

ESSAY

A Fragment on Legal Innovation

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Starting in the mid-nineteen sixties through at least the mid-nineteen eighties, if you were a Fortune 500 Company about to become involved in a major takeover fight, your law firm was either Skadden, Arps or Wachtell, Lipton¹—and if it was not, you wished it were.² These firms were mergers and acquisitions (M&A) law’s most dominant players,³ a fact attributable to their willingness to engage in and defend against hostile takeovers, a practice which was then considered “dishonorable” by the white-shoe law firms of the day.⁴ They were firms teaming with talented lawyers, ready

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1. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1835 (2008); see also Steven Brill, *Two Tough Lawyers in the Tender-Offer Game*, N.Y. MAG., June 21, 1976, at 52-53 (describing Colt Industries’ acquisition of Garlock, Inc.).

2. MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS 119 (2008); Brill, *supra* note 1, at 53-55.

3. See BRETT COLE, M&A TITANS: THE PIONEERS WHO SHAPED WALL STREET’S MERGERS AND ACQUISITIONS INDUSTRY 58-63 (2008).

4. Wald, *supra* note 1, at 1835; see also GLADWELL, *supra* note 2, at 124-25; Eli Wald, *The Rise of the Jewish Law Firm or is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 914-15 (2008).

and willing to use every legal tool at their disposal to win.⁵ Skadden and Wachtell were filled with the most brilliant lawyers from the most prestigious schools, who had been shut out of the white-shoe firms because they were Jewish.⁶

The men who led the M&A practices at these firms, and worked the big cases, Joe Flom and Marty Lipton, were the brightest of all.⁷ Joe Flom's partners regarded him as "the best lawyer of his generation" and "the finest in the second half of the twentieth century."⁸ Flom's nemesis, Marty Lipton, eight years Flom's junior, was not far behind.⁹ Top of his class at New York University Law School, a former Editor-in-Chief of the *New York University Law Review*, a graduate of the University of Pennsylvania's Wharton School,¹⁰ and "the merger industry's leading philosopher,"¹¹ one can scarcely whisper the name Joe Flom without some mention of Marty Lipton trailing close behind.¹²

Their talents and tenacity were legendary. Between them, these lawyers and the law firms they led crafted an enormous number of legal innovations.¹³ Skadden developed new and aggressive takeover tactics, employing what had been token corporate formalities to empower aggressive corporations to engage in hostile takeovers without the

5. See LINCOLN CAPLAN, *SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE* 8-10 (1993).

6. This racism was so intense and perverse that even Alexander Bickel—who would become "perhaps the finest constitutional scholar of his generation"—could not get a job on account of his "*antecedents*." GLADWELL, *supra* note 2, at 121-22; see also *id.* at 121-29 (detailing "The Importance of Being Jewish"); COLE, *supra* note 3, at 9. Skadden also had an unusually open culture, and welcomed "castoffs . . . late bloomers and, if not misfits, then not quite smooth fits." CAPLAN, *supra* note 5, at 47.

7. See COLE, *supra* note 3, at 3, 18, 62.

8. CAPLAN, *supra* note 5, at 3; see *id.* at 5-6.

9. See Brill, *supra* note 1, at 52-53.

10. COLE, *supra* note 3, at 18.

11. *Id.* at 2.

12. See CAPLAN, *supra* note 5, at 59; see also Brill, *supra* note 1, at 53.

13. See Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 *LAW & SOC. INQUIRY* 423, 433 (1993).

approval of the targets' corporate boards.¹⁴ Wachtell responded by making equally unprecedented use of primordial mechanisms for arranging corporate compensation, securitization, and organization to shut-down Skadden's circumventions.¹⁵ These mechanisms for corporate "defense"—golden parachutes, pac-man defenses, scorched earth retreats, shark repellants, and lock-ups—culminated in the "poison pill."¹⁶ "[T]he poison pill was a legal innovation that involved the issuance of new rights, or potential rights, to shareholders of target corporations"¹⁷—widely considered among the most important developments in corporate law in the latter-half of the twentieth century.¹⁸

Skadden and Wachtell's efforts transformed more than the arcane legal language within which corporate lawyers argue about fine points of corporate law: their efforts radically transformed the substance of these social arrangements, from the structure of the capital markets to the substantive relationship between boards, shareholders, and management we see today.¹⁹ Skadden and Wachtell also changed the rules of engagement between law firms and their corporate clients. Marketing their legal innovations to clients as specialized tools designed to achieve specific ends, they

14. *See id.* at 430 (describing Skadden's frequent and daring use of the "hostile tender offer" as a "deviant innovation utilized by outsiders to the main game on Wall Street").

15. *See id.* at 433-35.

16. *See id.* at 434.

17. *Id.* at 429.

18. *See* Ronald J. Gilson, *Lipton and Rowe's Apologia for Delaware: A Short Reply*, 27 DEL. J. CORP. L. 37, 37 (2002) ("Martin Lipton has a strong claim to having devised the most important innovation in corporate law since . . . 1879."); Powell, *supra* note 13, at 429 (calling it "the most significant and controversial of the several new defensive antitakeover devices that appeared during the mid-1980s"); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 779 (2010) (calling the poison pill "one of the most important legal inventions").

19. *See* COLE, *supra* note 3, at 7-11 (describing the shift on Wall Street from a culture focused on facilitating the aims of corporate clients to a culture focused on generating corporate transactions).

actively generated—or, in Wachtell's case, policed—the market for corporate control.²⁰

Skadden and Wachtell, we are told, were something new in the history of American corporate law. Though lawyers and law firms had long played a dynamic role in the making of corporate law,²¹ before Skadden and Wachtell the role was primarily thought to be instrumental, not generative.²² Lawyers helped corporations by guiding them and implementing the *corporation's* aims through the ritual of legality, not by inventing new devices and legal instruments of their own accord.²³ As Robert Gordon has explained, from the post-Civil War period through the early twentieth century—the era which saw the rise of enormous corporations—“[f]or the most part, corporate lawyers did little more than select and in some instances devise the most legally defensible and advantageous forms through which decisions already made could be executed.”²⁴ This is not to say that such lawyers did not use every legal tool in their toolboxes to pursue what Gordon describes as “economic warfare” against the laboring classes,²⁵ but it does represent a substantively different conception of the role of the lawyer,

20. See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 351-52 (1994); Powell, *supra* note 13, at 423, 427, 448, 452 (describing this fundamental shift); see also Brill, *supra* note 1, at 56.

