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# Book Reviews

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## BOOK REVIEWS

### A PROGRAMMED INTRODUCTION TO THE STUDY OF LAW—PART I: CASE SKILLS.

By Charles D. Kelso.<sup>1</sup> Indianapolis, Indiana: The Bobbs-Merrill Company, 1965. Pp. 576. Booklet pp. 194. \$17.50.

For quite some time, case books and textbooks in legal education have followed traditional patterns. Recently, books with variations in form and philosophy have appeared. Professor Kelso's text is an important innovation that should be brought to the attention of the profession. As a "programmed text," it is such a great departure from traditional books that some explanation of both its form and philosophy is appropriate. Therefore, this review will not be limited to a description and evaluation of the book per se, but also will incorporate a discussion of some of the general principles of programming.

The book is interesting from two points of view. Not only is it of great value as a "programmed text," but it is also an excellent text on "legal method." The transition from undergraduate work to the study of law is a difficult step for many students. A great deal of class time must be spent in changing the student's orientation before a serious study of the law can commence. This re-orientation can be a frustrating process. Sometimes the instructor is so anxious to "get on to the law" that the students are confused by a hurried and perhaps poorly prepared presentation. A book which could help prepare the student for the study of law would be a boon to both student and instructor, save class time, and perhaps prevent some unfortunate first impressions of the study of law. Professor Kelso's text was designed to achieve these results — to help students learn to read legal material with understanding, to analyze, synthesize and evaluate legal concepts, and to express themselves in a logical and meaningful manner.

One basic assumption dominates the entire book — in order to achieve the above objectives, a student must understand and appreciate factors which influence judicial opinion and how judges react to those factors. To restate this proposition in a positive manner, Professor Kelso believes that if a student does understand and appreciate these influences he can become a sophisticated and proficient student of law. Of course, many writers have referred to factors which influence judges. Different factors have been proposed as influences, and the same factors described in different vocabularies. Professor Kelso chose to use the four factors characterized by Karl N. Llewellyn: rule of law, precedent, reason and situation-sense.<sup>2</sup> The dominating effect of the basic assumption is reflected in the organization of the text. The first three chapters present and analyze the four factors. The fourth and final chapter analyzes the interrelation of the four factors.

Some might object to the emphasis given to Llewellyn's classification of factors. Professor Kelso adroitly avoided any argument as to what factors should affect judicial opinion and to what degree. Rather, he pointed out that dif-

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<sup>2</sup> LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

ferent judges are influenced to different degrees by different factors. For example, the text describes four fictional judges portraying different legal philosophies. The student is required to predict how each judge would respond to cases which involve subtle variations in the interrelations of the four factors.

In order to understand the influencing factors in an operational context, and in order to become efficient in the "craft of lawyering," the student must learn the mechanics of the judicial system. Professor Kelso intertwined discussions of legal tools and functions with his analysis of the influencing factors in such a manner that the concepts are mutually reinforcing. All the basic concepts<sup>3</sup> common to introductory texts were incorporated and applied in a thorough and almost meticulous manner. In fact, some might consider it overdone. In the opinion of this reviewer, any error should be made in the direction of inclusion.

One of the most impressive characteristics of the text is that it was designed to help the student achieve a level of comprehension usually expected only in the later stages of his academic training. But comprehension is only the first step. The text elicits student performance and self-expression. The student must apply what he has learned to solve complex problems and express his solution in traditional legal modes. For example, in one exercise the student is required to read *MacPherson v. Buick Motor Co.*,<sup>4</sup> write an analysis of the case, and compare his work with an analysis written by Llewellyn.<sup>5</sup>

Of primary interest, however, is the fact that Professor Kelso's book is a "programmed text." A programmed text is characterized by the method of presentation. The elementary material is introduced in small, simple increments. The program requires a written response by the student to each segment. The student checks his comprehension by comparing his answer to the response suggested by the program. In the early stages of the program, the response elicited may be only one or two words. Later, as the student acquires more knowledge, the problems and appropriate responses become more complicated.

This method of presentation is the result of a great deal of psychological research. It is based upon information obtained in laboratories and confirmed by use in disciplines ranging from elementary reading to calculus and symbolic logic. Professor Kelso brought this information to the attention of legal educators in 1960.<sup>6</sup> He conducted preliminary experiments testing the efficiency of programmed legal material<sup>7</sup> before he embarked upon the task of writing his text. The evidence indicates that the program method of presentation could be as effective in law as it has been in other disciplines.

Professor Kelso has done a magnificent job of programming. He con-

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3 Rule of Law, right, remedy, duty, liability, questions of law, questions of fact, application of law to the facts and tests for application, court, judge, jury, criminal action, civil action, plaintiff, defendant, trial, cause of action, common law, equity, pleading, complaint, caption, summons, demurrer, answer, defense, reply, voire dire examination, opening statements, introduction and admission of evidence, motion for directed verdict, prima facie case, final argument, instructions, decision, verdict, judgment, motion for new trial, appeal, error, appellate court, appellant, appellee, reverse, modify or affirm, holding, dictum, stare decisis, precedent.

4 217 N.Y. 382, 11 N.E. 1050 (1916).

