

**TEACHING THE LAW OF WRONGS WITHOUT
SEARCHING FOR WHAT IS RIGHT**

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Learn to do good; Seek justice.²

Each year thousands of students enroll in American law schools. Their decision is somewhat surprising considering evidence linking the first year of study in an American law school to a number of harmful physical, mental and emotional side-effects.³ At orientation, these new students are typically greeted with some version of the following Damoclean admonition: “Look to your right and look to your left; one of the three of you will not be here next year.” First-year law students, like enlisted soldiers entering boot camp, dutifully report to their classrooms prepared to “put aside their personal life and health and accept persistent discomfort, angst, isolation, even depression as the cost of becoming a lawyer.”⁴ Welcome to the legal profession.

Recent reports regarding the condition of the legal profession are similarly disquieting. The legal profession is distinguished from other professional

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² *Isaiah 1:17 (American Standard Version)*. After reviewing a draft of this essay, one of my colleagues encouraged me to remember that law school is a trade school and not a seminary. For the sake of clarity, I want to emphasize that I am not arguing that law school, even a religiously affiliated law school like the one at which I teach, is, or should become, a school of theology. I affirm our obligation to prepare our students for service in the legal profession and equip them with all training necessary for effective participation in “the real world”. However, the ancient admonition to do good and seek justice applies to all, even law professors. I do argue that our efforts to prepare law students for service in the legal profession would be more effective if we would integrate these ancient words of wisdom into our pedagogical goals.

³ See Lawrence S. Krieger, ‘Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence’ (2002) 52 *Journal of Legal Education* 112. Professor Krieger argues that legal educators are in denial about the correlation of legal education to negative mental, physical and emotional effects: “There is a wealth of what should be alarming information about the collective distress and unhappiness of our [law] students and the lawyers they become. We appear to be practicing a sort of organizational denial because, given this information, it is remarkable that we are not openly addressing these problems among ourselves at faculty meetings and in committees, and with our students in the context of courses and extracurricular programs. The negative phenomena we ignore are visible to most of us and are confirmed by an essentially unrebuted body of empirical findings.” at 112.

⁴ *Ibid* at 118.

pursuits by higher rates of substance abuse, depression, anxiety, divorce and suicide.⁵ Why? These indicia of professional malcontent are, in part, a result of a widening gap between the legal profession's ideals and the lawyer's actual work. Lawyers recite an oath in order to obtain their license whereby they dedicate themselves to public service and pursuit of the profession's ideals. Many of these lawyers begin churning out work product for clients they have not met in order to meet demanding billable hour requirements set by the partners of their firms. Many lawyers resign themselves to the view that they are merely cogs in the legal machine.⁶

Legal education well prepares law students for long hours and mechanical service. But is legal education equipping students with the ability to find meaning and satisfaction in their work? Are law schools inspiring students to do good work and to seek justice? Or is the legal academy contributing to that which is ailing the profession?

Some will argue that concern for the health of the legal profession is now irrelevant because the legal profession is already dead.⁷ Others claim that the profession is in danger of losing its soul.⁸ Respect for the profession "seems everywhere on the decline."⁹ As a member of the American legal profession, I join those who are saddened by news of the profession's poor health.¹⁰ Why is the profession in decline? There is a growing body of literature linking the legal

⁵ See eg Patrick J. Schiltz, 'On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession' (1999) 52 *Vanderbilt Law Review* 871.

⁶ For clarity, I am not arguing that the lawyer's work product is, in this setting, actually disconnected from the pursuit of justice. Instead, as will be discussed below, because the young lawyer's law school training did not adequately develop the lawyer's professional identity, many young lawyers faced with this technical, impersonal and often tedious work will easily lose sight of the connection between their work and the pursuit of justice. Others may react more severely and develop a cynical faith whose core tenant is (whether correct or not) that the entire legal process, the entire profession, is a power game in which ideals such as justice are irrelevant. Such realism contributes to the declining health of both the individual lawyer and the profession. For a more comprehensive description of the new cynical faith in the modern law firm see Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993) 300-14.

⁷ See Carl T. Bogus, 'The Death of an Honorable Profession' (1996) 71 *Indiana Law Journal* 911.

⁸ See Kronman, above n. 6 at 1.

⁹ Bogus, above n. 5, 912.

¹⁰ As noted in Professor Bogus' work, some observers are celebrating at the profession's wake. Richard Posner, for example, is eager to bury the profession so that he might get on with more intellectually autonomous and scientifically exact analysis without value-laden side constraints. *Ibid.*

profession's decline in America with the traditional program of legal education provided by American law schools.¹¹

In this essay I will argue that the declining health of the American legal profession (and its members) is caused, in part, by the traditional curriculum and pedagogy of the first year of education in an American law school. Specifically, I will argue that the traditional first year curriculum inappropriately neglects careful examination of moral and legal philosophy as well as professionalism and ethics in order to cultivate an unbalanced, supposedly objective, analytical tough-mindedness lacking moral grounding or constraint. Most law schools intentionally train first year law students to detach themselves from their own moral and ethical identities in order to learn what the law is without being distracted by what they think it ought to be. This process is, in part, necessary and beneficial.¹² However, as Roger Cramton observed while serving as Dean of Cornell Law School, the process is also “dangerous and crippling” if not balanced out by other pedagogical and curricular objectives.¹³ I will argue that the traditional first year of legal education is now unbalanced and destructive. The first-year curriculum sharpens minds but dulls souls. The current curriculum and pedagogy transforms the entering student's idealism and desire for engaging in the pursuit of justice into a peculiar sort of realism typified by the fierce skepticism endemic to the practice of law in America today.¹⁴ The remedy, I argue, is balancing the first year curriculum with the integration of a course (preferably the first semester) dedicated to the study of the concept of law and the lawyer's role in the legal system. Those teaching this course would pursue pedagogical objectives much different from the other doctrinal courses in order to provide greater exposure to the relationship between law and justice.¹⁵

¹¹ William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond and Lee S. Shulman, *Educating Lawyers* (2006) (hereinafter referred to as “Carnegie Report”); American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) (hereinafter referred to as “MacCrate Report”); Roy Stuckey, *Best Practices for Legal Education: A Vision and Road Map* (2007).

¹² See below n. 26 and related text.

¹³ Roger C. Cramton, ‘Ordinary Religion of the Law School Classroom’ (1977) 29 *Journal of Legal Education* 247, 253.

¹⁴ One study conducted by a group of psychologists at the University of Arizona and discussed by Professor Krieger in his research, found that law students entered law school with normal psychological markers but quickly shifted to major psychological distress in the first year. Krieger, above n. 3 at 114 (citation omitted).

¹⁵ Some will undoubtedly argue that this proposal is yet another “academic” solution to a problem requiring more creative, non-traditional solutions. I respond to this argument below.

I will begin by describing the traditional method of legal education utilized in the first year at American law schools giving particular attention to the study of tort law. In this section, we will follow a first-year student through her first few weeks in torts starting with her purchase of *Prosser on Torts* and then through her first few Socratic discussions. This section will describe the moral dilemma resulting from the first few weeks of the traditional first year curriculum and pedagogy. This dilemma is best summarized in this manner: the first year sharpens the student's ability to identify difficult moral and ethical issues embedded in legal disputes but does not adequately equip the law student to appreciate how these conflicts are resolved within a legal system¹⁶ nor allow the student to reconcile such conflicts with their own presuppositions. Instead, the student is trained to identify legal arguments, find the "rule of law" and move on to the next hard case without carefully reconciling the rule of law with the student's present understanding of justice. Because this process occurs in each of the doctrinal first year courses, without the aid of a contemporaneous examination of legal philosophy, the law student acquires a skewed view of the nature of law and the legal process. Without pursuing an understanding of the nature of law, the competing conceptions of justice and the lawyer's role in a legal system, the law student often acquires the skeptic's belief that there are no right answers to *any* questions (moral, ethical or legal) and the cynic's view that the only outcome-determinative issue in any legal conflict is which party was able to afford "the best" lawyer.¹⁷

Following this illustrative description of the typical first year experience, I will argue the American legal academy's traditionally unbalanced first-year pedagogy results from a misunderstanding of admonitions regarding legal education given

¹⁶ I am not suggesting that the lawyer is required to resolve every moral or ethical question embedded in a legal dispute. Instead, law students lacking grounding in legal philosophy will not appreciate the distinct roles of lawyers, legislators and judges. They will often assume, on the basis of the Socratic dialogue intended to develop the skill of identifying arguments for each party's use in the adversarial legal system and not intended to examine the merits of or roles within that adversarial system, that moral and ethical questions are not resolvable but by the arbitrary exercise of judicial or legislative power.

¹⁷ As discussed in more detail below, I am not asserting that every case examined in the first year of law school presents a question requiring discussion of what ought to be. Not every legal issue has only one right answer, and reasonable judges or legislators might differently resolve most legal issue. I am arguing that many of the legal rules examined in torts (and other doctrinal first year courses) do rest on premises rooted in moral or legal philosophy. Without an explicit acknowledgement of this reality (a rare occurrence within the Socratic classroom) the average law student forms a conception of law as nothing but what the judge in the case under review arbitrarily declares it to be. There are no right answers. According to Professor Daniel Coquillette, this confusion is at the heart of professional angst. See 'Professionalism: The Deep Theory' (1994) 72 *North Carolina Law Review* 1271, 1272.

in Oliver Wendell Homes' influential lecture, *The Path of the Law*. I will argue that Holmes acknowledged the necessity of connecting the particular with the general in order to master the lawyer's trade.

In the final part I will propose a modest change to the first year curriculum and pedagogy: the integration of a new course called *Law, the Lawyer and Justice* in the first semester of study. This course would introduce the law student to the nature of law and differing general theories of justice and also discuss the lawyer's professional obligations to client, bench and bar. This course, I argue, would enhance the student's ability to better develop the analytical skill being imparted by the case method by alleviating the moral tension ordinarily experienced in curriculum lacking an introductory exposure to legal philosophy. My course proposal is not entirely novel. I will identify examples of similar first-year curricular reforms already adopted in the American academy. Finally, as a faculty member at a religiously affiliated law school, I will discuss the relationship of my proposal to recent discussions regarding the role of religiously affiliated law schools in the legal academy.

I. The Traditional First Year Experience in an American Law School: The Loss of Moral Identity

Many students enter law school eager to pursue justice. This, in part, explains why there is a unique, almost palpable, energy present in first-year classrooms in American law schools. Despite their knowledge that law school will be difficult, many first year students are eager to study law. Any professor privileged to teach in the first-year will acknowledge the rich mixture of anxiety, anticipation and expectation in the first-year classroom. Like engines primed with fuel, first-year students expect the study of law to ignite a passion for life in the law.

