

# The University Bookman

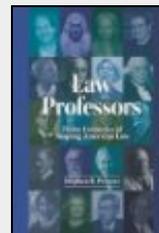
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Winter 2017

## Love and the Law Professors

*Law Professors: Three Centuries of Shaping American Law*

by Stephen B. Presser.  
West Academic Publishing, 2017.  
Hardcover, 502 pages, \$48.



ALLEN MENDENHALL

**A**s improbable as it sounds, someone has written “a love letter to the teaching of law.” At least that’s what Stephen B. Presser sets out to do in *Law Professors*, which is less pedagogical than it is historical and biographical in approach. If not a love letter, it’s at minimum a labor of love about the genealogy of American legal education, for which Presser is admirably passionate.

A poor man, if he has dignity, honesty, the respect of his neighbors, a realization of his duties, a love of the wisdom of his ancestors, and possibly some taste for knowledge or beauty, is rich in the unbought grace of life.

Russell Kirk

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Even more improbable is how a book about three centuries of law professors could be enjoyable. Yet it is. Every rising law student in the United States should read it as a primer; experienced legal educators should consult it to refresh their memory about the history and purpose of their profession.

Presser is the Raoul Berger Professor of Legal History Emeritus at Northwestern University's Prizker School of Law and the legal-affairs editor of *Chronicles*. He's a leading voice of what is sometime referred to as paleoconservatism, who maintains that our political dysfunction derives in part from the methods and jurisprudence of law professors. His book might be called a diagnosis of our social ailments, the cure being the repurposing of legal education.

Beneath his silhouettes—two involve fictional figures (Lewis Eliot and Charles Kingsfield) while the other twenty deal with actual flesh-and-blood teachers—lies a structural dualism that enables him to classify his subjects under mutually exclusive heads: those who believe in higher law and divine order, and those who believe that laws are merely commands of some human sovereign. The former recognize natural law, whereby rules and norms are antecedent to human promulgation, whereas the latter promote positivism, or the concept of law as socially constructed, i.e., ordered and instituted by human rulers.

These binaries, Presser says, explain the difference between “common lawyers and codifiers,” “advocates of Constitutional original understanding and a living Constitution,” and

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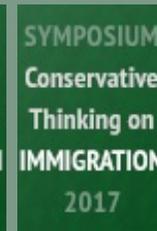
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“economic analysts of law and Critical Legal Studies.” Here the dualism collapses into itself. The common-law method is at odds with originalism in that it is evolutionary, reflecting the changing mores and values of local populations in a bottom-up rather than a top-down process of deciphering governing norms. Constitutionalism, especially the originalism practiced by Justice Scalia, treats the social contract created by a small group of founding framers as fixed and unamendable except on its own terms. The law-and-economics movement as represented by Judge Posner and Judge Easterbrook is difficult to square with natural law because it’s predicated on cost-benefit analysis and utilitarianism. In short, it’s a stretch to group the common law, originalism, and the law-and-economics movements together, just as it’s strange to conflate legislative codification with critical legal studies. Distinctions between these schools and traditions are important, and with regard to certain law professors, the binaries Presser erects are permeable, not rigid or absolute.

Presser’s narrative is one of decline, spanning from the late eighteenth century to the present day. It begins with Sir William Blackstone, “the first of the great modern law professors.” Presser may overstate the degree to which Blackstone propounded a common-law paradigm that was frozen or static and characterized by biblical principles. The influence of Christianity and moral principles is unmistakable in Blackstone’s *Commentaries on the Law of England*, especially in its introductory and more general sections, but the vast majority of the treatise—which was intended for an audience

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#### NEWS

🚩 We are pleased to announce the release of *The University Bookman on Edmund Burke*, now available for Kindle. Collecting 21 reviews, essays, and interviews from the Bookman on the life and thought of Edmund Burke, this book is only \$2.99, and purchases support our ongoing work to provide an imaginative defense of the Permanent Things. (3 Mar 2015)

#### OTHER SITES OF INTEREST

- 🚩 The Imaginative Conservative
- 🚩 Arts & Letters Daily
- 🚩 First Things
- 🚩 Manhattan Institute
- 🚩 City Journal
- 🚩 National Review
- 🚩 The Heritage Foundation
- 🚩 Ethics and Public Policy Center
- 🚩 Books & Culture
- 🚩 The New Atlantis
- 🚩 The New Criterion (and blog)
- 🚩 Intercollegiate Studies Institute
- 🚩 First Principles Journal
- 🚩 The Acton Institute
- 🚩 The New Inquiry
- 🚩 Image
- 🚩 Good Letters Blog

of young aspiring lawyers, not scholars or jurists—describes basic, mundane elements of the British legal system and organizes judicial principles and decisions topically for ease of reference. Presser is right that, more than anyone else, Blackstone influenced early American lawyers and their conception that the common law conformed to universal, uniform Christian values, but Jefferson’s more secular articulation of natural law as rooted in nature had its own adherents.

Other teachers included here are James Wilson (after whom Hadley Arkes has named a fine institute), Joseph Story (whose commitment to natural law is offset by his federalist and nationalist leanings), Christopher Columbus Langdell (whose “original and continuing impact on American legal education is unparalleled”), Oliver Wendell Holmes Jr. (whose career as a professor was short and undistinguished), John Henry Wigmore (whose “sometimes idol” was Holmes), Roscoe Pound (“a figure of extraordinary talent”), Karl Llewellyn (the “avatar” of the legal-realist movement), Felix Frankfurter (“no longer the God-like figure at Harvard”), Herbert Wechsler (“the anti-Holmes”), Ronald Dworkin (who reformulated the theories of John Rawls), Richard Posner (the subject of William Domnarski’s recent biography), Antonin Scalia (“best known for his bold conservative jurisprudence”), and several still-living contemporaries.