5 LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

6 Kelso, *Science and our Teaching Methods: Harmony or Discord*, 13 J. LEGAL ED. 183 (1960).

7 Kelso, *Programming Shows Promise for Training Lawyers: A Report on an Experiment*, 14 J. LEGAL ED. 243 (1961).

structed the program so as to produce maximum participation by the student. The student must comprehend and apply at each step. Under these conditions, the student may become personally involved — almost as a competitor — and thus be alert and concerned with his success. The text requires that the student understand each concept and be able to apply it before he proceeds to the next. Professor Kelso minimized the chance of aversive frustration and defeat (if the student works diligently) by arranging the material so that the student has previously learned concepts necessary to resolve new problems. The challenge of the problems and the student's involvement as a competitor tend to promote the necessary diligence.

The effectiveness of a program is directly related to the reinforcement the student experiences. The more immediate the reinforcement, the more effective it is. Professor Kelso's text presents a problem to the student to resolve. The student records his solution and immediately compares his answer with the response suggested by the text. If he were mistaken, he is immediately aware of the fact and corrects the error before proceeding, thereby avoiding a pyramiding of errors. If he were correct, he is immediately reinforced by his own gain in competence. This is indeed a refreshing thought. The text helps motivate a student to learn by capitalizing on the pleasure of learning — the student's enjoyment of his ability to use his new knowledge to solve new problems and his gain in competence. Professor Kelso's use of such reinforcement is quite apparent. Sprinkled through the text are remarks such as: "If you could answer most of the above questions, you should pat yourself on the back. . . ."

A programmed text, then, should be constructed so as to afford maximum reinforcement. The problem presented to the student must not be so simple that the solution is no reward. The result would be boredom rather than reinforcement. On the other hand, the task should not be so difficult that most students would be frustrated. A series of defeats is aversive rather than rewarding. Professor Kelso's text exhibits the sensitivity with which he gauged the ability of prospective students and composed a program which passes beautifully between boredom and defeat to achieve reinforcement. One way Professor Kelso handled this precarious balance was to make some problems of exceptional difficulty optional.

If a program is to provide maximum reinforcement, the programmer must be concerned with the rate of increase of difficulty of the material and problems. Professor Kelso's description of the process he used is as follows:

Students move around in the exercises and tests completing logically organized statements (using concepts defined and illustrated in program frames) to (1) indentifying the structural and logical properties of statements, (2) answering pointed questions, (3) completing or composing statements, outlines, or charts according to specification and (4) completing or composing an essay or outline in response to a legal problem posed by a fact situation — and then back again to completing logically organized statements. Each time the circle is rounded, the student must take another step upward because (1) hints, suggestions and other prompts gradually are withdrawn, and (2) there is an increasing complexity in (a) the material to which he must respond, (b) the responses called for, and (c) the

necessary intermediate "thinking steps" between the stimulus provided by the program and the response called for by the program. A few of the exercises require a complete trip around the circle, thus reinforcing review and the integration of skills.<sup>8</sup>

In a few places, the form of the response required by the program is obscure. In such instances, the energy of the student is spent in solving the program rather than the legal problem. In the reviewer's opinion, a student would profit by a summary at the end of each topic. The program begins with a preview and ends with a review, but neither performs the function of a summary.

Some students develop a negative attitude toward the first program they examine. The student must read a set of instructions before he can understand the text — admittedly a nuisance. Reading the first page or so requires as much attention to format as to the content. Some students object to programmed texts because considerable manipulation of physical objects is involved (but others consider this an asset). Professor Kelso's text involves more manipulation than most. Plastic shields are used to expose some material and the problem to be solved, and to block the suggested response from the student's view. Different types of shields are used on different pages. Furthermore, Professor Kelso's text comprises a book and a supplemental booklet. Sometimes the student must use both in connection with the same problem. These annoyances become trivial as the student becomes familiar with the format.

A much more serious problem common to most programs is caused by the need to begin with small, simple steps. Many students initially feel that programs must have been designed for morons and adopt a condescending attitude toward the whole affair. This attitude is accentuated by instructions which require the student to laboriously write out his responses — the crowning insult if the student considers the answer to be stupidly obvious. In the case of Professor Kelso's text, any condescension will be resolved as the student works through the program. He will realize very quickly that the size of the steps was delicately controlled to promote thorough understanding and reinforcement, and he will come to respect the text as a very efficient teaching device.

A quicker way for a student to dispel his condescension would be to thumb through some of the more complex problems and responses. Quite likely, the student's attitude would change 180 degrees. Then, he might feel hopelessly unable to ever achieve such a high level of competence. His salvation is to give himself and the program a chance. The experience in other disciplines has been that students who worked with programs enjoyed them, learned from them, and endorsed them.

Some instructors object to programmed legal texts because they assume the text was designed to replace case books and the case method. Professor Kelso states: "It is neither a substitute for nor a supplement to study by traditional case-book method. Rather it is designed to teach skills and knowledge that will make the case study more efficient and effective."<sup>9</sup> In the reviewer's opinion, in addition to making case study more efficient and effective, this text

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<sup>8</sup> Booklet, text at 183.

