

Pepperdine Law Review

Volume 40

Issue 2 *Symposium: The Lawyer of the Future:
Exploring the Impact of Past and Present
Lawyers and the Lessons They Provide for
Future Generations*

Article 2

2-26-2013

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Recommended Citation

Paul D. Carrington *Founding Legal Education in America*, 40 Pepp. L. Rev. Iss. 2 (2013)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol40/iss2/2>

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Founding Legal Education in America

Paul D. Carrington*

As all Americans know, an assembly of men gathered in Philadelphia on July 4, 1776, to pledge to one another their lives, their fortunes, and their sacred honors. It is not frequently noticed that their action that day marked the beginning of a distinctive profession of law. Its creation was marked by language appearing in two sentences of the brief Declaration of Independence that all present signed. Those sentences proclaimed:

- (1) the expectation of inalienable rights derived from natural law,
- (2) rights derived from the consent of their government, and
- (3) the right to equal treatment by the law.¹

Implicit in the text of the Declaration was the notion that all of these rights would be prescribed by their new government and made enforceable in a court of law.

Not all who signed the Declaration were equally committed to all three of these ideas about rights, and the three cannot always be reconciled to one another. Like most other legal texts, the Declaration was a compromise. Its words were chosen in the heat of the moment for the political purposes of rallying as many colonials as possible to the revolutionary cause and gaining support in England and in Europe.² And it was soon recognized that the proclamation of rights derived from natural law expressed an ambition that their new government would not be able to express or enforce. But a complex legal system and energetic advocates of rights were destined to arise.

There were not many lawyers in the thirteen colonies in 1776. And some opposed the Revolution and fled to Canada or England.³ But many of

* Professor of Law, Duke University. This article is part of *Pepperdine Law Review's* April 20, 2012 *The Lawyer of the Future* symposium, exploring the role of the lawyer in American society—past, present, and future.

1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. See David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 18 N.Y.U. L. REV. 932, 942 (2010).

3. Isaac Royall, the first benefactor of the Harvard Law School, was one. A slave owner in Medford, Massachusetts, he moved to Nova Scotia and then to England. Janet Halley, *My Isaac*

those who signed the Declaration were lawyers.⁴ In embracing the idea of self-government, they were declaring their own importance. Surely they were not expressing faith in the political wisdom of their fellow citizens whom they knew to be impulsive and often inattentive to the interests of other citizens and sometimes perhaps even to their own self-interests. Like legendary Athenians, their assemblies would behave as mobs.⁵ They therefore envisioned an important role for themselves as providers of the restraint and wisdom needed by self-governing people. That foresight was almost surely derived from their professional experience in counseling and representing clients who were often improvident. So the Signers expected lawyers to bring to the public tasks of government their reasonably sound instincts and professional experience acquired in weighing the interests of adversaries engaged in legal disputes. It was this understanding of law enforcement that enabled Thomas Paine to exult “that in America THE LAW IS KING.”⁶

Thomas Jefferson is rightly recognized as the author of the document. Less well known to the public was the role of his professional mentor and close friend George Wythe,⁷ who assisted in drafting the Declaration. The egalitarianism expressed in the document rather clearly came from Wythe, who was raised by a mother who was a passionate member of the Society of Friends.⁸ Wythe was not a Quaker but he thought like one.⁹ He practiced law in Williamsburg, the capital city of the colony, and his home, where Jefferson studied, is still there as a museum worthy of a visit by a lawyer in the vicinity.¹⁰

Jefferson was promptly elected Governor of the new Commonwealth of Virginia.¹¹ A part of the government he inherited from the colony was the

Royall Legacy, 24 HARV. BLACKLETTER L.J. 117, 122 (2008).