I teach torts in our first-year curriculum and very much enjoy the energy in the first year classroom. I also teach two upper-division courses and find the students in the upper division much different. Something has changed. Any professor who teaches both first year and second and third year students will recognize this difference. By the time a student reaches their second year, the anxiety of their first year is replaced by the sort of self-confidence possessed by one who thinks she has figured out how to play a game. The first year's eagerness to examine the nature of law and justice is often replaced by a resignation to a supposed realism, gleaned from their first year experience, a belief that law is nothing more than legal method used to mask the exercise of power. With the help of career services offices at law schools throughout the

academy, second year students spend much more time pursuing employment in the business of law than they do contemplating the moral, social and ethical issues related to the profession's nexus with the pursuit of justice. It is difficult, in this context, to capture the imagination of the student. In many ways, their imagination has already been suppressed.¹⁸

What happened between the beginning of the first year and the beginning of the second year? The first year happened. The American legal academy is beginning to acknowledge that something in the first year of legal education is broken. For example, the recently released *Best Practices for Legal Education* report concludes that “[t]he first year curriculum gives students a skewed and inaccurate vision of the legal profession and their roles in it. . . . The first year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as Llewellyn put it, away from cultivating the humanity of the student and toward the student’s re-engineering into a ‘legal machine.’”¹⁹ These concerns are reinforced by the conclusions of the American Bar Association’s task force on law schools: “Too often, the Socratic method of teaching emphasizes qualities that have little to do with justice, fairness and morality in daily practice. Students too easily gain the impression that wit, sharp responses, and dazzling performances are more important than the personal moral values that lawyers must possess and that the profession must espouse.”²⁰ These statements are illustrative of a growing recognition within the profession and academy that something is broken in our first year curriculum.

The traditional first year curriculum is doctrinal, analytical and supposedly scientific. The traditional first year experience is antagonistic to the entering student’s desire to pursue answers to conceptual questions (i.e., development of an understanding of general theories of justice). The student enrolled in a traditional first year program is not permitted to enroll in legal philosophy. Instead, first years are shoved into multiple doctrinal courses (usually torts, contracts, property, criminal law and civil procedure) alongside one technical skills course (usually legal research and writing).²¹ Thus, entering law students

¹⁸ For another perspective on this pattern see ‘Making Docile Lawyers: An Essay on the Pacification of Law Students’ (1998) 111 *Harvard Law Review* 2027.

¹⁹ Stuckey, above n. 11 at 22-23.

²⁰ MacCrate Report, above n. 11 at 236.

²¹ Most American law schools also include legal research and writing in the first year curriculum. These courses typically focus exclusively on technical legal knowledge and skill (i.e., structure of courts, sources of law, citation and fundamentals of legal writing). The method of instruction in such skills courses, however, is sometimes used to reinforce a legal philosophy

expecting to examine the nature of law and justice in an academic environment will instead be overwhelmed by the repetitive briefing of cases to in order to develop the trade skills of the lawyer-plumber.²²

In addition to the structure of the traditional first year experience, the traditional first year teaching method further isolates students from examining the philosophies underlying law. The traditional first year pedagogy is the Langdellian appellate case method combined with Socratic dialogue in the classroom.²³ The case method is useful and effective. The method develops the student's ability to critically deconstruct and examine case law (a skill essential to the formation of the lawyer's legal opinion and advice). The primary pedagogical purpose of the first year curriculum is development of the student's ability to think like a lawyer. The case method is well suited to this end. In an effort to develop rigorous analytical ability, first year professors usually use the Socratic teaching method merely to press the student to particular details of individual appellate decisions (i.e., what is this rule of this case).

But the case method is usually not effective at connecting the particular case to general principles of justice.²⁴ Accordingly, the student's desire to deepen their own understanding of justice is frustrated. This is an understatement. As will be explained below, the case method often ties the student in dialectic knots causing frustration leading to resignation that there must be no right answers to any question. This common experience results in the student's loss of interest in the pursuit of justice. Without the benefit of a preliminary examination of legal philosophy, first year students repeatedly dissect cases, describe the guts and learn the rules. Without the contextualization which would result from an contemporaneous examination of legal philosophy and allow the connection of the particular with the general, students are left with the false impression that the law is nothing more than what is contained in the few appellate

which rejects the possibility of just answers to legal questions. *See eg* Julie M. Spanbauer, 'Teaching First-Semester Students that Objective Analysis Persuades' (1999) 5 *Legal Writing: The Journal of the Legal Writing Institute* 167, 170-71 (describing legal writing teaching techniques resting on the philosophic rejection of objectivity).

²² *See* Erwin N. Griswold, 'Intellect and Spirit' (1967) 81 *Harvard Law Review* 292, 297.

²³ *See* Stuckey, above n. 11 at 207.

²⁴ I recognize that the case method and Socratic dialogue easily accommodate pursuit of first principles. However, because the primary goal of the first year is the development of analytical ability rather than the development of a solid jurisprudential foundation, the case method is often not used for development of the student's understanding of legal philosophy. Many professors use the method only to test the student's care in reading and deconstructing the particular case under examination. This practice is so prevalent in the American legal academy that there exists an industry devoted to the development of canned case briefs to guide the student through the Professor's Socratic questions.

opinions they encounter through the semester.²⁵ The traditional first year curriculum and pedagogy tosses students into the sea of common law and requires them to try and keep their heads above water. While they think they are drowning and are disoriented, many will stop asking “what is just?” and instead, looking for a plank floating in the water, only ask “what is the rule?”

Erwin Griswold, while he was Dean of Harvard Law School, noted both the utility and danger of the traditional first year teaching method:

The case method is a powerful device for inculcating a certain type of logical reasoning. Experience with this type of reasoning is an essential part of legal education, for it is widely used by judges, lawyers, and laymen in dealing with legal problems. Thus, in this part of our work, the case method has great utility, particularly in exposing the shallow or inadequately supported reasoning to which many people are prone. In dealing with concrete situations, whether based on cases or on problems, it avoids the danger of too broad generalizations and teaches the student to be extremely careful of his own thinking and skeptical of the easy conclusions of others. But the case method alone does little more than this. It is only a tool. It is not an end in itself, and it is fully as dangerous as it is useful. A knife may be an instrument of mercy in the hands of a surgeon and a lethal weapon when used by another. So too, traditional methods of law school instruction may be dangerous and destructive in their results when used without adequate understanding; and this may be no less disastrous because it is wholly unintended.²⁶

I agree with Dean Griswold’s analysis. The case method is valuable and should not be eliminated from legal education. However, it is not enough, especially in the first year.

The following description of the typical student’s experience in the first year will demonstrate the need for something more in the first year. The

²⁵ Others have noted the tendency of the first year teaching method to have this effect. Alan Watson, for example, has argued that American casebooks should be replaced with “an amalgam of the standard British legal textbook and the American casebook. Each section of the book would contain an overview of the subject with citation of the important cases supporting each proposition. Then would come the presentation of the individual case with questions designed to improve students’ analytical skills, and to show how and where the case fits in the overall context of the law. Teachers would both explain issues in the overview and test student skill in case analysis.” *Legal Education Reform: Modest Suggestions*, 51 J. Legal Educ. 91 (2001).

²⁶ Griswold, above n. 22 at 298-99.

case method and its intense focus on the process of legal reasoning conjoined with the repetitive search for individual rules of black letter law in each of the first year doctrinal courses fractures the law student's moral identity and results in a professional cynicism that will haunt the student in a profession committed to the pursuit of justice. Has this unbalanced first year curriculum and pedagogy sharpened minds at the expense the lawyer's ability to exercise judgment between that which is good and that which is not?²⁷

In order to understand the impact of the first year it is important to consider the identity of the average matriculating student. One hundred years ago, when the traditional first year curriculum and case method were coalescing, law student populations were much less diverse than they are today.²⁸ Additionally, students entering law school one hundred years ago were much more likely than those matriculating today to have enjoyed a rigorous liberal arts undergraduate training. These factors are important for two reasons.

First, the traditional first year curriculum was developed with the presupposition that first year law students had already studied moral and political philosophy in their liberal arts education. Thus, many of the students entering law school had already examined the nature of justice as they read Plato, Aristotle, Cicero, Augustine, Aquinas, Kant, Bentham, Locke, Mill, Hobbes and others in pursuit of their undergraduate degrees. These students entered law school with some appreciation of the political and moral context of the law. The purposeful exclusion of legal philosophy from the first year, in this context, in pursuit of narrow analytical ability was unlikely to lead students to the conclusion that there is no such thing as justice. The entering law student's undergraduate education served as bedrock for the acquisition of the deconstructing power of the legal method.²⁹

²⁷ Ibid. 'It has often been said, for a smile, that legal education sharpens the mind by narrowing it. To my mind, there is more truth to this than we have been willing to admit. The methods of legal education fostered at this school and widely adopted elsewhere do have a tendency to exalt dialectical skill, to focus the mind on narrow issues, and to obscure the fact that no reasoning, however logical, can rise above the premises on which it is based.'

²⁸ See *id.* at 18-25.

²⁹ Note that the structure of this education path, a general liberal arts education followed by rigorous analytical training, resembles the model of professional training still used in England. Students there begin with a foundation in theory in pursuit of their foundational degree in jurisprudence. The general study then leads to development of analytical and technical skills necessary for the lawyer's service to her clients and the profession.

Students entering law school today are much less likely than those entering one hundred years ago to have carefully thought about the nature of justice. The decline of general liberal arts education is well-known corollary to the academy's trend toward specialization. Unfortunately, such specialization results in students entering graduate school without a solid foundation in more general and conceptual knowledge. Students entering law school with degrees in business, economic, sociology, psychology or even pre-law have likely never carefully examined the nature of justice. Many are expecting to do that in law school. Anyone expecting to examine the nature of justice in their first few weeks of law school is in for an unwelcome surprise. Law school greets students with an intense specialization of its own, an effort to inculcate the legal method and "tough-minded" analytical skill.³⁰ Today's first year students, unless they have examined political or moral philosophy in college, often complete their first year in law school with the false impression that justice is nothing more than the legal method.

Second, the increasing diversity of matriculating students undermines another assumption shared by those who formulated the traditional first year curriculum. As will be discussed in more detail below, the first year curriculum and teaching method intentionally challenges first year students to set aside his moral and ethical presuppositions in order to learn "the law." The professor can carefully lead the class through this process when the class shares common presuppositions. However, when the presuppositions are more diverse, reflecting greater diversity within the classroom, then it is much more likely that the professor will lead some students to unintended ethical confusion and moral frustration as they these students attempt to follow down the Socratic path. Because today's students do not share a common foundation in western political thought the professor's Socratic dialogue is unlikely to lead all students down the same path.

With these characteristics in mind, now consider the experience of the typical first year student. First year students usually begin their legal education in America by spending hundreds of dollars on a set of casebooks for use in their doctrinal courses. Students typically begin reading and briefing cases before their first day of class.

For their torts sections, many first year students are required to purchase Dean William Prosser's casebook.³¹ Prosser's name is synonymous American tort law

³⁰ See Cramton, above n.13 at 250-51.

³¹ William L. Prosser, *Handbook of the Law of Torts* (1st ed, 1941) 1.
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and his text has been one of the most widely utilized casebooks in the academy. The book is so well associated with the American law school experience that it has obtained recognition in American popular culture.³² Perhaps the first thing, then, which an American law student encounters regarding the law of tort is Prosser's familiar definition: "A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy."³³ I suspect that if one were to ask the average American lawyer what a tort is she would reply by reciting what she remembers of Prosser's well-known definition.