21. See BERYL HAROLD LEVY, CORPORATION LAWYER: SAINT OR SINNER? 26, 47 (1961); see also Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983) [hereinafter Gordon, *Legal Thought*] (describing how lawyers contributed to lawmaking through the creation of new legal practices and devices, such as tax shelters, new ownership and leasing arrangements, new types of securities, and even new corporate forms).

22. See ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 160-67 (1964); Gordon, *Legal Thought*, *supra* note 21, at 78-81.

23. See Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 441-43, 453, 459, 466 (2010) (describing the distinction between rational-formal legality and substantive liberality).

24. Gordon, *Legal Thought*, *supra* note 21, at 78.

25. *Id.* at 78-80.

and the function of law, than the understanding Skadden and Wachtell are thought to have pioneered—that of the law firm as a research and development lab for the creation and refinement of “legal-technological innovation[s].”²⁶

But the idea that Skadden and Wachtell invented corporate legal innovation may be largely a product of narrative chance. In the years before their rise, the elite bar shrouded its efforts to mold and shape corporate law beneath a thick layer of aristocratic civility. Outwardly, lawyers told the world that their primary attributes were expertise and dispassionate counsel. Elite corporate lawyers hewed to the rhetoric of “the lawyer as instrument” through at least the middle twentieth century.²⁷ In *The Wall Street Lawyer*, Erwin O. Smigel’s classic account of the culture in the era’s large law firms, Smigel explained that Wall Street firms in the forties and fifties thought of themselves as white knights whose duty was to ensure that things ran smoothly for their clients.²⁸ But Smigel’s account was based almost entirely on what the lawyers in these firms told him their role was. Thus, the idea that lawyers were merely instruments may or may not have been how lawyers actually perceived themselves, but it was the picture of themselves they offered to the media and social historians.²⁹

This veneer of stoicism and traditionalism was easy to maintain. After all, these lawyers all came from the same Ivy League schools, went to the same churches, summered at the same vineyards, and considered litigation and contestation

26. *Id.* at 80 (“[I]t has yet to be established that . . . [legal-technological innovation] was of primary causal significance in determining strategies and structures of enterprise.”).

27. See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209 (2003).

28. See GLADWELL, *supra* note 2, at 124.

29. Erwin O. Smigel’s account is based on interviews. See SMIGEL, *supra* note 22, at 17-34. As for what these lawyers told the media, they were famously discrete, but this has too often been taken to mean they were not aggressive behind the scenes—in truth, we do not really know what happened behind the scenes, which was precisely what these lawyers sought. See GLADWELL, *supra* note 2, at 124; see also Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 142 (1977).

in the courts unseemly.³⁰ Thus, to the outside world, large law firms were not innovators, or even fearsome negotiators, but talented legal accountants.³¹ According to Smigel, the large law firms told him their primary task was to manage “the enormous complexity of nationwide and foreign commerce under our federal system, the powers reserved to the several states and the perplexing congeries of laws under which we move and have our being.”³² If anything, corporate lawyers were guardians of virtue who operated as a “brake” on voracious corporate appetites.³³ “Lawyers often use their positions as advisors to guide their clients into what they believe to be proper and moral legal positions” and serve “as the conscience of the businessman.”³⁴

This Victorian image—of corporate lawyers as little more than elite tax preparers—persists today.³⁵ As John C. Coffee,

30. GLADWELL, *supra* note 2, at 122-25; see Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 674-75 (1994).

31. SMIGEL, *supra* note 22, at 161-62. Smigel’s account of the nature of the elite corporate legal profession in the early twentieth century has been enormously influential. One can scarcely find a source that does not cite his work prominently at face value for the propositions that corporate lawyers saw themselves as counselors and advisors whose primary purpose was the implementation of corporate aims through ethical means. But Smigel’s account, as Smigel notes, reflects the self-description of the professionals within the profession at the time, and often at considerable temporal remove from the time they are describing. The account in the *The Wall Street Lawyer*, in other words, is almost surely much more of an elaborate rhetorical enterprise—a rosier and not altogether accurate depiction of the nature, aims, and goings-on of the American legal profession of the early twentieth century—than most scholars who rely on its attractively neat and straightforward narrative suspect.

32. *Id.* at 161 (quoting ARTHUR W. DEAN, WILLIAM NELSON CROMWELL, 1854-1948: AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE, AND INTERNATIONAL LAW 83-85 (1957)); see also *id.* at 162 (“That much of the business of the large law firms is complex and important is recognized by their legal staff and is documented in the histories of law offices.”).

33. *Id.* at 342 (“Their cautious use of societal brakes provides the liberal with time and opportunity to seek change in a relatively stable society. The revolutionary is thwarted because the keepers of the status quo do not allow the seeds of deep discontent to flower.”).

34. *Id.* at 6.

35. JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 193 (2006) (“In truth, the world of the corporate lawyer probably

Jr., wrote in 2006 of the contemporary bar, corporate lawyers are principally “transaction engineer[s]” whose “special skill” is “drafting and disclosure,” more similar to “the accountant” than “the litigator/advocate.”³⁶ Indeed to the extent that the role of the corporate lawyer has changed, it has changed for the worse, as the kind of lawyer Smigel described—possessing both the power and independence to serve as an ethical check on corporate appetites—has slowly gone extinct.³⁷ All that is left of the Paleolithic corporate lawyer, in Coffee’s view, is the lawyer-accountant.³⁸

The mythos of American corporate law has thus come to be dominated by an understanding that, until the rise of Skadden and Wachtell, lawyers in the private bar largely saw themselves as agents of corporate interests, and clients largely perceived them as tools for the solving of social problems through the ceremony of legal custom and legal argument.³⁹ Legal formalities were just that—formalities. Private lawyers existed then, and to a large extent exist now, more or less only to ensure that i’s are dotted and t’s are crossed. At their best, they were merely instruments by which decisions already made were implemented, justified, and rationalized.⁴⁰ In other words, before Skadden and Wachtell, lawyers in private law did not take into account public values or ideological ends when they engaged in litigation but rather made whatever arguments they could to

more closely borders on that of the accountant than that of the litigator/advocate.”).