4. John Adams, Samuel Chase, Abraham Clark, William Ellery, Thomas Heyward Jr., William Hooper, Francis Hopkinson, Samuel Huntington, Thomas Jefferson, Thomas Lynch Jr., Thomas McKean, William Paca, Robert Treat Paine, John Penn, George Read, George Ross, Edward Rutledge, Roger Sherman, Richard Stockton, Thomas Stone, George Walton, James Wilson, Oliver Wolcott, and George Wythe. A slightly larger number of non-lawyers also signed. Steve Mount, *Signers of the Declaration of Independence*, <http://www.usconstitution.net/declarsigndata.html> (last visited Sept. 24, 2012).

5. Or so James Madison said. THE FEDERALIST NO. 55, at 342 (James Madison) (Clinton Rossiter ed., 1961).

6. THOMAS PAINE, COMMON SENSE AND THE CRISIS 41 (Dolphin Books ed. 1960).

7. An account of their relationship can be found in DUMAS MALONE, JEFFERSON THE VIRGINIAN 73–74 (1948). The eulogy to Jefferson at the Capitol identifies Wythe as a second father.

8. Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 533 (1990) [hereinafter *Legal Education*].

9. *Id.*

10. Wythe Holt, *George Wythe: Early Modern Judge*, 58 ALA. L. REV. 1009, 1009–10 (2007).

11. Jefferson was elected in 1779. Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, 100 (1993).

royally funded College of William and Mary.¹² Among Jefferson's early deeds as Governor was to direct the group governing the College to create a professorship of law and politics, a post for which Wythe was the obvious choice.¹³ Wythe brought to the task a knowledge of civil as well as common law.¹⁴ He was fluent in seven languages.¹⁵ He was celebrated for his professional ethics.¹⁶

Wythe's course on Law and Politics¹⁷ was organized into three three-month terms. He lectured, but students were required to write and to speak in class.¹⁸ They were also required to argue cases posed by Wythe while he sat as judge.¹⁹ And to draft legislation and advocate its enactment.²⁰ The class was conducted in the room previously occupied by the colonial House of Burgesses.²¹ That classroom is still there in the old colonial capitol.²²

Among Wythe's first students was John Marshall.²³ Other notables included the future President James Monroe and the scholar St. George Tucker, who would succeed Wythe as the professor of law and politics and provide the American edition of Blackstone's Commentaries that quickly acquired status as the primary work on American common law.²⁴ Marshall, Tucker, and other of Wythe's students went off to war, but Wythe continued to teach.

Professor Wythe was present in 1787 at the Constitutional Convention in Philadelphia, but he had to leave before the meeting concluded because his wife had become severely ill and would pass away.²⁵ He then emancipated his few slaves, but not before teaching them to read and write.²⁶ And he taught one to read and write in Latin.²⁷

12. See LYON G. TYLER, *THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA: ITS HISTORY AND WORK 1693-1907*, at 60 (1907).

13. See *Legal Education*, *supra* note 8, at 533.

14. See *Legal Education*, *supra* note 8, at 533.

15. *Id.* at 534.

16. *Id.*

17. See *id.* at 533-37.

18. *Id.* at 535-36.

19. *Id.*

20. *Id.*

21. *Id.* at 536.

22. *Id.* at 536 n.61.

23. The story is told most fully in IMOGENE E. BROWN, *AMERICAN ARISTIDES 205-06* (1981). See generally 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919).

24. See Michael Hoefich, *American Blackstones*, in *BLACKSTONE AND HIS COMMENTARIES: BIOGRAPHY, LAW, HISTORY* 171, 172-73 (Wilfred Prest ed., 2009).

25. WILLIAM CLARKIN, *SERENE PATRIOT: A LIFE OF GEORGE WYTHE 177* (1970).

26. *Id.* at 209.