<sup>9</sup> *Id.* at iii.

should free more class time for case study because less time need be spent in matters preparatory to case analysis.

It is the reviewer's opinion that Professor Kelso has attempted to help beginning students learn more material, understand more concepts and perform at a higher level of competency, than any preceding author. Such a task required the talent of a student-oriented teacher thoroughly familiar with the subtleties of our legal system, jurisprudence, theories of learning, and the art and science of programming. His goals for the student are so high that many educators may consider them unrealistic. I believe that Professor Kelso leads the students from the simple to the complex so skillfully that most students will achieve the extraordinary degree of excellence which Professor Kelso expects. But the issue will not be determined by an exchange of opinion. The test is student behavior—the level of learning demonstrated by performance. This book deserves a thorough testing by the profession. Instructors whose interests are not limited to "teaching law," but who are also concerned with new ways to "help students learn," will find it fascinating.

*Thomas A. Wills\**

THE RISE OF THE LEGAL PROFESSION IN AMERICA. By Anton-Hermann Chroust.<sup>1</sup> Norman, Oklahoma: The University of Oklahoma Press, 1965. Two volumes, pp. xxiii, 334, 318. \$15.00. — The history of the United States is filled with law and lawyers. The emigration which brought the first white men here turned on deficiencies in the legal order they left. The American Revolution, to a greater extent than the revolutions in France and England, or modern revolutions, was founded on a legal idea; and it was led by lawyers. The new state was founded on neither ethnic identity nor a common religious creed—not even on a philosophical idea—but on modest and enduring and workable legal principles. The great problems of the American society have been legal problems, and lawyers have been this country's most important, least appreciated citizens.

These volumes originated in the years Dr. Chroust taught the History of the Legal Profession at the Notre Dame Law School; they draw on periodical articles (listed in an appendix to this review) which he prepared for his students, as well as a few pieces he has written more recently. The present study deals exclusively with American lawyers from 1608 to 1860—from Plymouth and Jamestown, which at first excluded lawyers,<sup>2</sup> to Fort Sumter, where Americans witnessed the results of their country's failure to apply the rule of law to its greatest problem. The first volume proceeds geographically, examining the nascent profession in each of the 13 colonies. The second is topical, with chapters on the Revolution, the profession on the frontier, the rise of the organized bar, legal education, and attempts to control the profession.<sup>3</sup>

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1 Professor of Law and University Graduate Research Professor, University of Notre Dame.

2 Two English barristers presented themselves in Massachusetts before 1641, but one was harassed away and the other was deported. I text at 72-74. In Virginia they were excluded for about half a century.

3 These volumes lack a table of contents—which will annoy browsers—but contain a thorough index at the end of Volume II. They are, incidentally, boxed and handsomely bound in gray, with gold lettering.

## I.

An entire volume devoted to the colonial profession is justified for a number of reasons. English-trained or English-influenced American lawyers transplanted the common law to our soil, a not always simple task, but a task largely and permanently accomplished before 1776. The development—one should perhaps say “adaptation”—of American legal institutions prior to the Revolution is vital because those institutions are still with us and the intellectual forces which framed them were the intellectual forces of the Revolution itself.<sup>4</sup> (One might compare the flight of the Puritans and Quakers to the New World, which Dr. Chroust shows to have been accompanied by disgust for English law and for lawyers, with the importance both the common law and common lawyers in this country had when the descendants of those Puritans and Quakers set out to sever their last ties to the King, at Concord and Independence Hall, a century and a half later.<sup>5</sup>)

Because the earliest colonists (in New England and Pennsylvania) feared English legal institutions, or because royal governors (in New York and New Jersey) or the dominant economic class (in Virginia, Maryland, the Carolinas and Georgia) were jealous of their own power, lawyers were generally suppressed prior to 1700. When they were finally allowed to practice, a combination of lax admission standards and niggardly restrictions on practice made the profession attractive mainly to the incompetent. After these two initial phases of discomfort—repeated throughout the colonies—lawyers began to foster idealism enough to protect their own effectiveness. This last phase of colonial development was at its zenith in 1776.

Dr. Chroust takes it as a guiding thesis that the legal profession cannot discipline itself and devote itself to the public good until a consistent body of laws, rules of procedure and settled jurisdiction are established. Of course, lawyers are instrumental in bringing about these conditions, but the conditions are also instrumental in bringing about lawyers. For instance, he attributes the slow development of the profession in New England—slower than in the Middle Atlantic and Southern colonies—to the fact that the Puritan theocracy tried to abolish law and lawyers in favor of lay-administered scriptural justice.<sup>6</sup>

4 Dr. Chroust quotes Sir Charles Grant Robertson, referring to England under the Hanover kings, who said that “lawyers are always the real makers of Revolution.” I text at 53. That would not seem to have been true of the Puritan revolution in England—and the contemporary emigration of the Puritans to America—or of the Glorious Revolution of 1688-89. It was certainly not true in France at the end of the 18th century.

5 “The American Revolution could be framed in legal language . . . because Americans had come to realize that the law was the structural foundation on which the new American community had grown. . . . From then on all the major issues of American political life would be cast in legal language, and . . . would receive their final shape from lawyers rather than from philosophers or political scientists.” I text at 54.

