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# Images of Law School and Law Teaching in An Imperfect Spy

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# Book Reviews

## Images of Law School and Law Teaching in *An Imperfect Spy*

Amanda Cross, *An Imperfect Spy*. New York: Ballantine, 1995.  
Pp. 240. \$20.00.

Stacy Caplow  
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We looked forward with great anticipation to reading *An Imperfect Spy*,<sup>1</sup> the latest in a series of mysteries written by Amanda Cross,<sup>2</sup> the pseudonym of Carolyn G. Heilbrun, the retired Avalon Foun-

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1. AMANDA CROSS, *AN IMPERFECT SPY* (1995) [hereinafter *SPY*].

2. AMANDA CROSS, *THE PLAYERS COME AGAIN* (1990); *A TRAP FOR FOOLS* (1989); *NO WORDS FROM WINIFRED* (1986); *SWEET DEATH, KIND DEATH* (1984); *THE JAMES JOYCE MURDERS* (1982); *DEATH IN A TENURED POSITION* (1981); *THE QUESTION OF MAX* (1976); *THE THEBAN MYSTERIES* (1971); *POETIC JUSTICE* (1970); *IN THE LAST ANALYSIS* (1964).

dation Professor of Humanities at Columbia University.<sup>3</sup> The book promised the perfect combination of ingredients for two law professors who enjoy a refreshing literary sorbet in between customarily weightier dishes of law review articles, cases, and other professional writings.

We had every reason to believe that *An Imperfect Spy* would cleanse our mental palates. First, it is one of many mysteries that feature an engaging yet feisty female protagonist.<sup>4</sup> Kate Fansler, the didactic, scotch-drinking, old-money WASP, feminist literature professor has the special knack of being around whenever people die or have baffling mysteries to solve. Unlike other popular female detectives, Kate solves her cases with her intellect rather than a gun.

Even better, the book is set in a law school. The academic novel is a well-established genre<sup>5</sup> and one of our favorite forms of literary fare. These "midnight snacks" satisfy our craving for parody and self-mockery, while leaving room for consumption of the legal literature we need to keep current in the classroom and in our scholarship. We particularly savor the academic mystery novel, which combines the familiar, self-absorbed, easily satirized aspects of the academic world with the intrigues of plot and problem-solving,<sup>6</sup> and we especially

3. Professor Heilbrun's academic writings, predominantly in the field of feminist literary criticism, are almost as prolific, and much more influential, than those of her alter ego. See CAROLYN G. HEILBRUN, *THE EDUCATION OF A WOMAN: THE LIFE AND TIMES OF GLORIA STEINEM* (1995); *HAMLET'S MOTHER AND OTHER WOMEN* [hereinafter *HAMLET'S MOTHER*] (1990); *WRITING A WOMAN'S LIFE* (1988); *THE REPRESENTATION OF WOMEN IN FICTION* (Carolyn G. Heilbrun ed., 1983); *REINVENTING WOMANHOOD* (1979).

In 1992, Heilbrun resigned her faculty position at Columbia in exasperation at the sexism in her department. See Courtney Leatherman, 'Isolation' of Pioneering Feminist Scholar Stirs Reappraisal of Women's Status in Academe, *CHRON. HIGHER ED.*, Nov. 11, 1992, at A17 ("Heilbrun said her retirement was brought about by her disappointment with the conservative male establishment of the university, whose policies were unfair and condescending to feminists like her."); Anne Matthews, *Rage in a Tenured Position*, *N.Y. TIMES*, Nov. 8, 1992, § 6 (Magazine), at 47 ("When I spoke up for women's issues, I was made to feel unwelcome in my own department, kept off crucial committees, ridiculed, ignored."); Kay Mills, *Life After a Tenured Position*, *L.A. TIMES*, July 19, 1992, § 13 (Magazine), at 13; Stephanie Schorow, *Men Meet Their Match*, *BOSTON HERALD*, Feb. 24, 1995, at 39.

4. The "Sisters in Crime" roster is long and estimable. Recent works featuring female detectives include: PATRICIA CORNWELL, *FROM POTTER'S FIELD* (1995); SUE GRAFTON, *L IS FOR LAWLESS* (1995); WENDY HORMSBY, *MIDNIGHT BABY* (1994); MARCIA MULLER, *WILD AND LONELY PLACE* (1995); SARAH PARETSKY, *TUNNEL VISION* (1994).

5. See, e.g., KINGLEY AMIS, *LUCKY JIM* (1953); JOHN BARTH, *THE END OF THE ROAD* (1967); ANNE BERNAYS, *PROFESSOR ROMEO* (1989); A.S. BYATT, *POSSESSION* (1990); ROBERTSON DAVIES, *REBEL ANGELS* (1981); REBECCA GOLDSTEIN, *THE MIND-BODY PROBLEM* (1983); DAVID LODGE, *SMALL WORLD* (1984); *CHANGING PLACES* (1975); ALLISON LURIE, *THE WAR AGAINST THE TATES* (1974); CAROL SHIELDS, *SWANN* (1987); JANE SMILEY, *MOO* (1995).

6. E.g., BATYA GUR, *LITERARY MURDER* (1994) (Hebrew University); D.J. JONES, *MURDER AT THE MLA* (1994); SUSAN KENNEY, *GRAVES IN ACADEME* (1985); *GARDEN OF MALICE* (1983); JANE LANGTON, *EMILY DICKINSON IS DEAD* (1984) (Amherst); *THE MEMORIAL HALL MURDER* (1978) (Harvard); DOROTHY L. SAYERS, *GAUDY NIGHT* (1936) (Oxford); EDITH SKOM, *THE MARK TWAIN MURDERS* (1989).

enjoy mystery novels with a legal backdrop, whether set at a law school<sup>7</sup> or featuring a lawyer protagonist.<sup>8</sup> *An Imperfect Spy* seemed the perfect recipe: an academic mystery with a law-driven intrigue, set in a law school, solved by a smart woman protagonist.

Heilbrun's story takes place at Schulyer Law School, described as "the worst law school in New York and perhaps the whole United States."<sup>9</sup> The fictional Kate Fansler, married to Reed Amhears, a law professor at an unnamed Ivy League university (presumably Columbia), almost capriciously signs on as a visiting professor of feminist law and literature at Schuyler while her husband is spending a term there to start the school's first clinical program. The book is a sometimes humorous and often horrifying depiction of Schulyer Law, its faculty, its administration, and its students.

The "spy" of the title is Harriet, an academic from another university working at Schuyler "undercover" as a secretary—with some initially undisclosed purpose in mind.<sup>10</sup> By posing as an aging member of the invisible support staff, and using Kate and Reed as her tools, Harriet infiltrates and exposes the iniquities of the institution. In particular, she obtains judicial review of the conviction of her daughter, a battered wife imprisoned for the murder of her husband, a Schuyler faculty member.

Ultimately, *An Imperfect Spy* engaged us less as a conventional mystery than as a portrait of law schools and law teaching.<sup>11</sup> The novel, in fact, contains little mystery or suspense. Of the two deaths

7. E.g., CARROLL LACHNIT, *MURDER IN BRIEF* (1995); LIA MATERA, *WHERE LAWYERS FEAR TO TREAD* (1987).

8. E.g., SARAH CAUDWELL, *THE SIRENS SANG OF MURDER* (1989); *THE SHORTEST WAY TO HADES* (1984); *THUS WAS ADONIS MURDERED* (1981); LIA MATERA, *FACE VALUE* (1994); *A HARD BARGAIN* (1992); *THE GOOD FIGHT* (1990); *SMART MONEY* (1988); MARISSA PIESMAN, *CLOSE QUARTERS* (1994); *Unorthodox Practices* (1989); SCOTT TUROW, *PRESUMED INNOCENT* (1987); CAROLYN WHEAT, *FRESH KILLS* (1995); *WHERE NOBODY DIES* (1986); *DEAD MAN'S THOUGHTS* (1983); SUSAN WOLFE, *THE LAST BILLABLE HOUR* (1989).

9. *SPY*, *supra* note 1, at 35.

10. The title's reference to John LeCarre's *A PERFECT SPY* (1986), whose British spooks and intricate psychological plots have little in common with the characters or mysteries Cross creates, refers to both Harriet's hidden agenda and her method of catalyzing others into action while remaining unnoticed. The character of Harriet also alludes to Harriet Vane, an independent proto-feminist who first appeared in DOROTHY L. SAYERS, *STRONG POISON* (1930), and is featured in DOROTHY L. SAYERS, *GAUDY NIGHT* (1936), and two other Sayers books. Heilbrun has written admiringly of Sayers and Vane in *Sayers, Lord Peter, and Harriet Vane at Oxford, in HAMLET'S MOTHER*, *supra* note 3, at 252. The deconstruction of the Heilbrun-Cross oeuvre is a cottage industry among literary scholars. See Matthews, *supra* note 3 (referring to series of articles entitled *Murder in the Canon: The Dual Personality of Carolyn Heilbrun*).