What jurisprudential conclusions might a first year student glean from Prosser's taxonomy of tort? Prosser's taxonomy is strikingly functional. He defines tort by referring to the availability of a remedy (a tort exist whenever "the law" provides a remedy). Prosser's definition thereby avoids the difficult normative task of identifying principles useful for delineating wrongful conduct.³⁴ The neophyte is gently led to the realist's conception of justice, that a "wrong" is anything a court says it is nothing more.³⁵ Because the student is not enrolled in jurisprudence, a course in which the realist's conception of justice would be articulated and examined alongside other general theories of justice, the student presumes that Prosser's definition is correct and eagerly moves on to the examination of the first tort. A small seed of cynicism has already been planted in the student's mind via Prosser's taxonomy of tort.

As the student moves forward, they quickly encounter liability for intentional torts. Like many casebooks, Prosser's text introduces the student to the concept of intent with a series of cases before the moving into the first intentional tort. Many students, like others not yet reprogrammed by legal education, suspect that intentional conduct is any action chosen by the actor with the subjective purpose of accomplishing a particular result. Most students presume that one *intends* to inflict harm on another when one acts with the deliberate purpose of causing harm. The student's ethical instincts typically recognize the value of admonitory and regulatory functions of tort law. Students are, therefore,

³² See Christopher J. Robinette, Prosser on Torts in Pop Culture (2009) <<http://lawprofessors.typepad.com/tortspof/2009/04/prosser-on-torts-in-pop-culture.html>> at 29 August 2009.

³³ As has been noted elsewhere, this sentence was the opening sentence of each of the four editions of Prosser's text published during his lifetime. See John C. P. Goldberg, 'Ten Half-Truths about Tort Law' (2008) 42 *Valparaiso Law Review* 1221, 1222.

³⁴ Holmes pursued such first principles of tort, contract and criminal law in *The Common Law*. Oliver Wendell Holmes, Jr., *The Common Law* (first published 1881).

³⁵ Prosser's functional definition of tort is consistent with his formulaic approach to tort. See G. Edward White, *Tort Law in America: An Intellectual History* (1980) 157.

comfortable with the imposition of liability whenever there is proof that one deliberately inflicts harm on another.

The first case in Prosser's casebook regarding intent is *Garratt v. Dailey*.³⁶ The case regards the conduct of five-year old Brian Dailey. Brian pulled a chair away from its location while Ruth Garratt was in the process of sitting down. Garratt sued Brian for battery. The trial court dismissed the case after determining that Brian acted without intending to harm Garratt. This conclusion of law confirms the average law student's ethical impulses regarding liability: one is a "wrongdoer" only if one acts intending to harm another.

The Washington Supreme Court reversed the trial court explaining that "the mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he [knew Garratt would attempt to sit down where the chair had been.]"³⁷ This finding does not significantly disturb most students because it is very far removed from their moral instincts. There is not a significant distance between imposition of liability on proof of deliberate intent to cause harm and the imposition of liability on proof of voluntary action chosen by the actor possessing actual knowledge that harmful results will result from the actor's conduct. The student's instincts regarding the moral boundaries of tort liability is preserved by the court in *Garratt* with these words: "Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability."³⁸ The court remanded the case with instructions to the trial court to determine whether Brian acted possessing a substantial certainty that Garratt would sit down after he moved the chair. So far so good.

The very next case in Prosser's book subtly introduces the student to one of the critical jurisprudential questions underlying tort law: the question of subjective versus objective standards of fault. The case is *Spivey v. Battaglia*.³⁹ The case involves physical injuries resulting from an unsolicited hug. The injuries were unintended (in layman's and first year law student's terms). The actor did not possess knowledge that his hug would result in harm to the plaintiff. Yet, the Florida Supreme Court imposed liability, reasoning that "the intent with which such a tort liability as assault is concerned is not necessarily a

³⁶ (1955) 279 P 2d 1091.

³⁷ Ibid 1094.

³⁸ Ibid.

³⁹ (1972) 258 SE 2d 815.

hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he intended it.”⁴⁰

The law student’s ethical instincts are now put to the test. Upon what moral or ethical basis does a court justify the leap from liability for deliberate intent or subjective knowledge of certain unlawful consequences of voluntary action to imposition of liability on the basis of an *ex post* analysis of the objective reasonableness of the actor’s conduct based on the surrounding circumstances? This question is a critical jurisprudential issue. Despite the complexity and importance of the question, in the current edition of Prosser’s text, the student is alerted to the issue only by the following brief note: “For a discussion of the treatment of intent in English and American law, *see* Finnis, ‘Intention in Tort Law’ in Owen, *Philosophical Foundations of Tort Law* 229 (Clarendon Press 1995).”⁴¹

While I appreciate the editors’ decision to include an indication that the issue is connected to legal philosophy, there is no indication of the existence of disagreement concerning the imposition of tort liability on the basis of an objective conception of intent. The brief note is not adequate. The overwhelming majority of first year torts students will not read the Finnis excerpt contained in Owen’s book. The editors of the casebook surely appreciate this fact. Most students will presume that their ethical instincts were wrong, they might be disturbed by a rule imposing liability for intentional conduct without requiring proof of actual subjective intent, but will undoubtedly put the objective standard in their notes and move on to search for other “rules” of tort law.

This is an extremely important moment in the development of the student’s professional identity. The student has encountered a problematic ethical issue. Rather than attempt to reconcile the proposed rule of tort law with a sound theory of justice, the student is essentially compelled by the editorial decisions of the casebook authors and the pace of the curricular course of study (the torts professor is unlikely to spend more than part of one class working through the implications of the *Spivey* opinion) to set their ethical qualms aside, learn the rule and move on.

⁴⁰ Ibid 816-17.

⁴¹ Victor E. Schwartz, Kathryn Kelly and David F. Partlett, *Prosser, Wade and Schwartz’s Torts: Cases and Materials*, (11th ed. 2005) 23 n. 3.

Because first year students are not enrolled in jurisprudence prior to or at the same time as they study tort law, they are unlikely to work through the implications of any of the difficult issues they will encounter. Nor will these students work through the moral and ethical implications of the problematic rules they encounter in contract, property, civil procedure or criminal law. Students simply learn to dissect cases to identify the “rule of law,” ignore their moral or ethical concerns and move on to the next case.

I am not arguing that Dean Prosser or any of his prestigious colleagues who have contributed to his text intentionally attempted to manipulating students by foisting on them a one-sided view of this foundational jurisprudential question.⁴² Instead, I am attempting to illustrate the moral and ethical dilemma first year students confront during their first few days in the typical torts class as they attempt to learn the law by reading their assignments and briefing their cases. Without the benefit of the context provided by a general examination of the nature of law, neophytes in the study of tort law might understandably presume that they are learning what the law is merely by memorizing individual rules from a few cases, even if those rules do not correlate to the student’s moral instincts.

Well, perhaps the typical classroom experience will clear up their moral confusion. What happens in class? Most professors, especially those in traditional common law courses, are eager to engage law students in Socratic dialogue in order to challenge the students’ presuppositions and ethical impulses. This is especially true in the study of tort law.

In his own thoughtful examination of the legal profession’s identity crisis, Walter Bennett traces the roots of cynicism in his own professional life to his legal education, specifically to an experience in his first year study of tort. He writes:

Early in the semester our reading assignment included *Beatty v. Central Iowa Railway*, a relatively short nineteenth-century case presenting the elements of negligence and reasonable care, and we had discussed the case exhaustively under my professor’s tutelage for the better part of two class meetings. I recall my intellectual and emotional disorientation

⁴² If justice permits an objective standard of liability then it is arguable that the editors are personally liable for harm resulting from editorial decisions made with an objective ex post substantial certainty that harm resulted from the failure to integrate a more detailed and systematic discussion of the jurisprudential implications of adopting an objective standard of fault.

in those first law school classes and the eagerness with which most of us sought direction in the jungle of questions that our teacher planted around us. I recall the cacophony of ideas, viewpoints, and voices our professor used to lead us about in that jungle and my feelings of being lost and bewildered when one attempt at closure after another was exposed as a false trail. . . . Finally, at a point well into the third class period when I was bound limb-for-limb in the dialectical tangle and feeling the hot breath of the leopard, one of my more vocal classmates (he actually volunteered answers – or, attempted answers) lunged for daylight. His attempted breakout came in his response to the last in a series of increasingly pointed questions from our professor about how reasoned analysis of the case could have led to the result my classmate had just proposed. At last cornered and growing desperate, my classmate blurted out: “Because it seems to be the best way to achieve justice.” The professor, who was pacing by this time, whirled in his tracks, thrust both hands in the air and shouted in a voice louder than any I had heard indoors, “Don’t speak to me of Justice! I do not wish to hear about Justice. I wish to hear about the rule of law.” . . . I had assumed, as had the student who uttered the fatal words on justice, that justice was the whole point of law and the reason I was in law school. But no – not only was it not the point, it was not even in the equation. I had entered a system where such concepts were apparently viewed as worthless or worse, a hindrance to my success in the system.⁴³

I include this lengthy passage for two reasons: (1) this passage reflects an experience shared by many who survived the first year; and (2) readers who have not been trained in an American law school may not be aware of the degree of antagonism there is in many first year classrooms to idealistic ethical and moral notions. Students who recognize the moral and ethical implications of various rules encountered in a typical first year torts course are often compelled to set those concerns aside and just learn the rules. Their desire to

⁴³ Walter Bennett, *The Lawyer’s Myth* (2001) 13-14. Similar experiences are recorded in Benjamin Sell’s *The Soul of the Law* 36 (1994). Professor Harold Berman, writing in 2001, recalls a similar experience occurring at the end of his education at Yale in the 1940s:

I recall vividly my last law-school class – it was in June 1947 (I had returned to law school after military service overseas) – when Professor Eugene Rostow, in the course in corporate finance, somehow brought the discussion around to the day’s news of the failure of a South Carolina grand jury to indict persons charged with carrying out the lynching of a black man, though the evidence against them was overwhelming. “Is that justice?” Professor Rostow asked. “What *is* justice?” I remember it particularly because it was the first time the word *justice* had been mentioned in any of the courses I had taken during three years of law study.

Harold J. Berman, ‘Forward’ in Michael W. McConnell, Robert F. Cochran, Jr. and Angela C. Carmella (eds), *Christian Perspectives on Legal Thought* (2001) xi-xii.

reconcile ethical dilemmas posited by numerous rules encountered in the study of tort (i.e., liability without fault, objective standards of fault, contingency fees, etc.) is the natural reaction of moral beings to such questions as those being are engaged in the active pursuit of justice. But many professors, especially torts professors, consider this desire to be a distraction which must be eliminated if the legal method will work.

Every torts student in America is quickly exposed to the caveat that there is a great chasm separating moral and legal rules. Many judicial opinions included in first year casebooks drive a wedge between moral and legal language. Without opportunity for meaningful reflection or discussion, law students, like Walter Bennett's colleague, are warned against "confusing law and morality." Students often interpret these warnings as signposts pointing down a path leading to the conclusion that law is amoral.