6 “[T]he period between 1630 and 1684 . . . was in Massachusetts, as elsewhere, a time in which the colony attempted to carry on its affairs without a stable body of laws—a period, moreover, which saw the administration of justice without professional lawyers, either on the bench or at the bar. It might be interesting to observe here that justice without law and justice without lawyers of necessity seem to go hand in hand.” I text at 65.

In Connecticut, Jesse Root called the common law a system “adapted to a people grown old in the habits of vice.” *Id.* at 113. In Pennsylvania, too, a theological idea resulted in the suppression of lawyers—the idea that God-fearing men, living under plain ordinances, did not need to litigate. *Id.* at 206-20.

The common law, because of this unsuccessful experiment, "remained largely an alien system in the colonies until about the eighteenth century."<sup>7</sup> As Franklin put it, the colonists did not carry the English law with their English blood, but only "such parts of the laws . . . as they should judge advantageous . . . [and] a right to make such others as they should think necessary."<sup>8</sup>

Other, largely physical, factors inhibited the profession in colonial America. There were virtually no legal materials for common law practice or for education in the 17th century, and few in the 18th; the statutes enacted in the colonies were not even available. Judges were usually laymen, often ignorant and hostile to any procedural order or substantive principle in which they smelled the smoke of English law. Governor John Winthrop of Massachusetts thought lawyers "mean men"; Judge John Dudley of New Hampshire said that demurrers were "an invention of the Bar to prevent justice . . . [and] a cursed cheat."<sup>9</sup> Lawyers in this period had to deal with hostile judges and legislatures on the one hand and with amateurs ("pettifoggers and sharpers" in Dr. Chroust's recurrent phrase) on the other.<sup>10</sup> And, of course, lay judges were rarely able to distinguish between the seminal profession and the nonprofession.

Lawyers did have, by 1776, especially in New England, the beginnings of a system of training and education, a self-policed method for admission and expulsion, the seeds of monopolization of professional services, and a "strictly enforced code of professional ethics."<sup>11</sup> And they had more than that. From the Bar in Boston, New York, New Jersey, Philadelphia and Virginia came the first and bravest leaders in the Revolution. The New Jersey Bar's courageous boycott of the Stamp Act, which imposed virtual paralysis on the courts there for about two months in 1766, is doubly significant: it demonstrates, first, the strength of the organized Bar at an early date; and it proves the leading position lawyers had assumed in resisting the King a decade before the Revolution.

New York and New Jersey had settled laws earlier—due to their status as royal colonies—but their legal professions were suppressed or controlled throughout the 17th century by royal governors and by the distrust that the prosperous burghers in those colonies had for lawyers. (Each source of suppression, of course, contributed to the other.) Another prominent difference between the early profession in New England and that in the Middle Atlantic colonies was the source of professional standardization. In New England, standards came relatively late, but they were usually in the hands of the Bar. This was not true in New York and New Jersey where standards were imposed by court order, or in Pennsylvania and Delaware where the legislatures regulated admission, fees and professional conduct.<sup>12</sup>

7 I text at 7.

8 I text at 15. With obvious disadvantages—including constant clerical interference, inconsistency in judgments, and double jeopardy.

9 I text at 127. Dr. Chroust concludes, though, that the colonists stayed closer to the common law than they might have thought—probably because it was as much a part of them as their English language was. They were, he says, "a people without much experience and with only a few lawbooks, who in their own dilettante manner were trying to imitate or reproduce on a crude scale what went on back in England." *Id.* at 70-71.

10 John Adams referred to the Braintree "bar" of 1760 as a "scene of strife, Vexation and Immorality." I text at 81.

11 I text at 90.

12 This externally imposed regulation—an antiprofessional phenomenon in Dr. Chroust's



The result was that the earliest influx and local preparation of competent lawyers was tentative, if not ineffective. No more than 24 trained lawyers practiced in New York between 1694 and 1702. There were probably no more than seven educated lawyers in Pennsylvania in 1708. The inevitable upshot of an insufficient Bar—so insufficient, in fact, that well-heeled litigants often hired all the lawyers available—was an opening for nonprofessional incompetents, who were consistently distinguished from trained lawyers in attempts at regulation in the Middle Atlantic colonies, but not in New England, where early regulations fell with dismal force on competent and incompetent alike.

