

REFLECTIONS ON *UNRESTRAINED*: LAW PROFESSORS, THE LEGAL ACADEMY, AND THE RULE OF LAW IN THE EARLY TWENTY-FIRST CENTURY

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I.	OUR PROBLEM OF UNRESTRAINT.....	349
II.	THE LAW BEFORE UNRESTRAINT.....	352
III.	THE BEGINNING OF UNRESTRAINT: OLIVER WENDELL HOLMES, JR., ROSCOE POUND, AND THE LEGAL REALISTS.....	354
IV.	UNRESTRAINT TRIUMPHANT: THE WARREN COURT AND CRITICAL LEGAL STUDIES.....	355
V.	DEFENDING UNRESTRAINT: RONALD DWORKIN.....	357
VI.	FIGHTING UNRESTRAINT: HERBERT WECHSLER, ANTONIN SCALIA, PAUL CARRINGTON, AND MARY ANN GLENDON.....	358
VII.	UNRESTRAINT IN OUR TIME: THE FAILURE OF THE FLAG PROTECTION AMENDMENT AND THE PASSAGE OF OBAMACARE.....	362
VIII.	UNRESTRAINT TRIUMPHANT: MORTON HORWITZ AND CASS SUNSTEIN.....	365
IX.	THE ALTERNATIVE TO UNRESTRAINT: SALVAGING THE RULE OF LAW.....	370
X.	CONCLUSION: RECAPTURING RESTRAINT.....	373

I. OUR PROBLEM OF UNRESTRAINT

My assignment for this symposium, which eventually ended up under the broad rubric of “The Supreme Court and American Culture,” was to discuss Robert Nagel’s marvelous book *Unrestrained: Judicial Excess and the Mind of the American Lawyer* (2008),¹ which I had reviewed, at the time of

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1. ROBERT F. NAGEL, *UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER* (2008).

its publication, for a little-known but important conservative website, the University Bookman.² As our symposium demonstrated, Professor Nagel's work as a brilliant conservative theorist resulted in many articles and several books, all of which have made profound contributions as Professor Nagel engaged in a rear-guard action in an attempt to alter the direction of American academic legal discourse, which seems increasingly to be flowing in a progressive rather than a conservative course. This Article uses Nagel's book, *Unrestrained: Judicial Excess and the Mind of the American Lawyer*, as a means of underscoring some points that I plan to make in my forthcoming monograph on the occasionally baleful influence of law professors on American law.³

In *Unrestrained*, Nagel argued that American public and private law is suffering from a failure of judges and lawyers to follow pre-existing legal rules—that, in short, we had a problem of “judicial excess,” or “lack of restraint,” for which the law schools, ultimately, were to blame.⁴ As he put it, the behavior of our lawyers and judges “has degraded our political discourse, intensified social conflict, drained moral confidence, institutionalized political revenge, undermined local political life, and impoverished the scope and significance of public decision making.”⁵ Nagel attributed this lack of restraint to the use by us law professors, in our classes, of the case method and our Socratic style of legal education, whereby we law professors teach our students to believe two somewhat contradictory things.⁶ These two contradictory beliefs were that: (1) judges' personal preferences inevitably influence cases; and (2) judicial

2. Stephen B. Presser, *The First Thing We Do . . .*, 47 U. BOOKMAN (Winter 2010), <http://www.kirkcenter.org/index.php/bookman/article/the-first-thing-we-do/> [<https://perma.cc/RH7F-PWBR>].

3. STEPHEN B. PRESSER, LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW (forthcoming Nov. 2016). I am taking the liberty, in the rest of this brief essay, of liberally quoting from the manuscript from that work, with the gracious permission of my publisher, West. Quotations from the forthcoming book have been reworked to conform to the thesis advanced in this Article.

4. For the ways in which law schools contribute to a “legal culture” that encourages judges to act in an “unrestrained” manner, see, for example, NAGEL, *supra* note 1, at 14–16, 53–63 (arguing that judges are educated to believe simultaneously in “legal realism,” and also in the binding nature of Constitutional materials).

5. *Id.* at 131.

6. *Id.* at 122–23 (explaining how the Socratic method in use at contemporary law schools results in the view that “judicial decisions constitute a superior domain of rational thought”).

personal idiosyncrasy can be reduced to acceptable levels because judges are constrained by a need to follow previous historical precedents and decide cases only with reference to the arguments of counsel and the relevant texts of the Constitution, statutes, and regulations.⁷ The result of this teaching, Nagel claimed, was to breed judges (all of whom are lawyers) who speak an esoteric language, and who become convinced of the moral clarity of their reasoning and the infallibility of their judgment, to such an extent that they are compelled to stray from the rule of law and to dictate their personal preferences for solutions to our most contentious social, cultural, and political issues.⁸

This Article sketches out how this deplorable situation came to be and how it is perpetuated, and presents possible solutions. The difficulties with American legal education, and the failings of the law professoriate appear to be beginning to penetrate the general American political consciousness. Thus, in criticizing his chief, President Obama, Leon Panetta, longtime member of Congress, former White House Chief of Staff, former CIA director, and former Secretary of Defense, said of the President, that “his most conspicuous weakness [was] a frustrating reticence to engage his opponents and rally support for his cause.”⁹ Elaborating, Panetta explained, “That is not a failing of ideas or of intellect,” but “[President Obama] does, however, sometimes lack fire.”¹⁰ Then came Panetta’s most cutting and much-quoted observation, “*Too often, in my view, the President relies on the logic of a law professor rather than the passion of a leader.*”¹¹ Why was that such a telling jibe? What is there about the logic of a law professor that one ought to shrink from employing? Perhaps it was not exactly logic that is and was the problem, but attitude. Consider the charge made by the brilliant radical law professor Duncan Kennedy, when he was a Yale law student:

One of the first and most lasting impressions that many students have of the Law School is that the teachers are

7. *Id.* at 15.

8. *See, e.g., id.* at 15–16.

9. LEON PANETTA & JIM NEWTON, WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE 442 (2014).

10. *Id.*

11. *Id.* (emphasis added).

either astoundingly intellectually self-confident or just plain *smug*. Many of them seem to their students to be preening themselves before their classes. In most cases, each gesture seems to say: “I am brilliant. I am famous in the only community that matters. I am doing the most difficult and most desirable thing in the world, and doing it well; I am being a Law Professor.”¹²

In the remainder of this Article, drawing principally from my forthcoming book, I will explore first, what the law and the legal academy were like “When the law was still restrained,” (Part II), how Oliver Wendell Holmes, Jr., Roscoe Pound, and the Legal Realists laid the foundation for the current legal situation of “unrestraint” that Nagel properly laments (Part III), how the Warren Court and the Critical Legal Studies movement furthered “unrestraint” (Part IV), how defenders of the Warren Court, such as Ronald Dworkin, sought to create a theoretical justification for “unrestraint” (Part V), how others besides Professor Nagel, and, in particular, Herbert Wechsler, Antonin Scalia, Paul Carrington, and Mary Ann Glendon engaged in the rear-guard action against “unrestraint” (Part VI), how rampant “unrestraint” continues in our time, demonstrated by such developments as the failure of the “Flag Protection Amendment” and the passage of “Obamacare” (Part VII), how “unrestraint” continues to be supported by the work of academic theorists such as Morton Horwitz and Cass Sunstein (Part VIII), and finally, how we might seek to recapture the rule of law and end “unrestraint” (Parts IX and X).