11. Cross's book has received mixed reviews. See, e.g., Nicci Gerrard, Book Review, *THE OBSERVER*, Apr. 23, 1995, at 6 (negative); Peter Handel, Book Review, *S.F. CHRON.*, Feb. 5, 1995, at 4 (negative); Marguerite Johnson, Book Review, *HOUSTON POST*, Apr. 9, 1995, at G11 (lukewarm); Nancy Pate, Book Review, *ORLANDO SENTINEL*, Jan. 15, 1995, at F9 (negative); Les Roberts, Book Review, *CLEVELAND PLAIN DEALER*, Jan. 1, 1995, at J10 (negative); Stephanie Sochorow, Book Review, *BOSTON HERALD*, Feb. 24, 1995, at 39 (positive); Marilyn Stasio, Book Review, *N.Y. TIMES*, Feb. 5, 1995, at 30 (lukewarm).

that Kate investigates, one turns out to be accidental, and the other may be legally justified. But Heilbrun's capacity for critical insight into legal academia is strong, enhanced by her dual status as both an insider and outsider. Although not a lawyer or law professor, Heilbrun has more than a passing knowledge of law schools. In the late 1980's, she spent a semester co-teaching a course in law and literature from a feminist perspective at Yale Law School with Professor Judith Resnick, and also taught a similar course at UCLA.<sup>12</sup>

The portrait of legal education that Heilbrun paints is devastating. Schuyler's administration is so rigid, its faculty so conservative, and its students so ill-mannered and second-rate, it is impossible not to wonder who would choose to attend the school or who would hire its graduates. Even in the current buyer's market for law teachers,<sup>13</sup> it is difficult to imagine why anyone would elect to teach there. Indeed, in order to give what finally is a rather flimsy story line drama and tension, Heilbrun has created a new type of villain: a Dickensian law school, an institution that allows her to create a more general account of the impact of new ideas on the citadel of legal academia. Through the metaphor of Schuyler, Heilbrun questions whether the dominant values and environment of legal education are really very different at institutions at both extremes of the prestige spectrum, and reminds us how much *all* law schools have to change in response to emerging legal thought, current ideas about the curriculum, and new notions about the role of law schools in preparing students to enter the legal profession.

In this essay, we examine Heilbrun's portrait of Schuyler Law School in light of our own law teaching experiences. In our view, much of Heilbrun's image of legal academia is unrecognizable not only to those of us familiar with that world, but even to those outsiders whose knowledge of law schools comes from the mainstream media.<sup>14</sup> Nevertheless, we conclude that Heilbrun, who presumably could have made her point by situating her mystery in any academic setting, believes that Schuyler's aversion to change and its sexist

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12. The experiences of Professors Heilbrun and Resnick are discussed in Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913, 1921 (1990) [hereinafter *Convergences*]. See also Teree E. Foster, *But Is It Law? Using Literature to Penetrate Societal Representations of Women*, 43 J. LEGAL EDUC. 133 (1993).

13. See, e.g., Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424 (1994).

14. See ELEANOR KERLOW, *POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL* (1995); ROBERT KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* (1992); JAMES S. KUNEN, *HOW CAN YOU DEFEND THOSE PEOPLE?* (1983); ERICH SEGAL, *LOVE STORY* (1970); SCOTT TUROW, *ONE L* (1977).

atmosphere are shared with a broad range of law schools, all of which need to examine themselves more critically. For this belief, we are able to forgive the failures of the book as both a mystery and a novel and appreciate Heilbrun's effort to satirize the pomposity and conservatism of law teachers who resist or disparage even modest innovations. This may not be a great book, but for insiders in law teaching, its caricaturization offers much that is familiar, provocative, and entertaining.

### I. HARD TIMES AT SCHUYLER LAW

Heilbrun offers a vision of Schuyler's faculty and student body that betrays her more general attitude about law school hierarchies. Most of Schuyler's faculty attended prestigious law schools—Harvard, Yale, and Chicago—and, even though they appear to be mediocre teachers and unproductive scholars, they all are tenured and quite self-important. The only tenured woman died under such sufficiently ambiguous circumstances that some suspect murder.<sup>15</sup> The lone minority faculty member is offensively conservative.<sup>16</sup> Another professor was a notorious wife abuser until finally killed by his victim, who herself was then convicted as a result of inaction on the part of some of her husband's colleagues and perjury on the part of others.<sup>17</sup> All of the faculty are obnoxious and boorish in their treatment of secretaries and condescending in their attitudes about students.<sup>18</sup>

The students themselves are "not your pampered darlings from Harvard and Yale, princes of all they survey."<sup>19</sup> They are strivers who lack market power to demand much of their education and are unlikely to rock the boat in the name of modernity and innovation. Judging from the meager participation in Kate's law and literature seminar, they also have very little intellectual depth. Comments made by the faculty about the students are disparaging: "There was a student [at a moot court argument] who was a lot brighter, or maybe I ought to say less rough-edged, than most of our students."<sup>20</sup>

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15. SPY, *supra* note 1, at 45, 55-57.

16. *Id.* at 78-81.

17. *Id.* at 84, 91.

18. One faculty member describes his colleagues as full of "scorn for the students, as though they despised them or were putting something over on them." *Id.* at 104.

19. *Id.* at 55. This and other remarks are meant to be compliments. Reed chastises Kate for her snobbery about Schuyler and further states, "Many of the students at Schuyler are older students, returnees, men and women, mostly women, who have decided they don't want to continue the life they're leading and want to become lawyers. Often the students are very interested, very earnest, and very motivated." *Id.* at 35.

20. *Id.* at 105.

Excellence at Schuyler is measured less by intellect than by more superficial qualities.

The Dean expresses the overwhelmingly conservative ethos of Schuyler in his toast at a faculty reception at the beginning of the semester. "Welcome to our traditional gathering," he intones. He goes on to state:

At least once a semester we join, all of us who teach in this fine institution, in one room to remind ourselves who we are and what our mission is: to pass on the law as our forefathers conceived it, to the young who will defend it after we are gone. The need for defense of that noble law grows greater each year. I lift my glass in tribute to those who honor what time and experience have proven true to our country's destiny.<sup>21</sup>

After an interruption in the narrative for one professor to whisper snide comments to Kate, the Dean snipes at trendy movements in legal education and defends the close-minded norm at Schuyler, which "maintain[s] standards too easily abandoned by institutions considered more elite, who had sold out to the demands of those marginal to our great culture, who had no hand in writing our laws or defending them against our enemies."<sup>22</sup> It is clear from this diatribe that no crits, fem-crits, critical race theorists, post-moderns, or believers in affirmative action are welcome at Schuyler's front door.

Even the most sympathetic professor at Schuyler would find it hard to find employment in the real world of law teaching. In a few short pages of cocktail party colloquy, Heilbrun reveals Schuyler professors to be misogynistic, territorial about non-lawyers teaching in law schools, dismissive of interdisciplinary teaching and scholarship, anti-feminist, antiabortion, anti-battered women's syndrome, pro-death penalty, pompous, and arrogant.<sup>23</sup>

The faculty rebel is Blair Whitson, who recruits Kate Fansler to co-teach a course in law and literature and Kate's husband to teach a live-client clinic. Despite these admirable initiatives, Blair is an unremarkable middle-aged white male with a military background and a propensity for flirtation. There is nothing in his history or experience which make him a candidate to lead the kind of rebellion needed to drag Schuyler into contemporary mainstream legal education. His late-life realization that women are objectified by men, and his suspicions that his friend and colleague, the first and only woman law professor at Schuyler, might have been murdered,

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21. *Id.* at 85.

22. *Id.* at 86.

23. *Id.* at 76-86.

provide the only explanation for his recent transformation from a WASP conformist into a more radical persona. Indeed, he explains that he was granted tenure by his colleagues under their mistaken belief that he was like them.<sup>24</sup>

In contrast to the claims of intellectual movements on the legal scene today such as critical legal studies, feminist legal theory, and critical race theory, Blair's protests seem quite tame and juvenile, and bereft of intellectual content. At first, it seems that Blair connives for the feminist law and literature course simply because it is the subject that most irritates his colleagues. He expresses no meaningful curiosity about the topic, and possesses no relevant academic experience. His main goal is politically modest: to "spread a little basic feminism around, and suggest that if law and literature can speak to each other, so can law and life."<sup>25</sup>

His course preparation techniques are peculiar. Blair's idea of preparing to co-teach a seminar on feminist perspectives in law and literature is to meet his co-teacher for the first time a week before class for drinks at the Plaza Hotel and present her with a list of potential cases. For almost whimsical reasons, Blair and Kate quickly pick Wednesday for the class (because it's in the middle of the week) and opt for an exam (for variety, because Kate always gives paper courses). Blair hands Kate the cases he has selected and requests that she identify readings in world literature that would make a good illustration or counterpoint to the themes in his preferred legal texts.<sup>26</sup> There is no apparent sense of urgency associated with the beginning of the semester, nor any embarrassment at running a semester-long course for the first time by winging it. He even suggests that the first class can easily consist of housekeeping details and no substance.<sup>27</sup>

Blair's approach suggests that he and his Neanderthal colleagues may have more similarities than differences. Laziness, lack of preparation, and a predilection for innuendo-laden banter mark him as a superficial teacher and colleague. Nothing in Heilbrun's meager descriptions of the feminist law and literature course suggests he possesses any gifts as a teacher or intellect. His residual sense of masculine superiority reveals itself when he assigns Kate to use her last week of summer vacation scrambling to fill in a syllabus of legal cases with softer literary materials that apparently are not worthy of

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24. *Id.* at 103.

25. *Id.* at 57.

26. The cases and literary works assigned in the seminar mirror those taught by Heilbrun and Resnick at Yale. See *Convergences*, *supra* note 12, at 1954-56.

27. SPY, *supra* note 1, at 51.



his time. Still, despite his flaws, Blair is meant to be the enlightened majoritarian who shoulders an enormous task, and we are meant to sympathize and applaud him. After all, it is he who brings the outsiders, Kate and Reed, to Schuyler, with dramatic results. In short order, the students in the clinic obtain review of the murder conviction of Harriet's daughter; student consciousness is raised through the medium of law and literature; and the couple's visit concludes with a virtual revolution that changes Schuyler Law forever. Even if he was not the direct instrument of change, Blair at least chooses his *dei ex machina* well.