Pennsylvania, like New England, and for similar reasons, discouraged lawyers and lawyer-judges until well into the 18th century—an ironic result of the system adopted, with a lawyer's help,<sup>13</sup> by William Penn. The result was a chaos of amateurs, followed by a chaos of charlatans, which finally yielded to the cautious order of a professional Bar in the generation before the Revolution.<sup>14</sup> Dr. Chroust generalizes on this theme:

[W]hensoever and wherever the legal profession is suppressed as a class, no matter for what reason, the work that ought to be done by responsible and trained experts of necessity falls into the hands of irresponsible and ignorant, and at the same time rapacious and ruthless, charlatans.<sup>15</sup>

Southern lawyers, taking Virginia as typical, were suppressed as long as they were identified as outsiders by the power-jealous planters. The profession began to grow *within* the landed class, though—as it had in England—and with that development came a measure of acceptance analogous to that dictated by expedience in the northern colonies.<sup>16</sup> Where the obstacle was less cultural and more purely economic—in Maryland, for instance—both English law and lawyers were accepted more readily.<sup>17</sup> Regulation of the profession appears to have come more from legislatures than from courts; there was apparently almost no internal regulation within the profession prior to the Revolution. The relatively higher incidence of English-trained lawyers in the South<sup>18</sup>

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view—started as early as 1677 in New York, I text at 155, and was fairly elaborate by 1730. *Id.* at 173. New Jersey's first statute on the subject was passed in 1676 and had extended even to fee schedules by 1750. *Id.* at 197-99. Similar legislation in Pennsylvania dates from 1710. *Id.* at 218.

13 "The Laws Agreed Upon in England" (1682), a key part of Penn's scheme, were compiled with the help of Thomas Rudyard, an English lawyer who apparently worked with Penn on both sides of the Atlantic. I text at 211-12. Penn also had legal assistance from David Lloyd, a Welsh immigrant and lawyer.

14 In Pennsylvania, Rhode Island and South Carolina, this included provision for counsel for all criminal defendants, including the indigent. Rhode Island, in fact, provided for counsel to accused felons when that practice was still forbidden in the mother country (1668). I text at 138, 222, 301.

15 I text at 220.

16 Cf. the Act of 1658 in Virginia. I text at 270-71.

17 Maryland even had courts of equity at an early date. I text at 239. There were ten active lawyers in the colony within 30 years of its founding. *Id.* at 242-43. Virginia had, Dr. Chroust estimates, 30 to 40 practitioners of varying degrees of competence by 1680. *Id.* at 279. Southern court structures—even in the Carolinas, once the Locke experiment was ended—had court structures patterned on England's.

18 See, as to Virginia, I text at 282-84; as to South Carolina, *id.* at 302 n.314.

impeded organization of the Bar, probably because an English barrister traced his primary professional identification to his inn in London.<sup>19</sup>

## II.

Although it was fomented largely by lawyers, the Revolution produced temporary reverses in the growth of the profession. Some of the more accomplished members of the Eastern Bar were hounded from their practice, or barred from it, because they had been Loyalists in the war. The combined influences of economic depression and Anglophobia revived colonial distaste for the common law and common lawyers. Benjamin Austin, a leading lawyer-baiter, said: "[T]he mere title of lawyer is sufficient to deprive a man of the public confidence."<sup>20</sup> But two centuries had taught America that lawyers were necessary, even though most citizens also considered them evil. Harassment, rather than complete suppression, characterized these post-Revolutionary attacks on the profession. Pennsylvania, for instance, found a brief experiment with nonprofessional arbitration to be disaster and thereafter contented itself with setting fees.

The revolutionary Bar was hardy and young; it survived. Dr. Chroust finds that the law, despite harassment, was "one of the most promising and attractive professions open to young men of talent and ambition."<sup>21</sup> Within a few years of the post-Revolutionary suppression, the Bar was again organized and effective in the East and was again insisting on the educational and professional standards it developed before the war.<sup>22</sup>

With this revival—or survival—came a compromise with the Anglophobes and Francophiles who distrusted the common law, and most states adopted constitutions or legislation incorporating the English common law as it existed prior to 1606 or, more commonly, prior to 1776. The former colonies, in other words, acknowledged the legal heritage they held in common with their errant parent,<sup>23</sup> but they insisted that American common law was to have an American character too. The compromise was followed by the production of first-rate case reporting<sup>24</sup> and the first of the American treatises.<sup>25</sup> By 1825, the American profession was, at least in the East, in full stride again. In 1821, Joseph Story, noting the aspiration as well as the performance of the Supreme Court Bar, said:

19 Another factor in slow organization in the South may have been the centralized admission to practice which prevailed in most states. I text at 309-10, 315.

20 II text at 21.

21 II text at 34.

22 These are detailed at II text at 35-38; the revival was not as early in the South and apparently did not reach the frontier at all.

23 Dr. Chroust describes in some detail two incidents which at least illustrate the turning point in Pennsylvania—the Passmore contempt case, involving a judge's power to punish for contempt, II text at 65-66, and the rise and fall of a statute of 1810 which forbade the citation of any English decision of later than July 4, 1776, *id.* at 67. Whatever Anglophobia lurked in this latter, it was a concession of sorts to common-law method.

24 Dr. Chroust mentions reports of Dallas (Pennsylvania), Chipman (Vermont), Wythe (Virginia), Martin (North Carolina), Kent, Coleman and Craine (New York), Hughes (Kentucky), Williams and Tyng (Massachusetts), Day (South Carolina), Greenleaf (Maine), Adams (New Hampshire), Charlton (Georgia) and Harrington (Delaware), as well as the Dallas and Cranch reports in the Supreme Court of the United States. II text at 75-76.