II. THE LAW BEFORE UNRESTRAINT

In trying to figure out what went wrong, and how things became so “unrestrained,” when drafting my book on American law professors, I decided to examine the evolution of the teaching of American law. I began with an English law professor, Sir William Blackstone, whose *Commentaries on the Law of England* (1765–1769) became legal best-sellers in the

12. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 72 (1970). For more on Kennedy, see especially PRESSER, *supra* note 3 (manuscript at ch. 14).

new American republic, and served as a basis for what became the American common law, the judicial precedents that for the better part of our two and a half centuries of independence guided the decisions of our courts.¹³ For Blackstone, and for Blackstone's immediate successors in America—for example, for James Wilson,¹⁴ who taught law at the University of Pennsylvania in the late eighteenth century, and for Wilson's federalist colleagues on the early nation's federal courts—order in the new republic was impossible without law, but law was impossible without morality, and morality was impossible without religion. For these early American jurists and scholars, in an attitude quite foreign to us now, the common law was, in Wilson's words, of "obligation indispensable" and of "origin divine."¹⁵ Indeed, one of Wilson's successors on the United States Supreme Court, and his successor in the law school classroom, Associate Justice Joseph Story (who was simultaneously Dane Professor of Law at Harvard),¹⁶ it was the duty of American government to promote the Christian religion, to thus presumably aid in the salvation of American citizens.¹⁷ Until about 1950 these notions about an unchanging and eternal moral and religious foundation for American law continued to hold sway in the courts and in the legal academy, but even as early as the late-nineteenth century this view was under attack.

13. For Blackstone, *see generally* PRESSER, *supra* note 3 (manuscript at ch. 1).

14. For Wilson, *see generally* PRESSER, *supra* note 3 (manuscript at ch. 2).

15. For Wilson's praise of the common law in these words, *see, for example*, TRIAL OF GIDEON HENFIELD, FOR ILLEGALLY ENLISTING IN A FRENCH PRIVATEER (1793), *reprinted in* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 62 (1849).

16. For Story, *see* PRESSER, *supra* note 3 (manuscript at ch. 3).

17. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 260 (The Lawbook Exchange, Ltd. 1999) (1840) ("The promulgation of the great doctrines of religion, the being, and attributes, and providence of one Almighty God; the responsibility to Him for all our actions, founded upon moral accountability; a future state of rewards and punishments; the cultivation of all the personal, social, and benevolent virtues—these never can be a matter of indifference in any well-ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And, at all events, it is impossible for those, who believe in the truth of Christianity, as a Divine revelation, to doubt, that it is the especial duty of government to foster, and encourage it among all the citizens and subjects.").

III. THE BEGINNING OF UNRESTRAINT: OLIVER WENDELL HOLMES, JR., ROSCOE POUND, AND THE LEGAL REALISTS

The principal underminer of the old view was Oliver Wendell Holmes, Jr., the man usually regarded as the only “authentic sage” of American law.¹⁸ In *The Common Law*,¹⁹ Holmes set forth a theory that the American common law, instead of being of “origin divine,” was, actually, nothing more or less than what was “convenient.” We ought, said Holmes, to look at the law the way a “bad man” would, a man who would be concerned only with what the “courts would do in fact,” so that he could better avoid the restraining force of the legal system.²⁰ The law was, for Holmes, simply an articulation of the particular policy needs of the time. The “life of the law,” said Holmes, in his most famous utterance, is “not logic, but experience.”²¹ In this way, Holmes removed the restraints of prior precedents, and their purportedly foundational moral and religious views.

But instead of running from Holmes’s notions, gradually American law professors came to embrace them. Holmes was the inspiration for the so-called “legal realists,” such as Karl Llewellyn,²² Jerome Frank,²³ and the early Roscoe Pound,²⁴ who essentially maintained that the invocation of precedents and legal rules by judges was often, if not inevitably, an after-the-fact rationalization for results reached through practical

18. For Holmes, see generally PRESSER, *supra* note 3 (manuscript at ch. 5).

19. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (The Belknap Press of Harvard University Press 1963) (1881).

20. See generally *id.*

21. The first appearance of this aphorism was apparently in a review of Christopher Columbus Langdell’s casebook on contracts. For a discussion of the “Life of the Law” sentence, see Brian Hawkins, *The Life of the Law: What Holmes Meant*, 33 WHITTIER L. REV. 323 (2011–2012). The anonymous book review appeared in *Book Notices*, 14 AM. L. REV. 233 (1880), and the sentence was repeated in HOLMES, *supra* note 19, at 1. The repetition may have been owing to the fact that “Holmes . . . loved his own ideas and language so much.” Hawkins, *supra*, at 324 (citing G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 444–45 (1993), and Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK. L. REV. 19, 29 (1997)). This note is taken from PRESSER, *supra* note 3 (manuscript at n.234).

22. On Llewellyn, see PRESSER, *supra* note 3 (manuscript at ch. 8).

23. Frank and the Legal Realists are analyzed in PRESSER, *supra* note 3 (manuscript at ch. 7–8).

24. For Pound, see *id.* (manuscript at ch. 7).

reasoning or psychologically-imposed preferences.²⁵

IV. UNRESTRAINT TRIUMPHANT: THE WARREN COURT AND CRITICAL LEGAL STUDIES

Pound may have later recanted Legal Realism, particularly after he became a famous dean at Harvard. He then turned to a more conservative jurisprudence, and sought to demonstrate that there really was a “taught legal tradition” that gave objective content to law, once he was ensconced in Cambridge.²⁶ This turn-about by Pound, this latter-day conservative outlook, made Pound a target for Holmes’s latter day acolytes, the legal realists such as Jerome Frank, and later the members in the legal academy who gathered under the banner of Critical Legal Studies (CLS).²⁷

The CLS movement argued that while there might be some “relative autonomy” to legal rules, so that they were not simply the Thrasymachian machinations of those in power, the rules were shot through with contradictions and incoherencies, and were ripe for replacement by a system more favorable to progressive ends.²⁸ One of their number, the brilliant and prolific Mark Tushnet, even explained that if he were a judge (presumably employing “unrestraint”) he would do everything in his power to advance the cause of socialism.²⁹ This remark later came back to haunt the Harvard Dean, Elena Kagan, who had hired Tushnet, when she was nominated to the United States Supreme Court. She finessed it nicely, however, and simply indicated that she did not share Tushnet’s Critical Legal Studies views.³⁰ Students of the Justice’s jurisprudence,

25. This is the central theme of JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

26. For his elaboration of this “taught legal tradition,” as articulated by nineteenth century American common law judges in what he called the “formative” era of American law, see ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (Peter Smith ed., 1960) (1938).