## II. IMAGES OF LAW SCHOOL

Our initial negative reaction to Heilbrun's book turned on her exceedingly unflattering depiction of legal education at every level. The images of classroom teaching, pedagogy, and clinical education are strikingly at odds with the work-a-day world we have observed at our own school, the schools we have visited or inspected, and those of our friends and colleagues.

The portrayal of Schuyler is equally out of touch with the mainstream images of law schools in the media and popular culture. Most fictional accounts of law school have tended to focus on the elite end of the legal spectrum, particularly on Harvard Law School. *The Paper Chase* and Professor Kingsfield, in both the film and television series, have set the standard for popular understanding of the Socratic method and the dehumanizing atmosphere of law school.<sup>28</sup> Schools like Schuyler generally receive no featured role in books, movies, or T.V. shows. If anything, they are the objects of derision, as in *My Cousin Vinny*<sup>29</sup> or *The Client*,<sup>30</sup> or mere background, as in *The Pelican Brief*.<sup>31</sup>

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28. JOHN JAY OSBORNE, *THE PAPER CHASE* (1971); *THE PAPER CHASE* (20th Century Fox 1973). Consider, also, the book and the film *REVERSAL OF FORTUNE*, which examines the Klaus Von Bulow case from the perspective of Alan Dershowitz and the law students who assisted him in obtaining the reversal of Von Bulow's conviction. ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE* (1986); *REVERSAL OF FORTUNE* (Warner Bros. 1990). Readers interested in non-fictional and seemingly more realistic accounts of Harvard Law School have been able to turn to Scott Turow's *One L*, TUROW, *supra* note 14, and the more recent *Broken Contract*, by Robert Kahlenberg, KAHLENBERG, *supra* note 14, as well as *Poisoned Ivy*, by Eleanor Kerlow, KERLOW, *supra* note 14. Reed recommends *Broken Contract* to Kate during a discussion. SPY, *supra* note 1, at 131.

29. *MY COUSIN VINNY* (Fox 1992) (Vinny of title graduated from unfelicitously named Brooklyn Academy of Law).

30. JOHN GRISHAM, *THE CLIENT* (1993) (heroine attended Memphis State Law School). In Grisham's last book, *THE RAINMAKER* (1995), his hero also attended Memphis State and, while there, participated in a quasi-clinic representing the elderly.

31. JOHN GRISHAM, *THE PELICAN BRIEF* (1992) (heroine and her law professor/mentor/lover are from Tulane Law School).

Nevertheless, law schools and law professors at all status levels have received an increasingly favorable amount of media coverage from a variety of sources. Trade publications like the *American Lawyer* and the *National Law Journal*, as well as mainstream periodicals, regularly cover the better and more controversial happenings in American law schools.<sup>32</sup> Papers such as the *New York Times* include frequent references to law schools and academics. Prominent legal scholars are featured in a wide variety of magazines and newspapers, and are frequent commentators, experts, and sources of sound bytes for the electronic and print media. Legal academics also often have been featured players in high-publicity cases, such as the O.J. Simpson trial.<sup>33</sup>

Heilbrun's negative images of law schools are inconsistent with the images of law professors which have emerged from this media exposure. Some law professors depicted in the media may be obnoxious egoists who reinforce negative stereotypes about lawyers, but they are rarely criminal, ignorant, prejudiced, or ridiculous, as are the less-than-esteemed Schuyler Law faculty. On the contrary, hostility to law professors as a sub-genre of the legal profession is, more likely, a reaction to the power emanating from their presumed intellect, expertise, and self-confidence.<sup>34</sup> If anything, law professors are viewed simply as somewhat more conceited, pedantic, and wooden versions of the absent-minded academic—and somewhat less objectionable than their counterparts in the practicing bar.<sup>35</sup>

Though images of law professors in the mainstream media are far from uniformly positive, the faculty of Schuyler receives exceptionally rough treatment by Heilbrun. The professors are troglodytes, unabashedly uninformed, and outspokenly narrow-minded. Heilbrun is totally ungenerous in her portrait of this pedestrian bunch, leaving

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32. See, e.g., Fox Butterfield, *Parody Puts Harvard Law Faculty in Sexism Battle*, N.Y. TIMES, Apr. 27, 1992, at A10; Calvin Trillin, *Harvard Law*, THE NEW YORKER, Mar. 26, 1984, at 53 (chronicling Critical Legal Studies tumult).

33. Members of the Simpson defense "dream team" include Barry Scheck of Cardozo Law School and Gerald Uelman of Santa Clara University School of Law. Michael Tigar of the University of Texas School of Law is representing an Oklahoma City bombing defendant. Charles Ogletree of Harvard Law School was Anita Hill's lead counsel. In addition to consulting on the Simpson trial, Alan Dershowitz has represented many (in)famous clients including Mike Tyson and Leona Helmsley.

34. Legal academics always have been prominent in national government. Three current Justices of the Supreme Court, Stephen Breyer, Antonin Scalia, and Ruth Bader Ginsburg, are former full-time law teachers. President Clinton himself taught at the University of Arkansas Law School.

35. In the movie *A WALK IN THE SPRING RAIN* (Columbia 1969), Ingrid Bergman has an affair with Anthony Quinn. John Hart Ely has observed that the reasons for her dalliance with the virile Quinn were telegraphed by a simple and effective metaphor: Her husband is a constitutional law professor, obviously a bore and a stiff. See FRED R. SHAPIRO, *THE MOST CITED ARTICLES FROM THE YALE LAW JOURNAL* 25 (1991).

anyone unfamiliar with legal academics no choice but to detest the whole lot, side unequivocally with the newcomers, and embrace Heilbrun's parable of redemption and transformation.

### III. IMAGES OF TEACHING

The only classroom experience depicted at Schuyler is the law and literature seminar co-taught by Kate and Blair. Although Heilbrun's depiction of the challenges of preparing and conducting an innovative new course initially appears as extreme as the rest of her description of Schuyler, her portrayal ultimately is both moving and, almost, realistic.<sup>36</sup> The struggles encountered in the course—student skepticism, disinterest, and hostility—mirror the experiences of many professors teaching experimental subject matter or using innovative teaching techniques.

The law and literature seminar is offered during the late afternoon, once a week, in a dingy, airless room in Schuyler's basement. The room assignment itself is a not-too-subtle reflection of the low esteem in which the course is held by the school. To the extent that the rest of the faculty is aware of the new offering, they sneer at it. The students include both men and women, but little else is presented about their numbers, ethnicity, or backgrounds, or even why these mavericks have chosen to enroll in this curious and unconventional course.

Heilbrun gives considerably more information about the reading material for the course. Following their initial meeting at the Plaza, Kate and Blair assemble a reasonable facsimile of a syllabus, modeled closely on the reading list Heilbrun used while visiting at Yale. Kate and Blair lead the students through close readings of texts such as *Jane Eyre*,<sup>37</sup> *Jude the Obscure*,<sup>38</sup> *Michael M. v. Superior Court*,<sup>39</sup> *Hoyt v. Florida*,<sup>40</sup> and *Bradwell v. Illinois*,<sup>41</sup> in search of the exclusion of feminist voices and the subjugation of women as objects in worlds where only men speak from positions of authority.

This hardly seems like an arduous semester for Kate. She has no office or formal office hours at Schuyler. Like any other visitor, she has no administrative responsibilities. Kate herself reflects that

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36. In offering our observations and reactions to these images, we respond only as experienced classroom teachers and offer no insights into the teaching of feminist theory or law and literature, which are not part of our teaching repertoire.

37. CHARLOTTE BRONTË, *JANE EYRE* (Everyman's Classic 1992) (1847).

38. THOMAS HARDY, *JUDE THE OBSCURE* (Everyman's Library 1992) (1895).

39. 450 U.S. 464 (1981).

40. 368 U.S. 57 (1961).

41. 83 U.S. 130 (1875).

preparation for only one course a week is "child's play."<sup>42</sup> She appears to be winging it, relying on familiar texts and interpretive tricks to teach an audience different from, and seemingly less worthy of her preparation time than, the literature students at her regular university. There is an arrogance here about teaching law students that defies the experience of every law professor who has agonized over teaching a new course for the first time.<sup>43</sup>

More troubling are the responses of the students *in* the classroom. They are acting out to an extraordinary degree. Ominous things begin to occur, transforming Schuyler into a Twilight Zone of legal education. One day after class, the entire seminar is locked into their classroom and faces the prospect of remaining there overnight, perhaps indefinitely, until a student remembers that she has a cellular phone and is able to reach the police. Later in the semester, in a nightmarish incident of both psychological and physical implausibility, a male student interrupts class and locks the room door. He announces to Blair, "I've had enough of your goddamn bullshit," and says that the thing he really hates are "straight men who let women tell them what to do."<sup>44</sup> The student then tackles Blair and tries to punch him out until a female student crashes a folding chair over the student's head.<sup>45</sup> The student eventually explains that he has acted in this outrageous way because he is enraged about the discussions in class and the "propaganda" espoused by Blair and, especially, by Kate.<sup>46</sup>

This particular student also secretly tapes the class in an effort to expose the professors' subversive treatment of issues like rape, sex, and gender equality.<sup>47</sup> He is abetted by one woman student, who, voicing her own stereotypical views about gender, says she believed, at least before the incident, that the assailant was a "real guy, not like the other so-called men in the class."<sup>48</sup> This same male student also

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42. SPY, *supra* note 1, at 94.

43. See Douglas Whalley, *Teaching Law, Advice for the New Professor*, 43 OHIO ST. L.J. 125 (1982). See also Fred Bosselman, *In Memoriam*, 31 HOUSTON L. REV. 1345, 1347 (1995) ("I spent half of my first year of teaching preparing for class and the other half worrying that I was not preparing enough . . ."); George C. Christie, *Legal Education in an Era of Change: the Recruitment of Law Faculty*, 1987 DUKE L.J. 306, 309 ("The first year of teaching should also be a learning experience for our hypothetical law professor, who is now finding out that teaching a subject is much harder work than he might anticipate.").