25 Chitty's *BILLS AND NOTES*, in the Story edition of 1809, is an example. II text at 77-79.

[T]heir eloquence can charm, when it vindicates the innocent, and the suffering under private wrongs. . . . [H]ow much more glory belongs to them, when this eloquence, this learning, and this genius, are employed in defense of their country . . . [to] expound the lofty doctrines which sustain, and connect, and guide the destinies of nations. . . . [T]hey triumph by arresting the progress of error and the march of power; and drive back the torrent, that threatens destruction equally to public liberty and private property.<sup>26</sup>

The work of the lawyers of that generation — Martin, Pinckney, Wirt, Mason, Webster, Choate, Petigru, Binney, Johnson — and of the judges before whom they practiced — Marshall, Kent, Story, Shaw, Gibson, Ruffin — will, Dr. Chroust says, “bear favorable comparison with the great legal accomplishments of any age in Western history.”<sup>27</sup>

This Eastern competence was slow to reach the frontier, where every man felt he could do anything, lawyering not excepted. Courts sat on the banks of streams and in barns; process was a matter of speed, force and a loud voice; and advocacy required good physical condition. “I don’t know what power the law gives me to keep order in this court,” Judge Lindsay of Versailles, Indiana, said, as he removed a spectator with the toe of his boot, “but I know very well the power God Almighty gave me.”<sup>28</sup> Justice was rustic, but it was also — usually — fair and it depended, even more than it had in the East, on a competent and responsible Bar. One needs only to read Abraham Lincoln’s case load to realize that the circuit judge with whom he rode could not have held court unless Lincoln was with him.

Western lawyers were poorly educated and sometimes admitted to practice on the theory that they were so ignorant of the law that no one would employ them anyway. They were cut off from Eastern professional standards and from the common law. When idealism in the administration of justice came to them, it had a Jacksonian flavor which stifled professional organization and identity (a condition from which the Midwest has not entirely recovered). But the law was a popular profession, and the West was blessed with enough good judges to give it an essential and minimum continuity — with itself and the rest of the nation.<sup>29</sup>

### III.

Probably the most significant ingredient in establishing a nationally cohesive profession was the education of lawyers — a subject not, in this country, coextensive with admission to the Bar (as it has always been in England). During most of the period Dr. Chroust surveys, qualification for the Bar was no tricks at all, except in a few Eastern states. This is a significant fact because it indicates a desire to learn the law for the sake of effective practice, rather

<sup>26</sup> II text at 81-82.

<sup>27</sup> II text at 84.

<sup>28</sup> II text at 98.

<sup>29</sup> Dr. Chroust mentions among the early lights of the Western Bench and Bar: Alexander and Robert Breckenridge and Judge John Boyle of Kentucky, Alphonso Taft of Ohio, James Whitcomb and Judge Isaak Blackford of Indiana, and Thomas Hart Benton of Missouri. II text at 116-27.

than for the sake of admission to practice. A corollary of that indication — and one obvious in the early history of legal education — is that students demanded useful, client-oriented instruction in the law (a demand not unheard in law schools even now).

The colonial period was English-dominated in education, as it was in the development of substantive law; resistance to English influence was constant, but the influence was more than constant. A few lawyers — relatively numerous in the South, relatively sparse elsewhere — were members of the Inns of Court, but, for the most part, American colonial legal education was less formal than the English system.<sup>30</sup> For many lawyers, learning was catch as catch can, usually by means of apprenticeships in law offices or courts, and often in private study. (Patrick Henry, for instance, appears to have prepared for the Bar by reading Coke for six weeks.)

After the Revolution there were two relatively popular alternatives to apprenticeship — study at a college,<sup>31</sup> and study at an independent law school. The first was a poor alternative if one wished to learn substantive law — and it was often supplemented by apprenticeship<sup>32</sup> — but the second was effective and influential. The independent law school — of which the Litchfield Law School in Connecticut was the most prosperous and respected example — was an outgrowth of apprenticeship; in some cases it was probably indistinguishable from apprenticeship,<sup>33</sup> but it usually provided a method of study at least more thorough and systematic than anything Americans had had in the 17th and 18th centuries.

Out of this three-pronged system of education — apprenticeship, university lectures and the independent law school — grew a peculiarly American contribution to legal education, the university law school, first at Harvard, then at Yale, and, by about 1870, at dozens of institutions.<sup>34</sup> This was an unprecedented innovation; it combined the professional advantages of independent practical education (offered, at the time, in the better independent law schools and in a few law offices) with the breadth of vision sometimes attributed to university lectures in law (Kent's at Columbia and Minor's at Virginia, for instance). "[I]t became an academic professional school, as contrasted with the purely academic

30 Dr. Chroust could find only seven American members of the inns prior to 1700 and not many more, aside from Southerners, in the 18th century. But these few apparently had wide influence — by example and by precept. All three of the courageous lawyers who represented John Peter Zenger were members of Gray's Inn.

31 William and Mary had a law lecturer in 1779, followed by not always successful attempts at imitation in Philadelphia, at (what is now) Columbia, where Kent lectured and chafed about student demands for practical instruction, at Yale, and elsewhere.

32 Apprenticeship was clearly required under the stringent standards for admission in Massachusetts, I text at 132-33, and New York, *id.* at 173, but standards elsewhere — notably on the frontier — were almost nonexistent.