American law professors have justified efforts to push their students' moral impulses out of the classroom by citing Justice Holmes' admonition in *The Path of Law* that there are "many evil effects of the confusion between legal and moral ideas."⁴⁴ Undoubtedly, Bennett's torts professor thought he was faithfully inculcating Holmsian analytical skill and pursuing Holmes' call for precision in legal reasoning. Such reasoning, said Holmes, resulted only "when we wash [moral terms] with cynical acid and expel everything except the object of our study."⁴⁵ The object of our legal education, as any realist will tell you, was well defined by Holmes: "When we study law we are not studying a mystery but a well known profession. . . . The object of our study, then, is prediction of the incidence of the public force through the instrumentality of the courts."⁴⁶

As I will discuss below, there is an important and valuable pedagogical purpose in challenging the student to attempt to step outside of their own moral instincts in order to describe the law. In Holmes words, the student's instincts are often "fuzzy" and distract the student from the skill of predicting what a court will declare the law to be. More will be said regarding this valuable process below. For now I note that there is an important distinction between challenging a student to temporarily suspend their own moral instincts and demanding that the student to throw their moral identity out of the classroom permanently for the purpose of studying law. The professor's effort to cast all

⁴⁴ Oliver Wendell Holmes, Jr., 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 457-58.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

moral questions out of the classroom, the attempt discuss the law only as it is rather than as it ought to be, fractures the law student's moral identity and sets the student up for much professional confusion and frustration.⁴⁷

The first year experience is transformative. The student's analytical capacity increases but the student's thinking is in many ways now more limited. The skepticism developed by the first year legal method now compels the student to questions everything, including her own moral and ethical impulses. Without the assistance of legal, moral or political philosophy, the student who survives her first year is now thinking like a lawyer and heading toward the mental, emotional, physical and spiritual confusion plaguing many of her colleagues in the profession today. Is this the career path in the law Holmes intended? A closer examination of Holmes influential lecture reveals that the academy has, unfortunately, only heard half of what he had to say regarding learning the law. Our students would be well served if we would listen to everything that he was advocating instead of picking only those parts that advance our own skepticism.

II. Reconsidering the *Path of the Law*

On January 8, 1897, Oliver Wendell Holmes spoke at a ceremony at Boston University School of Law delivering an address to a group of lawyers, law professors and law students entitled *The Path of the Law*. His remarks, subsequently published in the Harvard Law Review,⁴⁸ have been read and cited by thousands of lawyers, law professors and law students since that day. To say that Holmes' lecture has been influential is a tremendous understatement.⁴⁹ Robert George has credited Holmes' lecture as the source of twentieth century legal philosophy.⁵⁰ The lecture is especially important to members of the legal academy because in it Holmes attempts to articulate a method of effectively studying law.

⁴⁷ Roger Cramton describes this harmful profession as follows:

Modern dogmas entangle legal education – a moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry. We will neither understand nor transform these modern dogmas unless we abandon our unconcern for value premises. The beliefs and attitudes that anchor our lives must be examined and revealed.

Cramton, above n. 13 at 262.

⁴⁸ Holmes, above n. 44.

⁴⁹ “*The Path of the Law* is one of the great classics of the legal canon. Like so many classics, it endures because it is a catalyst for new ideas.” Robert G. Bone, ‘Forward: Symposium – The Path of the Law Today’ (1998) 78 *Boston University Law Review* 691.

⁵⁰ Robert P. George, ‘One Hundred Years of Legal Philosophy’ (1999) 74 *Notre Dame Law Review* 1533.

Holmes begins: “When we study law we are not studying a mystery but a well known profession.”⁵¹ Holmes directs his audience away from the conceptualism prevalent during his generation, a search for axioms and formulas of law, to what he describes as the “true object of our study,” an examination of an internal process of prediction, a method enabling lawyers to predict for their clients the likelihood of the “incidence of the public force through the instrumentality of the courts.”⁵²

Holmes’ opening words, set in the place and time where they were spoken, were provocative. Formal legal education of Holmes’ day was often conceptual and general rather than scientific and particular. In order to appreciate the context in which Holmes spoke, consider the reaction to Dean Langdell’s introduction of the scientific case method at Harvard just thirty years earlier. Certain members of the Harvard faculty were so upset by Dean Langdell’s effort to divorce the study of law from the examination of general principles to the study of individual appellate decisions that they resigned from Harvard and founded the law school at Boston University.⁵³

Holmes’ words to the audience at Boston University seemed to demand a movement away from pursuing general principles and universal truths to conceiving the study of law as an entirely internal examination of the legal process used to predict the instrumental use of public power. This interpretation of Holmes’ words is bolstered by his assertion that the “confusion between legal and moral ideas” within legal education was the cause of “many evil effects.”⁵⁴ According to Holmes, legal education should direct the student to the “narrow path of legal doctrine” by banishing “every word of moral significance altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”⁵⁵

With these statements the American legal realism movement was conceived. Importantly, the legal realism movement Holmes fathered took shape during the same period of time when the traditional first year curriculum was falling into place in the American legal academy. The realists, citing Holmes, began demanding a strict separation in law school classrooms between law and morality. According to Dean Cramton, the realists were successful in achieving

⁵¹ Holmes, above n. 44 at 457.

⁵² *Ibid.*

⁵³ “Even from the moment of its introduction, Langdell’s case method was the subject of controversy. Members of the faculty withdrew from the school. It is recorded in the *Centennial History of the Harvard Law School* that ‘as a protest against’ the case method, ‘the Law School of Boston University was founded, having on its faculty eminent members of the Boston bar, and for many years it was regarded as a more practical school for lawyers than the Harvard Law School.’” Griswold, above n. 22 at 294-95.

⁵⁴ Holmes, above n. 44 at 458.

⁵⁵ *Ibid.*

this separation: “one of the most insistent notions [frequently encountered in legal education] is that there is an unbridgeable chasm between ‘facts’ (which are ‘real’ or ‘hard’ or ‘tangible’) and ‘values’ (which are ‘subjective’ or ‘soft’ or ‘intangible’). The distinction between the *is* and the *ought*, the legal realists said, was temporary and was designed merely to free legal scholars so they could take a fresh and critical look at how officials actually behaved, all as a preliminary to the main task of reforming legal institutions in the light of the suspended goals.”⁵⁶ Similarly, the suspension of the law student’s own instincts regarding what the law ought to be, realists would argue, is necessary to develop the student’s ability to predict and describe what law actually is.

Walter Bennett’s experience in his torts class is illustrative of the process. The torts professor led the student down a familiar Socratic path with the knowledge that the student’s moral and ethical desire to achieve justice would conflict with what the rule announced in the case actually was. Rather than guiding the student through the difficult process of reconciling the student’s instincts regarding what the law ought to be with the rule of law announced in the case under review, the professor threw the discussion of what ought to be out of the classroom. Bennett acknowledges, and I agree, that there was pedagogical value in this process: “[The torts professor] was admonishing [his students] to forget (at least temporarily) the fuzzier notions of justice and morality in order to learn the rigorous process of legal analysis – to learn, as [] Holmes put it, ‘to predict the incidence of public force through the instruments of the courts.’”⁵⁷ But Bennett has correctly identified a critical pedagogical failure in his professor’s approach, a failure which I argue fractures the moral identity of the typical first year student: “the problem is that no one told me and my classmates that the separation of law from morality was temporary. Indeed, the entire attitude of the law school hierarchy, both in the law school I attended and in many others then and now, is that man’s highest achievement is rigorous legal analysis and that serious students of the law must pay primary, in not exclusive, fealty to that purpose. Notions of justice and a higher morality are treated as distractions.”⁵⁸

This pedagogy remains central to the first year of legal education in American law schools. The inculcation of Holmsian analytic skill has become what Dean Cramton referred to as the “ordinary religion of the law school classroom.”⁵⁹ According to Cramton, the religion inculcated in the American law school classroom consists of the following core tenants: “a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a ‘tough-

⁵⁶ Cramton, above n. 13 at 254.

⁵⁷ Bennett, above n. 38 at 16.

⁵⁸ Ibid.

⁵⁹ Cramton, above n.13.

minded' and analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place."⁶⁰ The neophyte is accepted into the system when he develops the lawyer's ability to insure that "affirmations of value (our desires concerning what ought to be) do not intrude upon thought and knowledge and fact concerning what *is*."⁶¹ This initiation is usually complete by the end of the first year. The student will never think (or feel?) the way they did before they were converted.

Arguably, the environment within the average American law school classroom has become less orthodox since Cramton's time. However, many of the factors identified by Cramton which inhibit the moral development of law students remain embedded in law schools, especially within the traditional first year curriculum and pedagogy. These factors include: a steady diet of borderline cases (what Dworkin calls "hard cases"); the opaqueness and arbitrariness of line-drawing in such hard cases; an overemphasis on uncertainty and instability of law; a tendency to teach students to advocate legal positions in light of the existing law rather than development of ability to articulate proper ends; the failure to discuss the lawyer's role in law creation; and an explicit avoidance of value discussions in the classroom.⁶² Based on the research of Professor Bennett, many of these factors appear to remain part of the law school classroom and continue to cause law students to experience "moral alienation" as a result of the teaching method.⁶³

Is this the educational experience Holmes was advocating? No. Holmes advocated pursuit of what he described as a "great life in the law." He also lived this life. I doubt whether he would approve of any pedagogy resulting in what Dean Anthony Kronman has described as the demise of the legal profession's soul.⁶⁴

⁶⁰ Ibid at 248.

⁶¹ Ibid.

⁶² Ibid. at 253-56.

⁶³ Bennett, above n. 38 at 18. Professor Alan Watson surveyed members of an upper level seminar at the University of Georgia regarding their experiences in law school and published the results of his survey in the *Journal of Legal Education*. (2001) 51 *Journal of Legal Education* 91. These results provide additional support for the conclusion that students are frustrated by their first year experience. Watson writes: 'I was horrified that none of the students had anything good – not one thing – to say about legal education (though they did recognize that some professors were good teachers) . . . All said that the first year in law school was a horrible experience. More than one claimed that it was the worst year of their lives.': at 91. Watson's students also noted that ethical issues received inadequate treatment throughout law school.: at 92.

⁶⁴ Kronman, above n. 7 at 1.

Holmes warned his audience against misinterpreting his words: “I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life.”⁶⁵ Holmes was not asserting that in the process of studying law students should become unmoored from their moral identities and divorced from their own ideals. Near the end of his lecture Holmes warns his audience against too much focus on the machinery of legal education. He notes that “theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in building of a house.”⁶⁶ It is hard to believe that the author of this statement would approve of a curriculum that focuses entirely on the machinery of doctrinal law at the expense of a careful study of legal philosophy.

There is no doubt that Holmes called for the law student’s temporary suspension of moral reasoning for the limited purpose of studying the nature of the legal system as it is rather than as the student thinks it ought to be. But those who have excluded moral and legal philosophy from the first year law school curriculum, citing Holmes, have failed to consider his final admonition: “The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”⁶⁷ Holmes recognized that in order to master the lawyer’s craft one must reconcile their determination of what is with what it ought to be. The academy’s failure to join Holmes in acknowledging this truth (the insistence that there is nothing external to the positive law) has led to a crisis within legal education and the legal profession.

In Dean Cramton’s words, the primary aim of all education “is to encourage a process of continuous self-learning that involves the mind, spirit and body of the whole person. This cannot be done unless larger questions of truth and meaning are directly faced. If all law and truth are relative, pressing our views on others would be arrogant and mischievous. But if there is really something that can be called truth, beauty or justice – even if in our finiteness we cannot always agree on what it is – then law school can be a place of searching and creativity that aspires to identify and accomplish justice . . . If truth and justice have no reality or coherence, what does a lawyer have to do?”⁶⁸ What is it we are training students to do?

⁶⁵ Holmes, above n. 44 at 459.

⁶⁶ Ibid at 477.