27. For Critical Legal Studies, see PRESSER, *supra* note 3 (manuscript at ch. 14).

28. A fine representative sample of this argument is to be found in Peter Gabel, *Book Review*, 91 HARV. L. REV. 302 (1977) (reviewing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977)), and see generally PRESSER, *supra* note 3 (manuscript at ch. 14).

29. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

30. Ruthann Robson, *Kagan on Mark Tushnet and Harold Koh: Post*

however, might well find in it the same “unrestraint.”

Other CLS scholars, while not explicitly advancing Fabian socialism, still suggested that the law ought to be moved in a direction better to meet the actual “needs of the human heart,”³¹ or to promote the realization among Americans that we share a common human bond, the better to achieve what two of them described as “intersubjective zap.”³² And while CLS never really was officially embraced by any members of the judiciary, other legal scholars, ostensibly a bit more restrained than CLS, did have a profound impact upon the articulation of American law. The work of the legal realists, building on that of Holmes, was understood to give license to the Warren Court completely to remake the meaning of the Fourteenth Amendment’s Equal Protection Clause, to authorize it to engage in a wholesale rewriting of jurisprudential doctrine involving criminal law, law and religion, the rights of criminal defendants, and legislative reapportionment. This wholesale legislation by the Supreme Court continued with the Burger Court’s *Roe v. Wade*³³ decision, and, in our own time, by a series of decisions on women’s rights,³⁴ gay rights,³⁵ and same-sex marriage.³⁶ This manifest judicial unrestraint, this departure from previous precedents which prompted Nagel’s book, has remained the source of countless legal academic efforts to justify or condemn this rogue judicial activism.

Confirmation Hearing Responses to Senators Questions, CONST. L. PROF. BLOG (July 10, 2010), <http://lawprofessors.typepad.com/conlaw/2010/07/kagan-on-mark-tushnet-and-harold-koh-post-confirmation-hearing-responses-to-senators-questions.html> [https://perma.cc/JT5Q-ET3N].

31. Gabel, *supra* note 28, at 314.

32. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 4 (1984).

33. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

34. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (holding that single-sex military academies violate the Fourteenth Amendment’s Equal Protection Clause).

35. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that adult consensual homosexual acts cannot be made criminal without violating the Fourteenth Amendment’s liberty protection).

36. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the Fourteenth Amendment guarantees same-sex couples the same right to marry as heterosexual couples).

V. DEFENDING UNRESTRAINT: RONALD DWORKIN

Given the progressive character of what the Warren Court did, and given the progressive cast of most of the American law school faculties in the late twentieth and early twenty-first centuries,³⁷ it is no surprise that the Warren Court's defenders have received the most acclaim. The most prominent of them, now apparently regarded as the foremost student of jurisprudence in his time, Ronald Dworkin,³⁸ is a particular target of Nagel.³⁹ Dworkin summed up his academic approach by stating:

Our constitutional system rests on a particular moral theory, namely that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.⁴⁰

To put it slightly more simply, courts are free to rewrite past practices and legal doctrines to conform to a judge's more advanced moral concepts.

37. Kate Hardiman, *Law Schools Dominated by Democrat Professors, Research Finds*, COLLEGE FIX (Aug. 31, 2015), <http://www.thecollegefix.com/post/24015/> [<https://perma.cc/YW6R-X2RU>]. A study by law professor James Lindgren concluded that “[t]he data show that in 1997 women and minorities were underrepresented compared to some populations, but Republicans and Christians were usually more underrepresented. For example, by the late 1990s, the proportion of the U.S. population that was neither Republican nor Christian was only 9%, but the majority of law professors (51%) was drawn from that small minority.” James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013* (Mar. 20, 2015) (Northwestern Law & Econ. Research Paper No. 15-07, Northwestern Public Law Research Paper No. 15-17 (2015)), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581675 [<https://perma.cc/52M6-8ZFS>].

38. On Dworkin, see generally PRESSER, *supra* note 3 (manuscript at ch. 12).

39. See NAGEL, *supra* note 1, at 10–12, 34, 65, 77, 115–17, 124–25.

40. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977).

VI. FIGHTING UNRESTRAINT: HERBERT WECHSLER, ANTONIN SCALIA, PAUL CARRINGTON, AND MARY ANN GLENDON

If this is true, of course, then there is really no restraint, and judges are simply legislators wearing black robes and, in Nagel's view (and mine) wrongly claiming to rule. If the role of judge and legislator is combined there is the potential for tyranny. One of the first, and one of the clearest voices against unrestraint, was Learned Hand, who, in his great *Bill of Rights*, called what the Warren Court was doing a usurpation of the people's right to self-government, and described it as an effort to substitute "Platonic Guardians" for neutral applications of the constitutional and legal rules.⁴¹ A very few other intrepid souls prefigured Nagel's efforts, most notably among them Herbert Wechsler,⁴² who, in a famous article, suggested that judges ought to be restrained in their jurisprudence, at least by the application of "neutral and general principles," by which he meant something other than naked outcome preference, and decisions that could be sensibly and consistently applied in similar factual circumstances.⁴³

Learned Hand's solution to the problem of restraining judges was to limit their interpretations to the historical understanding of a particular constitutional provision or legislative act.⁴⁴ This idea was also the core of the jurisprudence of Antonin Scalia,⁴⁵ the recently deceased senior Associate Justice of the Supreme Court. In his scholarly writing,⁴⁶ and in his extraordinarily frequent extrajudicial speech-making,⁴⁷ Scalia laid out a theory of constitutional and

41. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73-74* (1958) ("For myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.").

42. On Wechsler, see PRESSER, *supra* note 3 (manuscript at ch. 11).

43. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

44. See generally HAND, *supra* note 41.

45. On Scalia, see PRESSER, *supra* note 3 (manuscript at ch. 20).

46. See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

47. For this activity on Scalia's part see the generally rather critical, but

legal hermeneutics which was essentially similar to that of Hand, and which went, in the early twenty-first century, by the names of “original understanding,” “plain meaning,” or “textualism.” For decades, Scalia propounded this theory from the Supreme Court bench as well, and, in the view of one of his clerks and admirers, my colleague Steven Calabresi, at least, became as great or greater a Supreme Court Justice than John Marshall, because of Scalia’s greater fidelity to the beliefs of the Constitution’s framers.⁴⁸

A somewhat different and more provocative argument for guarding against “unrestraint” came from Paul Carrington,⁴⁹ a former Dean at Duke,⁵⁰ whose critique astutely exposed the still-prevalent problem that American legal education, curiously, teaches very few of the skills required to practice law. By the 1980s, however, Carrington had turned his attention to Critical Legal Studies which he found to be damaging to the aims of what he believed ought to be legal pedagogy.⁵¹ For Carrington, CLS, in what Carrington believed was its insistence that law was more about the naked exercise of power than it was about restraint, risked debilitating the belief that law students might have in the restraining force of the rule of law, and risked turning them into purveyors of bribery and corruption.⁵² There was fierce resistance to this blanket condemnation of CLS by Carrington, who was accused of siding with the “know-nothings” and “rednecks” of the legal profession by the defenders of CLS such as the elegant Robert Gordon.⁵³ Nevertheless, Carrington had behind him the

informative, BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* (2014).