44. SPY, *supra* note 1, at 137.

45. *Id.* at 137-38.

46. *Id.* at 139.

47. This incident seems to be drawn from the true-life example of a Dartmouth professor whose class was taped by students dissatisfied with the Afro-centric content and teaching methods of one of their professors. See Allan R. Gold, *Racial Tension at Dartmouth as Teacher and Paper Clash*, N.Y. TIMES, Mar. 2, 1988, at A16; Morton Kondrake, *The Dartmouth Wars: The Mud Pies Are Flying*, THE NEW REPUBLIC, Dec. 12, 1988, at 9.

48. SPY, *supra* note 1, at 140.

distributes a centerfold with Kate's head taped onto it to fellow students and some faculty, with segments of both groups finding it amusing.<sup>49</sup>

In this chaotic atmosphere, what could these students have learned? Apparently, they may have gained some self-awareness, even if they learned little about law and literature, and each may have taken some tentative steps towards acquiring a voice. After this series of ugly incidents, Blair explains to Kate:

We've given them permission to speak of their experiences, in and out of law school, which no other class has done. So, naturally, they take out their angers on us. Rather like parents with adolescent children, or so I would imagine. And rather like parents, we would dearly like to kick them from time to time.<sup>50</sup>

Heilbrun has written a very similar account of her surprise at her Yale students' reactions to her own teaching:

I was not at all prepared for the angry response our students expressed to the content of this new course, and to me in my presentation of it. I have since learned from the experiences of others that, even today, a class in gender theory inserted into the curriculum of a largely patriarchal institution . . . causes after-shocks.<sup>51</sup>

Drawing upon her real-life experience, Heilbrun has provided an exaggerated version of the "group therapy" that occurred at Yale, where women students "felt free to express the anger they dared not express to men. The instructors became, therefore, the objects of additional anger, not evoked by us but displaced onto us."<sup>52</sup>

Such expressions of anger cause Kate and Blair's class to transform, providing a powerful lens through which students view their own law school experiences.<sup>53</sup> The women shed their inhibitions to reveal their individual thoughts about inequities within the school—their demeaning treatment in class by male professors, the absence of women faculty, the exclusion or mistreatment of problems particular to women in classes, sexual harassment by male faculty members, their lack of representation on committees, and the lack of recog-

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49. *Id.* at 140-43. This incident may have had its inspiration in Heilbrun's own life, as Kate refers to similar treatment received by a friend of Heilbrun's in a right-wing journal. *Id.* at 142. The incident is also reminiscent of some of the sexual harassment found in *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990). See generally Martha Chamallas, *Jean Jew's Case: Resisting Sexual Harassment in the Academy*, 6 YALE J.L. & FEMINISM 71, 74 (1994).

50. SPY, *supra* note 1, at 95.

51. *Convergences*, *supra* note 12, at 1921-22.

52. *Id.* at 1923. See also Carolyn G. Heilbrun, *The Politics of the Mind: Women, Tradition, and the University*, in *HAMLET'S MOTHER*, *supra* note 3, at 213, 222.

53. SPY, *supra* note 1, at 167-70.

inition of women's accomplishments in the form of certain concrete symbols, such as editorship of the law review. These thoughts and emotions come tumbling out, expressing the empowerment provided by a course taught from a feminist perspective, which also includes the kind of anger at female authority figures experienced by Heilbrun herself.<sup>54</sup> For the first time at Schuyler, women begin to acquire the voice that Heilbrun in her academic persona so passionately advocates.<sup>55</sup>

Heilbrun's depiction of classroom teaching is consistent with her perspective as a feminist scholar and her interest in the transformative power of language. However, this depiction is only slightly more persuasive and realistic than her depiction of Schuyler as an institution. As teachers, we all hope that our ideas and the ideas we unlock will forever change and illuminate our students and the worlds in which they live. In reality, this rarely happens. Change, both personal and institutional, is incremental and evolutionary, rather than like a collective light bulb suddenly turning on over an otherwise sullen and uncommunicative student body. At an unreconstructed school like Schuyler, Kate is more likely to have opened only a few minds, and then only temporarily. Later, the ripples would die down as the power and challenge of change dissipates and students become more distant and dispersed.<sup>56</sup> As Heilbrun and Resnick note of their experience at Yale:

We do not see how the male perspective can fail to reform itself now that women have become a visible part of the legal and literary professions. But we were saddened to see that the pace of the reformation is slowed by the thickness of the institutions' doors, by multiple communications to students that inhibit and make them . . . afraid and ambivalent to make use of the techniques, theories, readings, and scholarship that feminism has so richly provided.<sup>57</sup>

Changing and opening even a few minds, nonetheless, should be cause for congratulations, without the need for exaggeration. The incidents of verbal and physical aggression by students, the attempts to degrade a woman professor, a shared concealment of surreptitious

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54. *Convergences*, *supra* note 12, at 1923.

55. "Women in the university need not only to pass from the margin to the center of intellectual life, they need help from the university in confronting the problems of being female in our culture and especially in the culture of the university . . . . And we must ask women within the university to speak for themselves also." Heilbrun, *supra* note 52, at 221.

56. Professor Resnick gently chides her co-author for an exaggerated sense of the dramatic changes that feminist theory has occasioned in the legal field. See *Convergences*, *supra* note 12, at 1938.

57. *Id.* at 1952.

taping of classes for use against a faculty member, and a general challenge against the authority of liberal and women faculty members—all eventually ring true to experience. As Heilbrun has observed, “while every woman teacher has an anecdote, if not several, of an aggressive young male student who challenges her authority, many white men have teaching careers without such confrontations.”<sup>58</sup> Upon reflection, our initial dismissal of Heilbrun’s fictional account receded, as we realized that her caricature of the worst class imaginable contained the ingredients of many of our own and our colleagues’ lives.

#### IV. IMAGES OF CLINICS

Clinical education is as primitive as everything else at Schuyler Law School. Indeed, at Schuyler, to support clinics may be “sufficient to qualify one as a revolutionary.”<sup>59</sup> Heilbrun unquestionably believes that clinical programs are valuable features of a law school curriculum and sees the lack of such programs as another of Schuyler’s deficiencies. The clinical program described, unfortunately, is neither thoughtful nor professional, and does not reflect accurately the current state of clinical legal education.

Kate’s husband, Reed Amhearst, burnt out as a traditional law school teacher,<sup>60</sup> is taking a leave from his more prestigious school to start a clinic at Schuyler. Looking for an adventure which his own institution “was a bit too ivy league” to support,<sup>61</sup> Reed starts a “prison project, perhaps connected to a project for battered women,”<sup>62</sup> areas of representation for which his years as an assistant district attorney and professor of criminal procedure hardly qualify him.

In fact, Reed has little relevant practical experience of *any* sort for this clinic, since he probably never represented a criminal defendant or prisoner during his entire legal career. His main experience seems to have been “help[ing] out” in some of the clinics at his home law school on “discrimination, Title VII, class suits [sic], gay rights and the rights of assembly.”<sup>63</sup> Reed’s fuller explanation of the clinic is more representative of the goals of similar programs at Yale<sup>64</sup> and other

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58. *Id.* at 1923.

59. SPY, *supra* note 1, at 49.

60. *Id.* at 30.

61. *Id.* at 33. In reality, Columbia and most other elite law schools have several client-based clinics.

62. *Id.*

63. *Id.* at 64.

64. See Stephen Wizner & Dennis Curtis, “Here’s What We Do”: Some Notes About Clinical Legal Education, 29 CLEV. ST. L. REV. 673 (1980).

law schools ("helping those once convicted but who have some real reason to believe that their convictions were improperly obtained or that their sentences are illegal in some way, or who have stories of mistreatment by prison staff").<sup>65</sup>

Despite being a visiting professor for only one semester, Reed pronounces, "I've thus decided that Schuyler shall have a clinic," and without going to any committee of the faculty for approval of the content and structure of his course, simply starts a program. Enrolling ten or twelve students,<sup>66</sup> a relatively large number for the first semester of any program's existence, he seems able to pop his clinic into the curriculum without making any decision about credits, enrollment criteria, prerequisites, scheduling, grading, or any other critical issues that law faculty generally consider when adopting a new course.

Reed's planning also ignores many of the vital concerns of clinical teachers. He seems to have forgone any need to identify and define the pedagogical goals of the course other than to introduce the model of real client representation to Schuyler. In this way, Heilbrun seems to suggest that all live-client clinics are the same, and better than simulation courses, simply because they "help people or plunge the students into actual legal situations."<sup>67</sup> Moreover, Reed gives no more than passing thought to any seminar component in which his students will "study about the criminal justice system."<sup>68</sup>

Case selection also is a mystery. Without explaining why he is so confident, Reed seems to have no doubts that he will find the clients who present problems of appropriate complexity and manageability for the students to represent in a single semester. Reed similarly shows no familiarity with any of the literature on client interviewing and counseling.<sup>69</sup> Presumably, his students will meet their first clients with no more than common sense to guide them, even though they probably will have had no prior experience with convicted felons, or, for that matter, with any kind of client.

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65. SPY, *supra* note 1, at 34.

66. *Id.* at 63.

67. *Id.* at 128.

68. *Id.* at 63. How likely is it that the conservative teacher of the students' first year criminal law course even covered the battered spouse syndrome defense? The prevailing attitude at Schuyler is exemplified by the remarks of one criminal law professor, who says, "When you distort the law to let a woman murder her husband and let her off by rules that don't apply to men, you have got yourself in real danger." *Id.* at 83.