36. *Id.* at 192-93.

37. *Id.* at 194-96.

38. *See id.* at 195 (“Over the last 30 years, the legal profession has to a considerable degree followed the business model of the accounting profession.”); *see also id.* at 195-97, 229-32.

39. *See, e.g.,* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 941 (1993) (“The fact that lawyers innovate to compete has practically gone unnoticed in writing about the legal profession.”); Powell, *supra* note 13, at 424 (“Sociological research on lawyers generally has followed two streams of development, neither of which explicitly addresses the role of lawyers in developing and expanding the law.”).

40. *See* Robert W. Gordon, *Corporate Law Practice As a Public Calling*, 49 MD. L. REV. 255, 257 (1990).

zealously advance the narrow interests of their immediate clients.

While there is much that is undoubtedly true in this account, it seems to neglect something important about how American lawyers throughout American history—outside, at least, the early twentieth-century elite corporate bar—have talked about themselves, the work they do, and the services they provide.⁴¹ American lawyers have long spoken in terms that seem to envision themselves as something more than sophisticated hammers. Lawyers have long branded themselves as something akin to legal-technological innovators—to borrow Robert Gordon's construction⁴²—whose professional role is to develop and invent remarkable and ingenious legal solutions to otherwise intractable social, political, economic, and legal puzzles even beyond the needs of their immediate clients.⁴³ While it is certainly possible and even likely that much of this narrative has been purely rhetorical, there is a story to be told about legal innovation before Skadden and Wachtell “invented” it. To understand how and why this is, it is useful to go back to the birth of modern commercial litigation more than two hundred years ago.

Before there was a Joe Flom or a Marty Lipton, even before there were law firms called Skadden or Wachtell, there were William Blackstone and William Murray, First Earl of Mansfield (who historians like to refer to as Lord

41. *But see* Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1498-1503 (1996) (arguing that most lawyers and judges are legal formalists who “experience law as a process of logical deduction” and that American jurisprudence fails to appreciate this because “American jurisprudence has yet to recognize the law in lawyers' heads.”). I dispute the premise that American lawyers have ever embraced or extolled formalism *over* functionalism. I think history points toward an understanding that formalism has only ever risen to ascendance in instances where it served functional ends. *See, e.g.*, Gordon, *Legal Thought*, *supra* note 21, at 71.

42. Gordon, *Legal Thought*, *supra* note 21, at 80.

43. *See, e.g.*, Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555, 562 (1989); Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679, 683 (1996).

Mansfield), a pair of English judges who profoundly influenced the legal culture of the colonial United States. Blackstone's *Commentaries on the Law of England* were probably the most widely read legal text in the United States between the late eighteenth and mid-nineteenth centuries.⁴⁴ As for Lord Mansfield, "[i]n this country . . . a pure Mansfieldianism flourished: not only were his cases regularly cited but his lighthearted disregard for precedent, his joyous acceptance of the idea that judges are supposed to make law—the more law the better—became a notable feature of our early jurisprudence."⁴⁵

Both Blackstone and Mansfield were pragmatists who saw law as something that should be, first and foremost, concerned with consequences.⁴⁶ Blackstone set his view of legal rationality in a historical frame, arguing that the development of the English Common Law reflected the logical development of doctrines that had come close to the perfection of reason precisely *because* it facilitated efficient commercial intercourse and promoted overall social welfare.⁴⁷

44. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967); DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* iii (1958) ("In the history of American institutions, no other book—except the Bible—has played so great a role . . ."); *id.* at 3 ("In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law."); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 7 (1996) ("Before 1900, almost every American lawyer read at least part of Blackstone."). The history presented here is necessarily stylized for brevity. More substantial works on the history of American legal thought and the American Legal Profession are numerous. Useful primers are MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977) [hereinafter HORWITZ, 1780-1860], and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960* (1992).

45. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 24 (1977) [hereinafter GILMORE, AGES]. Mansfield served as the Chief Justice of the Court of King's Bench in England from 1756 to 1788. *Id.* at 114 n.5 ("His opinions are notable for their salty wit, their almost complete irreverence for the past, and their extraordinary sensitivity to the actual practices of the mercantile community.").

46. As I use pragmatism in this Essay, I mean roughly—though only roughly—the sort of "evolutionary pragmatism" set out by Philip P. Wiener. See PHILIP P. WIENER, *EVOLUTION AND THE FOUNDERS OF PRAGMATISM* 174-89 (1949).

47. See, e.g., 1 WILLIAM BLACKSTONE, *COMMENTARIES* *74, *260-61, *273. Blackstone repeatedly throughout his *Commentaries* refers to the study of law as a "science." See, e.g., *id.* at *4, *9.