⁶⁷ Ibid at 478.

⁶⁸ Cramton, above n. 13 at 263.

An answer is found in the preamble to the model rules of professional conduct lawyers are officers of the legal system “having special responsibility for the quality of justice.”⁶⁹ Is this a meaningless statement? Is the law student required to continue her suspension of moral reason as she enters the profession? If the answer to these questions is no, and surely the answer is no, then the legal academy should reconsider the exclusion of moral order from its first year classrooms. Law students should be given permission (and perhaps required) to pursue an understanding of what is just. The following section will outline a proposal for a modest reform of the traditional first year curriculum and first year pedagogy which will purposefully reintegrate the pursuit of justice with the study of law.

III. A Proposed Remedy: Connecting the Is and the Ought

Many have noted problems within the current structure, curriculum and pedagogy of the American law school. The Carnegie Report, MacCrate Report and Best Practices reports all encourage curricular reform in order to better prepare law students for entry into the profession.⁷⁰ These reports have received much attention within the American legal academy and have sparked a variety of curricular reforms.⁷¹ Most schools implementing or considering curricular changes are focused on reshaping the second and third year.⁷² As I have argued above, much of the damage to the student’s professional identity is already completed before the second year. Accordingly, changes to the second and third years are inadequate to remedy the intense skepticism and the impulse to brush off challenging ethical issues embedded in the law student as a result of the traditional first year curriculum and pedagogy. Changes in the first year are necessary.

I am not suggesting that the traditional first year curriculum and pedagogy must be thrown out. The traditional first year program effectively develops and sharpens analytical ability fundamental to effective participation in the practice of law. The case method is effective because it replicates an analytical and argumentative process really used in practice. Students must develop proficiency in deconstructing case law, identifying relevant legal arguments and predicting what a court is likely to hold in a particular case. Holmes correctly noted that clients pay lawyers for a specific service, that of predicting whether

⁶⁹ American Bar Association, Center for Professional Responsibility, ‘Preamble and Scope,’ *Model Rules of Professional Conduct* (2007 ed.) 1.

⁷⁰ Above n. 11.

⁷¹ A helpful summary of the curricular reforms under consideration or adopted in the American academy is available at <<http://lawteaching.org/publications/ILTLchartoflegaleducationreform200905.pdf>> at 29 August 2009.

⁷² *Ibid.*

or not the client's proposed conduct violates the letter of the law. Thus, students should be trained to dispassionately evaluate whether or not the client's conduct will result in the "incidence of the public force through the instrumentality of the courts."⁷³ The repetition of case briefing together with Socratic dialogue is effective in imparting these fundamental skills and must not be eliminated from the first year experience.

Acknowledging that the case method has pedagogical value, however, does not mean that its use must be continued in every first year course. The great pedagogical weakness in the traditional first year curriculum is a consequence of an overly narrow conception of the *telos* of legal education. The structure, curriculum and pedagogy of most first year programs in the American legal academy have narrowly focused on one primary objective: the development of rigorous, dispassionate, analytical "tough mindedness." The sharpening of the first year student's mind has often come at the expense of the student's body and spirit. This unbalanced effort to sharpen minds, ironically, damages the student's intellect.⁷⁴ This problem cannot be remedied by altering the content of the second or third year (especially for those students on whom the sword of attrition falls. They leave law school with a very narrow and, most likely, negative view of law and the legal profession).

Consider education in a different context. Kindergarten students should be taught their alphabet because they will need the ability to work with their ABC's in the real world. But this does not mean that the ABC's are the only thing that these youngsters should study. We should also teach them how to count, paint and play. Similarly, neophyte lawyers should be taught skills fundamental to their trade but they need more than technical legal skill to flourish in their professional life. More can be accomplished in the first year of legal education than just sharpening minds. We can, by offering our students a broader view of

⁷³ Holmes, above n. 44 at 457.

⁷⁴ Dean Griswold noted his observation of this phenomena among the students he observed during his years at Harvard:

I would like to suggest that another consequence of the unthoughtful use of traditional approaches to legal instruction is the exaltation of rationality over other values which are of great importance to our society. Note that I said "rationality," and not intellectualism, for I am not making an anti-intellectual point. Quite the contrary. The very essence of my submission is that in exalting purely logical reasoning, sometimes almost of the chess or bridge game type, we are not giving sufficient weight to other elements in the situation which are equally relevant in any truly intellectual evaluation. We push and squeeze our students; we question them and prod them; we indicate our belief in the minutiae. Be again and again we stress logic as the ultimate objective, though we may be rather unaware that we are doing so. We encourage imagination – in small ways, and perhaps in analogical reasoning. But do we encourage imagination in the broad sense? Do we encourage our students to devise new premises, to start out on whole new lines of reasoning, to come up with new solutions?

Griswold, above n.22 at 300-01.

the nature of law and legal reasoning in their first semester, inspire our students to use their new analytical skills to pursue things which are beautiful and just. How would we do this? The first year should become a more balanced educational experience with the integration of a course during the first semester exposing the student to the nature of law and the lawyer's role in the legal system. I would call this course *Law, the Lawyer and Justice*. The course description would read as follows:

This course is a foundational course introducing the law student to the concept of law and to the legal profession. What is law? What is justice? This course will introduce different answers to these fundamental questions by examining various theories of justice prevalent in the western legal tradition including natural law and natural rights theory, positivism, utilitarianism, legal realism, critical legal studies and enlightenment liberalism. This course will also introduce the student to the structure of law and the lawyer's obligations within the legal system. This examination will introduce the student to the adversarial process and the lawyer's ethical obligations to the client, bench and bar.

This course would give law students a solid foundation in legal philosophy on which to stand while they develop analytical skills critical to the lawyer's craft. As Alan Watson has said, we should purposefully cater to the need of both lawyer philosopher and lawyer plumber for both are necessary to a healthy profession and society.⁷⁵

The first year reform I am suggesting begins with a careful reexamination of first year pedagogical objectives and desired outputs. This first step has been recommended by the Carnegie Foundation Report, the MacCrate Report and the Best Practices for Legal Education report. Each of these reports includes data and recommendations useful for development of more balanced first year teaching objectives.⁷⁶ Schools should consider what the current outputs of the traditional first year program. If the school is happy with the current output of the first year program then it may not pursue any reform.

⁷⁵ Watson, above n. 25 at 93.

⁷⁶ The MacCrate Report, for example, invites such use: "Law Schools can use the [Report] as a focus for examining proposals to modify their curricula to teach skills and values more extensively or differently than they do now. Such modifications might include, for example: revisions of conventional courses and teaching methods to more systematically integrate the study of skills and values with the study of substantive law and theory." MacCrate, above n. 11 at 128.

The traditional first year program, as demonstrated above, produces second year students who often lose sight of the forest for the trees. The case method, often used in all but their first year legal writing sections, has turned their minds away from contemplation of general concepts to the rigorous tough-minded focus on taxonomy which the case-method was designed to produce. The remedy is to expose students early in their legal education to the forest by adding legal philosophy into the first year as a foundational course alongside the traditional doctrinal courses. This change would satisfy the entering student's desire to study the nature of law and justice, counteract the tendency of the typical doctrinal course toward the atomistic and particular by exposing law students to general theories of justice and improve the student's understanding of the lawyer's role in society.

This change, I argue, would enhance the student's experience in the other traditional first year course by enabling the student to more carefully examine cases they are briefing in their other courses. For example, if law students were introduced to the law and economics movement in a legal philosophy course, the student's ability to understand and the premises underlying product liability theories in tort would be much improved. In my experience, it is difficult to pursue a careful analysis of the law and economics movement in torts because the primary pedagogical objective of the course (i.e., Socratic questioning designed to develop the student's analytical skills) leaves little time for anything else. Students acquire the ability to sense the theory floating behind the rule⁷⁷ but are forced to settle on learning the rule in order to move on to the next one. It is very difficult to counteract this tendency in doctrinal courses due to the pressure to cover all of the traditional black letter law. Classroom discussion in all of the doctrinal courses would be much improved if students had already been introduced to general legal theory in a foundational course.

Some will argue that addition of the course I propose will not remedy the problems identified above and that my proposal amounts to nothing more than "tinkering with the curriculum." I offer several responses to this criticism. First, I am not arguing that the addition of one course is the only or the complete remedy to the problems diagnosed above. Experiential learning, apprenticeship

⁷⁷ On other occasions the theory behind the rule is overt. For example, on the third day of my first semester section of torts this fall, the casebook assignment included *Mohr v. Williams*, (1906) 108 NW 2d 818. The *Mohr* court held that a battery occurred, despite the good faith and skillful and successful conduct of the surgeon, because the plaintiff had not consented to an operation on her right ear but not her left. The court rested its holding on the "natural right" of the plaintiff to autonomy. Thus, the students are exposed to a controversial premise of great importance but due to the pedagogical goals of the course I was unable to proceed to a discussion of natural law theory.

or other non-traditional methods of education might also be beneficial. For a variety of reasons, however, I doubt whether the addition of experiential learning or mandatory clinical experiences in the first year is a feasible or reasonable solution to the lack of balance within the first year curriculum. Second, tinkering with the curriculum is required when the problem is caused by curricular imbalance. As Professor Krieger has noted, it is important address the imbalance *within* the curriculum and not attempt to resolve this problem at orientation or by other extracurricular activity. Third, I am not proposing “just another class.” The course I propose would pursue pedagogical objectives different from the traditional first year doctrinal course and expose students to a wider variety of reading materials regarding law. Rather than developing analytical skill, the course I propose would assist the student’s development of professional identity.

A few law schools have departed from the traditional first year curriculum. St. Thomas School of Law, for example, has added a course titled *Foundations of Justice* to its first year curriculum. According to the course description, the course is intended to “implement a pervasive approach to integrating faith and reason in a search for truth with a focus on morality and social justice.”⁷⁸ Regent Law School requires its first year students to enroll in a course entitled *Christian Foundations of Law* described as a jurisprudential survey of the Christian foundations of Anglo-American law.⁷⁹ The University of Detroit Mercy School of Law recently revised its first year curriculum and added a required course entitled *Core Concepts* intended to broaden the entering students understanding of the legal process and the relationship between theory and practice.⁸⁰

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See <<http://www.stthomas.edu/law/academics/Courses/Foundations%20of%20Justi.html>> at 29 August 2009. For a description of St. Thomas’ first year program see <<http://www.stthomas.edu/law/academics/Firstyear.html>> at 29 August 2009.

⁷⁹ See <http://www.regent.edu/acad/schlaw/academics/req_courses.cfm> at 29 August 2009. This course is described as follows: “Jurisprudential survey of the Christian foundations of Anglo-American law, including the development of higher/natural law thinking, higher law influence on the development of the common law, the rise of modern legal philosophies and the influence of Christian and secular worldviews on the development of American law.”

⁸⁰ See <<http://www.law.udmercy.edu/prospective/curriculum/index.phpI>> at 29 August 2009. The course is described as follows: “The Core Concepts course introduces students to a wide range of theoretical approaches and analytical techniques for approaching legal problems. Students then apply these theories and techniques to a set of problems that cut across torts, contracts, property, and civil procedure. This problem solving experience is a better way to teach students theory by having them apply it and to show them that most legal issues do not fit neatly within boxes labeled ‘torts,’ ‘property,’ ‘contracts,’ etc.”