69. See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING (1990); GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS 124-273, 966-1105 (1978); DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS (1991); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LEGAL INTERVIEWING AND COUNSELING (1980).



Reed also has some extremely uninformed and superficial ideas about supervision, and has given no apparent thought to his role as a supervisor of students. His only mention of any kind of pre-appearance supervision is the reference, "Of course, we practice first, we have moots."<sup>70</sup> Without any real efforts to educate himself about the wide range of literature on the subject of legal clinic supervision,<sup>71</sup> it looks as if Reed will fall into the classic trap encountered by most novice clinicians of replicating his experience as a supervisor of younger attorneys, delegating less and intervening more than he should. His main acknowledgment of this dilemma is, "Of course, I go to court with them; usually the students are wonderful, but sometimes a professor, me, has to speak up in court and say 'Let me add something.' Not often, if all goes well."<sup>72</sup>

Amazingly, in what could only be a dangerous example of practicing law without a license, Reed hires a third year law student from his own school (destined for a job as an associate at a Wall Street firm—a future which hardly qualifies her to handle women's prison cases) to be his assistant.<sup>73</sup> This decision implicitly suggests that a third year student from Reed's Ivy League school is competent to assist in the supervision of her less capable peers at Schuyler. This "assistant director,"<sup>74</sup> who incidentally falls in love with Reed, accompanies Kate to visit a potential clinic client, the battered woman convicted of murdering her Schuyler professor-husband. This is the first of several troubling ethical dilemmas which Heilbrun simply ignores. Although Kate quite properly questions her role ("Am I supposed to be a lawyer?"),<sup>75</sup> Reed brushes off her concerns, responding, "Of course not . . . you're connected with a properly registered lawyer—me—and with [my assistant] who they [the prison authorities] know is working with me."<sup>76</sup>

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70. SPY, *supra* note 1, at 62.

71. See, e.g., Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981); Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L. REV. 301 (1986); Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537 (1990); Richard K. Neumann, *A Preliminary Inquiry Into the Art of Critique*, 40 HASTINGS L.J. 723 (1989); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, N.Y.U. REV. L. & SOC. CHANGE 109 (1993-4).

72. SPY, *supra* note 1, at 63. On the one occasion that Reed is actually in court with one of his students, the reader never learns anything about the case or the particular proceeding, or even in which court they are appearing. *Id.* at 146.

73. *Id.* at 100.

74. *Id.* at 145.

75. *Id.* at 146.

76. *Id.* Is this explanation sufficient to overcome any concerns about a potential waiver of the attorney-client privilege? The parameters of her conversation are never set. Her role in giving advice or counsel is unclear, her relationship to the eventual litigation undefined. At least Kate keeps the details of her conversation with the potential client to herself.

This particular client poses some rather unique and uncomfortable problems for Schuyler that the book conveniently overlooks. Reed casually disregards the conflict of interest this representation poses. The grounds for obtaining a review of the conviction include accusations of suppressed and even perjured testimony of members of the Schuyler faculty about the victim, one of their colleagues. Neither Reed nor his clinic students seem to have any problems with accusing the faculty at their school of serious, even criminal, misconduct. Someone working in the clinic, assuming it endures, will be in the untenable position of drafting affidavits accusing faculty members of lying at the earlier murder trial or, even worse, questioning under oath their torts and contracts professors.<sup>77</sup>

Although clinical legal education has a featured part in this book, its credibility as a valid teaching methodology suffers in Heilbrun's hands. Her portrait of clinical education does not share the cartoonish qualities of many of her other images of law school. Nonetheless, her depiction is defective, because it strengthens rather than dispels the criticism that clinical teaching is a non-theoretical, oversimplified, and superficial form of skills training. It is difficult to reproach anyone who advocates the proposition that live-client clinics offer a much richer tapestry of personal interaction and the deep satisfactions and rewards of helping another human being than is possible in "synthetic" (read simulation) programs. Similarly, it is hard to criticize an author who generally espouses the message of the MacCrate Report<sup>78</sup> when she debunks the narrow-minded attitudes of the antediluvian Schuyler faculty, which believes that it is a "waste of time to teach law students what they can learn on their own when they get out."<sup>79</sup> Yet Heilbrun's world of clinical legal education is so unsophisticated and so dangerously bordering on the unprofessional that any reader who forms the impression that this is an accurate portrait of today's clinical programs would be sadly misled. All this would be defensible if this simplistic depiction of clinical education was essential to either the plot, the parody, or the message of the novel. However, if anything, the story would have been

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77. Another ethical lapse occurs when Reed is planning the clinic. Reed says that he hopes to enlist the aid of some connections in the corrections establishment to develop the program. Though he is depending on his contacts with the very agency he may well sue in the future, he gives no consideration to this personal and professional conflict of interest. *Id.* at 62.

78. SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUC. AND PROFESSIONAL DEV.—AN EDUC. CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). See also *Symposium on the 21st Century Lawyer*, 69 WASH. L. REV. 505-678 (1994); *Symposium on the MacCrate Report: Papers from the Midwest Clinical Teachers Conference*, 1 CLIN. L. REV. 349-492 (1994).

79. SPY, *supra* note 1, at 180.

enhanced by a modest addition of realism about clinics. As a result of her writing, Heilbrun inadvertently strengthens negative stereotypes about clinical education, thereby contradicting her more general attack on conservative law school traditions.

#### V. PALE, MALE & NOT YALE?

Responding to *An Imperfect Spy* as a complete work requires some attempt to uncover why Heilbrun chose to delve into the ethos of Schuyler Law so deeply and depict it in such a negative manner. Presumably, Heilbrun chose the law school milieu deliberately and not merely because some setting was needed for the mystery novel. Most of Heilbrun's past works have been set in academia, but none in a law school. We believe that Heilbrun has chosen to portray Schuyler in such a peculiar way that this depiction is the real subject of *An Imperfect Spy*. Recognizing this transforms *Spy* from a mass-market mystery into a more narrow work destined to appeal to academics trying to decode the book as a *roman à clef* about their own institutions.<sup>80</sup>

There are several hypotheses that explain why Heilbrun chose to portray Schuyler so negatively. First, Heilbrun may simply misunderstand legal academia given the brevity of her own experience teaching at law schools. *An Imperfect Spy* also could be a thinly disguised description of Heilbrun's own experiences as a visiting professor at Yale. Or, in light of Heilbrun's career teaching at an elite institution like Columbia, and more limited experience at Yale, perhaps *Spy* is Heilbrun's attempt to portray an elite's vision of more pedestrian and less evolved schools like Schuyler. Finally, Heilbrun may be using Schuyler to make more universal points about all law schools or academia in general.

As for the first, it seems unlikely that the legal academy is such a strange creature that Heilbrun simply misunderstood what she saw. Her past fictional and scholarly works suggest an insightful eye for the ethos of university teaching and the relationships and petty conflicts that give academic institutions their identities.<sup>81</sup> As for the second, it would be entirely speculative to suggest that Schuyler is merely Yale in disguise. Heilbrun already has written about her experiences at Yale without the kind of rancor displayed against Schuyler.<sup>82</sup> There are no additional clues in interviews following the publication

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80. Which faculty member who constantly interrupts himself resembles a turtle butting his head to emphasize his points? *Id.* at 76. Who is that non-white, large, handsome, stately, conservative "old boy"? *Id.* at 78.

81. See *supra* notes 2-3.

82. See generally *Convergences*, *supra* note 12.

of *An Imperfect Spy* that would suggest this as her primary purpose.<sup>83</sup>

Similarly, it would be unfair conjecture, given Heilbrun's stature as a serious feminist critic, to suggest that this book offers a smug "it-could-never-happen-here" conclusion from a professor at an elite school looking askance at schools further down on the food chain. The few clues we have about Heilbrun's own life suggest otherwise. She has, in fact, been vocally critical of the sexism of her Columbia colleagues,<sup>84</sup> and has been on the receiving end of harassment and unfair treatment. Moreover, Heilbrun was outraged by the posthumous treatment received by Professor Mary Jo Frug at the hands of the *Harvard Law Review*, which parodied her work only a year after her unsolved murder,<sup>85</sup> an incident explicitly referenced in *Spy*.<sup>86</sup>

It would be a mistake, however, to limit an analysis of *Spy* to the narrow question of whether Schuyler is Yale, Columbia, or someplace else in disguise. Instead, Heilbrun is trying to tell us something about sexism *throughout* academia. As Heilbrun herself has noted, "Amanda Cross could write in the popular, unimportant form of detective fiction, the destiny she hoped for women . . . ."<sup>87</sup> Since it might be more difficult for a reader to accept bigotry and prejudice at supposedly advanced elite institutions, situating her story at a fifth quintile institution from which we can all disassociate in one form or another is an effective and diplomatic literary device. We are prepared to believe that anything can happen at a school like Schuyler.

Indeed, there are indications from Heilbrun's own life which suggest that Schuyler is meant as a more universal model of sexism at institutions of all levels of academic prestige. As a member of the first wave of feminist scholars, Heilbrun encountered the extreme prejudices and difficulties typical of her pioneering generation. Although today's women in academia certainly experience sexism and

83. See, e.g., Schorow, *supra* note 3.

84. *Id.* Heilbrun's accusation of sexism may find its best proof in the description of her proffered by the then chair of the English department: "I found her a maternal figure." Matthews, *supra* note 3, at 72. Heilbrun has recounted some of the in-fighting at Columbia. See, e.g., Carolyn G. Heilbrun, *Another Kind of Sexual Harassment*, 4 MD. J. CONTEMP. LEGAL ISSUES 183, 185 (1993); Kathryn McCormick, *Interview with Carolyn Heilbrun*, N.Y. NEWSDAY, Mar. 15, 1993, at 39.