Mansfield put these Blackstonian principles into practice. While he had no respect for the traditions or the precedents of the Common Law, he took the notion that judges should conform to commercial law as nearly as possible seriously.⁴⁸ In his time as Chief Justice of the Court of King's Bench, he often called together merchant juries that he consulted to decide commercial disputes.⁴⁹

Because they wrote and understood law in this way, Blackstone in his *Commentaries* and Mansfield in his cases both shaped the American understanding of law as its system began to take form, and also reflected the pragmatism and scientificism that was already emerging and overtaking English and American legal thought.⁵⁰ In other words, these pragmatic English legal roots mean that "American lawyers are and always have been rationalizers, generalizers, theorists—metaphysicians, we might say, *manqués*."⁵¹ American lawyers from the very first have cared far less for precedent than consequence, and far more for experience than principle.⁵² By 1820, American lawyers and judges treated the common law as an instrument for the promotion of progress, on equal footing with legislation in importance and prestige.⁵³ This "emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change."⁵⁴

But crediting the judges alone takes far too narrow a view. The creation of this understanding of the uses of the American common law emerged from a legal profession

48. Lochlan F. Shelfer, Note, *Special Juries in the Supreme Court*, 123 YALE L.J. 208, 213-15 (2013).

49. *Id.*; GILMORE, AGES, *supra* note 45, at 114 n.5 ("Mansfield established a 'jury' of London merchants and was accustomed to seek their advice on mercantile custom and practice in commercial cases.").

50. See, e.g., HORWITZ, 1780-1860, *supra* note 44, at 2; Gordon, *Legal Thought*, *supra* note 21, at 82; see also GILMORE, AGES, *supra* note 45, at 6-7, 10.

51. GILMORE, AGES, *supra* note 45, at 10.

52. See HORWITZ, 1780-1860, *supra* note 44, at 24.

53. *Id.* at 30.

54. *Id.*

steeped in Blackstone and awed by Mansfield. Lawyers saw themselves as part of a grand common law tradition, the strength of which had always been “the doggedness, always insensitive and often unscrupulous, with which ideas ha[d] been used as weapons” whose vitality lay in “the unceasing abuse of its elementary ideas.”⁵⁵ Lawyers of the time were merciless law abusers. To give just one example, future Chief Justice Marshall, in his only appearance before the United States Supreme Court in *Ware v. Hylton*—probably one of the most important cases in American history, settling once and for all that the federal government could do whatever was necessary to effectuate the 1783 Treaty of Paris with Great Britain—appealed almost exclusively to the Supreme Court’s sense of justice and fairness in arguing that his client, the defendant debtor Hylton, should not be made to pay the same debt twice.⁵⁶ He lost, but he argued boldly from consequence, not doctrine.⁵⁷

As English and American law and lawyers grew apart, American pragmatism took on a life of its own. Chancellor Kent, America’s Blackstonian disciple (a famed Judge, Law Professor at Columbia University, and probably the most influential American treatise writer of the 1830s onward⁵⁸), “devoted much of his career to overcoming populist impulses in legal administration and to justifying the continued

55. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* xi (1969).

56. *See Ware v. Hylton*, 3 U.S. 199, 213 (1796). Luckily for future generations of proud Americans, the Supreme Court rejected his view four to one. *Id.* at 220-85 (giving the opinions of each of the Justices seriatim). Only Justice Iredell agreed that fairness to the litigant outweighed the national interest in fulfilling its treaty commitments. *Id.* at 280 (opinion of Iredell, J.)

57. Of Marshall’s considerable lawyerly daring, Thomas Jefferson withheld no scorn: “So great is his sophistry, you must never give him an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I’d reply, ‘Sir, I don’t know, I can’t tell.’” 1 *DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES: NINETEENTH PRESIDENT OF THE UNITED STATES 1834-1860*, at 116 (Charles Richard Williams ed., 1922).

58. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *COLUM. L. REV.* 547, 564-66 (1993) (noting that Kent’s *Commentaries* went through fourteen editions and that “Kent died rich enough [from book royalties] to be included by the tax assessor on the list of New York’s wealthiest persons.”).

validity of the English common law in the new republic.”⁵⁹ Kent advocated English Common Law for the same reason Blackstone did—“the English decisions were pronounced by Judges of vastly higher erudition and skill in the knowledge of the common law.”⁶⁰ More learned, their decisions were more likely to be in the public interest.

Meanwhile, Mansfield’s great American acolyte, Justice Joseph Story,⁶¹ continued to preach the cause of consequentialism in all three of his great juridical roles: as a Justice on the Supreme Court, a prolific writer of treatises, and as the Dane Professor of Law at Harvard (at a time—the 1830s—when the Harvard Law Faculty consisted almost entirely of the Dane Professor of Law at Harvard).⁶² Story’s writings hold up a powerful mirror to their time. Story’s ideology was as much a product as a driver of an American legal culture that bore an intensely pragmatic hue. By 1850, “[l]aw, once conceived of as protective, regulative, paternalistic and, above all, a paramount expression of the moral sense of the community, had come to be thought of as facilitative of individual desires[.]”⁶³

American law retained this techno-instrumentalist flavor even during the era of formalism that lasted from roughly the middle nineteenth into the early twentieth century. The very ideologies that Blackstone, Mansfield, and Story had sown into American law enabled the era’s excesses. “It was Story himself, when he took over at Harvard in the 1840s, who reduced the content of legal science to private law” excluding “politics, legislation, civil law, international

59. *Id.* at 568 (footnote omitted).

60. Letter from James Kent to Simeon Baldwin, (n.p.) [Poughkeepsie] (July 18, 1786) (Yale Univ. Manuscripts & Archives, Baldwin Family Papers, Gen. Correspondence, Group 55, Series I, Box 3, Folder 48).

61. GILMORE, AGES, *supra* note 45, at 24.

62. *See id.* at 119 n.11; Michael von der Linn, *Harvard Law School’s Promotional Literature, 1829-1848: A Reflection of the Ideals and Realities of the Story-Ashmun-Greenleaf Era*, 13 GREEN BAG 2D 427, 427 n.1 (2010).

63. *See* HORWITZ, 1780-1860, *supra* note 44, at 253. Though this frenzied development had carried with it its own unexpected normative baggage. As Horwitz continues in the quoted passage above, law had also come to be seen “as simply reflective of the existing organization of economic and political power.” *Id.*

law, and liberal learning” from the Harvard curriculum.⁶⁴ Without realizing it, the idea that lawyers should use the law as a tool for legal innovation had become detached from any kind of training in what, precisely, the law-tool was meant to achieve. This was “a vulgarized version of Whig legal science, shorn of its pretension to elegance, public statesmanship, and Ciceronian virtue”⁶⁵—weapons training without a course on chivalry.