48. Stephen G. Calabresi, *Scalia Towered over John Marshall*, USA TODAY (Feb. 14, 2016, 3:28 PM), <http://www.usatoday.com/story/opinion/2016/02/13/scalia-text-legacy-clerk-steven-calabresi-column/80349810/> [https://perma.cc/6KEV-A2A5].

49. On Carrington, see PRESSER, *supra* note 3 (manuscript at ch. 19).

50. *Training for the Public Professions of the Law: 1971*, ASS’N AM. L. SCH. PROC. pt. 1, § 2 (1971), reprinted in HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION: A REPORT PREPARED FOR THE CARNEGIE COMMISSION ON HIGHER EDUCATION* 93 (1972).

51. Carrington’s blast at CLS is to be found at Paul D. Carrington, *Of Law and the River*, 34 J. OF LEGAL EDUC. 222, 226–27 (1984).

52. *Id.*

53. For Gordon’s initial reply to Carrington, see Robert W. Gordon, “*Of Law and the River*,” and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985). For Carrington’s response to Gordon’s criticism, see Paul D. Carrington, 35 J. LEGAL EDUC. 9 (1985), and for Gordon’s rejoinder to Carrington’s response, see Robert W. Gordon, 35 J. LEGAL EDUC. 13 (1985), as reprinted in STEPHEN B.

centuries of American and English experience with the common law, and what Carrington movingly described as a “romantic faith” that the rule of law could temper the exercise of the “lash of power.”⁵⁴ Carrington also had in support of his arguments the anti-restraint excesses of political correctness and the misnamed “Diversity!” movement, which were, when Carrington wrote, going far to undermine belief in the objectivity of the American legal system and Pound’s “taught legal tradition.”⁵⁵

Some of the forces Carrington lamented were some of the most popular means of expression of late-twentieth-century legal scholars, including the practitioners not only of CLS, but of the related sub-specialties of Critical Race Theory, Queer Legal Theory, and Feminism, all of which emphasized, with some justice, the manner in which orthodox legal rules operated to the advantage of certain sectors of the American polity and the manner in which these rules deprived others of power and influence.⁵⁶ This last part might be somewhat debatable, but the very real problems which these newer schools of American legal thought exposed, and their emphasis on the need for redistribution of power and resources in American society, dovetailed nicely with the ongoing legal academic defense of the essentially similar redistributionist aims of the jurisprudence of the Warren Court.

These new schools of jurisprudence also dovetailed with an increasing amount of litigation in America, ostensibly to implement the civil and property rights of less economically and politically powerful groups. This focus on rights, however, by the end of the twentieth century led some to understand that something was being lost in American jurisprudence. This notion was articulated perhaps most clearly by Mary Ann Glendon,⁵⁷ a rare conservative and religious woman in the legal professoriate, which is now overwhelmingly composed of men and secularists.⁵⁸ In her 1991 book, *Rights Talk*, perhaps

PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 1212–38 (8th ed. 2013).

54. Gordon, as reprinted in PRESSER & ZAINALDIN, *supra* note 53, at 1217.

55. See generally Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105.

56. On these topics, see, e.g., PRESSER, *supra* note 3 (manuscript at ch. 17) (discussing Catherine MacKinnon in particular, and feminism in general); *id.* (manuscript at ch. 21) (discussing Patricia Williams and Critical Race Theory).

57. For Glendon, see PRESSER, *supra* note 3 (manuscript at ch. 18).

58. See Lindgren, *supra* note 37.

the clearest and most complete statement of her key jurisprudential notions,⁵⁹ Glendon excoriated the sad state into which American political discourse had fallen, and, in particular, the concomitant “[c]ynicism, indifference, and ignorance concerning government,” which Glendon found to be “pervasive” in this country.⁶⁰ A profound symptom and a partial cause for what she calls “the impoverishment of our political discourse,” Glendon argued, is an “intemperate rhetoric of personal liberty” or “rights talk” which has all but eliminated the “sense of personal responsibility and of civic obligation,”⁶¹ which used to prevail in our republic. For Glendon it is not so much that there is anything really wrong with the notion of “rights,” it’s just that the “new version of rights discourse,” now prevalent in America, has pushed out other, older, and more sensible versions.⁶² For Glendon, “legal speech,” the vernacular of the law that is experienced by Americans, is now saturated with a new kind of “rights talk” that is “a good deal more morally neutral, adversarial, and rights-oriented” than it was in the early-nineteenth century.⁶³ The new version, in Glendon’s words, is characterized by “starkness and simplicity,” by “its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyper-individualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.”⁶⁴ Glendon believed that in our time we have erred in our reading of the famous libertarian John Stuart Mill, and his notion that participants in society ought to be free to do whatever they desired so long as they did not harm others.⁶⁵ We embraced his notion of individual freedom, but according to Glendon, we forgot that Mill advanced that principle not really so that everyone could do precisely as he or she pleased but in order for society itself to profit from the creativity of individual geniuses, and so that civilization would not descend into complete mediocrity.⁶⁶ We Americans, however, forgot this

59. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

60. *Id.* at ix.

61. *Id.* at x.

62. *See generally id.*

63. *Id.* at 3.

64. *Id.* at x.

65. *Id.* at 52–53.

66. *Id.* at 53.

intriguing elitist and communitarian aspect of Mill, and simply embraced an unthinking individualism that resulted both in a plethora of protected individual rights, and a misunderstanding of what was necessary to really enable the enjoyment of rights—a sensitivity to the fact that individuals have to exist with other individuals in society.⁶⁷ Europeans, she suggests, more influenced by Rousseau and his followers,⁶⁸ understand that humans in society owe duties to each other, and that the responsible exercise of those duties is the best means to further human flourishing.⁶⁹

VII. UNRESTRAINT IN OUR TIME: THE FAILURE OF THE FLAG PROTECTION AMENDMENT AND THE PASSAGE OF OBAMACARE

A jurisprudence of responsibility rather than individualist excess, a jurisprudence that would reinvigorate restraint, so to speak, is the goal towards which Glendon, Nagel and others may now be working, but those of us who believe that our tradition has been as much about responsibility and restraint as it has been about individual self-actualization are still in the distinct minority in the legal academy. This was brought home to me and to Professor Nagel, at least, way back in 1989, in the wake of the Supreme Court's 5–4 decision in *Texas v. Johnson*,⁷⁰ holding that the act of desecrating the flag of the United States was simply speech protected by the First Amendment. A movement soon began to reverse that decision by constitutional amendment,⁷¹ a movement that, according to polls, was able to garner about 75 percent support among the American people, and a movement that had the support of a

67. For the earliest and still most powerful sustained critique of Mill, arguing that liberty can only be secured if it is recognized that it must be undergirded by law and morality, see JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY FRATERNITY* (Stuart D. Warner ed., Liberty Fund 1993) (1874).

