad degree) that then goes way “off the compound,” and includes an array of intellectual indulgences by law professors, most that support their “research.” One law school, the University of Chicago, luxuriates in subjects like cultural anthropology, philosophical jurisprudence, identitarian agendas, economic choice theory, or the customs of ancient Rome, yet barely covers or enforces advanced technology, marketing, applied business finance or commercial accounting. As one student put it, “it’s all theory, all the time.”²⁰

Our modern law schools have two major flaws in their approach to legal education. First, it takes too long. *Does it really take 4 years of college and 3 more years of graduate school to write a sales contract or a divorce decree, but an undergraduate can be trained in 4 years or less as a professional engineer, qualified to design and build a nuclear power plant, modern skyscraper, or advanced jet airliner?*

The other flaw, related to the first, is that law students are over-exposed to the ideological indulgences, biases, thought patterns and work habits of their law professors, who have them under their institutional control until they’re in their mid or later 20s. By then, they’re looking at age 30 coming up fast, yet have little if any meaningful life and especially work experience. They’ve allocated the most precious, vital years of their life to books, libraries, papers and professors. How do they compensate? By falling back on all the theory and ideology, indeed perhaps relishing the progressive manipulation of abstraction they were indoctrinated with (and paid 6 figures for). Because that’s all they know.²¹ And when they do finally get out

¹⁹ It is also fascinating to consider the very critical distinction between a law professor like Tribe, Ginsburg, Krotoszynski or Bowman, for example, making public statements, recommendations, interpretations, op-ed public relations communications, or being hired as consultants, versus the actual legal representation made by the president’s lawyers, for example, who are acting in a actual lawyer role subject to their ARDC number, and generating actual institutional legal documents in a formal adjudication. Interestingly, the president’s lead counsel, Pat Cipollone, is a law graduate of the University of Chicago and obviously cut from a different cultural cloth. One might wonder if he will be invited back to campus as a guest speaker? Indeed, what percent of the Chicago Law professorship is so professionally represented? Otherwise, my point is that law professors hiding behind their university and tenure privilege, and working lawyers exposed to actual legal sanction, are two different realities—one merely casual but pedagogically predatory; the other formal and professionally accountable.

²⁰ This is not to say that the traditional “1L” is not without its shortcomings, including its fundamental basis in common law and in my view an excessive deference to judicial judgment, if not unwarranted legitimacy.

²¹ This is the “if you’re a hammer, everything looks like a nail” argument, and one could observe such behavior in its near perfected form vis-à-vis law, during the Senate impeachment trial, where both sides, but the House Managers especially, were tortured by the “legal thinking trap,” while naturally motivated to pursue their career

of law school, where do many aspire to work? As a “clerk” for a generalist judge, which is a fancy name for a secretary, and administrative housekeeper. Or worse, many aspire to work in government with no private sector experience *that can bear on bottom-up (versus top-down) policy and judgment*. And that is the kind of culture that was on display over the impeachment hearings, both from many Congressmen themselves, and from their law professor witnesses.

As I listened to and studied the language and thinking of such individuals, and as the public continues to, it became clear to me that there was a profound divide between the academic and legal culture of many legislators, career civil servants, and most academic witnesses, and the working and business culture the president, and many Republicans, come from. How many of these lawyers and professors know what it is like to negotiate first-hand, complex business transactions, solicit investors for large-scale industrial projects, re-negotiate bank loans, conduct meetings with partners from multiple countries, or otherwise “wheel and deal” in the rough and tumble of American, and global, business enterprise? The law students being trained in our law schools today are for the most part subject to the influences of career law professors, and an academic culture, that is saturated in ignorance, envy, disdain and contempt for commercial flair, business savvy, conservatism and the realpolitik of international relations.²² *It was a classic top-down (bureaucrat) versus bottom-up (business) cultural collision.*

Law schools can’t be expected to make seasoned adults and leaders. The best they can do is transmit the few basic working fundamentals of commercial and public legal practices. Getting into college is a great experience, *but getting out is even better*. And getting out as fast as you practically can, and getting on with work and life, spares you from falling into a seductive trap of idealism and theory that results from staying in a university environment for too long, and losing your mental bearings and the opportunity to learn how to develop your own thinking, and to trust your own judgments. *Sapere aude*, indeed.²³

Law is too important a thing to leave to lawyers. H.L.A. Hart

“Dumb” lawyers doesn’t mean stupid, as in intelligence (although that is not a sure thing, at least at Stanford, Harvard and Yale).²⁴ It means ignorant or blind, to the deep practical realities and

training for careerism. How would such congressmen perceive, for example, if they were experienced businessmen, more accustomed to managing and directing lawyers, than acting as one?