- ☰☆☆ The American Spectator
- ☰☆☆ The American Conservative
- ☰☆☆ Front Porch Republic
- ☰☆☆ Anamnesis Journal
- ☰☆☆ The City (from HBU)
- ☰☆☆ Lapham’s Quarterly
- ☰☆☆ Bookworm from KCRW
- ☰☆☆ G. K. Chesterton Institute
- ☰☆☆ The Catholic Thing
- ☰☆☆ What’s Wrong with the World?
- ☰☆☆ The Western Confucian
- ☰☆☆ The Tocqueville Forum
- ☰☆☆ National Humanities Institute
- ☰☆☆ The Center for Vision & Values at Grove City College
- ☰☆☆ Ricochet
- ☰☆☆ Chronicles
- ☰☆☆ Arion
- ☰☆☆ Via Meadia at The American Interest
- ☰☆☆ The Distributist Review
- ☰☆☆ Journal of Catholic Legal Studies
- ☰☆☆ The Library of Law and Liberty
- ☰☆☆ Huron County Extract
- ☰☆☆ The Academy of Philosophy and Letters
- ☰☆☆ Southern Literary Review
- ☰☆☆ The Dorchester Review
- ☰☆☆ The Independent Institute
- ☰☆☆ C.S. Lewis Society of California
- ☰☆☆ Crisis Magazine
- ☰☆☆ Liberty Island
- ☰☆☆ The New York C. S. Lewis Society
- ☰☆☆ Starting Points Journal

#### PUBLISHER SITES

- ☰☆☆ Yale University Press
- ☰☆☆ Eerdmans
- ☰☆☆ Harvard University Press
- ☰☆☆ Catholic University Press
- ☰☆☆ Princeton University Press
- ☰☆☆ Encounter Books
- ☰☆☆ Ivan R. Dee

Presser is particularly hard on Holmes, relying on Albert Alschuler's harsh and often careless assessments of the Magnificent Yankee. He charges Holmes with embracing the view that judges were essentially legislators and suggests that Holmes was "policy-oriented." Although this portrayal is popular, it is not entirely accurate. In fact, Holmes's jurisprudence was marked not by crude command theory (the Benthamite version of which he adamantly rejected) but by deference and restraint. Presser himself recalls Alschuler in claiming that Holmes "was prepared to approve of virtually anything any legislature did."

So was Holmes a policy-oriented judge legislating from the bench, or did he defer to legislatures? Undoubtedly the latter. Only once during his twenty years on the Massachusetts Supreme Judicial Court did he hold legislation to be unconstitutional. As a Supreme Court Justice, he almost programmatically deferred to state law. "[A] state legislature," he said, "can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States," adding that courts "should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." Rather than imposing his personal policy preferences, Holmes believed that a judge's "first business is to see that the game is played according to the rules whether [he] like[s] them or not." If Holmes's conception of judicial restraint and the Fourteenth Amendment had carried

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-  Cambridge University Press
-  University of Chicago Press
-  Farrar Straus Giroux
-  St Augustine's Press
-  Ignatius Press
-  University of Missouri Press
-  The University Press of Kentucky
-  The Crumpled Press
-  Slant Books
-  Wiseblood Books

the day, the holdings in *Roe v. Wade*, *Planned Parenthood v. Casey*, *Lawrence v. Texas*, and *Obergefell v. Hodges*, among others, would not have occurred.

Presser admittedly doesn't like Holmes, but he is polite about it. There's a charming sense of collegiality in his assessments of his contemporaries as well. He boasts of his own traditionalism without hesitating to call Duncan Kennedy and Catharine MacKinnon "brilliant." He disagrees with his opponents without denigrating their intelligence and expresses gratitude to faculty whose politics differ radically from his own. He describes a variety of disciplinary schools, including critical race theory, which don't appeal to him. And he gives some unjustly neglected thinkers (e.g., Mary Ann Glendon) the attention they rightly deserve while some overrated thinkers (e.g., Cass Sunstein) receive the attention they relish.

President Obama is held up as the quintessential modern law professor, the type of haughty pedagogue responsible for the demise of the rule of law and the widespread disregard for constitutional mandates and restrictions. Yet law professors as a class weren't always bad; in fact, they once, according to Presser, contributed marvelously to the moral, spiritual, and religious life of America. Presser hopes for a return to that era. He wishes to restore a proper understanding of natural law and the common-law tradition. His conclusion takes a tendentious turn that reveals his abiding conservatism. Those who agree with him will finish reading this book on a high note. His political adversaries, however, may question

whether they missed some latent political message in earlier chapters.

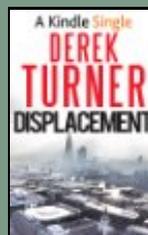
But isn't that the nature of love letters—to mean more than they say and say more than they mean? Presser's love letter to law teaching is enjoyable to read and draws attention to the far-reaching consequences of mundane classroom instruction. He's a trustworthy voice in these loud and rowdy times. 🚩☆

Allen Mendenhall is associate dean at Faulkner University Thomas Goode Jones School of Law and executive director of the Blackstone & Burke Center for Law & Liberty. Visit his website at [AllenMendenhall.com](http://AllenMendenhall.com).

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*Did you see this one?*

**A Terrible Beauty**  
Michael Warren Davis  
Summer 2015



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