68. See, e.g., IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed., Allen W. Wood trans., Yale Univ. Press 2002) (1785).

69. GLENDON, *supra* note 59.

70. *Texas v. Johnson*, 491 U.S. 397 (1989).

71. The proposed amendment was colloquially known as the “Flag Protection Amendment,” and its simple text was “Congress shall have the power to prohibit the physical desecration of the flag of the United States.” ROBERT JUSTIN GOLDSTEIN, *SAVING “OLD GLORY”: THE HISTORY OF THE AMERICAN FLAG DESECRATION CONTROVERSY* (1994). For the history of the Flag Protection Amendment effort, see generally *id.*

coalition of veterans' and civic groups concerned that the Supreme Court had forgotten that responsibilities, deference, and restraint might be as important as rights, but that movement was never able to succeed.⁷² It was never able to gain the support of the two-thirds majority in the Senate necessary to bring the amendment to the states, and it never gained the public support of more than three American law professors (Nagel and I were two of them, and Harvard's Richard Parker was the third).⁷³ Parker and I served as consultants to the Citizens' Flag Alliance, the umbrella organization of groups advocating the amendment, but Nagel's views were completely uninfluenced by anything except his legal and philosophical beliefs, which, as expressed in *Unrestrained*, made him wary of the unbridled license the Supreme Court's *Texas v. Johnson* decision represented.

The failure of the Flag Protection Amendment was one clear sign of unrestraint, one that showed the diminishing force of our national traditions. Most dangerous to our tradition, however, was the corrosive effect that legal realism, and later Critical Legal Studies, and their notions that the legal rules were essentially malleable, exerted on our core constitutional notions of separation of powers and federalism, two essential strands of the rule of law in this country. The extent to which these ideas had eroded became manifest in the presidency of Barack Obama. The most obvious sign of this may have been the successful passage by the President and his Democrat colleagues (without a single Republican vote in either house of Congress) of the Patient Protection and Affordable Care Act (Obamacare),⁷⁴ which, in effect, federalized that portion of the nation's economy devoted to health care (probably as much as

72. *Id.* See also CITIZENS FLAG ALLIANCE, <http://www.citizensflagalliance.org/> (last visited July 6, 2016) [<https://perma.cc/VR6H-SF2Y>], for further information on the Flag Protection Amendment. That website reports that "[i]ndependent pollsters, most of national prominence, have conducted more than 30 individual surveys in nationwide and state specific studies. Findings, from the first to the most recent surveys, consistently show that roughly three-quarters of voters across all demographic and geographic subgroups support a flag amendment." *Id.*

73. Professor Parker was perhaps the legal academy's greatest champion of popular sovereignty. See, e.g., RICHARD PARKER, *HERE THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO* (1994). His support for the Flag Protection Amendment flowed from his deference to the popular will, which was heavy in support of the measure. *Id.*

74. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2012).

one-sixth or one-seventh of it). The Act's requirement that all Americans purchase insurance was the first time in history that Congress's commerce power was used to create, rather than to regulate, commerce, and flew in the face of the Tenth Amendment's concept that the federal government was supposed to be one of limited and enumerated powers, with the rest reserved to the states or the people themselves. This core principle of Federalism was eviscerated by Obamacare, and then again when the United States Supreme Court shockingly upheld it, even while admitting that it exceeded Congress's Commerce Clause powers, as an appropriate exercise of the taxing power.⁷⁵

While Obamacare was an example of the erosion of federalism, other acts of the Obama Presidency diminished the continuing validity of separation of powers, most notably his wholesale rewriting of the immigration regulations, in effect to implement the DREAM Act⁷⁶ Congress failed to pass. Reversing the position that he himself had publicly taken that he was without power to change immigration law, President Obama, claiming he was exercising prosecutorial discretion, refused to enforce the formerly existing immigration law.⁷⁷ While one district court found this impermissible under separation of powers doctrine (and a violation of the President's Oath to "take care" that the laws be executed),⁷⁸ the court of appeals preferred to ground its affirmance of the decision on narrow Administrative Procedure Act interpretation,⁷⁹ and, at this writing, the decision was before the United States Supreme Court, where an equally divided bench seemed

75. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

76. DREAM is an acronym for Development, Relief, and Education for Alien Minors, and was a legislative proposal creating a path for undocumented alien minors toward U.S. Citizenship. *The Dream Act: Good for our Economy, Good for our Security, Good for our Nation*, WHITE HOUSE, <https://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf> (last visited June 16 2016) [<https://perma.cc/UR67-J29N>]. For the White House's argument in its favor, see for example *id.* (arguing in favor of the DREAM Act).

77. See, e.g., David G. Savage & Timothy M. Phelps, *Analysis: Key question in immigration court fight: Is Obama enforcing deportation laws or changing them?*, L.A. TIMES, Nov. 11, 2015, <http://www.latimes.com/nation/la-na-immigration-legal-analysis-20151111-story.html> [<https://perma.cc/3YQA-EN52>] (suggesting the debate regarding President Obama's actions turns on whether one believes, as Obama argued, that he was exercising prosecutorial discretion, or whether one believes he was, in effect, making new law).

78. *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015).

79. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

primed simply to affirm the court of appeals.⁸⁰

President Obama's expansive interpretation of executive power was not completely unchecked by the courts, and, for example, his filling of "recess appointments" when the Senate maintained it was not in recess was overturned 9–0 by the United States Supreme Court.⁸¹ Still, there were enough acts blatantly challenging the Constitution so that at least one law professor published a book apparently suggesting that the President's "lawless" behavior could be grounds for impeachment, though the chances of such impeachment were slim.⁸² No such move to impeach President Obama was undertaken, but his stretching presidential prerogative, and his acts diminishing federalism and the separation of powers, his "unrestraint," simply could not be denied. Could it be more than a coincidence that President Obama was a law student at Harvard, when CLS was in its zenith?

For whatever reason, the obvious "unrestraint" of the federal government under President Obama, and the increasing penetration of the federal government into national life, as well as the politically-correct "rights-talk" that Glendon and Carrington lament, have now given rise to the populist rising in both of our political parties, which have resulted in the unlikely successes of Donald Trump on the Republican side and Bernie Sanders for the Democrats. The appeal of their candidacies is about more than a lack of restraint, of course, but in both the Sanders and Trump campaigns one discerned a criticism of institutional and personal corruption that looks a lot like ruing the loss of the rule of law.