27. *Id.*

Wythe would then in 1790 move to Richmond as the Chancellor sitting on the Commonwealth of Virginia's Court of Equity and exercising the judicial powers traditionally exercised by the English Chancery.²⁸ While sitting as Chancellor, he had occasion to invalidate a law enacted by the legislature, holding it invalid as a violation of the peace treaty in which the national government had promised protection to the rights of English creditors.²⁹ Among the legislators who had enacted that law was Wythe's former student John Marshall.³⁰

While sitting as Chancellor, a friend sent Wythe an ambitious young clerk.³¹ His name was Henry Clay.³² He remained with Wythe for five years.³³ Wythe recognized Clay as a special talent headed for a life in public affairs. He advised Clay not to stay in Virginia, where he lacked family connections that other politicians would have.³⁴ He advised Clay, as he had advised several others, to head west to Kentucky and to hold the fragile Union together.³⁵

Clay took Wythe's advice in 1796 and settled in Lexington, Kentucky, where he connected with several other former students of Wythe.³⁶ Together, they participated in 1799 in founding a Transylvania University law department modeled on Wythe's teaching.³⁷ Clay was himself its professor of law and politics for three years but soon moved on to Congress.³⁸ In that role, he continued to promote the law school.³⁹ It was where young men went if they aspired to be political leaders like Clay.⁴⁰ It drew students from all the states west of the Alleghenies.⁴¹ It awarded bachelor degrees to all who completed two years of study, each year to

28. See *Legal Education*, *supra* note 8, at 537.

29. See generally GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY, WITH REMARKS UPON DECREES BY THE COURT OF APPEALS REVERSING SOME OF THOSE DECISIONS (1795).

30. See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 419 (1999).

31. BERNARD MAYO, HENRY CLAY: SPOKESMAN OF THE NEW WEST 24 (photo. reprint 1966) (1937).

32. *Id.*

33. *Id.* at 40.

34. *Id.* at 44.

35. *Id.*

36. See generally Charles Kerr, *Transylvania University's Law Department*, 31 AMERICANA ILLUSTRATED 7 (1937).

37. *Id.*

38. See *Legal Education*, *supra* note 8, at 558.

39. *Id.* at 559.

40. *Id.*

41. See Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 MERCER L. REV. 673, 677-78 (1990) [hereinafter *Transylvania*].

extend for six months.⁴² In 1820, it was housed in Morrison Hall, an elegant facility constructed by a generous client of Henry Clay.⁴³

Several of Transylvania's law professors sat on the Supreme Court of Kentucky, and three in addition to Clay were identified by Pennsylvania professor William Draper Lewis in 1908 as among the Great American Lawyers worthy of inclusion, with Wythe, in the eighty-one biographies set forth in Lewis's eight-volume set.⁴⁴

The law school at Transylvania did not survive the stress of the nation's political divide.⁴⁵ But over a half century, it graduated about a thousand lawyers.⁴⁶ Among its famed professors was Chief Justice George Robertson who held forth for twenty-four years, ever challenging his students to go forth and save the Union,⁴⁷ the cause most dear to the heart of Henry Clay and his mentor Wythe. Among Transylvania students were both slave owners from the South and abolitionists from the North.⁴⁸

Perhaps the greatest achievement of Clay's career was his crafting of the Compromise of 1850.⁴⁹ It saved the Union for another decade. It was a very complex compromise requiring several separate enactments so that no Senator or Representative would be required to vote for a law that his constituents overwhelmingly opposed.⁵⁰ Former President Martin Van Buren assessed Clay's achievement as a miraculous work of political genius.⁵¹ Of the fifty United States Senators serving in 1850, seven who engaged with Clay in working out the Compromise were graduates of the Transylvania Law Department.⁵² All were, in a sense, the professional

42. *Id.* at 693.

43. *Id.* at 686 n.79.

44. 2 GREAT AMERICAN LAWYERS 223 (William Draper Lewis ed., 1971) (1907) (John Boyle); 4 GREAT AMERICAN LAWYERS 301 (William Draper Lewis ed., 1971) (1908) (Thomas Alexander Marshall); 4 GREAT AMERICAN LAWYERS 365 (William Draper Lewis ed., 1971) (1908) (George Robertson).

45. *See Transylvania, supra* note 41, at 698.

46. *Id.* at 699.