85. Schorow, *supra* note 3. See Butterfield, *supra* note 32; Pedro E. Ponce, *Feudin' and Fightin' at Harvard Law*, LEGAL TIMES, Mar. 6, 1995, at 66; SPY, *supra* note 1, at 45.

86. SPY, *supra* note 1, at 92.

87. HEILBRUN, *WRITING A WOMAN'S LIFE*, *supra* note 3, at 119. Heilbrun has also explained why she writes detective novels: "[W]ith the momentum of a mystery and the trajectory of a good story with a solution, the author is left free to dabble in a little profound revolutionary thought." CAROLYN G. HEILBRUN, *Gender and Detective Fiction*, in HAMLET'S MOTHER, *supra* note 3, at 244, 251.

harassment, their mistreatment is less blatant than that heaped on the gate-crashers of Heilbrun's era. Heilbrun's hyperbole may well be the product of her own difficult battles for recognition as well as her frustration with the slow pace of meaningful changes in the attitudes of her male colleagues. Indeed, as a result of her concern about treatment by male colleagues of her and other woman teachers in the department, Heilbrun recently resigned from the Columbia University faculty, though her rancor was hardly confined to her own school.<sup>88</sup>

The arrogance of these men. They get frightened by anyone good, anyone powerful, anyone who's not male like themselves. They're frightened about sharing the power.<sup>89</sup>

It is Harriet, the elderly, invisible "spy" of the title, who observes that legal academia is a "clump of mediocrity," threatened by any attempt to transform the structure by which its members lead their lives.<sup>90</sup>

If Schuyler is every law school, how close does Heilbrun come to hitting the mark? Most readers will tend to view Schuyler as a very bad and anachronistic law school, but one that does not closely resemble their own. There is certainly a great deal of silliness at Schuyler that is not found elsewhere. In addition, a quick glance through the American Association of Law Schools directory suggests that no real school is so lacking in women and minority teachers.<sup>91</sup> However, all schools can do better.<sup>92</sup> Clinical and other skills teachers still confront issues of status and resources in comparison to the rest of their colleagues.<sup>93</sup> Feminist teaching in law schools, where it exists, is usually quite limited and marginal, and almost never a part of most law schools' core mission.<sup>94</sup> Similarly, even if a blatantly and uniformly sexist white male faculty à la Schuyler normally is a thing of the past, law schools are just beginning to come

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88. Schorow, *supra* note 3.

89. *Id.*

90. SPY, *supra* note 1, at 209-10.

91. *But cf.* Michael A. Cardozo, *Women Not in the Law Schools, 1950 to 1963*, 42 J. LEGAL ED. 594 (1992).

92. See Richard Chused, *The Hiring and Retention of Minorities and Women in American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93; White, *supra* note 13.

93. See Nina W. Tarr, *Current Issues in Clinical Education*, 37 HOW. L. J. 31, 36-38, 41-44 (1993); Stephen F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 MINN. L. REV. 619, 625-631 (1991).

94. For a discussion of challenges of introducing feminist scholarship and teaching into a traditional law school environment, see Cheryl B. Preston, *Joining Traditional Values and Feminist Legal Scholarship*, 43 J. LEGAL ED. 511 (1993).

to grips with the issue of how women law students perform and whether they receive the same rewards as their male counterparts.<sup>95</sup>

Thus, while Schuyler is a law school that deserves the ridicule Heilbrun heaps upon it, and we should be proud that so few of the characteristics of Schuyler can be found in abundance in any American law school today, individual ingredients certainly exist in many institutions—even if the entire recipe for disaster is missing. Fictional Schuyler is a valuable reminder that too much smugness and too quick a tendency to say that “it can’t happen here” may be self-delusional.

## VI. CONCLUSION

We are grateful to Heilbrun for providing another opportunity to listen to the educated conversation of Kate and Reed, and for championing the cause of modern approaches to legal education. At first, Heilbrun’s portrait of Schuyler seemed so preposterous and unreal that Heilbrun’s more important message was obscured. Now that we have reread the book several times, however, we can appreciate Heilbrun’s willingness to expose her views of legal academia and its follies, to risk being criticized for her exaggeration and hyperbole, and to continue to hope and fight for change within teaching institutions.

Even though *An Imperfect Spy* fails as a suspenseful mystery and as an effective parody, it still offers more than just a quick read to be forgotten in the crush of work or of leisure reading. In the Schuyler Law Schools of the world, people can come to grips with and triumph over the blatant forms of malice exposed in the book. The real-world issues facing the legal academy, though, are more subtle and difficult to confront. Adequate diversity in hiring, promotion, and tenure has not been attained. Nontraditional scholarship struggles for acceptance. The debate over the value and nature of skills training rages. Women and minority faculty still are treated with less respect than their white male counterparts by certain students. Only a reader who lacks appreciation for the history of an earlier generation of feminist academics epitomized by Harriet, Kate, and Professor Heilbrun would completely discount the message conveyed by the cruder obstacles portrayed in *An Imperfect Spy* as irrelevant relics of a less progressive era.<sup>96</sup>

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95. See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League School*, 143 U. PA. L. REV. 1 (1994); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); Marina Angel, *Women in Legal Education: What It’s Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 800 (1988).

96. For Professor Heilbrun’s views of her generation’s impact on subsequent feminists, see CAROLYN G. HEILBRUN, *Introduction*, in *HAMLET’S MOTHER*, *supra* note 3, 1, 4-5.

If this book seems to make a mockery of law school, it is probably because we do indeed take ourselves and our perquisites too seriously, and only satire can force us to look more closely at ourselves. Much in the book may appear unrealistic and risks being misleading about the law school environment. However, under the trappings of the academic mystery genre lies a sensible, consistent voice of a dedicated feminist urging us to “fight again with renewed vigor,”<sup>97</sup> wherever the battlefield. For Kate, the fight, however unwittingly undertaken, was a success. As Kate notes hopefully, “Maybe we’ve made something moribund a little livelier.”<sup>98</sup> And if antediluvian Schuyler can be forced to diversify, to adapt to and accept new ideas, and to modernize, then all of our infinitely better institutions should be able to absorb change and difference gracefully—without collapsing.

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97. *Convergences*, *supra* note 12, at 1924.

98. *SPY*, *supra* note 1, at 204.

# Reexamining the Prohibition Amendment

Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920*. Chapel Hill: University of North Carolina Press, 1995. Pp. x, 341. \$49.95.

**W. J. Rorabaugh**

Richard Hamm's book, *Shaping the Eighteenth Amendment*,<sup>1</sup> is a welcome addition to the literature on prohibition and the history of drinking in America. The author's most important contribution is to demonstrate the significance of law and the courts, both for prohibition in particular and for progressive politics more generally. He shows how the internal dynamics of legal processes, including the give and take of legislative and judicial bodies, provide the structure within which politics takes place. For reformers, both in the progressive era and more generally, this is a crucial insight: The reform impulse, usually nebulous and general, can only be realized in the political realm through policies that operate within the governmental structure. In a sense, all politics must relate to existing statutes and court decisions, but advocates of the status quo are likely to find inertia congenial, while reformers bear the special burden of seeking to use law and the courts to overturn powerful forces that are legally entrenched. The particular way that reformers choose to move is, to a surprising extent, dictated by the legal frame of reference. As Hamm demonstrates, the popularity of federalism long hampered prohibition and led to the adoption of national prohibition with an unworkable policy of concurrent federal and state enforcement. Although prohibition failed for many reasons, Hamm shows that the legal framework predetermined failure even if other conditions had been favorable.

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1. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance, Reform, Legal Culture, and the Polity, 1880-1920* (Chapel Hill: University of North Carolina Press, 1995).



*Shaping the Eighteenth Amendment* contains two parts. In the first, Hamm reviews the late nineteenth century, when the moral unctuousness of the radical drys limited their political effectiveness, while the shrewdly practical liquor industry, led by the brewers, exerted considerable influence. Largely dependent upon statutes, public officials had to construct alcohol policy within that era's prevailing *laissez-faire* values. In the second part, Hamm shows how matters changed after 1900. Borrowing lessons from the liquor lobby, pragmatic prohibitionists made incremental political demands that could be met through bureaucratic action or court rulings, as well as through new statutes. Wets found it increasingly difficult to oppose prohibition, because drys generally embraced other popular reforms. This progressive belief in using government to remake American society, along with the era's experimentalist mood, enabled drys to win.

Hamm's book has many pluses. It is impeccably researched, and the notes form an elegant guide to both primary sources and secondary literature; reading them is a pleasure. Manuscript collections are handled skillfully, and Hamm's use of newspapers is especially noteworthy for providing a sense of the national scale and variety of opinions about prohibition. Twists and turns of Congress and the courts are diligently traced and analyzed. One only wishes that the book were less repetitious, better organized, and more concrete about issues other than prohibition.