VIII. UNRESTRAINT TRIUMPHANT: MORTON HORWITZ AND CASS SUNSTEIN

Nagel is correct that the American legal academy's broad-based attack on the rule of law is to blame for much of this. Consider, for example, the frank disagreement that Morton

80. This is, in fact, what happened. *See generally* United States v. Texas, 136 S. Ct. 2271 (2016) (affirming, by an equally divided court, the Fifth Circuit's opinion, *Texas*, 809 F.3d 134).

81. Nat'l Labor Relations Bd. v. Canning, 134 S. Ct. 2550 (2014).

82. DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 137 (Jennifer Brown ed., 2015).

Horwitz, a major figure in CLS had with E.P. Thompson's defense of the rule of law as an "unqualified human good,"⁸³ which Thompson seemed to recognize, perhaps, as the signal achievement of Anglo-American culture. Horwitz wrote:

Unless we are prepared to succumb to Hobbesian pessimism "in this dangerous century," I do not see how a Man of the Left [Thompson] can describe the rule of law as "an unqualified human good!" It undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice, it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.⁸⁴

Horwitz is implying that a "benevolent" government could exercise power, contrary to the rule of law, in order to promote substantive equality, and, perhaps, as CLS has urged, to create a society with a less "atomistic conception of human relations."⁸⁵ These are the aims of progressives such as President Obama, and even those outside of CLS in the academy may share similar beliefs. Consider the views of Obama's former colleague at the University of Chicago Law School, Cass Sunstein.⁸⁶

As one laudatory recent article accurately observes, "Sunstein comes across as a brainy and cheerful technocrat, practiced at thinking about the consequences of rules,

83. E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

84. Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561, 566 (1977). For an extensive rumination on Horwitz's views of the rule of law as *not* an "unqualified good," see Sanford Levinson & Jack M. Balkin, *Morton Horwitz Wrestles with the Rule of Law*, in *TRANSFORMATIONS IN AMERICAN HISTORY: LAW, IDEOLOGY, POLITICS, AND METHOD* (Daniel W. Hamilton & Alfred L. Brophy eds., Harvard Univ. Press 2010).

85. Peter Gabel, *Book Review*, 91 *HARV. L. REV.* 302 (1977) (reviewing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977)). See generally PRESSER, *supra* note 3 (manuscript at ch. 14).

86. The next ten paragraphs on Cass Sunstein are taken from PRESSER, *supra* note 3 (manuscript at ch. 22).

regulations, and policies with attention to the linkages between particular means and ends.”⁸⁷ Still, Sunstein has made it his life’s work to explain how the basic assumption of Posnerian⁸⁸ law and economics, that people are rational wealth-maximizers, is at least partially incorrect, since people, in Sunstein’s view, often make irrational choices that undercut their own well-being.⁸⁹

At some level, perhaps, there is no denying that Sunstein is correct. One of the clearest indications that this is so is given by Sunstein in his accessible little e-book, *How to Humble a Wingnut and Other Lessons from Behavioral Economics*,⁹⁰ a collection of some of Sunstein’s essays for *Bloomberg View*. Sunstein notes:

If you take the average couple, and ask each member what percentage of the household work they do, the total number is very likely to be well over 100 (“self-serving bias”). About 90 percent of drivers believe themselves to be better than the average driver (“optimistic bias”). If you inform people that a product is 90 percent fat-free, they are a lot more likely to purchase it than if you [inform them] that it is 10 percent fat (“framing”). If you ask people whether certain events (a tornado, a hurricane, a terrorist attack) are likely, they might well be mistaken, because they will ask whether these kinds of events readily [come] to mind (“availability bias”).⁹¹

Given the facts that people can misperceive reality because of “self-serving bias,” “optimistic bias,” “framing,” “availability bias,” or other lapses in strict rationality, as behavioral economics teaches, then it might be appropriate to have some means of correcting for these lapses in rationality. Accordingly, for Sunstein, it is important to have a regulatory state that can, to use one of his favorite concepts, “nudge” people into

87. Lincoln Caplan, *The Legal Olympian: Cass Sunstein and the Modern Regulatory State*, 117 HARV. MAG. 43 (Dec. 18, 2014), <http://today.law.harvard.edu/harvard-magazine-legal-olympian/> [<https://perma.cc/GB2Q-9RWZ>].

88. On Posner, see PRESSER, *supra* note 3 (manuscript at ch. 15).

89. See *infra* note 103–14 and accompanying text.

90. CASS R. SUNSTEIN, *HOW TO HUMBLE A WINGNUT AND OTHER LESSONS FROM BEHAVIORAL ECONOMICS* (2014).

91. *Id.* at 1.

making correct choices.⁹² Cass Sunstein, in short, is thus in the business of saving the American people from themselves.

Like his former colleague Barack Obama, Professor Sunstein seems to start from the position that it is the obligation of government to act to enrich our lives, rather than the task of government simply to be a night watchman to enforce the working of the free market. As a recent piece on Sunstein by Lincoln Caplan—an important legal journalist and a member of the New York Times editorial board—observed, Sunstein is still working from a paradigm forged in the New Deal.⁹³ Caplan quoted Sunstein, who observed that,

New Deal regulation rested on the conviction that the common-law system “reflected anachronistic, inefficient, and unjust principles of laissez-faire” and was inadequate “because it was economically disastrous, insulated established property rights from democratic control, failed to protect the disadvantaged, and disabled the states and the national government from revitalizing or stabilizing the economy.”⁹⁴

In other words, as far as Sunstein was concerned, the common law (or the judges who made it) were acting irrationally. The New Deal, for Sunstein, was an effort to correct that irrationality. As Caplan concluded, regarding Sunstein’s view of what had happened with the New Deal, and in words striking for their acceptance of the notion of “popular constitutionalism,”⁹⁵ or, perhaps, the implementation of “unrestraint”:

The New Deal transformed the system of federalism by transferring power from the states to the federal

92. As Caplan observes, explaining the basis for Sunstein’s beliefs, “[i]n recent decades, behavioral economists have shown that, out of impulse, impatience, or ignorance, people often make choices that are not the best or even good for them: we are not the rational self-interest maximizers that conventional economists have long assumed.” Caplan, *supra* note 87, at 44.

93. *See generally* Caplan, *supra* note 87.

94. *Id.* at 49.