These new courses illustrate a renewed receptivity to consideration of the conceptual along with the empirical in legal education. It will likely be noted that each of these institutions is a religiously affiliated law school. Religiously affiliated schools are surely not the only institutions concerned about the issues discussed in this essay. It is my presumption that all law schools are concerned about the health and wholeness of students. However, many religiously affiliated institutions, like the one at which I teach, pursue missions unlike traditional law schools in an important way: our institutions affirm the existence of ideals, norms and values external to human law. My faith tradition, for example, affirms that God is and that this God is the author of justice who has demonstrated his justice, mercy and love through the life, death and resurrection of Jesus Christ.⁸¹ This affirmation, undoubtedly, impacts the pedagogy, legal philosophy and professional identity of those within my faith tradition who now call Christ Lord. But this affirmation does not lead to a single, narrow, close-minded, anti-intellectual view of the world. Christianity has contributed much to the development of western law and still has much to offer.⁸²

One attribute common in many religiously affiliated schools is the belief that education of students requires demands more than sharpening minds. My institution's mission statement, for example, expresses our desire to "glorify God through education of the whole person, emphasizing integrity of character in a caring Christian environment where every individual matters every day."⁸³ Pepperdine University's affirmation of faith provides another illustration: 'Pepperdine University affirms . . . That the educational process may not, with impunity, be divorced from the divine process; That the student, as a person of

⁸¹ Faulkner University is affiliated with the churches of Christ. For a description of Faulkner's mission see <<http://www.faulkner.edu/discover/ata glance.asp>> at 29 August 2009. Pepperdine University is also affiliated with the churches of Christ and its affirmation of faith is available at <<http://seaver.pepperdine.edu/about/mission/affirmation.htm>> at 29 August 2009.

⁸² See *eg* McConnell, above n. 43. This book contains essays contributed by more than two dozen legal scholars illustrating a variety of legal perspectives claiming a connection to the Christian tradition. In his forward to the book, Professor Berman explains that the essays in the book are united less by theology than by their shared philosophic inquiry. He identifies two questions of moral philosophy unifying the project:

[O]ne is the analysis of law in general, and of various branches of the law, from the perspective of Christian concepts of justice and injustice; the other is the critique of major contemporary schools of legal thought which, in the guise of pragmatism, reflect (in the words of Albert W. Alschuler) 'the vices of atomism, alienation, ambivalence, self-centeredness, and vacuity of commitment that are characteristic of our culture.' One can hear in this an echo of Jesus' reprimand, 'Woe unto you lawyers, for you tite mint and dill and cumin but neglect the weightier matters of the law, which are justice and mercy and good faith.' (Matthew 23:23).

Berman, above n.38 at xiii.

⁸³ Above n. 81.

infinite dignity, is the heart of the educational enterprise . . . That truth, having nothing to fear from investigation, must be pursued relentlessly in every discipline.⁸⁴ These mission statements reflect what Christ identified as the first command: ‘Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind.’⁸⁵ This integrated view of education also reflects an emerging post post-modern coherentist epistemology. Albert Alschuler describes this epistemology as one portraying “analogy, induction and deduction as a single continuous process.”⁸⁶ These views of human reason encourage the integrated pursuit of technical legal skill along with a deeper understanding of the moral and legal philosophy underlying the legal process.

The most recent edition of the American Association for Law School’s *Journal of Legal Education* includes a symposium regarding the role of religiously affiliated law schools in the legal academy.⁸⁷ As a faculty member at a religiously affiliated law school, it is my belief that institutions which affirm the existence of ideals, norms and values external to the law will contribute to the health of the legal academy and profession. At the very least, scholars at religiously affiliated institutions will sharpen the arguments of those rejecting external norms by critiquing the premises underlying competing conceptions of law and justice.

But even more than this, religiously affiliated law schools overtly recognize what is true of all law schools, the fact that all law schools confront values and belief. Dean Cramton rightly explains that “law schools and legal educators are inevitably involved in the service of values. For the most part they serve as priests of the established order and its modern dogmas. The educator has an obligation to address the values that he is serving; and there is room for at least a few prophets to call the legal profession and the larger society back to a covenant faith and moral commitment that it has forsaken.”⁸⁸ The great fallacy of the realists (who were largely responsible for the formation of the traditional first year curriculum) is their claim that it is possible to step outside of one’s own moral identity, spit out legal predictions like a machine without ever needing to reconcile the answers with values external to the legal machine. The realists claimed to possess no legal philosophy – but, in fact, inculcated a legal

⁸⁴ Ibid.

⁸⁵ Luke 10:27 (NIV).

⁸⁶ ‘A Century of Skepticism’ in McConnell, above n. 43 at 101.

⁸⁷ John Garvey, ‘AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools’ (2009) 59 *Journal of Legal Education* 1, 125.

⁸⁸ Cramton, above n.13 at 263.

philosophy now reflected in the doubt, skepticism and valueless values commonly shared by members of the ailing American legal profession.⁸⁹ The current condition of the legal profession is a consequence of the failure of the realists to allow law students of generations past to imagine the possibility of what the condition of the profession otherwise might have been, trapping lawyers in the real world instead of upholding the possibility of the world as it ought to be.

⁸⁹ Dean Prosser, for example, claimed that he had no legal philosophy. William Prosser, 'My Philosophy of Law' (1942) 27 *Cornell Law Quarterly* 292, 295.

**SOVEREIGNTY-ITS CONCOMITANT INGREDIENTS, ITS
PRAGMATIC CONSTRAINTS AND ISLAMIC JURISPRUDENCE:
A CRITICAL APPRAISAL**

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Abstract: The modern concept of sovereignty has had many implications and many writers have tried to deal with them in their own way according to the circumstances in which they lived and, moreover, according to the problems they wanted to address through it.

In the wake of new developments and globalisation, which is associated not only with a new ‘sovereignty regime’ but also with the emergence of powerful new non-territorial forms of economic and political organisation in the global domain. Globalisation in this account is, therefore, associated with a transformation an unbundling of relationship between sovereignty, territoriality and state power. The traditional conceptualisation of sovereignty was simply a transitional phase in the legal philosophy and whether thoughts of Hobbes and Austin regarding sovereignty can no longer hold feasible in our contemporary world?

The paper will try to examine the concept of ‘Sovereignty’, the state power and territoriality thus stand today in a more complex relation than in the epoch during which the modern nation-states were forged in the post- world war era. It will also focus on Islamic viewpoint of sovereignty; we mean the whole range of those attributes which are imperative to dominate human intelligence and rationality while laying down the guidelines for the governance.

INTRODUCTION

The modern definition of sovereignty is generally attributed to John Austin. No doubt, he was the first jurist who articulated its concept in such a manner that well suited the legal structure of England. Though written with the

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predominant consideration of British legal system, yet the phraseology which Austin used to define the term ‘sovereign’ and ‘sovereignty’ still remains a juristic reality despite all the criticisms from various quarters.

‘Sovereignty’ - The theory of sovereignty which Austin adopts from Hobbes’ political philosophy and, to a lesser extent, from Bentham’s commentaries on Blackstone is intended to serve these purposes.¹

What makes commands rules is the element of generality in them; what makes rules Laws- in the sense of positive laws, the subject of Austin’s jurisprudence - is the fact that they are direct or indirect commands of the sovereign of an independent political society. These commands are addressed to the members of that society, who are thus subjects of that sovereign.

It is essential to note that he always means by sovereign the office or institution which embodies supreme authority; never the individuals who happen to hold that office or embody that institution through their relationships at any given time. Austin’s sovereign is an abstraction —the location of the ultimate power which allows the creation of law in a society. As will appear later, this point is of the greatest importance, since he has often been criticised for describing sovereignty and the source of legal authority in ‘personal’ terms. Undoubtedly he felt no need to labour the matter for, in the tradition of political theory which he relies on; sovereignty is explicitly ‘abstract’. Hobbes writing in the context of Cromwellian England, describes sovereignty as the ‘artificial soul’ of ‘an artificial man’, the latter being the state or commonwealth. The sovereign is an office not a particular person or particular people.²

Though generally credited with being the pioneer in the field, John Austin can simply be considered as the jurist who developed the notion of ‘sovereignty’, the raw material for which had already been supplied by Jeremy Bentham and prior to him by Hobbes. Making a comparison between Bentham and Austin on this point, Joseph Raz observes;

“Sovereignty”—Bentham, ‘When a number of persons’, he wrote, ‘(whom we may style subjects) are supposed to be in the habit of paying obedience to a person or an assemblage of persons, of a known and certain description (whom

¹ Roger Cotterrell, *The Politics of Jurisprudence — A Critical Introduction to Legal Philosophy* 1989, (Butterworths, London and Edinburgh), 67.

² Ibid 67-68.

we may call governor and governors) such persons together (subjects and governors) are said to be in a state of political society.’

One need only compare this passage with the following from the Province, p.194 to realize how great Austin’s debt to his master is. If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.³

A vague idea had already been given by Hobbes, What is the sovereign of an independent political society? Hobbes had defined such a society as one which could defend itself, unaided, against any attack from without.⁴

Yet Austin, more than any other writer, provided the compact and systematic formulation of a conception of law which allowed an escape from the tradition-bound theory implicit in classical common law thought.⁵

SOME BASIC CHARACTERISTICS OF SOVEREIGN

Describing the basic characteristics of sovereign as enunciated by John Austin, Roger Cotterrell says;

‘Some characteristics of Austin’s sovereign: It must be common (that is only one sovereign can exist in any political society; the sovereign is, in that sense, indivisible although it can be made up of several components) that it must be determinate (that is, the composition of the sovereign body or the identity of the sovereign person must be clear). A further characteristic has produced more controversy than any other aspect of Austin’s conception of sovereignty. That is that the sovereign is illimitable by law. This follows directly from Austin’s definition of law. Every law is the direct or indirect command of the sovereign of an independent political society.’⁶

Austin provided what historical jurisprudence could not; a clear designation of the scope of legal knowledge, an orderly theory of law which allowed the legal to be distinguished from the non-legal and the logical connections between

³ Joseph Raz, *The Concept Of a legal System - An Introduction to The Theory of Legal System*, Second Edition- 1980 (Clarendon Press –Oxford), 6.

⁴ Roger Cotterrell, above n 1, 68

⁵ Ibid 52.

⁶ Ibid 69.

legal ideas to be made explicit. Finally he offered a way of looking at law which made legislation central rather than peripheral. Thus his legal theory recognized the reality of the modern state as a massive organization of power.⁷

One of Austin's most important successors (Hart, 1955) goes on to remark that 'within a few years of his death it was clear that his work had established the study of jurisprudence in England'. (Austin died in 1859)⁸

The basic ingredients of Austinian concept of 'sovereign' and 'sovereignty', according to Joseph Raz,
'Existence criterion - A law is a general command of a sovereign to his subjects. In contrast to Bentham (and Kelsen) Austin thinks that only general commands, i.e. those obliging to acts or forbearances of a class', are laws.⁹

For Austin a command is defined in terms of the following six conditions: C is A's command if and only if (1) A desires some other persons to behave in a certain way (2) he has expressed this desire (3) he intends to cause harm or pain to these persons if his desire is not fulfilled; (4) he has some power to do so (5) he has expressed his intention to do so and finally (6) C expresses the content of his desire and of his intention and nothing else. In Austin's own words; '.....But a command is distinguished from other significations of desire by this peculiarity; that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire. (Province, p.14 and p.17)¹⁰

A law is part of a legal system if and only if it was enacted directly or indirectly by the sovereign of that system (Austin), or if and only if it is authorized by the basic norm of the system (Kelsen), or if and only if it ought to be recognized according to the rule of recognition of the system (Hart). These three philosophers were not concerned with the material unity of legal systems.¹¹

'Austin says that sovereignty is the power of affecting others with evil or pain and of enforcing them, through fear of that evil, or fashion their conduct to one's wishes'. (Province, 24)¹²

⁷ Ibid 69.