The important takeaway is that legal innovation never slowed even as ideas about the ends of law radically transformed. Indeed, if anything, the rise of the new legal science in the 1870s and 1880s meant that law became even more instrumental. As the nation (or perhaps only the professional classes) increasingly embraced radical-libertarianism, “laissez-faire economics and late nineteenth-century legal theories” became “blood brothers.”⁶⁶ Lawyers working at the time not only felt no compunction casting off seven hundred years of English precedent (as they had been busy doing for the preceding century), but they found a way to cast off even those innovations that had been developed in the preceding decades by rival conceptions of public virtue.⁶⁷ In a McLuhan-esque maneuver, formalist lawyers of the era managed this transformation by asserting that the medium was the message⁶⁸: their outcomes—the preservation of liberty, the freedom to contract, the godhood of markets—were the outcomes deducible from social science. Unsurprisingly, these lawyers concluded they were also the outcomes deducible from legal science. Formalism was just another way of doing what American lawyers had been doing

64. Gordon, *Legal Thought*, *supra* note 21, at 87.

65. *Id.*

66. GILMORE, *AGES*, *supra* note 45, at 66.

67. *See id.* at 60-64. Though Gilmore does not explicitly recognize that this era of formalism actually implemented the public values ascendant at the time, he does explain admirably how it implemented the values it did.

68. *See generally* MARSHALL McLUHAN & LEWIS H. LAPHAM, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 18-35 (1994).

for the preceding hundred years—creating legal innovations.⁶⁹

Like a map of a large and complex terrain, the foregoing is necessarily an abstraction, including only the most essential features. Nonetheless, the takeaway of this brief account is meant to be merely this: American lawyers have possessed a kind of shadow-ideology since the founding—a self-perception that they are destined to be legal innovators.⁷⁰ Even as the modes and methods of argument have changed, and one formal understanding of the nature of law and legal argument has given way to another, lawyers have seen themselves and their role as that of creators of legal devices that benefit the public interest.

Moreover, as this brief survey reveals, legal innovation serves not only immutable interests (if there be any at all) but far more often serves ephemeral interests.⁷¹ As Justice Oliver Wendell Holmes, Jr., wrote in the opening lines of *The Common Law* in 1881—at the height of the era of legal formalism—it is “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men” that determine the rules by which men are governed.⁷² This phrase takes on new meaning if one thinks of Holmes not as an outsider but as a participant in an ongoing self-conscious process of legal innovation. In that light, *The Common Law* is not so much a critique of formalism, as it is often taken to be,⁷³ as an engagement with it. Formalism was just another way of implementing social policy, and Holmes was promoting a

69. See Gordon, *Legal Thought*, *supra* note 21, at 91-110.

70. The account could continue on into the early twentieth century, and perhaps in a later instantiation of this project it might, but for present purposes an account of the nation's first hundred years seems enough to highlight the trend.

71. See Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1016 (1997).

72. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

73. See, e.g., MORTON GABRIEL WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* 15-18 (Beacon Press 1957) (1949) (casting Holmes's effort as part of a “revolt against formalism.”).

different way—devising, as it were, his own legal innovations.⁷⁴

One legal innovation in particular still persists, which is the separation of contract and morals—an innovation that was litigated and ultimately fully entrenched in American legal thought by the end of the nineteenth century.⁷⁵ This legal innovation was the product of the private bar—lawyers working as lawyers—and it ultimately subsumed and replaced existing legal doctrines. Now, we take it for granted, though at the time of its formulation it marked a significant break with the past.

The idea of a transubstantive set of principles for the governance of all promises—that is, the very idea of contract as a unitary doctrinal field—is itself a legal innovation of relatively recent vintage.⁷⁶ Though it was not crafted by the practicing bar, but rather fashioned by Christopher Columbus Langdell, then the Dean at Harvard Law School in the 1870s.⁷⁷

This is not to say contract did not exist. Quite the opposite. There have been promises the law would enforce since the very earliest recorded history. But which promises the law would enforce and under what circumstances and how remained remarkably fluid for much of that history. In what may be among the oldest surviving reported cases in the history of the common law, the Court of Saint Albans Abbey awarded specific performance of a marriage contract in *Walter v. William Thomas* in 1247.⁷⁸ Today, you are lucky

74. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 66 (1984) [hereinafter Gordon, *Critical Legal Histories*].

75. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 710 (2007) (explaining that in modern American contract law there is a “substantive divergence between legal norms and moral norms . . .”).

76. Rafael Chodos, *Fiduciary Law: Why Now? Amending the Law School Curriculum*, 91 B.U. L. REV. 837, 841 (2011).

77. GRANT GILMORE, *THE DEATH OF CONTRACT* 6 (1974) [hereinafter GILMORE, *DEATH OF CONTRACT*].

78. Court Rolls of St. Albans Abbey (1247), in ADA E. LEVITT, *STUDIES IN MANORIAL HISTORY* 329-330 (1930), reprinted in JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 199 (1960).

if you can get specific performance for any kind of contract.⁷⁹

Nonetheless, the question of whether breaching a contract possessed a moral dimension remained an open one in the law of contracts well into the nineteenth century.⁸⁰ The first recorded American case awarding punitive damages in either tort or contract was a New Jersey case in 1791, *Coryell v. Colbaugh*, involving the breach of a promise to marry.⁸¹ The trial judge told the jury:

[T]hey were not to estimate the damages by any particular proof of suffering or actual loss; but to give damages for *example's* sake, to prevent such offences in future . . . [He] told the jury they were bound to no certain damages, but might give such a sum as would mark their disapprobation, and be an example to others.⁸²

To anyone schooled in the modern American law of contracts, this result is stupendous. As Holmes famously stated in 1897, “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”⁸³ And by damages, Holmes meant compensatory damages: “[i]f you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are

79. See E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1153 (1970) (“Our courts, like those of civil law countries, will not undertake to coerce a performance that is personal in nature—to compel an artist to paint a picture or a singer to sing a song.”). Imagine trying to force a marriage.