²² It’s also all the professors know, and their knowledge never gets “tested” against more mature students. Cf the executive MBA program which was inaugurated by UChicago after WW2 *in order to actually develop the faculty by exposure and interaction with seasoned managers and executives*. The recent AAUP communication “In Defense of Knowledge and Higher Education” is moreover an unfortunate organized labor position with no relevance to students, parents, learning theory, or financial sponsors of higher education.

²³ By accelerating and compressing the legal training degree back into an undergraduate program, a more natural and healthy relationship ensues between students—now independent alumnae—and the academy and professors, such that they can be collaborators or correspondents, rather than defined in a hierarchical relationship that can often suppress independent thinking and knowledge development, including complementary skills. Moreover, young law students need to gain work experience—any and as much work experience as they can, rather than merely aspire to what they deem “law.” Indeed it is fascinating to consider where the lawyer’s toolkit—language—actually came from. According to a recent study, it was “triggered by exaptation, or ‘hijacking’, of existing cognitive mechanisms related to sequential processing and motor execution,” in my view underscoring the “vital substrate” of task-specific applications necessary to the deeper development of legal craft. See Oren Kolodny and Shimon Edelman, “The evolution of the capacity for language: the ecological context and adaptive value of a process of cognitive hijacking,” *The Royal Society, Philosophical Transactions of the Royal Society B (Biological Sciences)*, 18 February 2018: <https://royalsocietypublishing.org/doi/full/10.1098/rstb.2017.0052>

²⁴ There is also a separate issue concerning law professor intelligence and discernment, beyond the relatively “retail” political entanglements of the impeachment hearing and trial, and that involves knowledge of or access to more relevant, more substantial intelligence concerning actual causes of impeachment action (including congressional culpability). Those include especially the current executive office foreign policy strategy in the Middle East, as part

necessities that come from lessons that simply can't be learned in law schools, classrooms, judge's chambers or congressional staff offices. It also implies a difficulty with emotion, and the impeachment hearing and trail was and continues to be, a fascinating example of emotional immaturity.²⁵

The nation just witnessed a US congress made up mostly of lawyers, career politicians and academic staffers, and a president cut from a different cloth: a balanced mix of higher education combined with seasoned experience from hard work in a working world where the true nature of economics--tradeoffs--is acted out. The public senses that distinction. Unfortunately, many of our legislator-lawyers cannot. You may love or hate Trump, but the sometimes rough-edged perspectives he, and others like him represent, is often a vital balance in a healthy republic.

So, what can be done structurally? (as Edmund Burke put it, *we must reform in order to conserve*). There are three things:

One, push the QLD, or first qualifying law degree (such that it is) back down into the undergraduate college as a LL.B, B.C.L or otherwise broader bachelor of law. This gets young lawyers out of school and into work much earlier, better prepared and with less debt and opportunity cost. The J.D. content can also be "emptied" into the M.B.A. or B.B.A. where law is merely no more or less important than accounting, but where accounting, finance, marketing and finite mathematics are *essential* to effective law, but deficient in law programs.

[Ask yourself this, as a consumer of legal services: who would you generally prefer to hire, and have represent you, a new fresh 26 year old graduate of Yale Law with an undergraduate degree in philosophy and summer jobs as a volunteer aid; or a 25 year old LL.B and military reservist with four years of full-time experience working in a practice team for a corporate law firm handling hundreds of demanding clients, conducting M&A due diligence; drafting middle market sales opinion letters; filing motions in elder care cases with partition agreements; handling Delaware incorporations and designing capital structures in Reg D securities offerings; accompanying defendants in depositions; writing and administering a proposed notice of public convenience; challenging a federal regulatory access constraint, or making City tax incremental finance petitions; complaining in a class action against ground water contamination, defending university professors in disciplinary charges; perfecting new municipal bond offerings, or representing homeowners in flood damage cases? Who would you generally want representing you in front of a judge; verifying representations on your first home purchase, or serving as an expert witness in your trial (who is even qualified?). Would the young Yale graduate ever even catch up in experience? And who is now better prepared and better qualified to undertake an LL.M in corporate or environmental law, for example, or generally better prepared to write a meaningful thesis in a JSD?—*who is the better prospect for advancing the knowledge of the law*

of the larger GWOT, for which the "impeachment" is not only "small beer" but a profound distraction. The law school community is unfortunately but understandably not generally privy to high levels of intelligence, although special interest assets do occupy positions in them and have and currently do, provide certain influence and direction toward organized political agendas, including ones external to US interests proper. Put another way, the president is in fact quite impeachable, but for reasons that the modern university law school will find difficult or impossible to advance given the suppression of critical inquiry by special interests that in part explicitly occupy the law school academy. The recent presidential "EO" championed by Chicago law professor Hemel, is a particularly potent example.