⁸ Ibid 52.

⁹ Joseph Raz, above n 3, 11.

¹⁰ Ibid 11.

¹¹ Joseph Raz, *The Authority of Law — Essays on law and Morality*, 1979, (Clarendon Press — Oxford), 79.

¹² Josef Raz, above n 3, 12-3

Where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command and, therefore, imposes a duty.¹³ ‘Any particular law may be disregarded and constantly violated, and still exist, so long as the legal system of which it is a part is on the whole obeyed.’¹⁴

THE PRAGMATIC CONSTRAINTS OF SOVEREIGNTY

Hobbes, Bentham, Austin and others who followed them in advocating the institution of sovereign having absolute powers within a given society might have been prompted by the political set-up of their own times. They perhaps wanted to discourage any effective challenge to the unbridled authority of the person or persons that happened to be at the helm of affairs and thus to strengthen the existing institutions.

The sovereign state thus emerges to vindicate the supremacy of the secular order against religious claims; and it forces the clerics into the position of subordinate authority from which, after the Dark Ages, it had itself so painfully emerged. It is argued by Bodin, as later by Hobbes in a period of similar disintegration, that if the state is to live there must be in every organised political community some definite authority not only itself obeyed, but also itself beyond the reach of authority. This was the root of Hobbes’ argument. The will of the state must be all or nothing. If it can be challenged the prospect of anarchy is obvious. ... A sovereign people, they argued cannot suffer derogation from the effective power of their instruments. Its will must be unimpeachable if it is to direct the destinies with which it is charged. We must not forget the atmosphere, not merely in which the theory of sovereignty was born, but also in which, at the hands of each of its great exponents, it has secured new emphasis. That has been always, from Bodin to Hegel, a period of crisis in which the state seemed likely to perish unless it could secure the unified allegiance from its members.¹⁵

Laski elaborates,

‘Those who have most powerfully shaped the theory of sovereignty — Bodin, Hobbes, Rousseau, Bentham and Austin — were, with the exception of Austin, all of them writing before the nature of federal state had been at all fully explored. Either, like Bodin, they thought in terms of unlimited power of the

¹³ Ibid 13.

¹⁴ Ibid 16.

¹⁵ Harold J.Laski, *A Grammar Of Politics*, First published in 1925,1982,(George Allen and Unwin Publishers Ltd.), 46.

prince, or, like Bentham, in terms of the unlimited power of the legislature; and they might, like Rousseau, deny legitimacy to any act which emanated merely from a representative organ.¹⁶

Bodin developed one of the most celebrated definitions of sovereignty. Sovereignty, in this account, is the untrammelled and undivided power to make laws. It is the supreme power over subjects; ‘the right to impose laws generally on all subjects regardless of their consent.’¹⁷

It was Hobbes, however, who was the first to grasp fully the nature of public power as a special kind of institution — an ‘Artificial Man’, defined by permanence and sovereignty, giving life and motion’ to society and body public.¹⁸

Further in the words of Fiona Robinson, ‘As Peterson and Runyan argue, sovereign men and sovereign states are defined not by connection or relationships but by autonomy in decision-making and freedom from the power of others .Security is understood not in terms of celebrating and sustaining life, but as the capacity to be indifferent to ‘others’ and, if necessary, to harm them’.(Peterson and Runyan,1993,p.34) By interpreting as indifference what is normally understood as prudent non—intervention ,we begin to highlight a serious moral deficiency of both political liberalism and the so-called morality of the states’.¹⁹

Notwithstanding the traditional definition of sovereignty and the political compulsions that induced its general acceptance, the political climate in which we find ourselves does not permit its continuance in that form. No doubt, the sovereign bodies within the fixed geographical limits will remain and continue to be acknowledged as such but their absolutism as the supreme law-makers, totally beyond challenge from any corner, has been brought under severe strain.

Sovereignty, the state power and territoriality thus stand today in a more complex relation than in the epoch during which the modern nation-state was forged and the post-war era during which the idea of human rights too hold.

¹⁶Ibid 49.

¹⁷ David Held, *Democracy and the Global Order - From the Modern State to Cosmopolitan Governance*, 1995 (Polity Press), 39.

¹⁸ Ibid 40.

¹⁹ Fiona Robinson , *The Limits of a Rights—Based approach to International Ethics in Human Rights* in Tony Evans edited ,*Fifty Years on –A re-appraisal*, 1998, (Manchester University Press), 63.

Indeed, globalisation is associated not only with a new ‘sovereignty regime’ but also with the emergence of powerful new non-territorial forms of economic and political organisation in the global domain, e.g. trans-national social movements, international regulatory agencies, and so on. The modern institution of territorially circumscribed sovereign rule appears somewhat anomalous juxtaposed with the trans-national organization of many aspects of contemporary economic and social life. Globalisation in this account is, therefore, associated with a transformation or to use Ruggie’s term, an unbundling of relationship between sovereignty, territoriality and state power.’(Ruggie, 1993; Sassen 1996)²⁰

The globalisation which has definite impact on the traditional notion of sovereignty has changed the basic character of those institutions which were hitherto regarded as the foundation of a nation’s sovereign independence. Moreover, in the fast changing international atmosphere which is encountering the terrorist and nuclear threats, the global community, if it adheres strictly to the principle of non-intervention on the pretext of the collapsing edifice of sovereignty, the doom of the world is inevitable. Most pertinent in this connection are the following observations of Harold J.Laski,

‘The pluralists therefore argued that, however majestic and powerful, the state in fact was only one of many associations in society, that, in experience, there were always limits to its powers, and that those were set by the relation between the purpose the state sought to fulfil and the judgment made by men of that purpose.’²¹

What ,as I think now, was right in the pluralist doctrine, were its conceptions,(1) that a purely legal theory of the state can never form the basis of an adequate philosophy of the state .(2) that the state is, in fact, no more entitled to allegiance than any other association on grounds of ethical right or political wisdom; and (3) that its sovereignty is at bottom, a concept of power made valid by the use of a coercion which, in itself, is morally neutral. Society as a complex whole is pluralistic; the united power of the state which we call sovereignty, that legal right as Bodin put it, to give orders to all and receive orders from none, is made monistic (as in the classical legal theory) by the fact

²⁰ Anthony G. Mc Grew ,Human Rights in a Global Age Corning to Terms with Globalisation, in Tony Evans edited, *Human Rights Fifty Years on — A re-appraisal*, 1998 (Manchester University Press) 193.

²¹ Harold J.Laski , above n 14, XI(Introductory Chapter).

that it has behind its will, on all normal occasions, the coercive power to get its will obeyed.²²

‘When a class- society in this sense is destroyed, the need for the state, as a sovereign instrument of coercion, disappears; in Marx’s phrase it “withers away”. As that is achieved, both the nature of authority and the law it ordains undergo a fundamental transformation.’²³

‘.....The scale of modern civilisation has made the national and sovereign state an institutional expedient of which the political un-wisdom and moral danger are both manifested.’²⁴

The sovereignty of states is seen to be a fiction as soon as they attempt the exertion of their sovereignty. Their wills meet with one another; they can not cut a clear and direct route to their goal. Their wills meet, because their relations grow ever more intimate, and the institutions of the sovereign state fail to express the moral wants of those intimate relations.²⁵

There are problems of which the impact upon humanity is too vital for any state to be felt to determine by itself what solution it will adopt. The notion of independent sovereignty, for example, leaves France free to invade Germany when and how she pleases; and the only retort that can be made is either a dissent which does not alter the fact, or a war which destroys civilization. Once we realize that the well-being of the world is, in all large issues, one and indivisible, the co-ordinate determination of them is the primary condition of social peace.²⁶

In such an aspect the notion of an independent sovereign state is, on the international side, fatal to the well-being of humanity.²⁷

The recent instances of how the international community is mobilised in its crusade against terrorism and the efforts to exert pressures on the nations to avert war, lest it should escalate into nuclear conflagration leading to some cataclysmic destruction, have established this reality that what Hobbes and

²² Ibid X1 (Introductory Chapter).

²³ Ibid XIII (Introductory Chapter).

²⁴ Ibid 587.

²⁵ Ibid 662.

²⁶ Ibid 65.

²⁷ Ibid 65.

Austin thought of sovereignty can no longer hold feasible in our contemporary world.

THE STRUCTURAL INGREDIENTS OF SOVEREIGNTY AND ISLAMIC PERCEPTION

‘Allah! There is no god but He, - the Living, the Self-subsisting Supporter of all. No slumber can seize Him, nor sleep. His are all things in the Heavens and on earth. Who is thee can intercede in His presence except as He permitted?. He knoweth what (appeareth) to His creatures as Before or After or Behind them. Nor shall they compass aught of His knowledge except as He willeth. His Throne doth extend over the heavens and the earth, and He feeleth no fatigue in guarding and preserving them. For He is the Most High, the Supreme (in glory)²⁸

It is enough, for the moment, to postulate the disappearance of state - sovereignty as the conditions without which the life of reason is impossible to states.²⁹

‘The developments relating to disruptive nationalism and to the all- affected idea of democracy clearly suggest, then, that important new ideas about the nature of ‘the people’ may be emerging.³⁰

The above observations clearly suggest that the theories of ‘state-sovereignty’ and ‘nationalism’, despite all the claims regarding their final acceptability, are still not firmly rooted and it appears as if a time has come which is necessitating a fresh definition of these terms. Their traditional meanings and significance have collapsed under the weight of changing circumstances. The Hobbes, Locke, Bentham and Austin’s definitions of ‘sovereign’ and ‘sovereignty’ might have appealed to reason at the time when the abstractions of natural law had totally confused the juristic approach but now with a radical change in the global circumstances, they are heading towards redundancy. Barry Holden observes on this point,

²⁸The Holy Qur’an, (Abdullah Yusuf Ali trans.1938), Surah 2- Al- Baqarah, Ayat.255.

²⁹ Harold J.Laski, *A Grammar of Politics* , Eleventh Impression -1982 (George Allen and Unwin Ltd),65.

³⁰ Barry Holden ,Democratic theory and The Problem of Global Warming, in Barry Holden Edited *The Ethical Dimensions of Global Change*, First Published Great Britain in 1996 (Macmillan Press Ltd),142.