80. See Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 11 (2004) (“Over the past two centuries, formalist judges and commentators have tried in vain to suffocate the reliance and moral obligation alternatives to a monist bargain test of promissory liability.”).

81. 1 N.J.L. 77, 77 (1791).

82. *Id.* at 77-78. It might well be remembered though that the Supreme Court of New Jersey in 1791 left something to be desired in the realm of professional training, counting among its three member Justices a physician who “had no legal education and had never practised law.” See John Whitehead, *The Supreme Court of New Jersey*, 3 GREEN BAG 401, 404 (1891). The Justices were Richard Stockton, a prominent Federalist Lawyer, James Kinsey, a Quaker Lawyer whose father had actually been Chief-Justice of Pennsylvania, and Isaac Smith, the aforementioned physician, of whom “very little can be said.” *Id.* at 402, 404, 406.

83. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

liable to pay a compensatory sum”⁸⁴ This, in Holmes estimation, was the common law rule, notwithstanding “such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.”⁸⁵

This is quite a different rule than that which obtains in civil law nations where the rule is *pacta sunt servanda* (“contracts must be honored”).⁸⁶ But it was also thought to be quite a different rule than that which had obtained in common law nations when Holmes said it.⁸⁷ Until about the mid-nineteenth century, just as there was no law of contracts, the common law had no fixed rules about the duty one owed not to breach a contract, or how to measure damages for breach. English authorities had held since the eighteenth century that damages in a contract case could be measured by the wrongfulness of the breach,⁸⁸ and there were dozens of decisions in the United States that saw contract as a moral obligation and breach as a wrong.⁸⁹ Damage awards,

84. *Id.*

85. *Id.*

86. Ronald J. Scalise, Jr., *Why No “Efficient Breach” in the Civil Law?: A Comparative Assessment of the Doctrine of Efficient Breach of Contract*, 55 AM. J. COMP. L. 721, 723 (2007).

87. Immediately after Holmes said it, the most Prominent Treatise writers on Contracts on both sides of the Atlantic harshly criticized it as inconsistent with their own theories of the rule of contract damages and moral obligation required by the common law. See WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT 8-10 (2d ed. 1882) (this discussion only appears in the second edition, as Anson chose to marginalize Holmes’s argument in later editions, shoving him into a footnote); FREDERICK POLLOCK, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY xix-xx (3d ed. 1881).

88. See, e.g., 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 4 (1736) (“In all Actions which sound in Damages, the Jury seem to have a discretionary Power of giving what Damages they think proper; for tho’ in Contracts the very Sum specified and agreed on is usually given, yet if there are any Circumstances of Hardship, Fraud or Deceit, tho’ not sufficient to invalidate the Contract, the Jury may consider of them and proportion and mitigate the Damages accordingly . . .”).

89. See Teeven, *supra* note 80, at 67 (“The case reports are replete with moral obligation decisions, and Mansfield’s moral obligation cases were regularly cited throughout the century.”); see, e.g., *Vance v. Wells*, 8 Ala. 399, 399 (1845); *Cook v. Bradley*, 7 Conn. 57, 57 (1828); *Ellicott v. Turner*, 4 Md. 476, 477 (1853); *State, Use of Stevenson, v. Reigart*, 1 Gill 1, 26 (Md. 1843); *Hatch v. Purcell*, 21 N.H.

as *Coryell v. Colbaugh* demonstrates, were jury questions.⁹⁰ How much the victim of a contract breach valued the performance promised was thought to be a case-by-case estimation as difficult to make as the estimation of the value for a tort injury.⁹¹

Enterprise lawyers found the state of contract damages in the United States and in England untenable. Uncertainty from the unpredictable nature of jury awards for contract breaches coupled with a rule that made their clients perform or pay more than compensation damages were unacceptable.⁹² Thus, beginning in the mid-eighteenth century they made two important legal innovations. They convinced judges to exercise strict control over jury awards, and to limit those awards to compensatory economic damages.⁹³ Contract was about commerce, these attorneys urged, not redress.⁹⁴

Hadley v. Baxendale,⁹⁵ decided in 1854, is the contemporary emblem of this relatively recent innovation.

544, 549 (1850); *Nixon v. Jenkins*, 1 Hill 318, 318 (N.Y. 1857); *Early v. Mahon*, 19 Johns. 147, 147 (N.Y. Sup. Ct. 1821); *Hatchell v. Odom*, 19 N.C. (2 Dev. & Bat.) 302, 306-07 (1836); *Clark v. Herring*, 5 Binn. 33, 38 (Pa. 1812); *Greeves v. McAllister*, 2 Binn. 591 (Pa. 1809); *McMorris v. Herndon*, 18 S.C.L. (2 Bail.) 56, 56 (1830); *Glass v. Beach*, 5 Vt. 172, 172 (1833).

90. See, e.g., Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, J. LEGAL STUD. 249, 255 (1975) (noting that "the calculation of damages in contracts suits . . . had previously been left to almost entirely unstructured decision by English juries" and that the preeminent treatise of the time devoted only thirteen of its 771 pages to damages).

91. See J. CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 768 (8th ed. 1851).

92. See Danzig, *supra* note 90, at 273; Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207, 211-12, 223 (1977). This discontent with the unpredictability of jury awards was traceable to at least the mid-seventeenth century. See, e.g., Sullivan, *supra*, at 211-12.

93. See, e.g., *Hoy v. Gronoble*, 34 Pa. 9, 10-12 (1859).

94. CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846 47 (1991) ("[T]he decisive reshaping of the law to the demands of the market was being accomplished by lawyers and judges, both Federalist and Republican, in the state courts. Lawyers were the shock troops of capitalism.").

95. 94 Ex. 341, 156 Eng. Rep. 145 (1854).