Before discussing Hamm's study in detail, it is helpful to review the period's historical context. In the nineteenth century, American society underwent rapid upheaval: immigration, urbanization, industrialization, western settlement, resource exploitation, and technological innovation. The Civil War saved the Union, ended slavery, and made federal power supreme, but the United States remained heterogeneous, a vast country with strong traditions of localism, with a devotion to individual liberty, and with an attachment to nineteenth-century *laissez-faire* ideas. Americans found it difficult to centralize government power; instead, the nation's huge new industrial enterprises became the most powerful forces of the late nineteenth century.<sup>2</sup>

Reformers, such as Henry Adams, noticed rising economic inequality, watched the wealthy grow more powerful, and saw the

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2. In general, see T.J. Jackson Lears, *No Place of Grace* (New York: Pantheon, 1981); Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill and Wang, 1967), and *The Opening of American Society* (New York: Knopf, 1984). On business, see Alfred D. Chandler, Jr., *The Visible Hand* (Cambridge, Mass.: Belknap Press, 1977); Alan Trachtenberg, *The Incorporation of America* (New York: Hill and Wang, 1982); and Olivier Zunz, *Making America Corporate, 1870-1920* (Chicago: University of Chicago Press, 1990).

political system become a cesspool of corruption. One of the worst episodes occurred in 1875, when distillers in the "Whiskey Ring" were caught bribing federal tax officials. Paralyzed by pre-industrial traditions, *laissez-faire* ideology, and the stupefying pace of socioeconomic change, reformers proved unable to organize effectively until around 1900. Then, a new generation of remarkable leaders emerged. Presidents Theodore Roosevelt and Woodrow Wilson, as well as Wisconsin Governor Robert La Follette and California Governor Hiram Johnson, not only defied tradition by refusing to wear beards but rallied long-alienated rural Americans into a politically powerful coalition with the more recently discontented urban middle class. They dared to attack both the unbridled power of capital and the nation's social ills, including workplace accidents, child labor, prostitution, impure food and drugs, and drunkenness.<sup>3</sup>

The progressives, as they called themselves, both reinvigorated and reinvented government. Seeking vastly increased power for government, they redefined government's proper functions and devised new, more sophisticated ways for officials to carry out their duties. In particular, they expanded the scope of regulatory agencies and enhanced the power of law by innovating administrative law. For example, many states established new public utility commissions to set rates; these commissions gained extensive power through substantive administrative rulings that acquired the force of law in the absence of detailed statutory regulation. Progressives recognized that the main traditional source of governmental power, the statute, was inadequate for governance in the complex modern age. Laws provided rough guidelines for action, but effective enforcement of matters such as shipping policies and rates, industrial safety and work rules, and the operation of public utilities required more refined judgments. These came increasingly through administrative regulations and the workings of complex bureaucratic processes. It was the age of the expert.

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3. An excellent recent survey of the period can be found in John M. Cooper, Jr., *Pivotal Decades* (New York: Norton, 1990). On leaders, see John M. Blum, *The Republican Roosevelt*, 2d ed. (Cambridge, Mass.: Harvard University Press, 1977); John M. Cooper, Jr., *The Warrior and the Priest* (Cambridge, Mass.: Harvard University Press, 1983); and Arthur S. Link, *Woodrow Wilson and the Progressive Era* (New York: Harper, 1954). On reformers, see Allen F. Davis, *Spearheads for Reform* (New York: Oxford University Press, 1967). On prostitution, see Mark Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill: University of North Carolina Press, 1980); and Ruth Rosen, *The Lost Sisterhood* (Baltimore: Johns Hopkins University Press, 1982). On food, see James H. Young, *Pure Food* (Princeton: Princeton University Press, 1989). On drugs, see David T. Courtwright, *Dark Paradise* (Cambridge, Mass.: Harvard University Press, 1982); and David F. Musto, *The American Disease*, 2d ed. (New York: Oxford University Press, 1987).

The courts also became an essential part of progressive governance, for without judicial support, law failed and policy floundered. In contrast with the *laissez-faire* ideas of the late nineteenth century, both state and federal courts after 1900 frequently upheld governmental regulation, including such initiatives as workmen's compensation, child labor regulations, and minimum wages for women. This expansion of the concept of law, the creation of supportive mechanisms, and the enlargement of governmental power gave overall shape to the progressive era. We still live with the consequences of these changes today.<sup>4</sup>

Alcohol use was among the many issues of the day to which the progressives applied their ideas about governance. The issue was not a new one. To many Americans, especially the majority raised in rural or small-town evangelical Protestant environments, Demon Rum explained almost all of society's ills, from poverty and unemployment to prostitution, wife beating, and murder. To stop the use of alcohol had long been an evangelical goal. The temperance campaign that started in the 1820's demanded personal abstinence both as the price of church membership and as a badge of middle-class respectability. By the 1850's, increased immigration, especially by whiskey-imbibing Irish and beer-drinking Germans, gave abstinence a patriotic twist: To drink was to be un-American.<sup>5</sup>

Abstainers began with their own salvation through teetotalism. Like other moral absolutists, they soon became obsessed with imposing their own particularist views upon the entire population through a legal ban. In 1851, Maine became the first state to enact prohibition, and, within four years, twelve states followed.<sup>6</sup> However,

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4. On progressive government, see Richard L. McCormick, *The Party Period and Public Policy* (New York: Oxford University Press, 1986); Stephen Skowronek, *Building a New American State* (Cambridge, Eng.: Cambridge University Press, 1982). On law, see Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992); Robert Stanley, *Dimensions of Law in the Service of Order* (New York: Oxford University Press, 1993). On ideas, see Morton G. White, *Social Thought in America, the Revolt Against Formalism* (New York: Viking Press, 1949). The classic plea for experts is Walter Lippmann, *Drift and Mastery* (New York: M. Kennerley, 1914).

5. On early alcohol use, see David W. Conroy, *In Public Houses* (Chapel Hill: University of North Carolina Press, 1995); W.J. Rorabaugh, *The Alcoholic Republic* (New York: Oxford University Press, 1979). On early temperance, see Ian R. Tyrrell, *Sobering Up* (Westport, Conn.: Greenwood, 1979); Harry G. Levine, "The Discovery of Addiction: Changing Conceptions of Habitual Drunkenness in America," *Journal of Studies on Alcohol* 39 (1978): 143-74. On alcohol use by immigrants, see Jed Dannenbaum, *Drink and Disorder* (Urbana, Ill.: University of Illinois Press, 1984). Three good studies of saloons are Perry Duis, *The Saloon* (Urbana, Ill.: University of Illinois Press, 1983); Thomas J. Noel, *The City and the Saloon, Denver, 1858-1916* (Lincoln, Neb.: University of Nebraska Press, 1982); Elliott West, *The Saloon on the Rocky Mountain Mining Frontier* (Lincoln, Neb.: University of Nebraska Press, 1979). An excellent survey of long-term cycles is Jack S. Blocker, Jr., *American Temperance Movements* (Boston: Twayne, 1989).

6. Hamm, 20.

enforcement generally failed, at least in part because of liquor shipped across state lines, and these early laws were all repealed. Prohibitionists concluded that dry areas would only be safe when the whole country was dry. Despite this conclusion, national prohibition did not occur for two generations. One important impediment was Frances Willard, the longtime head of the Woman's Christian Temperance Union (WCTU). From the 1870's until Willard's death in 1898, the WCTU dominated the anti-liquor movement. Although Willard favored prohibition, she stressed educating the public about personal abstinence. She also worried that a premature emphasis on prohibition would defeat her other great reform, women's suffrage. In Willard's lifetime, national prohibition seemed unlikely. It appeared unworkable inside the federal political system due to the limited role permitted for national government. All of this would change in the progressive era.<sup>7</sup>

No issue vexed the progressives more than prohibition. Many reformers were personal abstainers, and others who were not recognized the strong influence of prohibitionists upon the political system. The demand for growing governmental power to control alcohol was consistent with the more general progressive advocacy of governmental power to regulate other aspects of life, including slums, public health, education, and untamed capitalism. Yet prohibition, because of the particular nature of the reform, raised interesting questions. Could the federal government interfere with basic human rights? Could government at any level deprive a person of the right to personal possession and use of a product? Because alcohol was a commodity, was interstate shipment constitutionally protected? What were the limits of state control and federal power? At what precise point did federally-controlled shipment cease and state-controlled possession begin? Could a government collect taxes on illegal goods? Could a state obtain federal tax information about goods banned by a state? These were just some of the questions that emerged in this era.

One of the main themes in Hamm's book is that state and federal laws and United States Supreme Court rulings were not always consistent and frequently meandered. Public policy emerged from existing laws and past rulings, from what might be attained politically in the present, and from expectations about the future. In 1887, the

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7. Ruth B.A. Bordin, *Frances Willard* (Chapel Hill: University of North Carolina Press, 1986); Ruth B.A. Bordin, *Woman and Temperance* (Philadelphia: Temple University Press, 1981); and Barbara L. Epstein, *The Politics of Domesticity* (Middletown: Wesleyan University Press, 1981). See also Ian R. Tyrrell, *Woman's World/Woman's Empire* (Chapel Hill: University of North Carolina Press, 1991).

Supreme Court ruled in *Mugler v. Kansas* that dry states could seize liquor without having to pay compensation.<sup>8</sup> As Hamm points out, *Mugler* created the possibility of effective state prohibition. The Court, however, was anything but a dry bastion. In *Bowman v. Chicago and Northwestern R.R.*, the Court barred Iowa from banning interstate alcohol so long as the product remained in its original package.<sup>9</sup> However, the Court hinted that Congress might reverse this ruling by a specific statute or by authorizing state legislation. This decision, along with its affirmation in *Leisy v. Hardin*,<sup>10</sup> led the distillers to ship two- or four-ounce bottles unboxed in loose straw.<sup>11</sup> Angry drys persuaded Congress to overturn *Leisy* with the Wilson Act (1890), which allowed states to ban, tax, or regulate interstate alcohol.

Tax issues, as Hamm discusses in two fine, detailed chapters, frequently arose. After the federal government began to tax alcohol in 1862, the Internal Revenue Service (IRS) took the position that it would not share any information with the states. Thus, the IRS routinely demanded and received taxes on liquor illegally sold in dry states. This policy was driven by revenue needs, for, by the mid-1890's, liquor taxes constituted about two-fifths of all federal revenues.<sup>12</sup> Drys divided on this issue. Some believed that high taxes reduced demand and thereby helped dry the country. Others, including the WCTU, opposed liquor taxes because they thought that the large amounts of money collected made national prohibition impossible. Prohibitionists became strong advocates for a federal income tax in order to replace liquor taxes. Politicians, however, tended to prefer the existing alcohol tax to any new tax.