²⁵ "Testing a Beckerian-Arrowian model of political orientation discrimination on the U.S. law professor labor market: Measuring the 'rank gap', 2001-2010," James C. Philips. This was not the first emotional outburst by such law professors: the Kavanaugh hearing generated massive letter campaigns, while Yale Law dismissed its entire school from class in order to promote a mass opposition. See, <https://www.chicagomaroon.com/article/2018/10/9/booth-alum-says-law-school-signatories-mistakenly/>

school and professors? What happened to those precious 4 years of hard work that could have transformed a JD graduate's capabilities and expertise?]

The JD graduate degree program and the ABA, are actually blocking young adults from becoming functional lawyers; functional lawyers from becoming more knowledgeable and more experienced judges²⁶; and law schools from developing and testing knowledge. The "simplification" of law and legal decision making, as Posner describes,²⁷ is frustrated by the JD program which creates a self-perpetuating complexity especially when tied to extensive case law (versus case method) reliance. The management parameters are time, opportunity and direct cost, and legal performance.

Two, promote the LL.M as a true post-graduate law degree for experienced practitioners (modelled after the MBA), *linked to specific domains* (e.g. air and space; environmental law; human rights; tax and finance; media, sports and entertainment and dozens more). *Law is transformed by application. So are law students, and law professors.*

Three, *merge the J.D. into what it actually purports to be (but isn't): a doctorate.* The J.D. should be dropped. It is a failed experiment (based on a number of parameters). In its place, for (some of) those seeking a legal teaching career, the J.S.D. or LL.D is its *more honest* replacement. Better yet perhaps, the Ph.D in a domain of applied law. As always in the modern university, however, *caveat emptor.*

Judge Richard Posner recommends otherwise that the "Bluebook" should be burned.

More substantial, the 'Berlin Wall' known as the A.B.A. should be torn down.

*Habeas Corpus, indeed.*²⁸

²⁶ <https://www.spectator.co.uk/2019/10/letters-we-need-judges-with-practical-experience/>

²⁷ Richard A. Posner, 'Divergent Paths: The Academy and the Judiciary,' 2016

²⁸ *Its reach is as diverse as the forms of confinement.* 'The Law of Habeas Corpus,' Farbey, Sharpe, and Atrill, OUP, 2011

Citation Addendum in Legal and Philosophical Sources

[I]t is obvious that what is demanded is not merely a broadening of the present vocational curriculum, organized as that is on the basis of the old logic, or the addition of a graduate school of law to the vocational school, but rather an entirely new and different approach to legal problems. First and foremost, the members of such a group would need to have and to give their students a clear conception of what the scientific study of anything involves, and of the available tools for pursuing it in the legal field. This would require them to take account of modern investigations into logic and human reasoning, and to survey in general outline at least the development of science and scientific method. Only in this way, it is believed, can there be formulated an adequate conception of the technique involved in the scientific study of legal phenomena, and of the limitations of the technique; only in this way can there be secured the necessary degree of objectivity required for the study of legal problems. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927), reprinted from 15 Johns Hopkins Alumni Magazine (March 1, 1927).

It is a pity that this [inchoate sociological] knowledge, which probably does influence a judge's decisions, has to work under cover of a verbal ritual which is not so much a method of deliberating on legal (and that means, fundamentally, on social) problems as a means of concealing the absence of a method. Phrases like 'direct result' and 'remote consequences' enable a court of law to seem to give intelligible reasons for its decision without actually doing so [W]e are given no intelligible test by means of which to distinguish direct from indirect consequences; we are merely being fobbed off with a metaphor. THE NATURE OF LEGAL ARGUMENT. By O. C. Jensen. Oxford: Basil Blackwell, 1957.

In general, in law as in politics and economics, the value of substituting definite knowledge for vague beliefs is obvious. The law, therefore, endeavors to delimit the boundaries of conflicting interests as sharply as the facts will allow. But here as elsewhere the drawing of sharp lines has its dangers, and every legal system does violence to the finer social susceptibilities by its ignoring of individual differences. Hard and fast rules also depress social initiative and make legalism a curse. Hence the best legal minds always recognize the necessity of equity or *epieike* which comes into play with the sense of justice of the individual judge. COHEN, A PREFACE TO LOGIC 93 (1956 ed.)

In order to mandate progress in the name of law, especially in the name of constitutional law, it is necessary to deceive. Where the law is backward, it must be made to seem progressive. Where the law is uncertain or permissive, it must be made to seem definite and mandatory. Where arguments are limited and honestly debatable, they must be made to seem comprehensive and inescapable. Where opponents refuse to yield, their positions must be distorted. Robert F. Nagel, *The Implosion of American Federalism*, OUP (2001).