33 "Any lawyer who had a permanent office and perhaps a handfull of lawbooks could, if he wished to do so, establish a law school . . . which . . . differed from the traditional office apprenticeship only in that he [chose] to call it by the honorific name of 'law school'." II text at 220. Office study was occasionally even more thorough. Lemuel Shaw's office in Massachusetts, for instance, apparently provided a rigorous system of tutorial instruction. *Id.* at 174-75. John Adams was enthusiastic about Massachusetts apprenticeships, but Livingstone and Jefferson suggested that the system as it operated in New York and Virginia was less impressive.

34 Dr. Chroust surveys the Harvard Law School's origins in great detail. II text at 191-203.

law schools of continental Europe and the purely professional legal education prevailing in England. In sum, it established a distinctly American type of legal education.<sup>35</sup> Despite their frustrating struggle with the Jacksonians and Francophiles, despite the antiprofessionalism which plagued them from 1620 on, American lawyers had, by the time Thomas Jefferson died in 1826, made a lasting and valuable contribution to the ancient art of teaching law.

#### IV.

It is, in Dr. Chroust's view, impossible to identify stable professionalism until the Bar has in its own hands standards of admission, standards of expulsion and exclusion, and enough control of practice to justify a representation that it acts for the public welfare. This kind of control was slow to come in the colonies and, perhaps because the integrated character of the English Bar had been rendered a remote example, even slower in the infant states.

Admission, expulsion, certain aspects of practice, loyalty oaths, and even fees were controlled by either legislatures or courts in all the colonies and most of the states. The controls varied in severity, from stringent educational requirements in Massachusetts to relaxed and casually enforced ones in Illinois and Indiana, from viable schedules of maximum fees in New York and North Carolina to niggardly maximums that forced lawyers to support themselves with manual labor in Pennsylvania. But external regulation, beneficent or not, was virtually universal.<sup>36</sup> (I suspect, though, that the Bar had more control in these matters than it appears to have had. In Massachusetts, for instance, standards of admission imposed by the Supreme Judicial Court appear to have been suggested by the organized Bar,<sup>37</sup> and examinations of qualifications and character seem to have been carried out by lawyers, rather than or in addition to examinations by judges, throughout New England. In many cases, legislatures deferred to judges, and it may not be too much to suppose that judges deferred to lawyers for admission standards in at least some states.<sup>38</sup>) Whatever standards there were, however, withered in the popular fires of Jacksonian change, and many states opened wide the professional gates in the early 19th century. This produced a chaos which produced decline in professional organization, but the happy result of it (something beyond the scope of Dr. Chroust's present volumes)

35 II text at 197. Josiah Quincy predicted, at the dedication of the Dane Law School at Harvard in 1832, that the introduction of the common law into the university would produce better students and better law—"liberalized and refined," as he put it. *Id.* at 221-23.

36 In 1656, an early example of legislative control, the Massachusetts General Court imposed a fine of 20 shillings for each "excess hour" a pleader took in court. This cruel exaction unhappily fell with equal force on pettifogger and true professional.

37 Massachusetts court rules of 1806 and 1810 required apprenticeships in the offices of members of the Bar of the Supreme Judicial Court and required recommendations from the applicant's local Bar as to moral character. II text at 230. These rules appear to owe something to local rules on admission, imposed by the Bar, which date from 1768 in Essex and from somewhat later in Suffolk and Worcester counties. *Id.* at 35, 133.

38 Legislative deference was the pattern in Maine under legislation dated 1837 which contained provisions for local examination of candidates *by lawyers*. II text at 236. A similar pattern emerged in Vermont, *id.* at 236-40, Rhode Island, *id.* at 240-41, Connecticut, *id.* at 241-43, New Hampshire, *id.* at 243-45, and New York, *id.* at 245, but not, apparently, in Virginia and South Carolina, *id.* at 263-70.

Standards of practice, especially those imposed by tacit agreement and encouraged by professional fellowship, may have resulted from early and fairly thorough programs of continuing education in Massachusetts and New York. I text at 101, 104, 187-92.

was a new spirit of professional responsibility, a new movement to organize the Bar and a new deference in courts and legislatures to the profession's ability to control itself.

Dr. Chroust thus gives the American profession the first thorough account of its childhood. These volumes (despite the author's too-modest Foreword) contain an astounding amount of information, much of it from original and obscure secondary sources. Reading it is a rich and important experience for any lawyer interested in his heritage.

—THOMAS L. SHAFFER\*

## APPENDIX

### ANTON-HERMANN CHROUST ON THE HISTORY OF THE LEGAL PROFESSION\*\*

#### I—Book

THE RISE OF THE LEGAL PROFESSION IN AMERICA (2 vols., 1965).

#### II—Articles in THE NOTRE DAME LAWYER

*Lex Acilia and the Rise of Trial by Jury in the Roman World*, 24 NOTRE DAME LAWYER 1 (1948) (co-authored with J. R. Murphy).

*The Dilemma of the American Lawyer in the Post-Revolutionary Era*, 35 NOTRE DAME LAWYER 48 (1959).