In the *License Tax Cases*, decided in 1866, the United States Supreme Court upheld the right of the federal government to collect alcohol taxes in dry jurisdictions.<sup>13</sup> Dealers in such locations often boasted, to the irritation of drys, about their federal "licenses." Drys were also annoyed that the federal government routinely seized untaxed liquor and then sold it at public auctions on post office steps in dry jurisdictions. In order to maintain a working relationship with producers, IRS officials refused to cooperate in dry state prosecutions, a policy upheld by the Supreme Court in *Boske v. Comingore*<sup>14</sup> in

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8. 123 U.S. 623 (1887).

9. 125 U.S. 465 (1888).

10. 135 U.S. 100 (1890)(reaffirming that Iowa was constitutionally barred from banning interstate alcohol shipments).

11. Hamm, 71.

12. *Ibid.*, 96.

13. *McGuire v. Mass.*, 70 U.S. (3 Wall.) 382 (1866).

14. 177 U.S. 459 (1900).

1900.<sup>15</sup> Local officials, like the rest of the public, had only the right to inspect the list of federal liquor taxpayers that each IRS office was required to maintain. In 1906, under Anti-Saloon League (ASL) influence, Congress passed the Certified List Law, which required local IRS officials to provide dry state officials with the names of persons who had paid federal liquor taxes. As a result of this law, twelve dry states declared that being listed was *prima facie* evidence of a state law violation. Hamm notes that state prosecutions correspondingly became more robust.<sup>16</sup>

Even after passage of the Wilson Act, the interstate shipment of liquor continued to be a source of legal trouble because of the uncertain boundary between federal and state jurisdiction. In 1898, the Supreme Court held in *Rhodes v. Iowa* that a dry state could not interfere with alcohol that was "in transit."<sup>17</sup> Thus, a state could not seize liquor as a common carrier crossed the state line. That same year, the Court declared in *Vance v. W.A. Vandercook Co.* that a state could not stop the interstate shipment of liquor for personal use.<sup>18</sup> In 1905, the Court protected interstate shippers by extending federal protection to the point where the liquor actually reached the consignee.<sup>19</sup> These rulings resulted in an open liquor trade in dry areas. Express companies received liquor on behalf of fictitious consignees and then sold it to anyone who put in a claim.

While wets focused on the right to personal use, Hamm observes that the ASL shrewdly dodged the issue. It ignored individual consumers and instead concentrated on stopping large volumes of alcohol being sent for sale in dry areas.<sup>20</sup> In 1906, the IRS, following an ASL suggestion, began to demand liquor taxes from the express companies, who responded by curtailing their business. Producers filed lawsuits demanding that common carriers accept all goods, a position upheld by the Supreme Court six years later in *Louisville and Nashville R.R. Co. v. Cook Brewing Co.*<sup>21</sup> That decision provoked dries to seek relief from Congress. At the same time progressives pursued an expansion of federal power using the Constitution's Commerce Clause. The Mann Act, passed in 1910 and upheld in

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15. Hamm, 166.

16. *Ibid.*, 166-67, 173-74.

17. 170 U.S. 412 (1898).

18. 170 U.S. 438 (1898).

19. *American Express v. Iowa*, 196 U.S. 133 (1905).

20. On the Anti-Saloon League, see Jack S. Blocker, Jr., *Retreat from Reform* (Westport, Conn.: Greenwood, 1976); K. Austin Kerr, *Organized for Prohibition* (New Haven: Yale University Press, 1985).

21. 233 U.S. 70 (1912).

1913, had already attacked the interstate white slave trade in prostitution through this clause.<sup>22</sup>

The Commerce Clause formed the basis of the C.O.D. Act, passed in 1909, which required shippers to label clearly both the consignee's name and the package's contents. Congruent state laws produced rigorous enforcement. By this point, according to Hamm, unity between the ASL and the WCTU, as well as the growing comfort among progressives with use of the Commerce Clause, led Congress to pass the Webb-Kenyon Act in 1913.<sup>23</sup> This law stopped the interstate shipment of alcohol into dry areas, unless state law allowed personal use. Although the federal government could confiscate liquor, only the states could impose penalties under this statute. Southerners liked the states' rights features of the Webb-Kenyon measure, a fact that the ASL noticed.

As prohibition gained popularity, the law kept pace. By 1917, eighteen states had "bone-dry" laws that banned alcohol for personal use.<sup>24</sup> These laws were upheld by the Supreme Court.<sup>25</sup> Meanwhile, Congress had taken the United States into World War I, enacted wartime prohibition, and banned liquor from being sent into dry areas for any reason. Some dry states outlawed liquor advertising. It is a curious fact that the most strenuous dry provisions, including Webb-Kenyon, wartime prohibition, and the Eighteenth Amendment, were passed by Congresses controlled by Democrats. Although the Democratic South came late to prohibition, the region embraced the idea with zeal in the progressive era. Prohibition, however, was less a partisan issue than a geographical idea rooted in the rural, evangelical South and West.

After 1913, the ASL concentrated on national prohibition by constitutional amendment. This idea meshed with a general progressive faith in the utility of constitutional amendments. Although some proposals, such as the election of federal judges and a ban on child labor, failed, progressives ultimately passed four amendments, including the prohibition amendment. Collectively, these amendments demonstrated the progressive belief in powerful government action and expressed a consistent hostility to alcohol. The direct election of senators removed political decision-making from liquor-filled backrooms; the income tax enabled the federal government to replace the liquor tax; and female suffrage greatly expanded the dry electorate. Far from being an embarrassing anomaly, prohibition, then,

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22. Hamm, 196-97.

23. *Ibid.*, 212.

24. *Ibid.*, 236.

25. *Crane v. Campbell*, 245 U.S. 298 (1917).

was just one of a matrix of progressive reforms designed to remake the United States.

Hamm stresses that the Eighteenth Amendment, as passed by Congress in December 1917, did not ban personal possession or use of alcohol. The ASL feared that such a ban would sound too extreme and would defeat ratification. The ASL also paid attention to the Southern concern for states' rights, and thus the amendment called for a curious concurrent enforcement by federal and state authorities. At the time, legal experts disagreed about the meaning of dual control. In 1920, the Supreme Court upheld the ASL's definition: Essentially, federal and state governments could each enforce federal prohibition, though the states were free to enforce stricter state standards.<sup>26</sup> The main federal law, the Volstead Act of 1919,<sup>27</sup> was heavily influenced by the ASL and passed over Wilson's veto. It outlawed any beverage with more than .5 percent alcohol. Wet states, however, resisted enforcement, discredited prohibition by their inactivity, and helped bring about repeal in 1933. In practice, concurrent enforcement did not work.<sup>28</sup>

Hamm's study makes all of these points clear and enables us to draw a larger conclusion. Other reformers, including today's, need to be alert to the way in which the legislative and judicial structures, precedents, and processes encourage certain approaches, bar others, and provide the framework within which outcomes are shaped. As Hamm shows, the result may be that certain reforms are all but impossible. Other reforms may be possible, but only with carefully targeted effort, and some changes may be obtained only in partial ways that might not resemble the outcomes imagined by supporters.

It is worth considering prohibition in terms that go beyond Hamm's book. Ultimately, prohibition's failure was due to a lack of popular support for enforcement. For example, in the evangelical, Republican, and respectable small town in Pennsylvania where my father grew up, the only difference prohibition brought was that the saloon's front door was locked; patrons had to knock on the back door to gain admittance. Throughout prohibition, this town's Veterans of Foreign Wars post served liquor—and had slot machines. prohibition may be seen as a crusade by reformers whose zeal outran their sense, as the worst kind of pressure group politics, or as an

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26. National Prohibition Cases, 253 U.S. 350 (1920).

27. 41 Stat. 305 (1919).

28. On repeal, see David E. Kyvig, *Repealing National Prohibition* (Chicago: University of Chicago Press, 1979).



idealistic idea born of naiveté.<sup>29</sup> In any case, prohibition speaks volumes about the limited good that comes from reform movements.

At the same time, as Hamm demonstrates, the reformers' use of the legal structure, the passage of new laws, and the frequent, crucial Supreme Court decisions show that prohibition was not merely a matter of ideas and dry political power. There were many forces at work, many players in the political system, wets as well as drys, and all used the Congress, the courts, and bureaucratic agencies with varying degrees of success. This is surely a cautionary tale about hubris. Although the drys used political power to gain prohibition, both the movement and the laws ultimately failed. In a democracy, public opinion will ultimately triumph.

Then, too, the federal system, perhaps as James Madison intended, had made prohibition unworkable.<sup>30</sup> A nationally enforced federal law was too large a grant of police power to the distant central government to enjoy popular support. Yet dry state action alone had failed even before the progressive era, and concurrent federal-state enforcement proved impractical. Court decisions cannot all go one way, even if, as Mr. Dooley said, the Supreme Court follows the election returns, because the balance of forces inside the Court will shift over time, and issues will be reframed in ways that result in different decisions. The Court also seeks to balance state power and individual rights; many of the decisions that most distressed drys were based on American ideas about personal liberty. That ideal also defeated prohibition. Although the drys had energy and zeal, they found themselves opposing popular American ideas about alcohol, personal freedom, government, and federalism. Any government proscription in America may well produce strange, quixotic results. It is unlikely to produce the clear victory its advocates want.

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29. Peter H. Odegard, *Pressure Politics* (New York: Columbia University Press, 1928).

30. See Drew R. McCoy, *The Last of the Fathers* (Cambridge: Cambridge University Press, 1989).