The case adopted both the substantive limitation on damages and the procedural innovation the private bar so desperately sought.⁹⁶ As Richard Danzig has written of *Hadley v. Baxendale*—a case that “is still, and presumably always will be, a fixed star in the jurisprudential firmament”⁹⁷—“[t]he novelty of the changes effected in procedural and substantive law by *Hadley v. Baxendale* suggests that the opinion may be examined as an invention” for the “innovation effected in the law is here unusually stark.”⁹⁸

At the same time, across the Atlantic, American attorneys in every state were advancing the same arguments, often winning,⁹⁹ and making it the law.¹⁰⁰ Their arguments were neither particularly subtle nor even particularly good. As one scholar put it, the early cases are nearly impossible to study because they both lack citations and, for the most part, lack any justifications either.¹⁰¹ *Hadley v. Baxendale* is itself a prime example. “Baron Alderson, in support of the central proposition he advanced, cited no precedent and invoked no British legislative or academic authority in favor of the rule he articulated.”¹⁰² What he did do, however, was adopt the argument of Baxendale’s counsel almost wholesale.¹⁰³

In Texas, the year before Justice Holmes wrote his famous formulation that contract breach had no moral

96. Danzig, *supra* note 90, at 253-54.

97. GILMORE, DEATH OF CONTRACT, *supra* note 77, at 83.

98. Danzig, *supra* note 90, at 254.

99. But they did not always win. The rule was still in flux. *See, e.g.*, *Rose v. Beatie*, 11 S.C.L. (1 Nott & McC.) 538, 543 (1820).

100. *See, e.g.*, *Snow v. Grace*, 25 Ark. 570, 573 (1869); *Butler v. Moore*, 68 Ga. 780, 781 (1882); *Goins v. W. R.R. of Alabama*, 68 Ga. 190, 192 (1881); *Massie v. Baily*, 33 La. Ann. 485, 488 (1881); *Ryder v. Thayer*, 3 La. Ann. 149, 150 (1848); *Porter v. Barrow*, 3 La. Ann. 140, 140 (1848) (formulating a rule nearly identical to that set forth in *Hadley v. Baxendale* without any citation); *Arrowsmith v. Gordon*, 3 La. Ann. 105, 109 (1848) (formulating a similar *Baxendale*-esque rule); *Hoy v. Gronoble*, 34 Pa. 9, 11 (1859); *McCauley v. Long & Co.*, 61 Tex. 74, 79 (1884); *Houston & T.C. R.R. Co. v. Shirley*, 54 Tex. 125, 142 (1880); *Gordon v. Brewster*, 7 Wis. 355, 359 (1858).

101. *See Sullivan*, *supra* note 92, at 221-22.

102. Danzig, *supra* note 90, at 254.

103. *See id.* at 253, 254 n.20.

component, the Texas Supreme Court gave an unusually candid justification for the rule, on the very grounds for which it had been advanced—not on the basis of any precedent or superiority of argument, but on the urging of its necessity and benefit to society. “If, in ordinary litigation on contracts, issues as to motives and exemplary damages be allowed, the result would be greatly to increase the intricacy and uncertainty of such litigation”—ergo—“[t]he exclusion of such issues in suits on contract may be justified on the policy of limiting the uncertainties and asperities attending litigation of such issues.”¹⁰⁴

The received wisdom of this legal innovation, and certainly how it was expressed by lawyers at the time, was that it was necessary to effectuate the needs of modern industrial society.¹⁰⁵ It must be emphasized that this was believed by all to be in the public interest.¹⁰⁶ But it is equally worth noting that contrary to the received wisdom, private lawyers were making these arguments, and winning these cases long before they were the gospel of the academy or even the judiciary.¹⁰⁷ Accounts that place Langdell and Holmes at the center of the theory of efficient breach overlook that their insights lagged the private practice of the profession by nearly half a century.¹⁰⁸ Now, it is so firmly entrenched in American law that contract breach possesses no moral dimension that the ordinary lawyer may scarcely realize it was ever otherwise.¹⁰⁹

104. *Houston & T.C. R.R. Co.*, 54 Tex. at 142. *But see* Sullivan, *supra* note 92, at 220-21 (critiquing this justification).

105. Farnsworth, *supra* note 79, at 1216 (noting that “[a]ll in all, our system of legal remedies for breach of contract” is “heavily influenced by the economic philosophy of free enterprise”).

106. *See* JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836-1915*, at 285 (1964); E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 599 (1969).

107. *See* Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1162-64 (1975).

108. *See id.*

109. *See* Farnsworth, *supra* note 79, at 1146-47. Of course, moral objections to counseling clients to breach contracts remain. *See* PAUL G. HASKELL, *WHY LAWYERS BEHAVE AS THEY DO* 7-8 (1998).

What makes the contract innovation remarkable, however, was that it expressed a professional concern with legal innovation apart from the purely instrumental interests of immediate clients. As Professor Danzig discovered about *Hadley v. Baxendale*, the reason that the case became ascendant was not merely its revolutionary character or its suitability to the time:

There was another factor at play which has been lost sight of by modern observers. [Baxendale's lawyer] Sir James Shaw Willes . . . to whom I have ascribed much of the responsibility for the invention in the case, appears to have been remarkably situated to effect the marketing of the invention by virtue of his position as co-editor of the foremost legal textbook of the time: *Smith's Leading Cases*. Yet more remarkably—and this underscores the already mentioned intimacy of the mid-century British legal world—Willes' opposing counsel on appeal (and the counsel for the Hadleys at trial), Sir Henry Singer Keating, was the other editor of *Smith's*.

The two “editors” wasted no time in converting their litigation arguments into an academic analysis, so that a primary difference between the 1852 edition of *Smith's Leading Cases* and the 1856 edition was a lengthy description of and commentary on *Hadley v. Baxendale*.¹¹⁰

Which brings us full circle to the legal innovation that opened this Essay—the poison pill developed by Marty Lipton and his law firm, Wachtell. As Michael J. Powell explained in his seminal essay on *Legal Innovation* detailing the creation of the poison pill, as important as the poison pill was as an object of considerable lawyerly ingenuity, equally important was that “Lipton himself promoted the poison pill in client memoranda, interviews and addresses to lawyers,”¹¹¹ and he and his firm continued to push the pill in every forum and venue they could.¹¹² It was not just the fact of the innovation, but the ingenuity and enthusiasm of its diffusion that made the poison pill a legal innovation we still know and remember.