Thus what we have hitherto called juristic science is in fact either the philology of law-language, or the scholarship of law-ideas. It is now the only science that still continues to deduce the meaning of life from "eternally valid" principles. The German jurisprudence of to-day, says Sohm, represents very largely indeed an inheritance from medieval Scholasticism. We have not yet begun to consider in deep earnest the bearing of the basic values of the life about us upon legal theory. We do not even yet know what these values are.

Here, then, is the task that German thought of the future has to perform. From the practical life of the present it has to develop the deepest principles of that life and elevate them into basic law-ideas. If our great arts lie behind us, our great jurisprudence is yet to come. For the work of the

nineteenth century - however creative that century believed itself to be - was merely preparatory. It freed us from the hook of Justinian, but not from the concepts. The ideologues of Roman law among scholars no longer count, but scholarship of the old cast remains. It is another kind of jurisprudence that is needed now to free us from the schematism of these concepts. Philological expertness must give place to social and economic.

Every law is, to the extent that it would be impossible to exaggerate, customary law. Let the statute define the words; it is life that explains them. If, however, a scholar's law-language of alien origin and alien scheme tries to bind the native and proper law, the ideas remain void and the life remains dumb. Law becomes, not a tool, but a burden, and actuality marches on, not with, but apart from legal history

It must be emphasized then - and with all rigour - that Classical law was a law of bodies, while ours is a law of functions. The Romans created a juristic statics; our task is juristic dynamics. For us, persons are not bodies, but units of force and will; and things are not bodies, but aims, means, and creations of these units. The Classical relation between bodies was positional, but the relation between forces is called action. For a Roman the slave was a thing which produced new things. A writer like Cicero could never have conceived of "intellectual property," let alone property in a practical notion or in the potentialities of talent; for us, on the contrary, the organizer or inventor or promoter is a generative force which works upon other, executive, forces, by giving direction, aim, and means to their action.* Both belong to economic life, not as possessors of things, but as carriers of energies.

*Note, in this connexion, the remarkable development in modern American industry of a professional managerial class, distinct from the capitalist, the technician, and the 'worker.

The future will be called upon to transpose our entire legal thought into alignment with our higher physics and mathematics. Our whole social, economic, and technical life is waiting to be understood, at long last, in this wise. We shall need a century and more of keenest and deepest thought to arrive at the goal. And the prerequisite is a wholly new kind of preparatory training in the jurist. It demands: 1. An immediate, extended, and practical experience in the economic life of the present. 2.. An exact knowledge of the legal history of the West, with constant comparison of German, English, and .. Roman" development. 3. Knowledge of Classical jurisprudence, not as a model for principles of present-day validity, but as a brilliant example of how a law can develop strong and pure out of the practical life of its time. Roman law has ceased to be our source for principles of eternal validity. But the relation between Roman existence and Roman law-ideas gives it a renewed value for us. We can learn from it how we have to build up *our* law out of *our* experiences.

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O. Spengler, *The Decline of the West*, The Relations Between the Cultures, V.11, 75-83; 1928

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Matt Andersson is an aerospace professional, management consultant and author. He was the Founder and CEO of Indigo Airlines backed by the American Express Corporation, McKinsey & Company and Embraer, S.A. He was an Executive Advisor with the aerospace and defense practice of Booz Allen Hamilton, and Senior Aviation Consultant with economics, business and litigation consultancy Charles River Associates. He previously worked in banking with Merrill Lynch Worldwide and strategic investments with AT&T International. He attended the University of Texas at Austin where he studied with economist and former White House National Security Advisor W.W. Rostow at the Johnson School of Public Affairs; Yale University; and the University of Chicago, where he received an MBA from the Graduate School of Business. He has worked in Chicago, New York, Sydney, Moscow, Minsk, Kiev, Paris, Bonn and Warsaw and is proficient in Russian. He is originally from New York City (Queens) and grew up on a working farm in Connecticut. He has been featured in the Wall Street Journal, the New York Times, the Financial Times, Fortune, Time, The Guardian, National Review, The Economist, Wired, FastCompany, Institutional Investor, The Journal of Private Equity, the BBC, CBS, ABC, CNN and Bloomberg News and was featured in the Pulitzer prize winning report on the U.S air transportation system by the Chicago Tribune. He has over 200 publications in business, academic, and major media and writes regularly on law, economics and policy for the academic journal Issues in Aviation Law and Policy. He has testified before the U.S. Senate on science and technology, and consulted to senior US and foreign government, political, regulatory and commercial leaders. He served as a technical advisor with the U.S. State Department Telecommunications Blue Ribbon Panel in the former Soviet Union and has been a featured guest speaker of the U.S. Commerce Department; the U.S Department of Transportation; the Chicago Council on Global Affairs; the World Bank; Northwestern University Kellogg School of Business, Boston University and DePaul University College of Law. He is a member of YPO/WPO and former Board member of Catholic Charity Lifelink. He is a classical musician and college parent.