95. On “popular constitutionalism,” the notion that acts and understandings of the American people can effectively amend the United States Constitution outside of the Article V procedures, see generally PRESSER, *supra* note 3 (manuscript at ch. 16).

government. It redefined individual rights, from “rights to be free from government intrusion” to “government protection against the multiple hazards of industrialized society.” The result was “a dramatic change in the fabric of the national government”⁹⁶

Sunstein believes that the Government ought to be used broadly to increase the welfare of its citizens, even, or perhaps *especially*, when those individuals do not realize what is in their own best interests, and need a bit of coercion—or, as Sunstein would more gently describe it, a nudge. As the author of another admiring profile of Sunstein explained:

In “Nudge,”⁹⁷ a popular book that [Sunstein] wrote with the influential behavioral economist Richard Thaler, Sunstein elaborated a philosophy called “libertarian paternalism.” Conservative economists have long stressed that because people are rational, the best way for government to serve the public is to guarantee a fair market and to otherwise get out of the way. But in the real world, Sunstein and Thaler argue, people are subject to all sorts of biases and quirks. They also argue that this human quality, which some would call irrationality, can be predicted and—this is the controversial part—that if the social environment can be changed, people might be nudged into more rational behavior.⁹⁸

“Libertarian Paternalism,” if adopted as a governing philosophy, raises the same kind of questions as do other forms of Paternalism. It is difficult to draw a line where Paternalism ends and autocracy, tyranny, or totalitarianism begins, it is a justification for leaving “restraint” behind. More to the point, the implicit assumption of Sunstein and, apparently, of CLS is that it is the job of government to rearrange the economy and to redistribute resources along what seem to them to be wiser lines. But what if this is not supposed to be the job of the

96. Caplan, *supra* note 87, at 49.

97. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Penguin Books rev. ed. 2009).

98. Benjamin Wallis Wells, *Cass Sunstein Wants to Nudge Us*, N.Y. TIMES MAG. (May 13, 2010), http://www.nytimes.com/2010/05/16/magazine/16Sunstein-t.html?pagewanted=all&_r=0 [https://perma.cc/Q8AV-LC6W].

government at all? What if our tradition is actually something quite different? Is there anything to be said for that different tradition?

IX. THE ALTERNATIVE TO UNRESTRAINT: SALVAGING THE RULE OF LAW

What would be lost with a system like Sunstein's or that advocated by CLS? What their kind of "unrestraint" would establish to our detriment was made clear by the republication, a few days after his death, of M. Stanton Evans's⁹⁹ Sharon Statement.¹⁰⁰ Some selective quotes from that manifesto are instructive. The statement asserted "[t]hat foremost among the transcendent values is the individual's use of his God-given free will, whence derives his right to be free from the restrictions of arbitrary force . . ."¹⁰¹ The Sharon Statement went on to observe that "[t]he purpose of government" was to protect political and economic freedom, and that "when government ventures beyond these rightful functions, it accumulates power, which tends to diminish order and liberty"; that the Constitution's reservation of "primacy to the several states, or to the people,"¹⁰² must be maintained in order to check the federal government; that "the market economy, allocating resources by the free play of supply and demand, is the single economic system compatible with the requirements of personal freedom and constitutional government, and that it is at the same time the most productive supplier of human

99. For the best book-length statement of M. Stanton Evans's thought, see M. STANTON EVANS, *THE THEME IS FREEDOM: RELIGION, POLITICS, AND THE AMERICAN TRADITION* (Regnery 1994).

100. *Notable & Quotable: M. Stanton Evans*, WALL ST. J., Mar. 5, 2015, at A13. The Sharon Statement is also available on the Heritage Foundation's website. *The Sharon Statement*, HERITAGE FOUND. (Mar. 23, 2016), <http://www.heritage.org/initiatives/first-principles/primary-sources/the-sharon-statement> [<https://perma.cc/3F6K-NC7F>].

101. *Sharon Statement*, *supra* note 100.

102. Referring here to the Tenth Amendment's text that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. This is often taken as the central statement of our belief in "Federalism," the notion that the Federal government is one of limited and enumerated powers, and that other governmental powers are appropriately exercised by the state and local governments, those closest to the American people themselves.

needs”¹⁰³ And, finally, that “when government interferes with the work of the market economy it tends to reduce the moral and physical strength of the nation; that when it takes from one man to bestow on another, it diminishes the incentive of the first, the integrity of the second, and the moral autonomy of both.”¹⁰⁴ If the Sharon Statement is right, of course, CLS, the behavioral economists, and Cass Sunstein are very sadly and dangerously wrong.

In the end, of course, the question of who is right or wrong here, and the favoring or disfavoring of what has here been called “unrestraint”—the abandonment of the rule of law and the substitution of new redistribution-favoring rules—involves a choice of values; the Sharon Statement expresses the traditional conservatives’ prioritizing of individual liberty, but if one believes that our societal needs now call for a fundamental restructuring of institutions, a fundamental redistribution of resources, and a fundamentally more powerful government that could do that for us, the Sharon Statement will not be persuasive. But if one believes in these progressive goals, one will of course, have some trouble with the rule of law itself, because that is, ultimately, as Horwitz understands, a conservative doctrine. And, if one is willing to cashier the rule of law and bring with its dismissal the “unrestraint” that Nagel condemns, it is difficult to see what future there is in the legal profession and the legal academy, since we are, after all, supposed to be committed to the rule of law.

Indeed, there appears to be a temptation in the law professoriate to live in an alternate reality.¹⁰⁵ And this is not an exclusively recent phenomenon. H. N. Hirsch, in his biography of Felix Frankfurter, quotes Holmes himself as advising Frankfurter against joining the academy:¹⁰⁶ “Holmes wrote that ‘academic life is but half-life—it is withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.’”¹⁰⁷

But this is not the way things ought to be in the academy,

103. *Notable & Quotable: M. Stanton Evans*, *supra* note 100.

104. *Id.*

105. The next eight paragraphs are, in the main, taken from the conclusion of PRESSER, *supra* note 3.

106. H. N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 39 (Basic Books 1981). For Frankfurter, see PRESSER, *supra* note 3 (manuscript at ch. 9); for Holmes, see *id.* (manuscript at ch. 5).

107. HIRSCH, *supra* note 106, at 39.

and there are some law professors, and Frankfurter was one of them, who understood that the law and the Constitution needed to be preserved and enhanced in order for democracy to flourish in this country. For Frankfurter, one of his responsibilities was to “be in politics—with the emphasis on sustained thinking along the very questions of public affairs that have the greatest appeal to me.”¹⁰⁸ Frankfurter believed that it was the law professors’ task to keep the Justices faithful to the Constitution. He wrote to one of his disciples, the Yale Law Professor Alexander Bickel, that “[y]ou law professors really should sharpen your pens so that there is no mistaking as to what the trouble is and where the blame lies. I can give you proof that if you would speak out, you would get under [the Justices’] skins.”¹⁰⁹ Still, at the present time, as Nagel reminds us, the legal academy may have lost touch with the needs of the polity, especially if one believes, as some of us always have, that one of those needs is adherence to the rule of law itself.