The point of the foregoing is to highlight the way legal innovations dot the landscape of American history. The

110. Danzig, *supra* note 90, at 275.

111. Powell, *supra* note 13, at 439.

112. *See id.*

enormous changes in tort law beginning in the late eighteenth century and continuing on into the twentieth relating to industrial accidents and workplace safety possess their own compelling story, as does the shift from “caveat emptor” to strict liability for product defects.¹¹³ But given just the small amount that can be gleaned from the accounts given here, what might we say about legal innovation?

First, the conventional account of the development of American law is that it is a body of rules that developed through processes of accretion and gradual accumulation toward a preordained “optimal” set of rules for society’s social relations.¹¹⁴ One might be tempted to think that legal innovation fits this model: that legal innovation is inevitable and that therefore all that has been described herein is the doctrinal-legal evolution of our legal system toward its inevitable optimal structure.

But that surely cannot be so. That lawyers in the United States developed the idea that contract should be a unitary field, and should be the instrument of the implementation of efficient legal relations, was as much a product of creativity of private lawyers as the poison pill was more than a century later. With the benefit of hindsight, every historical development is guaranteed. But the truth is that the lawyers who decided that contract and morals would hereafter be distinct created that idea, brought it to the courts, and diffused it through the legal system of which they were a part.

Second, it seems equally clear that legal innovations really do begin with lawyers, and their ideas about public virtue and the ends that might be attained by law. This has long been a whispered sort of wisdom among legal historians about the nature of the development of law, but it never had much support. Legal historians have long asserted that lawyers shaped the decisions of corporations in the Age of American Enterprise by crafting ingenious legal arguments,

113. See generally JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004).

114. See Gordon, *Critical Legal Histories*, *supra* note 74, at 59-67 (1984) (describing this “dominant view” of the development of law).

and thereby generating solutions to the real-world problems of corporate law through their own ingenuity.¹¹⁵ This account was easy to suggest, but there never was much concrete evidence that the lawyer's efforts caused the innovations.¹¹⁶ There was, if anything, more evidence pointing the other way.¹¹⁷ Corporations demanded outcomes, and lawyers tried to deliver them.

But this Essay illustrates that lawyer-driven legal innovation is a real phenomenon at least some of the time. For innovation in contract is not like innovation on behalf of a corporate client. Nineteenth-century lawyers innovating in the area of contract and representing small claimants in one-off transactions, unlike corporate lawyers, had little vested interest in thoroughly shaping the law of contract damages to serve their clients' immediate interests. In the generalist one-lawyer era in which modern contract doctrine was set down, a lawyer's client might have been the defendant in a contract action in the morning and a plaintiff in a contract action in the afternoon. As such, we can make a claim, at least with respect to innovation in contract, that the source of contract innovation was the lawyers.

Finally, we might ask whether we should encourage or discourage legal innovation, or if that is even a meaningful question, or even if it is a meaningful question whether it is a question we can meaningfully answer.¹¹⁸ Legal innovations, as this Essay has shown, can become unproductive, useless—even dangerous—in the blink of an eye. But one might contend that the solution to too much outmoded legal innovation is more innovation. In a culture of legal experimentalism we would more often see competition to implement values which most closely align with the values of our own time, and our own society—or at least the

115. See, e.g., Gordon, *Legal Thought*, *supra* note 21, at 78-81.

116. *Id.* at 81.

117. *Id.* at 78.

118. See, e.g., John F. Duffy, *Harmony and Diversity in Global Patent Law*, 17 BERKELEY TECH. L.J. 685, 689-90 (2002).

professional lawyering class.¹¹⁹ Coupled with federalism, robust encouragement of legal innovation might also be the only means of truly fulfilling the promise of Louis Brandeis's ideal of the States as laboratories.¹²⁰ Lawyers who take their states' legal systems too far off the beaten path risk the loss of prestige that accompanies the exodus of souls to other states.

But should we worry about “democratic degradation”—that decisions of such great consequences are being carved in the law's interstices rather than in the open chambers of our legislative institutions?¹²¹ There is much to be said for this view, but it misses an important fact, which is that law is always there. We are never without it. And it is always becoming.¹²² Thus, the question is really narrower than the democratic degradation account suggests. The real question is whether lawyers should attempt to carve their own ideals into the law through the vehicle of legal devices and private litigation, or merely make whatever arguments serve their clients' immediate interests. And given that choice, it seems inevitable that lawyers will choose to express their values—the question is merely how boldly and how creatively they are willing to do so.

Should we encourage legal innovation or be wary of it? Should we hope to see the law firm of the future with a robust Research and Development arm, pumping out new contract devices, securities, derivatives, and mechanisms for shifting liability from clients to customers, or should we instead hope that law firms resist innovation and favor uniformity and stability? These questions do have answers. We should

119. See John F. Duffy, *Inventing Innovation: A Case Study of Legal Innovation*, 86 TEX. L. REV. 1, 3-5 (2007).

120. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting); see also James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475 (1996) (explaining the history and import of Brandeis's metaphor).

121. Cf. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33-51 (2012) (expressing the same concern due to boilerplate contracts).

122. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 6 (1975).

encourage legal innovation, and as much of it as we can get away with. But we should realize that lawyers make public policy through their private work as lawyers, and therefore the way we train our private lawyers will ultimately decide the quality and quantity of legal innovation our society receives. Perhaps then, this Essay merely concludes with a truth wise lawyers have always told us: “[i]n the last analysis, the law is what the lawyers are.”¹²³

123. Letter from Felix Frankfurter, Professor, Harvard Law School, to Julius Rosenwald, Philanthropist (May 13, 1927) (on file with the Harvard Law School library), *quoted in* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989).