‘The ‘sovereign people’ came to be identified with the nation and ‘until recently at least’, has accepted a given world divided into nation-states. But it is now being asked whether, in a changing world, this is any longer ‘the given’. There is both a questioning of the presumed coincidence of existing nations and states and some dissolution of the division of the world into watertight compartments.’³¹

He says further,

‘However, the fact that the central democratic value — mass control of governmental activity - is re-embodied in this emerging conception gives it a definitive importance such that it can be said to re-define ‘the people’. The question of who constitute the people’ comes to be answered by reference to a fresh specification of which sections of the masses should do the controlling.’³²

David Held attributes the emergence of the whole notion of sovereignty to the collapse of the established forms of the authority and it was through this new juristic notion that the vacuum could be filled up. The falling power of the Church in Europe, resulting in the clash of authority between the clergy and the aristocracy made it imperative that some new strategy be invented that should be acceptable to both as the centre of power. He writes;

‘Sovereignty became a new way of thinking about an old problem; the nature of power and rule. When established forms of authority could no longer be taken for granted, it was the idea of sovereignty that provided a fresh link between political power and ruler ship. In the struggle between Church, state and community, sovereignty offered an alternative way of conceiving the legitimacy of claims to power.’³³

The modern concept of sovereignty has had many implications and many writers have tried to deal with them in their own way according to the circumstances in which they lived and, moreover, according to the problems they wanted to address through it. Hobbes had his own way of defining it as Raymond Plant observes;

‘Hobbes’ account of the nature of the sovereign is concerned to draw conclusions about the necessity of the sort of power the sovereign wields from

³¹ Ibid 139.

³² Ibid 142.

³³ David Held, *Democracy and the Global Order - from the Modern State to Cosmopolitan Governance*, first ed. 1995 (Polity Press), 39.

facts about human desire, particularly the desire for power, and the relationship between individuals which follow from a proper understanding of their nature.³⁴

John Austin who is generally credited with having given one of the most precise and accurate definitions of sovereignty was also motivated by the political situation prevailing in England during his lifetime. His definition has been the most controversial one in the sense that whether the sovereign of his imagination is the absolute law-giver, not controlled by any other consideration. Many jurists conclude that the concentration of all powers in the hands of sovereign, to the exclusion of all other factors, is outside the Austinian hypothesis. For example Roger Cotterrell observes;

‘First, Austin does not suggest the sovereign is free of limitations but only legal limitations. Thus positive morality (reflected in public opinion, widespread moral or political expectations and ultimately the threat of rebellions) may provide important constraints. Secondly, most of Austin’s discussion of sovereignty relate primarily to the conditions of representative democracies. (Especially Britain and the United States) Thirdly, Austin’s concept of delegation by the sovereign is used by him to express the possibility (which has become a reality in most complex modern industrialised societies) of very extensive dispersion of legislative, adjudicative, and administrative authority with the overall hierarchical framework of a centralised state.’

Austin’s sovereignty is not a legal but a pre-legal notion. It is the logical correlate of an assumed factual obedience. (Manning 1933: 192,202) It is not “a specified organ” or complex of organs, but it means that individual or collectively at whose pleasure the Constitution is changed or subsists intact. (C.A.W. Manning, 1933:192)³⁵

Discussing the views of Rousseau about sovereignty, Martin, J. Walsh observes, it should be observed that the ‘sovereign’ means, in Rousseau, not the monarch or the government, but the community in its collective and legislative capacity.

‘The social contract can be stated in the following words. Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole.’ This act of association creates a moral and

³⁴Raymond Plant, *Modern Political Thought*, 1991(Basil Blackwell), 11.

³⁵Roger Cotterrell, *The Politics of Jurisprudence -A Critical Introduction to Legal Philosophy*, 1989, (Butterworths) 70.

collective body, which is called the state' when passive, the 'sovereign when active, and a power' in relation to other bodies like itself³⁶

Making an elaborate observation about the theory of Jean-Jacques Rousseau, Ian Adams observes,

'Jean-Jacques Rousseau (1712-78): His argument was that what distinguishes the human from the animal was not that humans have reason, but the fact that human beings are capable of moral choice and, therefore, men must be free in order to exercise that choice. If people are not free, or if their freedom is restricted, then their humanity is being denied and they are being treated as sub-human, as slaves or animals.'

Rousseau then went on to insist that if people had to live according to laws they did not make themselves, then they are not free, they are slaves. It made little difference if a law-making body had been elected by the people, since it was still other people making the laws; those subject to them were still denied the freedom which was their natural right as human beings. On Rousseau's theory, vast majority of us living in today's liberal democracies are denied their rightful freedom and, therefore, 'slaves'.

If everyone voted according to what they knew was the common good, and not their own interests, then the laws passed would be valid and binding; in obeying them everyone would be free because they would be obeying themselves. These laws would be, as he put it, an expression of the 'GENERAL WILL'.

He only wishes that the GENERAL WILL is always right and that 'the voice of the people is the voice of God'. But apart from these theoretical difficulties, Rousseau's notion of an assembly of all citizens is clearly not possible in modern states....³⁷

Commenting on Rousseau, Bertrand Russell, says, (Jean Jacques Rousseau - 1712-78) The social contract involves that whoever refuses to obey the general will shall be forced to do so. 'This means nothing less than that he will be forced to be free'..... The conception of being forced to be free' is very metaphysical....³⁸

³⁶ Martin. J. Walsh, *A History of Philosophy*, 1985,(Geoffrey Chapman London), 670.

³⁷ Ian Adams, *Political ideology today*, 1993, Manchester University Press, 20-21.

³⁸ Bertrand Russell, *History of Western Philosophy and Its Connection with Political and Social Circumstances From the Earliest Times to the Present Day*, 1955,(George Allen and Unwin London) ,671.

In the wake of the developments that have been taking place, especially after the First World War, which have witnessed the emergence of the written constitutions working with the internal dynamics of law, it appears that the traditional conceptualisation of sovereignty was simply a transitional phase in the legal philosophy. The first such assault on sovereignty came from the Pure Theory of Law as expounded by Hans Kelsen who evaluated legal theory, not in terms of sovereign and its subjects, but as an integrated structure of the hierarchy of norms. Discussing Kelsen, Roger Cotterrell observes,

The pure theory of law dissolves away the state's legitimacy as a potential agency of intolerance. It insists that the state is properly seen as merely the effect of the structure of norms governing the relationships of individual human beings. For Kelsen the doctrine of sovereignty is harmful precisely because it asserts the existence of a supreme entity above law.

Equally, the pure theory of law does its best to dissolve away the nation, as a supreme entity, too. Kelsen argues that the logic of the pure theory leads to the recognition of International law as a single supreme legal system; one in which the norms presented as the basic norms of national or municipal legal system, now appear in a new light as subordinate norms within the international legal order whose validity is ultimately governed by a basic norm of International law.³⁹

The great fanfare which marked the advent of the sovereignty, as we presently understand it, is gradually fading away. There was a time when the emergence of the British Parliament as an omnipotent sovereign body was heralded in legal philosophy as a landmark development but now it is being considered as having produced a negative impact on individual freedom F.A. Hayek writes on this development. "The triumphant claim of the British Parliament to have become sovereign, and so able to govern subject to no law, may prove to have been the death-knell of both individual freedom and democracy."⁴⁰

In the context of the sovereign's unlimited powers, Joseph Raz, while quoting Robert Paul Wolff, observes,

³⁹ Roger Cotterrell, *The Politics of Jurisprudence , A Critical Introduction to Legal Philosophy*, 1989, (Butterworths), 115.

⁴⁰ F.A. Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas*, first published in 1978, 1990 ,(Routledge),154.

‘Robert Paul Wolff, to take one well-known example says that authority is the right to command, and correlatively, the right to be obeyed.’ (Robert Paul Wolff- In Defence of Anarchism. New York, 1970.p.4)⁴¹

David Held, while explicating the various structural ingredients of sovereignty, writes, ‘The idea of state sovereignty was the source of the idea of impersonal state power. But it was also the legitimating framework of a centralised power system in which all social groups in the long run wanted a stake. How elements of both state and popular sovereignty were to be combined coherently remained far from settled.’⁴²

If sovereignty is the rightful capacity to take political decisions and to enact the law within a given community with some degree of finality, it must be entrenched in certain rules and institutions from which it cannot free itself.⁴³

CONCLUSION

Coming to Islamic conception, the most important thing is that the concept of sovereignty as inferred from the attributes of Allah bears many similarities to the modern concepts. Not only that, but it appears that Islamic concept is the progenitor of the whole philosophical conceptualisation regarding the definitions of sovereignty. The wordings of *Kalima*.⁴⁴ the first declaration of faith- that ‘There is no god but Allah and Muhammad is His Messenger bear a strong proximity to the Austinian theory that ‘If a determinate human superior, not in the habit of obedience to a like superior’ and to Kelsen’s theory of the hierarchy of norms’, meaning thereby that the Grundnorm is the justification for all subordinate norms whereas no norm can be used to justify the existence of Grundnorm. It is self-subsisting. All the conceptual aspects of sovereignty, its positive and negative implications, as found in Austin and Kelsen’s theories are present in the *Kalima*. The following verses are most relevant to understand the Islamic philosophy of Divine Sovereignty;

⁴¹ Joseph Raz, *The Authority of Law - Essays on Law and Morality*, 1979 (Clarendon Press- Oxford), 11.

⁴² David Held, *Democracy and The Global order from the Modern State to cosmopolitan Governance*, first published – 1995,(Polity Press),46.

⁴³ Ibid 157.

⁴⁴ Explanation of the word ‘Kalima.’ There is no god only Allah and Muhammad is the messenger of Allah

‘O ye who believe! Spend out of the (bounties). We have provided for you, before the Day comes when no bargaining (will avail), nor friendship, nor intercession. Those who reject Faith, they are the wrong-doers.’⁴⁵

‘Allah! There is no God but He, - the Living, the Self-subsisting, Supporter of all. No slumber can seize Him, nor sleep. His are all things in the Heavens and on earth. Who is thee can intercede in His presence except as He permitteth? He knoweth what (appeareth) to His creatures as Before or After or Behind them. Nor shall they compass aught of His knowledge except as He willeth. His Throne doth extend over the heavens and the earth, and He feeleth no fatigue in guarding and preserving them. For He is the Most High, the Supreme (in glory).’⁴⁶

‘Whatever is in the Heavens and on Earth, doth declare the praises and glory of Allah, - the Sovereign, the Holy One, the Exalted in Might, the Wise. It is He Who has sent amongst the unlettered a messenger from among themselves, to rehearse to them His Signs, to purify them, and to instruct them in the Book and Wisdom, - although they had been, before in the manifest error.’⁴⁷

‘Whatever is in the heavens and on earth, doth declare the Praises and Glory of Allah: to Him belongs dominion, and to Him belongs praise: and he has power over all things.’⁴⁸

In the present context, it is not only necessary that the existence of the ultimate authority as the last grundnorm must be established but the form of that authority is equally important. The authority, from the viewpoint of the faith may be taken as the Creator or Sustainer of the entire universe, but this aspect of the Authority is not enough to fulfil the need for which we discuss it from the juristic angle. In law the supposition of such an authority assumes a totally different dimension. When in jurisprudence we discuss this concept of authority, we mean the whole range of those attributes which are imperative to dominate human intelligence and rationality while laying down the guidelines for the governance.

⁴⁵ The Holy Qur’an, (Abdullah Yusuf Ali trans 1938), Surah. 2-Al- Baqarah, Ayat. 254.

⁴⁶ *Ibid.* 255.

⁴⁷ *Ibid.* Surah, 62- al-Jumuah, Ayat. 1-2.

⁴⁸ *Ibid.* Surah, 64- at - Taghabun, Ayat, 1.