*The Legal Profession during the Middle Ages: the Emergence of the English Lawyer prior to 1400*, 31 NOTRE DAME LAWYER 537, 32 NOTRE DAME LAWYER 85, 268 (1956-57).

*The Legal Profession in Ancient Athens*, 29 NOTRE DAME LAWYER 339 (1954).

*The Legal Profession in Ancient Imperial Rome*, 30 NOTRE DAME LAWYER 521 (1955).

*The Legal Profession in Ancient Republican Rome*, 30 NOTRE DAME LAWYER 97 (1954).

*The Legal Profession in Colonial America*, 33 NOTRE DAME LAWYER 51, 350, 34 NOTRE DAME LAWYER 44 (1957-58).

#### III—Articles in Other Journals

*Abraham Lincoln Argues a Pro-Slavery Case*, 5 AM. J. LEGAL HIST. 299 (1961).

*Contemporary Appraisals of the Early Boston Bar by Some of Its Own Members*, Boston B.J., March 1964, p. 12.

*Did President Jackson Actually Threaten the Supreme Court of the United States with Non-Enforcement of Its Injunction Against the State of Georgia?* 4 AM. J. LEGAL HIST. 76 (1960).

*John Marshall: The Lawyer — Contemporary Opinions by Lawyers*, Bull. Notre Dame Hist. Teach. Club, No. 3, 1964, p. 8.

*Legal Education in Ancient Rome*, 7 J. LEGAL ED. 509 (1955).

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\*\* This bibliography is confined to Dr. Chroust's work in only one area of his encyclopedic interest. It would take many more pages to list his work in the classics, in philosophy, in history (especially in ancient history), and on the natural law.

- Lincoln's Ability as a Lawyer*, 53 ILL. B.J. 512 (1965) (reprinted in Nev. S.B.J., July 1965, p. 8.)
- Professional Ethics and the American Lawyer*, I ESTUDIOS JURIDICO-SOCIALES — HOMENAJE AL PROFESSOR LUIS LEGAS Y LACAMBRA 543 (Universidad de Santiago de Compostela, Spain, 1960).
- The Beginning, Flourishing and Decline of the Inns of Court: the Consolidation of the English Legal Profession after 1400*, 10 VAND. L. REV. 79 (1956).
- The Emergence of Professional Standards and the Rise of the Legal Profession: the Graeco-Roman Period*, 36 B.U.L. REV. 587 (1956).
- The Lawyers of New Jersey and the Stamp Act*, 6 AM. J. LEGAL HIST. 286 (1962).
- The Legal Profession in Early Missouri*, 29 MO. L. REV. 129 (1964).
- The Ranks of the Legal Profession in England*, 11 W. RES. L. REV. 561 (1960).

## BOOKS RECEIVED

## CHURCH-STATE RELATIONS

RELIGION AND THE PUBLIC ORDER: 1964. Edited by Donald A. Giannella.  
Chicago: The University of Chicago Press, 1965. Pp. 280. \$6.00.

THE CHURCH SHALL BE FREE: A Glance at Eight Centuries of Church  
and State. By Arthur E. Sutherland.

Charlottesville, Virginia: The University Press of Virginia, 1965. Pp.  
41. \$ .75.

## CIVIL RIGHTS

THE NEGRO AND ORGANIZED LABOR. By Ray Marshall.

New York: John Wiley & Sons, Inc., 1965. Pp. viii, 327. \$6.95.

## CONGRESS

THE CONGRESS AND AMERICA'S FUTURE. Edited by David B. Truman.

Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965. Pp. vi, 186.  
\$3.95.

## CORPORATIONS

MODERN CORPORATIONS. By Dow Votaw.

Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965. Pp. viii, 120.  
\$2.25 (Paper).

## CRIMINAL LAW

CRIMES WITHOUT VICTIMS: Deviant Behavior and Public Policy—Abor-  
tion, Homosexuality, Drug Addiction. By Edwin M. Schur.

Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1965. Pp. ix, 181.  
\$4.95.

ROSCOE POUND AND CRIMINAL JUSTICE. Edited by Sheldon Glueck.

Dobbs Ferry, New York: Oceana Publications, Inc., 1965. Pp. x, 262.  
\$7.50.

## GOVERNMENT REGULATION OF BUSINESS

GOVERNMENT-BUSINESS RELATIONS: A Pragmatic Approach to the Ameri-  
can Experience. By Arthur M. Johnson.

Columbus, Ohio: Charles E. Merrill Books, Inc., 1965. Pp. xvi, 446.  
\$11.65.

## LEGAL HISTORY

MAGNA CARTA IN THE SEVENTEENTH CENTURY. By Maurice Ashley.

Charlottesville, Virginia: The University Press of Virginia, 1965. Pp.  
62. \$ .75.

## NATURAL LAW

THE TRADITION OF NATURAL LAW: A Philosopher's Reflections. By Yves  
Simon. Edited by Vukan Kuic.

New York: Fordham University Press, 1965. Pp. xii, 194. \$5.00.

## MISCELLANEOUS

THE POLITICS OF BUREAUCRACY. By Gordon Tullock.

Washington, D.C.: Public Affairs Press, 1965. Pp. 228. \$4.50.