As noted here, many American law professors—Akhil Amar¹¹⁰ and Cass Sunstein¹¹¹ might be taken as two representative examples—have concocted elaborate systems and elaborate justifications for straying from the strict rule of law to implement what they believe to be the necessary remedies for the problems of our times. President Obama’s view of the malleability of the law is similar, as his critics have argued.¹¹² All of this, perhaps, in the manner in which it justifies moving beyond the objective meaning of the Constitution and laws, is somewhat reminiscent of what the great Victorian novelist, Anthony Trollope, had to say about what he was trying to portray in the character of August Melmotte, his unscrupulous financier, in his most fully realized novel, *The Way We Live Now*.¹¹³ Wrote Trollope in his

108. *Id.* (quoting Felix Frankfurter to Henry L. Stimson, July 7, 1913).

109. *Id.* at 183 (quoting Felix Frankfurter to Alexander Bickel, March 18, 1963).

110. See PRESSER, *supra* note 3 (manuscript at ch. 16), for a discussion of Amar, centering around Amar’s notable book, AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012), which might be read as a virtual license for judicial unrestraint in interpreting the Constitution.

111. See PRESSER, *supra* note 3 (manuscript at ch. 22).

112. For President Obama’s jurisprudential views, see generally PRESSER, *supra* note 3 (manuscript at ch. 23).

113. ANTHONY TROLLOPE, *THE WAY WE LIVE NOW* (London, Chapman & Hall 1875).

autobiography:

[A] certain class of dishonesty, dishonesty magnificent in its proportions, and climbing into high places, has become at the same time so rampant and so splendid that there seems to be reason for fearing that men and women will be taught to feel that dishonesty, if it can become splendid, will cease to be abominable. If dishonesty can live in a gorgeous palace with pictures on all its walls, and gems in all its cupboards, with marble and ivory in all its corners, and can give Apician dinners, and get into Parliament, and deal in millions, then dishonesty is not disgraceful, and the man dishonest after such a fashion is not a low scoundrel.¹¹⁴

Trollope, of course, was addressing a different kind of “unrestraint,” but still, the elegant and elaborate theories of contemporary American law professors that justify departures from prior precedents or implement new versions of constitutional meaning, are similarly splendid, but similarly dishonest. If the rule of law in this country means anything, it is that it cannot be set aside without endangering everything on which popular sovereignty as expressed in our Constitution and laws ultimately stands.

X. CONCLUSION: RECAPTURING RESTRAINT

The legal philosopher John Finnis, now a law professor at Notre Dame and at Oxford, recently called for action to combat what he, too, like Nagel, saw to be an alarming trend on the part of the courts in many nations to engage in legislation rather than adjudication. Finnis concluded:

[W]e all, lawyers and non-lawyers alike, should be aware how much work we indispensably need the courts and their judges to do . . . so that in fidelity to real law applied to proven or admitted facts, they even-handedly restrain those individuals and groups who wield any of the many, many kinds of private or public power—including the power of

114. Anthony Trollope, *An Autobiography*, PROJECT GUTENBERG, <http://www.gutenberg.org/files/5978/5978-h/5978-h.htm> (last updated Apr. 28, 2013) [<https://perma.cc/4A9A-TJWX>].

media pressure, groupthink and ostracism—to keep them within the specific bounds and measures of our genuinely established law’s settled commitments, and to compensate those who have been unlawfully wronged.¹¹⁵

In other words, Finnis, in clear and simple language, was calling, like Nagel, for “restraint,” for a return to the rule of law, as the only security to person and property from the acts of arbitrary power.

It is encouraging that other members of the legal academy are beginning increasingly to understand the need for a return to what some have called “First Principles.”¹¹⁶ Steven Smith, long one of our more astute Constitutional commentators, recently noted the fact that what we have now is not the Constitution envisioned by our framers, because of judicial license and popular acquiescence in lawmaking by unelected administrative agencies. As Professor Smith put it, “For decades now, the whole project of constitutional law, in the profession and the legal academy, has centrally consisted of providing legitimation for the administrative state and for an active judicial implementation of a progressive political agenda.”¹¹⁷ In that piece Professor Smith reiterated an earlier statement that “it would be a harsh penance, worthy if not of hell at least of purgatory to be sentenced to sit in a comfortable air-conditioned office perpetually reading opinions by Justice O’Connor or Justice Kennedy.”¹¹⁸ Those two, of course, are the most notable swing justices of the late-twentieth and early-twenty-first centuries, two practitioners of unrestraint, whose opinions often seemed, to many of us, bereft of actual grounding in the Constitution. But whether or not the Supreme Court grounds its opinions in the Constitution, there is some risk to the American polity if it surrenders completely to the

115. John Finnis, *Judicial Power: Past, Present, and Future*, in UNIV. OF OXFORD RESEARCH PAPER SERIES 27 (Oxford Legal Studies Research Paper No. 2/2016, 2015).

116. See, e.g., SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999).

117. Steven D. Smith, *Constitution Day: “The Image of Liberty,”* in UNIV. OF SAN DIEGO SCH. OF L. RESEARCH PAPER SERIES 8 (San Diego Legal Studies Research Paper No. 15-196, 2015). For a penetrating book length study of our current “Administrative State,” see PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014) (answering the question he poses in the affirmative).

118. Smith, *supra* note 117, at 9.

law professors and lawyers.

In a thoughtful essay on our current administrative state, Professor Jeremy Kessler warns that “the rule of lawyers still reigns, embedding both executive action and public reaction in a legalistic discourse that continues to limit and legitimate American public policy.”¹¹⁹ But those who promulgated and succeeded in having ratified the Constitution in 1787 realized that only the virtue of the American people could preserve republican government in this country. This has not changed in two and one-quarter centuries, and it is perhaps time now, as John Finnis hints, for the American people themselves to save us from the politicians and the professors. Surely the political ferment that led up to the presidential elections of 2016, with the rise of anti-Establishment candidates in both parties, indicates a widespread perception that something has gone wrong with the operation of our constitutional system, which to many Americans now seems rigged to favor the Federal Leviathan and those who benefit from its operations, many of whom occupy positions in the elite academy, and many of whom are or have been law professors. Many of these professors, as we have seen, have understood, articulated and imagined an American law that is now a danger to the legal and constitutional foundations on which our republic rests. A real exercise of popular sovereignty, through the election of officials committed to ending “unrestraint,” and restoring the rule of law, or even the noblest exercise of popular sovereignty, another Constitutional Convention, might now be necessary.¹²⁰

119. Jeremy K. Kessler, *Book Review: The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 761 (2016) (reviewing DANIEL R. ERNST, *TOQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA 1900–1940* (2014)).

120. For a suggestion of what such a Constitutional Convention might look like, see, e.g., THOMAS E. BRENNAN, *THE ARTICLE V AMENDATORY CONSTITUTIONAL CONVENTION: KEEPING THE REPUBLIC IN THE TWENTY-FIRST CENTURY* (2014).