47. 4 GREAT AMERICAN LAWYERS 363 (William Draper Lewis ed., 1971) (1908). *See generally* GEORGE ROBERTSON, AN OUTLINE OF THE LIFE OF GEORGE ROBERTSON (1870).

48. *See Transylvania, supra* note 41, at 697.

49. *See generally* FERGUS M. BORDEWICH, AMERICA'S GREAT DEBATE: HENRY CLAY, STEPHEN A. DOUGLAS, AND THE COMPROMISE THAT PRESERVED THE UNION (2012).

50. *Id.* at 757.

51. ROBERT V. REMINI, HENRY CLAY: STATESMAN FOR THE UNION 738 (1991) (quoting Martin Van Buren).

52. David R. Atchison of Missouri, Jeremiah Clemens of Alabama, Jefferson Davis of Mississippi, Solomon W. Downs of Louisiana, George W. Jones of Iowa, Joseph R. Underwood of Kentucky, and James Whitcomb of Indiana. Paul D. Carrington, *The Aims of Early American Law Teaching: the Patriotism of Francis Lieber*, 42 J. LEG. ED. 339, 347 n.49 (1992) [hereinafter *Lieber*].

grandchildren of George Wythe. An eighth Transylvania alumnus would enter the Senate as a result of the Compromise.⁵³ He came to represent the new state of California.⁵⁴

And another alumnus of that time whose name may be familiar was Stephen F. Austin, the founding spirit of Texas.⁵⁵ He was a student of Professor Henry Clay.⁵⁶

There were of course other American law schools in the antebellum era. More famous than Transylvania was the school at Litchfield, Connecticut.⁵⁷ Its founder, Tapping Reeve, despised Jefferson; in 1804 he advocated the secession of New England, and in 1806 he was indicted for libeling President Jefferson.⁵⁸ Despite his several limitations, he graduated many lawyers who entered public service.⁵⁹

Columbia College tried to build a law school around James Kent, who was the premier legal scholar of the age,⁶⁰ but who apparently held his students in contempt, causing them to leave.⁶¹

Harvard would try to start a law school, but could not attract students until the 1830s when the presence of Justice Joseph Story made a difference.⁶² Story's curriculum resembled that of Transylvania. It required attendance for two six-month academic years.⁶³ Many of its alumni would go on to public careers, as its benefactor Nathan Dane had hoped.⁶⁴

What this brief account confirms is that the Founders understood that a republic needs experienced lawyers in high places who can work things out. This vision of the role of lawyers and their performance of that role was perceived in 1830 and recorded by the intellectual tourist Alexis de Tocqueville, who likened the role of American lawyers to that of European aristocrats in sharing a public responsibility to work things out.⁶⁵

53. *Id.*

54. *Id.*

55. See GREGG CANTRELL, STEPHEN F. AUSTIN: EMPRESARIO OF TEXAS 36–40 (1999).

56. See *Transylvania*, *supra* note 41, at 683.

57. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 357 (1911).

58. The indictment was dismissed on the motion of the President. MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 134, 157 (1986).

59. See *Lieber*, *supra* note 52, at 346.

60. See A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 11–15 (J. Goebel Jr. ed., 1955).

61. JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM 1763–1847, at 95 (1969).

62. ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF MEN AND IDEAS 1817–1967, at 100 (1967); CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA (1908).

63. See *Transylvania*, *supra* note 41, at 693.

64. Louis D. Brandeis, *The Harvard Law School*, 11 GREEN BAG 2D 483, 489–90, 508–09 (2008).

65. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 252 (Harvey C. Mansfield & Delba Winthrop trans. and ed., 2000) (1835).

Tocqueville seems to have derived this expectation from the work of his tour guide, the Prussian-American scholar Francis Lieber.⁶⁶

It seems that members of our profession are now more preoccupied with the pursuit of the wealth and social status of Tocqueville's aristocrats than they are with working out the nation's political disputes. I am sorry that this is so. Our law schools and the organized bar should attend to this failure of our profession.

66. *See Lieber, supra* note 52.
